



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

CRIMINAL APPEAL NO.155 OF 2017

Ganesh Alias Baban s/o Navnath
Lashkare, Age 22 years, Occu. Nil,
R/o Village Sonai, Taluka Newasa,
District Ahmednagar
(At present the appellant is in
Yerwada Central Prison, Yerwada,
Taluka and District Pune.

... APPELLANT

VERSUS

1) The State of Maharashtra
through the Sonai Police Station,
Taluka Newasa,
District Ahmednagar

2) Rajendra Takhatmal Gugale,
Age major, Occ. Business,
R/o Sonai, Taluka Newasa,
District Ahmednagar

... RESPONDENTS

.....
Mr. S.D. Kotkar, Advocate for appellant
Mrs. U.S. Bhosle, A.P.P. for respondent – State
Mr. D.R. Markad, Advocate for respondent No.2.
.....

WITH

CRIMINAL APPEAL NO.171 OF 2017

Ganesh Dattatraya Wadgule
Age 25 years, Occ.
R/o Sonai, Tal. Newasa
District Ahmednagar
(At present appellant is in
Yerwada Central Prison, Yerwada,
Taluka and District Pune

... APPELLANT

VERSUS

1. The State of Maharashtra
through Police Station Officer,
Police Station, Sonai,
Tal. Newasa, Dist. Ahmednagar.
(Copy to be served on
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)
2. Rajendra s/o Takhatmal Gugale,
Age 43 years, Occ. Business,
R/o Sonai, Tal. Newasa,
District Ahmednagar

... **RESPONDENTS**

.....
Mr. Aniket Wagal, Advocate and
Mr. Rajesh Mewara, Advocate for appellant
Mrs. U.S. Bhosle, A.P.P. for respondent – State
Mr. D.R. Markad, Advocate for respondent No.2.
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 2nd February, 2024

Date of pronouncing judgment : 16th February, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The challenge in both these appeals is to an order of conviction and sentence dated 8/3/2017, passed by learned District Judge-1 & Additional Sessions Judge, Newasa, District Ahmednagar in Sessions Case, No.36/2016. Vide impugned judgment and order, the appellants were convicted for the offences punishable under Sections 364-A, 363 and 386 read with Section 34 of the Indian Penal Code and under Section 120-B read with

Section 386 and 364-A of the Indian Penal Code, and therefore sentenced to suffer different terms of imprisonment, details whereof are given hereinbelow in tabular form:

Section	Imprisonment	Fine
364-A r/w 34 IPC	Imprisonment for life	Rs.50,000/- each, in default S.I. for 1 year
363 r/w 34 IPC	No separate sentence is passed	
386 r/w 34 IPC	R.I. for 5 years	10,000/- each, in default S.I. for 3 months
120-B r/w 386 and 364-A IPC	R.I. for 5 years	10,000/- each, in default S.I. for 3 months
All the substantive sentences have been directed to run concurrently.		

For the sake of convenience, the appellants in Criminal Appeal Nos.155/2017 and 171/2017 are hereinafter referred to as A/1 and A/2 respectively.

2. Facts necessary to decide the present appeals are as follows :

P.W.2 Rajendra (informant) was a resident of village Sonai, Taluka Newasa, District Ahmednagar. He was in the business of real estate. He was also elected Member of Panchayat Samiti, Taluka Newasa. One Sunil Gadakh was a Member of Legislative Assembly (MLA) from Newasa Constituency. Both, he and the informant were the members of Nationalist Congress Party

(NCP). Both of them were close friends.

3. It was 24/2/2016, the informant was in the office of Sunil. It was about 7.45 p.m., the informant received a phone call of his wife, informing their minor son (P.W.3 "Y") to have been kidnapped by motorcycle borne two persons. The informant hurriedly left the office of Sunil. He (informant) received a call on his cell phone by 8.15 p.m. The caller was his kidnapped son. He told the informant to pay money to his kidnappers and asked not to report the matter to the police. During the said call, one unknown person talked to the informant in Hindi. He gave the informant threats of eliminating his son if the informant approached police authorities. The informant thereupon asked him as to how much amount he wanted for the release of his son. The caller told the informant that he would call him after a while. The informant again received a call of the very person after some time. He made a demand of Rs.5 Crores. The informant expressed his inability to pay. He assured him to pay Rs.25 – 30 Lakhs. The kidnapper scaled down the demand to Rs.1 Crore and then discontinued the call. The informant thereafter made frantic efforts to call back on the very number. The phone was found to have been switched off.

4. The informant talked to his friends and relations. P.W.1 Tanaji was one of them. All of them suspected involvement of A/2. P.W.1 Tanaji therefore approached him. A/2 told him that he could trace out the child, provided he shall be paid a sum of Rs.2 Crores.

He also proposed to pay P.W.1 Tanaji a sum of Rs.10 Lakhs. With a view to verify the child to have been in his custody, P.W.1 Tanaji asked him to allow him to talk to the child. A/2, therefore, made a phone call to someone and asked the other side to allow the child to talk to his father. P.W.1 spoke with the child. He realised the child to have been in the custody of the kidnapper. Thereupon the informant could collect Rs.46 Lakhs. A/2 had asked them to accompany him to Pune. P.W.1 Tanaji, Uday and others, therefore, engaged one vehicle and they went to Pune along with A/2. A/2 took them to Pune Railway Station. It was about 6.00 in the morning of the following day. Officials of Local Crime Branch (LCB), Ahmednagar had followed them. Both, A/2 and P.W.1 (Approver) were taken into custody. In the meanwhile, police officer Sachin Sanap (P.W.11) could locate A/1 and the kidnapped child together in a hut on agricultural land in the nearby of village Sonai. It was little past 5.00 in the morning. He took them into custody and brought to the police station. The informant lodged the First Information Report (F.I.R.) by 2.30 p.m. Thereafter, the scene of offence panchanama (Exh.28) was drawn. Statement of the kidnapped child was recorded in the evening. The informant had recorded the phone calls of the kidnapper in his cell phone. He obtained the same in a pen drive and delivered it to the police officers under panchanama. Call Data Records (CDRs) were obtained from the concerned service provider. It was found that the

child was kidnapped in furtherance of a conspiracy/ common intention of both A/1 and A/2. P.W.1 Tanaji joined them mid-way. Upon completion of investigation, all the three, therefore, came to be proceeded against by filing the charge sheet before the Court of learned Judicial Magistrate, First Class, Newasa.

5. The learned Judicial Magistrate, First Class, Newasa committed the case to the Court of Additional Sessions Judge, Newasa (Trial Court). P.W.1 (original accused No.3) was granted pardon in terms of Section 307 of the Code of Criminal Procedure. Charge (Exh.8) was thereafter framed against both A/1 and A/2. They pleaded not guilty. Their defence was of false implication. According to A/1, he was in employment with the informant for about a year. Next before the incident in question. He was required to work over time. Informant had promised to pay him extra remuneration. According to him, the informant has a farm house. He would entertain his friends and police officials at the farm house. He would serve them liquor. He was required to stay overnight at the farm house. He left the job since he was not paid adequate remuneration.

6. According to A/2 he owned agricultural land. The informant wanted to buy the same. He refused to sell the land. Moreover, he had canvassed for a rival candidate of the informant in Panchayat Samiti elections. As such, it is a defence of both A/1

and A/2 to have been falsely implicated.

7. The prosecution examined 16 witnesses and produced in evidence number of documents. The Trial Court, on appreciation of evidence in the case, convicted both the appellants and consequently sentenced to various terms of imprisonment. The appellants were acquitted of the offences punishable under Section 3 r/w 25 of the Arms Act and Section 37 r/w 135 of the Bombay Police Act. The State did not prefer appeal against their acquittal.

P.W.1 Tanaji (Approver) was discharged since he complied with the terms of pardon.

8. Heard. Learned counsel representing the appellants took us through the evidence on record. According to them, offence punishable under section 364-A is serious one. The minimum punishment for the said offence is life imprisonment. The prosecution is under obligation to establish the guilt beyond reasonable doubt. According to them, the informant was a man of power and pelf. The F.I.R. was lodged little past 8 hours of the child to have been rescued. Most of the witnesses examined by the prosecution were friends of the informant. In spite of the appellants to have been taken into custody in the early morning, they are shown to have been arrested little past 6.00 p.m. i.e. after 12 hours. No panchanama of the happenings or rescue operation was drawn then and there. There was a residential house of a lady who owned

the land on which the hut stood. None of her family members have been examined. CDRs have not been duly proved. Report of Voice Expert has not been tendered in evidence. The cash amount that was collected for being paid to the kidnapper, was not seized. It was allowed to be returned to the informant. The investigation was tainted. The line of investigation appears to have been suitable to the desire of the informant and his mentor. The same runs counter to the criminal jurisprudence. The Trial Court simply relied on the oral evidence of the witnesses and handed down imprisonment for life with additional terms of imprisonments for other offences. According to learned counsel representing A/2, the A/2 tried to take advantage of the situation. He was not a privy to the offence. When the child was at the village itself, he would not have taken P.W.1 and others to Pune. The amount of ransom did not change hands. The child was not ill-treated. No crime had ever been registered against A/2 before the one in question. There was, therefore, no question of suspecting his involvement in the crime. In short, according to the learned counsel, the prosecution evidence fell short to bring home the charge beyond reasonable doubt. They, therefore, urged for allowing of the appeals.

9. Learned counsel for respondent No.2 – informant and learned A.P.P. for the respondent No.1 – State would, on the other hand, submit that, the child was found in the custody of A/1 while the A/2 was arrested in Pune. P.W.1 Tanaji, P.W.2 Rajendra, P.W.3,

P.W.4 Jalindar and P.W.5 Dinesh are the witnesses of truth. The Trial Court has rightly relied on their evidence. Learned counsel reiterated the reasons given by the Trial Court in support of the impugned order. They, therefore, urged for dismissal of the appeals.

10. Considered the submissions advanced. Perused the evidence relied on. Let us appreciate the same. Section 364-A of the Indian Penal Code reads thus :

“Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.”

11. A Division Bench of this Court in case of **Philips Fedrick D'souza & Anr. Vs.State of Maharashtra & Anr. [2009 CRI.L.J. 89]**, observed :-

“ in Suman Sood vs. State of Rajasthan (2007) 5 SCC 634 : AIR 2007 SC 2774. The Supreme Court held that kidnapping for ransom is an offence of unlawfully seizing a person and then confining the person, usually in a secret place, while attempting to extort ransom. Ransom is a sum of money to be

demanding to be paid for releasing a captive, prisoner or detenu. These principles have been reiterated in *Vinod vs. State of Haryana* (2008) 2 SCC 246 : AIR 2008 SC 1142.

18. The offence under Section 364A is not made out only upon the commission of the unlawful act of kidnapping or abduction. The essential ingredients of the statutory provision, apart from the act of kidnapping, abduction or, as the case may be, keeping a person in detention thereafter, are a threat to cause hurt or a reasonable apprehension of such a consequence or causing death or hurt, in order to compel the payment of ransom or the doing or abstention from doing any act by the government, a foreign state, an intergovernmental body or by any person. The purpose of the unlawful act is to demand ransom or to compel the doing or abstention from doing of a particular act. Kidnapping or the abduction by itself does not lead to an inference of the underlying purpose with which it was carried out. The purpose must exist at the time when the act of kidnapping or abduction takes place. Whether such a purpose existed at that time will have to be deduced from all the attendant circumstances. Events which take place prior to, at the time of and subsequent to the commission of the offence would weigh in the balance. In interpreting Section 364A the Court must be cognizant of the fact that the provision was introduced in order to deal with the serious menace posed by terrorism to the stability of civil society. Hence, while the underlying purpose, which is an ingredient of Section 364A, must demonstrably be found to exist as the foundation of the unlawful act, the Court would not be justified in abridging the parameters of the statutory provision with reference to requirements which have not been imposed by Parliament. Situations involving kidnapping or abduction for ransom are fluid. Demands which are raised by abductors may in the very nature of things evolve as the situation progresses. The law does not prescribe that the nature of the demand for ransom be precisely spelt out when the kidnapping or abduction is carried out. So long as the unlawful act of kidnapping

or abduction is carried out for the purpose of making a demand for ransom, the requirement of the section would be met. Moreover, as the Supreme Court noted, it may well happen that after the demand is made known to the victim, but before it is communicated to a third person, the accused may be arrested. That again would not detract from the circumstance that when act of kidnapping or abduction was carried out with the object and purpose of demanding ransom. A statutory provision like Section 364A must undoubtedly, like penal legislation, be construed strictly. But while construing a provision such as Section 364A the Court must be careful not to interpret it in a manner which would denude it of its legislative efficacy. More so when the stated object of Parliament was to deal with an aggravated form of an offence, the effect of which is to seriously undermine the stability of civil society.”

EVIDENCE IN THE CASE :-

12. P.W.3 (victim), 10 year old son of the informant testified that, he was in 4th Standard. He was playing in the lane along with his friends. He did not recollect the exact time. Darkness had descended. A motorcycle arrived. There were two persons on the motorcycle. They lifted him and made him sit between them. The person riding the motorcycle was sporting a helmet. The pillion rider had covered his face with a scarf. They took him to an agricultural field on Kharwandi Road. They asked him to make a phone call to his father (informant) and tell him to give them the demanded money. They also asked him to tell the informant not to approach police. According to him, the motorcycle rider had asked him to make such a call. P.W.3 thereupon made a call to his father

on Cell Phone Number 9822711000. It is further in his evidence that, he told his father (informant), "*Yane Jitta Paisa Lage utta De Nak an Police Ne Phone Nako Karu*". Thereafter the helmet sporting person took the cell phone from him and talked to the informant. It is further in his evidence, both of them asked him whether He wanted to eat something. He said, "No". It is further in his evidence that, the person sporting helmet removed the same and gave it to his companion, who in turn, worn it. That person then left to bring fruits. It is further in his evidence, the one who remained behind took him to a sugarcane field and asked to sleep there. Then he took him to a hut in the nearby. There was a lamp glowing in the hut. The one who left to fetch fruits did not return.

13. It is further in the evidence of P.W.3 that, the person wearing helmet received a few phone calls. He (P.W.3) could not sleep. After some time, somebody from outside of the hut enquired him, "*Bhaiyya Aahe Ka?*" He said, "Yes". The person with him got up and kept a knife on his leg. On enquiry by the person from outside, he (P.W.3) told him that there were only two persons in the hut. The outside person thereupon broke open the door of the hut and caught the person. When the helmet was removed, he realised him to be, "Baban Kaka" (A/1). According to him, Baban Kaka was serving with them. He would play with him. He identified the knife. It is further in his evidence that the person rescued him was a police official. He was brought to the Police Station and then united

with his parents.

14. It has come on record during cross-examination of P.W.3 that, none of the kidnappers assaulted him. There was a house at 100 ft. away from the hut. It was a thatched hut. On the day he came to the Court to give evidence, he was taken to the room of the Assistant Police Prosecutor. His evidence further indicates that, his statement was recorded by police by 6.00 in the evening i.e. 12 hours after he was rescued.

The evidence of this witness would be appreciated later on while appreciating the evidence of other material witnesses.

15. Evidence of P.W.2 Rajendra (informant) indicates that he was a man of means. He was in politics as well. He was a Member of NCP. He was elected as a Member of Panchayat Samiti, Taluka Newasa. He had close relations with the local MLA. On the given day, he was in the company of the MLA. It was about 7.45 p.m., he received a call of his wife, informing P.W.3 to have gone missing. It is further in his evidence that, he therefore left the office of the local MLA for home. One Shankar Bargal accompanied him. It is further in his evidence that, he then requested Sunil Gadakh to inform to the police. His evidence further discloses that, on the way, he received a phone call. It was little past 8.00 p.m. His son, P.W.3 talked to him on phone and asked him, "*Pappa Ine Paisa De Nhak, Police Ne Phone Lagau*

Nako". Thereafter the another person came on line. He was speaking in Hindi. He asked him not to tell the police, else his child would be killed. The informant thereupon asked him how much amount he wanted and he would pay the same. The person on the other side again threatened him if he approach the police. He did not make demand of any specific amount. He told the informant that he would be calling him back after an hour to disclose the quantum of amount to be paid to him. The evidence of the informant further disclose that, within 5 minutes he again received a call from the very number. The caller made a demand of Rs.5 Crores. The informant expressed his inability to pay that much amount. The informant told him that he could at the most pay him Rs.30 Lakhs. The caller then scaled down the demand to Rs.1 Crore. The informant then told him that he would call him again after a while. The caller, however, told him that the phone would be switched off. The call was then discontinued. The informant's efforts to contact back on the very cell phone proved futile since it was found to have been switched off. It is further in his evidence that, all the developments were being reported to P.I. Shri Sachin Sanap (P.W.11).

16. The evidence of the informant suggests that, in view of past incidents of kidnapping, he suspected involvement of A/2. He, therefore, asked his friend Uday (P.W.7) to keep watch on the movements of A/2. Uday (P.W.7) in turn informed him that A/2 was

seen wandering nearby of his (informant) farm house. His evidence further disclose that, he contacted P.W.1 Tanaji (Approver) to negotiate with A/2. P.W.1 Tanaji in turn informed him to have contacted A/2. He (A/2) made a demand of money. He asked P.W.2 Rajendra that they should follow the directions of A/2 for rescue of the child. Evidence of the informant further indicates that he collected a sum of Rs.46 Lakhs. Rs.30 Lakhs were with him. His friends gave him some amount to make it Rs.46 Lakhs. The cross-examination of this witness indicates that he had an unaccounted cash of Rs.30 Lakhs with him. A/1 was serving with him for about a year before the incidence. He, however, denied that A/2 was to work over time. He denied to have not kept his word to pay him extra remuneration for over time work. He denied that A/2 therefore left the job. His evidence further discloses that, 3– 4 months before the incident in question, his son had gone missing in the town. It was he (informant) who first approached P.W.1 (Approver). The suggestions in the nature of the defence of A/1 and A/2 have been denied.

17. Then we have evidence of P.W.1 Tanaji (Approver). His evidence indicates that, on the request of the informant, he contacted A/2. According to him, both A/1 and A/2 were his friends. He was in the construction business. He had close acquaintance with P.W.2 Rajendra (informant). He used to secure construction work for him. Just 15 days before the incidence, he had done work

of filling of well in the farm house of the informant. His evidence further suggests that he contacted A/2 on phone and related him about the kidnapping of the child. After a while, he received a call of A/2, informing that he was earlier called by Manoj Wagh (friend of the informant). He (P.W.1) went to the house of A/2 on his request. No sooner he reached the place of A/2, he (A/2) started weeping. He told P.W.1 that his father was no more. His wife has also passed away. He would not indulge in such activity. A/2 further told him to have been hungry. P.W.1 Tanaji, therefore, gave him non-veg food and liquor (quarter bottle). It is further in his evidence that, A/2 told him that he would trace out the child. He also asked P.W.1 Tanaji as to how much money the child's father could spare for release of the child. He even asked P.W.1 Tanaji to make a demand of Rs.2 Crores. He (A/2) proposed to pay him (P.W.1) Rs.10 Lakhs therefrom. It is further in his evidence that, thereafter A/2 consumed liquor. P.W.1 related all these facts to Uday (P.W.7) and others. On request of A/2, a four-wheeler was secured. The informant, as stated above, arranged for Rs.46 Lakhs. A/2 asked them that only two persons shall accompany him. Accordingly, they started in a four wheeler. On the way at Ghodegaon, fuel was filled in to the Car's tank capacity. On the way, A/2 was asking as to whether arrangement of Rs.1 Crore was made. He was informed that a sum of Rs.50 Lakhs has been collected and the remaining amount would be paid by a businessman in Pune. A/2 even verified

the cash contained in the bag. He then took them to Pune Railway Station. It was early in the morning of 25th. Officers of LCB, Nagar overpowered both A/2 and P.W.1 Tanaji. Their arrest panchanama (Exh.35) was drawn there. They were brought to Ahmednagar and then placed into custody of P.I., Newasa Police Station. It is further in the evidence of P.W.1 Tanaji that, so as to verify involvement of A/2 in the crime in question, he asked him to allow him to talk to the kidnapped child. A/2 in turn made a phone call to someone. He spoke in Hindi. Then he gave the cell phone to P.W.1 Tanaji. During the call, the kidnapped child came on line. P.W.1 Tanaji had a talk to him. P.W.1 Tanaji thus confirmed A/2 to have been a privy to the kidnapping of the child.

18. The cross-examination of P.W.1 Tanaji indicates that while he went to the house of A/2, he (A/2) was already drunk. According to him, A/2 agreed to trace out the child before he consumed liquor served by him (P.W.1).

19. P.W.4 Jalindar is a witness to running panchanama relating to the scene of offences. The panchanama is at Exh.28. It was drawn during 4.40 p.m. and 5.40 p.m.

20. Evidence of P.W.5 Dinesh indicates that he had accompanied A/2, P.W.1 Tanaji and Uday (P.W.7) to Pune in a Scorpio vehicle. On the way at Shikrapur, A/2 questioned as to whether the amount as demanded, has been arranged for. He was

informed that, Rs.50 Lakhs has been there. Remaining amount would be given by a businessman in Pune. The evidence of P.W.5 Dinesh is on the lines of the evidence of P.W.1 Tanaji to the effect that they reached Pune Railway Station. Officers of LCB, Ahmednagar were following them and both A/2 and P.W.1 Tanaji were taken into custody under the panchanama drawn then and there. The panchanama is at Exh.35. He signed the said panchanama as an attesting witness. His evidence further indicates that, cell phones in possession of both A/2 and P.W.1 Tanaji were taken charge of under the very panchanama.

21. P.W.5 Pankaj is another friend of the informant. His evidence indicates that, he paid the informant a sum of Rs.5 Lakhs to make up the amount for being paid to the kidnappers. It is further in his evidence that, he was in the company of the informant. The informant had recorded in his cell phone the calls made by one of the kidnappers. The recorded calls were played in his presence. He heard the same. Those were the calls made from Cell Number 7057030583.

22. Then there is evidence of P.W.7 Uday, another friend of the informant. His evidence is consistent with the evidence of informant and P.W.1 Tanaji. He had also accompanied A/2 and the P.W.1 Tanaji to Pune. According to him, the maternal uncle of the kidnapped child and even P.W.1 Tanaji talked to the kidnapped child

from cell phone of A/2. Thus, it was confirmed that A/2 was involved in commission of the crime. He admitted to be the close friend of the informant.

23. P.W.8 Sayyed Anwar is a witness to the panchanama of seizure of a pen drive and C.D. containing recording of the calls made by the kidnappers. The panchanama is at Exh.42. He is also witness to a panchanama as to seizure of a knife, helmet and motorcycle allegedly used by the kidnappers.

24. P.W.9 Babasaheb is a witness in whose name the SIM Card Number 7057030583 was issued. Admittedly, the kidnappers had made calls from this SIM Card demanding the ransom. It is in his evidence that, although he had applied for issue of a fresh SIM Card and submitted necessary documents in that regard, he did not receive the SIM Card of the same number. He later on obtained a SIM Card of Idea Service provider. By examining this witness, the prosecution wanted to bring on record that the SIM Card had neither been received or used by him.

25. P.W.10 Sanjay is an official of LCB, Ahmednagar. His evidence indicates that, he along with his staff were following A/2 and others to Pune. His evidence indicates that, at Pune Railway Station, A/2 and P.W.1 Tanaji were taken into custody.

26. P.W.11 Sachin, Police Inspector, serving with Newasa

Police Station at the relevant time, testified that he was being kept posted of all the events. On the basis of a software, "Talash", he traced out the location of the caller who had made first two calls from the Cell Number 7057030583. It is further in his evidence that, during investigation, he learnt from his informer that there is a hut on the land of one Pisal. He, therefore, went there along with his Driver and one another person to find the kidnapped child to have been detained in the hut by A/1. He broke open the hut and rescued the kidnapped child. It is he who brought them to the Police Station and then allowed the child to unite with his parents. According to him, the informant had requested not to register crime initially. He admitted that, when the accused is taken into custody, a panchanama of arrest is required to be drawn immediately. He, however, did not draw such panchanama when A/2 was taken into custody by 6.00 in the morning. It has also been in his evidence that, no crime of kidnapping was ever registered against A/2 before the one in question.

27. P.W.12 Jitendra was a Nodal officer serving with Airtel Cellular Ltd. He tendered in evidence Call Data Records of certain phone numbers namely 8300994026, 7387587505 and 9890795637.

28. P.W.13 Sachin was a Nodal Officer serving with Idea Cellular Ltd. He produced in evidence documents submitted by the

concerned in relation to the certain cell phone numbers including the cell phone number of the informant, P.W.1 Tanaji and others. Certain CDRs have also been produced in evidence.

29. P.W.14 Kiran is a witness to the seizure of a revolver pursuant to the disclosure statement made by A/2. His evidence is not referred to since A/2 has been acquitted of the charge of having possessed a firearm without a licence.

30. P.W.15 Sanjay is a Police official who did some investigation of the crime. He had obtained voice sample of A/1 and A/2 and others who had conversation with them. It was he who has drawn the scene of offence panchanama.

31. P.W.16 Sayyad Rafik is a police official who seized jerkin which was on the person of the kidnapped child at the relevant time.

APPRECIATION :-

32. Let us appreciate the evidence in the case. The offence punishable under Section 364A, if proved, invites punishment of life imprisonment or death. As such, it is a serious offence. Strict proof is, therefore, warranted. The Trial Court has rightly not relied on the evidence in the nature of recorded conversation between the informant and the alleged kidnappers for want of failure to seize the cell phones of the informant and retrieve

therefrom the recorded conversation. What contained in the pen drive and the C.D. was a conversation that was transmitted from the cell phone wherein it was originally recorded. Although the cell phone of both A/1 and A/2 have been seized, there is no evidence to indicate that any of them had used the SIM Card bearing Number 7057030583. The prosecution could have proved the said fact by IMEI Number of the cell phone in which the said SIM Card was inserted and the first two calls were made. Although the voice samples of all the concerned were obtained and submitted to C.F.S.L. for voice analysis, the reports thereof have not been tendered in evidence. The Trial Court, however, indirectly relied on the recorded conversation between the informant and one of the kidnappers since it relied on the evidence of the informant regarding the said conversation and reproduction thereof in the F.I.R. (Exh.22).

33. It is reiterated that, the informant is a man of means. He was in politics as well. He has close acquaintance with the local MLA. True, the evidence of child (P.W.3) and the evidence of other witnesses undoubtedly lead us to infer that the child had in fact been kidnapped by 6.00 p.m. on 24/2/2016 by two persons, one of whom was sporting helmet and the other had covered his face with a scarf.

34. In our view, there are material flaws in the investigation.

When the incident of kidnapping took place at 6.00 p.m. on 24th, the F.I.R. was lodged by P.W.2 Rajendra at 2.30 p.m. on the following day, i.e. about 20 hours after kidnapping and about 8 hours after rescue of the kidnapped child. It is not known as to why the F.I.R. was not registered immediately. Admittedly, even no station diary entry was effected regarding the steps taken during the investigation. Admittedly, the A/1 was in the employment of the informant for a year next before the incident. He quit the job a few days before.

First we have to see whether both the appellants had conspired to kidnap the informant's child and they in fact kidnapped the child pursuant to the said conspiracy or in furtherance of the common intention to kidnap. Admittedly, while the child was kidnapped, one of the kidnappers was sporting helmet. The other had covered his face with a scarf. According to the kidnapped child, the helmet sporting kidnapper was riding the motorcycle. While he was taken to the agricultural field, the said person removed his helmet and gave it to the another one to put on. The same suggests the kidnapped child to have seen the other kidnapper. The investigating officer did not arrange for test identification parade.

35. The other evidence relied on to show both the appellants to have been the kidnappers, is the evidence in the

nature of A/2 to have made two phone calls to the other kidnapper and allowed P.W.1 and the maternal uncle of the kidnapped child to talk with the child. The maternal uncle has not been examined.

36. The prosecution is heavily relying on the evidence of P.W.1 Tanaji, an accomplice, who was tendered a pardon. His evidence has been referred to hereinabove in extenso. In our view, P.W.1 Tanaji has in fact been used as a decoy or trap. He cannot be said to have been involved in the crime in question. There is no shred of evidence to indicate he was a privy to the so called conspiracy hatched by both A/1 and A/2. According to P.W.1 Tanaji, he got involved in the commission of the crime only when he accepted the offer to receive Rs.10 Lakhs from the amount of ransom that would be received by A/2 from the informant. Close reading of the evidence of the informant and other two witnesses namely Uday and Dinesh Chavan indicates that P.W.1 Tanaji was closely associated with them. His services were availed to approach A/2 to find whether he (A/2) was really involved in the crime. According to the prosecution, the involvement of A/2 was suspected since he was involved in similar crime in the past. The investigating officer has, however, candidly admitted that no such crime had ever been registered against the A/2 in the past. While P.W.1 Tanaji went to A/2 and broached the subject of kidnapping, A/2 had already been under influence of alcohol. According to P.W.1 Tanaji, A/2 agreed to trace out the child provided the father of

the child paid him Rs.2 Crores.

37. Section 114(b) of the Evidence Act reads that, an accomplice is unworthy of credit, unless he is corroborated in material particulars. While Section 133 of the Evidence Act speaks of an accomplice to be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

38. At the cost of repetition, we find P.W.1 Tanaji to have in fact in no way involved in the crime in question. It is not known as to why he was taken into custody along with A/2 at Pune Railway Station. True, he remained behind the bars for about a year. The Trial Court granted him pardon in terms of Section 307 of the Code of Criminal Procedure, that is necessarily post committal of the case. We have, therefore, no advantage to have before us any previous statement of P.W.1 Tanaji since none has been recorded. P.W.1 Tanaji gave evidence before the Court for the first time disclosing his role as a witness and even according to him, his role as an accomplice. Admittedly, he is close friend of the informant. It is reiterated that, he was approached only with a view to make a search for the kidnapped child and his rescue. The Apex Court, in case of **Dagdu & Ors. Vs. State of Maharashtra etc., (AIR 1977 SC 1579)**, held :-

Though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence, tending to incriminate the particular accused in the commission of the crime.

It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal who, in so far as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

It is true that an approver has real incentive to speak out his mind after tender of pardon, but where it is impossible to reconcile his earlier statements with his later assertions, his evidence has to be left out of consideration. It is one thing to say that an approver's statement cannot be discarded for the mere reason that he did not disclose the entire story in his police statement and quite another to accept an approver in spite of contradictions which cast a veil of doubt over his involvement of others.

39. Close appreciation of the entire prosecution evidence lead us to infer that P.W.1 Tanaji was in no way involved in the crime. He even ought not to have been arrested and made an accused, leave apart, granting him tender of pardon. Even if we assume him to have been involved in the crime, we have to find whether there is a corroboration to his evidence. His evidence suggests that A/2 was drunk while he had approached him and while A/2 told P.W.1 that he could trace out the child provided he was paid a sum of Rs.2 Crores. His evidence indicates he had made such a statement without there being shred of material to indicate his involvement. Thereafter P.W.1 Tanaji served A/2 non-veg food and liquor. When A/2 allegedly made a phone call to one of the alleged kidnapper and during the call P.W.1 Tanaji spoke with the child, there is no evidence in the nature of CDR indicating such a call had in fact been made. It has already been stated above that the maternal uncle of the kidnapped child who had also allegedly talked to the child from the cell phone of A/2 has not been examined. To top it, the child in his evidence did not speak of to have a talk with P.W.1 Tanaji or his maternal uncle while he was in the custody of the kidnappers.

40. When the sum of Rs.46 Lakhs was collected and taken to Pune, for being paid to A/2, the said cash has not been seized

under the panchanama that was drawn at Pune Railway Station. It is not known as to why the cash was not seized. The informant had admitted that the sum of Rs.30 Lakhs was an unaccounted cash with him. Be that as it may, the police officials appear to have favoured the informant. True, there is evidence to indicate that A/2 had made a demand of Rs.2 Crores. According to the learned counsel representing him, it was so made as a chance to earn money. We may not buy the submission of the learned counsel. The fact, however, remains that there is no evidence to indicate that one of the two kidnappers on the motorcycle was A/2. On his arrest, no test identification parade was held for his identification by the child. Evidence of P.W.1 Tanaji is not to be relied on since there is no evidence in the nature of CDRs to indicate talk between A/1 and A/2 to indicate both of them to have been in league/ conspiracy.

41. Evidence of P.W.11 Sachin Sanap indicates that, pursuant to information received by him from his informer, he reached the hut wherein the kidnapped boy was detained by A/1. In our view, the investigating agency cannot have benefit of Section 125 of the Evidence Act. His evidence indicates that he enquired with the child as to who was present with him in the hut. After having realised that only one person was with him, he broke open the hut and took both the child and A/1 into custody. It was stated to be early in the morning, to be specific, at 6.00 a.m. Admittedly, the house of the landlady on whose land the hut was standing, was

at a distance of about 100 ft. away from the hut. No statement of any of the inmates of the said house has been recorded. To top it, when the child was rescued and A/1 was taken into custody, no panchanama was drawn then and there. Reasons are best known to P.W.11 Sachin Sanap. Admittedly, he was accompanied by his Driver and one or two more persons. He could have drawn the panchanama of the rescue operation then and there. When the child was rescued at 6.00 in the morning and brought to the Police Station immediately, it is not known as to why the child's statement was recorded 12 hours after his release. It is also reiterated that, the F.I.R. was also registered about 8 hours after the child was rescued. Even therebefore, the investigating officer was felicitated.

The scene of offence panchanama was drawn during 4.40 p.m. to 5.50 p.m. It is at Exh.28. It was made by P.W.15 Sanjay Kawde, A.P.I. Reading of the said panchanama indicates that the hut was shown by the informant and not the child. P.W.11 Sachin Sanap, who had allegedly rescued the child from the hut was not a privy to the said panchanama. It is not known as to how and when the informant got to know about the location of the hut, wherein his son was allegedly detained. It is reiterated that P.W.3 (child) had not accompanied P.W.15 Sanjay Kawde and panch witnesses to take them to point out the hut. As such, the scene of offence panchanama relating to hut does not further the prosecution case.

42. There is another aspect of the matter i.e. when A/1 was taken into custody, during the rescue operation at 6.00 in the morning, in the police record, he is shown to have been arrested at 6.00 in the evening (Page Nos.17 and 63 of R & P). We have perused all the papers in that regard. Even first remand application indicates his time of arrest as 6.00 p.m. on 25th February. Had he really been taken into custody during rescue operation of the child, there was no reason for the police authorities to arrest him after 12 hours. Where was A/1 for all those 12 hours or in whose custody he was kept or detained is also not forthcoming. True, fortunately the child has been rescued unscathed. Kidnappers did not hurt him. Even he was offered food. Since the offence is serious one, inviting minimum sentence of life imprisonment and the investigation to have been flawed altogether and there being no shred of evidence to indicate both A/1 and A/2 to have conspired together and P.W.1 Tanaji to have not been an accomplice and his there being no previous statement, and he being a close friend of the informant, we do not propose to act upon such kind of evidence. It is reiterated that, the SIM Card of the particular number from which the kidnapper made first two calls, stood in the name of someone else (P.W.9 Babasaheb). There is nothing to indicate the said SIM Card was used by A/1 or A/2. The prosecution could have placed on record such kind of evidence since cell phone of both A/1 and A/2 were seized. No such evidence is forthcoming.

43. On appreciation of the entire evidence on record, the principles of criminal jurisprudence lead us to infer the prosecution to have not brought home the charge beyond reasonable doubt. It can at the most be observed that the appellants might have kidnapped the child for ransom. Both the appellants have been behind the bars for more than 8 years.

44. For all the aforesaid reasons, we are not at one with the findings recorded by learned Additional Sessions Judge. We are, therefore, inclined to allow the appeals. In the result, the appeals succeed. Hence the order :

ORDER

- (i) Both the Criminal Appeals are allowed.
- (ii) The judgment and order of conviction and sentence dated 8/3/2017, passed by learned District Judge-1 & Additional Sessions Judge, Newasa, District Ahmednagar in Sessions Case No.36/2016 is hereby set aside. The appellants are acquitted of the offences punishable under Sections 364-A, 363 and 386 read with Section 34 of the Indian Penal Code and under Section 120-B read with Section 386 and 364-A of the Indian Penal Code.

- (iii) The appellants be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to them.
- (iv) Both the Criminal Appeals are disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-