

Criminal Appeal Nos.147 of 2006 and 134 of 2006 have been preferred by accused nos.1 and 2

respectively assailing the judgment and order dated 06.02.2006 passed in Sessions Case No.194 of 2004 by the learned 2nd Additional Sessions Judge, Jalgaon, whereby they have been convicted for the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code ("I.P.C.", for short) and sentenced to suffer imprisonment for life and to pay a fine of Rs.1,000/- each, with default stipulation.

2. For the sake of convenience, the appellants, hereinafter, would be referred to as accused no.1 and accused no.2.

3. The informant namely, Nishikant Mangesh Kakade, r/o. Vikas Colony, Bhusawal was working as a Manager in the State Bank of India at Bhusawal in the year 2004. His daughters namely, Janhavi and Vaishnavi, aged about 11 years and 7 years, respectively, were studying in St. Aloysius Marathi Primary School, at Bhusawal, in 6th standard and 2nd standard, respectively. Their school hours were from

7.00 a.m. to 12.00 noon. An auto-rickshaw was engaged to facilitate them to attend the school.

4. On 18.06.2004 at about 7.00 p.m., when the informant went back to his house, his wife namely, Manisha informed that on that day at about 1.30 p.m., a boy aged about 20 to 22 years, having blackish complexion and who had worn a jeans pant and T-shirt, had been to their house to collect information of their daughters namely, Janhavi and Vaishnavi, on the say that the said information was necessary for drawing their insurance policies. However, she did not furnish any information to him. The said boy asked for drinking water. When she went to another room to bring water, the said boy asked the names of the daughters, who were in the front-side room. After drinking water, that boy went away.

5. On 22.06.2004 at about 7.00 a.m., Janhavi and Vaishnavi went to their school by an auto-rickshaw. The informant also attended his office at

about 10.30 a.m. When he was sitting inside his cabin, a boy of the above-mentioned description came there at about 1.00 p.m. to 1.15 p.m. and asked the informant, whether he had received any phone call. When the informant answered him in the negative and further asked as to who had proposed to call him on phone, the said boy answered that he wanted to open a new account and went away.

6. Then at about 2.15 p.m., the wife of the informant phoned him and informed that Janhavi and Vaishnavi had not come back from the school and the rickshaw driver told her that somebody had taken away both of the daughters from the school.

7. The informant then started to go to the school. At that time, an unknown person called him through mobile no.9822876909 and informed him that both the daughters were with him and demanded Rs.25,00,000/-. He further informed that he would call after sometime and ended the call.

8. The informant went to the school to inquire about his daughters, whereon the Headmistress of the school informed him that sometime prior to the end of the school hours, two boys aged 20 to 22 years gave a written application informing that the mother of Janhavi and Vaishnavi had met with an accident and therefore, they wanted to take Janhavi and Vaishnavi to their house. After receiving that application, both the girls were given in the custody of those two boys. Both of them took away the two girls with them.

9. Thereafter, the informant went back to his bank. He then received three phone calls from a person with the intervals of 15 to 20 minutes from phone no.02582225826 asking him whether he had arranged for money and informing that his daughters were safe with him. The informant expressed his inability to arrange for the amount demanded and on being asked by that person, stated that he had arranged for Rs.50,000/-. The informant then asked that person as to where he should hand over that

amount. The said person then told the informant that he would come to the bank and take away the amount. The said person again said that the question of payment of money would be considered later on and that his daughters would reach his house within 5 to 10 minutes. It was the time of about 3.40 p.m. Thereafter, informant received a phone call at about 4.00 p.m. from his wife, who informed that both the daughters had come to the house.

10. The informant went to his house and asked Janhavi as to what had happened. She informed that the boy, who had been to their house before 3-4 days, had come to her school and informed that her mother had met with an accident and her father had called her to Jalgaon. The said person obtained permission from her teacher and took Vaishnavi and herself from the school to a petrol pump. He then made them to sit in a bus (Luxury) with his friend, who was of fair complexion, and he stayed there only. The friend of that boy then took both of them to Jalgaon and again

brought them to Bhusawal by S.T. Bus. Then, from S.T. bus - stand, they were made to sit in an auto-rickshaw with instructions to the rickshaw-driver to reach both of them to their house.

11. The informant went to Bazar Peth Police Station, Bhusawal and lodged F.I.R. against unknown persons. On the basis of that F.I.R., Crime No.81 of 2004 came to be registered for the offence punishable under Section 364-A read with Section 34 of the I.P.C. A.P.I. Borse conducted investigation. He seized the chit/application given for the purpose of taking away Janhavi and Vaishnavi from the school. He recorded statements of witnesses. On the basis of the phone numbers given by the informant, through which the person kidnapping Janhavi and Vaishnavi had contacted the informant, A.P.I. Borse could connect accused no.1 with the said incident. He arrested accused no.1 on 24.06.2004. On the basis of further investigation and interrogation with accused no.1, he found that accused no.2 was also involved in the

incident of kidnapping. Therefore, he arrested accused no.2 also on 24.06.2004. A note-book bearing the hand-writing of accused no.1 came to be seized. His specimen hand-writings were obtained. The said documents were subsequently sent to the hand-writing expert with the chit/application received from the Headmistress of the school.

12. When accused no.1 was in the police custody on 29.06.2004, he gave a disclosure statement and offered to produce two SIM-cards of IDEA company, the bills under which they were purchased by him and two mobile hand-sets of Siemens company. Accordingly, the said SIM-cards, mobile hand-sets and the bills came to be seized on being produced by him from his house. The SIM-cards were in respect of the same mobile numbers on which the informant had received calls on the day of the incident in connection with kidnapping of Janhavi and Vaishnavi and demand of Rs.25,00,000/-. A.P.I. Borse collected the Call Details Record (C.D.R.) in respect of the SIM-cards.

Test identification parade of accused nos.1 and 2 was conducted on 28.06.2004 through the Tahsildar. Accused nos.1 and 2 were identified by Janhavi as the same person, who had taken Vaishnavi and herself from the school on the day of the incident. Accused no.1 was identified by the informant and his wife Manisha as well.

13. The opinion of the hand-writing expert disclosed that the chit given to the Headmistress, while taking away Janhavi and Vaishnavi from the school, was in the hand-writing of accused no.1. After completion of the investigation, accused nos.1 and 2 came to be charge-sheeted for the above-mentioned offence in the Court of the learned Judicial Magistrate F.C., Bhusawal.

14. The offence punishable under Section 364-A of the I.P.C. being exclusively triable by the Court of Session, the learned Magistrate committed the case to the Sessions Court at Jalgaon.

15. The learned trial Judge framed Charge against both the accused for the above-mentioned offences vide Exh.15 and explained the contents thereof to them in vernacular. The accused pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication.

16. The prosecution examined thirteen witnesses to establish guilt of the accused for the above-mentioned offence. The learned trial Judge scrutinised the said evidence and came to hold that the prosecution established guilt of the accused for the above-mentioned offence beyond reasonable doubt. He, therefore, convicted and sentenced the accused for the above-mentioned offence, as stated above.

17. The learned Counsel for accused no.1 submits that there are a number of deficiencies in the evidence of the prosecution, which make it unbelievable. According to him, the identity of accused no.1 itself has not been duly proved. He

submits that the wife of the informant namely, Manisha had seen accused no.1, however she has not been examined by the prosecution without assigning any reason. He then states that the description and features of accused no.1, as stated by the Headmistress of the school and Janhavi were not at all sufficient to connect accused no.1 with the incident in question. The Tahsildar has not followed the provisions of the Criminal Manual issued by the High Court in respect of test identification parade and therefore, the evidence of the informant and Janhavi about having identified accused no.1 in the T.I. Parade cannot be believed. He submits that if the evidence in respect of the T.I. parade is disregarded, there remains hardly any evidence to connect accused no.1 in question.

18. The learned Counsel for accused no.1 further submits that the C.D.R. has been wrongly admitted by the learned trial Judge. According to him, in the absence of the certificate under Section 65-B of the

Evidence Act, the evidence in respect of the C.D.R. was not at all admissible in view of the judgment in the case of **Anvar P.V. Vs. P.K. Basheer and ors., (2014)10 SCC 473**. The learned Counsel submits that the evidence on record falls short in establishing the ingredients of the offence under Section 364-A of the I.P.C. According to him, the learned trial Judge did not appreciate the evidence on record correctly and properly. Accused no.1 has been wrongly held guilty for the above-mentioned offence. He, therefore, prays that the impugned judgment and order may be set aside and accused no.1 may be acquitted.

19. The learned Counsel for accused no.1, in the alternative, submits that from the facts of the case, at the most, the offence of kidnapping made punishable under Section 363 of the I.P.C. would be disclosed. If accused no.1 is held guilty for the said offence, it may be considered that the incident took place before about 13 years. At that time, accused no.1 was aged about 22 years. He has no

criminal antecedents. He has now got married and is having responsibility of his family. The daughters of the informant safely reached his house. Nothing objectionable was done with them. In view of the above circumstances, the learned Counsel prays that benefit of probation may be given to accused no.1. In the alternative, he submits that accused no.1 was behind the bars for about five months in respect of this crime. Therefore, if the benefit of probation could not be given to him, accused no.1 may be sentenced for the period, which he has already undergone.

20. The learned Senior Counsel for accused no.2 adopts the arguments advanced on behalf of accused no.1 in respect of merits of the case. In addition to that, he submits that the identity of accused no.2 is not at all established. He submits that the evidence connecting accused no.2 with the incident in question is not cogent, consistent and believable. He, therefore, prays that accused no.2 may be acquitted.

In the alternative, he submits that accused no.2 filed an application stating therein that there has been amicable settlement between the informant and himself. The informant has filed an affidavit in support of that application stating that the incident has taken place before thirteen years. He intends to forgive accused no.2 since, at the relevant time, he was a young student and in the young age, he committed mistake, which resulted into present case. The learned Senior Counsel submits that accused no.2 has no criminal background. He is a young person having responsibility of his family. Since the offence is not compoundable, considering the above facts and circumstances of the case as well as the role played by accused no.2, the learned Senior Counsel prays that accused no.2 may be given benefit of probation.

21. The case of the prosecution is depending on direct as well as circumstantial evidence. So far as accused no.1 is concerned, there is direct evidence

of Janhavi (PW 6)(Exh.34) and the Headmistress of the school – Sister Juvana (PW 9)(Exh.37). The evidence of the informant – Nishikant (PW 1)(Exh.23) also shows involvement of accused no.1 in the incident in question.

22. Janhavi (PW 6) deposes that she was aged about 11 years and was studying in 6th standard in St. Alies High School, Bhusawal when the incident took place. She further states that her younger sister Vaishnavi was studying in 2nd standard in the same school. The informant also states the same. This evidence has not been challenged on behalf of the accused persons. It is, thus, clear that Janhavi (PW6) and Vaishnavi were much below 18 years of age at the time of the incident.

23. Janhavi (PW 6) deposes that on 18.06.2004 at about 1.30 p.m., she was at her home with her mother. At that time, a boy of blackish complexion came there and asked her mother about their details for the

purpose of getting them insured. The said boy asked for drinking water. When her mother went inside the other room, the said boy asked her about her name, phone number, school name and standard. After drinking water, he went away.

24. Janhavi (PW 6) then states that on 22.06.2004, she had gone to school along with her younger sister – Vaishnavi. Some time prior to the closing hours of the school, a Peon came to her class and told the class-teacher that somebody had come to take her (Janhavi - PW 6). Therefore, she went to the office of the Headmistress. Her sister Vaishnavi also was there. Janhavi (PW 6) states that the boy, who had come to their house prior to about four days, was present there with his colleague. Her teacher asked, whether she was knowing the said boy of blackish complexion. Janhavi (PW 6) replied that she was knowing him. She states that the said boy told her that her mother had met with an accident and he had come to take her for going to Jalgaon. She then

states that the said boy of blackish complexion and his friend, having fair complexion, took her sister and herself to bus-stand, Bhusawal, in an auto-rickshaw. They were made to sit for sometime. Thereafter, they were taken to Jalgaon by S.T. bus by the boy who was of fair complexion. They were made to sit at the bus-stand, Jalgaon, for half an hour. Thereafter, the boy of fair complexion brought them back to Bhusawal by bus. After alighting from the bus at bus-stand, Bhusawal, they found the boy of blackish complexion present there. He sent her sister and herself to their house in an auto-rickshaw. Janhavi (PW 6) identifies accused no.1 as the boy of blackish complexion and accused no.2 as the boy of fair complexion.

25. The evidence of Janhavi (PW 6) about visit of accused no.1 to her house prior to about four days of the incident, has not been challenged in her cross-examination. Her further evidence, that on 22.06.2004, accused no.1, who had been to her house

about four days prior to the incident, had come to the school to take her and her sister and on being asked by her teacher, she replied that she was knowing accused no.1, also has not been challenged in her cross-examination. Whatever role has been attributed by Janhavi (PW 6) against accused no.1 in her examination-in-chief has not at all been challenged in her cross-examination.

26. As regards accused no.2 also, the evidence of Janhavi (PW 6) is very specific. From her evidence, it is clear that accused no.2 was with her right from her school to the bus-stand at Bhusawal. Thereafter, Vaishnavi and herself went with accused no.2 at Jalgaon. At Jalgaon also, they were with him for about half an hour. Thereafter, accused no.2 brought them back by bus from Bhusawal to Jalgaon. Thus, Janhavi (PW 6) was in the company of accused no.2 for sufficient time so as to remember his face and features. Except putting a suggestion denying that no incident, as alleged by Janhavi (PW 6), had

taken place, which has been flatly denied by her, nothing has been elicited in her cross-examination so as to throw doubt on her version about the role attributed by her against accused no.2.

27. It is clear that Janhavi (PW 6), who was aged about 11 years and was quite a competent witness, as seen from the manner in which she has given the evidence before the Court, was knowing accused nos.1 and 2 by their faces and appearances. Her evidence shows that she had seen both the accused for sufficiently long a time. She had sufficient time and opportunity to have longstanding imprints in her mind about the faces and features of accused nos.1 and 2. It is not that she had a passing glance of the accused for a few minutes and therefore, it was not possible for her to remember their faces and appearances so as to make her difficult to identify them.

28. Janhavi (PW 6) had no axe-to-grind against accused nos.1 and 2. Her evidence is quite natural, cogent and dependable. There is no reason for her to falsely implicate accused nos.1 and 2 in the incident in question. There is absolutely no possibility of mistaken identity of accused nos.1 and 2 on the part of Janhavi (PW 6).

29. Sister Juvana (PW 9) was working as Headmistress in St. Aloysius Marathi Primary School in the year 2004. She states that she received a phone call in the name of the father of Janhavi (PW6) and Vaishnavi, that their mother had met with an accident and was shifted to Jalgaon. She was asked to send both of them with a boy who was being sent by the informant i.e. Mr.Kakade (PW 1) to school. She states that thereafter the said boy came to the school. She asked for an application from the parents of Janhavi (PW 6) and Vaishnavi. Therefore, that boy again went back and came with an

application. After reading that application, she got called Janhavi (PW 6) and Vaishnavi from their classrooms. She asked them, whether they were knowing that boy. Janhavi (PW 6) replied that she was knowing that boy since he had come to their house prior to about three days. Then, she [i.e. Sister Juvana (PW 9)] allowed both the girls to go with that boy. She identifies accused no.1 as the same boy.

30. From the evidence of Juvana (PW 9), it is clear that she had sufficient time to interact with accused no.1. Therefore, it was natural and probable on her part to note and remember the face and features of accused no.1. In her cross-examination, except putting a suggestion denying her evidence that she identified accused no.1, nothing concrete has been elicited to raise any suspicion about veracity about her evidence. Sister Juvana (PW 9) has not been attributed with any malice against accused no.1. She had no reason to falsely implicate accused no.1. Her evidence corroborates the version of Janhavi (PW 6)

about the role attributed against accused no.1 in the incident in question.

31. Sister Juvana (PW 9) states that accused no.1 had given an application for taking Janhavi (PW6) and Vaishnavi with him on the day of the incident. She states that she handed over that application to the police. A.P.I. Borse (PW 12) (Exh.63) deposes that he seized that chit/application vide panchnama (Exh.64) The panchnama (Exh.64) shows that it was prepared on 23.06.2004, while seizing the application/chit from Sister Juvana (PW 9). The fact that the said application was handed over by Sister Juvana (PW 9) to the police has not been challenged in her cross-examination. The evidence of A.P.I. Borse (PW 12) that he seized that application/chit from the Sister Juvana (PW 9) under panchnama (Exh.64) also remained unchallenged in his cross-examination. Thus, there is absolutely no reason to disbelieve the evidence of these two witnesses on the

point of seizure of application/chit given by accused no.1 vide panchnama (Exh.64).

32. A.P.I. Borse (PW 12) states that he sent the application/chit seized vide panchnama (Exh.64) along with the specimen hand-writing of accused no.1 to the hand-writing expert vide letter (Exh.65). This evidence has not been challenged in his cross-examination. Kathar (PW 13)(Exh.74), who was working as Assistant State Examiner of Documents, deposes that he received one register and seven loose documents from Bazar Peth Police Station, Bhusawal with letter (Exh.65). The said documents were collectively marked as Exh.75. He states that the questioned writing was marked by him as Exh.A (Exh.25), the specimen writing as Exh.'B-1' to Exh.'B-6' and the natural writing from the note-book of accused no.1 as Exh.'C-1' to Exh.'C-6'. He examined those documents under various magnifications, such as simple lens, ultra lens, microscope, etc. He also examined those documents

under various lighting conditions such as, direct light, oblique light, transmitted light, etc. He examined the documents in various sittings. After thorough examination, he arrived at a conclusion that the red encircled writings marked by him as Exh.A was written by the person, who had written Exh.B-1 to Exh.B-6 and Exh.C-1 to Exh.C-6. Accordingly, he gave his opinion vide Exh.76. Thus, from the evidence of Kathar (PW 13), the application/chit (Exh.75) was in the handwriting of accused no.1. Nothing has been elicited in the cross-examination of Kathar (PW 13) so as to throw doubt on his opinion. It is, thus, clear that accused no.1 alone had given application/chit (Exh.75) for taking away Janhavi (PW6) and Vaishnavi from their school on the day of the incident.

33. The learned Counsel for accused no.1 submits that the application/chit (Exh.75) was not shown to Sister Juvana (PW 9) in the Court. It does not bear any inward number of the school. Therefore, it cannot

be said to have been given by any person in the school of Janhavi (PW 6) as alleged by the prosecution. We are not inclined to accept this contention. As seen from the evidence of A.P.I. Borse (PW 12), the application/chit (Exh.75) was seized from Sister Juvana (PW 9) vide panchnama (Exh.64) on 23.06.2004. It was sent to Kathar (PW 13) with letter (Exh.65) dated 08.08.2004. Kathar (PW 13) gave his opinion (Exh.76) on 15.02.2005. As such, the said application/chit (Exh.75) was with him until he gave his opinion. Sister Juvana (PW 9) was examined on 31.01.2005. As such, the said application/chit was not before the Court on the date on which Sister Juvana (PW 9) was examined. Therefore, she stated that she would identify that application if shown to her. In the circumstances, it cannot be said that though the application/chit was available before the Court, it was not shown to Sister Juvana (PW 9). It may be noted that the fact about receiving of the application/chit was stated by Juvana (PW 9) to the

police on the next day of the incident and the said application/chit was seized by A.P.I. Borse (PW 12) vide panchnama (Exh.64) on 23.06.2004 itself. As stated above, accused no.1 was arrested on 24.06.2004. It is, thus, clear that even prior to the arrest of accused no.1, it was handed over by Sister Juvana (PW 9) to the police. In the circumstances, only because the said application does not bear the inward number, it cannot be said that it was not received by Sister Juvana (PW 9) on 22.06.2004. It was most natural and probable on the part of Sister Juvana (PW 9) to ask for something in writing, while giving the daughters of the informant in the custody of some third person. It is, thus, clear that the application (Exh.75) is genuine document, which was received by Sister Juvana (PW 9) on the day of the incident itself from accused no.1.

34. The evidence of Janhavi (PW 6) is corroborated by the evidence of Sister Juvana (PW 9) in respect of the role played by accused no.1. The

involvement of accused no.1 in the incident in question, has been strongly corroborated by the evidence of Kathar (PW 13), who opined that the application/chit (Exh.75) was in the handwriting of accused no.1. The informant also identifies accused no.1 as the same person who had been to his cabin on 22.06.2004 at about 1.00 p.m. It is well settled that evidence has to be weighed and not counted. Considering this strong and dependable evidence to connect accused no.1 with the incident in question, non-examination of Manisha, i.e. the mother of Janhavi (PW 6), would have no adverse effect on the case of the prosecution.

35. So far as the role attributed against accused no.2 is concerned, we find the evidence of Janhavi (PW 6) itself, worthy of credence. It creates a great confidence. She has no reason to falsely implicate accused no.2 in the incident in question.

36. The learned A.P.P. submits that Darare (PW10)(Exh.38), the Tahsildar, conducted T.I. parade on 28.06.2004 and accused nos.1 and 2 were identified by the witnesses as accused persons. She submits that this is an additional piece of evidence to corroborate the evidence of Janhavi (PW 6). She cited the case of **Prakash Vs. State of Karnataka, (2014) 12 SCC 133**, wherein it is observed as under :-

" T.I. Parade is not mandatory nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of time."

37. The learned Counsel for the accused have challenged the evidence of Darare (PW 10) on various grounds. According to them, he prepared the memorandums Exhs.39, 41, 43, 45, 47, 49, 51 and 53 in respect of the T.I. parade when the identifying witnesses were called upon to identify accused nos.1 and 2 each. Darare (PW 10) has mentioned the duration of parade attended by all the identifying witnesses as "12.15 p.m. to 1.50 p.m." They submit that panchas were supposed to be called by Darare (PW 10), however, he clearly states that he had asked the police to bring two panchas and accordingly, they were produced by the police. If this version is accepted, it would throw doubt on the fairness of the T.I. parade. The learned Counsel for accused no.1 has relied on the following judgments to challenge the evidentiary value of T.I. parade conducted by Darare (PW 10):-

- i. Ramcharan Bhudiram Gupta Vs. The State of Maharashtra, 1996(1) Bom.C.R.190;**
- ii. Vilas Vasantao Patil Vs. State of Maharashtra, 1997(Supp.) Bom.C.R.152;**
- iii. Balu Shravan Ahire Vs. State of Maharashtra, 2001(2)Mh.L.J. 76;**
- iv. Sanjay @ Gangadhar Vishvarup Shelke and anr. Vs. State of Maharashtra, 2000 Bom.C.R. (Cri.) 684;**
- v. Ayyub Vs. State of Uttar Pradesh, (2002)3 SCC 510.**

38. The sum and substance of these rulings is that the Officer, who conducts T.I. parade has to strictly follow the provisions laid down in the Criminal Manual issued by the High Court for guidance of the Criminal Courts and Officers subordinate to them. There should not be inordinate delay in holding T.I. parade. There should not be interference by the police investigating the crime in the T.I. parade. The Officer holding T.I. parade has to call two

respectable persons as panchas. The chances of the suspects being shown to the witnesses prior to their test identification should be eliminated.

39. In the present case, from the evidence of Darare (PW 10), it is clear that he had taken maximum care to see that the T.I. parade in respect of accused nos.1 and 2 is held as per the provisions of Criminal Manual. The only defects on his part are that he got called the panchas through police and further instead of recording specific time of test identification in respect of each individual identifying witness, he mentioned the total time in the memorandums that was required by him to complete the proceedings. In the circumstances, in our view, the evidentiary value of the T.I. parade would get minimised. It has been held in the case of **Prakash Vs. State of Karnataka** (supra) cited by the learned A.P.P., the purpose of pre-trial identification evidence is to provide corroboration to the evidence given by the witness or

victim later in Court and if the suspect is a complete stranger to the witness then an identification parade is desirable. In our view, even if the corroborative evidence pertaining to T.I. parade is kept out of consideration for the above-mentioned faults on the part of Darare (PW 10) in conducting T.I. parade, considering the strong and dependable substantive evidence of Janhavi (PW 6), Sister Juvana (PW 9) and that of Hand Writing Expert Kathar (PW 13), the prosecution established beyond reasonable doubt identity of accused nos.1 and 2 as the persons involved in the incident in question.

40. The prosecution is relying on the evidence of Sachin Shinde (PW 11)(Exh.59), the Nodal Officer of IDEA Mobile Company. He produced C.D.R. (Exh.61) to establish that the informant received phone calls from mobile SIM-card numbers 9822876909 and 9822876706 which, allegedly, were purchased by accused no.1 from Nandan (PW 7)(Exh.35) and were produced by accused no.1 consequent upon his

disclosure statement (Exh.30) recorded on 29.06.2004 in the presence of Nilesh (PW 4). The learned Counsel for accused no.1 relies on the judgment in the case of **Anvar P.V.** (Supra), wherein it is held as under :-

“....

22. The evidence relating to electronic record, as noted herein-before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in the case of State (NCT of Delhi) Vs. Navjot Sandhu, (2005) 11 SCC 600, does not lay down the correct legal

position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

41. Admittedly, Sachin Shinde (PW 11) has not produced the certificate under Section 65-B of the Evidence Act along with the C.D.R. In the absence of such certificate, the C.D.R. (Exh.61) would be inadmissible in evidence. If that be so, the evidence in respect of the seizure of the mobile hand-sets, SIM-cards and C.D.R. would not be of any help to the prosecution to connect accused no.1 with the incident in question and more particularly, with the alleged demand of money made by him from the informant, since his evidence that he received phone calls from any

particular mobile numbers at any point of time after his daughters were taken away from the school, would remain uncorroborated.

42. From the above discussed evidence, it will be clear that accused nos.1 and 2 took away Janhavi (PW6) and Vaishnavi from their school on the pretext that their mother had met with an accident and therefore, they were required to be taken to their mother at Jalgaon. It is well settled that the guardianship of the parents does not cease while the minor is in the physical possession of any other person, who has been lawfully entrusted with care and custody of such minor by its parents. In the present case, the accused persons took away Janhavi (PW 6) and Vaishnavi without the consent of their parents from their school, where they were lawfully entrusted by their parents for care and custody. As such, they committed the offence of kidnapping, as defined under Section 361 of the I.P.C.

43. The evidence of the informant that somebody phoned him and demanded Rs.25,00,000/- from him on saying that his daughters were in his custody and that he offered Rs.50,000/- to that person, does not find any corroboration, since the alleged C.D. Record has not been proved by the prosecution. The informant deposes that when he offered to pay Rs.50,000/- to the person who was talking on phone, the said person told him that he would drop his daughters within 5-10 minutes. The daughters of the informant had accordingly reached his house and his wife informed that fact to him after about 10-15 minutes. From this evidence, it does not appear that the daughters of the informant were detained by the accused persons for ransom. Here, it would be necessary to refer to the judgment in the case of **Philips Fadrick D'souza and Ravindra @ Balu Pandurang Kambre Vs. The State of Maharashtra and anr., 2009 Cri.L.J.89** cited on behalf of accused no.1, wherein the essential ingredients of Section 364-A of the I.P.C. are dissected, as

under :-

"Where a person :

(a) (i) kidnaps or abducts any person or;

(ii) keeps a person in detention after such kidnapping or abduction; and

(b) (i) threatens to cause death or hurt to such person; or

(ii) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt; or

(iii) causes hurt or death to such person; and

(c) in order to compel the Government or any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom."

44. The evidence on record does not prove above-referred ingredients (b) and (c). As such, the offence under Section 364-A of the I.P.C. is not

established against the accused. In the circumstances, we hold that the prosecution has failed to establish the guilt of the accused for the offence punishable under Section 364-A of the I.P.C. However, the prosecution has established beyond reasonable doubt that accused nos.1 and 2, in furtherance of their common intention, committed the offence of kidnapping as defined under Section 361 punishable under Section 363 of the I.P.C.

45. The learned trial Judge did not appreciate the evidence of the prosecution correctly and properly and wrongly held the accused guilty for the offence punishable under Section 364-A of the I.P.C. The said finding is not supported by the evidence on record.

46. The learned Counsel for the accused cited the judgments in the cases of **Surendra Kumar Vs. State of Rajasthan, AIR 1979 SC 1048** and **Ved Prakash Vs. State of Haryana, AIR 1981 SC 643**, seeking

benefit of probation. In view of the peculiar facts of these cases, gravity of offences, the antecedents and character of the accused persons therein, the benefit of probation was extended to them. In the present case, the offence of kidnapping the minor girls of the informant, being serious one, we are not inclined to grant the said benefit to accused nos.1 and 2.

47. Since the offence under Section 363 of the I.P.C. is not compoundable, the application filed by the informant bearing Criminal Application No.6365 of 2017, seeking permission to compound the offence, cannot be considered and simply will have to be filed and is accordingly filed.

48. The learned Senior Counsel for accused no.2 referred to the case of **Surendra Nath Mohanty and anr. Vs. State of Orissa, AIR 1999 SC 2181**, wherein it was observed as under :-

" Though the offence punishable under Section 326 of the I.P.C. is not compoundable, considering the fact that the parties had settled their dispute outside the Court, 10 years had elapsed from the date of the incident and accused had already undergone three months rigorous imprisonment, sentence of imprisonment was reduced to the period already undergone."

49. The learned Senior Counsel further referred to the case of **Puttaswamy Vs. State of Karnataka and anr., 2009 AIR SCW 1744**, wherein the offences were non-compoundable, but since the parties had reached at a compromise, the Hon'ble Supreme Court, while maintaining the conviction increased fine from Rs.2,000/- to Rs.25,000/- and reduced the sentence to the period already undergone. On the strength of these rulings, the learned Senior Counsel prays that leniency may be shown to the accused in the matter of inflicting punishment.

50. The record shows that the accused were aged 22 and 24 years respectively, at the time of the incident. Though they kidnapped the minor daughters of the informant, they did not take any disadvantage of their position. The daughters of the informant did not allege any indecent or objectionable behavior with them by the accused when they were in their custody. The accused did not insist for money for releasing the daughters of the informant from their custody. They safely reached the daughters of the informant to his house. The accused are having responsibilities of their family members including their aged parents. The period of thirteen years has been elapsed after the incident. The informant also has tendered pardon to accused no.2. Considering these mitigating circumstances, we are inclined to show leniency in the matter of inflicting punishment.

51. Both the accused were arrested on 24.06.2004 and released on bail on 23.09.2004. They were taken into custody on being convicted by the trial Court on

06.02.2006 and were released on bail by this Court on 03.04.2006. As such, they were behind the bars for about five months in connection with this crime. In our view, instead of sending the accused persons behind the bars anymore, if they are asked to pay substantial fine amount, it would meet the ends of justice. In our view, the accused need to be sentenced to suffer the imprisonment, which they have already undergone and to pay a fine of Rs.25,000/- each, with default stipulation.

52. The appeals are liable to be partly allowed. The impugned judgment convicting the accused for the offence punishable under Section 364-A read with Section 34 of the I.P.C. is liable to be quashed and set aside. Instead, they are liable to be convicted for the offence punishable under Section 363 of the I.P.C.

53. In the result, we pass the following order :-

O R D E R

- (1) Both the Criminal Appeals are partly allowed.
- (2) The impugned judgment and order convicting the appellants/accused for the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code are quashed and set aside.
- (3) The appellants/accused are acquitted of the offence punishable under Section 364-A of the Indian Penal Code. Instead, they are convicted for the offence punishable under Section 363 read with Section 34 of the Indian Penal Code.
- (4) Both the appellants are sentenced to undergo imprisonment for the period already undergone by them and to pay a fine of

Rs.25,000/- (Rupees Twenty Five Thousand) each, in default, to suffer rigorous imprisonment for six months each.

- (5) The appellants shall surrender to their bail bonds before the trial Court within a period of two weeks from today for depositing the amount of fine or to undergo the sentence of imprisonment passed in default of payment of fine.
- (6) If the accused persons fail to appear before the trial Court within two weeks from today, the trial Court shall issue coercive process against them to secure their presence.
- (7) The appeals are accordingly disposed of.
- (8) Criminal Application No.6365 of 2017 is filed and disposed of.

[SANGITRAO S. PATIL, J.]

[SUNIL P. DESHMUKH, J.]

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