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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. Appeal No.942/2004

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Date of Decision : 20th of December, 2007

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MR.BHARAT SINGH @ DEPUTY

& ORS.

.....Petitioner

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Through : Mr. D.K. Sharma, Adv.

versus

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STATE

.....Respondent

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Through : Ms. Fizani Hussain, Adv.

AND

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Crl. Appeal No.93/2005

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DINESH KUMAR

.....Petitioner

!

Through : Ms. Purnima Sethi, Adv.

versus

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STATE

.....Respondent

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Through : Ms. Fizani Hussain, Adv.

AND

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Crl. Appeal No.08/2005

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RAM KUMAR

.....Petitioner

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Through : Mr. J.M. Kalia, Adv.

versus

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STATE

.....Respondent

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Through : Ms. Fizani Hussain, Adv.

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CORAM:

HON'BLE MR. JUSTICE B.N. CHATURVEDI

HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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B.N.CHATURVEDI, J.

1. These are three criminal appeals arising out of judgment of conviction dated 11th October, 2004 under Section 364-A/120-B IPC and order dated 13th October, 2004 inflicting sentence of imprisonment for life and a fine of Rs.1500/- on respective appellants and in default of payment of fine to undergo RI for six months.
2. The factual content of prosecution case reveals that on 17th April, 2001 at about 8 pm Dipanshu, a five year old child, went missing. Jitender, father and Smt. Sharda, mother of the child searched for him at different places in the vicinity but in vain. Jitender, on failing to trace his child went to Police Post

Fountain to inform the police about the incident. Later he also made a phone call to PCR in this regard. A police officer from PCR visited the house of Jitender. On an information from PCR regarding incident a DD entry No.53 was made at PS Kotwali. A copy of such DD report was sent to SI Rajender Singh of Police Post Fountain for necessary action. SI Rajender Singh, accompanied by other police staff, reached the house of the complainant but could not come across with the family members of the missing child. He waited for return of the complainant and on his return to his house, his statement was recorded by SI Rajender Singh, which was sent to police station Kotwali and on that basis a FIR was registered at 9.15 am on 18th June, 2001. During investigation the parents of the missing child expressed suspicion on Dinesh Kumar, appellant in kidnap of their child. Appellant Dinesh Kumar happened to be one of the relatives of the complainant, who lived nearby but was found missing from his place.

3. At about 12.30 pm/1.00 pm on 18th June, 2001 a ransom call was received by Jitender, complainant on his phone demanding an amount of Rs.2 lacs for release of Dipanshu. The person making ransom call threatened Jitender not to inform the police, else result would be bad. Dinesh Kumar was, later in the course of day, at about 2.30 pm/3.00 pm, brought by younger brother of the complainant and one of his cousins to his house and on being informed, the police arrived there and took Dinesh Kumar away with them. Appellant Dinesh Kumar was subjected to interrogation and on a disclosure being made by him, a raiding party comprising police officials, the complainant and his brother-in-law (sister's husband) Gopal Singh, proceeded on the evening of 18th June, 2001 to Village Kaser Khurd P.S. Debai in District Bulandshahar, U.P. The raiding party first reached PS Debai. From there some local police officials accompanied the raiding party and reached Village Kaser Khurd past midnight. There, appellant

Dinesh Kumar led the raiding party to the house of Bharat Singh, co-appellant. The police arrested Bharat Singh from his house and pursuant to a disclosure made by him a black T-shirt with red lining and a blue knicker, which Dipanshu was wearing when he went missing, were recovered from near the main gate of his house. Arrest of Bharat Singh, appellant was followed by arrest of his co-appellants Navrangi Lal and Ram Kumar as well, who also lived in the same village nearby. The raiding party thereafter taking appellants Dinesh Kumar, Bharat Singh, Navrangi Lal and Ram Kumar along, proceeded to village Paseri, which was at a distance of about 25-30 kms from village Kaser Khurd, where the child was being kept in the custody of appellant Kharak Singh, in the house of one Pratap. On reaching village Paseri the house of Pratap was found locked. Appellant Kharak Singh was however found sleeping on a cot with Dipanshu. The child was thus recovered from his custody. After effecting recovery of the child the raiding party and the local

police officials returned to PS Debai. On way to P.S. Debai appellant Bharat Singh pointed out a STD booth wherefrom he had made the ransom call to the complainant on his telephone.

4. On 5th July, 2001 appellants Ram Kumar, Navrangi Lal and Kharak Singh were produced in muffled face before the Metropolitan Magistrate concerned for fixing a date for their TIP but the said appellants refused to take part in the test identification parade as according to them the police was already having their photographs with them.

5. Against the impugned conviction and sentence, a common argument raised on behalf of respective appellants was that the testimony of material prosecution witnesses being afflicted by contradictions on vital aspects, their affirmations lacked conviction and could not have supplied justification to hold the appellants guilty of the offence they were charged with. Such contradictions were brought out before the learned trial court also but the same, in the view of the learned trial court

did not materially affect the credibility of the witnesses so as to make the charge of kidnapping for ransom suspect.

6. On behalf of appellant Dinesh Kumar it was contended that there being no evidence of any threat of bodily injury to the kidnapped child and of ransom demand made for his release, he could not have, in any case, been held guilty and punished for an offence punishable under Section 364-A IPC. Learned counsel argued that even if factum of kidnapping of child is held proved, in the given situation, it would be a case covered under Section 365 IPC only.

7. Learned counsel for appellants Ram Kumar and Naurangi pointed out with reference to the statement of Dipanshu, PW-3 that even though according to prosecution case they were party to criminal conspiracy in kidnapping him for ransom and were stated to have been present guarding him at the place of his captivity, he did not identify either of them in the course of his statement before the

court and thus inspite of the fact that they had refused to participate in test identification parade, in the absence of their identification before the court by the kidnapped child, it was unreasonable to find that they had actually played any role in kidnapping and keeping the child in captivity for ransom.

8. The learned counsel for appellant Bharat Singh questioned the recovery of the clothes of kidnapped child from his house pursuant to the disclosure made by him, in the face of glaring contradictions in the statements of witnesses of such recovery. It was contended that the appellant was picked up from his house and falsely implicated in this case on account of complainant's animosity towards co-appellant Dinesh Kumar as he happened to be his (Dinesh Kumar) friend. It was disputed on his behalf that he had ever pointed out the STD booth at Debai as claimed or that he had made any ransom call on phone to the complainant from that booth.

9. Referring to inconsistencies in the statements

of prosecution witnesses in whose presence the kidnapped child was claimed to have been recovered from village Paseri, it was contended by learned counsel for appellant Kharak Singh that the child was never recovered from his custody and that he was falsely implicated in the case by lifting him from his house in another village near village Paseri.

10. Ms. Fizani Husain, appearing for the respondent State, on the other hand, argued that discrepancies in the statements of witnesses, as highlighted on behalf of appellants, notwithstanding, veracity of statements of material witnesses continues to be unshaken. In the circumstances, contended the learned Addl. P.P., there can be no reason to overlook the testimony of such witnesses. She, accordingly pleaded that conviction and sentence warrant no interference and ought to be upheld.

11. We have heard at length, the learned counsel for respective appellants as also learned Addl. Public Prosecutor for the State.

12. Testimony of the kidnapped child and

concerned police officials apart, the fate of prosecution case to a great extent depends on the statements of Jitender, PW-2, father of the kidnapped child and Gopal Singh, PW-5 as they are the ones who remained associated with investigation of the case right from the stage of registration of FIR until recovery of kidnapped child.

13. The fact that the child had gone missing around 8.00 pm on 17th June, 2001 is evident in view of a FIR Ext. PW-10/A based on a statement Ext. PW-2/A of Jitender, PW-2, father of the child, being registered at 9.15 am on 18th June, 2001. Appellant Dinesh Kumar, according to Jitender PW-2 was apprehended and brought to his house by Jasvinder, his younger brother and one Ravinder, son of his uncle Vir Singh at about 2.30/3.00 pm on 18th June, 2001 who was later handed over to the police. Prior to appellant Dinesh Kumar being apprehended a ransom call for Rs.2 lacs had already been received by Jitender PW-2 on his phone. According to Jitender PW-2, appellant Dinesh Kumar had disclosed to him

that such ransom call was made by him only. It was contended by learned counsel for appellant Dinesh Kumar that the ransom call according to the prosecution case was made from a STD booth at Debai in District Bulandshahar far away from Delhi. He argued that if appellant Dinesh Kumar was the one who would have made that ransom call, it could not have been possible for him to have reached Delhi by 2.30 or 3.00 pm when he was claimed to have been apprehended and brought to the house of Jitender, PW-2. Jitender, PW-2 does not claim to have identified the voice of the caller who had made the ransom call on his phone. He named appellant Dinesh Kumar as the one making that call solely on the basis of a so called disclosure in that regard being made to him by none else than appellant Dinesh Kumar himself. The statement of Jitender, PW-2 in this regard however being based on alleged disclosure by Dinesh Kumar, appellant, this part of his statement cannot be used against this appellant to find that it was he who had actually made the

ransom call. The learned counsel for the appellant Dinesh Kumar made reference to the statement of SI Rajinder, PW-7 where he claims to have had effected the arrest of this appellant at about 4.00 am on 18th June, 2001 and recorded his disclosure statement at about 4.05 am. It is however discovered that the time of arrest of appellant Dinesh Kumar as recorded in his statement suffers from inadvertent clerical mistake which is evident from the fact that in terms of his arrest memo Ext. PW-2/K, his actual time of arrest is 4.00 pm on 18th June, 2001 and not 4.00 am. There would thus appear no discrepancy in the statement of Jitender, PW-2 regarding apprehension of appellant Dinesh Kumar around 2.30/3.00 pm and his arrest by the police later at 4.00 pm.

14. Ext. PW-2/B is the disclosure statement made by appellant Dinesh Kumar before the police in the presence of Jitender, PW-2 and Gopal Singh, PW-5. In his statement under Section 313 Cr.P.C. appellant Dinesh Kumar disowned having made any such disclosure statement. To lend support to his plea in

this regard a reference was made to the statements of Jitender, PW-2 and Gopal Singh, PW-5 who, though signed the disclosure statement Ext. P-2/B as witnesses thereto, categorically affirmed that the disclosure as contained therein was actually not made in their immediate presence. May be that what Jitender, PW-2 and Gopal Singh, PW-5 stated in regard to the disclosure statement by appellant Dinesh Kumar is true to the extent that the same was actually not made in their immediate presence but at the same time, from their statements it is evident that they were very much present at the police station where the appellant Dinesh Kumar was being interrogated to ascertain whereabouts of the kidnapped child and further that he did disclose to the police the place where the kidnapped child could be found. Noticeably, before arrest and interrogation of appellant Dinesh Kumar, the parents as also the police were clueless in regard to place of captivity of the child and it was only on appellant Dinesh Kumar making a disclosure in that respect that a raiding

party comprising police officials, Jitender, PW-2 and Gopal Singh, PW-5 set out on the evening of 18th June, 2001 initially for village Kaser Khurd in Bulandshahar where co-appellants Bharat Singh @ Deputy, Ram Kumar and Naurangi were arrested and thereafter reached village Paseri where the kidnapped child was found in the custody of co-appellant Kharak Singh. The entire operation leading to eventual recovery of the kidnapped child in such a short time could not have been possible without a definite information regarding place of captivity of the child being made available to the father of the child and the police. There could be no better person other than the one who was himself involved in kidnapping the child and keeping him in captivity for ransom to supply the information in this regard to the police. Thus, inspite of the fact that the disclosure statement Ext. PW-2/B is not proved to have been made in the immediate presence of Jitender, PW-2 and Gopal Singh, PW-5, there appears no reason to entertain any doubt about the disclosure statement as such

being made by the appellant, Dinesh Kumar. A finding in this respect is fortified also from the fact that it was appellant Dinesh Kumar who led the raiding party to village Kaser Khurd, District Bulandshahar and facilitated arrest of his co-appellants Bharat Singh @ Deputy, Ram Kumar and Naurangi from their respective houses there and further led the raiding party, assisted by his said three co-appellants as well, to village Paseri wherefrom the child was eventually recovered from the custody of co-appellant Kharak Singh.

15. Learned counsel for the appellant Dinesh Kumar pointed out certain contradictions in regard to hiring of a Tata Sumo and an Ambassador car in which the members of raiding party had proceeded to Debai before reaching village Kaser Khurd and later village Paseri. It really makes little difference whether both the said vehicles were arranged by Jitender, PW-2, father of kidnapped child or anybody else including the police. The fact remains that the raiding party did proceed on the said two vehicles

from Delhi and reached PS Debai wherefrom local police officials led by SI Sunder Singh, PW-13 accompanied them in their official vehicle to village Kaser Khurd and village Paseri.

16. The arrest of co-appellants Bharat Singh, @ Deputy, Ram Kumar and Naurangi from their respective houses in village Kaser Khurd was effected on the intervening night of 18/19th June, 2001 in the presence of Jitender PW-2, Gopal Singh PW-5, SI Sunder Singh, PW-13 of PS Debai and SI Sanjay Sharma, PW-14 (I.O.). SI Sunder Singh, PW-13 who corroborated the statements of Jitender PW-2, Gopal Singh PW-5 and the Investigating Officer (PW-14) went uncross-examined on behalf of appellants Bharat Singh, @ Deputy, Ram Kumar and Naurangi with respect to their arrest. It is thus clearly proved that the said appellants were apprehended from their respective houses on the alleged date and time.

17. Appellant Bharat Singh, @ Deputy, upon his apprehension made a disclosure statement Ext. PW-2/G leading to recovery of clothes of the kidnapped

child, which he was wearing at the time of kidnapping. No doubt the witnesses of recovery of such clothes including Jitender PW-2 and Gopal Singh PW-5 did not corroborate each other in regard to the exact place wherefrom the recovery was effected, all the same, the witnesses were unanimous that the clothes were recovered from behind the main gate on the ground floor of the house of appellant Bharat Singh @ Deputy. At the time of his recovery the child was found wearing different clothes which did not belong to him. Recovery of child's clothes from the premises of appellant Bharat Singh @ Deputy at his pointing out clearly indicates that his clothes, which he was wearing at the time of kidnapping, were changed before he was left with appellant Kharak singh in village Paseri.

18. Dipanshu PW-3, the kidnapped child, knew appellants Dinesh Kumar and Bharat Singh @ Deputy before the date of incident. He was, therefore, able to name them. He however, did not know appellants Ram Kumar, Naurangi and Kharak Singh before the

day of kidnapping and came across with them only after appellant Dinesh Kumar had taken him along and handed him over to them before returning to Delhi. Dipanshu, PW-3, in his statement before the court told that apart from appellant Kharak Singh, appellants Ram Kumar and Naurangi were also noticed present while he was held in captivity. He stated that appellant Ram Kumar had even slapped him once. It was argued on behalf of appellants Ram Kumar and Naurangi that Dipanshu, PW-3 did not identify either of them while making his statement before the court. In this context it is significant to take note of relevant part of statement of Dipanshu, PW-3 which reads thus :

“.....in the house accused (Ram Kumar) had also met me. He had given me beatings also. In the garden apart from accused Dinesh Kumar and accused (Ram Kumar) accused (Naurangi) had also met me.....”

It appears that the names of appellants Ram Kumar and Naurangi Lal were mentioned in the bracket, as indicated above, only on the child

witness particularly pointing towards them as mentioning of their names in bracket could not have been possible without their being singled out by him in the course of his statement. It seems that the learned trial court unwittingly omitted to record its observation that both these appellants namely, Ram Kumar and Naurangi Lal, were specifically identified before it by the witness. Ram Kumar and Naurangi Lal thus cannot be allowed to take undue advantage of said omission on the part of learned trial court.

19. Another argument advanced on behalf of appellant Ram Kumar was that Dipanshu, PW-3, in his statement under Section 164 Cr.P.C. had named only Dinesh Kumar and Bharat Singh @ Deputy and that his being named by the witness before the court was only an improvement prompted by tutoring. A look at the statement of Dipanshu, PW-3 would show that he as a matter of fact nowhere mentioned the name of this appellant as, had it been so there could have been no reason to indicate his name in the bracket. Undoubtedly, Dipanshu PW-3 in his

statement under Section 164 Cr.P.C. named Dinesh Kumar and Bharat Singh @ Deputy only and made no mention of any other person. His attention was however not invited to his statement under Section 164 Cr.P.C. to bring out the contradiction. It was argued on behalf of appellant Ram Kumar that in regard to said omission the witness was not required to be confronted with his previous statement under Section 164 Cr.P.C. and that the same could still be used to point out contradiction between his that statement and the one made before the court. To support the contention, reference was made to a decision of the Supreme Court in **Laxman & Ors. Vs. State of Maharashtra** (1974) 2 SCR 505. This was a case in which applicability of Section 145 of Evidence Act for the purpose of contradiction with reference to a previous statement under Section 162 Cr.P.C. was dealt with. Notably a statement under Section 164 Cr.P.C. is not in the nature of substantive evidence and it can be used only to corroborate the statement of a witness or for the

purpose of contradicting a witness. (see Ram Kishan Singh Vs. Harmit Kaur & Anr. Manu/SC/0169/1971/page 1). In view of failure to confront the witness with his statement under Section 164 Cr.P.C. such statement cannot be used to supplement the argument that the witness has contradicted himself by omitting to mention about the said appellant in his statement under Section 164 Cr.P.C. It is noticed that the statement of the witness under Section 164 Cr.P.C. vide Ext. PW 9/B is a very cryptic one. At the time of making such statement Dipanshu PW-3 was only five year old. It was difficult for a child of that age to have recounted all necessary details concerning his kidnapping and captivity. Eliciting requisite information by putting simple and short questions to him could have been a better way of recording his statement instead of letting him make the same on his own. Left to him, he made a sort of statement which a child of that age could have. In any case, since the witness was not confronted with his statement under Section 164

Cr.P.C. to afford him an opportunity of explaining omission in making mention of presence of Ram Kumar, appellant that statement now cannot be allowed to be made use of to point out contradiction in his statement before the court.

20. Dipanshu PW-3 was, according to prosecution case recovered from the custody of the appellant Kharak Singh vide memo Ext. PW-2/H. Appellant Bharat Singh, @ Deputy had led the raiding party to village Paseri and pointed out the place where appellant Kharak Singh was sleeping on a cot in the open with the kidnapped child. Apart from Jitender Singh PW-2, the recovery of child was effected in the presence of Netra Pal, PW-4 and one Pramod Kumar who happened to be residents of the same village. Netra Pal, PW-4 while deposing before the court did not support the prosecution case that the child was recovered in his presence. He, of course, admitted his having signed at point B on recovery memo Ext. PW-2/H but added that his such signature was obtained at his residence only where the police had come with

the child and did the writing work. The fact that child was with the police at village Paseri at least indicates that he was recovered from that very village. The statement of Jitender Singh PW-2, Gopal Singh PW-5, SI Sunder Singh PW-13 and SI Sanjay Sharma PW-14 clearly proved that the child was recovered from that village while he was sleeping on a cot with appellant Kharak Singh. Certain contradictions in the statements of the aforesaid witnesses of recovery of child regarding exact place where appellant Kharak Singh was found sleeping with the child were brought out with reference to their respective statements, on behalf of the appellants to contend that no such recovery of child was actually made from appellant Kharak Singh. Contradictions in regard to the location of house of Pratap Singh, nature and details of construction in that house were also pointed out on behalf of the appellants to question the credibility of the witnesses of recovery of child. Noticeably, the raiding party had reached village Paseri during night. It was dark and

there was no electricity in the village. In such a situation it was difficult for the witnesses, who happened to visit village Paseri for the first time, to have been able to observe the location of the house as also the nature and details of construction of that house. The prosecution did not examine Pramod Kumar as he was stated to have been won over by the appellants. The apprehension of the prosecution in this regard could not be held unfounded keeping in view that even the other witness namely Netra Pal, PW-4 resiled from his statement under Section 161 Cr. P.C. to the police when he omitted to depose that the child was recovered from appellant Kharak Singh in his presence. As already pointed out Netra Pal PW-4 has in any case corroborated the statements of Jitender Singh PW-3, Gopal Singh PW-5, SI Sunder Singh PW-13 and SI Sanjay Sharma PW-14 with respect to the presence of the child at village Paseri. SI Sunder Singh PW-13 was not cross examined on behalf of appellants Bharat Singh, Ram Kumar and Naurangi Lal as far as recovery of child from appellant

Kharak Singh was concerned. It is notable that it was appellant Bharat Singh who had led the raiding party to the place of recovery of child. Given the nature of contradictions as pointed out on behalf of the appellants, the approach of learned trial court in ignoring the same while finding that Dipanshu PW-3 was recovered from the possession of appellant Kharak Singh cannot be faulted.

21. Jitender Singh PW-2 categorically stated that he had received a ransom call on his phone at about 12.30/1.00 pm on 18th June, 2001 and had told the police about the same. SI Rajender Singh, PW-7 corroborated his statement in this regard. Though Jitender Singh PW-2 could not identify the person making the ransom call, the fact that the child was kept in captivity by the appellants after being kidnapped clearly indicates that the ransom call would have been made by one of the appellants. The evidence on record proves that a call was made from STD booth at Debai on the phone of the Jitender Singh PW-2 on 18th June, 2001. The STD booth at

Debai being pointed out vide Ext. PW-2/J by appellant Bharat Singh assumes significance in finding that the ransom call from that STD booth was made by none other than appellant Bharat Singh @ Deputy himself.

22. Identity of appellants Dinesh Kumar and Bharat Singh @ Deputy is beyond question in view of Dipanshu PW-3 clearly naming them in his statement under Section 164 Cr.P.C. as well as before the court. Since appellants Kharak Singh, Naurangi Lal and Ram Kumar were not known to Dipanshu PW-3 before the date of kidnapping, the prosecution applied for their test identification parade to fix their identity but they refused on the plea that their photographs were already there with the police. In their respective statements under Section 313 Cr.P.C. the said appellants however took a different stand to the effect that they had been shown to the witnesses at the police station as also outside the court. It appears that since the said appellants knew that the child would be able to identify them in the

event of their taking part in test identification parade they found it advisable to decline their participation in TIP by pleading that they had been shown to the witnesses. Refusal on their part to participate in TIP without any acceptable justification thus leads to adverse inference.

23. An alternative argument was raised on behalf of appellant Dinesh Kumar that since no bodily injury was caused to the kidnapped child and also as there is no evidence of any ransom demand being made for his release, he could not have been convicted for an offence punishable under Section 364-A IPC and that at best it is a case which would fall under Section 365 IPC only. As far as question of ransom demand is concerned, in view of a finding that ransom demand was in fact made to the father of the kidnapped child by appellant Bharat Singh, any argument to the contrary would not hold good. Jitender PW-2 testified that while making ransom demand the caller had threatened him not to inform the police about the same, else the result would be

bad. Such threat was obviously to be understood in relation to the well being of the child, even though the caller did not spell out the precise nature of threat to the child in clear terms. The threat as extended on phone was good enough to disturb the mental equilibrium of child's parents and make them anxious about his life. As deposed by Dipanshu PW-3 he was even beaten by appellant Ram Kumar while being in their captivity. For a child of such tender age even a slap was sufficient to scare him and make him apprehensive of further bodily injury being caused. There is thus no substance in the plea that the offence committed was one under Section 365 IPC only and not under Section 364-A IPC.

24. The evidence on record proves that all the appellants were party to a criminal conspiracy playing different roles in kidnapping the child and keeping him in captivity for ransom.

25. We in the ultimate analysis find no reason to take a view different from the one recorded by the learned trial court. We, therefore, uphold the

conviction and sentence against all the appellants
under Section 364 A read with Section 120 B IPC and
as a consequence dismiss the appeals.

(B.N.CHATURVEDI)
JUDGE

December 20, 2007
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(G.S. SISTANI)
JUDGE