A.F.R.

C.J. Court **Reserved on 09.02.2023**

Delivered on 25.04.2023

CRIMINAL APPEAL No. - 8080 of 2008

Indra Pal and another ---- Appellants

Vs.

State of U.P. ---- Respondent

For Appellants	:	Sri Noor Mohammad
For Respondent	:	Sri Amit Sinha, AGA & Ms. Mayuri Mehrotra, State Counsel

with

CRIMINAL APPEAL No. - 8477 of 2008

Shreepal and another ---- Appellants

Vs.

State of U.P. ---- Respondent

For Appellants	:	Sri Noor Mohammad
For Respondent	:	Sri Amit Sinha, AGA & Ms. Mayuri Mehrotra, State Counsel

Hon'ble Pritinker Diwaker, Chief Justice
Hon'ble Nalin Kumar Srivastava, J.

(Per : Nalin Kumar Srivastava, J.)
(25.04.2023)

1. Since these appeals have been preferred against the same judgment and relate to same Crime Number, they were heard together and are being decided by this common judgment.

2. The Special Judge (DAA) / Additional Sessions Judge, Court No.5, Etah by judgment and order dated 22.11.2008 passed in Special Sessions Trial No. 25 of 1998 (Crime No. 346 of 1997), P.S. Soron, District Etah convicted and sentenced the appellants under Section 364A I.P.C. to undergo life imprisonment with a fine of Rs. 2,000/- each and under Section

307 I.P.C. read with Section 149 I.P.C. to undergo seven years rigorous imprisonment with a fine of Rs. 500/- each and in default of payment of fine, to undergo three months additional rigorous imprisonment. All the sentences were directed to run concurrently. Aggrieved with the said judgment, present appeals have been preferred by the appellants.

3. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Chandra Pal son of Roopram, resident of Badanpur, Police Station Soron, District Etah, on 22.11.1997 at 2.45 p.m., with the averments that in the night of 21/22.11.1997, as usual, he was sleeping inside his shop and his wife Prema Devi was sleeping in the shed with the kids and nearby his children were also sleeping on different cots. At about 12.00 p.m. when the wife of the informant made noise that miscreants had come, he came out unlocking the shop. Six seven miscreants came and took his 11 years old son Rajesh. On raising alarm by the informant and his wife, his neighbors also came there. When everyone tried to rescue the boy from the miscreants, they fired with guns and went towards south with the boy. Jabar Singh son of Siya Ram Jatav received gunshot injury in the occurrence.

4. On the basis of aforesaid written report, on 22.11.1997 F.I.R. was lodged against 6-7 unknown miscreants for the offence under Sections 364 and 307 I.P.C. Investigating Officer started investigation and inspected the spot and prepared the site plan. Injured Jabar Singh was medically examined on the same day at the Community Health Centre, Soron, Etah. During the course of investigation, on the basis of an information dated 4.12.1997, the Investigating Officer with other police personnel, reached Badanpur where the informant Chandrapal met and handed over a letter regarding demand of ransom of Rs. 70,000/- in respect of the kidnapped boy. When the police personnel alongwith the informant and

other persons, with a view to search out the kidnapped boy, reached the old brick kiln before the village Goyti, information was received that in the house of Pusey son of Sonpal Kashyap, the kidnapped boy alongwith the kidnappers are present. On the basis of the said information, the police personnel alongwith informer and other persons, reached at village Chauraghat and when on the tip of the informer, reached the corner of the western wall of the house of Pusey Kashyap, it was seen that six persons, armed with gun and tamancha, were sitting on the north face of the roof (kotha) and when they saw the police personnel, they fired 5-6 shots with intention to kill them. In their defence, the police personnel also fired upon them and by using necessary force, two miscreants were caught by surrounding them in front of Pusey's house and the remaining four miscreants, namely, Pusey, Mahatma, Awadhesh and Kallu managed to escape. Of the criminals caught, one told his name as Shripal son of Chhuni Lal, resident of Pachauraghat, P.S. Soron, District Etah and on his search, one SBBL gun 12 bore with three live cartridges of 12 bore were recovered, whereas the other person identified himself as Indrapal son of Anar Singh, resident of Badanpur, P.S. Soron, District Etah. On his search, one tamancha deshi bore and two live cartridges were recovered. On the pointing out of Shripal, the kidnapped boy was recovered from the Pusey’s roof (kotha). Informant Chandrapal identified him as his son Rajesh, who was kidnapped for ransom. Accused persons Shripal and Indrapal were arrested and recovered SBBL gun and country made pistol alongwith live and empty cartridges were sealed in separate cloths and specimen seal was prepared. The plastic rope, with which the kidnapped boy was tied, was also seized and a memo was prepared. On the basis of seizure, cases under Sections 147,148, 149, 307 I.P.C. against accused

Kallu, Shripal, Indrapal, Mahatma and Pusey and under Section 25 Arms Act against accused Shripal and Indrapal were registered. Rajesh, the kidnapped boy, was medically examined on 4.12.1997 at the Community Health Centre, Soron at 2.45 p.m. and was handed over to his father Chandra Pal. After completing the investigation, charge sheets under Sections 364A and 307 I.P.C. against the accused Shripal, Indrapal, Mahatma, Awadhesh, Kallu and Pusey, under Sections 147, 148, 149, 307 I.P.C. against accused Kallu, Shripal, Indrapal, Mahatma and Pusey and under Section 25 Arms Act against the accused Shripal and Indrapal, were submitted. Concerned Magistrate took the cognizance. The cases being exclusively triable by Sessions Court, were committed to the Court of Sessions.

5. On 23.5.1998, charges under Sections 148, 307 I.P.C. read with Section 149 I.P.C. were framed against accused Kallu, Shripal, Indrapal and Mahatma in S.T. No. 193 of 1998. On the said date, charge under Section 25 Arms Act was also framed against accused Indrapal and Shripal in the said S.T.. On 18.8.1999, charges under Sections 364A and 307 I.P.C. read with Section 149 I.P.C. were framed against accused Shripal, Indrapal, Mahatma, Awadhesh, Pusey and Kallu in S.S.T. No. 25 of 1998. On 4.12.1998 in S.T. No. 676 of 1998 against the accused Pusey, charges under Sections 148, 307 I.P.C. read with Section 149 I.P.C. were framed.

6. All the six accused persons appeared before the trial court. They denied the charges and claimed their trial.

7. It transpires from the record that accused persons charged in this case were tried in different sessions trials, which were subsequently amalgamated. Accused Shripal, Indrapal, Mahatma, Kallu and Pusey were tried in S.S.T. No. 25 of 1998, accused Kallu, Shripal, Indrapal and Mahatma

were tried in Sessions Trial No. 193 of 1998 and accused Pusey was tried in Sessions Trial No. 676 of 1998. It also transpires from the record that earlier evidence of separate Sessions Trial was recorded separately, particularly, in Sessions Trial Nos. 25 of 1998 and 193 of 1998 and that is why the exhibits marked over the documents in separate sessions trials when taken together make a confusing situation and accordingly Exhibit Numbers marked over the documents are somewhere overlapping, but the learned trial court has made a systematic assessment of the evidence on record and this Court is also apprised of this fact.

8. Trial proceeded and to bring home the charges against the accused persons, prosecution has examined in all eight witnesses, who are as follows:

1	Jabar Singh	PW-1 (injured) (in S.S.T. No. 25/1998)
2	Chandra Pal	PW-2 (informant) (in S.S.T. No. 25/1998)
3	Rajesh	PW-3 (kidnapped boy) (in S.S.T. No. 25/1998)
4	Dr. Awadhesh Kumar	PW-4 (witness of injury report) (in S.S.T. No. 25/1998)
5	Indra Pal Singh Solanki	PW-5 (Investigating Officer) (in S.S.T. No. 25/1998)
6	Inspector Dharam Singh	PW-6 (witness of recovery of the boy) (in S.S.T. No. 25/1998)
7	HCP Giridhari Singh	PW-7 (scribe) (in S.S.T. No. 25/1998)
8	S.I. Shitla Prasad	PW-8 (Investigating Officer of police firing case) (in S.S.T. No. 25/1998)

9. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Chik F.I.R. crime no. 346/1997	Ext. A-1
2	Copy of recovery memo	Ext. A-2
3	Supurdginama	Ext. A-3
4	Injury report	Ext. A-4
5	Injury report	Ext. A-5

6	Site Plan	Ext. A-6
7	Site Plan	Ext. A-7
8	Charge sheet	Ext. A-8
9	Carbon copy of G.D.	Ext. A-9
10	Site plan of place of recovery	Ext. A-10
11	Charge sheets	Ext. A-11, Ext. A-12, Ext. A-13, Ext. A-14
12	Prosecution sanction letter against accused Shripal	Ext. A-15
13	Prosecution sanction letter against accused Indra Pal	Ext. A-16
14	Supplementary charge sheet	Ext. A-17
15	Chik F.I.R. under Section 25 Arms Act	Ext. A-18

10. After closure of evidence, incriminating materials appearing in the prosecution evidence were put to the appellants in their statements under Section 313 CrPC of which they denied and claimed false implication.

11. Appellants in their defence have examined DW-1 Ram Prakash and DW-2 Saudan Singh.

12. During trial, accused Awadhesh died and trial against him was abated.

13. PW-1 Jabar Singh is the injured witness of the occurrence. In his examination-in-chief, he has stated that his house is near the house of the informant. It was 12.00 in the night. 5-6 miscreants came to the house of Chandrapal. On the noise, he woke-up. While the miscreants were taking away Rajesh son of Chandrapal, he shouted that he recognized the miscreant, the miscreant immediately shot him which hit on his ear. He further stated that firstly, the villagers carried him at Police Station and thereafter to the hospital. He further stated that he had recognized miscreant Awadhesh, who was the resident of Badanpur but could not recognize the other miscreants. He further states that he fainted as soon as he got shot. After 15-20 days of the incident, his statement was

recorded by the police. He further stated that when he regained consciousness after eight days, he told the name of Awadhesh to Chandrapal.

14. PW-2, Chandrapal, is the informant of the occurrence. He has supported the contents of the written report and also the entire prosecution case including the recovery of the kidnapped boy and the weapons and also the role of the miscreants.

15. PW-3 is Rajesh, the kidnapped boy. He has stated the manner in which he was kidnapped by the miscreants. He has also stated that he recognized the miscreants as Kallu, Shripal, Awadhesh, Mahatma and Indrapal. He also stated that the miscreants had not covered their faces. He has deposed the entire scene of his recovery.

16. PW-4 Dr. Awadhesh Kumar has medically examined the injured Jabar Singh and Rajesh, the kidnapped boy and has proved the injury reports as Ext. A-4 and Ext. A-5.

17. PW-5 S.S.I. Indrapal Singh Solanki is the Investigating Officer. He has proved the proceedings of investigation in his examination-in-chief and also proved the site plans (Ext A-6 and Ext. A-7). He has also proved the charge sheet (Ext. A-8).

18. PW-6 Inspector Dharm Singh was posted as S.O. of the police station concerned. He also accompanied the Investigating Officer for the recovery of the kidnapped boy and has proved the manner of the recovery of the kidnapped boy, firing on police by the miscreants, the weapons, live and empty cartridges recovered from the possession of the accused persons, the rope with which the kidnapped boy was tied, the blindfold and the empty cartridges, which the police had fired in defence.

19. PW-7, Head Constable Giridhari Singh, is the scribe of the F.I.R. and has proved the chik F.I.R. and G.D. Rapat No. 4 at 2.45 a.m. as Ext. A-18 and Ext. A-9, respectively.

20. PW-8, Sub-Inspector Shitla Prasad, the Investigating Officer of crime no. 354 of 1997 under Section 147, 148, 149, 307 of I.P.C. P.S. Soron and crime nos. 355 of 1997 and 356 of 1997, which was handed over to him on 4.12.1997. He has proved the investigation proceeding, the site plan (Ext. A-10) and charge sheets (Ext. A-11 and Ext. A-17). He has also proved the permission letters of the District Magistrate to initiate prosecution under Section 25 Arms Act against accused Shripal and Indrapal as Ext. A-15 and Ext. A-16, respectively. He has also proved the chik F.I.R. (Ext. A-18).

21. DW-1, Ram Prakash @ Prakash, has stated in his deposition that Chandrapal is his uncle and Rajesh, the abductee, is his brother. Upon hearing the noise, he had gone to the house of Chandrapal. He has further stated that the miscreants had not covered their faces. He knew the accused persons Indrapal, Kallu, Shripal, Pusey, Mahatma and Awadhesh before the incident. They had come to his village shop to take ration. They had not kidnapped Rajesh. Awadhesh had not fired upon Jabar Singh. He had also gone to police station alongwith other villagers. Since the miscreants could not be recognized, the F.I.R. was lodged against unknown persons. He further stated that there was strong partibandi in his village. He further stated that neither the kidnapped boy was recovered before him nor there was any firing between the police party and the miscreants. No weapon was recovered before him from the possession of accused Indrapal and Shripal. He had seen the miscreants carrying Rajesh alongwith them.

22. DW-2 Saudan Singh, has stated that on the day of incident at about 11.00-12.00 p.m. the buffalo of his uncle Chandrapal (informant) was calving. The gas lantern was en-lighting due to calving of buffalo. His house is in front of the house of Chandrapal (informant). Rajesh was kidnapped by unknown miscreants. When the miscreants came, their faces were uncovered. He, Jabar Singh and Chandrapal could not recognize them. He had also gone to police station for lodging F.I.R. but as the miscreants could not be recognized, the F.I.R. was lodged against unknown persons. He was not interrogated by the police about the incident.

23. On the basis of aforesaid evidence, learned trial court came to the conclusion that the prosecution has succeeded to establish the guilt against the accused persons on the basis of cogent, consistent and reliable evidence and charges against accused were proved beyond reasonable doubt and accordingly conviction order was passed.

24. Heard Shri Noor Mohammad, learned counsel for the appellants in both the appeals and Shri Amit Sinha, learned AGA and Ms. Mayuri Mehrotra, learned State Counsel.

25. Learned counsel for the appellants has assailed the impugned judgment and order on various grounds. It has been argued that the accused persons are not named in the F.I.R. and F.I.R. was lodged against unknown persons whereas the evidence reveals that the accused persons were identified at the place of occurrence at the time of kidnapping. It is also pointed out that the kidnapping of the son of the informant was not done for any ransom and, hence, the case of the prosecution does not fall within the ambit of Section 364A I.P.C. It is further submitted that the evidence of witnesses of fact is contradictory to each other. In the so called police firing case, all the accused persons have been acquitted and it is

found by the trial court that the alleged occurrence of police firing was false and since the kidnapped boy is said to be recovered in the incident of the aforesaid police firing case, the story of which has been falsified by the witnesses, the alleged recovery of the kidnapped boy from the possession of the present appellants is also proved to be a false story. It is next contended that due to previous animosity, the appellants have been falsely implicated in this case and on some other points also it has been submitted that the appellants deserve to be acquitted of the charges and the appeals deserve to be allowed.

26. Per contra, learned AGA, vehemently opposing the appeals has stated that the kidnapping of the son of the informant was made for ransom. The factum of kidnapping has been proved by cogent and reliable evidence of the kidnapped boy himself, which is fully corroborated by the evidence of his father and village witness Jabar Singh. The injury report of the injured Jabar Singh affirms the fact that during the commission of the offence of kidnapping, the injured Jabar Singh was shot fired by the appellants. The evidence also reveals that ransom letter was received by the informant, which was sent by the appellants and the same was handed over to the Investigating Officer. Apart from this, on the basis of several other grounds, the present appeals have been assailed by the learned State Counsel and dismissal of the appeals is prayed for.

27. To proceed with the present matter, it will be desirable to have a glance upon the provisions of Section 364A I.P.C., which are as follows:

> "**364 A. Kidnapping for ransom, etc.—** Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by

his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

28. The Hon'ble Apex Court in **Suman Sood alias Kamal Jeet Kaur vs. State of Rajasthan read with Daya Singh Lahoriya alias Rajeev Sudan vs. State of Rajasthan, (2007) 5 SCC 634** has laid down certain requirements for the application of Section 364A I.P.C. and it has been so held by the Hon'ble Apex Court :

*"**57.** Before above section is attracted and a person is convicted, the prosecution must prove the following ingredients:*

(1) the accused must have kidnapped, abducted or detained any person;

(2) He must have kept such person under custody or detention; and

(3) Kidnapping, abduction or detention must have been for ransom."

29. The first and foremost fact to be ascertained in the case in hand is whether the minor son of the informant was kidnapped by the present appellants and firearm injury was caused to injured Jabar Singh during the commission of crime of kidnapping.

30. A perusal of the F.I.R. (Ext. ka-1) proved by the informant PW-2 goes to show that at the time of occurrence, 6-7 accused persons took away Rajesh Kumar, the son of the informant and when on their shrieks their neighbours also came over there and tried to rescue the boy, the accused persons fled away with the boy firing by their guns and the gun shot injury also inflicted upon Jabar Singh and he

sustained injury. The said F.I.R. was written in the hand writing of PW-7, the scribe of the F.I.R., who has proved his hand writing and signature over it and also the registration G.D. as Ext. ka-9.

31. In his cross-examination, PW-1 further states that accused persons Awadhesh, Indrapal and Mahatma are the native of his own village, who are acquainted with him and further he states that the accused persons were very well identified by him in the light of gas lantern. At one place, he says that he did not know the accused persons by name, but later in his deposition, he names the accused persons involved in the incident. Further more, he states that he knew the accused persons by their names and face prior to the incident and none of the accused persons had hidden their face. He fairly admits that he has not named the accused persons in his report, nor disclosed it to the Investigating Officer and further testimony of this witness reflects that he had a fair reason to conceal the name of the accused persons.

32. This witness states that during the commission of the occurrence, fire was made upon Jabar Singh, which inflicted injury over his ear. He further clarified that it was the accused Awadhesh who had shot fire upon Jabar Singh, but he was afraid of the murder of his son, if he disclose the name of Awadhesh Singh, as his son was in the custody of the accused persons. In his cross-examination, he fairly admits that "मैंने बयान में कहा था की अवधेश ने जबर सिंह को फायर मारा था । 5 कदम की दूरी से मारा था । अवधेश का नाम मैंने रिपोर्ट में इसलिए नहीं लिखाया था कि मेरा लड़का फंसा हुआ था । अगर मैं नाम लिखाता तो मेरा लड़का मारा जाता ।"

33. The aforesaid statement of PW-2 is found by us to be capable of explaining the circumstances under which albeit knowing very well the names and addresses of the accused persons, their identity was not disclosed in the F.I.R. by PW-2

and it was lodged against unknown persons. This is also an innocent statement of the poor father, PW-2 that he did not name the accused Awadhesh even to the Investigating Officer or any other person in order to save the life of his young son.

34. PW-1, injured Jabar Singh, has also corroborated this fact that when on shrieks he awoke in the night, he saw that some accused persons were carrying the son of Chandrapal and when he shouted, he was fired upon by one of the accused Awadhesh, a native of his own village and the firearm injury was inflicted upon his ear. He was taken to the police station and thereafter to the hospital. In the cross-examination, he has clearly stated that accused Awadhesh had not hidden his face at the time of occurrence but he did not know the other co-accused persons and eight days after the incident, when he became conscious, he disclosed this fact to the informant Chandrapal.

35. PW-3, Rajesh, is the kidnapped boy and is the key-witness. In his testimony, he has affirmed this fact that at the time of the occurrence, in the night, accused persons Kallu, Shripal, Awadhesh, Mahatma and Indrapal took him from his house with guns and deshi pistols with them and when they were chased by his family members, fire was opened by them. He has also clarified that since the accused person happened to come over his grocery shop, they were known to him prior to the incident. In his cross-examination, he has stated that none of the accused persons had hidden their face, they had come with open face, and during the occurrence, he has also received some injuries in his hand and buttock.

36. The Investigating Officer – PW-5 in S.S.T. No. 25 of 1998 has affirmed this fact that the kidnapped boy Rajesh in his statement had told him that Pusey, Shripal, Indrapal, Awadhesh, Kallu and Mahatma had kidnapped him in the

incident. He has corroborated this fact that when the informant came to the police station, he himself was present over there and he had sent the witness Jabar Singh, who was not in a condition to speak, to the hospital. He was informed by them that some unknown persons had kidnapped Rajesh and it was also not disclosed to him that the fire was shot by accused Awadhesh. It is to be mentioned here that the reason for non-disclosure of the names of the accused persons has been discussed in the earlier part of this judgment. The same statement has been made by PW-6 Inspector Dharam Singh that in his presence the F.I.R. was lodged but the names of the accused persons were not disclosed by the informant or witnesses in the police station.

37. The prosecution has produced PW-4 Dr. Awadhesh Kumar to prove the fact that one gunshot injury was inflicted upon the injured Jabar Singh during the commission of offence of kidnapping.

38. PW-4, Dr. Awadhesh Kumar, has stated in his evidence that on 22.11.2003 at 3.20 a.m. he had medically examined injured Jabar Singh of P.S. Soron where he was working as Medical Officer and found following injuries on the injured Jabar Singh :

> "(1) Organ damage Rt ear and Fire Arm wound size 10 cm X 4 cm X bone deep on Rt. side of Head about 9 cm. Lateral to Rt. Eye brow. Blackening & Burn present, injury kept U/O advice X ray skull (antero – posterior & lateral views). Pt. Refer to District Hospital Etah for x ray and further management.
>
> (2) Abrasion size 2 cm X 0.5 cm on Lt forehead about 2 cm above Lt. Eyebrow.
>
> Opinion – injury No. (1) caused by any type of fire arm and injury No. (2) caused by friction. Injury No. (1) kept U/O advice x ray skull

(antero – posterior & lateral views) Injury no. (2) simple in nature. Duration of all injury – fresh."

PW-4 has proved the injury report as Ext. ka-4. It is important to mention here that the medical examination of injured Jabar Singh has been performed on the basis of 'chitthi majrubi' (letter for medical examination) given by the police.

39. Although x-ray report of injured Jabar Singh is available on record wherein a fracture of right temporal bone has been found but the said X-ray report was not proved in evidence.

40. However, it is pertinent to mention here that the firearm injury has been inflicted over the right ear of the injured Jabar Singh and the dimension thereof was 10 cm X 4 cm X bone deep. This injury was 9 cm lateral to the right eyebrow with blackening and burn was also present which means that the injury was inflicted from a close range on a vital part of the body in the forehead area of the injured, which itself speaks that the fire was made with intention to kill the injured, who was trying to rescue the kidnapped boy.

41. The specific plea taken by the appellants in respect of non-proving of the x-ray report and thereby claiming a legal lacuna to put the case of the prosecution within the ambit of Section 307 I.P.C. takes us to the perusal of the provisions of Section 307 I.P.C. as conviction of the appellants has been made under Section 307/149 I.P.C. also for the specific charge of inflicting firearm injury over the injured Jabar Singh with intention to kill him.

42. Section 307 I.P.C. provides as under:

"**307. Attempt to murder.—**Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which

> may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.
>
> **Attempts by life convicts -** When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

43. The law settled in the context of Section 307 I.P.C. is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of Section 307 is the intention or knowledge with which, all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question whether the offence under Section 307 I.P.C. is made out, is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. The Hon'ble Supreme Court in ***Hari Kishan and State of Haryana vs. Sukhbir Singh, AIR 1988 SC 2127*** has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In **State of Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120,** it was reiterated that Section 307 I.P.C. does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 I.P.C.

44. Since the blackening and burn was found in the injury of the injured by the doctor, fire might have been made from a close range and the injured PW-1 makes a specific statement on this point that the fire was made by Awadhesh from a

distance of 3-4 steps, which elucidates the intention to kill the injured on the part of the appellants.

45. On the basis of evidence on record, we are of the considered view that the learned trial court has made an anxious consideration of the evidence on record and has rightly convicted the appellants under Sections 307/149 I.P.C. It is noteworthy that albeit accused Awadhesh, who is said to be the main assailant to open fire upon injured Jabar Singh, has died but since the offence was committed in prosecution of common object of all the members of unlawful assembly, being the member of unlawful assembly, all the appellants were guilty jointly for the aforesaid offence and on that basis their conviction is legal and proper.

46. The legal position has been clarified in **Susanta Das vs. State of Orissa, (2016) 4 SCC 371,** wherein it was held that :

> "When once, participation of each member of an unlawful assembly of five or more persons is shown, who indulge in an offence as a member of such an unlawful assembly, for the purposes of invoking Section 149, it is not necessary that there must be specific overt act played by each of the member of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such person knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a member of an unlawful assembly, the offence, as stipulated in Section 149, will stand proved."

47. After successfully proving its case in respect of kidnapping of the son of the informant and injury caused to the injured Jabar Singh, while trying to rescue the kidnapped boy, the prosecution further claims that the kidnapped boy was recovered from the possession of the appellants.

48. The informant PW-2 and victim/kidnapped boy PW-3 both have proved this fact that the boy was recovered after an encounter between the police and the accused persons. The informant PW-2 states that the Investigating Officer had taken him to the place of recovery and there firing took place between both the sides. His son was recovered from the kuthia. The kidnapped boy PW-3 also states the same fact. The Investigating Officer PW-5 also proves the story of recovery of kidnapped body and states that after police encounter wherein the accused persons opened fire upon the police party which was reciprocated in defence by the police, accused persons Indrapal and Shripal were arrested and rest of the accused persons fled away. The boy was retrieved from the kuthia, whose hands and mouth were roped, arms and cartridges were also retrieved, memo of recovery (Ext. ka-7) was prepared. The rope and cloth used in tiding the boy were also proved as material Ext. ka 1,2 and 3 by PW-5. PW-6 Inspector Dharam Singh, who was accompanying the police at the time of recovery of the boy also states the same story. However, no injury was caused to any of the accused persons or police personnel. Thus, the prosecution has fully proved that the kidnapped boy was recovered from the possession of the accused appellants.

49. Against the cogent and reliable evidence adduced by the prosecution, depositions of DW-1 and DW-2 do not inspire confidence in its entirety because at one place both the DWs make a total denial of the prosecution version whereas at some places, their depositions support the material facts of the prosecution story.

50. We have also noted that in their statements under Section 313 CrPC, the accused persons have not made any specific statement in their defence. They have simply stated that the incriminating evidence and circumstances proved

against them are wrong and even the question regarding retrieving the kidnapped boy from their possession and his rescue has been answered only as 'wrong'. We would like to impress upon ***Shivaji Sahab Rao vs. State of Maharashtra, 1973 SCC (Cri) 1033,*** wherein it has been observed that:

> *"The prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. Where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. It is open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assumed that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."*

51. In the light of the aforesaid discussions, we find the testimony of DW-1 and DW-2 as unreliable and no benefit thereof can be given to the appellants.

52. Further, the prosecution is under obligation to establish that the demand of ransom was made on the family of the complainant and it is also to be kept in mind that in the absence of there being any communication demanding payment of ransom, case of the prosecution will not be covered under Section 364A I.P.C.

53. In the case in hand, the informant Chandrapal, PW-2, who is the father of the kidnapped boy, deposes in his examination in chief that "लड़के को फिरौती के लिए चिट्ठी आई थी जिसे मैंने S.I. धर्म सिंह को दे दिया था जिसकी फोटो प्रति अभिलेख में शामिल है इस लड़के की वापसी के लिए फिरौती 70000/- सत्तर हज़ार मांगी गयी थी ये चिट्ठी डाक से आयी थी । ... ... फिरौती की चिट्ठी मैंने दरोगा जी को गाँव में दी थी जब दरोगा जी 14 दिन बाद गाँव आये थे ।". Inspector Dharam Singh, PW-6, who was accompanying the Investigating Officer of the case S.S.I. Indrapal Singh Solanki when police surrounded the accused persons in order to recover the kidnapped boy from their possession, states in his evidence that when the police force came to Badanpur in order to enquire into the whereabouts of the accused persons and recovery of the kidnapped boy, Chandrapal, the father of the kidnapped body, met them and showed ransom letter which he had received and handed over to the Investigating Officer of the case S.S.I. Indrapal Singh Solanki. He has proved the photocopy of the ransom letter, sent by inland letter, as Ext. Ka-7.

54. To pay ransom may be taken as "to pay price or demand for ransom", as defined in Black's Law Dictionary, and the 'demand' may be taken as "to require or to claim as one's due", "an asking with authority" "claiming" etc. It is also necessary that the demand for ransom must be communicated and claimed or imperative request or asking with authority could only be if the demand is conveyed or communicated. To transit or to convey or to give information or the sharing of knowledge by one with another is communication in broad sense and thus we can say that the 'demand' in order to communicate, requires necessarily the information to be conveyed to the person for whom it is meant. It is only receipt of this information that the question to pay a ransom would arise. The said dictum was

promulgated by the Delhi High Court in **Netra Pal vs. State (National Capital Territory of Delhi), 2001 0 Supreme (Del) 293**.

55. In **Shaik Ahmed vs. State of Telangana, 2021 0 Supreme (SC) 304**, it has been held that the ingredients of Section 364A I.P.C. must be necessarily proved to bring home the charge under the aforesaid provision and the second condition provided in the said Section "threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom". It has been emphasized that the second condition is also a condition precedent, which requisite is to be satisfied to attract Section 364A I.P.C. and in the aforesaid case since the second condition was not satisfied the conviction and sentence under Section 364A I.P.C. was set aside by the Hon'ble Apex Court and the accused was held guilty only for the offence of kidnapping.

56. For the purpose of ascertaining whether the ingredients of Section 364A I.P.C. are made out or not in the case in hand, the contents of Ext. ka-7 are necessary to be taken into account. It has been mentioned in Ext. ka-7 that the informant will come alone with Rs. 70000/- with him for the release of his son and if he is accompanied by some other persons or the matter is informed to the police, his son will be killed. It is also mentioned that the kidnapped son of the informant is in the custody of the accused persons.

57. At this stage a pertinent plea has been raised by the learned counsel for the appellants that Ext. ka-7, the so called

ransom letter has not been properly proved in evidence and as such it cannot be read in evidence. It has been vehemently argued that the alleged ransom letter, which was handed over by the informant to the police, is not on record in original, rather, a photocopy of the same is found on record, which has been wrongly exhibited by the trial court without ascertaining the availability of the original copy of the alleged ransom letter.

58. From the perusal of the examination-in-chief of PW-6, it will be proper to read it in verbatim whatsoever has been stated by him in respect of ransom letter and he states that :

" पत्रावली कागज़ सं0 98/1 मूल अंतर देशीय पत्र की सही छाया प्रति है जिसको चंद्रपाल वादी ने दौरन विवेचना S.S.I. इंद्रपाल सिंह सोलंकी के सामने मुझे दी थी । जिसको देखकर गवाह ने कहा कि यह वही चिट्ठी की छाया प्रति है जिस पर इक्ज़ क-7 डाला गया ।"

59. PW-2 in his deposition has stated that the ransom letter was handed over by him to the police after 14 days and it has been sent by post. PW-6 Dharam Singh also states that the letter was handed over by Chandrapal to S.S.I. Indrapal Singh Solanki, the Investigating Officer of the case.

60. In view of that, our attention is drawn towards Section 62 of the Evidence At, 1872, which provides that :

> **"62. Primary evidence.—** Primary evidence means the document itself produced for the inspection of the Court.
>
> *Explanation 1.*—Where a document is executed in several parts, each part is primary evidence of the document.
>
> Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
>
> *Explanation 2.*— Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original."

61. Section 63 of the Evidence Act deals with secondary evidence.

62. The legal procedure to prove a document is incorporated in Section 64 of the Evidence Act, which formulates that :

> "**64. Proof of documents by primary evidence.—** Documents must be proved by primary evidence except in the cases hereinafter mentioned."

63. Section 65 of the Evidence Act relates to the cases in which secondary evidence relating to the documents may be given and it says that :

> "**65. Cases in which secondary evidence relating to documents may be given.—** Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
>
> (a) when the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or
> of any person legally bound to produce it,
> and when, after the notice mentioned in section 66, such person does not produce it;
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
> (d) when the original is of such a nature as not to be easily movable;
> (e) when the original is a public document within the meaning of section 74;
> (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;
> (g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.
> In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.
> In case (b), the written admission is admissible.
> In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.
> In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

64. In **J. Yashoda vs. K. Shobha Rani, (2007) 5 SCC 730**, explaining the rule of best evidence, the Hon'ble Apex Court has observed as under :

> "The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced only, means that, so long as the higher or superior evidence is within the possession of a person or may be reached by a person, that person shall give no inferior proof in relation to it. Essentially, secondary evidence is evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given."

65. In **H. Siddiqui vs. A. Ramlingam, (2011) 4 SCC 240** it has been so held by the Hon'ble Apex Court that :

> "Court is obliged to examine probative value of documents produced in the court or their contents and decide question of admissibility of a document in secondary evidence."

66. From the above, we find that if original copy of any document is available it is the primary evidence and such document must be proved by virtue of Section 64 of the Evidence Act, except in the cases of secondary evidence which are provided in Section 65 of the Evidence Act. In the matter in hand, nowhere it has been explained by the prosecution that as to why the original ransom inland letter could not be produced before the Court. Unless the prosecution shows that the original has been lost, or destroyed or falls in any of the categories mentioned in Section 65 of the Evidence Act, it was not permitted to produce photocopy of the document as secondary evidence. Even PW-5, who proves the photocopy of the ransom letter, does not speak a single word as to where the original was. Thus, on the basis of the aforesaid discussions, we find that a wrong procedure was adopted by the prosecution, to prove the photocopy of the alleged ransom

letter without showing its inability to produce the original thereof before the Court and the trial court has also committed an error of law while permitting to exhibit the photocopy of the said ransom letter without ascertaining that for want of original, the photocopy was capable of being permitted to be produced in Court as evidence. Therefore, the said ransom letter (Ext. ka-7) has not been proved in the manner prescribed by law and thus having no legal sanctity is of no use and we cannot permit the trial court to proceed with the case on the basis of photocopy of a document only.

67. In the circumstances of the case in hand, we can take note of the judgment of the Hon'ble Apex Court in J**agmail Singh vs. Karamjit Singh, (2020) 5 SCC 178** wherein it has been observed that :

> "Factual foundational evidence must be adduced showing reasons for not furnishing evidence. Mere admission in evidence and making exhibit of a a document not enough as the same has to be proved in accordance with law."

68. In Ram **Suresh Singh vs. Prabhat Singh, (2009) 6 SCC 681,** it has been formulated by the Hon'ble Supreme Court that :

> "Xerox copy / photocopy / facsimile copy in the absence of original is not admission in evidence."

69. Since no communication took place between the accused persons and the informant except through the alleged ransom letter, which is not proved in evidence, there is no evidence on record to show that the victim was anyway threatened for his death or hurt by the accused persons or hurt was actually caused to him in order to compel the informant to pay the ransom. The injuries caused to the victim are abrasions and simple in nature as mentioned in the injury report (Ext. ka-5) and were probably caused by friction as per the opinion of

doctor (PW-4). We should remind here that both the hands of the victim were tied with rope, as discovered in the evidence.

70. No evidence is available on the record to show the source of knowledge on the part of the informant or the details in respect of demand of ransom by the accused persons / appellants, as the alleged ransom letter is not proved. Even PW-3, the victim, nowhere states in respect of any threatening given to him by the accused persons that he would be killed or assaulted if ransom is not paid by his father, nor by informant (PW-2).

71. Much thrust was given to the contention that there is absolutely no evidence for ransom and the ingredients of Section 364A of IPC are not attracted and thus, at the best, the appellants can be convicted only under Section 365 IPC and not under Section 364A IPC. This contention has force.

72. Now, the question arises whether the evidence on record satisfies the ingredients of Section 365 of IPC. The provisions of Section 365 of IPC reads as under:

> ''**365. Kidnapping or abducting with intent secretly and wrongfully to confine person.--**Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine''.

73. It is clear from the evidence that victim PW-3 was kidnapped on 21/22.11.1997 and was recovered on 4.12.1997 and as such remained under the custody of the accused appellants for about 14 days under unlawful confinement. The abducted boy has stated that he was rescued by police 14 days after the incident from the house of Pusey after encounter between police and gang of accused persons. The miscreants kept him in the field of sugar cane, thereafter in the field of bajra and then kept in kuthia. They had kept his

eyes closed with cloth, and cotton was placed into his ears and hands were also tied. PW-5 also corroborates this fact that when the boy was retrieved inside the kuthia, his hands were tied with rope and mouth was also closed with some cloth and the rope was opened by the police and the said rope and cloth have also been identified by him in the Court. The aforesaid evidence fulfils the essential ingredients of the offence under Section 365 IPC.

74. In **Mahesh V State of UP, Criminal Appeal No. 3647 of 2005** decided on 16.08.2016, this Court found that there was no evidence of ransom and the prosecution has failed to establish the essential ingredients of any such demand as required under Section 364A of IPC. On the other hand, the offence alleged and proved against the appellants, squarely falls within the ambit and purview of Section 365 of IPC. Accordingly, the conviction of appellants u/s 364A of IPC was altered and modified to one under Section 365 of IPC only.

75. Similarly, in the case of **Ashwani Dubey V State of UP, Criminal Appeal No. 7740 of 2006** decided on 10.08.2016, on the facts of similar nature, this Court taking similar view, has altered the conviction from Section 364A of IPC to one u/s 365 of IPC. In the case in hand, evidence on record reveals that the intention of the appellants for kidnapping the son of the informant was to keep him secretly and under wrongful confinement. It is thus clear that the ingredient of ransom is not proved and the evidence establishes the ingredients of Section 365 of IPC, and therefore, the conviction can be altered from Section 364A of IPC to u/s 365 of IPC.

76. Considering the entire facts, it is clear that the evidence on record fulfills all the ingredients of Section 365 of IPC. In view of the peculiar facts and circumstances of the case, there does not appear any hurdle in alteration of conviction of the

appellants from Section 364A of IPC to u/s 365 of IPC. A perusal of the provisions of Sections 364A and 365 of IPC indicates that the mischief punishable u/s 365 IPC, is a less aggravated form of the offence punishable u/s 364A IPC and the offence punishable under Section 365 of IPC is of same nature and specific and it prescribes less punishment than that of Section 364A of IPC. In view of all these facts and evidence on record, the alteration of conviction of the appellants from Section 364A of IPC to Section 365 of IPC would not result into any prejudice to the accused-appellants. Learned counsel for the accused-appellants could also not dispute the above stated position of law. The evidence on record clearly makes out a case of kidnapping as punishable u/s 365 of IPC. Accordingly, we are of the firm opinion that the conviction of appellants recorded by the trial court under Section 364A of IPC should be altered and modified to one under Section 365 of IPC only, wherein the offence is punishable with imprisonment of either description for a term which may extend to seven years, coupled with fine.

77. In view of the above, the conviction and sentence under Section 364A of IPC awarded by the trial court vide impugned judgment and order is set aside and modified to the extent that the appellants are convicted under Section 365 of IPC and are sentenced to the imprisonment of seven years with a fine of Rs. 2,000/-, each, however, the conviction and sentence awarded by the trial court for the offence under Section 307/149 IPC vide impugned judgment and order is affirmed. The appellants Indrapal and Shripal are said to be in jail since last about 14 years and thus, they have already spent more than seven years of incarceration. The sentences passed in all the offences were to run concurrently, therefore, the total period of imprisonment has already been undergone by the appellants Indrapal and Shripal. We maintain the fine

amount and default sentence. The default sentence will start after seven years, which would also now over in respect of appellants Indrapal and Shripal. Appellants Indrapal and Shripal be released forthwith, if they are not wanted in connection with any other case. However, appellants Kallu and Mahatma are on bail, their bail bonds are cancelled and sureties are discharged. The concerned Court is directed to take the appellants Kallu and Mahatma into custody forthwith and send them to jail to serve-out the remaining sentence.

78. Criminal Appeals are **partly allowed** in above terms.

79. Registry is directed to transmit the record to the Court concerned for necessary compliance.

Order Date :- 25.04.2023
safi

(Nalin Kumar Srivastava, J.) (Pritinker Diwaker, CJ)