

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL APPEAL NO. 60 OF 2002

Vinod Dadarao Waghmare,
Age : 21 yrs., Occu. Student,
R/o. Ghodka (Rajuri),
Tq. and Dist. Beed.

... Appellant
Orig. Accused No. 4

VERSUS

The State of Maharashtra

... Respondent

.....
Mr S. P. Katneshwarkar, Advocate for the appellant
Mr S. D. Ghayal, APP for respondent/State
.....

WITH

CRIMINAL APPEAL NO. 240 OF 2002

The State of Maharashtra
through Police Station Officer,
Police Station Beed City.

... Appellant
Orig. Complainant

VERSUS

1. Gangaram S/o Dnyanoba Gavli,
Age : 36 years, Occu. Furniture maker,
R/o. Pune.
2. Yadykhan S/o Jummankhan Pathan,
Age : 22 years, Occu. Labour,
R/o. Pune.
3. Shaikh Shahabuddin S/o Shaikh Hussain,
Age : 40 years, Occu. Guarage, R/o. Pune.
4. Vinod S/o Dadarao Waghmare,
Age : 21 years, Occu. Education,
R/o. Pune.

... Respondents
(Orig. Accused)

.....
 Mr S. D. Ghayal, APP for appellant/State
 Mr S. S. Thombre & Mr. A. R. Gaikwad, Advocate for respondent no.1
 Mr S. P. Katneshwarkar, Advocate for respondent no. 4
 Mrs A. N. Ansari, Advocate for respondents No. 2 and 3

.....
 WITH
CRIMINAL APPEAL NO. 255 OF 2002

The State of Maharashtra
 through Police Station Officer,
 Police Station Beed City.

... Appellant
 (Orig. Complainant)

VERSUS

1. Gangaram S/o Dnyanoba Gavli,
 Age : 36 years, Occu. Furniture maker,
 R/o. Pune.
2. Yadykhan S/o Jummankhan Pathan,
 Age : 22 years, Occu. Labour,
 R/o. Pune. (Dismissed as per order dt. 14/2/11
 passed in CA 825/02).
3. Vinod S/o Dadarao Waghmare,
 Age : 21 years, Occu. Education,
 R/o. Pune.

....Respondents
 (Orig. Accused 1, 2 & 4)

.....
 Mr S. D. Ghayal, APP for appellant/State
 Mr S. S. Thombre & Mr. A. R. Gaikwad, Advocate for respondent no.1
 Mr S. P. Katneshwarkar, Advocate for respondent no. 3

CORAM : T. V. NALAWADE &
 A. M. DHAVALA, JJ.
 RESERVED ON : 17.11.2017.
 PRONOUNCED ON : 12.12.2017.

JUDGMENT (PER A. M. DHAVALA, J.):

1. These appeals arise out of a common judgment delivered
 by Addl. Sessions Judge, Beed on 18.01.2002 in Sessions Case

No.32/2000, whereby accused no. 1 - Gangaram, accused no. 2 – Yadukhan and accused no. 4 – Vinod were convicted u/s 363 r/w 34 of IPC and were sentenced to undergo RI for two years and to pay fine of Rs. 2,000/-, in default, to undergo further RI for six months. Accused no. 3 – Sk. Shahabuddin was acquitted. The aggrieved accused no. 4 – Vinod has preferred Cri. Appeal No. 60/2002 challenging his conviction, while the State has preferred Cri. Appeal No. 240/2002 seeking leave u/s 378(1)(3) for filing appeal against acquittal and for conviction of all the accused u/s 364A r/w 34 IPC including that of acquitted accused no. 3 – Sk. Shahabuddin. Cri. Appeal No. 255/2002 is filed by State for enhancement of the sentence of all the accused.

2. The facts relevant for deciding these appeals may be stated as follows :

PW9 Abhijeet, aged eight years, a student studying in 3rd std. is son of PW4 Somnath and in January-2000, he was studying in Sanskar Vidyalaya at Beed. Arrangement of common auto-rickshaw was made for to and fro journey from his house to school and PW5 Virbhadrha was the auto rickshaw driver. The school timing was from 7.00 a.m. to 12.30 noon. PW4 Somnath and his brother are in business of manufacturing oil. They had a Oil Mill at MIDC, Beed.

On 10.01.2000, PW5 Virbhadra dropped PW9 Abhijeet near his school at 7:00 a.m. When PW5 Virbhadra went to the school at 12:30 noon, PW9 Abhijeet was not there. He was searched but he was not traceable. The information was given to his parents and they also started search. As he could not be searched, a missing report was lodged in the same afternoon. PW4 Somnath, his brother and cousins PW7-Navnath, PW8-Arun and PW1-Suresh continued the search and contacted the relations but Abhijeet could not be traced. On next day i.e. on 11.01.2000, at about 09:00 to 09:30 a.m., an anonymous phone call was received by Sangita (PW9 Abhijeet's mother). The caller made inquiry about Soma (PW4) and when Sangita told him that her husband was not at home, he told her that he would again make a call after one hour and Soma should attend it. After one hour, the caller informed PW4 Somnath in hindi that he was calling from Mumbai and his son Abhijeet was in his custody and if he (PW4) wanted his child back, he should pay Rs. 5.00 lakhs. PW4 Somnath told him that he would be required to consult his brothers. The caller informed him that this fact should not be communicated to his brother Baban and to the police, lest he would kill his son. He told him that he would again call him in the evening. PW4 Somnath shared the information with his brother. Again there was a call at 5:00 to 5:30 p.m. The caller disclosed his name as Gawali and told

him that his son was in his custody and he should come to receive him at Shivajinagar Bus Stand, Pune. Within five minutes thereafter, PW4 received phone call from a Jamadar ASI - Kale from Nigadi Police Station, Pune and informed him that Abhijeet was in their custody and the communication was arranged with Abhijeet. PW4 then reported the matter to Beed Police and he along with police at Beed reached Pune. PW9 Abhijeet was in the Police Station of Nigadi Corporation. One more person was there. On enquiry, Abhijeet informed him that when he was proceeding to his classroom, one person came to him and told him that his father had called him and he was to be taken for darshan of god and goddess. Then PW9 along with his school bag came out of the school. He was taken to a car wherein two persons were already there. Those two persons had brought him by the car to Pune and he slept in the room of one Bhaiyya. The car was driven by one person by name Gawali (accused no.1 - Gangaram). After sometime the person who had called him from the school to the car left the spot and the remaining three persons took him to Indira Gandhi Garden. After sometime, two of them went to a car and one Bhaiyya was with him. He somehow managed to run away from him and gave information to the watchman of the garden wearing uniform like a police that he was kidnapped and they were likely to kill him. The watchman reached

him and the said Bhaiyya to the nearest Police Station, Nigadi. The person with Abhijeet was accused no. 2 – Yadukhan. He informed that, he along with accused no. 1 – Gangaram Gawali and accused no. 3 – Sk. Shahabuddin conspired to kidnap Abhijeet so as to extort money from his father and he was brought to Pune in a car bearing No. MTJ 5293 belonging to accused no. 1. It was agreed that a demand of Rs.5.00 lakhs should be made for releasing the boy. Accordingly, Gawali had made a demand of Rs. 5.00 lakhs. Accused no. 2 - Yadukhan also gave information that accused no. 4-Vinod was along with them from morning till the time of their arrest. Accused nos. 1, 2 and 4 were brought from Pune to Beed and on 13.01.2000, PW1 Suresh, uncle of PW9 lodged FIR at Beed City Police Station at 8:40 am. On the basis of the same, the crime was registered at C.R. No. 12/2000 u/s 363, 364, 384, 120B of IPC and the same was investigated into by PW15 Dy.S.P.-Pathak. During the investigation, personal search of accused no. 1 was taken and some petrol receipts, toll receipts and garden parking receipts were seized from accused no.1. The rest of the investigation was carried out by recording statements of material witnesses and drawing seizure panchanama. The car was seized from the custody of accused no. 1, which was containing a school bag with notebooks and lunch box of PW9. After completion of investigation, charge-sheet was submitted in the court.

3. In due course, the case was committed to the court of Sessions. The ld. Addl. Sessions Judge framed charge at Exh. 40 u/s 364A/34 against accused nos. 1 to 3 and u/s 120B IPC against accused nos. 1 to 4. The accused pleaded not guilty. The prosecution examined 15 witnesses. The defence of the accused is of total denial. The ld. Addl. Sessions Judge held accused nos. 1, 2 and 4 guilty u/s 363 r/w. 34 of IPC and convicted and sentenced them as referred to above. Hence these appeals.

4. Ld. APP Shri. Ghayal has taken us through the evidence on record and has argued that there is a cogent, consistent and reliable evidence to disclose that accused nos. 1 to 4 conspired together and accused nos. 1 to 3 kidnapped PW9 Abhijeet from the lawful custody of his parents and took him to Pune. The said kidnapping was for ransom and a demand of Rs.5.00 lakhs was accordingly made by phone calls. There was ample evidence showing the commission of offence u/s 364A r/w 120B IPC. The ld. trial Judge erred in neglecting the unchallenged evidence on the point of demand of ransom amount by phone calls and unnecessarily reduced the sentence to Section 363 IPC. Besides, accused no. 3 has been wrongly acquitted as he was one of the main accused who had kidnapped the child. The punishment awarded is also not proportionate to the

nature and severity of the crime. Therefore, accused nos. 1 to 4 be held guilty for offences u/s 364A r/w 120B IPC and the maximum sentence should be awarded to them.

5. Per contra, learned Advocate Mrs. Ansari argued that accused no. 3 – Sk. Shahabuddin has already undergone the period of sentence as under-trial prisoner. There is no proper evidence on identification of accused no. 3 – Sk. Shahabuddin to connect him with the crime. PW9 Abhijeet has admitted that, he has disclosed his name only at the instance of police and after tutoring. Similarly, PW14 Swapnil, friend of Abhijeet has also given admission which washed out his entire evidence with regard to identification of accused no.3. She also argued that, there was no other evidence to connect accused no. 3 with the crime and, therefore, the acquittal of accused no. 3 cannot be interfered with.

6. Learned Advocate Shri. S. P. Katneshwarkar for respondent no. 4 argued that, accused no. 4 Vinod had not been to Beed for the purpose of kidnapping. Though PW9 Abhijeet stated that he was with him when he met the watchman of the Garden, PW10- Dnyandeo Bule the watchman who took him to the Police Constable and PW13 of Nigadi Police Station have falsified him. According to

him, it was accused no. 2 – Yadukhan who was with boy. No role has been assigned to accused no. 4-Vinod and, therefore, his conviction is based on no material. Therefore, the appeal of accused no. 4 be allowed and he be acquitted.

7. Learned advocate Shri. Gaikwad for accused no. 1 - Gawali stated that, the evidence regarding involvement of accused no. 1 and his identification is not at all satisfactory. Considering the discrepancies in the evidence, accused no. 1 should have been acquitted.

8. Mrs. Ansari, Id. Advocate was appointed for accused no. 2- Yadukhan and she argued that, no T.I. parade was held. Accused no.2 – Yadukhan had no role to play. The evidence regarding his involvement is contradictory. Hence, he should be acquitted.

9. Learned APP has relied on judgment of Division Bench at the Principal Seat of this High Court in Criminal Appeal No. 477 of 2008, Naseem Ahmed Habib Ahmed V/s. State of Maharashtra, decided on 17.06.2013 (Smt. V. K. Tahilramani & P. D. Kode, JJ.) wherein the conviction of accused no. 1 u/s 120-B, 364-A r/w 34 of IPC was upheld.

10. On the basis of arguments advanced and evidence on record, the points for our consideration with our findings thereon are as follows :

Sr. No.	Points	Findings
1	Whether accused nos. 1 to 4 conspired to commit the offence of kidnapping of PW9 Abhijeet for ransom?	Proved against A1 & A2.
2	Whether in pursuance of the conspiracy accused nos. 1 to 4 kidnapped PW9 Abhijeet from the lawful custody of his parents and taken him from Beed to Pune and kept him in a wrongful confinement from 10.01.2000 7.00 a.m. to 11.01.2000 4.00 p.m.?	Proved against A1 & A2.
3	Whether any interference is required in the order of conviction or the order of sentence?	In the affirmative.
4	What order?	Accused nos. 3 and 4 are acquitted. Accused nos. 1 and 2 are convicted u/s 364A r/w 120B IPC.

REASONS

11. The prosecution has examined 15 witnesses, which may be conveniently grouped as follows :

[I] Missing of PW9 Abhijeet :

- (i) PW1 Suresh has lodged the FIR Exh. 54 on 13.01.2000 at 8:40 am.
- (ii) PW4 Somnath, father of the child.
- (iii) PW5 Virbhadra was auto-rickshaw driver. He was taking the child from house to school. He has deposed that, as usual on 10.01.2000 at 07:15 a.m. he dropped Abhijeet near the school and when he went there at 12:30 noon, the scheduled time of closing the school, he found PW9 Abhijeet missing. He searched for Abhijeet but he was not there. He reported the matter to parents of the Abhijeet.
- (iv) PW6 Prabhavati deposed that on 10.01.2000, she had taken roll call of 3rd std. division 'D' at 07:40 a.m. and that time Abhijeet was absent from the school.
- (v) PW7 Navnath is cousin of PW9's father PW4 Somnath. He has also deposed about missing of Abhijeet and search conducted by them.
- (vi) PW8-Arun and PW7-Navnath had also deposed that after receipt of message from police at Nigadi Police Station, they had gone to Pune and went to Nigadi Police Station and from there they took custody of Abhijeet who was brought by them to Beed. The evidence in this regard has remained unchallenged.

- (vii) The record shows that, the factum of kidnapping of PW9 on 10.01.2000 at 7:00 a.m. while he was near the school and taking him by car to Pune and thereafter he being found along with somebody in Appughar Garden and brought to Nigadi Police Station and thereafter to Beed, is not in dispute. There is also evidence that, PW4 Somnath had received a telephonic demand of Rs. 5.00 lakhs for release of Abhijeet who was claimed to be in the custody of the caller. The evidence in this regard is also undisputed. The accused are only disputing their involvement in the crime.
- (viii) PW9 Abhijeet is the star witness. He deposed that, on the fateful day, by his usual rickshaw he came to the school at 06:45 a.m. Then one person came to him and told him that his parents had called him as they wanted to take him to the temples of god and goddess. PW9 Abhijeet was aged eight years. He could not understand the trap laid by said person and he came and got into the car. His evidence shows that, accused no. 3 - Sk. Shahabuddin was the person who was calling him in the car. He stated that, accused no. 1 Gawali and accused no. 2 Yadukhan were present in the car and they took him from Beed to Pune. They showed him one cinema in a Cinema Hall. Thereafter, they slept in one room. He was not knowing their names. On the next day, one of them by name Gawali asked another person to go to Beed

and he went to Beed. Thereafter, he and other accused including Gawali and one another person came to a garden. Accused no. 1-Gawali went away for sometime, he made a request to remaining two persons to allow him to sit near a policeman (they were in the garden at Nigadi known as Appughar and he was taking the watchman of the garden as policeman). However, he was not allowed but he somehow escaped from them and contacted said watchman assuming him to be a policeman. He told him that, he was beaten. That time accused no.1 Gawali came there and the watchman brought him and the accused to the police station. He was provided Bhaji Poli (Vegetable + Chapati). He identified accused no. 3 – Shahabuddin as the same person who had taken him away from the school. He identified accused no.1-Gangaram and accused no.2-Yadukhan as the persons who had taken him from Beed to Pune. He identified accused no. 4-Vinod as the person who was with him in the garden. He stated that his school bag containing notebooks and lunch box was in the car. He identified the said school bag and lunch box (article no. 3).

- (ix) PW10 – Dnyandeo Bule has supported PW9. He stated that, he was serving as a Watchman in Indira Gandhi Garden at Pune. On 11.01.2000 at 3:00 p.m. he joined his duty in second shift. He saw one boy aged 7-8 years (PW9) accompanied with one person aged 20-22 years in the garden. The boy was

weeping. The watchman asked that person why he had beaten that boy. That time the boy rushed to him and told him that he was kidnapped by the person. He made further inquiry and noticed that the boy was frightened and weeping. The person along with him told that the boy was of his Seth and his Seth had gone to Nigadi. The watchman told that person to sit away from the boy so that boy can sit near him (PW10). The person stated that the boy would run away. PW10 then made detailed inquiry with the boy. He disclosed to him that he was kidnapped and his school bag was in the Fiat Car and the boy requested him to reach him to his house. The boy disclosed to him that he was resident of Beed. He was wearing the uniform of the school. PW10 found substance in the story regarding kidnapping and he requested his co-worker Mr. Mode to contact police. That time, two more persons came by a car. One of them asked that boy to proceed with him. PW10 Dnyandeo made inquiry with him as to who was the boy and he told that he was his relative and that boy was mentally retarded and he should not pay any heed to his say. PW10 told him that he should bring the father of the boy and then only he should take away the boy. Then those two persons left the garden and went in their car. He restrained them from proceeding in the car and kept one of them with him. Then the other co-workers gathered and the boy and the person were sent to the police. The other two persons who left in the car did not return. PW10 has

identified PW9 as the said boy, accused no. 2- Yadukhan as the person accompanying him and accused no. 1-Gangaram and accused no. 4 Vinod as the persons who had been to the garden in the car. In cross, it is brought on record that he did not lodge any report at the Police Station nor submitted a written report to his superior. His statement was later on recorded by police from Pune. He stated that, he had gone to the Police Station Nigadi at 4:30 to 5:00 p.m. He stated that, accused no. 1 was in the garden for about five minutes and thereafter he saw him for the first time in the court. He stated that he had stated before the police that he had told one of the persons to stay in the garden. He denied that he had seen the persons in the car for few moments.

- (x) PW13 Sharad Kale was a Police Constable to whom PW10 had taken PW9. He stated that, at about 3:00 p.m., PW10 watchman from Appughar brought a child (PW9) stating that he was kidnapped from Beed. PW3 gave the information to the Superintendent of Police, Beed. He also stated that, PW10 had produced before him, accused no. 2 Yadukhan. He has not been cross-examined by any of the accused.
- (xi) PW14 Swapnil is a witness to the incident which took place in front of the school. He had identified accused no. 3 - Sk. Shahabuddin as the person who had taken away PW9 Abhijeet.

14. As far as role of accused no. 3 – Sk. Shahabuddin is concerned, the evidence is not convincing. PW9-Abhijeet admitted that he identified accused no. 3 – Sk. Shahabuddin as he was shown to him by police. He stated that, he came to know about that person from police. He identified accused no. 3 – Sk. Shahabuddin on the say of police. In evidence, he has stated that accused no. 1-Gangaram and accused no. 2-Yadukhan were the persons who were with him in the car. He has not specifically stated that accused no. 3 – Shahabuddin had accompanied them from the School to Pune in the car. He had stated that Gawali asked one of those persons to go to Beed but he had not specifically stated that the said person was accused no. 3 – Sk. Shahabuddin. PW14 Swapnil had identified accused no. 3 as the person who kidnapped Abhijeet but in the cross-examination he gave admissions as follows :

“It was the school time when we were playing. I was busy in playing and therefore today I cannot identify that man who had called Abhijeet. Police had brought one man and shown him to me and therefore I say that the said man had called Abhijeet. I say that accused no. 3 – Sk. Shahabuddin is that man as police told me and showed him to me.”

15. We find that, the evidence of PW9 and PW14 is not convincing with regard to identification of accused no. 3 – Sk. Shahabuddin. PW10 Watchman Dnyandeo Bule and PW13 Police Constable Sharad Kale had not seen accused no. 3 – Sk. Shahabuddin. The evidence of PW9-Abhijeet even if read minutely does not positively indicate that accused no. 3 – Shahabuddin had accompanied them from Beed to Pune. Accused no. 3-Shahabuddin was not known to PW3 & PW14. PW9 has not given any description of accused no. 3 – Shahabuddin nor T.I. parade was held by the Investigating Officer. We therefore find that the ld. trial Judge rightly gave benefit of doubt to accused No. 3 – Sk. Shahabuddin.

16. As far as accused no. 4 – Vinod is concerned, we find evidence against him also not free from doubt. PW9 Abhijeet has stated that accuse no. 4-Vinod was with him in the garden when he contacted the watchman. However, the evidence of watchman and evidence of PW13 Sharad Kale shows that it was accused no. 2 – Yadukhan who was with him. PW9 was too young and deposed in the court after a gap of around 10 months.

17. The evidence of PW10-Dnyandeo Bule, Watchman, shows that, accused no. 4 was simply present along with accused no. 1-

Gangaram in the garden. There is no evidence of PW9 that he was along with them in the room where they stayed over night. PW9 has also not stated that accused no. 4 was with them in the car.

18. According to PW10, accused no. 4-Vinod did not speak anything. It was only accused no. 1-Gangaram, who spoke for few minutes only. It is quite possible that PW10 and PW9 had very little opportunity to minutely observe accused no. 4 – Vinod. He was unknown to both. His description was not given and no T.I. parade was held for his identification. PW9 has already committed mistakes about identity of accused no. 4-Vinod. In the result, accused no. 4 deserves to get benefit of doubt.

19. However, as far as evidence against accused nos. 1 and 2 is concerned, it is quite convincing. PW9 Abhijeet has stated that both of them were present along with him in the car from Beed to Pune. PW9 had ample opportunity to see them as, they were along with him even thereafter in the room i.e. from 7:00 a.m. on 10.01.2000 till 3:00 p.m. on 11.01.2000. Accused no. 2 was along with PW9-Abhijeet in the garden. He was identified by PW10-Dnyandeo Bule and he was taken by PW10 to the Police Station where he was again identified by PW13 Sharad Kale, Police Constable. The evidence of

Sharad Kale has gone unchallenged.

20. Thus, we find that there is convincing evidence showing the role of accused no.2 - Yadukhan in the crime.

21. As far as accused no. 1 is concerned, he was in the car as well as in the room with PW9 Abhijeet right from 7:00 a.m. on 10.01.2000 till 3.00 p.m. on 11.01.2000. Thereafter, he had been to the garden and had a talk with PW10 Dnyandeo Bule for sufficient length of time. PW10 that time was aware that PW9 was probably kidnapped and accused no. 1 might be a suspect. Accused no. 1 told him that, PW9 was mentally retarded and he should not pay attention to his say. When PW10 declined to allow him to take PW9 with him, he has left the spot.

22. Besides, the evidence of PW3 Balkrishna Sikchi shows that, on 12.01.2000 at Corporation Police Station, Nigadi, accused no. 1 was personally searched in his presence and several receipts of petrol bills and one receipt of Hirapur toll tax were found with him. He did not speak about the seizure of Indira Gandhi Udyan parking receipt. The said receipt was also not shown to PW3 for identification. Thereafter, the panchanama to that effect is at Exh. 58. Thereafter,

by a separate panchanama the Fiat car of the accused was seized. It was containing a school bag. The school bag was identified by PW9 as his school bag (article no. 3).

23. PW9 has also stated that, accused no. 1's name was Gawali. PW4-Somnath has stated that, when he received phone call of demand of Rs.5.00 lakhs, the caller has disclosed his name as Gawali. We find that, even in absence of T.I. parade, there is sufficient material to show involvement of accused no. 1 in the crime.

24. It was argued that, the prosecution witnesses were not knowing the accused persons and therefore it was necessary to hold T.I. parade. It is a normal rule if the witnesses are not knowing the accused persons, holding of T.I. parade is necessary. However, in the present case, accused no. 2-Yadukhan was caught red handed and was brought to the Police Station and, therefore, in his case T.I. parade was not necessary. As far as accused no. 1 is concerned, he had kidnapped PW9 and PW9 Abhijeet was in his company for a long period. He had ample opportunity and during the entire period, PW9 must be under fear. It must have created a lasting impression on the mind of PW9, so that he could not have committed error in identifying accused no.1. As far as PW10 is concerned, he had talked

to accused no. 1 knowing-fully well that he might have committed kidnapping of the child. In the light of these facts, we find the evidence of PW9 and PW10 as against accused nos. 1 and 2 trustworthy and reliable even in absence of T.I. parade. Both of them have identified accused nos. 1 and 2 in the court and the said identification cannot be discarded merely on account of absence of TI parade. In this regard, we rely upon **Mahabir v. State of Delhi AIR 2008 SC 2343**, wherein in para 12 it is held as under.

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a

test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350), Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 102).

25. In **Mulla & Anr. v. State of U. P. AIR 2010 SC 942**,

wherein in para 21 it is held as under :

21. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction. As was observed by this Court in Matru v. State of U.P., (1971) 2 SCC 75, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (Vide Santokh Singh v. Izhar Hussain, (1973) 2 SCC 406) : (AIR 1973 SC 2190).

27. The next question is; **whether there was conspiracy or not**. It is well settled that, there can be no direct evidence about conspiracy and it has to be inferred from the facts of the case. In the present case, one person called PW9 Abhijeet and told that his father had called him for going to take darshan of gods and then he was

seated in the car, the car was taken from Beed to Pune. The provision for room was already made. Thereafter, phone calls were made to the father of the child. The caller knew the name of father of the child. These facts clearly indicate that it was a well planned act of kidnapping. There is convincing evidence of PW4 Somnath, PW1 Suresh, PW7 Navnath cousin of PW4 Somnath and PW8 Arun brother of PW4 Somnath that on next day i.e. on 11.01.2000 at 09:00 a.m. one phone call was received. It is obvious that the caller had collected the phone number of PW4 Somnath before kidnapping his son as the caller wanted to talk to PW4 Somnath. After one hour, he again gave ring and disclosed to PW4 that his son was in his custody and he should keep Rs.5.00 lakhs ready by way of ransom for releasing of boy.

28. It is true that, the Police should have tapped the phone and should have traced out the phone from where the calls were made and could have reached the accused by such mode. But, merely because the police have not carried out the investigation in proper manner, it cannot be said that, PW9 was not kidnapped for ransom. PW9 Abhijeet was not taken to Pune for a pleasure trip or ride. His father was rich industrialist having ownership of oil mill. His phone number was also collected and when PW9 was kidnapped, the phone

call was made. Here we have to apply the yardstick of a reasonable and prudent man. From these facts, any reasonable and prudent man would come to the conclusion that the phone must have been made by one of the accused who were in possession of PW9 Abhijeet. We therefore hold that PW9 was kidnapped for ransom. There was clear apprehension about causing of hurt or death of the kidnapped child if the demand for money made by the accused was not satisfied. The caller making phone at 10:00 am had disclosed that he was at Mumbai when the accused was actually at Pune. There was direction to PW4 that he should not approach the Police. If all these facts are taken together, there is no doubt in our mind that the offence u/s 364A r/w 120B was complete.

29. For the reasons discussed herein above, the evidence against accused nos. 3 and 4 is not beyond reasonable doubt particularly in absence of T.I. parade but we hold accused nos. 1 and 2 guilty for offence u/s 364A r/w 120B IPC.

30. We find that the ld. trial Judge has not taken into consideration the seriousness of the act. Had the child not escaped, there would have been threat to his life. The act is very serious. In the facts and circumstances, the ld. trial Judge has shown undue

leniency. We have considered the submissions made by accused nos.1 and 2 before the trial Judge with regard to sentence. In fact, accused nos. 1 and 2 have not made any submissions but they were under-trial prisoners for two years. Considering all the facts, we find it appropriate to award sentence of rigorous imprisonment for seven years to accused nos. 1 and 2 u/s 364A r/w 120B of IPC.

31. In the result, Criminal Appeal No. 240/2002 deserves to be partly allowed and Criminal Appeal No. 60/2002 filed by accused no.4 deserves to be allowed whereas; there is no question of enhancement of the sentence u/s 363 of IPC as we are convicting accused nos. 1 and 2 u/s 364A r/w 120B of IPC. Hence the order.

ORDER

- (i) Criminal Appeal No. 60/2002 is allowed. Appellant/Accused No. 4-Vinod Waghmare is acquitted. His bail bonds stand cancelled.
- (ii) Criminal Appeal No. 240/2002 is allowed as against accused nos. 1 and 2. The conviction of accused nos. 1 and 2 is altered from Section 363 r/w 34 to Section 364A r/w 120B of IPC and both the accused are sentenced to

suffer rigorous imprisonment for seven years and to pay fine of Rs. 1,000/- each, in default, to further undergo RI for 50 days. The period undergone by them in Jail as under-trial prisoners shall be set off against substantive sentence.

- (iii) Criminal Appeal No. 255 of 2002 stands dismissed.
- (iv) Fees of the learned counsel Mrs A. N. Ansari, appointed for accused no. 2 be paid through the office of High Court Legal Services Sub-Committee, Aurangabad as per rules.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

sgp