

**Criminal Appeal No.153 of 2009**

Sheodan Singh ....Appellant

Vs.

State of Uttar Pradesh ....Respondent

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 For Appellant : Shri B.K. Solanki

For Respondent/State : Shri Amit Sinha, AGA

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 WITH
**Criminal Appeal No. 159 of 2009**

Omveer Singh ....Appellant

Vs.

State of Uttar Pradesh ....Respondent

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 For Appellant : Shri B.K. Solanki

For Respondent/State : Shri Amit Sinha, AGA

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 WITH
**Criminal Appeal No. 1434 of 2019**

Suresh ....Appellant

Vs.

State of Uttar Pradesh ....Respondent

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 For Appellant : Shri Saghir Ahmad

For Respondent/State : Shri Amit Sinha, AGA

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**Hon'ble Pritinker Diwaker, J.****Hon'ble Ali Zamin, J.****Per: Pritinker Diwaker, J.****(9.5.2019)**

As these three appeals arise out of a common judgment dated 15.12.2008 and order dated 16.12.2018 passed by Additional Sessions Judge, Court No.5, Aligarh, in Sessions Trial No. 625 of 2002 (State vs. Omveer Singh and others) and Sessions Trial

No.625A of 2002 (State vs. Suresh) convicting all the accused appellants under Section 364-A and 368 of IPC, except accused Smt. Ramwati @ Roopwati, who has been convicted only under Section 364-A of IPC and sentencing them to undergo imprisonment for life, with a fine of Rs.5,000/- each, for each offence, in default thereof, three months additional jail sentence, with a direction that all the sentences to run concurrently, they are being disposed of by this common judgment.

2. As per prosecution case, victim Jeetu S/o Kalyan Singh (PW-2), aged about 3 1/2 years went missing since 1.00 pm on 23.3.2002. A missing report Ex.Ka.1 was lodged on 25.3.2002 at 9.10 pm by Triveni Devi (DW-1), mother of the victim. On the basis of the written report dated 26.3.2002 lodged by Kalyan Singh (PW-2), FIR, Ex.Ka-2 was registered at 7:30 am under Section 364-A of IPC against accused Omveer Thakur, showing him to be a suspect.

Further case of prosecution is that accused Omveer was residing as a tenant of informant Kalyan Singh. After lodging the report, accused Omveer was arrested on 26.3.2002 at 2.00 pm from his house. He was interrogated and based on his statement, from flour mill of accused Soran Singh, at 5.30 pm, victim was recovered on 26.3.2002 itself and at that time, victim was sleeping in between the cot of accused Sheodan and Suresh. The victim was identified as Jeetu by his elder brother Santosh (PW-3). After investigation charge sheet was filed against Omveer, Sheodan, Soran Singh, Smt. Ramwati @ Roopwati and Suresh.

3. While framing charge, trial Judge has framed charge against all the accused persons under Sections 364-A and 368 of IPC, except accused Smt. Ramwati @ Roopwati, against whom charge was framed only under Section 364A of IPC.

4. So as to hold accused persons guilty, prosecution has examined six witnesses, whereas two defence witnesses have also

been examined. Statement of accused persons were recorded under Section 313 of Cr PC in which, they pleaded their innocence and false implication.

5. By the impugned judgment, the trial Judge has convicted all the accused persons under Sections 364-A and 368 of IPC, except accused Smt. Ramwati @ Roopwati, who has been convicted only under Section 364A of IPC and sentenced them, as mentioned in para.1 of this judgment. Hence these appeals.

6. During pendency of these appeals, accused Smt. Ramwati @ Roopwati and Soran Singh have expired and, therefore, appeal in their respect stands abated and the present appeals confine only in respect of accused Sheodan, Omveer and Suresh.

7. Learned counsel for the appellants submit:-

- (1) that there is inordinate delay in lodging the report. It has been argued that a young child aged about 3 1/2 years went missing since 23.3.2002, but for the first time, missing report was lodged on 25.3.2002 by the mother of the victim and thereafter on 26.3.2002, FIR, Ex.Ka.2, was lodged by Kalyan Singh (PW-2), father of the victim.
- (2) that as per written report lodged by Kalyan Singh (PW-2), Omveer had been shown as suspect, whereas as per statement of Santosh (PW-3), it was accused Suresh, who called him on telephone and demanded a ransom amount. Learned counsel submit that FIR and statement of Santosh goes contrary to each other.
- (3) that missing report, Ex.Ka.1 was lodged on 25.3.2002 at 09.10 pm by Triveni Devi (DW-1), mother of the victim and by that time, ransom call was already received by Santosh sometime in the evening and as per FIR, Ex.Ka.2, Santosh had shown suspicion on

Omveer. Learned counsel submit that once, at the time of lodging missing report, Ex.Ka.1, Triveni Devi (DW-1) was aware about Omveer to be a suspect, then she ought to have mentioned his name as an accused in the report.

- (4) that accused persons have been convicted on the sole testimony of child witness Jeetu (PW-1) aged about 3 1/2 years, at the time of occurrence, but the said witness is not competent and trustworthy. It has been argued that child witness is a son of a Labour and when he was subjected to some preliminary questions, to test his mental aptitude, he could not answer those questions in proper manner and he appears to be a tutored witness. He placed reliance on the judgments of the Supreme Court in **Panchhi v State of Uttar Pradesh**, AIR 1998 SC 2726, **State of Uttar Pradesh v Ashok Dixit & Ors.** AIR 2000 SC 1066 and of Delhi High Court in **State vs. Sujeet Kumar**, 2014 (4) JCC 2718.
- (5) that as per statement of Triveni Devi (DW-1), minor child was recovered at 6.00 am on 26.3.2002, whereas as per statement of Kalyan Singh (PW-2), child was seen in the police station in between 12.00–12.30 hours on 26.3.2002. Learned counsel submits that inconsistency in the statement of mother and father of the victim makes it clear that no such incident had occurred.
- (6) that the demand of ransom has not been proved by the prosecution and no such call details have been proved by the prosecution.
- (7) that appellants are in jail since last more than 10 years.

8. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that conviction of the appellants is in accordance with law and there is no infirmity in the same.

9. We have heard learned counsel for the parties and perused the record.

10. (PW-1) Jeetu, is a victim, allegedly abducted by the accused appellants. Before recording his statement, the trial Court had put certain questions to him, to know his aptitude and mental status, but he even could not tell the name of his mother or could give his address. He, however, in his Court statement, has stated that he was taken by accused Smt. Ramwati @ Roopwati, who was an old lady by showing that she would take him to his mother's house; at the relevant time, his mother had gone to market along with accused Omveer. He states that accused Smt. Ramwati @ Roopwati first took him to her house and then accused Omveer and Smt. Ramwati @ Roopwati took him on their bicycle, but he was not aware as to where he was taken. He states that the place where he was taken, there was a flour mill. He states that police reached there and then recovered him.

Examination-in-chief of this witness was conducted on 30.6.2003, however, he was cross-examined almost after about five years on 9.4.2008. In the cross-examination, he states that he is not aware about his date of birth, nor he can tell anything as to who was running the State before six years. He further states that he cannot tell as to who were his tenants six years back, nor he can tell as to how many rooms were there in his house. He further cannot say as to who were his neighbours, nor he can tell his house number. He states that he does not remember the date and month of incident nor he is aware as to whether there was any fair in the village on the date of occurrence. He further states that he is not aware as to whom police had arrested, nor he can say as to whether six years back, he

had gone to police station or not. He further states that he does not remember about his examination-in-chief conducted in the Court, but he made some statement in the Court. He has further stated that he cannot tell anything about the occurrence.

11. Kalyan Singh (PW-2) is the father of the victim (PW-1), has stated that he is a Labour; on the date of occurrence, his son was abducted for which a written report was lodged by his wife on 25.3.2002 and then on 26.3.2002, he lodged FIR. He states that his son was taken by accused Smt. Ramwati @ Roopwati and this fact was informed to him by his wife. He further states that in the FIR, he had not disclosed the names of Smt. Ramwati @ Roopwati and Omveer and then he states that he did disclose the names of these persons, but he could not tell the reason as to why their names have not been mentioned in the FIR. He further states that scribe of the report was Ram Gopal, but he was not aware as to what was written in the same and he had simply put his thumb impression. He further states that he cannot read Hindi and he is not aware as to whether his statement was recorded by the police or not. He states that he is illiterate, he does not know the date or month of the incident. He further states that though he came to know about the incident at his work place, but even on the second day, he had not gone to the police station to lodge the report. He states that two days before lodging the FIR, he came to know that the voice of the person, who called on telephone, was like of accused Omveer. He, however, admits that as he was not aware about the details of accused Omveer and Smt. Ramwati @ Roopwati, he did not inform their names to the police. He further states that after about two days of missing of his child, the victim was recovered and at 12:00-12:30 in the afternoon, he saw the victim in the police station.

12. Santosh (PW-3) is the brother of victim, aged about 18 years, states that on the date of occurrence, accused Omveer was his tenant and when after completing his day work he reached to his house, he

came to know that his brother is missing and that he was being searched. He states that on the date of incident, at about 6:00 pm, accused Suresh made a telephone call on his neighbour Turram Singh's phone, which was attended by him (PW-3). Accused Suresh informed him that the victim is with him and he is required to make arrangement of Rs.1.00 lakh. He further states that when victim could not be traced, his mother lodged the missing report and in the evening itself, police had come to his house, but his statement was not recorded by the police. He further states that on the next day, along with police, he had gone to the place Karnvas and there in the flour mill, victim was recovered from the house of Sheodan and Soran Singh. On the next day, he took the custody of his minor brother from the police station. He has clarified that call was received by him at 6:00 pm and it was accused Suresh, who called him up. He further states that he did inform the police that it is accused Suresh who called him up, but if this fact is not recorded, he could not tell the reason.

13. Yogendra Kumar (PW-4) recorded the check FIR.

14. Javed Alam (PW-5), Constable, assisted during investigation.

15. Virendra Kumar (PW-6), is the Investigating Officer, has duly supported the prosecution case.

16. Triveni Devi (DW-1), is the mother of the victim and the lodger of missing report, has been examined as Defence Witness instead examining her as Prosecution Witness. She states that at the time when her son was abducted, he was aged about 3 1/2 years and at that time, she had gone to market along with accused Omveer and when she returned after about two hours along with Omveer, she came to know about the missing of her child. She further states that ransom call was received on her neighbour's (Turram Singh) telephone, which was attended by her son Santosh (PW-3). She further states that at about 6:00 pm on 26.3.2002, police had brought

back the victim.

17. Y D Sharma (DW-2) has not stated anything specific which may be of any help to the defence.

18. Close scrutiny of the evidence makes it clear that two parallel stories have been put forth by the prosecution. As per FIR lodged by Kalyan Singh (PW-2), father of the victim, his son was abducted on 23.3.2002 and on 25.3.2002, a telephone call was made on the phone of his neighbour Turram Singh, which was attended by his son Santosh (PW-3). After attending the call, his son had suspicion that the call was made by accused Omveer. Accordingly, at the time of lodging FIR, accused Omveer was shown as suspect. Contrary to it, Santosh (PW-3) who attended the call, in his Court statement, has stated that the call was made by accused Suresh. There is absolutely no evidence on record to clear this confusion between Kalyan Singh (PW-2) and Santosh (PW-3). Furthermore, as per *tehrir* (written report), on 25.3.2002 at 6:00 pm, a ransom call was made on the telephone of Turram Singh which was attended by Santosh (PW-3), missing report was lodged on 25.3.3002 at 9:10 pm by Triveni Devi (DW-1), but at the time of lodging missing report, Triveni Devi had not mentioned anything about ransom call, nor that of accused Suresh or that of Omveer. Once this fact was brought to the knowledge of victim's family, that victim has been abducted by accused Suresh or Omveer, it was expected from them to disclose the name of accused persons even as suspects at the time of lodging missing report.

19. There is enough substance in the argument of the defence that the child witness, Jeetu (PW-1) does not appear to be trustworthy. At the time of incident, this witness was about 3 1/2 years and his testimony does not appear to be reliable. He stated that he was taken by accused Smt. Ramwati @ Roopwati to her house and then Smt. Ramwati @ Roopwati and Omveer took him on their bicycle to a

place which he was not aware. This witness was subjected to cross-examination after about five years of his examination-in-chief and from his cross-examination, it is apparent that he is not sure as to what had happened with him about five years back. He was subjected to various questions, to test his memory, but he failed to answer those questions in a proper manner and based on his statement, we do not feel it safe to convict the appellants. The law in respect of evidentiary value and reliability of a child witness is very clear.

20. In **Panchi v State of U.P.** (Supra), the Supreme Court, while dealing with the issue relating to the evidence of child witness, held as under:-

"... .. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. [vide *Prakash & Anr. vs. State of Madhya Pradesh*, 1992 CriLJ 3703, *Baby Kandayanathi vs. State of Kerala*, 1993 CriLJ 2605, *Raja Ram Yadav vs. State of Bihar*, 1996 CriLJ 2307, *Dattu Ramrao Sakhare & Ors. vs. State of Maharashtra*, 1997 (5) SCC 341 and *State of Uttar Pradesh vs. Ashok Dixit & Ors*, AIR 2000 SC 1066."

With regard to the testimony of child witness, the Supreme Court in **State of Karnataka v. Shantappa Madivalappa Galapuji & Ors.**<sup>1</sup> had noticed the case law and held as under:

(i) "The Indian Evidence Act, 1872 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 understanding the questions put to them or from giving rational answers to these 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

<sup>1</sup> (2009) 12 SCC 731

testify if he has intellectual capacity to understand questions and give rational answers thereto. 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 v. State of Karnataka* (2001) 9 SCC.”

In **Dattu Ramrao Sakhare v. State of Maharashtra**<sup>2</sup>, 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 under Section 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 reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The position of law relating to the evidence of a child witness has also been dealt with by the Apex Court in **Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra**<sup>3</sup> and **Golla Yelugu Govindu v. State of Andhra Pradesh**<sup>4</sup>.

In **Alagupandi alias Alagupandian v. State of Tamil Nadu**,<sup>5</sup> the Supreme Court has emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that:

"36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, 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

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2 (1997) 5 SCC 341

3 (2008) 12 SCC 565

4 2008 (4) SCALE 569

5 (2012) 10 SCC 451

his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

In **Digamber Vaishnav vs State Of Chhattisgarh**<sup>6</sup>, the Supreme Court observed as under:

"It is clear from the testimony of PW-8 that she is not an eyewitness to the incident. She was aged about 9 years at the time of the incident. Her evidence is fraught with inconsistencies."

21. Applying the above principles of law laid down by the Apex Court, we are of the considered view that it will not be safe for this Court to rely upon the testimony of child witness and to uphold conviction of the appellants based on that.

Yet another important aspect of the case is that the mother of the victim Triveni Devi has been examined as Defence Witness and in her statement, she has stated that when her child was abducted, she was in the market along with accused Omveer. If accused Omveer was with the mother of victim, then story put forth by the prosecution that accused Omveer and Smt. Ramwati @ Roopwati took the victim on their bicycle to a third place from where he was recovered, becomes doubtful. There is absolutely no evidence against accused Sheodan and Soran Singh, but for the fact that the victim was sleeping in a cot where Sheodan and Soran Singh were sitting. As per FIR, suspect was Omveer, whereas as per statement of Santosh (PW-3), he received ransom call from accused Suresh.

22. Taking cumulative effect of the evidence, we are of the view that the prosecution has failed to prove its case against the appellants beyond all reasonable doubt. Of course, it is the accused

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<sup>6</sup> Criminal Appeals No.428-430, decided on 5 March, 2019.

appellants, who are entitled to get benefit of doubt. Appeals are, accordingly, **allowed**. The impugned judgment and order passed by the trial Court is set aside.

23. Accused appellants Sheodan, Omveer and Suresh are in jail since last more than ten years, they be set free forthwith, if not required in any other case.

24. This Court appreciates the assistance rendered by Mr Saghir Ahmad, learned Amicus, who has argued on behalf of appellant-Suresh. He be paid Rs.10,000/- as his remuneration.

**Order Dated:**9.5.2019

Nethra/RKK/-

(Pritinker Diwaker, J)

(Ali Zamin, J)