

GAHC010053352020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

CRIMINAL APPEAL NO. 213/2020

- 1) Sri Sanjay Das, S/o- Sri Suchen Das, R/o- Village - Maneswari, Police Station - Bijni, Dist- Chirang
- 2) Sri Dipankar Mallick, S/o Late Madan Mallick, R/o Village - Satianguri, Police Station - Bijni, District - Chirang
- 3) Sri Ram Prasad Biswas, S/o Dam Biswas, R/o Village - Satianguri, Police Station - Bijni, District - Chirang

.....Appellants

-VERSUS-

- 1) The State of Assam, represented by learned Public Prosecutor, Assam
- 2) Sri Dulal Nayak, S/o Late Nalini Ranjan, R/o Village - Maneswari, Police Station - Bijni, District - Chirang

.....Respondents

Advocates :

Appellants : Mr. S.K. Talukdar, Advocate
 Respondent no. 1 : Ms. B. Bhuyan, Senior Advocate and Additional Public
 Prosecutor, Assam; and Ms. R. Das, Advocate
 Date of Hearing : 30.04.2024
 Date of Judgment & Order : 12.06.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER

[M. Choudhury, J]

Taking exception to a Judgment and Order dated 14.11.2019 passed by the Court of learned Additional Sessions Judge, Bijni in Sessions Case no. 291[B]/2018 [old Sessions Case no. 81[B]/2010], the three appellants, namely, [i] Sanjay Das; [ii] Dipankar Mallick; and [iii] Ram Prasad Biswas; [hereinafter referred to as 'the accused-appellants', at places, for easy reference] have preferred the present criminal appeal under Section 374[2], Code of Criminal Procedure, 1973 ['the CrPC' or 'the Code', for short] to assail the same. By the Judgment and Order dated 14.11.2019, the Court of learned Additional Sessions Judge, Bijni [hereinafter referred to as 'the trial court', for short] has convicted the three accused-appellants for the offence under Section 364A, Indian Penal Code [IPC] read with Section 34, IPC and they have been sentenced to undergo rigorous imprisonment for life each and to pay a fine of Rs. 5,000/- each, in default of payment of fine, to undergo rigorous imprisonment for another 3 [three] months each. It has been ordered that the period of detention already undergone by the accused-appellants shall be set-off against the sentence of imprisonment.

2. The case, Sessions Case no. 291[B]/2018 arose out of G.R. Case no. 180/2010 and Bijni Police Station Case no. 120/2010. The First Information Report [FIR] on the basis of which the case, Bijni Police Station Case no. 120/2010 stood registered, was submitted by one Sri Dulal Nayak as the informant on 13.05.2010. In the said First Information Report [FIR], five persons viz. [i] Sanjay Das; [ii] Dipankar Mallick; [iii] Ram Prasad Biswas; [iv] Mahadev Das; and [v] Tapash Mallick [Dabla] were named as accused.

3. In the Written FIR lodged on 13.05.2010, it was *inter alia* mentioned by the informant that when his minor son, Amit Nayak, aged about 15 years, went missing since 10-00 a.m. on 09.05.2010 [Sunday], he lodged one *ejahar* at Bijni Police Station on 10.05.2010 [Monday]. The informant further mentioned that at around 07-50 p.m. on 10.05.2010, some unknown persons called him using a mobile phone no. 9613635121 and demanded Rupees One Crore for release of his son. The informant further stated that he was given a threat that in the event of his failure to pay the amount of Rupees One Crore, they would send his son's deadbody to his house. He further stated that after he informed about the said incident to Bijni Police Station, the Police carried out an investigation into the matter and recovered his son from the house of the accused person, Ram Prasad Biswas where his son was allegedly kept confined by the accused persons. The informant mentioned that the accused persons, named in the FIR, were also found in that house. By lodging the FIR before the Officer In-Charge, Bijni Police Station, the informant requested to give the custody of his recovered minor son to him and to take necessary action against the accused persons by investigating into the matter. One Darbesh Ali was the Scribe of the FIR and Darbesh Ali wrote therein that the FIR was written as per the version of the informant and after the contents of the FIR was read over to the informant and when the informant stated that the FIR had been written as per his version, he subscribed his signature therein.

4. On receipt of the afore-mentioned FIR, the Officer In-Charge, Bijni Police Station registered the same as Bijni Police Station Case no. 120/2010 on 13.05.2010 for the offence under Section 364A, IPC read with Section 34, IPC and entrusted the investigation to one Sonmoni Saikia, a Sub-Inspector of Police attached to Bijni Police Station.

5. The Investigating Officer [I.O.] of the case, during the course of investigation, recorded the statements of the witnesses under Section 161, CrPC. The I.O. also got the statements of [i] Dulal Nayak, the informant; [ii] Amit Nayak, the alleged victim; and [iii] Narayan Sarkar; recorded under Section 164, CrPC. In the course of investigation, the I.O. made certain seizures and also arrested some of the accused persons including the three accused-appellants. The I.O. upon completion of investigation in connection with Bijni Police Station Case no. 120/2010 [G.R. Case no. 180/2010], submitted a charge sheet under Section 173[2], CrPC vide Charge Sheet no. 73/2010 on 27.06.2010 finding *a prima facie case* for the offence under Section 364A, IPC read with Section 34, IPC well established against 6 [six] nos. of accused persons viz. [i] Sanjay Das; [ii] Dipankar Mallick; [iii] Ram Prasad Biswas; [iv] Mahadev Das; [v] Tapash Mallick [Dabla]; and [vi] Sajal Singha Biswas @ Sajal Biswas. It was mentioned in the Charge-Sheet that the charge-sheeted accused person, Dipankar Mallick was found absconding evading arrest during the period of investigation.

6. On submission of the Charge Sheet, the Court of learned Sub-Divisional Judicial Magistrate [M], Bijni secured appearance of the accused persons viz. [i] Sanjay Das; [ii] Ram Prasad Biswas; [iii] Mahadev Das; and

[iv] Sajal Biswas; before it from Jail hajot on 21.07.2010. Finding from the case records that the accused person, Dipankar Mallick was then at large and was yet to make appearance to face the trial, the Court of learned Sub-Divisional Judicial Magistrate [M], Bijni took into consideration the facts that the four accused persons viz. [i] Sri Sanjay Das; [ii] Ram Prasad Biswas; [iii] Mahadev Das; and [iv] Sajal Biswas; were appearing regularly as undertrials from Jail and in the event of delay in appearance of the absentee accused person, Dipankar Mallick, their interests would be prejudiced. In order to expedite the trial, the case was split up against the absentee accused person with a direction to take fresh steps to secure his presence. As the copies were ready on 21.07.2010, the copies were furnished to the four accused persons who were present before the Court on that day, in compliance of the provisions of Section 207, CrPC. As the offence under Section 364A, IPC is exclusively triable by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate [M], Bijni committed the case records of G.R. Case no. 180/2010, arising out of Bijni Police Station Case no. 120/2010, to the Court of Sessions, Bongaigaon as per the provisions of Section 209, CrPC by an Order of Commitment dated 21.07.2010. It was ordered to remand the four accused persons to Jail hajot with a direction to produce them before the learned Court of Sessions, Bongaigaon on the next date to stand the trial. The learned Public Prosecutor was notified accordingly. On receipt of the case records of G.R. Case no. 180/2010 pursuant to the Order of Commitment dated 21.07.2010, the Court of Sessions, Bongaigaon registered the same as Sessions Case no. 291[B]/2018 [old Sessions Case no. 81[B]/2010].

7. On appearance of the accused persons viz. [i] Sanjay Das; [ii] Ram Prasad Biswas; [iii] Mahadev Das; and [iv] Sajal Biswas; from Jail custody before the learned Sessions Judge, Bongaigaon on 10.08.2010 and after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials on record, the learned Sessions Judge, Bongaigaon framed charges under Section 364A, IPC read with Section 34, IPC against all of them. When the charge were read over and explained to the said four accused persons, they pleaded not guilty and claimed to be tried. On 13.02.2012, the accused person, Dipankar Mallick appeared before the learned Sessions Judge, Bongaigaon. The said accused person, Dipankar Mallick was heard on the point of charge and after hearing, the same charge was framed against him. As by that date, 13.02.2012, six prosecution witnesses were examined, the accused person, Dipankar Mallick was asked as to whether he would intend to recall those six prosecution witnesses. As the accused person, Dipankar Mallick submitted that he did not want to recall the prosecution witnesses who were already examined, the trial proceeded for examination of the remaining prosecution witnesses. During the course of the trial, the accused person, Mahadev Das was declared as an absconder and a proclaimed offender by an Order dated 20.01.2015 and the case was filed against him till his arrest. As a result, the trial proceeded thereafter against the remaining four accused persons, that is, [i] Sanjay Das [hereinafter also referred to as 'A-1', at places, for easy reference]; [ii] Dipankar Mallick [hereinafter also referred to as 'A-2']; [iii] Ram Prasad Biswas [hereinafter also referred to as 'A-3']; and [iv] Sajal Singha Biswas @ Sajal Biswas.

8. During the course of the trial, the prosecution side examined eleven nos. of witnesses and exhibited nine nos. of documents to bring home the charge against the accused-appellants. The witnesses examined by the prosecution were :- [i] P.W.1 – Dulal Nayak; [ii] P.W.2 – Smti. Priya Lata Nayak; [iii] P.W.3 – Smti. Niyoti Nayak; [iv] P.W.4 – Narayan Sarkar; [v] P.W.5 – Amit Nayak; [vi] P.W.6 – Ratan Nayak; [vii] P.W.7 – Arun Singha; [viii] P.W.8 - Shankar Das; [ix] P.W.9 - Smti. Sajani Singha; [x] P.W.10 – Dr. Birendra Basumatary; and [xi] P.W.11 – Sonmani Saikia. The documentary evidence which were exhibited by the prosecution during the trial were [i] Ext.-1 – the First Information Report [FIR] lodged on 13.05.2010; [ii] Ext.-2 – the Statement of Dulal Nayak [P.W.1] recorded under Section 164, CrPC; [iii] Ext.-3 – the Statement of Narayan Sarkar [P.W.4] recorded under Section 164, CrPC; [iv] Ext.-4 – the Statement of Amit Nayak [P.W.5] recorded under Section 164, CrPC; [v] Ext.-5 – a Seizure List, M.R. no. 58/2010 dated 13.05.2010; [vi] Ext.-6 – another Seizure List, M.R. no. 57/2010 dated 13.05.2010; [vii] Ext.-7 - a Medical Examination Report of Amit Nayak [P.W.5]; [viii] Ext.-8 – Call Details Record [CDR] Report; and [ix] Ext.-9 – the Charge-Sheet no. 73/2010 dated 27.06.2010. One witness, Jadav Sharma, Sub-Inspector of Police, who was posted at Bijni Police Station on 04.12.2012, was examined as C.W.1. Prior to submission of the Charge-Sheet in the case, another accused person named Tapash Mallick was declared as a juvenile in conflict with law and the case was split up against him. After closure of the evidence from the prosecution side, the four accused persons who stood the trial, were examined under Section 313, CrPC and their pleas were denial. The defence did not adduce any evidence. After appreciation of the evidence on record and hearing the learned counsel for the parties, the learned trial court has convicted the three accused-appellants [A-1, A-2 & A-3] finding them guilty of the charges under Section 364A, IPC read with Section 34, IPC and they have been sentenced in the manner, indicated above. The accused person, Sajal Singha Biswas @ Sajal Biswas has been acquitted from the charge by the learned trial court.

9. We have heard Mr. S.K. Talukdar, learned counsel for the appellants and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor, Assam assisted by Ms. R. Das, learned counsel for the respondent State of Assam.

10. Mr. Talukdar, learned counsel appearing for the accused-appellants has submitted that neither the demand for ransom and threat to cause death or hurt to the allegedly kidnapped/abducted victim nor the demand for ransom and threat to cause death or hurt to the allegedly kidnapped/abducted victim to the parents giving rise to any reasonable apprehension in their minds have been satisfactorily established by the prosecution. It is his contention that the phone call allegedly made from the ends of the accused-appellants to the father of the allegedly kidnapped/abducted victim has not been proved by the prosecution by admissible evidence. The prosecution has only produced a copy of a Call Details Record [CDR] from a service provider without complying the mandatory requirement of certification. He has contended that from the evidence/materials on

record it does not emerge that there was any kind of enticement on the part of the accused-appellants. There was no evidence that the alleged victim was taken away from the lawful guardianship of his parents. There was no threat or wrongful detention or wrongful restraint. The prosecution has miserably failed to prove that the alleged victim was below sixteen years of age on the date of his alleged missing. As an accused found guilty of the offence under Section 364A, IPC is handed over serious punishment like imprisonment, it is incumbent on the part of the prosecution to prove its case beyond all reasonable doubts. By drawing attention to the testimonies of the prosecution witnesses, the learned counsel for the accused-appellants has implored that the standard of proof required even to bring home the charge of kidnapping from lawful guardianship, not to speak of the offence of kidnapping for ransom, has been established in this case. Submitting so, he has contended that the Judgment and Order of conviction and sentence is liable to be set aside acquitting the accused-appellants.

11. Ms. Bhuyan, learned Additional Public Prosecutor appearing for the State has supported the Judgment and Order of the learned trial court by contending that in the case in hand, all the ingredients for the offence under Section 364A, IPC are established by the prosecution by bringing cogent evidence on record. Controverting the submissions of the learned counsel for the accused-appellants, it has been contended that the evidence/materials on record have clearly pointed towards the accused-appellants as perpetrators not only of the crime of kidnapping but also of the crime of kidnapping for ransom. The testimonies of the parents of the victim and the victim are found to be consistent and their testimonies are corroborated by the other prosecution witnesses on material points. Keeping the victim inside a house for a period of three days and making of a demand for ransom with consequential threat to cause death are clear pointers that the victim was kidnapped for ransom. That there was reasonable apprehension in the minds of the parents can be clearly inferred from the sequence of events happened during the period from 09.05.2010 when the minor victim had gone missing, to his recovery from the custody of the accused-appellants on 13.05.2010. Thus, there is no scope for interference in the present case, Ms. Bhuyan has contended from the charges.

12. We have duly considered the rival submissions of the parties and have also perused the evidence/materials on record available in the case records of Sessions Case no. 291[B]/2018, in original. We have meticulously gone through the testimonies of the prosecution witnesses and other evidence/materials on record. We have also considered the decisions referred to by the learned counsel for the parties.

13. In order to examine as to whether the ingredients of the offence with which the accused-appellants was charged for are present or not, it is necessary, at first, to refer to the oral testimonies of the prosecution witnesses and the documentary evidence led by the prosecution during the course of the trial.

14. **Examination-in-Chief of P.W.1** :- P.W.1 deposed that his son, Amit Nayak [hereinafter also

interchangeably referred to as 'Amit'] [P.W.5] was aged about fifteen years of age and was studying in Class-X on the date of the incident, 09.05.2010. At about 11-30 a.m. on that day, Amit [P.W.5] went to *Shishu Kalyan High School, Bijni* alone due to the occasion of *Rabindra Jayanti Day*. When he [P.W.1] was heading home at that point of time, he came across his son, Amit [P.W.5] on the road. As his son, Amit [P.W.5] did not return to home till evening, they enquired about him. Amit [P.W.5] did not return on that day. P.W.1 was told by a boy that he had seen Amit [P.W.5] at *Anamika Studio, Bijni* with Tapash. P.W.5 feigned ignorance as by whom he was given such information. When he [P.W.1] went to *Anamika Studio* on the following day, the owner of *Anamika Studio*, Harlal Rai told him that Amit [P.W.5] came to the studio with Tapash, whose house was situated near to his [P.W.1's] house. Then he [P.W.1] went to the house of Tapash and asked Tapash. He [P.W.1] was told by Tapash that he [Tapash] and Amit [P.W.5] left each other at the market. Thereafter, he [P.W.1] informed about the incident verbally at the Police Station. At around 07-00 p.m. on 10.05.2010, someone made a phone call to him from a mobile phone no. 9613635121 and informed him that they were terrorists; that they had kidnapped his son, Amit [P.W.5]; and that if an amount of Rupees One Crore was not given, then they would send the deadbody of his son, Amit [P.W.5] to him. The matter was informed by him [P.W.1] to his friend, Narayan Sarkar [P.W.4] and Narayan Sarkar [P.W.4] went to the Police Station taking his [P.W.1's] mobile phone with him [P.W.4]. P.W.1 further deposed that Narayan Sarkar [P.W.4] told the Police personnel at the Police Station about the matter and showed the mobile phone to them. Two days later, another phone call was received by him from the same mobile phone number and on that occasion, an amount of Rs. 95 lakhs was demanded. On 13.05.2010, he [P.W.1] was informed over phone by the Police personnel from Bijni Police Station that his son, Amit [P.W.5] had been recovered. When he [P.W.1] asked his son, Amit [P.W.5], Amit [P.W.5] told him that Tapash took him away and handed him over to the accused persons, Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]. P.W.1 further stated that he lodged the FIR [Ext-1] at the Police Station and he exhibited his signature therein as Ext.-1[1]. P.W.1 also exhibited his statement recorded under Section 164, CrPC as Ext.-2[1] and the signature therein as Ext.-2[2].

14.1. **Cross-examination of P.W.1** :- P.W.1 stated that he was not aware as to whom the mobile phone no. 9613635121 belonged. The accused, Tapash was a friend of his son, Amit [P.W.5] and they studied in the same class, though their schools were different. As the accused, Mahadev Das hailed from his locality, he was acquainted with him. P.W.1 stated that while talking with him over phone, the callers who spoke in Assamese, did not mention that they were terrorists. P.W.1 stated that after receipt of the phone call on 10.05.2010, he did not lodge any written FIR at the Police Station. P.W.1 further stated that his son, Amit [P.W.5] went to *Anamika Studio* to load songs and its owner, Harlal Rai told him that another boy went to the studio with his son, Amit [P.W.5]. P.W.1 further stated that Narayan Sarkar [P.W.4] went to the Police Station taking his mobile phone and reported the incident to the Police, but the Police did not seize that mobile phone. He again stated that a written FIR was lodged by him at the Police Station on 10.05.2010 and he lodged Ext.-1 – FIR after recovery of his son,

Amit [P.W.5] on the 13th day of the month. P.W.1 admitted that he did not know from whose house; under what circumstances; and how the Police recovered his son. He denied suggestions that the accused persons did not kidnap his son; and that his son went to visit some place and he was recovered by the Police. He stated that the statement under Section 164, CrPC was recorded one or two days after recovery of his son.

15. **Examination-in-Chief of P.W.2 :-** P.W.2 also stated that the incident took place on 09.05.2010. At that point of time, her son, Amit [P.W.5] was studying in *Shishu Kalyan High School, Bijni* and he was fifteen years of age. As it was *Rabindra Jayanti Day*, her son, Amit [P.W.5] went to the School in between 10-30 a.m. and 11-30 a.m. Though she told her son, Amit [P.W.5] to come back by 12-00 noon, he did not come back home on that day. As her son did not come back, P.W.2 asked her brother-in-law, Kamal Nayak [not a witness] over phone as to whether her son was with him. But she was told by Kamal Nayak that her son, Amit [P.W.5] was not with him. At about 05-00 p.m. on that day, when her husband [P.W.1] was informed about the matter, P.W.1 came back home. Thereafter, enquiries were made in the house of the accused person, Sanjay Das [A-1] as his younger brother was a classmate of her son. P.W.2 stated that she, however, did not know the name of the younger brother of Sanjay Das [A-1]. The younger brother of Sanjay Das [A-1] told her that he did not see her son, Amit [P.W.5] at the school. She was told by another boy [whose name P.W.2 did not know] that her son, Amit [P.W.5] was seen at *Anamika Studio* with Tapash. P.W.2 further deposed that at about 08-00 p.m. on 10.05.2010, the accused, Mahadev Das told them over phone that her son, Amit [P.W.5] was kidnapped by them and demanded an amount of Rupees One Crore, else they would also kidnap her nephew, Gaurab too. P.W.2 also stated that the caller did not disclose his name while talking over phone and she learnt the name later. On 13.05.2010, the Police informed that her son, Amit [P.W.5] had been recovered. Her husband, Dulal Nayak [P.W.1] then, went to the Police Station and came back home at around 07-00 p.m. When asked, her son, Amit [P.W.5] told her that he went with Tapash; that Tapash had a haircut; and that thereafter, they went to see a football match at *Satianguri*. Her son, Amit [P.W.5] had further stated that after some time he was told by Tapash that he would call someone and asking him to wait there, Tapash left the place taking the bicycle of her son. Tapash did not come back thereafter and the bicycle was brought by another boy. P.W.2 was told by her son, Amit [P.W.5] that thereafter, he was handed over to the accused persons, Mahadev Das, Sanjay Das [A-1], Dipankar Mallick [A-2], and Ram Prasad Biswas [A-3] and the said four accused persons kept her son, Amit [P.W.5] inside the jungle. Thereafter, her son, Amit [P.W.5] was brought to *Bishnupur* in the evening hours wherefrom he was recovered by the Police.

15.1. **Cross-examination of P.W.2 :-** P.W.2 deposed that she stated on supposition that the phone call was made by Mahadev Das. P.W.2 further stated that she did not know from whose house and how the Police had recovered her son. P.W.2 also disclosed that the accused, Mahadev Das was their neighbour with whom, they had

no enmity. P.W.2 stated that she had adduced evidence before the court that day after hearing about the incident from her son, Amit [P.W.5].

16. **Examination-in-Chief of P.W.3** :- P.W.3 is the wife of one Gauranga Nayak [not a witness], who is an elder brother of the informant, Dulal Nayak [P.W.1]. P.W.3 deposed that the incident took place on 09.05.2010. Her nephew, Amit [P.W.5], who was then studying in Class-X in *Shishu Kalyan High School, Bijni* and was aged about fifteen/sixteen years, left home at around 10-00 a.m./10-30 a.m. on that day saying that he would go to the School due to the occasion of *Rabindra Jayanti Day*. Amit [P.W.5] did not come back home on that day. When search was made for him by them, they could not find him. At about 07-00 p.m., the accused persons made a phone call to Dulal Nayak [P.W.1]. Later on, P.W.3 heard that the accused persons demanded an amount of Rupees One Crore. Subsequently, P.W.3 came to learn from Amit [P.W.5] that the accused person, Mahadev Das made the phone call and said that they would have kidnapped her [P.W.3's] son, Gaurav too. The Police, later on, informed that Amit [P.W.5] had been recovered. Then, Dulal Nayak [P.W.1] went to the Police Station and brought back Amit [P.W.5]. Amit [P.W.5] told that Tapash took him to *Satian* and there, Tapash called Mahadev Das over phone to inform that Amit [P.W.5] was brought by him. P.W.3 deposed that she was told by Amit [P.W.5] that Mahadev Das and Dipankar Mallick [A-2] took him to jungle by showing dagger and thereafter, to *Bishnupur* at about 01-00 a.m. Subsequently, Amit [P.W.5] was recovered on 13.05.2010 from *Bishnupur*.

16.1. **Cross-examination of P.W.3** :- P.W.3 admitted that she did not state to the Police that Amit [P.W.5] had said to her that Mahadev Das had made the phone call; that in course of the phone call made to Dulal Nayak [P.W.1], he was told in Assamese that his son was kidnapped by terrorists; and that a demand for Rupees One Crore was made. P.W.3 further stated that Amit [P.W.5] and Tapash were friends and Mahadev Das was a resident of their village with whom they had no enmity. P.W.3 also deposed that Mahadev Das was not a member of any terrorist organization. She did not know wherefrom and in what condition the Police had recovered Amit [P.W.5].

17. **Examination-in-Chief of P.W.4** :- P.W.4 is a friend of Dulal Nayak [P.W.1]. He deposed that he knew the accused persons, Sanjay Das [A-1], Ram Prasad Biswas [A-3], Sajal Biswas and Mahadev Das. His house is situated near the house of the informant, Dulal Nayak [P.W.1]. P.W.4 deposed that on 09.05.2010, Dulal Nayak [P.W.1] told him that his son, Amit [P.W.5] after leaving the house to see *Rabindra Jayanti Day* celebration, did not come back home. On 10.05.2010, while he and Dulal Nayak [P.W.1] were going towards Bijni market in the evening hours, someone made a phone call to the mobile phone of Dulal Nayak [P.W.1]. P.W.4 deposed that the said phone call was made by Mahadev Das, who told Dulal Nayak [P.W.1] that his son,

Amit [P.W.5] had been kidnapped by them and demanded an amount of Rupees One Crore, else they would send his deadbody. Then, Dulal Nayak [P.W.1] who became nervous, gave the mobile phone to him. P.W.4 stated to have requested Mahadev Das over phone to release Amit [P.W.5] on humanitarian ground. Then, Mahadev Das asked his name. When P.W.4 disclosed his name to Mahadev Das, Mahadev Das hung up the phone saying that he would not talk to P.W.4. The said incident stated to have taken place between 07-45 p.m. and 08-00 p.m. P.W.4 further stated that thereafter, he went to the Police Station taking the mobile phone of Dulal Nayak [P.W.1]. On 13.05.2010, Amit [P.W.5] was recovered by the Police and the Police also caught Mahadev Das, Sanjay Das [A-1] and Ram Prasad Biswas [A-3] from the house of Ram Prasad Biswas [A-3], situated at Village – *Bishnupur no. 3*. P.W.4 further deposed that Amit [P.W.5] said to him that he had gone to Bijni with Tapash to see *Rabindra Jayanti Day* celebration; that both of them had gone to *Anamika Studio* to load songs but could not do so due to non-availability of electricity at that time; that both of them had got their hairs dressed and then, Tapash suggested to Amit [P.W.5] that they should go to *Satianguri* to enjoy a football match; that on the way, Tapash had handed Amit [P.W.5] over to the accused persons – Mahadev Das, Sanjay Das [A-1], Dipankar Mallick [A-2] and Ram Prasad Biswas [A-3] at a place resembling a jungle; that they had taken Amit [P.W.5] thereafter inside a jungle by showing dagger; that as darkness descended, they had taken Amit [P.W.5] to the house of Ram Prasad Biswas [A-3]; and that Amit [P.W.5] was kept there for about four days. P.W.4 exhibited his statement recorded under Section 164, CrPC as Ext.-3 with his signatures therein as Ext.-3[1] and Ext.-3[2].

17.1. **Cross-examination of P.W.4** :- P.W.4 denied the suggestions that he did not state before the Police that a phone call was made to the mobile phone of Dulal Nayak [P.W.1] while he and Dulal Nayak [P.W.1] were going towards Bijni market; and that he had talked to accused person, Mahadev Das over the mobile phone, which belonged to Dulal Nayak [P.W.1]. P.W.4 testified that he did not know whether after receipt of the said phone call, Dulal Nayak [P.W.1] had informed the Police Station in writing. P.W.4 stated to have heard about the place from Amit [P.W.5] wherefrom Amit [P.W.5] was recovered. He denied a suggestion that he stated before the Magistrate that the son of Dulal Nayak [P.W.1] was kidnapped by extremists. He claimed ignorance about the exact date when his statement was recorded by the Magistrate. He denied suggestions that he did not know about the incident; and that he adduced evidence on the basis of hearsay.

18. **Examination-in-Chief of P.W.5** :- Amit [P.W.5] deposed that he knew Mahadev Das, Sanjay Das [A-1], Dipankar Mallick [A-2], Ram Prasad Biswas [A-3] and Tapash Mallick. Narrating about the incident, P.W.5 deposed that he went to *Shishu Kalyan High School, Bijni* from his house at about 11-30 a.m. on 09.05.2010 to see *Rabindra Jayanti Day* celebration. He met Tapash on the way and Tapash asked him not to go to the School but to accompany him to *Anamika Studio* near *Ballamguri Bus Stand* to download

songs on mobile phone. When they went to *Anamika Studio*, they could not download songs in mobile phone due to non-availability of electricity. Thereafter, he and Tapash got their hairs dressed in a saloon. From the saloon, Tapash took him to *Satianguri* and there was a jungle near that place. There, he came across Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]. Then Dipankar Mallick [A-2] took his bicycle to purchase betel nut. After Dipankar Mallick [A-2] came back with his bicycle, Dipankar Mallick [A-2] took him to the jungle. When inside the jungle, Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2] told him not to shout and to accompany them. P.W.5 deposed that when he asked them why he should go with them, the accused persons told him that they would demand an amount of Rupees One Crore from his family for his release. After keeping him in the jungle during the day hours, Mahadev Das took him, in the evening, on a bicycle to the house of Ram Prasad Biswas [A-3] at *Village – Bishnupur*. At *Bishnupur*, Mahadev demanded an amount of Rupees One Crore from his father, Dulal Nayak [P.W.1] by making a call from a mobile phone and he [P.W.5] too talked to his father, Dulal Nayak [P.W.1]. P.W.5 further deposed that for that night, he stayed in the house of Ram Prasad Biswas [A-3] and on the following day, he was taken to the jungle at *Bishnupur*. Since elephant roams in the jungle, he was again brought back to the house of Ram Prasad Biswas [A-3] where he stayed for the next three days. On the following day, the Police recovered him from the house of Ram Prasad Biswas [A-3] and at that time, Mahadev Das, Sanjay Das [A-1] and Ram Prasad Biswas [A-3] were with him. Dipankar Mallick [A-2] was not with them at that time. Tapash had left them earlier. P.W.5 stated that subsequently, he told all these things to his father, Dulal Nayak [P.W.1]. P.W.5 exhibited his statement recorded under Section 164, CrPC as Ext.-4 with his signatures therein as Ext.-4[1], Ext.-4[2] and Ext.-4[3] respectively.

18.1. Cross-examination of P.W.5 :- P.W.5 stated that the phone call to his father, Dulal Nayak [P.W.1] on the following day was made from inside the jungle at *Bishnupur*. P.W.5 reiterated that he talked to his father as well as to his mother on the following day. P.W.5 stated that when Mahadev Das took him on a bicycle, he did not scream. Except Ram Prasad Biswas [A-3] and his wife, no other person was present in his house and he was not allowed to talk to the wife of Ram Prasad Biswas [A-3]. He stated that there were houses of other families near the house of Ram Prasad Biswas [A-3]. He stated that he and Tapash studied in the same class but in different schools. On the date of the incident, he came across Tapash when Tapash was alone. He stated that he did not come back to his house after getting his hair dressed. He denied the suggestions that he paid a visit to the house of Ram Prasad Biswas [A-3]; that he was not taken there forcibly; that he was aged more than 17 years at the time of the incident; that the statement that the accused persons demanded an amount of Rupees One Crore from his father was false; and that there was no demand for an amount of Rupees One Crore from his father. P.W.5 stated that after he was taken to the Police Station, he was allowed to go to his house with his father. He further denied the suggestions that he gave his statement before the Magistrate in the manner he was taught by his father; and that the accused persons did not commit any offence.

19. **Examination-in-Chief of P.W.6** :- P.W.6 is the younger brother of Dulal Nayak [P.W.1] and an uncle of P.W.5. Narrating about the incident, P.W.6 deposed that his nephew, Amit [P.W.5] left the house at about 10-00 a.m. on 09.05.2010 to see *Rabindra Jayanti Day* celebration. When Amit [P.W.5] did not come back till evening hours, the family members got worried and when they searched for him, Amit [P.W.5] could not be traced. Amit [P.W.5] did not come back in that night. On the following day, his elder brother, Dulal Nayak [P.W.1] lodged a missing report at Bijni Police Station. In the evening hours on the following day, a phone call from an unknown number was made to the mobile phone of Dulal Nayak [P.W.1]. P.W.6 stated that at the time of the said phone call, he was not present at the house. Dulal Nayak [P.W.1] told him that Amit [P.W.5] had been kidnapped and the kidnappers had demanded a ransom of Rupees One Crore. P.W.6 admitted that he did not know the mobile phone number wherefrom and by whom the phone call was made. Later on, they came to know from Amit [P.W.5], after his recovery, that it was Mahadev Das, who made the phone call. P.W.6 deposed, after knowing from Amit [P.W.5], to the effect that Amit [P.W.5] had gone to see *Rabindra Jayanti Day* celebration with Tapash and Tapash had asked him to go to *Satianguri* with him to enjoy a football match; that on their way back when they reached near a jungle, they came across Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]; that Dipankar Mallick [A-2] took his bicycle to go to *Satianguri Chariali* to purchase betel nut; that thereafter, Tapash left leaving others there and Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2] took him inside the jungle at *Satianguri* and kept him there for the day; that when he [Amit-P.W.5] intended to come back to his house, he was shown a dagger and was threatened that he would be killed; that the three of them took him [Amit – P.W.5] close to the jungle of *Bishnupur* and kept him in the house of Ram Prasad Biswas [A-3] for 2/3 days; that the Police recovered him [Amit-P.W.5] from there when Mahadev Das, Sanjay Das [A-1] and Ram Prasad Biswas [A-3] were with him at that time; and that Dipankar [A-2] had left that place on the previous day.

19.1. **Cross-examination of P.W.6** :- P.W.6 stated that he used to reside in the same house with his elder brother, Dulal Nayak [P.W.1]. Sanjay Das [A-1] was from the same village. P.W.6 admitted that he did not hear the conversation made with his elder brother over phone. He denied a suggestion that Amit [P.W.5] did not tell him that the accused persons had put him under threat by showing dagger. P.W.6 admitted that he gave his testimony on the basis of what he had heard from his nephew, Amit [P.W.5].

20. **Examination-in-Chief of P.W.7** :- P.W.7 deposed that he knew Sajal Biswas who was his son-in-law, Ram Prasad Biswas [A-1]; and the informant, Dulal Nayak [P.W.1]; but he did not know the other accused persons. P.W.7 stated that about one year earlier, the Officer In-Charge and other Police personnel from Bijni Police Station came and asked him where he used to charge his mobile phone. To the said query, he replied that he used to charge his mobile phone in the shop [pharmacy] of one Shankar [P.W.8]. On being asked, he took

them to Shankar [P.W.8] and the Police personnel apprehended Shankar [P.W.8]. As at that time the mobile phone was not with him, P.W.7 stated to have told the Police that his son-in-law, Sajal Biswas had taken his mobile phone about two/three days earlier. When the Police asked him about the location of the house of Ram Prasad Biswas [A-3], the Police was shown the house of Ram Prasad Biswas [A-3] by him. P.W.7 saw Mahadev Das, Ram Prasad Biswas [A-3], two other accused persons [names not known to him] and the kidnapped boy [name not known to him] in the house of Ram Prasad Biswas [A-3]. The Police seized a *Hi-Tech Mobile Phone* [with SIM Card] from his house in his presence and in the Seizure List, Ext.-5 so prepared, he subscribed his signature as Ext.-5[1]. P.W.7 exhibited the said *Hi-Tech Mobile Phone* as Mat. Ext.-1. P.W.7 further stated that his another mobile phone set was also seized by Police by a Seizure List, Ext.-6 wherein he subscribed his signature as Ext.-6[1]. He identified his *Sony Ericsson Mobile Phone* as Mat. Ext.-2.

20.1. **Cross-examination of P.W.7** :- P.W.7 stated that he could not say the numbers of the two seized mobile phones. He did not see whether the mobile phones contained SIM Cards or not. It was the Police personnel who told him that the boy whom he saw, had been kidnapped. He further stated that the Police found his mobile handset in the pharmacy of Shankar Das [P.W.8]. He did not know if Sanjay Das [A-1] and Ram Prasad Biswas [A-3] were involved in any case earlier.

21. **Examination-in-Chief of P.W.8** :- P.W.8 stated that he knew Sajal Biswas but he did not know Dulal Nayak [P.W.1] and the rest of the accused persons. In his testimony, P.W.8 stated that in the morning hours on 12.05.2010, Police personnel, along with Arun Singha [P.W.7], came to his house. Prior to that, Arun Singha [P.W.7] had given him a mobile phone to charge its battery. On 12.05.2010, the Police personnel asked him whether the mobile phone, which Arun Singha [P.W.7] had given him, was available with him or not. P.W.8 stated to have told the Police personnel that the mobile phone was in his pharmacy. Taking the Police personnel to his pharmacy, P.W.8 handed over the mobile phone to the Police personnel and the said mobile phone, a *Sony Ericsson Mobile Phone*, was seized vide a Seizure List, Ext.-6 wherein he subscribed his signature as Ext.-6[2]. P.W.8 further deposed that the Police personnel seized another mobile phone from the house of Arun Singha [P.W.7] vide a Seizure List, Ext.-5 wherein he subscribed his signature as Ext.-5[2]. He identified the mobile phone seized vide Ext.-5 as Mat. Ext.-1 and the mobile phone seized vide Ext.-6 as Mat. Ext.-2. P.W.8 stated that later on, he heard that the Police arrested four persons in connection with kidnapping of a boy and Sajal Biswas was one of the arrested persons.

21.1. **Cross-examination of P.W.8** :- P.W.8 stated that he put his signatures in Ext.-5 and Ext.-6 without reading the contents. He further stated that he was not present at the time of seizure of Mat. Ext.-1 mobile phone. He stated that mobile phones like Mat. Ext.-2 mobile phone were generally available and Mat. Ext.-2 seemed to

be the mobile phone, seized from his pharmacy.

22. **Examination-in-Chief of P.W.9** :- P.W.9 stated that she knew Sajal Biswas and Ram Prasad Biswas [A-3] but did not know Dulal Nayak [P.W.1] and any of the other accused persons. She deposed that one day about two years back, she brought his father's [P.W.7] mobile phone and Ram Prasad Biswas [A-3] took the mobile phone of her on that day itself. The mobile phone was taken from her two days prior to the day on which she was questioned by the Police. P.W.9 stated that the mobile phone was returned to her after one day. P.W.9 further stated that later on, she heard that Ram Prasad Biswas [A-3] had made phone call[s] to someone using that mobile phone; and that the Police had apprehended three/four persons including Ram Prasad Biswas [A-3], from his house.

22.1. **Cross-examination of P.W.9** :- P.W.9 stated, in her cross-examination, that her husband [Sajal Singha] was not in the house when the mobile phone was taken away and her husband came later. She did not know the mobile phone number of her father [P.W.7].

23. **Examination-in-Chief of P.W.10** :- P.W.10 was posted as the Deputy Superintendent at Betagaon CHC on 13.05.2010. P.W.10 testified that he examined Amit [P.W.5] at 11-35 a.m. on 13.05.2010. On examination, he found presence of pain in the abdomen and there was no injury marks on the body of Amit [P.W.5] at the time of examination. He exhibited the Medical Examination Report as Ext.-7 with his signature therein as Ext.-7[1].

23.1. **Cross-examination of P.W.10** :- P.W.10 stated that he examined the patient on Police requisition and no case number was mentioned in the requisition. He stated that there was no external injury mark at the abdomen of the patient. He further deposed that pain at abdomen might be due to gastritis or any other disease also and he did not advise USG to detect the cause of the abdomen pain.

24. **Examination-in-Chief of P.W.11** :- P.W.11 was the I.O. of the case, who was posted as the Officer In-Charge, Bijni Police Station on 10.05.2010. P.W.11 stated that on receipt of a written information that a fifteen years old boy named Amit had gone missing, he made a general diary entry vide General Diary Entry no. 244 dated 10.05.2010 and took up the investigation. During the investigation, the informant, Dulal Nayak [P.W.1] came to the Police Station and informed that at about 07-50 p.m. on 10.05.2010, a phone call was received by him from mobile phone no. 9613635121 and the caller demanded a ransom of Rupees One Crore for the release of his son. P.W.11 stated that then, he made a request to the Sub-Divisional Police Officer to collect the Call Details Record [CDR] of mobile phone having SIM Card no. 9613635121. It was found from the CDR that the

phone call came from *Bishnupur* area and the name of the SIM Card holder was Arun Singha [P.W.7]. P.W.11 further stated that he got a secret information that two boys had taken shelter in a house at *Bishnupur* area and they did not come out of that house. They then went to the house of Arun Singha [P.W.7] and asked for his mobile phone. Arun Singha [P.W.7] said that he had left the mobile phone in a shop at *Bishnupur* for charging. Thereafter, they taking Arun Singha [P.W.7] along, went to *Bishnupur* and seized the mobile phone, on being shown by Arun Singha [P.W.7]. On interrogating Arun Singha [P.W.7], he came to learn that Sajal Biswas was using the mobile phone for the last three days and the house of Sajal Biswas was raided but Sajal Biswas was not found in the house. He stated that he came to know from the father of Sajal Biswas [not a witness] that the mobile phone, used by Sajal Biswas, was being used by Ram Prasad Biswas [A-3], an inhabitant of *Village - Bishnupur no. 3*, for the last three days. Accordingly, the house of Ram Prasad Biswas [A-3] was raided and Amit [P.W.5] was recovered from there. He stated to have arrested Sanjay Das [A-1], Ram Prasad Biswas [A-3] and Mahadev Das, who were in the house of Sajal Biswas. P.W.11 deposed that later on, Dulal Nayak [P.W.1], the father of Amit [P.W.5] lodged the FIR [Ext.-1] at the Police Station and the rest of the investigation was done on the basis of the FIR [Ext.-1]. P.W.11 exhibited the Seizure List [Ext.-6] whereby he seized the mobile phone handset with SIM Card from Arun Singha [P.W.7]; the CDR as Ext.-8; and the Charge-Sheet as Ext.-9 which was submitted against Sanjay Das [A-1], Dipankar Mallick [A-2], Ram Prasad Biswas [A-3], Mahadev Das, Tapash Mallick and Sajal Singha. He further exhibited the General Diary Entry no. 244 dated 10.05.2010 as Ext.-10.

24.1. **Cross-examination of P.W.11** :- P.W.11 stated that he was given the charge of investigation on the basis of General Diary Entry no. 244 dated 10.05.2010 [Ext.-10] and the FIR [Ext.-1] was lodged on 13.05.2010. P.W.11 disclosed that he did not remember whether the SIM Card was seized or not and did not ascertain who was the subscriber of the Aircel number. P.W.11 stated that he seized the mobile phone through which the call was made but did not find the SIM Card. He carried out the investigation as per the CDR. He denied a suggestion that he did not recover the victim from the house of Ram Prasad Biswas [A-3] at *Village - Bishnupur no. 3*. P.W.11 admitted that he did not get any medical test done to ascertain the age of the victim. P.W.11 further admitted that he did not collect the birth certificate of the victim during the investigation. He denied the suggestions that the victim was an adult and he submitted the Charge-Sheet without carrying out the investigation properly.

25. **Examination of C.W.1** :- C.W.1, in his deposition, stated that on 04.12.2012, he was in Bijni Police Station. On receipt of a proclamation and attachment order issued by the Court against the accused person, Mahadev Das, the Officer In-Charge, Bijni Police Station deputed him to execute. Accordingly, he went to the house of accused at *Satianguri no. 2* under Bijni Police Station in search of the accused. He went to the house of the accused on several dates but the accused was not in the house. On asking the inmates of the house

and the people of the village, C.W.1 came to learn that the accused, Mahadev Das had not been in the house for a long time. As no movable or immovable property was found in the name of the accused, Mahadev Das, he sent back the order of attachment to the Court with his report. He hung a copy of the proclamation on the wall of a shop at *Satianguri* and in the notice board of the Police Station. The warrant of arrest issued against the accused was kept in the pending file of the Police Station for arrest of the accused in future. C.W.1 exhibited the proclamation as Ext.-‘Ka’; the order of attachment as Ext.-‘Kha’ and his report as Ext.-‘Ga’.

26. First on the evidence led by the prosecution as regards the events prior to the missing of Amit [P.W.5]. Dulal Nayak [P.W.1] who was the informant and the father of Amit [P.W.5], testified that his son was a student in Class-X on 09.05.2010 and at about 11-30 a.m. on 09.05.2010, Amit [P.W.5] went to his school, *Shishu Kalyan High School, Bijni* alone due to the occasion of *Rabindra Jayanti Day*. When Amit [P.W.5] was on his way to the school, he [P.W.1] who was heading home at that time, came across Amit [P.W.5] on the road. Priya Lata Nayak [P.W.2], the mother of Amit [P.W.5], deposed that her son, Amit [P.W.5] was a student of *Shishu Kalyan High School, Bijni* and in between 10-30 a.m. and 11-30 a.m. on 09.05.2010, Amit [P.W.5] left for the school telling her and she told him to come back by 12-00 noon. Niyoti Nayak [P.W.3] also stated that her nephew, Amit [P.W.5] was studying in Class-X in *Shishu Kalyan High School, Bijni*. P.W.3 also stated that Amit [P.W.5] left for his school from his house at around 10-00 a.m./10-30 a.m. and it was the occasion of *Rabindra Jayanti Day*. Narayan Sarkar [P.W.4] deposed on the said aspect after being reported about it by Dulal Nayak [P.W.1], the father of Amit [P.W.5]. P.W.5 deposed to the effect that he left the house for his school, *Shishu Kalyan High School, Bijni* at about 11-30 a.m. on 09.05.2010 to see *Rabindra Jayanti Day* celebration. Ratan Nayak [P.W.6] deposed that his nephew, Amit [P.W.5] left his house at about 10-00 a.m. on 09.05.2010 to see *Rabindra Jayanti Day* celebration.

26.1. From the testimonies of the above prosecution witnesses, it has been established that on the relevant date, that is, on 09.05.2010, Amit [P.W.5] was a student of Class-X in *Shishu Kalyan High School, Bijni*. On that day, *Rabindra Jayanti Day* was being celebrated. Amit [P.W.5] left for his school on that day, in between 10-00 a.m. and 11-30 a.m., from his house to enjoy the celebration of *Rabindra Jayanti Day*. The afore-mentioned prosecution witnesses were not confronted on the above aspects by the defence.

27. The prosecution witnesses also deposed on the events subsequent to Amit’s [P.W.5] going to the school on 09.05.2010. Dulal Nayak [P.W.1] in his evidence-in-chief, had testified that his son, Amit [P.W.5] did not return home on that day [09.05.2010]. When till the evening hours Amit [P.W.5] did not return to his house, he made enquiries and he was told by a boy [not a witness] that Amit [P.W.5] was seen at *Anamika Studio, Bijni* with Tapash. When he [P.W.1] went to *Anamika Studio* on the following day [10.05.2010], the owner of *Anamika*

Studio, Harlal Rai [not a witness] told him that Amit [P.W.5] came to *Anamika Studio* with Tapash. Then, he [P.W.1] went to the house of Tapash, whose house was situated near to his house, and he was told by Tapash that he [Tapash] parted with the company of Amit [P.W.5] at the market. Priya Lata Nayak [P.W.2] deposed that when her son, Amit [P.W.5] did not come back by the evening of 09.05.2010, she enquired with her brother-in-law, Kamal Nayak [not a witness] as to whether her son, Amit [P.W.5] was with him. At about 05-00 p.m. on 09.05.2010, she [P.W.2] informed her husband [P.W.1] that Amit [P.W.5], had not returned. P.W.2 stated that they made enquiries in the house of the accused person, Sanjay Das [A-1] as his younger brother [whose name P.W.2 did not know] was a classmate of her son. P.W.2 deposed that the younger brother of Sanjay Das [A-1] told her that he did not see Amit [P.W.5] at the school. P.W.2 was told by another boy [whose name P.W.2 did not know] that Amit [P.W.5] was seen at *Anamika Studio* with Tapash. P.W.3 stated that when Amit [P.W.5] did not come back home on 09.05.2010, a search was made for him by them but Amit [P.W.5] could not be found. Amit [P.W.5], in his testimony, stated that when he was on his way to the school, he met Tapash on the way and Tapash asked him not to go to the school but to accompany Tapash to *Anamika Studio* to download songs in mobile phones. When he went with Tapash to *Anamika Studio*, songs could not be downloaded in mobile phones due to non-availability of electricity. Thereafter, he [P.W.5] and Tapash got their hairs dressed in a saloon and thereafter, Tapash took him to *Satianguri* and the place they went was near a jungle. There, he came across Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]. Then, Dipankar Mallick [A-2] took the bicycle from him in order to purchase betel nut. After Dipankar Mallick [A-2] came back with his bicycle, Dipankar Mallick [A-2] took him to the jungle.

27.1. From the above testimonies of the prosecution witnesses including the testimony of Amit [P.W.5], it has emerged that Amit [P.W.5] met Tapash when he was on his way to the school to enjoy *Rabindra Jayanti Day* celebration and Tapash asked him not to go to the school but to accompany Tapash to *Anamika Studio, Bijni* to download songs in mobile phones. Thereafter, Amit [P.W.5] and Tapash went to *Anamika Studio, Bijni* to download songs but they could not download songs at *Anamika Studio* as there was no electricity at that point of time. Thereafter, both of them went to *Satianguri*, at the instance of Tapash and going there, Amit [P.W.5] met Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2] at a place near the jungle. At that point of time, Dipankar Mallick [A-2] took the bicycle of Amit [P.W.5] to purchase betel-nut and after a while, Dipankar Mallick [A-2] returned back to the same place with the bicycle. It was thereafter, Dipankar [A-2] took him to the jungle. Amit [P.W.5] did not state as to whether Mahadev Das and Sanjay Das [A-1] were also there and accompanied him and Dipankar Mallick [A-2] to the jungle. From the testimony of Amit [P.W.5], it is evident that the meeting between him and Tapash was not a pre-arranged one. It was a chance meeting on the road when Amit [P.W.5] was on his way to the school.

28. The prosecution witnesses testified on the events subsequent to the entry of Amit [P.W.5] into the jungle after meeting Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2] at a place near the jungle. Dulal Nayak [P.W.1] stated that after his son, Amit [P.W.5] was recovered when he asked Amit [P.W.5], he was told that Tapash took him [Amit-P.W.5] away and handed him [Amit-P.W.5] over to the accused persons, Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]. Dulal Nayak [P.W.1] when cross-examined, admitted that he did not know from whose house; under what circumstances; and how the Police recovered his son, Amit [P.W.5]. Priya Lata Nayak [P.W.2] deposed that her son, Amit [P.W.5] came back to house at around 07-00 p.m. on 13.05.2010 after recovery. When she asked her son, Amit [P.W.5], she was told by Amit [P.W.5] that he went with Tapash; that Tapash had a hair cut; that thereafter, they went to enjoy a football match at *Satianguri*. Amit [P.W.5] further told that after some time he was told by Tapash that he [Tapash] would call someone and asking him [Amit-P.W.5] to wait there, Tapash left the place taking the bicycle of Amit [P.W.5]. Tapash did not come back thereafter and the bicycle was brought by another boy. P.W.2 further deposed that her son, Amit [P.W.5] told her that thereafter, he was handed over to the accused persons, Mahadev Das, Sanjay Das [A-1], Dipankar Mallick [A-2] and Ram Prasad Biswas [A-3] and the four accused persons kept him inside the jungle and thereafter, he was brought to *Bishnupur* in the evening hours wherefrom he was recovered by the Police. When cross-examined, P.W.2 stated that she had adduced evidence before the Court after hearing about the events from her son, Amit [P.W.5]. P.W.2 also admitted that she did not know from whose house and how the Police had recovered her son, Amit [P.W.5]. Niyoti Nayak [P.W.3] testified that she was told by Amit [P.W.5] after recovery, that Tapash took him [Amit-P.W.5] to *Satian* and there, Tapash told Mahadev Das over phone that he [Tapash] had brought Amit [P.W.5]. P.W.3 further deposed that she was told by Amit [P.W.5] that Mahadev Das and Dipankar Mallick [A-2] took him to jungle by showing dagger and thereafter, to *Bishnupur* at about 01-00 a.m. Narayan Sarkar [P.W.4] deposed that Amit [P.W.5] told him that Tapash suggested him [Amit-P.W.5] that they should go to *Satianguri* to enjoy a football match; that on the way, Tapash handed him [Amit-P.W.5] over to the accused persons - Mahadev Das, Sanjay Das [A-1], Dipankar Mallick [A-2] and Ram Prasad Biswas [A-3] at a place resembling a jungle; that the accused persons took Amit [P.W.5] thereafter inside a jungle by showing a dagger; that as darkness descended, they took Amit [P.W.5] to the house of Ram Prasad [A-3]; that Amit [P.W.5] was kept there for about four days. In cross-examination, P.W.4 stated that he heard about the place from Amit [P.W.5] wherefrom Amit [P.W.5] was recovered. P.W.6 stated, after knowing from Amit [P.W.5] that Tapash asked him [Amit] to go to *Satianguri* to enjoy a football match; that on their way back, when they reached a jungle, they came across Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2]; that thereafter, Tapash left leaving others there and Mahadev Das, Sanjay Das [A-1] and Dipankar Mallick [A-2] took to the jungle of *Satianguri* and took him there for the day; that he [Amit-P.W.5] intended to come to his house, he was shown a dagger and was threatened that he would be killed; and that the three of them took him [Amit-P.W.5] close to the jungle of *Bishnupur* and kept him in the house of Ram Prasad Biswas [A-3] for

2/3 days. In cross-examination, P.W.6 admitted that he gave his testimony on the basis of what he had heard from his nephew, Amit [P.W.5].

29. In view of the nature of such testimonies given by the prosecution witnesses, P.W.1, P.W.2, P.W.3, P.W.4 and P.W.6 after the chance meeting with Tapash, it is found necessary to dilate on the aspect how such nature of evidence is to be appreciated.

30. Chapter IV of the Indian Evidence Act, 1872 has dealt with oral evidence. As per Section 59, all facts, except the contents of documents or electronic records, may be proved by oral evidence. As per Section 60, oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. The testimonies of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.6 on the events subsequent to the chance meeting of Amit [P.W.5] with Tapash do not fall within the ambit of direct oral evidence.

31. A Constitution Bench of the Hon'ble Supreme Court of India in ***Neeraj Dutta vs. State [Government of NCT of Delhi]***, reported in ***[2023] 4 SCC 731***, has observed that oral evidence can be classified as original evidence and hearsay evidence. Original evidence is that which a witness reports himself to have seen or heard through the medium of his own senses. The Constitution Bench has observed that although the expression, 'hearsay evidence' is not defined under the Evidence Act, it is, nevertheless, in constant use in the courts. Hearsay evidence is also called derivative, transmitted, or second-hand evidence in which a witness is merely reporting not what he himself saw or heard, and not what has come under the immediate observation of his bodily senses, but what he has learnt in respect of the fact through the medium of a third person. Section 60 of the Evidence Act requires that oral evidence must be direct or positive. The word 'direct' is used in juxtaposition to derivative or hearsay evidence where a witness gives evidence that he receives information from some other person. If that person does not, himself, state such information, such evidence would be inadmissible being hearsay evidence. Hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed such as evidence of an informant of the crime. It has further observed that even with regard to oral evidence, there are distinctions between sub-categories – primary evidence and secondary evidence. Primary evidence is an oral account of the original evidence, that is, of a person who saw what happened and gives an account of it recorded by the court. Secondary evidence is a report or an oral account of

the original evidence.

32. The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say. Sometimes it means whatever a person declares on information given by someone else and sometimes it is treated as nearly synonymous with irrelevant. On the rule of appreciation of hearsay evidence, it has been held in ***Kalyan Kumar Gogoi vs. Ashutosh Agnihotri and another***, reported in **[2011] 2 SCC 532**, that hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. It is a fundamental rule of evidence under the Indian law that hearsay evidence is inadmissible. Some of the reasons which are enumerated as to why hearsay evidence is not received as relevant evidence, are as follows :- [a] the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying 'I do not know but so and so told me'; [b] truth is diluted and diminished with each repetition; and [c] if permitted, gives ample scope for playing fraud by saying 'someone told me that ...'. It would be attaching importance to false rumour flying from one foul lip to another. Thus statements of witnesses based on information received from others is inadmissible.

33. From the testimonies of the prosecution witnesses, P.W.1, P.W.2, P.W.3, P.W.4 and P.W.6, it is evidently clear that the basis on which they had deposed as regards the events subsequent to the chance meeting of Amit [P.W.5] with Tapash including what had happened to Amit [P.W.5] at *Satianguri* on 09.05.2010 and thereafter till his recovery by the Police on 13.05.2010 was what they had heard from Amit [P.W.5]. Thus, the testimonies on the events about what had happened to Amit [P.W.5] subsequent to his [Amit-P.W.5] chance meeting with Tapash on 09.05.2010 and thereafter till his recovery by Police on 13.05.2010 were clearly hearsay and as per the rule of appreciation of hearsay evidence, such evidence is not admissible, more particularly, when the person, Amit [P.W.5] from whom they had heard about the events, had himself testified about the same events.

34. As it is strenuously contended on behalf of the appellants that even the ingredients of the offence under Section 361, IPC which is punishable under Section 363, IPC, not to speak of the ingredients of the offence under Section 364A, IPC, are not present in the case in hand, it would be profitable to extract the provisions of Section 359, Section 361, Section 362, Section 363 and Section 364A of the Penal Code, for ready reference, :-

359. Kidnapping. – *Kidnapping is of two kinds : kidnapping from India, and kidnapping from lawful guardianship.*

361. Kidnapping from lawful guardianship. – *Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

362. Abduction – *Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.*

363. Punishment for kidnapping. – *Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

364A. Kidnapping for ransom, etc. – *Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.*

35. According to Section 364A, IPC, whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom then such a person is to be held guilty for the offence under Section 364A, IPC and the offence is punishable with death, or imprisonment for life and is also liable to pay fine. The important ingredient for the offence under Section 364A, IPC is abduction or kidnapping, as the case may be. Elucidating on the ingredients of the offence under Section 364A, IPC and on its three distinct components, the Hon'ble Supreme Court of India in the case of **Shaik Ahmed vs. State of Telangana**, reported in [2021] 9 SCC 59, has observed as under :-

12. We may now look into Section 364-A to find out as to what ingredients the section itself contemplate for the offence. When we paraphrase Section 364-A following is deciphered:

[i] 'Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction'

[ii] 'and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt',

[iii] 'or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom'

[iv] 'shall be punishable with death, or imprisonment for life, and shall also be liable to fine.'

The first essential condition as incorporated in Section 364-A is 'whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction'. The second condition begins with conjunction 'and'. The second condition has also two parts i.e. [a] threatens to cause death or hurt to such person or [b] by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt. Either part of above condition, if fulfilled, shall fulfil the second condition for offence. The third condition begins with the word 'or' i.e. or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom. Third condition begins with the words 'or causes hurt or death to such person in order to compel the Government or any foreign State to do or abstain from doing any act or to pay a ransom'. Section 364-A contains a heading 'Kidnapping for ransom, etc.' The kidnapping by a person to demand ransom is fully covered by Section 364-A.

13. We have noticed that after the first condition the second condition is joined

by conjunction 'and', thus, whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person.

14. The use of conjunction 'and' has its purpose and object. Section 364-A uses the word 'or' nine times and the whole section contains only one conjunction 'and', which joins the first and second condition. Thus, for covering an offence under Section 364-A, apart from fulfilment of first condition, the second condition i.e. 'and threatens to cause death or hurt to such person' also needs to be proved in case the case is not covered by subsequent clauses joined by 'or'.

15. The word 'and' is used as conjunction. The use of word 'or' is clearly distinctive. Both the words have been used for different purpose and object. Crawford on Interpretation of Law while dealing with the subject 'disjunctive' and 'conjunctive' words with regard to criminal statute made following statement:

" ... The court should be extremely reluctant in a criminal statute to substitute disjunctive words for conjunctive words, and vice versa, if such action adversely affects the accused."

* * * * *

33. After noticing the statutory provision of Section 364-A and the law laid down by this Court in the abovenoted cases, we conclude that the essential ingredients to convict an accused under Section 364-A which are required to be proved by the prosecution are as follows:

[i] Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and

[ii] threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to

death or hurt; or

[iii] causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organisation or any other person to do or abstain from doing any act or to pay a ransom.

Thus, after establishing first condition, one more condition has to be fulfilled since after first condition, word used is 'and'. Thus, in addition to first condition either condition [ii] or [iii] has to be proved, failing which conviction under Section 364-A cannot be sustained.

35.1. The afore-mentioned paragraphs are also referred to and relied upon in the subsequent decision in **Ravi Dhingra vs. State of Haryana**, reported in **[2023] 6 SCC 76**. It has been observed in **Ravi Dhingra** that since the offence under Section 364A, IPC is punishable with death or imprisonment for life, the prosecution in order to bring home the charge has to meet a higher evidentiary standard.

36. The point as to whether the ingredients of the offence under Section 364A, IPC are present or not in the case in hand is to be decided mainly on the basis of the testimony of Amit [P.W.5], who gave first-person account of the events about what had happened to him at **Satianguri** on 09.05.2010 and thereafter, till his recovery by the Police on 13.05.2010. On such events, Amit [P.W.5] testified as under :-

Then Dipankar Mallick took my bicycle and left for purchase of betel nut. After Dipankar came back with the bicycle, Dipankar took me to the jungle. There Mahadev, Dipankar and Sanjay asked me not to shout and to accompany them. When I asked why I should go with them, Mahadev and the other two accused told me that they would demand an amount of Rupees One Crore from my family for my release. After keeping me in the jungle during the day hours, Mahadev took me, in the evening, on a bicycle to the house of accused Ram Prasad Biswas at village Bishnupur. At Bishnupur, Mahadev demanded an amount of Rupees One Crore from my father, over a phone call made from mobile phone. I talked to my father. I stayed the night in the house of Ram Prasad. I stayed in the house of Ram Prasad for three days. On the following day, Police recovered me from the house of Ram Prasad. Then accused Mahadev, Sanjay and Ram Prasad were with me. Accused Dipankar was not there at that time. Tapash had left earlier.

37. The evidence/materials available on record, therefore, needs an examination by taking into consideration

the ingredients of the offence under Section 364A, IPC and the principles laid down in the above-cited decisions.

37.1. The Doctor [P.W.10] who examined Amit [P.W.5] on 13.05.2010, did not find any injury mark on his person except pain in the abdomen, reported by Amit [P.W.5]. The Doctor [P.W.10] did not find any external injury mark in the abdomen of Amit [P.W.5] and it was reported accordingly in the Medical Examination Report [Ext.-7], given by The Doctor [P.W.10]. Amit [P.W.5], in his testimony, had not mentioned anything as regards any injury sustained by him. There is nothing in his testimony to the effect that any of the accused-appellants had assaulted him physically resulting into any kind of hurt to him. On examination of the versions of Amit [P.W.5] and the Doctor [P.W.10] with the Medical Examination Report [Ext.-7], it is evident that no hurt was caused to Amit [P.W.5].

37.2. Amit [P.W.5] had not stated that by any conduct of the accused-appellants any reasonable apprehension arose in his mind that they would either cause hurt to him or he would be killed. There is nothing in the testimony of Amit [P.W.5] that by their conduct, Amit [P.W.5] was threatened by the accused persons to the effect that death or hurt would be caused to him which, in turn, gave rise to a reasonable apprehension in his mind that he would be put to death or hurt would be caused to him. Amit [P.W.5] said that he was only told by the accused persons not to shout and to accompany them. Amit [P.W.5] in his evidence did not state that any force was applied to him at any point of time and he was either wrongfully restrained or wrongfully detained in the house of Ram Prasad Biswas [A-3] at *Village - Bishnupur*.

37.3. Amit [P.W.5] stated about a mobile phone call made to his father, Dulal Nayak [P.W.1] by Mahadev Das. He further stated that while the said mobile phone call was made, he [Amit-P.W.5] also talked to his father, Dulal Nayak [P.W.1]. Amit [P.W.5] was silent as regards the manner he reacted when he was told by the accused persons not to shout and to accompany them so that they would demand an amount of Rupees One Crore from his family for his release. In his testimony, Amit [P.W.5] was silent about any kind of resistance put by him or any kind of protest lodged by him when he was allegedly asked by the accused persons to accompany them to inside the jungle. He stated that he stayed in the house of Ram Prasad Biswas [A-3] for three days and there were many houses nearby. Amit [P.W.5] further disclosed that when he was riding a bicycle with one of the accused persons, he did not scream. He did not throw any light on the presence of the accused-appellants in the same house during those three days.

38. Simply because the alleged victim, Amit [P.W.5] was told not to shout and to accompany the accused persons, as testified by Amit [P.W.5] himself, the same was not enough to treat as a threat to cause death or hurt. In this connection, it is apposite to refer to the following observations made in **Ravi Dhingra** [supra] :-

28. ... For proving the ingredient of threat, the intimidation of the child victim, for the purpose of making him silent, cannot be enough. If the sentence carrying a maximum sentence of death and a minimum sentence of life sentence has such a low evidentiary threshold, the difference between punishments for kidnapping under Sections 363, 364 and 364A shall become meaningless.

39. From the ingredients of the offence defined by Section 364A, IPC, it emerges that in a given case, if the demand for ransom and threat given to the parents or the relatives of the person kidnapped or abducted by the accused were established and because of such demand for ransom and threat, there arose reasonable apprehension in the minds of the parents or the relatives of the person kidnapped or abducted might be put to death or hurt might be caused to him then also the case would fall within scope and ambit of Section 364A, IPC if the prosecution is able to prove such demand for ransom and threat.

40. In the case in hand, there were allegations as regards a demand for ransom and a threat to cause death to Amit [P.W.5], who was allegedly kidnapped on 09.05.2010. It is the case of the prosecution that such demand for ransom and threat came through a phone call made from a mobile phone having SIM [Subscriber Identity Module] no. 9613635121 to the mobile phone of Dulal Nayak [P.W.1] on 10.05.2010. Dulal Nayak [P.W.1] stated, in his evidence-in-chief, to the effect that at around 07-00 p.m. on 10.05.2010, someone made a phone call to him from mobile phone having SIM no. 9613635121 and told him that they were terrorists and they had kidnapped his son, Amit [P.W.5]. He further deposed that the caller by the said phone call, demanded a ransom of Rupees One Crore from him for release of his son with the threat that in the event of failure to pay such ransom, the deadbody of his son would be sent to him. In his cross-examination, Dulal Nayak [P.W.5] made a retreat by saying that while talking to him over mobile phone, the caller did not mention that they were terrorists. Contrary to the version of his son, Amit [P.W.5] who stated that he also talked to his father, Dulal Nayak [P.W.5] did not say that during the said phone call, his son, Amit [P.W.5] also talked to him. Dulal Nayak [P.W.1] also deposed that his friend, Narayan Sarkar [P.W.4] was also with him when the call came on 10.05.2010. Narayan Sarkar [P.W.4] acknowledged that he was with Dulal Nayak [P.W.1] when the call was made on 10.05.2010. Dulal Nayak [P.W.1] stated that after the mobile phone call, he sent Narayan Sarkar [P.W.4] to the Police Station with his mobile phone to tell about the matter and to show the mobile phone of his to the Police. Narayan Sarkar [P.W.4] corroborated Dulal Nayak [P.W.1] on this aspect by stating that he, by taking the mobile phone of Dulal Nayak [P.W.1], went to the Police Station and verbally informed the matter.

40.1. But, the mobile phone of Dulal Nayak [P.W.1] was not seized by the I.O. [P.W.11] during the investigation. The prosecution has not brought any evidence regarding the SIM number and IMEI number in relation to the mobile phone of Dulal Nayak [P.W.1]. The prosecution has not also brought the Call Detail Records [CDR] of

the mobile phone of Dulal Nayak [P.W.1].

40.2. The I.O., P.W.11 deposed that the informant, Dulal Nayak [P.W.1] appeared at the Police Station and verbally informed at about 07-50 p.m. on 10.05.2010 that he had received a phone call at his mobile phone from mobile phone no. 9613635121 and the caller demanded a ransom of Rupees One Crore for the release of his son. No General Diary Entry was exhibited in support of such fact. The General Diary Entry no. 244 dated 10.05.2010 [Ext.-10] was only to the effect that Dulal Nayak [P.W.1] informed that his son, Amit [P.W.5] was missing after going out from house to see *Rabindra Jayanti Day* on 09.05.2010. P.W.11 also stated that he then collected the Call Details Record [CDR] of mobile phone no. 9613635121 and found that the said mobile phone call came from *Bishnupur* area and the name of the SIM Card holder was Arun Singha [P.W.7]. He [P.W.11] then went to the house of Arun Singha [P.W.7] and asked for P.W.7's mobile phone. Arun Singha [P.W.7] told to him [P.W.11] that he left the mobile phone in a shop at *Bishnupur* for charging. Thereafter, P.W.11 taking Arun Singha [P.W.7] with him, went to *Village - Bishnupur* and seized the mobile phone of Arun Singha [P.W.7], on being shown by him. On interrogation, Arun Singha [P.W.7] told the I.O. [P.W.11] that Sajal Biswas was using the mobile phone for the previous three days. When the house of Sajal Biswas was raided, Sajal Biswas was not found in the house. The I.O. [P.W.11] further stated that he learnt from the father of Sajal Biswas [not a witness] that the mobile phone, used by Sajal Biswas, was also used by Ram Prasad Biswas [A-3], a resident of *Village - Bishnupur no. 3* for previous two days. Arun Singha [P.W.7] stated that on one day, Police personnel came and asked him where he used to charge his mobile phone. To the said query, Arun Singha [P.W.7] replied that he used to charge his mobile phone in a shop [pharmacy] of Shankar Das [P.W.8]. Arun Singha [P.W.7] then took the Police personnel to Shankar Das [P.W.8]. Arun Singha [P.W.7] also told the Police personnel that his son-in-law, Sajal Biswas took his mobile phone about 2/3 days earlier. When Shankar Das [P.W.8] was examined, he stated that on 12.05.2010, Police personnel along with Arun Singha [P.W.7] came to his house. Prior to that, Arun Singha [P.W.7] gave him a mobile phone to charge its battery. When Police personnel asked him for the mobile phone, Sankar Das [P.W.8] took the Police personnel to his shop [pharmacy] and handed over the mobile phone of Arun Singha [P.W.7], which was a *Sony Ericsson Mobile Phone*. Arun Singha [P.W.7] and Shankar Das [P.W.8] also testified that the Police personnel seized another mobile phone of brand - *Hi-Tech* from the house of Arun Singha [P.W.7] on 12.05.2010. They deposed that the *Hi-Tech Mobile Phone* was seized vide Ext.-5, Seizure List whereas the *Sony Ericsson Mobile Phone* was seized vide Ext.-6, Seizure List and both of them signed in those Seizure Lists.

40.3. As per Ext.-5, Seizure List, the articles seized were of following descriptions :- [i] One *Hi-Tech Mobile Phone* model no. 1209, IMEI no. 357993/03/679962/0 along with *Airtel SIM Card* bearing no. [SIM Card not mentioned]; [ii] One *Airtel SIM Card* bearing no. 32K 89912 91209 11955 04283; [iii] One

Airtel SIM Card bearing no. 89915 60000 00520 53169; and [iv] One *Vodafone SIM Card* bearing no. 89917 51260 03532 040 0. Vide Ext.-6, Seizure List, one *Sony Ericsson Mobile Phone* model no. K220i with IMEI no. 35243402-433410-9 and one *Airtel SIM Card [SIM Card number not mentioned]* were shown to be seized from the possession of Arun Singha [P.W.7].

40.4. When Arun Singha [P.W.7] was examined, he was shown the *Sony Ericsson Mobile Phone* [Mat. Ext.-2], seized vide Ext.-6, Seizure List. Similarly, Mat. Ext.-2 was shown to Shankar Das [P.W.8] when he was examined before the court. The I.O. [P.W.11] exhibited one CDR as Ext.-8 and it was deposed by him that Ext.-8, CDR was collected by him from service provider, *Aircel*. He also exhibited Ext.-6, Seizure List and proved his signature therein as Ext.-6[3]. But, neither Arun Singha [P.W.7] nor Shankar Das [P.W.8] was asked about the SIM Card number used in the *Sony Ericsson Mobile Phone* [Mat. Ext.-2]. It is noticed that the Seizure List [Ext.-6] was silent about the SIM Card number.

40.5. In order to establish that a phone call was made to the mobile phone of Dulal Nayak [P.W.1] from another mobile phone no. 9613635121 on 10.05.2010, the prosecution side led the above evidence.

41. The question, therefore, is whether the above evidence was sufficient to prove such phone call. If the factum of such phone call is proved as per law, then the same can be treated as a link in connection with the demand for ransom and threat allegedly made by the accused-appellants to Dulal Nayak [P.W.1] giving rise to a reasonable apprehension in his mind or in the minds of the members of the family of Amit [P.W.5], who was stated to be kidnapped.

42. To prove such phone call, it was important for the prosecution to prove that a call was made to the mobile phone of Dulal Nayak [P.W.1] from another mobile phone, which was used by the accused-appellants. It appears that the case of the prosecution was that the alleged phone call was made from a *Sony Ericsson Mobile Phone* using SIM Card no. 9613635121 belonging to Arun Singha [P.W.7]. But, Arun Singha [P.W.7] stated that he could not say the SIM Card numbers of his two mobile phone sets, seized by the I.O. [P.W.11]. Shankar Das [P.W.8] to whom Arun Singha [P.W.7] had handed over the *Sony Ericsson Mobile Phone* did not say anything about the SIM Card number used in the said *Sony Ericsson Mobile Phone*. Sajani Singha [P.W.9] from whom Ram Prasad Biswas [A-3] had allegedly taken the mobile phone handset of Arun Singha [P.W.7] stated that she did not know the mobile phone number of her father, Arun Singha [P.W.7].

42.1. The prosecution side did not lead any evidence as regards the mobile phone of Dulal Nayak [P.W.1]. There was neither any evidence as regards the SIM Card used in the *Sony Ericsson Mobile Phone* nor any

evidence regarding the mobile phone [SIM Card] number, which was used by Dulal Nayak [P.W.1]. In such situation, the mobile handset of Dulal Nayak [P.W.1] would have been the primary evidence under Section 62 of the Evidence Act, 1872. But the prosecution did not seize the mobile phone handset and the SIM Card used by Dulal Nayak [P.W.1] where the alleged phone call came on 10.05.2010 allegedly demanding ransom coupled with threat to kill his son.

42.2. Though one CDR was exhibited as Ext.-8 through the I.O. of the case, the I.O. [P.W.11] stated that the CDR [Ext.-8] was collected by him from the service provider, *Aircel*. The I.O. [P.W.11] when cross-examined by the defence, had admitted that though he seized the mobile phone through which the alleged call demanding ransom was made but he did not find the SIM Card. The I.O. [P.W.11] admitted that he did not ascertain about the subscriber of the Aircel SIM Card number and did not remember whether the SIM Card was seized or not. The evidence/materials on record has revealed that none of the items seized from the possession of Mahadev Das, Sanjay Das [A-1] and Ram Prasad Biswas [A-3] was related to any *Aircel* number. The CDR [Ext.-8] which was obtained from the service provider, *Aircel* was without any certification under Section 65-B of the Evidence Act, 1872. The CDR [Ext.-8] would have been treated as a secondary evidence only if such CDR was accompanied by a certificate under Section 65-B of the Evidence Act, 1872. Noticeably, the CDR [Ext.-8] is only a photocopy. In the absence of a certificate under Section 65-B of the Evidence Act, the CDR [Ext.-8] cannot be treated as a piece of secondary evidence.

42.3. In view of inadmissibility of the CDR [Ext.-8] as secondary evidence, the fallout is absence of any evidence to establish that there was a phone call from a mobile phone having *Aircel SIM Card number* to the mobile phone of Dulal Nayak [P.W.1] on 10.05.2010. With such fallout as regards the phone call made to Dulal Nayak [P.W.1] demanding ransom and the threat to cause death in the event of failure to pay the ransom by which the prosecution had sought to establish a link, the endeavour of the prosecution to connect the alleged demand and the threat with the accused-appellants has also failed. Thus, in the case in hand, the prosecution has failed to lead cogent and legal evidence to establish the part of Section 364A, IPC containing ingredients about, *firstly*, the demand for ransom given by the accused; and *secondly*, the threats given by the accused to the parents or close relatives of the allegedly kidnapped/abducted victim that death or hurt would be caused to the allegedly kidnapped/abducted victim.

43. In view of the above facts and circumstances, we find that the prosecution has not been able to lead cogent and admissible evidence to establish all the ingredients required to record a conviction for the offence under Section 364A, IPC beyond all reasonable doubts. Resultantly, the conviction and sentence recorded by the learned trial court for the offence under Section 364A, IPC against the accused-appellants is found not

sustainable in law. Therefore, the Judgment and Order of conviction and sentence dated 14.11.2019 by the learned trial court in so far as against the accused-appellants under Section 364A, IPC is liable to be set aside. It is accordingly set aside.

44. The next question which has fallen for consideration is whether the accused-appellants can be convicted for the offence of kidnapping from lawful guardianship under Section 363, IPC as it is permissible in an appropriate case if the ingredients of the offence defined in Section 361, IPC are established. From the definitions extracted in paragraph 34 above, Section 359, IPC has described about two kinds of kidnapping and one of the two kinds of kidnapping is kidnapping from lawful guardianship. In so far as the offence of kidnapping from lawful guardianship is concerned, the Penal Code has laid down a distinction between a male minor and a female minor. Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, out of the keeping of the lawful guardian of such minor without the consent of such guardian is said to kidnap such minor from lawful guardianship. It can, thus, be seen that if anyone takes or entices any minor not below sixteen years of age if a male, then it will not fall within the scope and ambit of the offence of kidnapping from lawful guardianship, which is punishable under Section 363, IPC. As per the definition provided for offence of abduction provided by Section 362 of the Penal Code, whoever by force, compels or by any deceitful means induces, any person to go from any place, is said to abduct that person. Thus, the ingredients for kidnapping from lawful guardianship and abduction are different. Abduction *simpliciter* is not an offence under the Penal Code. Similarly, kidnapping *simpliciter* of a male above sixteen years of age is also not an offence under the Penal Code. If abduction or kidnapping of a male above sixteen years of age is done with certain intent specified in the Penal Code, for example, kidnapping/abducting in order to murder [Section 364, IPC], for ransom, etc. [Section 364A, IPC], with intent secretly and wrongfully to confine person [Section 365, IPC], etc. then such kind of abduction or kidnapping is punishable under the Penal Code. As per Section 363, IPC, whoever kidnaps any person from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

45. In the present case, the prosecution was launched with the allegation that the accused persons had kidnapped the alleged victim [P.W.5] from his lawful guardianship. Thus, the most essential ingredient which is required to be established by the prosecution to bring the said charge against the accused-appellants, is to prove that the alleged victim, Amit [P.W.5] being a male, was under sixteen years of age on the date of alleged kidnapping. To find about the kind of evidence led by the prosecution on that aspect, there appears a necessity to revisit the evidence/materials on record.

46. The father and the mother of the alleged victim, Amit [P.W.5], that is, Dulal Nayak [P.W.1] and Priya Lata Nayak [P.W.2] had stated that their son, Amit [P.W.5] was fifteen years of age on the date of his missing. The

aunt of Amit [P.W.5] - Niyoti Nayak [P.W.3] stated that Amit [P.W.5] was aged about fifteen/sixteen years of age on the date of his missing. The alleged victim, Amit [P.W.5] did not say anything as regards his age. But, Amit [P.W.5] was confronted by the defence suggesting that he was aged more than seventeen years at the time of the incident which suggestion Amit [P.W.5] had, however, denied. The I.O. [P.W.11] was confronted by the defence as regards the age of the alleged victim, Amit [P.W.5]. The I.O. [P.W.11] admitted that he did not get any medical test done to ascertain the age of Amit [P.W.5]. The I.O. [P.W.11] also admitted that he did not collect the birth certificate of Amit [P.W.5] during the investigation. The I.O. [P.W.11] only denied a suggestion that the alleged victim, Amit [P.W.5] was a major at the time of the incident.

47. When commission of an offence is dependent on the age of a victim then it is the duty of the prosecution to prove the age of the victim by legally admissible documentary age proof. For the offence of kidnapping from lawful guardianship, defined under Section 361 of the Penal Code, the prosecution has the duty to prove that the age of the victim was under sixteen years of age if a male or under eighteen years of age if a female, by legal admissible documentary age proof. The proof of age irrespective of whether it is by legally admissible documentary age proof or in absence of such documents, any other permissible mode like an ossification test lies upon the prosecution. It has been observed in ***Jarnail Singh vs. State of Haryana***, reported in [2013] 7 SCC 263, that though the age determination procedure laid down in Juvenile Justice [Care and Protection of Children] Act and the Rules framed thereunder is applicable to determine the age of a child in conflict with law, such statutory provision should also be the basis for determining age of a child who is the victim of crime as there is hardly any difference as far as the issue of minority is concerned, between a child in conflict with law and a child who is a victim of crime. Therefore, in the present case, the prosecution had the duty to prove that the age of the alleged victim, Amit [P.W.5] on the date of the incident was below sixteen years of age, more so, as a doubt was raised by the defence during the trial that the age of Amit [P.W.5] was more than seventeen years of age at the time of the incident. In absence of any legally admissible documentary age proof as regards the age of the alleged victim, Amit [P.W.5], the prosecution could have resorted to ossification test to determine the age of the allegedly kidnapped victim. In view of such failure on the part of the prosecution to prove the age of the allegedly kidnapped victim, it is difficult to accept that Amit [P.W.5] was below the age of sixteen years on the date of the incident.

48. From the evidence/materials on record, it is found that there was no active part on the part of the accused-appellants in the act of the alleged victim, Amit [P.W.5] of going out of his house on 09.05.2010 to attend the occasion of ***Rabindra Jayanti Day***. After so going out, the alleged victim, Amit [P.W.5] had a meeting by chance with Tapash on the road and there is nothing on record that the accused-appellants had facilitated such chance meeting. There is nothing on record that there was any active part on the accused-appellants till the time the alleged victim, Amit [P.W.5] reached ***Satianguri*** with Tapash on that very day. From ***Satianguri***, the

alleged victim, Amit [P.W.5] had allegedly joined one of the accused-appellants to enter into the jungle nearby. Such joining appears to have fallen short of the requirement of **taking or enticing away**. From the version of the alleged victim, Amit [P.W.5], it does not emerge that there was any kind of enticement or persuasion on the part of the accused-appellants to accompany them inside the jungle. There is always a distinction between taking away a minor/person and allowing a minor/person to accompany a person.

49. There are few other aspects which also need a mention. The I.O. [P.W.11] exhibited the General Diary Entry no. 244 dated 10.05.2010 as Ext.-10. On perusal of the General Diary Entry no. 244 dated 10.05.2010 as Ext.-10, it is noticed that the said entry was made mentioning that Dulal Nayak [P.W.1] by appearing at the Police Station and by submitting a written application, had informed that his son, Amit [P.W.5] was missing since 09.05.2010. The General Diary Entry no. 244 dated 10.05.2010 [Ext.-10] further mentioned that the report was made as no information about Amit [P.W.5] was found despite searches made. But, no written application on the basis of which the General Diary Entry no. 244 dated 10.05.2010 [Ext.-10] was made, was placed before the trial court or found in the records. Both Dulal Nayak [P.W.1] and Narayan Sarkar [P.W.4] deposed to the effect that after receiving the alleged phone call at about 07-00 p.m. on 10.05.2010 demanding ransom and making threat to cause death, the matter was reported at the Police Station. Had the information of such demand for ransom and threat to cause death to the allegedly kidnapped victim by a person known to both of them was duly reported at the Police Station, there should have been a proper entry in the General Diary Register maintained at the Police Station. Such information was *prima facie* suggestive of commission of a cognizable offence. But the I.O. [P.W.11] was silent on that aspect though he admitted that Dulal Nayak [P.W.1] came to the Police Station and informed that at about 07-30 p.m. on 10.05.2010, a phone call was received by him where the caller demanded a ransom of Rupees One Crore for the release of the allegedly kidnapped victim. Such lacunae in the prosecution case has created a doubt about the entire prosecution case. With such deficiencies in the evidence, mere recovery of allegedly kidnapped/abducted victim and two of the accused-appellants from the same place are not sufficient enough to convict the accused-appellants under Section 363, IPC with the aid of Section 34, IPC. Thus, in the considered view of this Court, the prosecution has not been able to prove all the ingredients required for bringing home the charge under Section 363, IPC against the accused-appellants.

50. For the discussion made and the reasons recorded herein, we are of the considered view that in the present case, the prosecution has not been able to prove all the ingredients required for establishing a case against the accused-appellants to bring home the charge either under Section 364A or under Section 363 of the Penal Code, in aid of Section 34, IPC, beyond all reasonable doubts. It is too well settled that any benefit of doubt, other things being equal, at all stages, goes in favour of the accused. In such view of the matter, we find that the Judgment and Order dated 14.11.2019 passed by the learned trial court in Sessions Case no. 291[B]/2018 is not sustainable in law in so far as the accused-appellants are concerned. Accordingly, the Judgment and Order dated

14.11.2019 of conviction and sentence is set aside in so far as the accused-appellants are concerned. Resultantly, this criminal appeal stands allowed.

51. The accused-appellants are to be released forthwith from custody, if their detention is not required in connection with any other case.

52. The records of the learned trial court be send back forthwith.

JUDGE

JUDGE

Comparing Assistant