

**(2009) 04 DEL CK 0232**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 460 of 2004**

Rukhsar

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

**Date of Decision : 09-04-2009**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 34, 363, 364A

**Citation : (2009) 4 ILR Delhi 640**

**Hon'ble Judges : P.K. Bhasin, J;B.N. Chaturvedi, J**

**Bench : Division Bench**

**Advocate : D.M. Bhalla, in Criminal Appeal No. 460/2004 and Charu Verma, Amicus Curiae in Criminal Appeal No. 501/200, for the Appellant; M.N. Dudeja, APP, for the Respondent**

## Judgement

B.N. Chaturvedi, J.—The appellants were charged and tried for an offence punishable u/s 364A/34 IPC. They were convicted therefore by the learned Additional Sessions Judge by a judgment dated 29th May, 2004 and sentenced to life imprisonment with a fine of Rs. 2,000/- each, in default of payment of fine RI for six months vide order dated 31st May, 2004. Aggrieved by their conviction and sentence, the appellants have filed these two separate appeals which are being disposed of by a common order.

2. Material facts of the prosecution case read thus:

Salman, a four and a half year old son of Jameel, went missing on 11th February, 2001 at about 6.00 p.m. from a park near his house where he had gone to play. On Salman not returning to his house, his father, Jameel as also his other family members frantically searched for him, but without success. A report regarding disappearance of Salman was lodged with the police on the next day, i.e., 12th February, 2001 at about 11.45 a.m. at Police Station Gokal Puri and accordingly a DD report No. 10A dated 12th February, 2001 was recorded at the said Police Station. At about 10.00 p.m. on the same day, i.e., 12th February, 2001, a

telephone call was received at the house of Jameel, which was attended by his brother, Salim. The phone call was made by some unknown person, who told that Salman was in their custody and that if he wished the child to be safe, he was to pay Rs. 50,000/- at a place near petrol pump at Baraut-Delhi bus stand between 12 midnight and 2.00 a.m. on that very day. The person making the phone call further told Salim that a person clad in a black T-shirt and blue jeans would come to him at the said place to collect the money and on said amount of Rs. 50,000/- being paid, the custody of the child would be handed back to him. While making the said ransom demand, the caller warned Salim that in case he tries to act smart, the child would not be left alive. On aforesaid phone call being received, Salim accompanied by his younger brother, Jameel, approached the police at the Police Station Gokal Puri and informed SI Ajit Malik about the ransom call. SI Ajit Malik recorded the statement of Salim at the Police Station and got a case u/s 364A IPC registered at about 11.25 p.m. on 12th February, 2001.

3. A raiding party consisting of two constables, namely, Ct.Rishi Raj and Ct.Shiv Kumar, in addition to Jameel and Salim was organized by SI Ajit Malik. Five wads of paper containing one currency note each of the denomination of Rs. 100/- on the top and bottom of the wads were placed in a raxin bag to be handed over to the person concerned at the appointed place on his approaching to collect the same. The raiding party started from Delhi to Baraut at about 11.30 p.m. on 12th February, 2001 in a private vehicle and reached Police Station Baraut at about 01.00 a.m. SI Ajit Malik got a DD Entry recorded in Daily Diary of the Police Station concerned at Baraut about his arrival there. The raiding party thereafter accompanied by two local police officials proceeded to the appointed place. A trap was laid to apprehend the person concerned who was to come to collect the ransom money. Salim was instructed to stand at the appointed place with the bag containing the said wads and hand over the same to the person in black T-shirt and blue jeans on being approached by him. He was further instructed to signal the other members of the raiding party on handing over the bag so as to prevent escape of that person with the bag and to facilitate his apprehension. Salim acted accordingly. After a short while, at about 1.15 a.m., appellant-Rajjan, dressed in a black T-shirt and blue jeans, approached Salim and asked for payment of ransom amount. Salim handed over the bag to him and gave the signal, as instructed earlier, whereupon the police officials as also Jameel rushed to the place and apprehended the appellant-Rajjan. The raxin bag was seized from appellant- Rajjan and taken into his possession by SI Ajit Malik. On being interrogated regarding whereabouts of Salman, appellant- Rajjan told that he was there in the custody of his accomplice Rukhsar-appellant, hiding behind the boundary wall of the petrol pump. The police officials accordingly rushed to the place pointed out by appellant-Rajjan and over-powered Rukhsar-appellant and recovered Salman from his custody. The team returned to Delhi alongwith Salman and the two appellants, on the same very night. The appellants were formally arrested in the case at 5.15 a.m. on 13th February, 2001 on reaching Delhi.

4. The learned Trial Court based the impugned conviction primarily on the testimony of Head Constable Shiv Kumar, PW- 2, Jameel, PW-4, Salim, PW-5, Ct.Rishi Raj, PW-8, Ct.Kanwar Pal, PW-9 and SI Ajit Malik, PW-10, and Salman, the kidnapped child.

5. Ms. Charu Verma, Amicus Curiae appearing for the appellant-Rajjan questioned the correctness of impugned conviction on the grounds that the particular place in the park from where Salman was allegedly picked up by the appellant- Rajjan and his accomplice Rukhsar has not been pinpointed in the site plan. She contended that the black T-shirt and blue jeans which, according to the prosecution, the appellant was wearing at the time of his alleged apprehension near petrol pump at Baraut, has not been taken into possession nor any member of public was joined at the petrol pump to witness the raxin bag being handed over to him. Her further contention was that even the place of recovery of child from the custody of appellant-Rukhsar has not been shown in the site plan. It was further argued that the police did not collect any evidence to establish that the alleged ransom call received at the residence of the complainant was made from Baraut by either of the two appellants. According to Ms. Verma, the appellant-Rajjan was actually not present at the given place in Baraut rather he was picked up from his residence in the neighbourhood of the complainant where he was living with his brother Khaleel "Ms. Verma lastly contended that even if the statements of the kidnapped child, Salman, his father, Jameel and uncle, Salim are accepted at their face value, the charge u/s 364A IPC cannot be held proved as there is no evidence that there was any threat to cause death or hurt to Salman or the two appellants conducted in a way that could give rise to reasonable apprehension that Salman may be put to death or hurt. She added that neither of the appellants caused any hurt to the kidnapped child. She accordingly pleaded that the conviction and sentencing of appellant-Rajjan for an offence punishable u/s 364A IPC is thus not sustainable.

6. Shri D.M. Bhalla, Advocate, another Amicus Curiae representing appellant-Rukhsar also raised a similar plea while assailing the impugned conviction u/s 364A IPC. He further contended that even an offence u/s 363 IPC could not be held proved against appellant-Rukhsar as he was not the one who had actually kidnapped Salman.

7. Mr. M.N. Dudeja, appearing for the State advanced counter arguments to the effect that in view of overwhelming evidence on record proving involvement of Salman by both the appellants, the learned Trial Court committed no error in recording the finding of conviction u/s 364A IPC against both of them. He contended that the omission on the part of Investigating Officer to indicate in the site plans the particular place in the park from where Salman was kidnapped or from where he was eventually recovered from the custody of appellant-Rukhsar is inconsequential in view of oral testimony of the prosecution witnesses including the kidnapped child inculpatng both the appellants for kidnapping for ransom. On non-joining of any person from public at the time of alleged

apprehension of appellant-Rajjan and recovery of Salman from the custody of appellant-Rukhsar from behind the boundary wall of the petrol pump, Mr. Dudeja pleaded that being odd hour of night, no person was easily available there and even those who could be present nearby were reluctant to be associated with the proceedings. Alternatively, Mr. Dudeja argued that even if there was a lapse on the part of the Investigating Officer in associating some of the members of public that alone cannot be a ground to discard the testimony of the prosecution witnesses being wholly reliable. It was contended that no doubt there was lack of exercise of due diligence on the part of the Investigating Officer in conducting the investigation inasmuch as he did not collect evidence to ascertain the origin of ransom call on the residential phone of the complainant, he submitted that in view of a categorical statement of Salim, PW-5, that the ransom call was received by him coupled with the apprehension of both the appellants with the child from Baraut, the ransom call could unerringly be taken to have been made on behalf of the appellants only and it hardly matters if such call was made personally by either of the two appellants or by a third person on their behalf. Referring to two decisions of the Supreme Court in *Malleshi v. State of Karnataka* AIR 2004 SC 4865 and *Vinod Vs. State of Haryana*, , it was contended that to attract application of Section 364A IPC, it is not essential also to prove that the ransom call is accompanied by a threat of death or hurt to the kidnapped person or any hurt being caused to such a person or from the conduct of the persons involved in kidnapping, there is reasonable apprehension that death or hurt could be caused to the kidnapped person. Mr. Dudeja accordingly submitted that the impugned conviction of the appellants u/s 364A IPC with the aid of Section 34 IPC is absolutely justified and consequently both the appeals are liable to be dismissed.

8. We have heard respective counsel representing either of the appellants and also examined the evidence on record.

9. The fact that Salman disappeared on the evening of 11th February, 2001 when he had gone out to play in a nearby park is evident from the statements of his father, Jameel, PW-4 and Salim, PW-5. No report in regard to his disappearance was lodged with the police immediately for the reason that the father, uncle and other family members of Salman appeared hopeful of finding him in the course of their search for him. It was only on their failure to locate Salman, inspite of search, that the matter was reported to the police on the next day, i.e., 12th February, 2001 at about 11.45 a.m. and a report was accordingly recorded in the Daily Diary being DD No. 10A dated 12th February, 2001 at PS Gokal Puri. Salman was eventually recovered with the help of the police on the intervening night of 12th and 13th February, 2001. Apart from the statements of the prosecution witnesses Constituting basis of impugned conviction, the fact that the raiding party comprising three police officials including the Investigating Officer as also Jameel, PW-4 and Salim, PW-5 proceeded to Baraut, District Baghpat, U.P. at about 11.30 p.m. on 12th February, 2001 and reached Police Station Baraut at about 01.00 a.m. is proved from DD No. 67B dated 12th

February, 2001, PS Gokal Puri, Delhi, Ex.PW-10/E and DD No. 2 recorded at Police Station Baraut, Ex.PW-10/F respectively. The said raiding party visiting PS Baraut is further corroborated by Ct. Kunwar Pal, PW-9, of that Police Station. Another DD No. 30A dated 13th February, 2001, PS Gokal Puri, Ex.PW-10/G, lends support to prosecution case that both the appellants were brought to Delhi at about 3.15 a.m. on 13th February, 2001. On behalf of appellant-Rajjan, a plea was raised that he was actually picked up from his residence in the neighbourhood of the complainant and falsely implicated in the case. Similarly, it was argued in respect of appellant-Rukhsar that he was lifted by the police from his work place and implicated as an accused in the case. For appellant- Rukhsar, one Rafiq Raja, DW-1, appeared as a witness to support the aforesaid defence plea raised on his behalf. Another witness, namely, Mahmood Mistri, DW-2, was examined in defence of both the appellants who deposed that he was present at his shop near petrol pump in Baraut from 12.00 midnight to 5.00 a.m., but he did not witness either the police visiting that place on the intervening night of 12th and 13th February, 2001 or recovery of any child from behind the boundary wall of petrol pump being effected. The learned Trial Judge appears to have committed no mistake in disbelieving the statements of both these defence witnesses, for the reasons stated in the impugned judgment. No animosity on the part of Jameel, PW-4, and Salim, PW-5, towards either of the appellant is alleged which could have accounted for their false implication in the case at their instance. The appellant-Rajjan admitted in his statement u/s 313 Cr.P.C. that he was residing with his brother Khaleel in a rented accommodation in the neighbourhood of Jameel, PW-4, and Salim, PW-5, for the last about 2-3 months where appellant- Rukhsar used to visit him at times. This fact is otherwise established in view of statements of Pop Singh, PW-2 and Kali Ram, PW-3. Pop Singh, PW-2, was the landlord of the premises where appellant-Rajjan was staying with his brother Khaleel and Kali Ram, PW-3, is one living in the neighbourhood. Since appellant-Rajjan was staying in the neighbourhood of the complainant and appellant-Rukhsar used to visit him at times, there was nothing unusual that Salman, the victim of kidnapping, was well familiar with them. Salman made a short statement to the effect that he was offered a bubble gum by both the appellants on the date and time of his kidnapping and taken to Baraut, Baghpat. No doubt, Salman, in the course of his cross-examination on behalf of the appellants, admitted that before entering the witness box, he was briefed by his father as to what he was to depose, such admission on his part, however, cannot be taken to imply that whatever he stated in his examination-in-chief was wholly based on the briefing by his father. As noticed earlier the fact that Salman had disappeared on the evening of 11th February, 2001 from the park where he had gone to play and could not be traced inspite of search by his family members is not in doubt. His disappearance was obviously caused on account of his kidnapping. On the relevant date though Salman was only four and a half year old, he could have very well identified his kidnappers and for that he did not require any briefing by his father. There being no witness who could have seen Salman being taken away by the appellants, there can possibly be no

other evidence except the statement of the kidnapped child himself insofar as identity of the kidnapper/s is concerned. Of course, it was too much to expect from a four and a half year old child to have known about the place where he was ultimately taken and detained and, therefore, his statement to the effect that he was taken by the appellants to Baraut, Baghpat cannot be accepted to be based on his personal knowledge. From the DD report Ex.PW-10/F, coupled with the statement of Ct. Kunwar Pal, PW-9, of Police Station Baraut, in addition to the statements of Head Constable Shiv Kumar, PW- 2, Jameel, PW-4, Salim, PW-5, Ct. Rishi Raj, PW-8 and SI Ajit Malik, PW-10, it stands established beyond doubt that Investigating Officer accompanied by the two police officials from Police Station Gokal Puri, Delhi and Jameel, PW-4 as also Salim, PW-5 did visit the Police Station Baraut, Baghpat, U.P. on the night of 12th/13th February, 2001 and local police was associated before proceeding to the appointed place near petrol pump at Baraut-Delhi bus stand in order to apprehend the persons responsible for kidnapping of Salman and rescuing the child from them. It is difficult to accept that the raiding party comprising aforesaid police officials, the father and uncle of Salman actually did not visit Police Station Baraut on the given date and time and the DD report Ex.PW-10/E was simply fabricated in order to prove apprehension of the appellants near the petrol pump at Baraut-Delhi bus stand or recovery of Salman from there. The members of the raiding party substantially corroborated the statements of each other barring some minor contradictions on certain aspects which cannot be taken to adversely affect their credibility so as to discard their testimony. In the face of enormity of evidence on record, oral as well as documentary, the fact that Salman was kidnapped on the evening of 11th February, 2001 from the nearby park where he had gone to play and that he was kept in confinement by both the appellants in furtherance of their common intention to extort ransom amount from the father/family members of Salman stands proved beyond doubt. The finding of the learned Trial Court in this respect thus cannot be held to suffer from infirmity. Omission on the part of the Investigating Officer to indicate the particular place in the park wherefrom Salman was kidnapped by the appellants or the place behind the boundary wall of the petrol pump in Baraut wherefrom he was recovered from the custody of appellant-Rukhsar are not so material as to dislodge the testimony of the witnesses in whose presence both the appellants were apprehended one after the other and the kidnapped child was rescued. The fact that a ransom call was received by Salim, PW-5, on the phone at his residence at about 10.00 p.m. on the night of 12th February, 2001 and that he had immediately informed his younger brother Jameel, PW-4 and thereafter SI Ajit Malik, PW-10 at Police Station Gokal Puri about the same and further that on the basis of his statement, recorded by SI Ajit Malik, PW-10, an FIR vide Ex.PW-1/A was registered is clearly established in view of the affirmations in that respect by Jameel, PW-4, Salim, PW-5 and SI Ajit Malik, PW-10. In the face of recovery of child from the custody of the appellants, it appears immaterial as to who had actually made the ransom call. The fact that the appellant-Rajjan approached Salim, PW-5 at the given place near petrol pump and collected the

raxin bag purported to contain the ransom amount of Rs. 50,000/- as also appellant- Rukhsar being found hiding behind the boundary wall of the petrol pump holding the kidnapped child in his custody clearly proved that the ransom call was made by either of them only as otherwise they were not expected to act the way they did. Thus, inspite of lapse on the part of Investigating Officer to collect evidence in regard to origin of ransom call, no mileage can be claimed by the appellants on this score.

10. Adverting to the last plea on behalf of the appellants to the effect that even if it is held to have been proved beyond doubt that Salman was kidnapped for ransom by the appellants only and that there was a demand from them in that respect, in the absence of any threat to cause his death or hurt being extended or that he was physically harmed in any manner or that they had conducted in a way that gave rise to a reasonable apprehension that Salman could be put to death or hurt, no offence u/s 364A IPC could be held proved for which they were convicted and sentenced by the learned Trial Court. In this context, it may be noticed that though Salim, PW-5, in his statement recorded by SI Ajit Malik, PW-10, at Police Station Gokal Puri while speaking about the ransom call on his residential phone told that the caller had extended a threat that in the event of his not paying the ransom amount and trying to play smart, the child (Salman) would not be left alive, in the course of his statement before the Court, Salim, PW-5, or Jameel, PW-4, did not depose even a single word regarding the threat to the life of Salman as mentioned in the said statement before SI Ajit Malik, PW-10 and the FIR, Ex.PW- 1/A, recorded on the basis thereof. Salman in his statement before the Court did not say that he was at any point of time after his kidnapping and before his rescual was badly treated or physically harmed by either of the appellant. He has rather stated that on reaching Baraut, the appellants had offered him toffees and food as well. Thus, there is no evidence of any rough treatment to the child during the period of his detention by the appellants. A plain reading of Section 364A IPC would show that a mere demand of ransom amount for release of a kidnapped person is not sufficient to attract penal consequences u/s 364A IPC unless it is proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnappers is such which gives rise to a reasonable apprehension that he could be put to death or hurt if the ransom demand was not paid or that any hurt is actually caused by the kidnapper/s. Reliance by Mr. Dudeja on decisions of the Supreme Court in Malleshi and Vinod (supra) does not really help advance the argument raised by him that a mere demand for ransom is sufficient to convict and sentence a person u/s 364A IPC. In Vinod (supra), the conviction u/s 364A IPC was upheld by the Supreme Court in view of the fact that there was a clear evidence of threat to life to the abducted person in the event of ransom demand being not satisfied. In Malleshi (supra), the questions raised, which were being examined by the Apex Court were altogether different. The Supreme Court came to examine necessary ingredients of Section 364A IPC, which were posed for a finding in that respect in Anil @ Raju Namdev Patil Vs. Administration of Daman

and Diu, Daman and Another, and Vishwanath Gupta Vs. State of Uttaranchal, . Relevant part of observations by the Supreme Court in Anil @ Raju Namdev Patil (supra) read thus:

for obtaining a conviction for commission of an offence u/s 364A thereof it is necessary to prove that not only such kidnapping or abetment (abduction) has taken place but thereafter the accused threatened 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 intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom.

Similarly in Vishwanath Gupta (supra), it was held: 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 (met) 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 (met), then causing death. If the three ingredients are available/ that will constitute the offence u/s 364A of the Indian Penal Code

In the case on hand since evidence in regard to any threat to cause death or hurt to Salman or any injury to his person being caused by the appellants is missing, Section 364A IPC would have no application and consequently the appellants could not have been convicted and sentenced thereunder. The conviction of the appellants u/s 364A IPC is thus liable to be converted into one u/s 363 IPC and the appellants are to be sentenced accordingly.

11. By an order dated 19th January, 2005 of this Court in the course of hearing on appeal by Rukhsar, noticing that it was required to be examined as to whether or not the said appellant had completed 18 years of age on the date of commission of the offence, the matter was remanded to the learned Trial Court to that extent for recording fresh evidence on the issue and thereupon giving its finding on that issue within a period of three months. The learned Trial Court pursuant to aforesaid direction recorded the evidence produced from either side and returned its finding by an order dated 20th April, 2005 holding that Rukhsar-appellant was more than 19 years of age on the date of commission of offence. This order has neither been challenged on behalf of the said appellant nor was any argument advanced by Shri Bhalla while addressing arguments challenging the impugned conviction and sentence. In the circumstances, we take it that Rukhsar-appellant has accepted the finding on the issue of his age as returned by the learned Trial Court and, therefore, we do not find it necessary to examine the correctness of findings in that regard.

12. In the result, both the appeals are partly allowed by converting the

conviction u/s 364A IPC to one u/s 363 IPC and accordingly sentencing them to 7 years RI and a fine of Rs. 5,000/- each, in default of payment of fine, SI for one year. The conviction and sentence u/s 364A IPC shall stand set aside.