

(2014) 05 DEL CK 0295
In the Delhi High Court
Case No : Crl. A. 1379/2010

Shishir Kumar @ Chunnu

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313, 374(2)
Evidence Act, 1872 — Section 118
Penal Code, 1860 (IPC) — Section 120B, 34, 364A, 420

Citation : (2014) 05 DEL CK 0295

Hon'ble Judges : G.S. Sistani, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Lal Singh Thakur, Mr. Bharat Bhushan and Mr. Vikas Vats, Advocate for the Appellant; Rajdipa Behura, Advocate for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—Challenge in the present appeal, filed u/s 374(2) of the Code of Criminal Procedure, is to the judgment dated 27.8.2010 and order on sentence dated 30.8.2010 passed in Sessions Case No. 140/2008, arising out of FIR No. 58/2004, registered u/s 364A/420/120B/34 IPC, Police Station Mahipalpur, by which the appellant has been sentenced to undergo imprisonment for life for the offences punishable u/s 364A IPC and u/s 120B IPC. It was directed that the sentences would run concurrently. In addition thereto, the appellant was directed to pay a fine of Rs. 5,000/-, each, for the offences and in default thereof simple imprisonment for six months, each.

2. The version of the prosecution, as noticed by the trial court, is as under:

1. The case of the prosecution is that Ram Sanjivan, a blind man, was a distributor of "Amway". He has a child namely Prateek aged 6 years, while Krishan Kumar (P.O.) was a tenant of Ram Sanjivan in House No. 294, Pocket-I, Phase-II, Sector-13, Dwarka, New Delhi.

2. It is further the case of the prosecution that accused Subhash, Krishan Kumar and Shishir Kumar entered into a criminal conspiracy to commit a crime and to compel Ram Sanjivan to deliver valuables and in pursuance thereof accused Shishir Kumar came to the house of Ram Sanjivan on 15.8.2004 and showed interest in obtaining distributorship of Amway by representing himself, as Abhay, and not Shishir Kumar, taking benefit of blindness of Ram Sanjivan. Ram Sanjivan in turn told him to come on 17.8.2004 as on that date, he would also call accused Krishan Kumar to his house, who is his senior.

3. Though accused Shishir Kumar was asked to come on 17.8.2004, but he visited the house of Ram Sanjivan on 16.8.2004 also, in the absence of Ram Sanjivan when wife of Ram Sanjivan refused his entry into the house. It is also the case of the prosecution that during his visit, not only inside the house but even outside the house of Ram Sanjivan, Shishir showed more interest in developing friendship with Prateek s/o. Ram Sanjivan, and on 18.8.2004, offered a sum of Rs. 5/- to Prateek to purchase sweets from a shop, which act was not liked to, by the wife of Ram Sanjivan and she herself handed over a sum of Rs. 5/- to Prateek to purchase toffee.

4. When Prateek went to the market, accused Shishir Kumar left the house on some pretext and followed Prateek and kidnapped him and took Prateek to a house where accused Subhash was also present, and thereafter he demanded a ransom of Rs. Thirty lacs for the release of the child of Ram Sanjivan in a safe condition, and at the time of demand so conveyed on telephone, accused Krishan Kumar was also present at the house of Ram Sanjivan.

5. On receipt of such a call, Ram Sanjivan became perturbed, when accused Krishan Kumar who remained at the house of Ram Sanjivan, asked Ram Sanjivan not to take the threat lightly and rather should make arrangements for payment of a sum of Rs. 30 lacs as ransom to accused Shishir Kumar.

6. Not only accused Krishan Kumar asked Ram Sanjivan to pay the ransom amount, despite the fact that Ram Sanjivan told him that he is not in a position to do so, but accused Krishan Kumar also told and suggested to Ram Sanjivan, as to the manner in which a sum of Rs. 30/- lacs can be arranged, and asked Ram Sanjivan to collect title documents of his house NO. 294, Pocket-I, Phase-II, Sector-13, Dwarka, and the ornaments in possession of his wife, and further told Ram Sanjivan that he will also help Ram Sanjivan by obtaining a sum of Rs. 10 lacs from Vijender who was residing at Punjabi Bagh, with whom he had already invested a sum of Rs. 5 lacs which he will ask Vijender to repay him, and he will ask Vijender to extend a loan to Ram Sanjivan to the tune of Rs. 5 lacs. He also suggested that he will also take the ornaments of his wife worth Rs. 4.5 lacs and the property of Ram Sanjivan will be sold to one Dinesh Kumar for a sum of Rs. 13 lacs, and a further sum of Rs. 2 lacs will be obtained as loan from Dinesh Kumar and in such manner, entire ransom money of Rs. 30 lacs will be managed i.e. ten lacs from Vijender, 15 lacs from Dinesh and jewellery worth Rs. 4.5 lacs of wife of Krishan Kumar and the balance amount in the shape of jewellery of

wife of Ram Sanjivan.

7. It is also the case of the prosecution that it was a ploy by Krishan Kumar to dupe Ram Sanjivan of his property, ornaments and money, as in fact he had already left a bag alleged to be containing a sum of Rs. 10 Lakhs with Vijender Sharma, and alleged sum of Rs. 15 Lakhs with Dinesh Kumar Tiwari and thereafter, the ransom money including jewellery was handed over to kidnappers under Punjabi Bagh Flyover and though, it was stated by the kidnappers that the boy will be in a park but later on the boy was traced at Bus Stand of Modi Nagar, and Ram Sanjivan alongwith boy reached the police station.

8. It is also the case of the prosecution that later on, it transpired that accused Krishan Kumar had kept blank papers cut in the shape of currency notes and in fact, no amount was ever received either from Vijender Kumar or Dinesh Kumar and the amount so received and shown to have been received at the behest of Krishan Kumar from Dinesh and Vijender were in fact, bundles of papers cut in the shape of currency notes, and the jewellery handed over by his wife was artificial jewellery, and in this manner, Ram Sanjivan was duped of the title documents of his house as well as the jewellery belonging to his wife, and was shown to be indebted to a sum of Rs. 2 Lakhs to Dinesh Kumar and a sum of Rs. 5 Lakhs each to Krishan Kumar and Vijender Kumar.

9. It is also the case of the prosecution that Scooter bearing No. DL-1SH-4014, was obtained by Krishan Kumar on 17.8.2004 from one Shakir Malik, after representing that his own motorcycle is out of order and that the said Scooter belonged to one Viswajit, who was the registered owner thereof, and had given the same to his brother-in-law Shakir Malik, and was later on seized by the police being found in possession of accused Shishir Kumar at the time of his arrest, and was released on superdari to its owner.

10. It is also the case of the prosecution that the ransom call was traced to have been made from a public booth and though the shop was identified but it transpired that the person manning the booth, had started operating a PCO from a shop of betel vendor, and stated that he is not in a position to say, as to by whom call was made, as many persons visit the PCO booth on daily basis, and later on at the instance of accused Krishan Kumar, accused Shishir Kumar was arrested and was found in possession of artificial jewellery belonging to the wife of accused Krishan Kumar, the jewellery belonging to the wife of Ram Sanjivan, and the bundles of currency notes alongwith bag, which in fact, were simply papers cut in the shape of currency notes and accused Shishir refused to join TIP.

11. On the basis of such version of the prosecution, my Ld. Predecessor framed Charges U/s. 120B IPC read with Section 364A IPC for entering a criminal conspiracy for kidnapping Prateek, son of Ram Sanjivan, a blind person, and actually kidnapping Prateek and demanding a sum of Rs. 30 Lakhs from Ram Sanjivan and extending threats to cause death of Prateek in case of non payment of ransom, and a separate Charge was framed against accused Krishan Kumar

for playing fraud upon Ram Sanjivan and for handing over to him bundles of currency notes instead of real currency after dishonestly inducing him to part with jewellery of his wife as well as the title documents of his property.

3. Prosecution has in all examined 17 witnesses, out of whom Ram Sanjivan has been examined as PW-1, his son Prateek as PW-4 and his wife, Kanika Kushwaha, as PW-5.

4. Learned counsel for the appellant submits that the impugned judgment is bad in law and the same is based on surmises and conjectures. Counsel further submits that the trial court has failed to appreciate that the complainant, namely, Sh. Ram Sanjivan Kushwaha, had failed to identify the currency note of Rs. 100/- when learned counsel for the appellant during cross-examination had handed over a currency note of Rs. 100/- but had only stated that it was a plain piece of paper, whereas during the trial he had deposed that he is aware of the difference between a currency note and paper, although he is totally blind.

5. Learned counsel for the appellant contends that there are material contradictions and improvements in the statements made by the witnesses. Counsel further contends that the trial court has failed to appreciate that the complainant had stated that the appellant, Shishir, had asked for the literature book of Amway, however, he was confronted with Exhibit PW-1/A, wherein this fact was not recorded. Moreover, the complainant had stated that Abhay (Appellant Shishir) had asked for a glass of water from his wife when he was standing outside the house, which statement was also confronted with Exhibit PW-1/A, wherein this fact was not recorded. It is also contended that the complainant had submitted that on 16.8.2004 his son Prateek had told him that uncle (appellant Shishir) was standing and watching him at the gate of Airport Colony, when the gate keeper made the child to enter the gate of the colony, which statement was also confronted with Exhibit PW-1/A, wherein this fact was not recorded. Another contradiction, which has been pointed out, is that the complainant had deposed that he had told the appellant, Abhay (Shishir), that his senior, Sh. K.K. Tiwari, was not coming, since the appellant had come late and the complainant had already informed Sh. K.K. Tiwari not to come, which statement was also confronted with Exhibit PW-1/A, wherein this fact was not recorded.

6. It has also been pointed out by learned counsel for the appellant that the trial court has failed to consider that it has been deposed by the wife of the complainant that she gave Rs. 5 to Prateek to buy some eatables and thereafter, Prateek went out of the house and meanwhile the appellant followed him and told him that he will come in the evening and join the Amway distribution, which does not find mention in the statement made u/s 161 Cr.P.C., Marx-X.

7. It is also pointed out by learned counsel for the appellant that the complainant had told the Police that Krishan Kumar had told him to collect the title documents of his flat at Dwarka, which again does not find mention in Exhibit PW-1/A.

8. Counsel further submits that the evidence of child witness, PW-4, is neither trustworthy nor reliable. It is also contended that the recoveries are doubtful as no reasonable and prudent man would keep the alleged scooter and blank papers in his house. It is next submitted that neither any ransom call was made nor was any monetary benefit derived by the appellant from the complainant. Counsel also submits that the appellant had no relationship with Krishan Kumar and, thus, the story of the prosecution cannot be believed.

9. Ms. Rajdipa Behura, learned counsel for the State, submits that there are no discrepancies in the evidence of PW-1, PW-4 and PW-5, as such, and the contradictions, sought to be pointed out by counsel for the appellant, are not material in nature, and hence, would not dent the case of the prosecution. Counsel further submits that the evidence of PW-4, the child, is reliable as he has identified the appellant and, thus, the prosecution has been able to establish its case beyond doubt.

10. We have heard learned counsels for the parties, considered their rival submissions and also perused the impugned judgment passed by the learned trial court. Before dealing with the rival submissions of the counsels for the parties, we deem it appropriate to discuss the evidence of some of the material witnesses in detail.

11. PW-1 Ram Sanjivan has deposed that appellant, Shishir, whom he identified from his voice (as PW-1 is a blind person) came to his house on 15.8.04 and asked him for literature book of Amway as he was also interested in becoming a distributor of Amway. PW-1 gave him a book, and told him that further information with regard to the same can be given by Krishan Kumar, his senior, and asked the appellant to come on 17.8.04 as he will not be available on 16.8.04. However, on 16.8.04 appellant, Shishir, in the absence of PW-1 came to his house and asked his wife to give further literature of "Amway", which was refused by her on the plea that her husband is not at home and after having water, accused Shishir Kumar left. In the evening when PW-1 returned to his house he was told by his son that the appellant, Shishir, who had given him a chocolate on 15.08.04, was standing at the gate of the Airport Colony and watching him. He has further stated that on 17.8.2004 he received a telephone call from the appellant, Shishir Kumar, expressing his inability to meet him on account of having sustained injuries in an accident but then he turned up at his house at 2.30 or 3 pm. PW-1 told the appellant that since earlier he had refused to come, PW-1 had already asked the accused, Krishan Kumar, not to come to his house on 17.8.04 and thereafter gave the appellant an appointment for 18.8.2004. On 18.8.2004, accused, Krishan Kumar, came to his house at 1 p.m., and 10 to 15 minutes thereafter, appellant Shishir Kumar also reached there.

12. He has further stated that though the discussion regarding distributorship of "Amway" started between all three of them i.e. PW-1; accused, Krishan Kumar; and appellant, Shishir Kumar; however, he found that appellant Shishir Kumar was taking more interest in his son (PW-4) than in the discussion and was trying

to be friendly with him asking about his likes and dislikes and after knowing the things liked by Prateek, appellant, told him that he also has a lot of cartoons. His son started playing with the appellant, who eventually offered a sum of Rs. 5/- to his son to buy some potato chips, which aspect was told by his son to his wife, who asked her son not to accept the money from the appellant and rather, herself gave a sum of Rs. 5/- to Prateek to buy eatables, and then he went outside. In the meantime, accused Shishir also followed his son after representing that he will come in the evening and will join the Amway distribution.

13. He has further deposed that his son did not return and was searched for by his wife, who could not find him. At 3.45 pm, he received a telephone call on his mobile informing him that his son had been kidnapped by the caller who demanded a sum of Rs. 30 lakhs for the release of his son. Furthermore, the caller threatened to kill his son, in case the demand was not met.

14. He has further testified that he became dumb and his wife became unconscious. He asked the accused, Krishan Kumar, as to how his son will be rescued as he did not have the money to pay the ransom amount, on which Krishan Kumar asked him to collect the title documents of his House bearing No. 294, Part-I, Phase-II, Sector-13, Dwarka, and the ornaments in possession of his wife, and further assured him that wife of Krishan Kumar has also got ornaments worth Rs. 4.5 lakhs which he will collect and that he will also collect a sum of Rs. 5 lakhs from Vijender Sharma, with whom he had invested the same and will also arrange a further sum of Rs. 5 lakhs as loan on interest from Vijender Sharma and thereafter, the complainant (PW-1) collected the ornaments of his wife as well as title documents of his house and accompanied Krishan Kumar.

15. He has further stated that firstly, they reached the house of Krishan Kumar, from where Krishan Kumar collected ornaments belonging to his wife and from there, they proceeded to the house of Vijender at Punjabi Bagh where Vijender handed over a sum of Rs. 5 lakhs, which he owed to Krishan Kumar and a further sum of Rs. 5 lakhs as loan @ 3% interest per month to him and that the notes were in the form of bundles and were given by Vijender to Krishan Kumar.

16. He has further testified that Krishan Kumar told him that the notes were in the denomination of Rs. 500/- and though, he touched the notes, he could not say whether they were actual currency notes or merely paper notes and after collecting the said amount, they went to the house of Dinesh Tiwari, who had earlier shown interest to purchase the complainant's property at Dwarka for a sum of Rs. 14,20,000/-. When the accused, Krishan Kumar, asked Dinesh Kumar to purchase the property, Dinesh said that he will not pay more than Rs. 12.5 lakhs for the property. However, when accused, Krishan Kumar, requested Dinesh Kumar, he agreed to pay Rs. 13 lakhs towards consideration amount for purchase of the house and a further sum of Rs. 2 lakhs as loan on the surety of Krishan Kumar and in this manner, a further sum of Rs. 15 lakhs was collected by Krishan Kumar and kept in a briefcase. The witness (PW-1) has specifically stated that he

had not touched the notes.

17. PW-1 has further stated that he took the bag containing jewellery and other articles on the motorcycle of Krishan Kumar and started moving to Mahipal Pur. When they reached Punjabi Bagh, he received a call on his mobile phone bearing No. 32744467 and was asked by the caller to come under Punjabi Bagh Flyover, and otherwise, he threatened to slit the throat of his son and throw his body away. PW-1 further stated that he came to know about the place where they had reached on enquiries being made by him from Krishan Kumar, who informed him that they had reached Punjabi Bagh and will be reaching the flyover soon. He handed over the mobile to Krishan Kumar to understand the exact location of meeting the kidnappers, and after Krishan Kumar talked to the caller on the mobile, they reached under Punjabi Bagh Flyover.

18. He has further stated that from the talks, it appeared that two or three persons were talking to each other (as the witness is blind) and on the asking of Krishan Kumar, PW-1 (complainant) handed over the bag containing the jewellery of his wife and of the wife of Krishan Kumar, and one briefcase said to be containing Rs. 25 lakhs to one of the said persons.

19. He has further stated that he told the persons to handover his son Prateek to him as he had paid the ransom to them on which he was asked to go towards roadside where his son would be present, but when he reached near roadside along with accused Krishan Kumar, his son was not present. Thereafter he received a telephone call informing him that his son was standing at the Bus Stand of Voltas Company, Moti Nagar, and that they may pick him from there. On reaching there, he found Prateek present at the Bus Stop alone at 11 p.m., who was then picked up and made to board the same motorcycle on which PW-1 and accused Krishan Kumar were travelling.

20. The witness has further stated that he called up no. 100, and when they reached Uttam Nagar, he was asked to come at P.S. Mahipal Pur, but Krishan Kumar told him not to go to the police station and rather, asked him to proceed towards his house at Dwarka. However, when he told Krishan Kumar that he was going to the police station only because he had received a phone call from PS Mahipal Pur and that he will not lodge any complaint with the police, Krishan Kumar agreed to accompany him to PS Mahipal Pur and they reached PS Mahipal Pur, where enquiries were made from him and he lodged the FIR Ex. PW-1/A bearing No. 58/04.

21. He has further testified that police personnel took accused Krishan Kumar to the place from where payments were arranged and the place from where the child was recovered, and Vijender (PW-2) and Dinesh Tiwari (PW-6) also reached the police station, where they were interrogated. Vijender told the police that Rs. 10 lakhs did not belong to him but in fact were kept with him by Krishan Kumar saying that whenever he will bring the complainant along with him, Vijender had to say that Rs. 5 lakhs belong to Krishan Kumar and the other Rs. 5 lakhs were

being given on loan. Even Dinesh PW-2 informed the police that the sum of Rs. 15 lakhs given did not belong to him, but were left by Krishan Kumar Tiwari at his house on the representation that he had to conduct the deal of purchase of the house with the complainant. Thereafter, police interrogated accused Krishan Kumar. This witness (PW-1) was cross examined at length and the Counsel for appellant Shishir Kumar has argued that on all aspects, this witness was confronted with his previous statements made to the police, and as such, his testimony should not be relied upon on account of material discrepancies between the same.

22. We also deem it appropriate to reproduce the testimony of the child witness, PW-4, Prateek who has given a vivid description of the events that unfolded from the time he was kidnapped by the appellant till he was picked up by his father (PW-1) from the bus stop. Testimony of PW-4 reads as under:-

PW-4 Prateek s/o Ram Sanjivan, student, aged 7 years r/o A6/7 AAI Colony, Mahipal Pur New Delhi

Q: In which class do you study?

A: I study in 2nd class.

Q: What is the name of your class teacher?

A: My class teacher is Yog Maya.

Q: What is name of your school"

A: Deep Public School.

Q: Where is your school situated

A: In Vasant Kunj.

Q: How many children are in your class.

A: There are 30 children in my class.

Q: What is the name of your mother.

A: My mothers name is Kamla.

Q. How many brothers and sisters (sic. sisters) you have?

A. I have one sister.

Q. What is the name of your sister?

A. The name of my sister is Kirti.

I have put specific questions to the witness. He looks quite intelligent but keeping in view his tender age the oath is not being administered to the witness as he is very young in age and he does not appear to understand the sanctity of the oath.

(Without oath)

On 18.8.04 at about 2.30 pm I was playing at my house, one uncle came and he offered me Rs. 5 and then I told to my mother who had told to me not to accept that. I can identify that person who offered Rs. 5, the child witness has correctly identified by pointing out towards the accused Shishir. Then my mother gave me money and when I was going to purchase some eatables and the uncle met me near the temple who had earlier offered me Rs. 5 note the witness is again pointed out towards the accused Shishir Kumar correctly. Then he took me on a two wheeler scooter to a far distance. That uncle gave me Mazza to drink and cheetos to eat. That uncle made me to stand on the bus stand and he went to make a telephone call. After some time my father came there where I and accused Shishir were already present. The accused Shishir had also come to our house and so I knew him earlier.

XXXXXX by Sh. Dharamraj Counsel for accused Subash and Krishan

It is wrong to say that I had told the colour of scooter as green in my statement U/s. 161 Cr.P.C. Vol The accused was having blue helmet. Confronted with statement Ex. PW4/DA where the colour of the scooter is mentioned as blue. It is wrong to say that I have been tutored by my mother and father.

xxxxx by Sh. RS Jain adv for accused Shishir

I do not know if the name of the uncle who had kidnapped me is Shishir. The uncle Shishir, accused present in Court, had come to our house on 15th August only. It is wrong to say that I came back to my house along with accused Shishir. My father did not have any friendship with accused Shishir. After the arrest of accused Shishir police had taken me and accused to PS. One day after the incident, I identified the accused Shishir in the PS. It is wrong to say that police had told me that accused Shishir had kidnapped me. Vol. I was already knowing that accused Shishir had kidnapped me. There is security guard on the gate of our society. Police had never taken me with the IO to the court for TIP. Accused Shishir had not given me beatings. Accused had offered of Maza and Chocolate to me. The scooter kept on roaming for about half an hour after the kidnapping. The accused had taken me to a room where was offered food etc. and by that time it has become dark and I was taken to the bus stand. It is wrong to say that I had gone with accused Shishir on the asking of my father.

23. Testimony of PW-5, Kamla Kushwaha, reads as under:

PW-5 Kamla Kushwaha w/o Ram Sanjivan aged 30 years, housewife r/o A-6/7 AI Colony Mahipal Pur New Delhi

On SA:

On 15.8.03 accused Shishir present in the court came at my house. I was not present at my house. On 16.8.03 he again came and he ring up the door bell and asked that whether Ram Sanjivan was at home. I told him that he had gone for

his duty. The accused Shishir asked that he had to take a book and I told him that my husband had not told me about this thing. I asked him to come on next day as my husband was not at home, then he asked for a glass of water. I did not open the door and asked him to remain outside. I brought a glass of water and gave him. After taking water he went. When I went to take my son at bus stand where he used to come from his school at 12.30 pm, my son was with the chowkidar and my son Pratik told me that the uncle who had given him the chocolate on 15.8.03 at my house was standing near the bus stand near Safal. I came with my child to my house on 16.8.03. Accused Shishir present in court again came at my house on 17.8.03. My husband also present at the house. Shishir was talking to my husband regarding Amway company. My husband told him that Krishan Kumar can tell him better in this regard. On 18.8.03 Krishan Kumar also came at about 1 pm. Shishir telephoned to my husband and asked about whether Krishan had come then my husband told that Krishan present in court had come and then accused Shishir present in court also came to my house at about 1.15 pm. Then I prepared tea. My child Pratik started playing with the accused persons, accused Shishir and Krishan present in court correctly identified. After preparing tea I started working my domestic work. Accused Shishir asked my child Pratik to wear clothes and my son came to me and told that uncle was giving him Rs. 5 and should he accept. I refused not to accept that money. I gave Rs. 5 to my son and then my son left the house to purchase eatables. After sometimes Shishir also left saying that he will come in the evening and Krishan remained present in the house. My husband asked me where my son had gone and I told that he had gone to purchase some eatables. Then when my child did not come back I searched him in the area but he was not traceable. I came to my house. Krishan Kumar was having mobile phone and he asked me that where I had searched for my son then I told him that I searched Pratik in the nearby areas but he was not traceable. Then he told me that he had received a telephone call was received that my son had been kidnapped and he also disclosed that there was a demand of Rs. 30 lacs from the kidnappers and then I started weeping. Accused Krishan asked me to take the papers/documents of my house which was situated in Dwarka and asked me to take my jewellery with me saying that there was no time and the money is to be arranged for the release for child. He also told me not to inform the police otherwise we will not get the child back. I believing him and took the papers and jewellery with me and accompanied accused Krishan and he took me and kept me at his house with his wife at Pappan Kalan sector-13. Accused Krishan Kumar took my husband who is blind with the jewellery and papers of the house. He had also taken the jewellery of his wife with him saying that money is to be arranged by selling the jewellery and the house and by collecting from the persons to those he had given the money on debt. He took my husband but I do not know where he had taken my husband. On 19.8.04 when I had gone to PS I had come to know that the accused who had kidnapped my son had been arrested. When I came to the court I say the accused Shishir present in court in judicial custody. Later some jewellery recovered by the police and I later on released them on superdari. I

have brought the jewellery with me today. Three Mangal Sutra Ex. P1, P2 and P3, Ring Ex. P4 all of gold, one pair of Jhumki Ex. P5/1-2, nose ring Ex. P6, Kamar Patta Ex. P7, one Tagri Ex. P8, one heavy pair of Pazeab Ex. P9, one pair of light pazeab Ex. P1-, one single Pazeab Ex. P-10, six silver coins Ex. P12, one bichua Ex. P13 correctly identified.

Xxxx by Sh. RS Jain counsel for accused Shishir Kumar

Police recorded my statement in the PS on 19.8.04. Accused Shishir Kumar present in court had visited my house twice again said thrice. For the first time accused Shishir came to my house on 15.8.04 at about 12 noon when I was not at my house and it was told to me by my husband. It is correct that my husband has told me that Shishir had come at 12 noon. Again Shishir came at about 4 pm when I was present at my house and I served to him and I went into other room and Shishir remained with my husband for about half an hour. Shishir had also visited on 16.8.04 at 12 noon in my presence. My husband had gone for duty. Shishir stayed at my house for about five minutes. Accused Shishir was not known to me prior to his visit at my house. It is wrong to say that my husband and Shishir were friends for the last about two years. Statement mark X was recorded by the police on 19.8.04. I gave my correct statement to the police. The bus stand is at a distance of five minutes distance from my house. But stand is not visible from my house. There is a mother dairy shop near the bus stand. It is wrong to say that my son did not tell me that Shishir met him and he had offered chocolate to him or that I have given a wrong statement at the instance of my husband Ram Sanjivan to falsely implicate the accused in this case. It is wrong to say that I deposed falsey. It is wrong to say that Shishir did not come at any time after 16.8.04. It is wrong to say that my son was not kidnapped by anybody and it was a concocted story just to frame the accused persons in this case. I did not see accused Shishir taking away my son nor my son recovered from the possession of Shishir. It is wrong to say that I deposed falsely.

Xxxxx on behalf of accused Krishan, Subash

Nil. Opp. Given.

...

PW-5 Kamla Kushwaha recalled for further cross examination on behalf of accused Krishan and Subhash on S.A.

Xxxxxx by Shri Dharam Raj counsel for accused Krishan and Subhash

The accused Shishir came to my house on 15-08-2004 and not on 15-8-2003 which has wrongly been recorded earlier. I had gone to Sunday bazaar. I had gone to Sunday Bazaar from 12 noon to 1 pm. I had gone to the Independence Day function but it was over by 11 am. It was in colony itself and my son had also accompanied me. However, my son did not go with me in the market. The Sunday Bazaar is nearby to our colony which is within a distance of 10 minutes walking near the police station. It is incorrect that on 18-8-2004 accused Krishan

Kumar did not come to my house. It is incorrect that no jewellery was taken by accused Krishan from me. The accused has taken my husband with him and not me. Since I did not accompany the accused as such I cannot say where they have taken my husband. It is incorrect to suggest that I am deposing falsely. It is incorrect that the accused has not taken the documents of ownership of the flat. It is incorrect to suggest that I have falsely implicated the accused persons as accused Krishan was not vacating the house which was on rent with him.

It is incorrect that the value of jewellery was not more than Rs. 5,000/-.

24. Testimony of PW-6 reads as under:

PW6, Dinesh Kumar Tiwari, s/o Chander Bhan Tiwari, 43 years, private service, r/o 67, Pocket E 15, Sector 8, Rohini Delhi.

On SA:

I know accused Krishan Kumar who is present in the court who is the neighbour of my in laws and who used to reside at SBM Colony Karampura.

On 17/8/2004 at about 9.30 pm, accused Krishan Kumar came at my residence at Rohini having a brief case with me which was locked and asked me to keep that brief and that it was containing money and also told me that he would collect the same the next morning. The reason accused tendered to me was that it was not safe for him to carry the brief case as it was having huge money and that he had to go to Dwarka. Believing him, I kept the brief case with me and after about ten minutes he left my house. Next day, in the evening, he came about 8.30-9 pm along with a blind man on "motor cycle". That blind man was made to sit in the drawing room and accused Krishan Kumar took me in a corner of the house. He told that blind was in difficulty and he (blind man) had to sell his house as he was facing some financial constraint. He asked me that I should agree to purchase the house for a consideration of 12 to 13 lac and in addition to it he also asked to give consent to give Rs. 2 lac to that blind man. He told me that he had arranged the money. I initially refused but when he insisted that blind man was his friend, I agreed to his proposal. I gave the brief case to Krishan Kumar which was left with me and he left with blind man within ten minutes. There was however no transaction carried out between us.

On 19/8/2004, in the morning at about 4.35 am some police officers came from the PS Mahipalpur and I was instructed to come to the police station. I reached there at about 10.30 am. Then I came to know about this case. Then my statement was recorded at 12.30 pm.

XXX by Sh. RS Jain counsel for accused Shishir Kumar

My statement was recorded in PS on 18/19.8.04. I first time saw Ram Sanjivan when he came with accused Krishan at my residence on 18.8.04. It is wrong to say that I have deposed falsely at the instance of Ram Sanjivan. It is wrong to say that I deposed falsely.

Xxxxxx on behalf of accused Krishan, Subash

Nil. Opp. Given.

25. We have carefully examined the evidence of all the witnesses and for the sake of convenience reproduced the evidence of some of the material witnesses. PW-1, Ram Sanjivan, father of the victim, is a blind person. During his testimony, he identified the appellant from his voice, as the person, who came to his house on 15.8.2004 and asked for the literature book of Amway being interested in becoming a distributor. The evidence of PW-1 read with the evidence of his wife, PW-5, Kamla Kushwaha clearly establishes that the appellant had visited their house on 15.8.2004, 16.8.2004 and 17.8.2004; and their testimonies also establish the keen interest taken by the appellant in their son. The appellant also enquired from their son about his likes and dislikes. PW-1 has also given a detailed account of how his son did not return home and thereafter he received a telephone call on his mobile informing him that his son had been kidnapped by the caller and in case Rs. 30.0 lacs were not paid, he would find his son dead.

26. PW-1 has also given a vivid description of the role of Kishan Kumar, the co-accused, who has been declared a Proclaimed Offender. PW-1 has also described the second ransom call received by him on his phone no. 32744467, asking him to reach under Punjabi Bagh Flyover, otherwise threatening to slit the throat of his son. PW-1 has also described how the briefcase containing Rs. 25.0 lacs and jewellery were handed over on the asking of Kishan Kumar by PW-1. And finally PW-1 has described how a third phone call was received by him informing him that his son was standing at the bus stop at Voltas Company, Moti Nagar where they finally found his son.

27. The first submission of counsel for the appellant is that there are material contradictions and improvements in the evidence of PW-1, father of the victim and PW-5, the mother of the victim. This submission of counsel for the appellant is without any force. The contradictions which have been pointed out and have been noticed by this court are minor contradictions, which do not touch the core issue and the contradictions are of such a nature which do not shake the case of the prosecution. Whether the appellant had asked for the literature book of Amway or not or whether he had asked for a glass of water from the wife of the complainant or not cannot be treated as material contradictions. It has been repeatedly held that to reach a conclusion that there are material contradictions and improvements in the case of the prosecution, courts must read the evidence as a whole and must consider only those improvements and contradictions which go to the core of the issue and not any and every contradiction should be a ground to doubt the case of the prosecution.

28. The Apex Court in the case of Shyamal Ghosh Vs. State of West Bengal, , has held as under:

46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have

given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

47. xxxx

48. xxxx

49. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

xxxxx

68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a

situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

70. In terms of the explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a statement of a witness u/s 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (Dr. Sunil Kumar Sambhudayal Gupta and Others Vs. State of Maharashtra, and Subhash Vs. State of Haryana, .

71. The basic element which is unambiguously clear from the explanation to Section 162 Cr.P.C. is use of the expression "may". To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression "shall" in place of the word "may". The word "may" introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

29. Applying the law to the facts of this case, we find that the contradictions pointed out by counsel for the appellant are minor in nature and cannot be a ground to set aside the order of conviction passed by the trial court.

30. Another argument raised before us is that the evidence of PW-4 is neither trustworthy nor reliable by virtue of him being a child witness. This submission of counsel for the appellant is also without any force. We have extracted the evidence of PW-4 and carefully examined the same. The law with regard to reliance on the evidence of a child witness is well settled. The Apex Court in the case of Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat, , held that a child witness, if found competent to depose, his/her testimony can be the basis of conviction. Relevant portion of the judgment reads as under:

6. Pivotal submission of the appellant is regarding acceptability of PW 11's evidence. The age of the witness during examination was taken to be about 10 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not

prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from questions, because of tender years, extreme old age, disease—whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and given rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States*, 40 L Ed 244, 159 US 523 (1895). The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Suryanarayana Vs. State of Karnataka*, .

7. In *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra*, it was held as follows: (SCC p. 343, para 5)

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered u/s 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. The precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

31. This question was also the subject matter of a judgment of the Supreme Court in *Acharaparambath Pradeepan and Another Vs. State of Kerala*, . Relevant portion of the judgment reads as under:-

48. Section 118 of the Indian Evidence Act seeks to exclude evidence of those who may suffer from intellectual weaknesses. It reads as under:

Who may testify.--All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

49. In terms of the said provision therefore, all persons shall be competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational answers. It is for the Judge to satisfy himself as regards fulfillment of the requirement of the said provision. The opinion of the learned Judge had been recorded and, thus, it satisfies the test laid down by this Court in Rameshwar Vs. The State of Rajasthan, .

50. It is not the case of the appellants that the court had failed to comply with the statutory obligations in this behalf. It is also not the case of the appellants that their testimonies otherwise should not have been accepted.

51. A child indisputably is competent to testify if he understands the question(s) put to him and gives rational answer thereto. None of the witnesses have been found to be suffering from any intellectual incapacity to understand the questions and give rational answers thereto.

53. Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.

32. In the case at hand, the court had put specific questions to the child witness and reached a conclusion that he had answered the questions in an intelligent manner. The questions put by the court have also been reproduced and we find that the court has put material questions to the child and has rightly been able to assess that he was in a position to testify. We find the evidence of the child witness to be reliable, cogent and trustworthy. The child witness has identified the appellant as the person, who had taken him on a scooter to a far away place and had also offered him Rs. 5/-. The identity of the appellant stands duly established by the testimony of the child witness, which is further corroborated by the evidence of PW-5 and voice identification by PW-1. It may also be noticed that the appellant had refused to take part in the TIP.

33. The version of PW-1 regarding selling of the property at Dwarka to Dinesh Kumar is duly corroborated by Dinesh Kumar, who has been examined as PW-6. PW-6 has deposed that he knew accused Krishan Kumar being a neighbour of his in-laws. He stated that on 17.8.04 i.e. a day prior to 18.8.04, accused Krishan had come to his house with a briefcase containing money which was locked and he requested him to keep that briefcase in his safe custody. He represented that he will collect the same on the next morning and that he had to leave it behind with him that night as he had to go to Dwarka and since the brief case contained

money it was not safe for him to carry it at night all the way to Dwarka. PW-6 has also deposed that on the next day i.e. 18.8.04 in the evening, accused Krishan Kumar came with a blind person on a motorcycle. The blind person was made to sit in the drawing room and accused Krishan Kumar took PW-6 to a corner and told him that the blind person was in difficulty and had to sell his house as he was facing some financial constraints and asked him to agree to purchase the house for consideration of Rs. 12 lakhs to Rs. 13 lakhs and in addition to give Rs. 2 lakhs to that blind man for which money had already been arranged by Krishan Kumar. PW-6 further deposed that he initially refused but when Krishan Kumar insisted that the blind person is his friend, he agreed and handed over the briefcase to Krishan Kumar, which was left in his custody on the previous day by him but in fact, no transaction was carried out between him and the blind man. PW-6 has also deposed that on 19.8.04 he was called to the police station and thereafter he came to know about the real facts and he made a statement. This witness was also not cross examined on the material aspects and in his cross examination, he categorically stated that for the first time, he saw Ram Sanjivan at his residence on 18.8.04 and has denied the suggestion that he had deposed falsely. In view of the testimony of PW-6, the version of a fake deal with Dinesh Kumar at the instance of accused Krishan Kumar regarding purchase of property at Dwarka for consideration of Rs. 12 lakhs to Rs. 13 lakhs and further making Ram Sanjivan indebted to a sum of Rs. 2 lakhs and as such arrangement of Rs. 15 lakhs from Dinesh Kumar stands duly established, and it is also clear that the same was done at the behest and asking of accused Krishan Kumar (P.O.).

34. From the testimony of PW-6 it is also clear that accused Krishan Kumar had come with Ram Sanjivan, PW-1 on a motorcycle and thus, the version of Ram Sanjivan that he was taken by accused Krishan Kumar on a motorcycle also stands duly corroborated. This very motorcycle was seized by the police at the instance of accused Krishan Kumar.

35. PW-16, S.I. Randhir Singh has also testified that appellant Shishir was apprehended while coming on a Scooter at the instance of accused Krishan Kumar and that at that time accused Shishir Kumar was carrying a VIP bag on his left shoulder and a briefcase was lying on a two-wheeler scooter bearing No. DL-1SH-4014. The bag and the briefcase were checked and the bag was found to contain gold and silver jewellery and some artificial jewellery, while in the briefcase rubber-bands and bundles giving appearance as if they are bundles of notes were found and the said bag was in turn found to contain another bag full of bundles of papers giving appearance of bundles of currency notes wrapped in newspaper and tied with rubber-bands and the total number of such bundles were thirty. PW-16 has also testified that from amongst the jewellery recovered from the bag, accused Krishan Kumar identified certain jewellery to be belonging to his wife Anju and certain jewellery belonging to Kamla, wife of complainant and the jewellery was separated and while jewellery belonging to Anju was taken into possession vide seizure memo Ex. PW-15/E, the jewellery of Kamla was

taken into possession separately by giving Nos. 6 & 7 separately to the pullandas which were sealed with the seal of RS.

36. PW-16 has also testified that the appellant Shishir Kumar was arrested vide memo Ex. PW-15/A and disclosure statement of accused Shishir Kumar was recorded, who pointed out the place from where Prateek was kidnapped and the pointing out memo Ex. PW-15/F was prepared, and Shishir Kumar also pointed out the place near Punjabi Bagh Flyover where ransom money was paid and memo Ex. PW-15/K6 was prepared in this regard. PW-16 has also testified that accused Subhash (acquitted) was arrested on 21.8.04 and his disclosure statement was recorded. This witness was not cross-examined on behalf of any of the accused.

37. The conspiracy is further established from the fact that Krishan Kumar and Shishir Kumar are both related to each other and are cousins, and this aspect has been admitted by appellant Shishir Kumar in his statement u/s 313 Cr.P.C. and the fact remains that neither was this disclosed by Shishir Kumar or by Krishan Kumar to Ram Sanjivan that they are relatives nor was such a question put to PW-1 or PW-5 in their cross-examination.

38. In view of the testimonies of the witnesses, the fact that the victim has clearly identified the appellant as the person who had kidnapped him and also made a call from the phone booth, the evidence of parents of the victim, who have identified appellant as the person who had come to their house and had shown keen interest in their son and the evidence of PW-16, it can be concluded that the prosecution has been able to prove its case beyond any reasonable doubt. No grounds are made out to set aside the impugned judgment and order on sentence. Accordingly, the appeal is dismissed.