

Vijay Ranglal Chorasiya and Ors

v.

State of Gujarat

(High Court Of Gujarat At Ahmedabad)

Criminal Appeal No. 99, 227, 244, 313, 610 And 762 Of 2000 And 1326 Of 2006 | 21-01-2009

D.N. Patel, J.

1. Criminal Appeal Nos. 99, 227, 244, 313, 610 and 762 of the year 2000 arise out of judgment and order of conviction and sentence dated 11th January, 2000 passed by learned Additional Sessions Judge, Bharuch in Sessions Case No. 99 of 1998 and Criminal Appeal No. 1326 of 2006 arises out of judgment and order of acquittal and sentence dated 31st January, 2006 passed by learned Additional Sessions Judge, Fast Track Court No. 5, Bharuch in Sessions Case No. 99 of 2002. Criminal Appeal No. 99 of 2000 is preferred by the original accused No. 5; Criminal Appeal No. 244 of 2000 is preferred by original accused No. 2; Criminal Appeal No. 313 of 2000 is preferred by original accused No. 3; Criminal Appeal No. 610 of 2000 is preferred by original accused No. 11 and Criminal Appeal No. 762 of 2000 is preferred by original accused No. 4, who have been convicted for the offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code and are ordered to undergo life imprisonment and to pay a fine of Rs. 1,000/-, in default, simple imprisonment of two months has been awarded. They are also convicted for the offence punishable under Section 364 read with 120-B of the Indian Penal Code. No separate sentence has been awarded for this offence. They are also convicted for the offence punishable under Section 346 read with Section 34 of the Indian Penal Code read with Section 364-A and 120-B of the Indian Penal Code and are ordered to undergo for two years" rigorous imprisonment. They are also convicted for the offence punishable under Section 341 read with Section 34 of the Indian Penal Code and are ordered to undergo simple imprisonment of one month and to pay a fine of Rs. 100/-, in default, simple imprisonment of 7 days has been awarded. They are also convicted for an offence punishable under Section 342 read with Section 34 of the Indian Penal Code and ordered to undergo rigorous imprisonment of one year. They are also convicted for an offence punishable under Section 343 read with Section 34 of the Indian Penal Code and ordered to undergo rigorous imprisonment of one year. These sentences are ordered to run concurrently. Accused No. 4, who has committed an offence while he was absconding in another offence, for him, sentence could not run concurrently with his earlier conviction. As accused No. 6 is absconding, an order was passed that his case shall be tried as and when charge-sheet is filed. Against this judgement and order of conviction and sentence, original accused Nos. 2, 3, 4, 5 and 11 have preferred aforesaid Criminal Appeals. Criminal Appeal No. 227 of 2000 has been preferred by the State against the order of acquittal passed by learned Additional Sessions Judge, Bharuch for original accused Nos. 7 to 10. Criminal Appeal No. 1326 of 2006

has been preferred by the State against an order of acquittal for original accused No. 6, passed by the Trial Court.

2. If the case of the prosecution is unfolded, the brief facts of the case, are as under:

2.1 It is the case of the prosecution that an offence of abduction with a view to get ransom has taken place on 15th July, 1997 at about 7:30 p.m. Abduction of Manish Bhupendrabhai Shah had taken place from Ankleshwar, near railway overbridge, Nr.ONGC, when he was returning from his office situated at GIDC, Ankleshwar to his residence at Ankleshwar. While he was travelling in maruti car, one cielo car has over take his vehicle and accused came out of cielo car and abducted Manish with the help of fire arm. Thereafter, he was taken at difference places. Initially, telephone call was received at the house of Bhupendrabhai Shah to the effect that Manish will not come for dinner, but, father was not available on phone and thereafter again, telephone call was received after 1 1/2 hours. Thereafter, accused compelled Manish to talk to his father and he was asked that he was kidnapped. Ransom was demanded, otherwise Manish was threatened to cause death. It is case of the prosecution that upon receiving this message from accused, Bhupendrabhai immediately called his brothers namely Mahendrabhai Prabhulal Shah (P.W. No. 11) and Pravinchandra Prabhulal Shah (P.W. No. 12). Thereafter, they informed District Superintendent of Police. Necessary messages were sent to various police officers, who have been examined as witnesses and D.S.P. has also arranged for installation of tap recording machine at the house of victim Manish and he also informed concerned Police Inspector to keep under surveillance telephones of residence of victim Manish. Immediately, Bharatsingh Kanchanlal Shah (P.W. No. 35), P.S.I. wireless, Bharuch was informed at 1:15 p.m. on 16th July, 1997 for installation of tap recording machine.

2.2 It is also case of the prosecution that thereafter several times, father of the victim has received telephone calls and an amount of Rs. 1 crore was demanded and he was called at Koba circle, Ahmedabad. Tap recorded evidence reveals that he was unable to make arrangement of such a huge amount and ultimately amount was fixed at Rs. 50 Lacs. As police was already informed at late night hours on 15th July, 1997, police officers as well as father of the victim came at Koba Circle, Ahmedabad with money. A watch was also kept by police officer at Koba circle, but, for any reason whatsoever accused did not come at Koba circle, Ahmedabad and they informed victim Manish that his father has informed police. Accused persons again called father of the victim with money at village: Kadodara, District: Surat.

2.3 It is the case of the prosecution that it was not possible for the father of the victim to rush from Ahmedabad to Surat within couple of hours, which is at a distance of approximately 350 kms. and,

therefore, accused threatened father of the victim on telephone. Tap recording was going on in cassettes, which are presented in the Court as evidence. On 18th July, 1997 at the residence of the victim, received phone from accused No. 5 from phone No. 43533 of Bharuch. As telephone of the residence of the victim was under surveillance, immediately police rushed to the place where phone No. 43533 was installed. It was an STD PCO of accused No. 5. At that place, employee of accused No. 5 was available and he informed that this phone call was made by accused No. 5. Immediately accused No. 5 was arrested. This is how detection of offender has been started in this case.

Upon interrogation of accused No. 5, he informed that convict Manish has been kept at Divya Flats in the city of Ahmedabad and, therefore, they started travelling from Bharuch, to city of Ahmedabad. Divya Flats were shown by accused No. 5 and the premises was raided from where accused Nos. 1, 2, 3, 8 and 9 were found out. From the said flat, two revolvers were recovered along with cartridges. Still there are other accused. Accused No. 1 informed Investigating Officer that victim was taken by accused Nos. 3 and 4 to village: Dediasan and, therefore, whole team of Investigating Officer along with Deputy Superintendent of Police, Mr. Abhaysinh Chudasama (P.W. No. 27) went to village: Dediasan, wherefrom accused No. 7 was arrested. Accused No. 7 was brought at Divya Flats. At that time, telephone call came at Divya Flats on cellular phone of accused. Police interrogated about the person, who is calling to accused No. 2 and it was informed by accused No. 2 that accused No. 4 was talking to him and, therefore, police compelled accused No. 2 to call accused No. 4. Accused No. 2 called accused No. 4 in the area nearby Judges Bungalow, Vastrapur, Ahmedabad. Police again, had gone to this place and arrested accused No. 4 along with tamancha (country made pistol). After arrest of accused No. 4, upon interrogation, it was informed by accused No. 4 that victim Manish was taken to Village: Naranpura falia, Taluka: Patdi and this place was raided by police, from where, accused No. 11 was found out and was arrested and victim Manish was also found out and by necessary panchnama, custody of Manish was taken and handed over to his father.

Meanwhile, it was also informed to the police officer that accused No. 2 is also having carbine machine gun. Upon interrogation, accused No. 2 called accused No. 6 along with cielo car, which was used for abduction of Manish. Accused No. 6 come at Divya Flats situated in the city of Ahmedabad in the same blue/black colour cielo car. This is how accused No. 6 was arrested with carbine gun, three magazines containing 58 cartridges. According to prosecution, accused No. 6 is the owner of cielo car, which was used from the beginning for abduction of Manish. It is the same cielo car, which was moved from place to place for telephone call from different STD PCO, as per prosecution witnesses.

According to prosecution, pager No. 475625 was issued in the name of brother of accused No. 6, which was utilized by accused No. 6 and on this page on 18th July, 1997, message was sent "Please contact within 5 minutes on 43533 at Bharuch". Phone No. 43533 belongs to Accused No. 5. Thus, immediately after telephone call received at the telephone of residence of victim on 18th July, 1997 at 8:30 p.m., this

message was left for accused No. 6. Thus, as per prosecution, by drawing separate panchnama, carbine gun, 58 cartridges and 1 revolver were also recovered at the behest of this accused. He was absconding when trial was conducted and, therefore, initially, when charge-sheet was filed against other accused, he was shown as absconding and, thereafter, separate charge-sheet was filed and Sessions Case No. 99 of 2002 was instituted against him and he has been acquitted. Against this order of acquittal, Criminal Appeal No. 1326 of 2006 has been preferred by the State.

Accused No. 1 has expired during the trial and accused No. 7 was expired during the pendency of Criminal Appeal. Trial Court has convicted accused Nos. 2, 3, 4, 5 and 11 and, therefore, they have preferred conviction appeal, whereas, trial court has acquitted accused Nos. 7 to 10 and, therefore, acquittal appeal bearing Criminal Appeal No. 227 of 2000 has been preferred by the State. Likewise, acquittal appeal bearing Criminal Appeal No. 1326 of 2006 has been preferred by the State against acquittal of accused No. 6.

We have heard learned Counsels appearing for the accused persons. They have submitted that prosecution has not proved the offence of abduction beyond reasonable doubt. There are number of omissions, contradictions and improvements in the deposition of the prosecution witnesses. This aspect of the matter has not been appreciated by the Trial Court, while convicting the accused and, therefore, order of conviction and sentence passed by the Trial Court deserves to be quashed and set aside.

3. Learned Counsels for the convicted accused submitted that offence has taken place on 15th July, 1997, whereas FIR was filed at belated stage i.e. on 18th July, 1997 at about 22-30 hours. It is also submitted that in a tap recording of conversation, it is not clear before the Trial Court as to who brought the cassettes? Whether cassettes were prerecorded or not? There is no convincing evidence before the Trial Court that the tap recorded cassettes was not tampered with.

4. Learned Counsel for the convicted accused submitted that victim Manish had no opportunity to identify the voices of all the accused and, therefore, his evidence ought not to have been considered, so far as identification of voices are concerned. It is submitted that there are lot of lapses in test identification parade. Panchas are selected panchas. Certain witnesses like Masumali, Mobin Aiyub and Shabbir Altaf could not identify any accused. It is also submitted by learned Counsels for the convicted accused that so far as evidence given by persons, who are in-charge of STD-PCO, they could not remember any person, as several persons are visiting their STD PCO and, therefore, identification by P.W. Nos. 5, 8, 9 and 10 ought not to have been accepted by the Trial Court. In fact, P.W. Nos. 8 and 10 have turned hostile. Likewise, P.W. No. 36, who is owner of STD PCO at Prantij, has not supported the case of the prosecution. It is also vehemently submitted that the whole case has been got up against

accused. In fact, there was enough publicity in the newspaper. Several times photos of accused were published in the newspaper and, therefore, identification parade has got no evidenciary value. Manish has opportunity to see accused at Divya Flats in the city of Ahmedabad and his identification of the accused is also devoid of any merits and ought not to be given any evidenciary value by the Trial Court. This aspect of the matter has not been appreciated by the Trial Court and, hence, the order of conviction and sentence passed by the Trial Court against accused Nos. 2, 3, 4, 5 and 11 deserves to be quashed and set aside.

5. It is submitted by learned Counsels for the convicted accused that never any weapons have been used in commissioning of the offence. Even if the case of the prosecution is taken at its highest pitch, no threat was administered by the accused to cause death of the victim and, therefore, alleged offence is not falling under Section 364-A of the Indian Penal Code and it was also submitted that there was enough opportunity with Manish to run away or to shout, but neither he has shouted or has run away and lastly when accused No. 11 was arrested from Naranpura falia, Patdi. Manish was found sitting on a cot. Thus, he had all opportunity to run away. This aspect of the matter has not been appreciated by the Trial Court. Likewise, it is also argued by learned Counsels for the convicted accused that accused No. 5 had never come with police from Bharuch to Ahmedabad. There is nothing on record, which proves that accused No. 5 come with police from Bharuch to Ahmedabad. No logbook is maintained by the police and the same is presented before the Trial Court as evidence. Likewise, statement of D.S.P. Mr. Ashish Bhatia and other police officers were never recorded and they have given evidence before the Trial Court and, therefore, this evidence ought not to have been considered by the Trial Court, while convicting the appellant-accused and therefore also, the order of conviction and sentence passed by the Trial Court deserves to be quashed and set aside.

6. It is also contended by the learned Counsels for the acquitted accused that appeal has been preferred by the State bearing Criminal Appeal No. 227 of 2000 against acquittal of accused Nos. 7 to 10 and Criminal Appeal No. 1326 of 2006 against acquittal of accused No. 6. The Trial Court has correctly acquitted these accused from the charges levelled against them. There is no evidence against these accused, much less prosecution has not proved the offence beyond reasonable doubt against these accused. In fact, accused No. 7 during the pendency of the Criminal Appeal has expired. Accused Nos. 8 and 9 are lady accused, who have nothing to do with the kidnapping of victim Manish. No role have been played by these lady accused, even as per deposition of victim Manish (P.W. No. 13). Likewise against accused No. 10, there are allegation by the prosecution that he has supplied fire arms to the other accused, but, there is no evidence before the Trial Court. In fact, accused No. 10 is ordinarily a resident of city of Nagpur and there is no connection of accused No. 10 with rest of the accused. This aspect of the matter has been correctly appreciated by the Trial Court. Likewise, Trial Court has rightly acquitted accused No. 6 as there is no evidence against accused No. 6. As per deposition of victim Manish (P.W. No. 13), no role is played by accused No. 6. This accused has not been identified by victim Manish. This aspect of the matter has been correctly appreciated by the Trial Court and, therefore,

order of acquittal passed by the Trial Court in Sessions Case No. 99 of 1998 and in Sessions Case No. 99 of 2002, so far as accused Nos. 7 to 10 and so far as accused No. 6 respectively is concerned, may not be altered by this Court.

7. Learned Additional Public Prosecutor Mr. H.L. Jani for the State vehemently submitted that prosecution has proved the offence, against accused Nos. 2, 3, 4, 5, 6 and 11, beyond reasonable doubt. Looking to the deposition of victim Manish along with deposition of other prosecution witnesses, offence of abduction has been proved. Father of victim informed on 15th July, 1997 to the District Superintendent of Police Mr. Ashish Bhatia (P.W. No. 34) about the offence as father of victim received telephone call from accused as well as from Manish. Immediately necessary instructions were passed by D.S.P. Tap recording machine was installed at the house of the victim so that telephone calls can be recorded and accused can be traced out. Learned Additional Public Prosecutor for the State submitted that accused had demanded Rs. 1 crore as ransom from the father of the victim. Inability was shown by father of the victim and, ultimately amount was reduced at Rs. 50 Lacs. As per evidence of father of the victim (P.W. No. 3), he was called at Koba circle, city of Ahmedabad. They had gone with money with police officer, but, accused had not come with Manish to receive the money. They again called father of the victim at village Kadodara at Surat. Inability was shown by father of the victim that it was not possible to reach Ahmedabad to Surat within couple of hours, which is situated at the distance of 350 kms. One by one, days had passed and as per P.W. No. 26 - Exh-177, Kiritsingh Zala's evidence, on 18th July, 1997 telephone call was received at the residence of victim Manish. It was telephone call from Bharuch. Immediately police raided the premises and accused No. 5 was arrested. Upon his interrogation, Divya Flats at city of Ahmedabad was raided, from where, accused Nos. 1, 2, 3, 8 and 9 were arrested along with two revolvers and cartridges. Upon interrogation, it was stated that victim was taken at village: Dediyan. Again police raided this premises, wherefrom accused No. 7 was arrested. He was brought to Divya Flats. At that time, one telephone call received on cellular phone of accused No. 2. Accused No. 4 was talking with accused No. 2 and accused No. 2 was compelled to call accused No. 4. This is how accused No. 4 was arrested from the area nearby Judges Bungalow, Vastrapur, Ahmedabad. Upon interrogation, Accused No. 4 has informed that victim Manish was kept at village Naranpura falia, Patdi. Again this premises was raided and victim Manish was found out and was handed over to his father. Necessary panchnama were drawn. Accused moved from place to place from 15th to 18th July, 1997. Owners/persons in-charge of various STD PCO i.e. P.W. Nos. 5, 8, 9 and P.W. No. 10 have been examined as prosecution witnesses. They have also identified accused Nos. 1, 2 and 3 in test identification parade. Likewise Manish identified accused Nos. 1 to 5 and accused Nos. 7 to 9 and has also identified voices of accused. Thus, there is enough direct allegation as well as circumstantial evidence against the accused, which supports the case of the prosecution. Several fire arms have been recovered along with cartridges. This aspect of the matter has been correctly appreciated by the Trial Court and no error has been committed by the Trial Court in convicting the accused and, therefore, order of conviction may not be altered by this Court.

8. Learned Additional Public Prosecutor further submitted that there is no irregularity in the investigation. Highest head of police of the District was informed within couple of hours from abduction by the father of the victim on the same day i.e. on 15th July, 1997. As there was danger to the life of the victim, the same is reduced in writing later on. Even otherwise also, a "janva jog entry" was already recorded at Exh-174 on 16th July, 1997 at 13-20 hours by P.S.I., GIDC, Ankleshwar. It is submitted by learned Additional Public Prosecutor that number of registers and telephone bills have been presented as evidence from different STD PCO situated in the different Districts, from where, accused had telephoned at the residence of victim Manish, whereby ransom money was demanded. Even in holding test identification parade, no irregularity has been committed by the prosecution. Executive Magistrate has given clear deposition before the Trial Court. So far as victim Manish is concerned, he has identified accused Nos. 1 to 5, 7 to 9 and 11. Likewise, several other witnesses have identified accused Nos. 1, 2 and 3. P.W. Nos. 14 & 15 - Executive Magistrates have given clear deposition at Exh-143 and 146 for different test identification parades. Merely because some of the witnesses have turned hostile, their evidence cannot be brushed aside in totality. Their evidence gets corroborated by other oral, documentary and direct evidence. Learned Additional Public Prosecutor also relied upon the decisions rendered by the Hon'ble Supreme Court and pointed out that there is no illegality in holding Test Identification Parade. Much has been mentioned about case diary. Learned Additional Public Prosecutor submitted that there is no illegality in maintaining case diary. Even otherwise also, looking to the case diary, nothing is coming out in favour of the accused. So far as accused No. 6 is concerned, it is submitted that there is cogent and convincing evidence against him. Initially accused No. 6 was absconding and, therefore, a separate charge-sheet was filed and separate Sessions Case No. 99 of 2002 was registered against him. Accused No. 6 is a person, who is owner of cielo car, which was used for kidnapping. It is clear that this blue/black colour cielo car, in which accused came, they overtook Maruti car of victim and compelled the victim to stop the maruti car. Accused came out of cielo car and this is the same cielo car, which carried accused and victim Manish from one place to another place, for phone call at the residence of the victim Manish demanding ransom. Prosecution witnesses of different STD PCO owners have stated before the Trial Court i.e. P.W. Nos. 5, 8, 9, 10, 16, 17 and 36 have stated before the Trial Court that from cielo car accused came and they telephoned at the residence of victim Manish. Some of the witnesses have turned hostile but they have identified some of the accused in test identification parade. Accused Nos. 1, 2 and 3 were identified in test identification parade by P.W. Nos. 5, 9 and 10. Telephone bills/Registers have also been presented before the Trial Court at Exh Nos. 116, 123, 152 and 155. It is also submitted by Learned Additional Public Prosecutor that this accused No. 6 was arrested with carbine gun, three magazines and several cartridges were found out. It is this accused No. 6 from whom one more revolver and three cartridges were recovered and it is submitted that pager No. 475625 was issued in the name of brother of accused No. 6, but, pager was used by accused No. 6 himself. On 18th July, 1997 accused No. 5 telephoned at the residence of victim Manish and immediately accused No. 5 was arrested on the very same day. This accused No. 6 has also received telephone message at about 9:00 a.m. on 18th July, 1997 "Please contact within 5 minute on 43533 at Bharuch". Phone No. 43533 belongs to accused No. 5. This circumstance proves beyond reasonable doubt about live contract between accused No. 5 and accused No. 6. Not only this but victim Manish has given clear deposition before the Trial Court in Sessions Case No. 99 of 2002 that there were two persons of same name Gautam. Name of accused No. 6 is Gautam. Accused No. 6 was identified by

victim Manish in the Court. There is also charge of conspiracy by this accused. In this set of circumstances, accused No. 6 is directly involved in abduction of Manish and this aspect of the matter has not been appreciated by the Trial Court and, therefore, order of acquittal passed by the Trial Court for accused No. 6 in Sessions Case No. 99 of 2002 deserves to be quashed and set aside and accused No. 6 may be held guilty mainly for the offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code.

9. Learned Additional Public Prosecutor submitted that there was use of fire arm while abduction of victim Manish. Manish has given clear deposition before the Trial Court that on point of gun/pistol, he was abducted and threat was given by the accused at different places and there was free fight also at Naranpura falia with accused No. 11. At that time also, revolver was aimed at him. Firearm which was recovered was also used and constant threat was given to the victim to cause death in order to get ransom and, therefore, accused has committed an offence punishable under Section 364-A of the Indian Penal Code. It is submitted by learned Additional Public Prosecutor that some of accused i.e. accused No. 4 and accused No. 6 were convicted for the offence of murder. Several antecedents previous behaviour of accused involved in this offence has been pointed out by learned Additional Public Prosecutor.

10. Learned Additional Public Prosecutor submitted that accused Nos. 8 and 9 are lady accused and they were present at Divya Flats in the city of Ahmedabad. There were no convincing reasons for them to stay at Divya Flats with several accused. Accused No. 10 had supplied fire arms and, therefore, acquittal order passed by the Trial Court against accused Nos. 8, 9 and 10 deserves to be quashed and set aside.

Evidence as to abduction, information to police investigation and F.I.R.:

11. Having heard the learned Counsel for both the sides and looking to the evidence which has been read and re-read by learned Counsel for both the sides, it appears that an offence has taken place on 15th July, 1997 at about 7:30 pm. Manish was abducted when he was returning from his office situated at GIDC, Ankleshwar to his residence at Ankleshwar. Manish is basically a Master degree holder in computer and he is running his own business as private limited company. His father is a shroff - financier, residing in Ankleshwar. Upon his abduction, he was compelled to make telephone call that he was kidnapped and thereafter, accused had demanded ransom of Rs. 1 crore. Father of the victim called his brothers, who are residing in Bharuch and they informed DSP, Bharuch on the same day. Tap recording machine was installed. Telephone of residence of the victim was kept in surveillance. Several times call have been received and voices has been recorded. Prosecution has examined several witnesses including STD PCO owners/managers. Several premises have been raided. Firstly accused No. 5 was

arrested as he telephoned on 18th July, 1997 from telephone Nos. 43533 situated at Bharuch. Then, informed that victim was shifted at Divya Flats in the city of Ahmedabad. This premises was raided and accused Nos. 1, 2, 3, 8 and 9 were arrested from Divya Flats, two revolvers were recovered along with several cartridges. Again upon interrogation, it was stated that victim was kept at village Dediasan. This premises was raided and accused No. 7 was arrested. Accused No. 4, telephoned to accused No. 2 and accused No. 2 was compelled to call accused No. 4 and this is how accused No. 4 was arrested nearby Judges Bungalows, Vastrapur, Ahmedabad. Weapon was recovered from Accused No. 4 and necessary panchnama was drawn at Exh-228 and upon his interrogation, it is stated that victim was taken to village: Naranpura Falia, Taluka: Patdi. This place was also raided and victim was found out from his place along with accused No. 11.

12. Looking to the evidence given by P.W. No. 1, Umeshbhai Fakirdas at Exh-93, which is a serviceman at Medical store. Looking to his deposition, he has stated that accused had come to purchase adhesive tap, which was used while abduction of Manish.

13. Likewise as per deposition of P.W. No. 2 - Mr. Dixitbhai Patel, who is examined at Exh-94, who is serving in Viral Opticals, has also identified accused No. 4 in the Court, who had come to purchase black goggles. This goggles was constantly utilised in abduction of Manish. Looking to the deposition of P.W. No. 3, who is complainant and father of victim, it appears that he is financier. He is doing business of landing money (shroff). His son Manish has obtained computer degree of MCA. He is doing business in GIDC, Ankleshwar, he was using his own Maruti car and while returning from his office on 15th July, 1997, he was abducted by accused. Initially phone was received by Manish that dinner for which they had to go, was cancelled. This talks has taken place between Manish and mother of the Manish. Father of Manish came thereafter and again, he has received telephone call from Manish and looking to deposition of P.W. No. 3, he has called his two brothers namely Mahendrabhai Prabhulal Shah (P.W. No. 11) and Pravinchandra Prabhulal Shah (P.W. No. 12) and they informed Mr. Ashish Bhatia, D.S.P. (P.W. No. 34) immediately.

14. Learned Counsel for the convicted accused submitted that there is late recording of FIR on 18th July, 1997 whereas offence has taken place on 15th July, 1997. This contention is not accepted by this Court for the reason that it is not fatal to the prosecution. Whenever there is danger to the life of abducted person, especially when offence is committed under Section 364-A of the Indian Penal Code and when police is informed first and immediately there will be instruction to sub-ordinate police officer for finding out accused and victim and the complaint will be reduced in writing later on. In this case also, Mr. Ashish Bhatia D.S.P. was informed immediately within couple of hours from abduction of Manish. Bharatsingh Kanchanlal Shah, wireless P.S.I., Bharuch - P.W. No. 35 examined at Exh-209 was called upon by D.S.P. and there was instruction for installation of tap recording machine at the house of the victim. Cassettes were also provided by the police. Accused No. 5 was arrested on 18th July, 1997.

Looking to the deposition of this witness including cross-examination of this witness, it appears that this witness is trustworthy and reliable witness. He is father of the victim and there is no reason for this witness to give false statement. There is no enmity between this witness and the accused. Looking to his deposition, it has been proved by the prosecution that abduction of Manish has taken place at 7:30 pm and his son was abducted. So far as depositions of P.W. Nos. 11 & 12 are concerned, they are brothers of original complainant. Looking to their depositions also, it appears that they were called immediately upon receiving phone from accused as well as victim Manish. All these three witnesses have contacted D.S.P. on the very same day. On cross-examination also, nothing is coming out in favour of the accused. They have stated before the Court that they received telephone from Manish that he has been abducted and they have also identified voices in the tap recorded evidence. There is no reason for these witnesses to falsely implicate these accused. They immediately contacted police and looking to their depositions also, they are trustworthy and reliable witnesses.

15. Prosecution has also examined P.W. No. 13 at Exh 136, who has clearly stated before the Trial Court that while returning from his office at 7:30 p.m., he was overtaken by blue/black car and pushed him back side and a gun was pointed out at him. He has been abducted. He was compelled to call his father at his residence. Father of Manish was not in the house. Again Manish was compelled to telephone after couple of hours from abduction. Thus, abduction and its purpose is proved by these P.W. No. 3, 11, 12 and 13. Threat to cause death of Manish was given by the accused, in order to get ransom of Rs. 1 Crore. FIR was registered at Exh-11 on 18th July, 1997, but, as stated by this prosecution witness that immediately on the very same day, District Superintendent of Police, Mr. Ashish Bhatia was informed about offence. As there was danger to the life of victim, D.S.P. informed sub-ordinate police officers and instructions were given for recording of telephone phone calls of the house of the victim and police officer were assigned with their duty to keep watch upon phone-calls from accused and to remain in touch with telephone exchange at Bharuch. Delayed F.I.R. is not fatal to the prosecution. Promptness in such type of cases in recording FIR leads to danger of the life of victim. Looking to the case of the prosecution, father had taken all necessary steps to find out Manish. It ought to be kept in mind that jurisprudence about the early recording of the information about commissioning of an offence is only with a view to avoid false implication of accused. If there is no chance of false implication of accused, if there is no possibility of false accusation, if there is no probability of false narration of facts about offence, late FIR is not fatal to the prosecution.

16. Looking to the deposition of P.W. No. 3 Bhupendrabhai Prabhulal Shah and P.W. Nos. 11, 12 and other police witnesses, it appears that father of the victim immediately informed the highest head of the District i.e. D.S.P. Now, it is left at the wisdom of the Investigating Agency when this information is to be reduced in writing and steps were taken by D.S.P. to find out victim and abducted person and FIR was registered on 18th July, 1997. The goal to be achieved in recording of late FIR, is to avoid danger of life of innocent abducted person. In this case, as stated by the PW 3, PW 11 AND PW 12 whatever information they received from victim Manish was conveyed immediately on the same day within

couple of hours, to D.S.P. Telephone of residence of victim was kept under surveillance. Accused persons were constantly telephoning at the residence of the victim so that the ransom can be received by them. From telephonic call at the house of victim, accused called father of the victim at Koba Circle, Ahmedabad with money and they again called at Village: Kadodara. District: Bharuch. It was certain that accused were moving along with Manish from one place to another. Constantly they are demanding huge amount and, therefore, offence was registered on 18th July, 1997 at 20:22 hours. In this set of circumstances and evidence, it cannot be said that late recording of FIR is fatal to the prosecution. It is pointed out by the Trial Court that already "janva jog entry" No. 42/97 (Exh-173) was registered by P.S.I., GIDC, Ankleshwar on 16th July, 1997 at 13:20 hours. The same is presented at Exh-174. The kidnapping has been reflected in the "janva jog entry" recorded on 16th July, 1997. Looking to the deposition of PW No. 24 Lakhandersing Dixit, P.I., Ankleshwar Police Station examined at Exh-170, when he was in petrolling on 16th July, 1997, he was informed that victim has been abducted from his Maruti Car No. GJ-16-T-9922. There is station entry No. 42/97 to this effect dated 17th July, 1997 at 12:30 p.m. (Exh-172). Maruti car was recovered by drawing panchnama at Exh-272 by PW No. 31 Sunderbhai Ambalal Desai (Exh 201). Police Station entry No. 12 incorporated (Exh.202). Thus, D.S.P. was knowing the offence and already "janva jog entry" (Exh-173) was registered on 15th July, 1997. In this set of circumstances, later FIR is not fatal to the prosecution.

#### 17. EVIDENCE AS TO TAP RECORDING:

Victim Manish P.W. No. 13 (Exh.136) is eye-witness and has identified accused and their voices. It has been brought on record by the different prosecution witnesses like PW No. 3, PW No. 11, PW No. 12 and PW No. 13 about commissioning of the offence. D.S.P. informed his other sub-ordinate police officers for installation of tap recording machine at the residence of the victim. P.W. No. 35- Bharatsingh Kanchanlal Shah, wireless P.S.I. received message at 1:15 p.m. on 16th July, 1997. As per deposition of this witness at Exh-209, he was called to control room by D.S.P.. Upon instruction from D.S.P., tap recording machine was installed and blank cassettes were also given by the police for recording of conversation between the parents of victim and the accused.

18. It has also been contended by learned Counsel for the convicted accused that there is discrepancy of the evidence about who brought cassettes. Father of the victim stated that he has purchased the cassettes whereas police witnesses says that cassettes were provided by the police. Looking to the evidence given by P.W. No. 35- Bharatsingh Shan at Exh-209, cassettes were provided by the police. Looking to the deposition of P.W. No. 11 at Exh-130 (uncle of the victim), he has stated in his deposition that police has provided three cassettes. Thus, cassettes were provided by the police for recording conversation.

19. Learned Counsel for the convicted accused submitted that there is no convincing evidence with the Trial Court that this tap recording evidence is not tampered with. It is also submitted that several times, witnesses have heard the cassettes and without recording panchnama, the cassettes were recovered and, therefore, there is no authenticity of cassettes. This contention is not accepted by this Court for the reason that looking to the deposition given by the complainant P.W. No. 3 and looking to the evidence given by Mahendrabhai Prabhulal P.W. No. 11 and Pravinchandra Prabhulal Shah P.W. No. 12 and also looking to the deposition of P.W. No. 66- Jayendrasinh Zala, P.I., - Investigating Officer, examined at Exh-286, cassettes were recovered by drawing panchnama at Exh-242. Panch witnesses namely Vijaykumar Rajnikant has also been examined at Exh-241. Even complainant has stated that the cassettes were recovered by the police. Thus, the cassettes were correctly recovered from the house of victim by drawing necessary panchnama and there is no tampering in these cassettes, after voices of the accused have been recorded. It has been held by the Hon"ble Supreme Court in the case of R.K. Malkani v. State of Maharashtra reported in : 1973CriLJ228 , especially in para 23, reads as under:

23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is *res gestae*. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.

Thus, it has been held that (a) there must be identification of voice (b) what is tap recorded must have been proved so that tampering can be avoided (c) it must be relevant. Similar is the ratio decidendi in the case of Ram Singh and Ors. v. Col. Ram Singh reported in : AIR1986SC3 . For proving these necessary ingredients before attaching evidenciary value, prosecution has examined P.W. Nos. 3, 11 and 13 and they have identified their own voices. They have also identified voices of accused Nos. 2, 3, 5 and D.S.P., Bharuch. P.W. Nos. 11 and 12 i.e. Mahendrabhai Prabhulal and Pravinchandra Prabhulal have identified voices of another accused also. Looking to the evidence of victim Manish, there is enough opportunity with Manish to identify the voices of the accused. Looking to expert report at Exh-199, voices of the accused have been proved by the prosecution beyond reasonable doubt. The whole conversation has been transcribed into manuscript. Article 9 cassette was transcribed in manuscript 302, Article 10 cassette was transcribed in manuscript 302/2 and 302/3 and 302/4 and Article 11 cassette was

transcribed in manuscript 302/5, 302/6 and 302/7. In details, prosecution witness Nos. 3, 11 and 13 have been examined for identification of voices. This evidence proves beyond reasonable doubt that voices of accused Nos. 2, 3 and 5 have been identified by these witnesses.

20. It has been vehemently submitted by learned Counsel for accused No. 5 that he had never telephoned from his own telephone at the residence of the victim. In fact, telephone No. 43533 is not belonging to STD PCO of accused No. 5. This contention is not accepted by this Court. Looking to the evidence given by P.W. No. 28 - Atulkumar Sharma, who is examined at Exh-182, who is Divisional Engineer, he has stated in his deposition that accused No. 5 had initially having telephone No. 34119, he applied for transfer of this telephone. He preferred an application and signed as Jay Telecommunication and new telephone number was given to accused No. 5 as 43533. It is also stated by this witness P.W. No. 28 Divisional Engineer that accused No. 5 was also a holder of another phone number 41193 and there was conference facility with local telephone No. 41193. Exh-184 reveals the fact that phone call was received at the house of Manish from Phone No. 43533, which is belonging to accused No. 5. So far as Voice Spectrography is concerned, prosecution has examined P.W. No. 29 - Chandrakumar Mahendrakumar Jain at Exh-196, who is Scientific Officer, C.B.I.. Looking to his deposition, Voice Spectrography Analyst supports the deposition given by P.W. Nos. 3, 11, 12 and 13 read with deposition given by P.W. No. 34 and deposition given by Bharatsingh Kanchanlal, wireless P.S.I., Bharuch. Identification of voices has been done by witnesses as well as by voice spectrography, as per report (Exh-199 - proved by PW No. 29) presented before the Trial Court. Thus, the cassettes were provided by the police witnesses. They were also recovered under panchnama. Panch witnesses namely PW No. 50 Shri Vijaykumar Kayasth was examined at Exh-241. Looking to the deposition of Jayendrasinh Zala, who is Investigating Officer examined at Exh-286, it has been proved by the prosecution that there was no tampering with the tap recording machine and looking to the conversation, as per deposition given by P.W. Nos. 3, 11 and 13, these talks are relevant, so far as these offences are concern. Three ingredients propounded by the Hon"ble Supreme Court, viz - there must be identification of voice by direct evidence, secondly what is recorded must have been proved so that tampering can be avoided that thirdly it must be relevant. All three ingredients have been proved by the prosecution beyond reasonable doubt and, therefore, evidence of recording of conversation reveals the fact that accused have abducted the victim and threatened him to cause death to get ransom in conspiracy with other co-conspirator. No error has been committed by the Trial Court in appreciating the evidence.

Looking to the evidence of P.W. No. 13 victim Manish, P.W. No. 26- Kiritsingh Surubha Zala, P.W. No. 27 - Abhaysingh Devisingh Chudasama and P.W. No. 66 - Jayendrasingh Dilawarsingh Zala, participation in abduction of Manish, by accused Nos. 1, 2, 3, 4, 5, 6 and by accused No. 11 is clearly proved by the prosecution. Looking to their depositions before the trial court, there is enough corroboration from other evidences like depositions given by STD PCO holders, identification of accused by various panchnamas at Exh-145, Exh-148 and Exh.150 also by recovery of number of firearms and cartridges including carbine gun and three magazines containing 57 cartridges. There are also enough

corroboration to participation by convicted accused and by accused No. 6 from various other evidences which is discussed hereinafter.

## 21. TEST IDENTIFICATION PARADE:

Three Test Identification Parades have been held by the prosecution. First Test Identification Parade was held on 24th July, 1997. Executive Magistrate Ahmad Usuf Sajji, who is P.W. No. 15 is examined at Exh-146. Looking to his deposition P.W. No. 13 victim Manish has identified accused Nos. 1 to 5 and accused Nos. 7 to 9. Looking to the deposition of this witness, there is no procedural error in test identification parade. It has been held by Hon'ble Supreme Court in the case of State of Maharashtra v. Suresh reported in : (2000)1SCC471 , especially in para 22 and 23, as under:

22. If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held (vide Budhsen v. State of U.P.; Ramanathan v. State of T.N.)

23. When we scan through Ex.17 minutes of the test identification parade we feel that the safeguards adopted by PW 2 Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably foolproof manner. We feel that the Division Bench niggled on unimportant details and came to the wrong conclusion that the test identification parade was irretrievably vitiated. The reasons by which the testimony of those three witnesses had been jettisoned by the Division Bench were fatuous and we cannot support them.

22. In presence of panchas, Jashwantsingh Muljibava Dodia - P.W. No. 30, who is examined at Exh-200, this test identification parade was held. Even looking to the deposition of this Jashwantsingh Dodia, he has supported the panchnama and victim Manish had enough and adequate opportunity to identify the

accused from 15th July, 1997 onwards as he was with the accused. He has identified voices as well as faces of the accused. Looking to the cross-examination of P.W. No. 15 as well as P.W. No. 30, nothing is coming out in favour of the accused. In fact, test identification parade is not substantive piece of evidence. It confirms what is stated by these witnesses. In search of corroboration, test identification parade is held. Even otherwise also, looking to the deposition of P.W. No. 13 - victim Manish, there is cogent, convincing and reliable evidence before the Trial Court, who had identified accused as well as their voices and narrated clearly the role played by the accused.

23. It has been consistently argued by learned Counsel for the convicted accused that panch witnesses in all three test identification parades are selected and, therefore, no evidenciary value can be attached with these test identification parades. This contention is not accepted by this Court mainly for the reason that panch witness is not the sole eye-witness of these test identification parades. There are other eye-witnesses to these test identification parades. Executive Magistrate is eye-witness to these test identification parades. Executive Magistrate generally selects panch witness, from nearby available persons. Presence of these panch witnesses was there, as per depositions of PW No. 14 and PW 15. Looking to the depositions of P.W. No. 14 and 15, Executive Magistrates for test identification parade dated 21st August, 1997, there is a clear, cogent and convincing evidence regarding legality of the test identification parade. Witnesses over and above victim Manish, who are owners/Managers of different STD PCO have identified accused Nos. 1, 2 and 3. Victim Manish (PW No. 13) is eye-witness of test identification parade. Owners/Managers of different STD PCO situated at different places, like Pavagadh Bus stand, Pavagadh Road, Halol (Panchmahal), Prantij, etc. have also given cogent and convincing evidence before the Trial Court and they have identified different accused. Even telephone bills/registers, maintained by them, which are contemporary evidences have been proved before the Trial Court and proved by the prosecution, which corroborates depositions of P.W. Nos. 3, 11, 12 and 13. First Test Identification Parade was held on 24th July, 1997. It is not possible for the prosecution to fabricate STD PCO owner/manager of Pavagadh, Rajpipla, etc., who were not knowing these accused persons. Bills/Registers have been presented before the Trial Court. All these evidence could not have been got up by the prosecution. Second test identification parade was held on 28th July, 1997. Panchnama was drawn at Exh- 148. Looking to the deposition of P.W. No. 15 at Exh-146 by Ahmad Usuf Sajji, it appears that various prosecution witnesses have identified various accused. For quick look of identification, following are the table:

Prosecution witness	Name of the prosecution witnesses	Identified accused
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P.W. No. 4	Jayeshkumar Patel	Accused No. 1
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P.W. No. 5            Dhaval                            Accused No. 1

P.W. No. 8            Mehboob Rusul Shaikh            Accused No. 3

P.W. No. 9            Vahibbhat Abdul Haji            Accused No. 2

P.W. No. 10            Arvindkumar                    Accused No. 2

Panch witnesses Sabbir Hussain Gulam Mohamad, has been examined by the prosecution at Exh-204. Looking to his deposition also, he supports test identification parade panchnama at Exh-148. Looking to the deposition of P.W. No. 15 and looking to the depositions of other prosecution witnesses, it appears that accused No. 1, 2 and 3 have been identified by different prosecution witnesses. P.W. No. 5 - Dhaval Indravadan, examined at Exh-114, runs STD PCO at Rajpipla. He has clearly stated in his deposition that a cielo car came on 15th July, 1997 and some persons initially telephoned at telephone No. 55196, which was wrong number and, thereafter, another telephone call was made on telephone No. 55169. Looking to Exh.123 - telephone bills of telephones of residence of the victim, there were two telephones at the house of the victim; one telephone No. 55169 and another telephone No. 58167. As per deposition of P.W. No. 5 - STD PCO owner at Rajpipla, he has clearly stated that telephone call was made at Ankleshwar on telephone No. 55169. He has also identified accused No. 1. Likewise other P.W. Nos. 5, 8, 9 and 10 given their depositions. Register maintained at STD PCO and bills were presented before the Trial Court. Looking to their depositions also, no error has been committed by the Executive Magistrate in holding test identification parade and no error has been committed in identification process. Likewise, third test identification parade was held by P.W. No. 14 on 21st August, 1997. Looking to the deposition of Manubhai Patel - P.W. No. 14 examined at Exh-143, he has stated that third test identification parade was held on 21st August, 1997 and P.W. No. 13 - victim Manish had identified accused No. 11. Necessary panchnama was drawn at Exh-145 of test identification parade. This process of test identification parade was held in presence of panch witness Mr. Bechar, who is also examined at Exh-240 and he also supports test identification parade. Panchnama is at Exh-150. Thus, all three test identification parades have been supported by three panch witnesses and by two Executive Magistrates, who have been examined as prosecution witnesses. Looking to the depositions of these witnesses, no error has been committed by the Trial Court in appreciating this evidence. This identification of accused Nos. 1 to 5 and 7 to 9 and 11 by different prosecution witnesses supports the depositions given by P.W. Nos. 3, 11, 12 and 13. Even if the arguments canvassed by learned Counsel for the convicted accused is taken at its highest pitch, the panchs were selected and, therefore, no evidenciary value attached to these test identification parades, not accepted by this Court mainly for the reason that victim Manish - PW No. 13 has given clear, cogent and convincing evidence. Panchas are not only witnesses to these test

identification parades, Secondly for the reason that merely because panchas are selected by Executive Magistrate, there is no reason to brush aside the whole test identification parades. Thirdly for the reason that looking to the depositions of the prosecution witnesses, who have identified different accused whether there is any corroboration or not. In the facts of the present case, different STD PCO holders have been examined as P.W. Nos. 5, 8, 9 and 10. Over and above, P.W. No. 13 - victim Manish, they have not only identified accused Nos. 1 to 3, but prosecution has also collected, presented and proved contemporary evidence. Registers, they were maintaining at STD PCO and telephone bills could not have been fabricated by the prosecution nor by the prosecution witnesses, fourthly for the reason that there is no reason for STD PCO holders to falsely implicate these accused in the offence. All these witnesses are saying in one breath that cielo car came, accused came out and they telephoned at the residence of the victim accused and prosecution has presented their telephone registers and bills. Nothing more or less has been stated by them. There is no exaggeration in their depositions. If this evidence is viewed from deposition of P.W. No. 13 and other documentary evidences, we see no reason to come to another conclusion than what is concluded by the Trial Court that the accused have been correctly identified by the prosecution witnesses in these three different test identification parades. In the year 1997, cielo car of blue/black colour was primarily a different car or is a luxurious car and, therefore, prosecution witnesses might have remembered this incident. All depends upon memories of the witnesses. Always deposition before the Court depends upon observation, memory and reproduction of witness. How prosecution witnesses could have remembered the incident is left to the prosecution witnesses but in the facts of the present case, not only they have identified the accused but the prosecution has presented before the Trial Court their Registers and bills and their depositions getting corroboration by documentary evidence. Thus, accused were identified by different prosecution witnesses in three different test identification parades.

It has been held by Hon"ble Supreme Court in the case of Heera and Anr. v. State of Rajasthan reported in : (2007) 10 SCC 175, para 6 and 7 read as under:

6. ...

23. In State of U.P. v. Boota Singh this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

24. In Ramanbhai Naranbhai Patel and v. State of Gujarat after considering the earlier decisions this Court observed: (SCC p.369, para 20)

20. It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) v. V.C. Shukla : 1980CriLJ965 wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha v. State of Maharashtra : 2000CriLJ380 and State of H.P. v. Lekh Raj : 2000CriLJ44 had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them.

These aspects were recently highlighted in Munshi Singh Gautam (dead) and Ors. v. State of M.P. : 2005CriLJ320 .

7. In the instant case the accused persons have been identified by PWs 1 and 11 and no infirmity was noticed in their evidence. Additionally, evidence of PW 22 clearly shows that all requisite formalities with regard to Test Identification Parade were adopted and followed. In that view of the matter there is no merit in the appeal which is accordingly dismissed.

24. STD PCO HOLDERS" EVIDENCE:

As stated herein above, prosecution has examined Dhaval Indravadan Shah, PW No. 5 at Exh-114, who is owner of STD PCO at Rajipla. In test identification parade, he has identified accused No. 1. He has presented Register maintained at STD PCO at Exh-116 and has stated that on 15th July, 1997 at about 8:00 p.m. a telephone call was made at Ankleshwar on Phone No. 55169. Likewise, Mehboob PW No. 8 was examined at Exh-122, who is owner of STD PCO at Pavagadh Bus Stand and he has identified accused No. 2 and has stated in his deposition that telephone call was made on phone No. 55169 at Ankleshwar. As per document produced at Exh-131 and Exh.132, it appears that two telephones belonged to the father of the victim. This witness has presented bill at Exh-123 and had identified accused No. 3. Though he had turned hostile, looking to the other depositions of Executive Magistrate and Bills at Exh-123, it is proved that accused had telephoned from STD PCO at Ankleshwar at the residence of the victim. Likewise, prosecution has examined Wahid Haji- P.W. No. 9 at Exh-124, who is running STD PCO at Pavagadh Road. He has stated that on 15th July, 1997 blue/black colour car came, some persons came out of the car. He has identified accused No. 2 in test identification parade. He supports the case of prosecution.

25. Prosecution has examined Arvindkumar - P.W. No. 10 at Exh-125, who is STD PCO owner at Halol-Godhara Road. He has identified accused No. 2. Though he has turned hostile, looking to the deposition given by Executive Magistrate, accused No. 2 had telephoned from STD PCO to the residence of the victim. Prosecution has also examined P.W. No. 16 - Rajanikant Patel at Exh-151, who is holder of STD PCO Kalol, (N.G.). He has stated in his deposition that on 16th July, 1997 at about 8:00 a.m., a telephone call was made at Ankleshwar. He has also presented Register maintained by him and at Sr. No. 80, phone number is also mentioned of house of victim Manish and telephone bill at Exh-152 was also presented by this witness. Thus, this witness had telephoned from different STD PCO booths to the residence of the victim. Prosecution has also examined Masumali Rahimbhai Kadiwala - P.W. No. 17, who is examined at Exh-154. He is the owner of STD PCO at Kalol (N.G.). He has stated that on 17th July, 1997 at 2:00 pm, a telephone call was made at Ankleshwar on telephone No. 55167, as per documents at Exh-132, it also belongs to father of the victim. He has presented bill at Exh- 155 for Rs. 93.80 ps. for this telephonic talk. Documentary evidence proves the fact that there was a telephone call from his STD PCO to Ankleshwar on 16th July, 1997 at 2:30 p.m. Likewise, prosecution has also examined Kamlesh Patel, who is owner of STD PCO of Prantij, running in the name of "Ashapura", examined at Exh-210 on 17th July, 1997 a telephone call was made from STD PCO of this witness.

26. Learned Counsel for the convicted accused submitted that some of the STD PCO owners have turned hostile and, therefore, their depositions cannot be relied upon by the Trial Court. This contention is not accepted by this Court mainly for the reason that looking to the depositions of the prosecution witnesses that P.W. Nos. 4, 5, 8, 9 and 10 have identified accused Nos. 1 to 3 in test identification parade held on 28th July, 1997. Panchnama was drawn at Exh-128, which is proved by the prosecution

with the help of deposition given by P.W. No. 15 at Exh-146 and with the help of Sabiir Hussain Gulam Mohamad - P.W. No. 32 examined at Exh.204. Secondly for the reason that it has been held by Hon"ble Supreme Court in the case of Surrender Singh v. State of Haryana reported in : (2006)9SCC247 , that even if panch witness has turned hostile and his signature has been identified, his deposition cannot be brushed aside in totality. Para 7 of the judgement held by Hon"ble Supreme Court in the case of Surrender Singh v. State of Haryana reported in : (2006)9SCC247 , reads as under:

7. With regard to PWs 3 and 4 panch witnesses being turned hostile, this contention was also well considered by the trial court and the High Court. And both the Courts held that their statements do not affect materially the prosecution story. PW 3 stated that pistol or cartridges or currency notes mentioned in Ext.PC were not recovered in his presence. He, however, admitted his signatures over Ext.PC and Ext.PD. PW 4 also stated that the pistol, cartridges or currency notes mentioned in Ext.PC were not recovered in his presence. He also admitted that Ext.PC and Ext.PD bear his signatures. Therefore, both the Courts correctly held that Ext.PC and Ext.PD were recovered in the presence of PWs 3 and 4 who were panch witnesses.

These STD PCO holders are persons, who presented their bills and registers before the Trial Court and in the facts of the present case, different STD PCO holders have presented following documents:

Sr. No.	Exh. No.	Nature of document
1	116	Original register maintained by STD PCO, Rajpipla
2	123	A bill for telephone No. 55169 presented by STD PCO,  Pavagadh Bus stand.
3	153	Register maintained by STD PCO, Kalol (N.G.)
4	152	Bill presented by P.W. No. 16 for telephone call

made at Ankleshwar.

5 155 Bill presented by P.W. No. 17 for telephone call

at Ankleshwar for Rs. 93.80ps..

Thus, from the aforesaid documentary evidence also, it is proved by prosecution that identified accused Nos. 1, 2 and 3 had telephoned from relevant STD PCO booth at house of victim Manish at Ankleshwar. Thus, even if some of the STD PCO holders have turned hostile, their evidence cannot be brushed aside, as per the decision propounded by Hon"ble Supreme Court in the aforesaid judgement especially when enough, adequate and reliable evidence is given by other witnesses.

#### 27. POLICE WITNESSES:

Prosecution has also examined Kiritsingh Zhala as P.W. No. 26 at Exh-177, who is P.I., Bharuch "A" Division Police Station. Looking to his deposition, he was informed by PSI at 1:15 pm on 17th July, 1997 that Manish is abducted and he should remain in touch with Bharuch Telephone Exchange. Arrangement was made for installing tap recording machine at the residence of the victim Manish. Prosecution has also examined Mr. Ashish Bhatia- D.S.P. as P.W. No. 34 at Exh-208. It has been clearly stated by this witness that father of the victim (P.W. No. 3) and his brothers contacted him and pointed out about abduction of Manish as there was danger to his life, the instruction was passed to his subordinate police officer for installation of tap recording machine so that accused can be arrested and victim can be safely obtained from the hands of the accused.

28. Prosecution has also examined P.W. No. 66 at Exh-286 Jayendrasinh Dilavarsinh Zala. This police witness has stated before the Court that initially accused were insisting for sizeable amount and ultimately the amount was fixed at Rs. 50 Lacs. Father of the victim was called at Koba Circle, city of Ahmedabad. Police officer and parents of victim called at Koba circle but accused, for any reason, did not come at Koba circle. Thereafter, they had called father of the victim at District: Surat with money. On 18th July, 1997 a phone call came from Ph. No. 43533 from Gayatrinagar, Bharuch. Immediately this place was raided by Bharatsingh, wireless PSI, Bharuch and accused No. 5 was arrested. Looking to the deposition of this witness, accused No. 5 informed to the police that Manish was kept at Divya Flats in the city of Ahmedabad and, therefore, all come from Bharuch to Ahmedabad. Divya Flats was raided from where accused Nos. 1, 2, 3, 8 and 9 were arrested. A detailed narration has been given against all

the accused as to how at midnight, door of Divya flat was opened and accused were arrested. Upon further interrogation of the accused, accused No. 1 informed that the victim was taken by accused Nos. 3 and 4 at Village: Dediasan. D.S.P. Mr. Chudasama, P.W. No. 27, who is examined at Exh-181, D.S.P. of Anti Terrorist also accompanied police and raided village: Dediasan, from where, accused No. 7 was arrested. Accused No. 7 had expired during the pendency of Criminal appeal. This accused No. 7 was brought at Divya Flat in the city of Ahmedabad and looking to the deposition of this police witness, a phone came on cellular of accused No. 2 and, therefore, police officer asked accused No. 2 who is the person who talked with you. He has told that accused No. 4, who is speaking from nearby area of Judges Bungalow, Vastrapur, Ahmedabad. Police Officer told accused No. 2 to call accused No. 4 and thereafter, police officer went nearby Judges Bungalow, Vastrapur, Ahmedabad and accused No. 4 was arrested along with tamancha by drawing necessary panchnama, with the help of P.W. No. 88. Accused No. 4 was interrogated further and looking to his deposition, Manish was taken to Naranpura Falia, Patdi. This premises was also raided by this police from where victim was found out and accused No. 11 was arrested therefrom. This is how the whole detection of the accused have been narrated. No error has been committed by the Trial Court in appreciating deposition of this police witness. It is consistently argued by learned Counsel for the convicted accused that no statement has been recorded by D.S.P. Mr. Ashish Bhatia and, therefore, his evidence ought to be discarded. Statement of P.W. No. 27 was recorded after one month and, therefore, his evidence has been discarded by the Trial Court. These contentions are not accepted by this Court mainly for the reason that merely because there is delay in recording statement of P.I. , Kirtisingh Zala is not fatal to the prosecution. He has visited and raised several places. Several persons have been arrested. Several revolvers and country made pistols were recovered in the presence of panchas. This documentary evidences supports deposition given by P.W. No. 26 at Exh-177. Likewise, previous statement of Mr. Ashish Bhatia, D.S.P. is not recorded, and that cannot be the sole reason for discarding evidence in totality, especially when his deposition is getting enough corroboration by depositions of other prosecution witnesses and by other documentary evidences and for the reason that there is no inimical relation between these accused and the police. Several panchnama have been drawn in presence of panchas while arresting accused and recovered fire arms from the accused by this police witness. Hon"ble Supreme Court in the case of Satbir v. State of Uttar Pradesh reported in : 1982CriLJ1743 , held that merely statement has been recorded at belated state, is not fatal to the prosecution.

29. It is contended by learned Counsel for accused No. 5 that he has never come from Bharuch to Ahmedabad. The whole story has been fabricated by the prosecution. No log book of police has been presented in the Trial Court and, therefore, their evidence ought not to have been accepted by the Trial Court. This contention is not accepted by this Court mainly for the reason that because log book is not presented before the Trial Court, cannot be the reason for discarding the whole evidence of police witnesses. Accused No. 4 informed that in the Divya Flats, victim was kept. Police came from Bharuch to Ahmedabad at night hours. The premises at Divya Flats bearing No. C/7 was knocked in the name of Kamlesh. Accused No. 5 was compelled to give name of accused No. 1 and it is accused No. 1, who opened door of Divya Flats and from this premises, accused Nos. 1, 2, 3, 8 and 9 were arrested. Thus,

accused No. 5 was a key of Divya Flats. Two revolvers and several cartridges were recovered from this Divya Flats. Even if logbook of police is not maintained or presented as evidence before the trial court, evidence given by police cannot be discarded. Thus, prosecution has proved offence beyond reasonable doubt that accused hatch conspiracy and acted in conspiracy with each other and thereafter they abducted Manish and threatened Manish to cause death in order to get ransom of Rs. 1 Crore. Thus, with the help of aforesaid evidence, it is proved beyond reasonable doubt by the prosecution that accused Nos. 1, 2, 3, 4, 5 and 11 have committed offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code. No error has been committed by the Trial Court in appreciating the evidence of prosecution witnesses. It is also contended by Learned Additional Public Prosecutor for the State that some of the accused have committed several other offence including offence punishable under Section 302 of the Indian Penal Code and while absconding from the earlier offence, the present offence has been committed and has presented jail record before the Court. Apart from his history, here is cogent and convincing evidence from the reliable witnesses that they have abducted Manish and they have threatened him to cause death in order to get ransom.

30. It has been contended by learned Counsel for the convicted accused that there are lot of defects in the investigation. Though witnesses are not cited in the charge-sheet, they have been examined and, therefore, benefit of doubt should be given to the accused. This contention is not accepted by this Court mainly for the reason that it has been held by Hon"ble Supreme Court in the case of State of Karnataka v. K. Yarappa Reddy reported in : 2000CriLJ400 as well as in the case of Karnel Singh v. State of M.P. reported in : 1995CriLJ4173 that merely because there are some errors in the investigation or irregularity in the investigation, the benefit cannot be given to the accused. Late registering of the FIR is the main defect, as per the learned Counsel for the convicted accused but the FIR is not sole basis for conviction. Secondly for the reason that information ought to have been reduced in writing, but at what point of time will depend upon facts of each case. In the cases in which accused threatened victim to cause death, all depends upon wisdom of police officer to put the criminal law in motion by recording FIR immediately. Sometimes threat to cause death of the victim, an offence punishable under Section 364-A of the Indian Penal Code is committed immediate recording of information as FIR, adds to the complexity in the investigating process and, therefore, once the offence is disclosed by the informant. (in the facts of the present case, P.W. No. 3 father of the victim informed DSP) the information can be reduced in writing later on, looking to the nature of offence, effect upon victim etc.. Thus, offence was disclosed earlier in point of time, which was reduced in writing later, but that makes no difference to the accused and no prejudice is caused in this case to the accused. As stated herein above, the need for earlier recording of FIR is to avoid implicating false accused. Here is no question of false implication of any accused because accused were not known on 15th July, 1997 when P.W. No. 3 - father of the victim disclosed offence before Mr. Ashish Bhatia, D.S.P., during night hours. Merely because prosecution witnesses are not cited in the charge sheet, they cannot be examined as prosecution witness, this contention is not accepted by this Court in view of the decision rendered in the case of Miyana Ismailbhai Noormohammed and Ors. v. State of Gujarat reported in : (2003)3GLR2049 , more so, when applications were preferred at Exh-166 and 167 by prosecution seeking permission of the trial court to

examine the prosecution witnesses, whose previous statements were not recorded during investigation and who were not mentioned as prosecution witnesses in the charge-sheet. Both these applications are allowed by the Trial Court. Even otherwise, as per the decision rendered in the case of Miyana Ismailbhai Noormohammed and Ors. v. State of Gujarat reported in : (2003)3GLR2049 , on the basis of no prejudice theory, no illegality has been committed by the prosecution. This aspect of the matter has been correctly appreciated by the Trial Court and we see no reason to take any deviation from the conclusion arrived at by the Trial Court and Trial Court has rightly convicted accused Nos. 2, 3, 4, 5 and 11 mainly for the offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code. There is no substance in Criminal Appeal Nos. 99/2000, 244/2000, 313/2000, 610/2000, 762/2000 and the same are hereby dismissed.

### 31. CRIMINAL APPEAL No. 1326 OF 2006:

The aforesaid Criminal Appeal has been preferred by the State against order of acquittal of original accused No. 6 passed in Sessions Case No. 99 of 2002. Accused No. 6 has been acquitted by the Trial Court and, therefore, Criminal Appeal has been preferred by the State, wherein, learned Counsel for the accused No. 6 submitted that there is no much evidence much less evidence alleged by the prosecution before the trial court proving the charge against accused No. 6 and, hence, order of acquittal passed by the Trial Court is true and correct and may not be interfered with by this Court. Accused No. 6 has not been identified by victim Manish nor he has played any role in abduction of victim Manish. Neither this accused has been identified by any STD PCO holder nor any prosecution witnesses have stated about any role played by accused No. 6 nor was present at Divya Flats, when premises was raided by the police. This aspect of the matter has been correctly appreciated by the Trial Court.

32. We have also heard Learned Additional Public Prosecutor for the State, who has submitted that there is ample evidence provided by the prosecution, which shows participation of accused No. 6 directly in abduction of victim Manish. Charge of conspiracy is levelled against accused No. 6. Cielo car is owned by accused No. 6 and from very beginning this car has been utilized for abduction of victim Manish. When Manish was coming back from his factory to his residence, these blue/black colour cielo car over took maruti car. Few accused came out with revolver from cielo car and pushed victim on backside of maruti car and Manish was informed that he has been abducted. Telephone call was made from different places. Ultimately it was pointed out by witness P.W. No. 4 - Jayeshkumar Patel, who is examined at Exh-107 that he has seen that victim was transferred from Maruti car to Cielo car at Village: Vaghapura. Maruti car was left at that place, which was recovered by Sundarbhai (PW No. 31), who is examined at Exh-201. Maruti car was recovered in abandoned condition and entry No. 12 was made in police station diary at Exh-202. Panchnama was drawn at Exh-272. It is also submitted by Learned Additional Public Prosecutor that cielo car moved from one place to another place. Various STD PCO holders stated this fact before the Trial Court that accused No. 6 was owner of this cielo car. This is how

the accused has been convicted. Apart from use of cielo car in abduction of Manish, there is another ample evidence against accused No. 6. One carbine gun, 3 magazines and several cartridges were also recovered from this accused along with cielo car. Looking to deposition of this prosecution witness Mr. Kiritsingh Zala (Exh.177), accused No. 2 was having information about accused No. 6 and upon his calling, accused No. 6 came with carbine gun and 56 cartridges. Upon interrogation of this accused No. 6, he has shown one more revolver and two cartridges from one house. Its key was found out by this accused which was hide by him previously. This revolver was also recovered in the presence of panch witness PW 6 - Kiranbhai Chaudhari. This accused is also using pager, which was issued in the name of his brother and on this pager, message was received on 18th July, 1997 during morning hours that "Please contact within five minutes on 43533 at Bharuch". This message was sent by accused No. 5. Telephone No. 43533 was belonging to accused No. 5. Over and above this evidence, it is stated by Learned Additional Public Prosecutor for the State that looking to the deposition given by victim Manish, he has clearly stated that there were two persons of same name "Gautam". Accused No. 2 is also having name Gautam, who was already arrested and convicted in Sessions Case No. 99 of 1998. Left out another Gautam is accused No. 6, who is "Gautam Devji Rathod" and lastly it is submitted that victim Manish has identified accused No. 6 in the Court. Thus, offence is proved beyond reasonable doubt against accused No. 6. Accused No. 6 is one of the co-conspirator in abduction of Manish, who was threatened to cause death in order to get ransom. This aspect of the matter has not been appreciated by the Trial Court and, therefore, order of acquittal of accused No. 6 deserves to be quashed and set aside.

33. Having heard the learned Counsel for both the sides and looking to the evidence on record, it appears that there is ample evidence against accused No. 6 presented by the prosecution before the Trial Court. As per deposition given by P.W. No. 25, a blue/black colour cielo car was used for abduction of Manish. As per deposition given by victim Manish, it is this very cielo car, which was in possession of accused No. 6. He came in this cielo car with two revolvers, three magazines and 58 cartridges, upon call of accused No. 2. Thus, accused No. 6 was in conscious possession of cielo car and fire arms. Looking to the deposition of STD PCO holders at different places in this cielo car of blue/black colour accused came and telephone call has been made at the residence of the victim Manish. Telephone bills and registers have been presented before the Trial Court. Looking to the evidence, it appears that accused No. 6 has also shown one more fire arm and revolver and two cartridges. Key of the said premises was found from the bathroom of this accused, as per deposition of Kiritsingh. Looking to the deposition given by victim himself, he has clearly narrated that there were two accused of same name "Gautam". Name of accused No. 2 Gautam Ramanuj and who was already arrested and convicted in Sessions Case No. 99 of 1998 and name of accused No. 6 is also Gautam Devji Rathod. Victim Manish is eye witness of the whole incident. There is no reason for this Court to disbelieve this witness. He is trustworthy and reliable witness. He has also identified accused No. 6 in the Court. Looking to the charge levelled by the prosecution, there is charge of conspiracy. Every act of co-conspirator is furtherance and enhancement of conspiracy with the rest of the co-conspirator. Learned Counsel for accused No. 6 submitted that initially victim could not identify accused No. 6 in test identification parade and, therefore, his identification in the Court ought

not to be given any weightage. This contention is not accepted by this Court mainly for the reason that this is not only the circumstance that this accused was not identified by Manish in Test Identification Parade, but, there is ample evidence proved by the prosecution against reasonable doubt that this accused has participated in abduction of victim Manish, in conspiracy with other co-conspirator.

34. It is vehemently submitted by learned Counsel for accused No. 6 that accused No. 6 was never owner of cielo car but as stated herein above, it has been stated by P.W. No. 25 that this very accused was present at the time of purchase of cielo car. Secondly accused No. 6 came in cielo car by driving himself along with carbine gun and 58 cartridges. He was in conscious possession of cielo car, which was used constantly for the offence of abduction of Manish on 15th July, 1997 and had moved from different places of STD PCO booths, as per prosecution witnesses. Manish has also given cogent and convincing evidence. He has also stated that there were two persons in the same name "Gautam". Accused No. 6 is involved in commissioning of the offence of abduction of Manish and has committed offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code. This aspect of the matter has not been appreciated by the Trial Court.

We have carefully gone through the evidence of P.W. No. 2 Manishbhai Bhupendrabhai Shah (Exh.46), P.W. No. Kiranbhai Rameshchandra Chokshi (Exh.60) and also looking to the deposition given by PW No. 9 Kaushikkumar Dinkarra Pandya (Exh-67) and also looking to the evidence given by PW No. 13 Devisingh Chudasama (Exh.79) and evidence given by PW No. 14 Jayendrasinh Dilavarsinh Zala (Exh-87), prosecution has proved the participation of the present respondent (original accused No. 6) in hatching conspiracy and in abducting victim Manish and in giving threat to cause his death in order to get ransom. This aspect of the matter has not been properly appreciated by the Trial Court. Moreover, it has been stated by Learned Additional Public Prosecutor that his conduct before the trial and after the trial is worth to be noted. He committed present offence when he was absconding for the offence punishable under Section 302 of Indian Penal Code in Sessions Case No. 127 of 1989 and convicted by Learned City Sessions Court at Ahmedabad for life imprisonment. He was granted temporary bail/suspension of sentence under Section 389 of the Code of Criminal Procedure, 1973 from 28th June, 1996 and instead of surrendering to the jail authority within 10 days from which temporary bail was granted, he has remained absconding and committed offence on 15th July, 1997. Thus, the present offence was committed by accused No. 6 when he was absconding in previous offence for which he has been convicted under Section 302 of the Indian Penal Code. Thereafter, he was arrested by the police on 3rd August, 1997 and he was sent to the jail again. He obtained bail in earlier case of Section 302 of the Indian Penal Code on 7th January, 1999 and he was absconding during which Session Case No. 99 of 1998 was conducted and before the charge framed in present case i.e. Sessions Case No. 99 of 1998, he was absconding. Thus, his trial was separated and he remained out till the trial was over. In Sessions Case No. 99 of 1998, the judgement was delivered by learned Additional Sessions Judge in the month of January, 2000. Accused No. 6 remained absconding during the whole trial of Sessions Case No. 99 of 1998 and, therefore, his trial was separated. Thereafter, he was arrested on 2nd September, 2000 and

again he was sent in jail and, therefore, separate case was instituted against the original accused No. 6. Thus, offence was committed by accused No. 6 when he was absconding in the previous case, wherein he was convicted for an offence punishable under Section 302 of the Indian Penal Code. As stated herein above, there are enough, cogent and convincing evidence against accused No. 6, especially looking to the deposition of victim Manish and recovery of cielo car, revolvers, 58 cartridges. Cielo car was used from the very beginning, in the offence of abduction of victim Manish. There is also charge of conspiracy against accused No. 6. Accused No. 2 called accused No. 6 and accused No. 6 came in cielo car along with carbine gun, which reveals the fact that there is live link between accused No. 6 with other accused of Sessions Case No. 99 of 1998, otherwise, there is no reason for accused No. 6 to act as per command of accused No. 2, more so when he was absconding accused of previous offence, he shall not rushed at the back and call of accused No. 2 at Divya Flats and that too with cielo car with carbine gun, three magazines and 58 cartridges. This circumstance is also against accused No. 6. This aspect of the matter has not been properly appreciated by the Trial Court, which led to guilt of accused No. 6. Prosecution has proved the offence punishable under Section 364-A to be read with Section 120-B of the Indian Penal Code, beyond reasonable doubt and, therefore, order of acquittal of accused No. 6 passed in Sessions Case No. 99 of 2002 is hereby quashed and set aside and he is held guilty for offence under Section 364-A to be read with Section 120-B of the Indian Penal Code for abduction of Manish who was threaten to cause death for ransom and is ordered to undergo life imprisonment.

35. It argued that accused No. 6 is already underging sentence imposed by the Court under Section 302 of the Indian Penal Code and, therefore, in the present case accused No. 6 should be given set off, for the period for which he has remained in jail. Looking to Section 428 of the Code of Criminal Procedure, 1973 and looking to the decision rendered by Hon"ble Supreme Court in the case of State of Maharashtra and Anr. v. Najakat alias Mubarak Ali reported in : 2001CriLJ2588 , especially in paras 36 and 42, accused No. 6 is not entitled to any set off in the present case. Paras 36 and 42 of the aforesaid judgment, reads as under:

36. After going through the scheme of the Code and the object for which Section 428 was incorporated, I have reached the conclusion that the law laid down by this Court in Raghbir Singh's case (supra) does not require any review or a new interpretation. Taking any other view would amount to legislating and amending the plain meanings of the section. Giving a contrary interpretation may, in some cases, be against the public policy. Any person accused of a heinous crime, in that event, be at liberty to commit minor offences and being under trial prisoner in the main case, eventually may not get any imprisonment of law for the minor offences committed by him. It cannot be the object of civilised criminal jurisprudence to encourage the repetition of crime by adoption of an approach of liberality. The commercial approach of sale of commodities providing for purchasing of one expensive item and getting three free with it, cannot be imported into criminal justice system. The views of Guwahati High Court in Lalrifela v. State of Mizoram Andhra Pradesh High Court in Gedala Ramulu Naidu v. State of A.P. and Madras High Court in Chinnasamy v. State of Tamil Nadu 1984 Cri LJ 447 would amount to giving bonus

to a person accused of a heinous crime to have the minor offences committed with it virtually without any punishment of law. Delhi High Court in K.C. Das v. State : 14(1978)DLT16B is shown to have adopted an approach which apparently is contradictory in terms. After holding:

The words of the same case" are important. The Section speaks of the "period of detention" undergone by the accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, inquiry or trial of the case in which the accused person has been convicted. The Section makes it clear that the period of detention which it allows to be set off against the term of imprisonment impugned on the accused on conviction must be during the investigation, inquiry or trial in connection with the "same case" in which he has been convicted.

the Court by referring to an illustration formulated by itself in para 3 of the judgment, posed a question to itself, and answered the same, observing:

Will it not be true to say that the accused is an under trial prisoner in the second case in our illustration. If it is so he will be entitled to set off his pre-conviction period against the term of imprisonment imposed on him in the second case as in the first. We see no ground to deny him the benefit in the second case.

42. In the light of the view I have taken the impugned judgment of the High Court cannot be sustained and is liable to be set aside. Allowing the appeal filed by the State the judgment impugned is set aside holding that the respondent is not entitled to the benefit of set off in the sentence awarded to him in the second case.

Thus, expression "same offence" used in Section 428 of the Code of Criminal Procedure, 1973, has been explained to the effect that unless and until the accused has remained under trial prisoner, in the present case, he is not entitled to any set off. Accused No. 6 was never under trial prisoner in the present case. Accused No. 6 - Gautam Devji Rathod is convicted accused for the previous offence for which he has been punished for the offence punishable under Section 302 of the Indian Penal Code, on 30th June, 1997 by City Civil Court at Ahmedabad and he was brought to the Court as convict in the present case for facing the trial. The judgment and order of acquittal of original accused No. 6 dated 31st January, 2006 passed by learned Additional Sessions Judge, Fast Track Court No. 5, Bharuch in Sessions Case No. 99 of 2002 is hereby quashed and set aside. This Criminal Appeal No. 1326 of 2006 is allowed.

36. CRIMINAL APPEAL No. 227 OF 2000:

The present appeal has been preferred by the State against acquittal of accused Nos. 7 to 10 in Sessions Case No. 99 of 1998. We have heard this appeal along with aforesaid criminal appeals. It has been contended by Learned Additional Public Prosecutor for the State that all these accused were very much present at Divya Flats in the city of Ahmedabad and they have also participated in abduction of Manish. This aspect of the matter has not been appreciated by the Trial Court. Learned Additional Public Prosecutor submitted that conspiracy is always hatched in secrecy. There is no direct evidence of conspiracy and even if little role is played by the accused in abduction of Manish, he ought to have been convicted for the offence punishable under Section 364-A read with Section 120-B of the Indian Penal Code. This aspect of the matter has not been appreciated by the Trial Court and, hence, order of acquittal passed by the Trial Court deserves to be quashed and set aside.

37. We have heard learned Counsel for the acquitted accused, who has submitted that there is no evidence against original accused Nos. 7 to 10. This aspect of the matter has been correctly appreciated by the Trial Court. In fact, accused No. 7 has expired during the pendency of the Criminal Appeal and, therefore, now, left out original accused are accused Nos. 8 to 10. Out of these three accused, accused Nos. 8 and 9 are lady accused. Even looking to the deposition of victim Manish (P.W. No. 13), no role has been played by these accused. Even if the case of the prosecution is taken at its highest pitch, there is no evidence against these three left out accused. This aspect of the matter has been properly appreciated by the Trial Court and while appreciating as appellate Court unless and until, the order passed by the Trial Court is perverse and prima facie erroneous, may not be interfered with by this Court.

38. Having heard the learned Counsel for both the sides and looking to the evidence on record, it appears that no error has been committed by the Trial Court, while passing the order of acquittal of accused Nos. 7 to 10. Even otherwise also, accused No. 1 has already expired during the pendency of the present Criminal Appeal. Looking to the evidence of victim Manish (P.W. No. 13) no role has been played by these accused. It has been stated by Manish that accused No. 8 had conveyed to him that she will not come with any other accused and in fact, no accusation is levelled by victim Manish against any of these acquitted accused. This aspect of the matter has been correctly appreciated by the Trial Court. Looking to the other evidence also, the prosecution has failed to prove the offence beyond reasonable doubt. Looking to the depositions of the prosecution witnesses, they have not participated in hatching the conspiracy and, therefore, trial court has rightly acquitted accused Nos. 8, 9 and 10. The order passed by the Trial Court cannot be said to be erroneous and perverse and the same cannot be interfered with.

39. As a cumulative effect of the aforesaid evidence of prosecution witnesses have not brought home the charges levelled against accused Nos. 8, 9 and 10. It is alleged that accused No. 10 provided fire arms to the remaining accused, but, there is no convincing evidence against accused No. 10 that this accused has provided fire arms to any other accused. In view of this, we see no reason to alter the order of acquittal passed by the Trial Court in Sessions Case No. 99 of 1998 for original accused Nos. 8, 9 and 10. There is no substance in the present acquittal appeal preferred by the State bearing Criminal Appeal No. 227 of 2000, and, hence, the same is hereby dismissed.