IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.589 of 2016

Arising Out of PS. Case No.-216 Year-2014 Thana- SARAIYA District- Muzaffarpur

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Tarkeshwar Ram S/o Dhurendhar Ram Resident of Village- Saraiya Basant, PS Taraiya District Saran Chapra.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 785 of 2016

Arising Out of PS. Case No.-216 Year-2014 Thana- SARAIYA District- Muzaffarpur

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Suresh Sahni Son of Late Sonelal Sahni resident of village – Chakki, Sohagpur, P.S. Paroo, District - Muzaffarpur

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Code of Criminal Procedure, 1973; Section 374(2) – Appeal Against Conviction – Victim- A Material Witness - Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution. The test is whether he is a witness essential to the unfolding of the narrative on which the prosecution is based. *(Referred to Narain & Others V. State of Punjab 1958 SCC Online SC 47, Para 13). (Para -16, 17, 17.1).*

Indian Evidence Act, 1872 - Cross-Examination – Investigating Officer- A Material Witness- Non-Examination of Investigating Officer- creates material *lacuna* **- creating reasonable doubt in the case of the prosecution.** *(Referred to Munna Lal V. State of Uttar Pradesh 2023 SCC Online SC 80, Para- 39), (Para-19, 19.1).* **Witness to be produced for cross examination. If not – defence loses its opportunity to cross examine.** *(Referred to State of U.P & Anr. V. Jaggo Alias Jagdish & Others (1971) 2 SCC 42, Para-15) ; Ram Ranjan Roy v. Emperor (ILR 42 Cal 422: 19 CWN 28 : 27 IC 554 ; Stephen Senivaratne V. King (AIR 1936 PC 289) (Para 18, 18.1)* **Non- Examination of Investigating Officer non- fatal - when no prejudice is likely to be suffered by the accused - Right of accused to cross-examine a witness – vital** *(Lahu Kamlakar Patil & Anr. V. State of Maharashtra (2013) 6 SCC 417, Para-18). (Para – 20, 20.1)*

Code of Criminal Procedure, 1973- (*Para-21, 23, 24)*- Section 164 – Delay in recording statement - Victim accompanied by family – No Source of identification - Reliance on Case diary – in absence of any other cogent evidence – Prosecution failed to prove beyond reasonable doubt - appeal stands allowed.

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CRIMINAL APPEAL (DB) No. 785 of 2016

Arising Out of PS. Case No.-216 Year-2014 Thana- SARAIYA District- Muzaffarpur

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Suresh Sahni Son of Late Sonelal Sahni resident of village - Chakki, Sohagpur, P.S. Paroo, District - Muzaffarpur

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :
(In CRIMINAL APPEAL (DB) No. 589 of 2016)

For the Appellant : Mr. Radha Mohan Singh, Advocate
Mr. Satyam Anand, Advocate

For the State : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 785 of 2016)

For the Appellant : Mr. Aaruni Singh, Advocate
Mr. Sandip Kumar Gautam, Advocate

For the State : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 16-01-2024

Both these appeals are filed under Section 374(2)

of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') by appellants/convicts against judgment of conviction and order of sentence dated 20.05.2016, passed by learned Additional District & Sessions Judge-11, Muzaffarpur in Sessions Trial No.934/14, arising out of Saraiya P.S. Case No.216/14 by which both the appellants have been convicted under Section 364A read with 34 of the Indian Penal Code and sentenced to undergo imprisonment for life and fine of Rs.25,000/- each and, in default of payment of fine, the appellants shall suffer RI for one year.

2. The prosecution case, in brief, is as under:

Informant, Mantu Singh has given a written complaint to the SHO of Saraiya Police Station stating therein that on 17.06.2014 between 12:00 – 01:00 in the night, his son, aged about 7 years, was kidnapped when he was sleeping with his grandmother. When the mother of the informant woke up at 01:00 in the night, she did not find her grandson and she informed the informant and they started searching for the boy. The informant alongwith villagers also started to make search for the boy and informed the police. The police came and they also tried to search the victim boy.

3. Heard Mr. Radha Mohan Singh, learned counsel

for the appellant in Criminal Appeal (DB) No.589 of 2016, Mr. Aaruni Singh, learned counsel for the appellant in Criminal Appeal (DB) No.785 of 2016, and Mr. Sujit Kumar Singh and Mr. Satya Narayan Prasad, learned APP's. for the respondent-State in both the appeals.

4. Learned Advocates appearing for the appellants would mainly submit that in the FIR lodged by the father of the victim, PW-1, he has not given the names of the present appellants. However, on the basis of the so called confessional statement of one of the accused, another accused was arrested and it is alleged that the victim boy was recovered from the hut of accused Tarkeshwar Ram. It is submitted that with a view to prove the relevant and important aspect, it was the duty of the prosecution to examine the Investigating Officer and the victim boy. However, in the present case, the prosecution did not examine both the aforesaid important witnesses, as a result of which the appellants/accused have lost opportunity to cross-examine the aforesaid important witnesses. It is further submitted that while passing the impugned order of conviction against the appellants, the Trial Court has relied upon the case diary and the reference has also been made with regard to CDR, however, CDR is not exhibited. Further, the Trial Court has

committed an error while referring the case diary and that too when the Investigating Officer has not been examined by the prosecution. Learned Advocates further submit that the Trial Court has also simply placed reliance upon the statement of the victim which was recorded under Section 164 of the Code. However, thereafter the boy was not presented for the purpose of cross-examination before the Trial Court.

5. The learned Advocates would further submit that even while recording the statement under Section 164 of the Code, the concerned Magistrate has also not put question to the victim with a view to ascertain whether the said victim boy is in a position to narrate the correct facts or not. It is further submitted that the victim was found, as per the case of the prosecution, on 22.06.2014, however, the informant and the other relatives met the said victim boy in the police station and thereafter the boy was taken to the concerned Magistrate after a period of two days, i.e., on 24.06.2014 for the purpose of recording his statement under Section 164 of the Code and, therefore, there are all chances that during the period of two days, the informant and other relatives may have tutored the said victim. It is further contended that appellant Suresh Sahni has falsely been implicated as he was a tenant and there was rent

dispute between the informant and the said accused. Learned counsel, therefore, urged that when the prosecution has failed to prove the case against the appellants/convicts beyond reasonable doubt, the impugned order passed by the Trial Court be quashed and set aside and thereby both these appellants be acquitted.

6. Learned Advocates for the appellants have placed reliance upon the following decisions:-

(i) **Narain & Ors. v. State of Punjab**, reported in **1958 SCC OnLine SC 47**

(ii) **State of U.P. & Anr. v. Jaggo Alias Jagdish & Ors.**, reported in **(1971) 2 SCC 42**

(iii) **Munna Lal v. State of Uttar Pradesh** and another analogous case, reported in **2023 SCC OnLine SC 80**

(iv) **Lahu Kamlakar Patil & Anr. v. State of Maharashtra**, reported in **(2013) 6 SCC 417**

7. On the other hand, learned APP has vehemently opposed both these appeals. It is submitted by learned APP that the victim himself has stated before the Magistrate while giving his statement under Section 164 of the Code that the accused Suresh Sahni and 4-5 other persons kidnapped him during night hours when he was sleeping with his grandmother. There was no

reason to disbelieve the version given by the victim himself. It is further submitted that telephone call was made to the informant and demand of Rs.10,00,000/- was also made with a threat that they would kill the son of the informant. Thus, the prosecution has proved the ingredients of the offence punishable under Section 364A of the Indian Penal Code and, therefore, the Trial Court has not committed any error while passing the impugned order. It is further submitted that merely because the Investigating Officer has not been examined by the prosecution, the benefit of the same may not be given to the accused. Learned APP has also referred the reasoning recorded by the Trial Court and thereafter submitted that there is ample material in the case diary which is referred by the Trial Court against the appellants/convicts. The Trial Court has also referred CDR which was collected by the Investigating Officer during the course of investigation on the basis of which Suresh Sahni was apprehended and thereafter, on the basis of his confessional statement, the boy was, in fact, recovered from the hut of Tarkeshwar Ram. The boy was taken to the Magistrate for recording his statement where the victim boy has specifically taken the name of Suresh Sahni. Learned APP, therefore, urged that when the prosecution has proved the case against both these

appellants/convicts beyond reasonable doubt, this Court may not interfere with the impugned order.

8. We have considered the submissions canvassed by learned counsel for the parties. We have also gone through the materials placed on record, including the deposition given by the prosecution witnesses. From the evidence led by the prosecution, it would emerge that the informant, who is the father of the victim boy, has lodged the FIR against unknown persons by alleging that his son was kidnapped during night hours of 17.06.2014 and thereafter his son, aged about 7 years, is missing. It is further revealed from the record that after registration of the FIR, the Investigating Officer commenced the investigation and during the course of investigation, he has recorded the statement of the witnesses. It is the case of the prosecution that when the further statement of the informant was recorded, he had stated that on his mobile phone, a call was received by him wherein the concerned caller demanded Rs.10,00,000/- as *Rangdari* (ransom). It is further the case of the prosecution that threat was also given to the informant that if the amount demanded is not paid, his son would be killed. It appears that thereafter the Investigating Officer has further carried out the investigation and it is the case of the prosecution

that during the course of the said investigation, the Investigating Officer has apprehended the accused Suresh Sahni and on the basis of his confessional statement, one mobile phone was recovered from his house. Prior to that, on the basis of the CDR, the Investigating Officer reached to accused Suresh Sahni. Thereafter, on the basis of the confessional statement, it is alleged that boy was recovered from the hut of Tarkeshwar Ram on 22.06.2014 and thereafter he was taken to the Magistrate for recording his statement under Section 164 of the Code.

9. However, if the evidence led by the prosecution is scrutinized/appreciated, it is revealed that PW-1, Mantu Singh, informant, who is the father of the victim boy, has stated in his deposition that on 17.06.2017 at about 12:00 to 01:00 during night hours, his son was sleeping with mother of the said witness. However, thereafter the boy was not found and, therefore, they tried to search the boy on the next day morning and thereafter FIR was lodged. It is further stated by the said witness that on 18.06.2014 one call was received by him on his mobile No. 9631433457 and the concerned person demanded Rs.10,00,000/- by way of *Rangdari* (ransom) and threat was also given that if the amount is not paid, his son would be killed. Therefore, he has provided the said telephone number to the

police. Thereafter during the search, his son was recovered from the house of Tarkeshwar Ram and Tarkeshwar Ram was arrested by the police. During the said search, one Suresh Sahni was also arrested.

9.1 During cross-examination, the said witness stated that during the search, he has not accompanied the police. He has also not seen from where his son was recovered by the police. The voice of the person who has demanded *Rangdari* on telephone, was not a voice of any of his related person. Before the boy was produced by the police before the Court for the purpose of recording his statement, he met his son in the police station and a number of persons also visited the police station when his son was in the police station and in the police station all such persons had a talk with the boy.

10. PW-2, Hemanti Devi, grandmother of the victim boy, has deposed that she was sleeping with her grandson, namely, Sunny Raj and when she woke up between 12:00 – 01:00 in the night, she did not find her grandson. She informed her son and started making search for the boy. This witness also deposed in her examination-in-chief that on the next day, his son received a phone call and the caller had demanded Rs.10,00,000/- as *Rangdari* (ransom). It is also

deposed that thereafter, on the basis of the phone call, the police started investigation and after five days, the police recovered her grandson from a hut situated at Saraiya Diyar. This witness also deposed in her examination-in-chief that the accused threatened to kill her grandson.

10.1. PW-2 in her cross-examination stated that when her grandson was kidnapped, she was sleeping and who kidnapped her grandson, she could not see. It is also stated that she did not see the hut from where her grandson was recovered. After kidnapping of the victim boy, her family members started making search for the boy. This witness further stated in her cross-examination that she met her grandson in the police station after his recovery. Demand of Rangdari was made through phone call on the mobile phone of her son. The accused threatened that if Rs.10,00,000/- is not paid, the boy would be killed. The police enquired from her and she informed the police about the demand of *Rangdari*. This witness further states in her cross-examination that it is not true that her grandson was weak in study and he ran away from home.

11. PW-3, Devendra Singh has stated in his examination-in-chief that occurrence took place on 17.06.2014 in between 12:00 – 01:00 in the night. He was sleeping at that

time. He woke up on *hulla* and knew that Sunny Ram was kidnapped. Police came after receiving information and started making search for the child. This witness further deposed that on the next day, Mantu Singh, father of the victim boy, received a phone call and the caller demanded Rs.10,00,000/- as Rangdari and threat was also given that if the said amount is not given, the boy would be killed. Police recovered the victim boy on 22nd. The accused were apprehended.

11.1. PW-3 in his cross-examination stated that Mantu Singh is his cousin and Suresh Sahni was his tenant. He did not see how the victim boy was kidnapped. He did not know accused Tarkeshwar Ram from before. After recovery of the boy, the police brought him to the Saraiya Police Station and thereafter they brought the boy. It is further stated by this witness in his cross-examination that house of Tarkeshwar Ram is situated under the jurisdiction of Saraiya Police Station.

12. PW-4, Sunaina Devi also in paragraph-3 and 4 of her examination-in-chief supported the factum of kidnapping of the boy and demand of *Rangdari* (ransom). This witness also supports the factum of recovery of the victim boy after a period of five days.

13. PW-5, Sanjeev Kumar Singh was working as

Judicial Magistrate, 1st Class, Muzaffarpur at the relevant time. He has stated that the kidnapped boy Sunny Raj was produced before him for the purpose of recording his statement. He had recorded the statement of kidnapped boy Sunny Raj which was read over to him and thereafter it was signed.

13.1 During cross-examination, he has stated that age of the victim boy was 7 years. The boy was also understanding the question put to him.

14. PW-6, Sandip Kumar is the Investigating Officer who had taken over the investigation on 24.08.2014. The said witness has filed charge-sheet against both the accused.

14.1 During cross-examination, said witness has stated that the formal FIR was not in his handwriting. He had also not visited the place of occurrence. The same was made by his predecessor. The place from where the boy was recovered was also not visited by him.

15. At this stage, it is also pertinent to note that the prosecution has also produced the statement of victim which was recorded under Section 164 of the Code wherein the victim boy stated that he was sleeping with his grandmother. At that time, Suresh Sahni and 4-5 others came there and took him to *Saraiya Diyar*. He was kept in a hut for five days. The

concerned persons were also providing food to him. After 4-5 days, police came and took him to the police station and today he has come with his mother and father.

16. Thus, we have re-appreciated the entire evidence produced by the prosecution before the Trial Court. As observed hereinabove, the informant gave the FIR with regard to the occurrence of kidnapping of his son who was kidnapped on 17.06.2014 during night hours. In the said FIR, he has not disclosed the name of any of the accused. From the evidence of PW-1, it is revealed that he received the telephone call on his mobile number wherein the concerned caller demanded Rs.10,00,000/- by way of *Rangdari* (ransom). Threat was also given that if the said amount is not given, his son would be killed. However, it is pertinent to note that from which mobile phone the informant has received the call, is not reflected from the record though the Trial Court has observed that one mobile phone was recovered from the house of Suresh Sahni and he was arrested on the basis of the CDR. It is further relevant to note that copy of the said CDR has not been produced by the prosecution before the Trial Court. The Trial Court has also referred about the case diary and the confessional statement of accused Suresh Sahni. The prosecution has failed to examine the

Investigating Officer who has carried out the investigation during the course of which, he had collected the so called evidence in the form of CDR and also recorded the confessional statement of accused Suresh Sahni. It is also not in dispute that nobody has seen that the victim boy was recovered from the hut of Tarkeshwar Ram. It is further revealed that the prosecution has examined Sandip Kumar as PW-6, the Investigating Officer who had taken over the investigation in August, 2014. However, it is relevant to note that the said witness has only filed charge-sheet against the concerned accused persons and during cross-examination he has specifically stated that he has not examined the place of occurrence or the place from where the victim boy was recovered. It is not in dispute that the prosecution has also not examined the victim boy. The deposition of the victim boy is relevant in the facts of the present case because he is the important witness of the prosecution. Thus, when the prosecution has failed to examine the important witness, like, the victim boy and the Investigating Officer, the defence has lost the opportunity to cross-examine the aforesaid two important witnesses.

17. At this stage, we would like to refer the decision rendered by the Hon’ble Supreme Court in the case of

Narain & Ors. (supra) wherein the Hon'ble Supreme Court has discussed about "material witness". The Hon'ble Supreme Court has observed in **Paragraph-13** as under:

> *"**13.** The question then is, was Raghbir a material witness? It is an accepted rule as stated by the Judicial Committee in Stephen Seneviratne v. King2 that "witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution". It will be seen that the test whether a witness is material for the present purpose is not whether he would have given evidence in support of the defence. The test is whether he is a witness "essential to the unfolding of the narrative on which the prosecution is based". Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied. It is not however that the prosecution is bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. But apart from this, the prosecution should call all material witnesses."*

17.1 From the aforesaid observation made by the Hon'ble Supreme Court, it can be said that witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution. The test is whether he is a witness essential to the unfolding of the narrative on which the prosecution is based.

18. In the case of **State of U.P. & Anr. v. Jaggo Alias Jagdish & Ors. (supra)**, the Hon'ble Supreme Court observed in **Paragraph-15** as under:

> *"**15.** This Court in Habeeb Mohammad case referred to the observations of Jenkins, C.J., in Ram Ranjan Roy v. Emperor [ILR 42 Cal 422 : 19 CWN 28 : 27 IC 554] that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a Public Prosecutor is to represent the administration of justice so that the testimony of all the available eyewitnesses should be before the court. Lord Roche in Stephen Senivaratne v. King [AIR 1936 PC 289 : 39 Bom LR 1 : 164 IC 321] referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in Habeeb Mohammad case said that the absence of an eyewitness in the circumstances of the case might affect a fair trial. On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness had been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an*

eyewitness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence."

18.1 From the aforesaid observation made by the Hon'ble Supreme Court, it can be said that a witness is to be produced for cross-examination by the accused. In the present case, the victim boy, who is the material witness of the prosecution, was not presented before the Court for the purpose of cross-examination and thereby the defence has lost the opportunity to cross-examine.

19. In the case of **Munna Lal (supra)**, the Hon'ble Supreme Court observed in **Paragraph-39** as under:

*"**39.** Secondly, though PW-4 is said to have reached the place of occurrence at 1.30 p.m. on 5th September, 1985 and recovered a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to seize the weapons by which the murderous attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eyewitnesses, i.e., PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is*

required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating Officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non-examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case."

19.1 From the aforesaid observation made by the Hon'ble Supreme Court, it is revealed that in the said case, the Investigating Officer was not examined though his evidence was necessary as a material witness and, therefore, the Hon'ble Supreme Court has observed that his non-examination creates a material *lacuna* in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the case of the prosecution.

20. In the case of **Lahu Kamlakar Patil (supra)**, the Hon'ble Supreme Court has observed in **Paragraph-18** as

under:

> *"**18.** Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] , this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] , it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of*

Bihar [(2001) 6 SCC 407 : 2001 SCC (Cri) 1148] , Rattanlal v. State of J&K [(2007) 13 SCC 18 : (2009) 2 SCC (Cri) 349] and Ravishwar Manjhi v. State of Jharkhand [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50] , has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution."

20.1 From the aforesaid observation, it can be said that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. However, in a given circumstance where the examination of Investigating Officer becomes vital, it is the duty of the prosecution to examine the Investigating Officer and in such cases his non-examination creates a *lacuna* in the case of the prosecution.

21. Keeping in view the aforesaid decisions rendered by the Hon'ble Supreme Court, if the facts of the present case, as discussed hereinabove, are carefully examined, we are of the view that though the prosecution has produced the witnesses, like, informant who is father of the victim, grandmother of the victim, cousin of the informant and wife of the cousin of the informant, none of the said witnesses have

given the name of the present appellants/convicts. On the basis of the call details of the mobile phone of the informant, the accused Suresh Sahni was apprehended by the Investigating Officer. It is alleged that one mobile phone was recovered from the house of Suresh Sahni and on his confessional statement boy was recovered from the house of co-accused/co-convict Tarkeshwar Ram. However, it is relevant to note that even the prosecution has not examined the Investigating Officer, the call details, i.e., CDR is not brought on record and the said document has not been duly exhibited. Even confessional statement was also not brought before the Court on the basis of which co-convict Tarkeshwar Ram has been arrested and from whose hut it is alleged that the victim boy was recovered. Thus, in the facts and circumstances of the present case, by non-examination of the Investigating Officer, the defence has lost the opportunity to cross-examine the said witness, i.e., the Investigating Officer and thereby there is *lacuna* in the case of the prosecution. It is important to note once again that the prosecution has also not examined the victim boy though his statement recorded under Section 164 of the Code was relied upon by the learned Trial Court while recording the conviction of the appellants herein.

22. Thus, in the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has failed to prove beyond reasonable doubt that the appellants have kidnapped the victim boy from the house of the informant and they demanded Rs.10,00,000/- by way of *Rangdari* (ransom) and gave threat to kill the boy if the said amount is not given.

23. It is pertinent to note here that recovery of the victim boy from the hut of Tarkeshwar Ram is also not duly proved. Though the statement of the victim boy under Section 164 of the Code was recorded by the Magistrate, it is relevant to note that his statement was recorded by the Magistrate after a period of two days from the date of his recovery and when he was produced before the Magistrate for recording his statement, he came alongwith his parents and not with the police.

24. Thus, looking to the facts and circumstances of the present case, we are of the view that prosecution has failed to prove the case against the appellants beyond reasonable doubt. We have also gone through the reasoning recorded by the learned Trial Court and we are of the view that the Trial Court has simply relied upon the CDR, confessional statement recorded by the Investigating Officer and the case diary. However, as observed hereinabove, CDR has not been duly

proved. The Investigating Officer who has collected the said CDR and confessional statement is also not examined by the prosecution and case diary cannot be simply relied upon in absence of any other cogent evidence. Hence, we are of the view that the Trial Court has committed grave error while relying upon the aforesaid documents. Moreover, it does not reveal from the statement of the victim boy recorded under Section 164 of the Code as to how he could identify appellant, Suresh Sahni during night hours. It also does not reveal from the record that the victim boy was recovered from the hut of Tarkeshwar Ram as the Investigating Officer has not been examined in this case.

25. Hence, for the reasons recorded above, both these appeals stand allowed. The impugned judgment of conviction and order of sentence dated 20.05.2016 passed by learned Additional District & Sessions Judge-11, Muzaffarpur in connection with Sessions Trial No.934/14, arising out of Saraiya P.S. Case No.216 of 2014 is quashed and set aside. The appellant, namely, Tarkeshwar Ram in Criminal Appeal (DB) No.589 of 2016 and appellant, namely, Suresh Sahni in Criminal Appeal (DB) No.785 of 2016 are acquitted of the charges levelled against them by the learned trial court. Since both the appellants, named above, are in jail, they are directed to be

released forthwith, if their presence is not required in any other case.

(Vipul M. Pancholi, J.)

(Rudra Prakash Mishra, J.)

Sanjay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	23.01.2024
Transmission Date	23.01.2024