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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A.237/2010

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**Judgment reserved on 1st July, 2013.
Judgment delivered on 31st July, 2013**

JAMIL AHMED

..... Appellant

Through : Mr.Sumer Kumar Sethi, Advocate

versus

STATE (NCT) OF DELHI

..... Respondent

Through : Ms.Richa Kapoor, Advocate for State
along with A.S.I. Baldev Raj,
P.S. Khajuri Khas.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE G.P. MITTAL

G.S. SISTANI, J.

1. Present appeal, filed under Section 374(2) of the Code of criminal Procedure, is directed against the judgment dated 4.2.2009, whereby the appellant, Jamil Ahmed, had been held guilty by the trial court for the offences punishable under Sections 363 and 364A of the Indian Penal Code (hereinafter referred to as '*the Code*'); and the order of sentence dated 12.2.2009 whereby the appellant was sentenced to undergo imprisonment for life and pay a fine of Rs.5,000/- for the offence punishable under Section 364A of the Code and in default of payment of fine, rigorous imprisonment of one year. Appellant has also been sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.2,000/- for the offence punishable under Section 363 of the

Code and in default of payment of fine, rigorous imprisonment of four months.

2. The case of the prosecution, as noticed by the trial court, is that on 29.4.2006, Master Arvind Kumar, six year old son of Shri Dinesh Kumar Sahni, was kidnapped for ransom by a labourer, who had worked in the house of Shri Dinesh Kumar Sahni for about one and a half months, when the house was being renovated. The labourer was able to assess the financial position of Shri Dinesh Kumar Sahni and, thus, he decided to kidnap Master Arvind Kumar for ransom. On the fateful day i.e. 29.4.2006, Master Arvind Kumar, was kidnapped by the labourer and taken to Village Ujhani, District Badayun, U.P. As the parents could not find their child, the father, Shri Dinesh Kumar Sahni, lodged a report with the Police. Investigation was taken up by SI Rakesh Kumar. During the course of investigation it was revealed that the child, Master Arvind Kumar, was last seen with Jamil Ahmed by Champa Devi, who runs a provision store. Jamil Ahmed demanded a sum of Rs.2.00 lakhs for release of the child by making a telephonic call from a mobile no.9319457257 on the mobile phone of Mr.Dinesh Kumar bearing no.9810691021. The call, which was made, was from Badayun, UP. The Police party reached Village Ujhani along with Mr.Dinesh Kumar Singh and others where Jamil Ahmed was overpowered, and Master Arvind Kumar was recovered at the instance of Jamil Ahmed from the house of Rukhsana, sister of Jamil Ahmed. The appellant was arrested and the child, Master Arvind Kumar, was recovered from the house of the sister of the appellant. Ms.Poonam Chaudhary, the then learned Magistrate, recorded the statement of Master Arvind Kumar, son of Mr.Dinesh Kumar Sahni, under Section 164 of the Code, exhibit PW-4/A. In the

statement the child disclosed that one Mistri, who was working at his house, caught hold of him, took him away and told him to get Rs.5,000/- from his father and then he would leave him.

3. Charge for the offence punishable under Sections 363 and 364A of the Indian Penal Code was framed. The appellant pleaded not guilty. The prosecution examined thirteen witnesses. No evidence was led in defence.
4. The conviction by the trial court of the appellant on the charge of kidnapping for ransom is primarily based on the evidence of the victim, PW-4, and duly supported by the evidence of PW-1, Smt.Champa Devi, who had last seen the victim along with the appellant; the evidence of the father of the child; Police officials including the investigation officer, who were members of the raiding party and present at the time of recovery of the child from the house of the sister of the appellant; and also PW-9, Shri Rakesh Kumar Gupta, who was running the PCO booth from where the call was made for demanding ransom; and also on the basis of the record of Reliance Communications, produced by PW-10, Shri Raj Kumar Yadav, Assistant Nodal Officer, Reliance Communication.
5. Mr.Sethi, learned counsel for the appellant, submits that the judgment of the trial court is based on conjectures and surmises and the same is not supported with any legally admitted principles of law. It is argued that there is no clinching or reasonable evidence against the appellant and, thus, the judgment and order on sentence is liable to be set aside. Mr.Sethi further submits that the trial court has failed to appreciate the inconsistencies in the statements of the witnesses recorded, which would only show that the evidence of the witnesses, sought to be relied upon by

the prosecution, is unreliable. It is also contended by counsel for the appellant that the trial court has failed to appreciate that there is no evidence to link the appellant with the crime, as alleged by the prosecution. Moreover, the investigation was conducted in a biased manner. Learned counsel next submits that the trial court has failed to appreciate the fact that PW-1, Smt.Champa Devi, during her cross-examination had stated that the Police had met her on the day of occurrence and recorded her statement, however, she did not remember if she had signed her statement before the Police or not. Smt.Champa Devi also did not tell the Police that even prior to the day of occurrence the appellant used to visit her shop with one child. It is further contended by Mr.Sethi that as per the deposition of PW-3, Shri Dinesh Kumar Sahni, his son was not recovered from the house of the appellant. Mr.Sethi has also laboured hard to point out that the trial court has failed to appreciate the fact that PW-3, Sh.Dinesh Kumar Sahni, had stated that he did not know the number of his mobile phone, which would lead to the conclusion that the testimony of the said witness cannot be relied upon. Counsel has also submitted before this Court that the trial court has failed to appreciate that while examining the witness, who was a minor, no precaution was taken whether the witness was capable of giving evidence or not. It is also submitted that the evidence of PW-4, Master Arvind Kumar, would show that he was a tutored witness and, thus, the evidence of the child witness is neither reliable nor the conviction can be based on the evidence of the child witness. Mr.Sethi has also contended before this Court that PW-6, Abdul Nazim, is a planted witness, as he was not even aware about the name of the sister of the appellant.

6. The main thrust of the argument of learned counsel for the appellant is that in the absence of any evidence to show that there was threat to the life or body of the kidnapped child in the event of ransom money not being paid, Section 364A IPC would not be attracted. Mr.Sethi, learned counsel for the appellant, has also contended that the trial court was not justified in recording the finding of conviction in relation to the appellant under Section 364A IPC and sentencing him accordingly.
7. Per contra, Ms.Richa Kapoor, learned Public Prosecutor for the State, contends that there is sufficient evidence to prove that Master Arvind Kumar, son of Shri Dinesh Kumar Sahni was kidnapped by the accused, Jamil Ahmed; the child was recovered from the house of the sister of the appellant; and the child identified the appellant. The Public Prosecutor further submits that the contradictions, sought to be pointed out by the learned counsel for the appellant, are not material contradictions as the said contradictions would have no effect or bearing on the unimpeachable evidence placed on record. Ms.Kapoor also submits that a case under Section 364A IPC is made out against the appellant, as the child, Master Arvind Kumar, was kidnapped for ransom by the appellant and the conduct of the appellant would show that there was threat to the life or body of the child in the event the ransom was not paid.
8. We have heard learned counsel for the parties, considered their rival submissions and also perused the record of the trial court. We have also carefully analyzed the evidence placed on record. We deem it appropriate to reproduce the evidence of the child. Prior to the recording of the statement of the child a few questions were put to the victim, Master Arvind Kumar, in order to ascertain whether he understands that he is deposing in the Court and also to ascertain whether he is giving the

statement voluntarily and out of his own free will. Upon satisfaction of the learned Metropolitan Magistrate that the child was making the statement out of his own free will, his statement was recorded. It would be useful to reproduce the evidence of the victim, which reads as under:

“PW-4

Q: What is your name?

A: Arvind.

Q: What is your fathers name.

A: Dinesh Saini.

Q: How old are you?

A: No answer.

Q: Do you go to school?

A: Yes.

Q: Can you tell the name of the school?

A: No answer.

Q: In which class do you study?

A: First class.

Q: Do you have any brothers.

A: We are three brothers.

Q: Are they elder or younger to you?

A: One is elder to me and the other is younger to me.

Q: Do you know the accused present in the Court?

A: Yes. He is a mistri. He had worked in our house.

Q: What work did he do in your house.

A: He was doing the work of construction.

Q: Where did he meet you?

A: I was outside my house when the accused met and told me that he will get me chocolates.

Q: Had he got you the chocolates?

A: Yes. He got me chocolates from the shop of Babita which was near my house.

Q: Where did he take you after that?

A: He took me to Badayun in a bus.

Q: What was he saying?

A: The accused had demanded money from my father.

Q: Had you asked the accused to leave you at your fathers house?

A: He told me that he would leave me when my father pays the money.
 Q: In whose house did he take you?
 A: The accused had taken me to the house of his sister.
 Q: Who rescued you from there?
 A: Police came there with my father.
 Q: Had police made enquiries from you?
 A: Yes police had made enquiries from me and I had deposed the facts as I have deposed today.
 Q: Where were you brought from there?
 A: I was brought to the police chowki.
 Q: Have you come to the court earlier.
 A: Yes.
 Q: Have you made any statement before the Court.
 A: Yes.

At this stage one sealed envelope sealed with the seal of PC is allowed to be opened and the statement U/s 164 Cr.P.C. is taken out which is ExPW4/A.

XXXX by Sh.V.K. Singh, Amicus Curiae for the accused

Accused had given me food in the bus. There were many persons in the bus. I did not tell anyone in the bus that I was being lifted. It is incorrect to suggest that I am deposing falsely at the instance of my father.”

9. The father of the victim, PW-3, has deposed that on 29.4.2006 his six years old son, Master Arvind, had gone out of his house at about 4.00 p.m., but he did not return. After searching for him uptill 9.00 p.m. he lodged missing report (Exhibit PW-2/A).
10. PW-2, HC Subhash Chand, had deposed that he was posted as a Duty Officer at Police Station Khajoori Khas on 29.4.2006. He further deposed that a missing report (Exhibit PW-2/A) was lodged in Police Station Khajoori Khas by the father of the victim. Evidence of PWs-2

and 3 would establish that the son of Sh.Dinesh Kumar Sahni went missing on 29.4.2006.

11. The victim was last seen in the company of the appellant has been established by the testimony of PW-1, Champa Devi, who deposed that on 29.4.2006 at about 5.00 p.m. when she was present at her shop the appellant had come to her shop along with the child, son of Sh.Dinesh Kumar Sahni. The appellant had purchased toffee from her shop for the child and when the mother of the child came to her house she had informed the mother of the child about her son.
12. In the cross-examination the appellant has failed to shake the testimony of PW-1, Champa Devi. PW-1 had categorically stated that she knew the appellant prior to 29.4.2006 as he had been working in the house of Dinesh Kumar Sahni, father of the victim. Abdul Nazim had also seen the appellant with the child on 29.4.2006 and 1.5.2006. PW-3, father of the deceased, has also deposed that on 30.4.2006 he learnt from one, Champa Devi, PW-1, who was running a purchase shop near his house that she had seen his son, Arvind along with the appellant. Thus it is clearly proved that the victim was last seen in the company of the appellant on the date on 29.4.2006 and on 1.5.2006.
13. PW-3, father of the victim, deposed that after he came to know from Smt.Champa Devi that she had seen his son with the appellant, he went to the house of the contractor, Sh.Udam Singh, who had sent the appellant to his house, who worked as a *beldar* in his house. Udam Singh had produced another *beldar*, who informed the Police that the appellant belonged to his Village. PW-3 along with the Police officials and the *beldar* proceeded to the village of the appellant. On reaching the village of the appellant at about 4.00 a.m. they neither found the

appellant nor his son in the house of the appellant, however, his son, Master Arvind, was recovered from the house of the sister of the appellant. PW-3 identified his signatures on the Recovery Memo of his child (Exhibit PW-3/B) and the arrest memo of the appellant (Exhibit PW-3/C). PW-3 had also pointed out the PCR booth from where the calls were made on his mobile number.

14. Evidence of PW-3 and PW-4 with regard to the recovery of the child and arrest of the appellant also stand corroborated by the evidence of PWs-5 to 7. PW-5, who was a co-worker of the appellant, has deposed that on 30.5.2006, Udam Singh along with Dinesh Kumar Sahni enquired from him about the appellant. He informed them that the appellant had come to him a day earlier and informed him that he would be going to his village. PW-5 had further deposed that he along with PW-3, father of the victim, and the Police officials went to Village Khureni, Police Station Data Ganj, but the appellant could not be found in his house and thereafter he informed them that Abdul Nazim was aware of the house of the appellant's sister.
15. PW-6 in his testimony had stated that on 1.5.2006 Natthu along with SI Rakesh and Dinesh had come to his house enquiring about the appellant. He informed them that the appellant had come to his house a day earlier at noon along with one child who was crying. On enquiry the appellant told him that the child was his Bhanja and he would be going to leave the child in the house of his sister who was residing at Village Chattiaya. Testimony of this witness would reveal that he joined the investigation and went along with SI Rakesh and PW-3 to the village of the sister of the appellant and on reaching the village he pointed out to the appellant who was coming from the fields at about 6.30/6.45 p.m. The appellant

had led them to the house of his sister where the child was recovered and he identified the boy, who was brought by the appellant to his house.

16. PW-8, Ct.Khem Chand, has also corroborated the evidence of PWs-5 and 6. He was also present when the child was recovered from the house of the sister of the appellant.
17. PW-12, Ct.Neeraj Kumar has also testified that the complainant had informed him that Smt.Champa Devi had seen his son with the *beldar* on 29.4.2006 and he along with the complainant had visited the house of Smt.Champa Devi and on enquiry she confirmed the said information. This witness had also confirmed the visit to the house of Udam Singh. Evidence of this witness would also show that Nathu had taken them to Village Purani. He also testified the meeting with Abdul Nazim and confirmed the conversation that a day earlier the appellant had visited the house of Abdul Nazim along with a small boy whom he claimed his nephew. The recovery of the boy also stands duly corroborated by the evidence of this witness. The recovery of the child is also corroborated by the evidence of PW-13 and further in the statement made by the child he has indentified the appellant as the mistri who had worked in his house. The child also deposed that the appellant had told him that he would get him chocolates and in fact he did buy him chocolates from the shop of Babita, near his house. Thus, there is no element of doubt that the child was kidnapped by the appellant and duly recovered from the house of the sister of the appellant.
18. The father of the victim, PW-3, has deposed that he had received a phone call on his mobile phone from the appellant, who had demanded a sum of Rs.2.00 lakhs for releasing his son. The testimony of PW-3 with regard to receipt of call on his mobile phone finds corroborated with the

evidence of PW-9, Rakesh Kumar Gupta, who was running a PCO booth under the name of Gupta PCO Centre.

19. PW-9, Rakesh Kumar Gupta, had deposed that at about 10.04 a.m. a male person had come to his shop and made a call from a telephone installed in his booth bearing no.9319457257 to 09810691021. He had also deposed that he maintains a register Exhibit PW-9/B. The entry made in this register was pointed out as Exhibit PW-9/A.
20. PW-10, Raj Kumar Yadav, Assistant Nodal Officer in Reliance Communication, brought the call details of incoming and outgoing with respect to mobile no.9319457257 for the relevant period, which has been exhibited as Exhibit PW-10/A. Perusal of PW-10/A makes it clear that a call was made from mobile phone no.9319457257 to mobile phone no.09810691021 at about 10.04 a.m. on 30.4.2006. The above facts lend confirmation to the evidence of Rakesh Kumar Gupta, PW-10, and the testimony of PW-3, father of the child, that a call was made on his mobile phone on 30.4.2006.
21. In view of the testimony of PW-3, father of the victim; PW-4, victim; PW-1, Champa Devi; and also the evidence of PW-5 to PW-7, it cannot be said that the judgment of the trial court is based on conjectures and surmises and accordingly the submissions made by Mr.Sethi is without any force. The evidence of the witnesses is trustworthy and the minor discrepancies and inconsistencies as pointed out by Mr.Sethi are of no consequences and the same do not affect the case of the prosecution as the evidence is to be read as a whole which appear to have a ring of truth.
22. In the case of *Shaymal Ghosh v. State of West Bengal*, reported at (2012) 7 SCC 646, it was held that every variation may not be enough to adversely affect the case of the prosecution and the Court must ascertain

whether the variations are material and would affect the case substantially.

23. In this case, we find the variations neither material nor would they affect the case of the prosecution. No doubt the testimony of child witness should be accepted with great caution and circumspection as a child witness may be prone to tutoring. In this case, we have carefully examined the evidence of the child witness, the same is truthful and it is supported by other evidence on record.
24. Mr.Sethi, learned counsel for the appellant, has strongly urged before this Court that there is no evidence to show that there was threat to the life or body of the kidnapped child in the event of ransom money not being paid and, thus, the appellant could not have been convicted under Section 364A IPC.
25. Section 364A of the Indian Penal Code reads as under:

“364A. Kidnapping for ransom, etc.- Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.”
26. Thus Section 364A has the following ingredients:
 - i. That kidnapping or abduction of a person is caused; or ‘such kidnapped or abducted person’ is kept under detention;
 - ii. That the accused threatened to cause death or hurt, to ‘such person’ or gave rise to a reasonable apprehension that death or

hurt may be caused to 'such person', or death or hurt is actually caused;

- iii. The above said is done to compel another person to do or abstain from doing any act or to pay a ransom.

27. In ***Vishwanath Gupta v. State of Uttaranchal***, 2007(11) SCC 633, the Supreme Court observed that to prove the offence under Section 364A, three facts are required to be established. The Supreme Court held that:

“According to Section 364A, whoever kidnaps or abducts any person and keeps him in detention and threatens to cause death or hurt to such person and by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, and claims a ransom and if death is caused then in that case the accused can be punished with death or imprisonment for life and also liable to pay fine.

6. *The important ingredient of Section 364A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the kidnapped/abducted that if the demand for ransom is not made then the victim is likely to be put to death and in the event death is caused, the offence of Section 364A is complete. There are three stages in this Section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not made, then causing death. If the three ingredients are available, that will constitute the offence under Section 364A of the Indian Penal Code...”*

28. Thus to cause death or hurt to a kidnapped person or a reasonable apprehension that death or hurt may be caused to such person is one of the essential ingredients of the offence under Section 364A IPC. In ***Rafiq & Anr. v. State***, ILR(2008) II Delhi 534, a Division Bench of this Court, which is comprising of one of us (G.S. Sistani, J), while interpreting the provision of Section 364A observed that a mere demand of ransom for release of a kidnapped person was not sufficient to attract application

of Section 364A IPC unless it was also proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnappers was such as to raise such an apprehension. Relevant para of the report in **Rafiq** is extracted hereunder:

10.That apart, a mere demand of ransom amount for release of a kidnapped person, is not sufficient to attract application of Section 364A IPC unless it is also proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnappers was such which could raise a reasonable apprehension that he could be put to death or hurt if the ransom amount was not paid. In the present case the child did not state that the appellants had at any point of time threatened to cause his death or hurt. Even the father of the child at no place in his statement testifies that the person making ransom calls had on any occasion threatened to kill the kidnapped child or cause hurt to him. The appellants at no stage by their conduct gave rise to a reasonable apprehension to the father or any member of his family that in the event of ransom amount being not paid, the kidnapped child would be put to death or hurt. The learned trial court in the impugned judgment while finding that the appellants from their conduct gave rise to reasonable apprehension that the kidnapped child would be put to death or hurt, did not spell out their particular conduct which could have given rise to the reasonable apprehension as aforesaid. There being total absence of evidence in regard to any threat to cause death or hurt to the kidnapped child and also for lack of evidence in regard to the appellants conducting themselves in a way that could give rise to a reasonable apprehension that the child would be put to death or hurt, the ransom demands implicate could not have brought the offence within the ambit of Section 364A IPC.”

29. Another Division Bench of this Court in **Amar Mishra & Ors. v. State of Delhi, 2011 VIII AD(Delhi) 590**, held that to complete the offence, there should be proof that the abducted person, was, after abduction, either killed, or injured, or was threatened with such acts, or the conduct

of the abductors would result in reasonable apprehension of such consequence.

30. It may be noticed that although there is evidence to show that a ransom call was received by the father of the kidnapped child yet a mere demand of ransom amount for release of kidnapped child is not sufficient for application of Section 364A IPC unless it is proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnapper was such which could raise a reasonable apprehension that the kidnapped person could be put to death or hurt if the ransom amount was not paid. Reading of the evidence of the child, PW-4, which has been extracted above, it cannot be said that the appellant had at any point of time threatened to cause death or hurt. Even the testimony of the father of the victim would show that he had only received a phone call from the appellant demanding a sum of Rs.2.00 lakhs. PW-3, father of the child, at no place in his statement has testified that the appellant while making the ransom call had threatened to kill the child or cause hurt to him. The appellant, at no stage, by his conduct gave rise to a reasonable apprehension to the father of the child that in the event of ransom amount not being paid the kidnapped child would be put to death or hurt.
31. In the absence of any evidence with regard to any threat to cause death or hurt to the kidnapped child and also for lack of evidence in regard to the appellant conducting himself in a way that could give rise to a reasonable apprehension that the child would be put to death or hurt, the ransom demands simplicitor could not have brought the evidence within the ambit of Section 364A of the IPC.
32. Accordingly, the conviction and sentence under Section 364A of the IPC is found unsustainable and, thus, liable to be set aside. The conviction

under Section 363 of the IPC is maintained. The appellant is sentenced to undergo seven years of rigorous imprisonment and to pay a fine of Rs.5,000/-; and in default of payment of fine of Rs.5,000/- the appellant would undergo rigorous imprisonment for a period of six months.

**G.S. SISTANI
(JUDGE)**

**G.P. MITTAL
(JUDGE)**

JULY 31st, 2013
msr