Kolkata High Court (Appellete Side)
Abdul Rahaman Kunji vs The State Of West Bengal on 14 November, 2014
Author: Nishita Mhatre

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Nishita Mhatre
And
The Hon'ble Justice Tapash Mookherjee

CRA 454 of 2009

Abdul Rahaman Kunji ... Appellant
vs.
The State of West Bengal ... Respondent

With

CRA 624 of 2009

Akib Ali Khan and Another ... Appellants
vs.
The State of West Bengal ... Respondent

For the Appellant
in CRA 454 of 2009 : Mr. Jayanta Narayan Chatterjee
Ms. Mandira Basu
Mr. Sirsendu Sinharoy
Mr. Dwaipayan Biswas
Mr. Apalak Basu
For the Appellants
in CRA 624 of 2009 : Mr. Sandip Kumar Bhattacharya
Mr. Sovan Kumar Dutta
Mr. Joydeep Chatterjee
Ms. Nabanita Bhadra

For the State : Mr. Saswata Gopal Mukherjee
Mr. Rudradipta Nandy
Mr. Sanjay Banerjee

Judgment on : 14.11.2014

Nishita Mhatre, J.:

1 These appeals are directed against the judgment and order of the Additional Sessions Judge, 2nd Court, Alipore in Sessions Trial No. 1(6)05 corresponds to Sessions case no. 65(1) of 2003 which was decided on 20th May,

2009. The Sessions Court has convicted the appellants for offences punishable under Sections 364A, 120B of the IPC. They have been sentenced to suffer imprisonment for life together with a fine of `5000/- and in default of payment of fine they have been directed to undergo rigorous imprisonment for two months. The trial Court has not convicted the appellants separately under Section 342

IPC as the charge under that Section had merged with the main Section, i.e., 364A.

Facts

2. On 25th July, 2001 one Partha Roy Barman, a Director of Khadim Shoe Company, was abducted on his way to work. He was proceeding to his place of work from his residence at Salt Lake in his SUV, a Tata Safari being driven by his chauffeur. When his car reached C. N. Roy Road at about 11.30 a.m., it was stopped at the junction by two miscreants. They struck the front windscreen and a window of the car. The driver was forcibly dragged out of the car. Two or three other miscreants pulled Partha Roy Barman out of his vehicle and bundled him into a waiting white Maruti 800 car. In the melee, he was shot on his hands. He was made to wear dark glasses and was seated on the rear seat of the waiting car. He was forced to drink some liquid which made him unconscious. When he regained his senses he found himself lying on the floor in a dark room. The victim's driver in the meantime hailed a cab and rushed to his employer's residence. He narrated the incident to Siddhartha Roy Barman, the younger brother of the victim. Siddhartha Roy Barman then lodged a complaint at the Tiljala Police Station. He narrated the manner in which Partha was abducted and mentioned that it was a clear case of abduction for ransom.

3. On receipt of the complaint the police interrogated Siddhartha Roy Barman and Suman Roy Barman, a cousin of Partha. A phone call was received on the landline at Siddhartha Roy Barman's residence from Dubai demanding `20 crores as ransom for the release of Partha Roy Barman. Siddhartha Roy Barman was directed by the caller to use a new SIM card for his cell phone. Calls made to this phone were then intercepted by the police. The CBI Interpol was approached to secure the assistance of other agencies in order to intercept these calls. Accordingly, the Federal Bureau of Investigation, USA (hereinafter referred to as 'FBI'), found that these calls emanated from Dubai and Pakistan. Investigations led to the arrest of Abdul Rahaman Kunji, the appellant in CRA 454 of 2009 and one Swati Paul in Mumbai on 19th August, 2001. The appellants in CRA 624 of 2009, Ashabuddin @ Saukat @ Sahabuddin was arrested on 3rd November, 2001 in Delhi and Akib Ali @ Farasat Ali Khan @ Vali was arrested in Bhopal on 6th November, 2001. Happy Singh @ Harpreet Singh, one of the convicts who had filed CRA 486 of 2009, was arrested in New Delhi. The police arrested several others and ultimately twenty two persons faced the trial. Seventeen of these persons

were acquitted by the Sessions Court. Five persons were found guilty by the Sessions Court, three of whom have filed the present appeals before this Court. Happy Singh whose appeal was being heard along with these appeals expired while in custody during the hearing of the present appeals. His appeal being CRA 486 of 2009 has abated and an order to that effect has been passed by us on 5th June, 2014.

4. The foundation of the case of the prosecution is a conspiracy allegedly hatched by the present appellants and one Aftab Ansari who has been convicted but has not filed any appeal. The prosecution examined 139 witnesses in order to prove its case of a conspiracy hatched for the abduction for ransom of Partha Roy Barman. The prosecution case is mainly based on the testimony of two approvers - Noor Ahmed Molla (PW 34) and Bablu Zaffar @ Sikander (PW 35). Besides this, the prosecution has emphasised the testimony of Swati Paul (PW

44) who was initially arrested, but later discharged from the case. The victim Partha Roy Barman who has been examined as PW 54 and the members of his family, his friends and employees of Khadim India Limited who have been examined as prosecution witnesses have been all declared hostile. The other evidence relied on by the prosecution is the e-mails exchanged between the accused, the call charts and the voice recordings of the accused. The seven remaining persons out of thirty five persons charge-sheeted are facing trial today as they were absconding when the trial was conducted against the other accused.

5. According to the prosecution, the conspiracy was contrived by Aftab Ahmed Ansari and Abdul Rahaman Kunji in Dubai. The details of the execution of the plot were chalked out by the conspirators, including the appellants before us, and were finalised in a flat at 21B, Gorachand Lane. The conspiracy took effect with the abduction of Partha Roy Barman for ransom and his confinement in a room in village Pukuria, which the prosecution witnesses have referred to as the 'Bhoot Bungalow'.

Evidence

6. It is necessary for us to consider the nature of the evidence led by the prosecution to prove its case against the appellants. The victim, who has been examined as PW 54, has supported the prosecution case initially, regarding his abduction and confinement. He has stated that he was proceeding in his SUV Tata Safari to his Company's godown from his Salt Lake residence on 25th July, 2001 at about 9.45 a.m. When he reached the C. N. Roy Road, his vehicle was blocked by another car. 2/3 persons encircled his car. He heard the sound of the windscreen shattering. He realised that he had been shot after his hands became numb and started bleeding. He was dragged out of his own car and forced to wear dark glasses and pushed into the waiting car which had blocked his SUV. He was compelled to drink some liquid due to which he lost his senses. After regaining consciousness he found himself lying on the floor of a dark room. He noticed that he was wearing a lungi and T-shirt and not the clothes in which he had left his residence. One person attended to the wounds sustained on his hands. Due to the darkness in the room he could not differentiate between day and night. He has spoken about the fact that he was made to dress in a kurta- pyjama, shoes and wear the dark glasses once again and forced to sit in the rear seat of a car. He was dropped off after travelling a

certain distance. He hailed an auto rickshaw and ascertained that the area in which he found himself was in Dum Dum. The victim travelled in this rickshaw to Jessore Road. On finding a taxi he paid the rickshaw driver by borrowing money from the taxi driver who drove him to his residence in Salt Lake. The doorkeeper at his residence paid off the taxi driver. Partha Roy Barman has spoken about being admitted to Woodlands Nursing Home on the same day i.e. on 2nd August, 2001 and his return home on being discharged from the hospital on 15th August, 2001. He failed to identify the voices recorded on the cassettes which were produced in Court though one of those voices was his own. He was declared hostile after he denied having seen any of his abductors. The witness denied having any knowledge about the demand for ransom having been made by the appellants or anybody else. He also denied any knowledge about ransom being paid to his abductors. From the evidence of this witness the prosecution has been able to prove that he was abducted by some persons at C. N. Roy Road and that he was shot on his hands. He was confined in a dark room till he was released after 8 days. There is evidence on record to prove that the victim was under treatment in a nursing home, after his release and that he was treated for the wounds on his hands. However, this witness has not been useful to the prosecution to prove that ransom had been demanded or paid to the appellants.

7. The younger brother of Partha Roy Barman, Siddhartha Roy Barman was examined as PW 60. He was the Managing Director of Khadim Shoe Company when the abduction occurred. He has stated that Partha Roy Barman was untraceable from 25th July to 2nd August, 2001. After he denied having received a call from Dubai on 26th July, 2001 on his landline this witness was declared hostile. He denied that a demand of `20 crores was made by the caller from Dubai for the release of Partha Roy Barman. He also denied making any statement to the police on 31st July, 2001 about the abduction of Partha Roy Barman by unknown miscreants. He further denied having settled the ransom amount for `5 crores out of which `3.75 crores were to be paid immediately and the balance of `1.25 crores, within 11/2 months. He also failed to identify his own voice. He was unable to identify any of the accused in the test identification parade.

8. The prosecution has relied on the evidence of customers at roadside tea stalls to support its case about Partha Roy Barman having been abducted at C. N. Roy Road. PW 5 was a customer at one such tea stall on the aforesaid road. He claims to have seen a Maruti 800 car bearing number WB 5144 blocking the road due to which a Tata Safari approaching from the by-pass coming to a halt. He heard the sound of firing and then saw a person from the Tata Safari being forcefully whisked into the Maruti car after which the latter car sped away from the place of occurrence in the direction of the by-pass. The witness has been declared hostile as he did not support the prosecution's case thereafter. His evidence has been corroborated by PW 17 a customer at another tea stall on the same road, except that he has not mentioned the number of the car. Although PW 14, a paan stall owner, has been declared hostile, he has admitted that one person was forcibly dragging out another from the Tata Safari and that he heard the sound of gunshots. He has also admitted having stated to the police that the same person was pushed into the Maruti car which was then driven away. PW 27 has stated that while he was in his shop at C. N. Roy Road, he heard a sound and found that a Tata Safari car had dashed on a lamppost. He also saw a white Maruti car reversing and stopping at the middle of C. N. Roy Road. He noticed a bearded man being pushed out of the Tata Safari and forced into white Maruti 800 car, which then sped away. The prosecution has also relied on the evidence of a

garage mechanic, PW 15 in support of its case that a Maruti 800 car was used for the abduction and that its tail light, which was broken during the incident, was repaired by him.

9. Considering the evidence of Partha and the other witnesses, there is no doubt that Partha Roy Barman was abducted and confined in a dark room. Some of these witnesses including the victim who was supposed to be the star witness for the prosecution have been declared hostile. However it is well settled that the testimony of a hostile witness need not be discarded in its entirety. The evidence on record also proves that Partha returned home nine days after being abducted. It has also been established that he sustained gunshot wounds on his hands for which he was treated while in captivity. His hospitalization on his release has also been proved. It is now necessary for us to ascertain whether the appellants before us were involved in any manner in this crime, either in the abduction of Partha or in the demand for ransom or both.

10. As stated earlier the prosecution has attempted to prove the involvement of the appellants through witnesses who, according to the prosecution, have proved the conspiracy which was initially contrived in Dubai by Aftab Ansari and was formalised at 21B, Gorachand Lane. The plan was executed first at C. N. Roy Road when Partha Roy Barman was abducted and later at the Bhoot Bungalow in village Pukuria where the victim was confined in a dark room for several days. We will now have to ascertain whether the appellants were present either at 21B, Gorachand Lane where the conspiracy was furthered and roles were assigned to those present or when the abduction occurred or at Pukuria where the victim was confined.

11. PW 1 is the owner of the house at 21B, Gorachand Lane. He has spoken about one Mehmood Hasan having rented a flat in the building for residential purposes as well as for his shoe business. According to this witness Mehmood Hasan did not live in the flat. However, the flat was looked after by one Bablu Zaffar and one Asraf who was the cook. He identified Bablu Zaffar and Asraf Molla, i.e., the approvers in this case, in Court.

12. Zahid Ali, PW 3, claims to have visited the aforesaid place along with one Asif and Amir. When he visited 21B, Gorachand Lane on 18th or 20th July, 2001 in the afternoon with Imran, he was introduced to some persons he named who were the accused in this case. The witness has also mentioned the name of Akib who is the appellant in CRA 624 of 2009. According to this witness, when he met Bablu Zaffar (PW 35) on 25th July, 2001 he was not inclined to talk to the witness, as he was rushing for a meeting to be attended by many people at 21B, Gorachand Lane. This witness speaks of having seen Amir entering the premises. He has identified Akib in Court. The witness has stated that on enquiring from Asif he learnt later that the latter had detained a shoe merchant and had released him after collecting money from him.

13. The prosecution has relied on the evidence of PWs 34 and 35 to prove the presence of Akib and the other accused at 21B, Gorachand Lane.

14. PW 34 Noor Ahmed Molla is one of the approvers in this case. He has stated that he was a vegetable vendor. In the latter part of the year 2000, his neighbour Jalal Molla @ Omar bhai offered to find for him a job in a shoe factory belonging to his friend. About 3 to 4 months later, PW 34 was

introduced to one Miraj bhai, who he came to know later was Asif Reza Khan. This person assured PW 34 employment in his new office room. Three months later he accompanied Omar bhai to 21B, Gorachand Lane. He claimed that he was told to stay in the room of Asif Reza Khan. This witness has conceded that he was also known as Asraf. He claimed that when he reached 21B, Gorachand Lane, one Abdullah was present and he was directed by Asif Reza Khan to stay there as a cook for the persons visiting that office. According to him many people visited 21B, Gorachand Lane. They discussed about the abduction of the proprietor of Khadim Shoe Company and about the requirement of a room, vehicle and arms. He has disclosed the names of those persons: Asif Reza Khan, Abdullah, Dilsad, Omar bhai, Sahajahan @ Mizanur Rahaman, Mansur bhai, Sikander, Akram, Abdul Khaleque, Abu Ubaida, Hasan bhai, Sahabaz, Sahadat, Mayem, Abu Aslam, Happy, Rahaman and others. According to this witness, on 23rd July, 2001 Asif Reza Khan directed each of the persons assembled to work as per his instructions, after which they all left at noon from 21B, Gorachand Lane. On 24th July, 2001 many of those persons assembled again at the same place and dispersed at mid-day. The witness has said that only Abdullah returned that night. He has stated that none of these persons visited 21B, Gorachand Lane either on 25th July or till the night of 26th July except Abdullah who returned at night on each of the days. He has then stated that he was directed to return home thereafter. He was arrested about 9 to 10 months later. This witness has identified Happy Singh, Rahaman @ Abdul Rahaman, Abdul Khaleque in Court and has mentioned that he was detained in the same jail as Happy Singh and Abdul Khaleque. He has identified Sikander who was also known as Bablu Zaffar and who is the other approver in this case. The witness has denied the suggestions put to him in the cross-examination that he never visited 21B, Gorachand Lane nor seen the persons who visited that place. He has stated in his cross-examination that he applied for pardon and that he signed the application in English. The witness has further conceded in his cross- examination that he was produced before the SDJM together with all the other accused and that he had met all of them earlier as well as at the time of production. The witness agreed that he had no formal appointment letter as a cook at 21B, Gorachand Lane nor had he any document to indicate that he stayed there or received a salary. He has stated that in the afternoon on 26th July, 2001, two persons enquired about Abdulla and Asif. The witness claimed that he could identify Rahaman, i.e., Abdul Rahaman Kunji and Bablu Zaffar. Thus, this witness has only spoken about the presence of the appellant Abdul Rahaman Kunji and not the other appellants Akib Ali and Ashabuddin at 21B, Gorachand Lane.

15. PW 35 Bablu Zaffar, the other approver, claimed that he knew Asif Reza Khan as they stayed in the same locality since their childhood. According to him, Asif Reza Khan was arrested by the Delhi Police in connection with a TADA case and about 5 years later in the year 1999 he was released and returned to their locality. Asif Reza Khan and this witness boarded a Maruti van on Ripon Street and he was introduced to the driver of the van, Azahar bhai. This witness stated that Asif Reza Khan informed him 2 to 3 days later that the driver of the van was Aftab Ansari and he was warned not to disclose that to anybody. He then identified Aftab Ansari @ Azahar in Court. Asif Reza Khan offered PW 35 a job and directed the witness to inform his family that he was leaving the city for work. Asif Reza Khan then led him to 21B, Gorachand Lane where he found people sitting in a room. He was introduced by Asif Reza Khan to the others as Sikander bhai. The witness claims that he stayed at 21B, Gorachand Lane for more than 3 months. Several persons came to this place. They discussed how to secure a room and a vehicle. He claimed that Asif Reza Khan enquired of him whether he

knew of any rich man or businessman whose abduction would ensure a huge amount of money for them as ransom. According to this witness, he stated that he was unable to suggest any such name. After a few days Asif Reza Khan mentioned the name of the proprietor of Khadim Shoe Company and asked whether he would be a suitable target. PW 35 has claimed that he could not opine on this issue. Asif Reza Khan then informed him that he would have to visit a different place within 2 or 3 days. According to this witness, the others who would visit 21B, Gorachand Lane were Abdullah, Umar bhai, Mansur bhai, Sahajahan, Asraf, Akram, Aslam, Nayeem, Naved, Sahabaz, Sahadat, Akib, Saukat, Happy, Vinod, Pawan, Karim, Hasan, Abu Ubaida, Ishaque, Firoz and others. The witness claims that Aftab Ansari was the prime mover and the person who devised the plan. Asif Reza Khan would execute the plan for Aftab Ansari with the assistance of PW 35 and others. The witness has claimed that on 23rd July, 2001 Asif Reza Khan instructed him to leave for the Bhoot Bungalow, Haroa in village Pukuria, accompanied by Sahajahan. This Bhoot Bungalow was an incomplete two storeyed building. He mentioned that when he entered the building he found Abdullah, Mansur bhai, Umar bhai and Akram there and that he started staying with them in that Bhoot Bungalow. The witness has stated that on 25th July, 2001 on about 12.45 p.m. a white Maruti 1000 car entered and Sahajahan closed the gate of the building. He saw 3 persons alighting from the car. They were Asif Reza Khan, Abu Ubaida and Sahabaz. Asif Reza Khan called PW 35 down when he found a fair complexioned man sitting in the car, wearing goggles. Asif Reza Khan informed him that the person in the car was Partha Roy Barman. The witness has claimed that he saw blood oozing out from the wounds on Partha Roy Barman's hands. The latter was taken upstairs. Asif Reza Khan directed Sahajahan to purchase medicines on the instruction of Abu Ubaida. The witness has claimed that on enquiring with Asif Reza Khan he learnt that despite having forbidden him, Aslam, a Pakistani national, shot Partha on his hands. On that same night Asif Reza instructed him and Akram to stay in the Bhoot Bungalow to look after Partha Roy Barman. He claims that Asif Reza Khan told him that Maharoof, Aslam, Sahajahan and Abu Ubaida were deputed to abduct Partha Roy Barman and that a Maruti 800 car No. DL-6C-D- 4964 was deployed for that purpose. He was also informed that Asif Reza Khan and Akib Ali were waiting at Basanti Road in a Maruti 1000 car No. WB-02B- 8771. The witness claimed that Asif told him that on the date of the abduction, Partha Roy Barman was shifted to a Maruti 1000 car from the car used to abduct him. Aslam and Akib then drove away the Maruti 800 car to a garage to repair a damaged rear light. Asif Reza Khan told the witness that as Aslam's shirt was bloodstained, a new shirt was purchased for him. PW 35 saw Asif Reza Khan bringing a tape recorder on 30th July, 2011 to the house. He approached Partha Roy Barman and informed him that he would have to answer some questions for recording his voice because the members of his family did not believe that he was being held captive. The witness has claimed that on 31st July or on 1st August, 2011 Abu Ubaida came to the Bhoot Bungalow in a blue Maruti 800 car bearing the doctor's insignia and with the number plate WB-02J-9240. He claimed that Abu Ubaida informed them that the amount of `3.75 crores had already been realised from Partha Roy Barman's house. That money was delivered to Aftab Ansari in Dubai through Karim and Vinod via Hyderabad. He has spoken about dressing Partha Roy Barman on 2nd August, 2001 before he was released. Asif Reza Khan instructed this witness to flee to Bangladesh or Nepal. However, he continued to remain in India. Asif Reza Khan also instructed Akram and PW 35 to deposit the pistols with Abdullah. Thereafter Abu Ubaida and Asif Reza Khan left the place with Partha Roy Barman in the blue Maruti 800 car. According to the witness when he heard that the police would visit his house and that of Asif Reza Khan, he fled to Bangladesh. He returned to India and was

arrested at Ripon Street, Calcutta. He has stated that he could identify the accused Akib, Naved @ Md. Amran, Happy Singh, Saukat @ Abdullah and Rahaman @ Abdul Rahaman who were all produced in Court. He claimed that he made a statement before the Magistrate after he was arrested, disclosing everything that had occurred leading to the abduction of Partha Roy Barman. In his cross- examination he was not able to mention the exact number of persons who resided at 21B, Gorachand Lane nor could he remember exactly whether he had mentioned the name of Abdul Rahaman and Happy Singh in his statement before the Magistrate. He has conceded that he was closely connected with the conspiracy to abduct Partha Roy Barman. He has further stated that he was produced in Court from custody together with Happy Singh and Abdul Rahaman.

16. The witness was then asked about the e-mails which were on record when he stated that he did not know how to use an e-mail account. According to this witness no application had been made by him before the Magistrate for making a confessional statement. He claims that he did not remember whether he mentioned the names of Akib Ali and Saukat before the Magistrate when he confessed.

17. Thus the conspiracy to abduct Partha Roy Barman for ransom has been conclusively proved through PW 34 and PW 35. It is true that it is not safe to convict a person only on the basis of the testimony of an approver. Such evidence has to be assessed with caution and should be corroborated by other evidence. As noted earlier the victim himself has spoken about being abducted and his confinement in a dark room. The evidence of PW 1 establishes that the premises at 21B Gorachand Lane were rented out to Asif Reza Khan. The depositions of PWs 3 and 16 indicate that several persons met in these premises. The evidence of PWs 34 and 35 who were privy to the discussions held in the flat, establishes the manner in which the plot was engineered and the details about its execution.

18. It is now necessary to determine whether each of the appellants before us was actively involved in the conspiracy and whether they shared a common object with others to abduct Partha for ransom. For the sake of convenience we will deal with the evidence against each of the appellants separately.

19. Ashabuddin - The prosecution has tried to implicate Ashabuddin @ Saukat @ Shabuddin by relying on the evidence of PWs 9, 27, 35, 80, 81, 83, 90 and

116.

20. PW 9 is motor van driver who claims to have driven Akib, Saukat and others from Malatipur Station in his motor van to the house of Rafiquiddin who was his grandfather in village Pukuria (the Bhoot Bungalow). According to him, he developed an acquaintance with them and came to know the names. This witness has not disclosed the number of occasions on which he ferried the persons in his motor van. He claims that his grandfather Rafiquiddin sold his house to a businessman of Calcutta and that one Mizanur, one of the accused in this case, had brokered the deal. It is difficult to believe that the witness would remember the names of all the persons he ferried on just one occasion even after four years when he deposed in Court. In fact it has been recorded that he took a long time to identify the accused in Court. Surprisingly he was not a witness to the T. I. Parade.

21. PW 27 is another witness on whose testimony the prosecution has relied to prove the involvement of Ashabuddin. This witness has stated that while he was in his shop at C. N. Roy Road, he heard a sound and found that a Tata Safari car had dashed on a lamppost. He also saw a white Maruti car reversing and stopping at the middle of C. N. Roy Road. He noticed a bearded man being pushed out of the Tata Safari and forced into Maruti 800 car, which then sped away. However, he has not named any of the accused.

22. PW 80 is the other witness on whom the prosecution relied to prove the involvement of Ashabuddin @ Saukat. This witness is a journalist who sold his Maruti 800 car bearing No. DL-6-CD-469 through PW 83 to one Abdul Sultan. The latter was accompanied by two other persons. This witness has not spoken about Ashabuddin. This car was used for the abduction after being sold.

23. PW 81 who is an estate broker of Delhi speaks about Ashabuddin having approached him with one Vinod Kumar to purchase property in New Delhi. He has identified Ashabuddin in Court. He claims that a white Maruti car was seized in front of his office at the instance of Ashabuddin. He was witness to the seizure.

24. The next witness that the prosecution has relied on to implicate Ashabuddin is PW 83, the owner of Amba Leasing and Finance Company. He has spoken of selling a white Maruti 800 car of his friend PW 80. He claims that on 21st July, 2001, three persons came to his office to buy an old Maruti 800 car. One of them was Abdul Sultan and the others were Farasat @ Akib. He could not remember the third person whose name according to him perhaps was Sahabuddin i.e. one of the aliases used by Ashabuddin.

25. PW 90 is the Inspector of Police, CID, who was posted at Bhabani Bhawan. He was a member of the special team formed to investigate the present case, i.e., Tiljala P.S. case no. 223 dated 25th July, 2001. He has spoken about receiving a requisition to arrest Rabindranath Das. He proceeded to Farukabad P.S. and arrested him. After completing the necessary formalities he returned to Kolkata and handed over the accused, Rabindranath Das to the Investigating Officer in this case. He claims that the Investigating Officer received information that the CBI had arrested Akib Ali and Saukat @ Ashabuddin whose names transpired in the present case.

26. PW 116 arrested Ashabuddin in connection with some other case in New Delhi. He seized a car bearing No. DL-6-CD-4694, at the instance of Ashabuddin. There is evidence on record to indicate that this car had been used to abduct Partha after changing its number plate. According to this witness, on the disclosure made by Ashabuddin, Akib Ali was arrested in Bhopal on 6th November, 2001.

27. Considering the testimony of the witnesses on whom the prosecution has relied to implicate Ashabuddin @ Sahabuddin @ Saukat it is evident that he was a conspirator and had the common object with the others of abducting Partha Roy Barman. He was involved in the procurement of the white Maruti car bearing No. DL-6-CD-4694 which was used to abduct the victim. It was seized at his instance. The approver PW 35 has spoken about his presence in the premises used by the

conspirators to meet and discuss their plan of action. Therefore, in our opinion, there is no doubt about the complicity of Ashabudin in the abduction of Partha Roy Barman for ransom.

28. Akib Ali - The next accused is Akib Ali @ Farasat @ Vali. The prosecution has relied on the evidence of PWs 9, 12, 15, 16, 21, 22, 27, 35, 82, 83, 85, 90, 110, 111, 116, 117, 118 and 132.

29. PW 9, a motor van driver as stated earlier, claims that he remembered the names of the accused including Akib Ali and Saukat as he had ferried them in his van to the house of Rafiquiddin, his grandfather. He claimed that he could identify Akib in Court. But the evidence does not indicate that he did actually identify Akib Ali. He has not been cross-examined on behalf of Akib Ali. As mentioned earlier this witness had not stated the number of times he interacted with the accused; nor was he a witness at the T. I. Parade. Therefore it is difficult to believe that he would remember the accused after five years when he deposed in Court when there is no evidence on record to indicate that there was any special circumstance which prompted him to recall the names and the identity of the accused.

30. PW 12 is another witness on whose testimony the learned Advocate for the State has laid emphasis. He was an employee of a cloth store, Jashoda Bastralaya in 2001. According to this witness, one tall Hindi speaking person bought a T-shirt from the shop. He claims that he saw a stationary Maruti car, outside their store in which a bare bodied person was sitting. The person who purchased the shirt drove the car away. He identified the T-shirt in Court as Jashoda Bastralaya was the manufacturer of that brand of T-shirts which were available only in their shop in West Bengal. PW 12 is a witness to the T. I. Parade where he identified Akib Ali. He also identified him in Court. He conceded that he had not described any special mark of identification of the person who visited their shop to the police.

31. PW 15 is a garage mechanic who has stated that on 25th July, 2001 a tall fair complexioned person drove a Marui 800 car into the garage when he was working. The tail light of the car was not working and he repaired it as requested by that person. This witness identified Akib Ali in the T. I. parade and in Court.

32. PW 16 Imran Khan has claimed that he and Zahid Ali (PW 3) were walking towards Gorachand Lane when they met Khurram and Bablu. He and PW 3 went to the premises occupied by Asif Reza Khan at 21B, Gorachand Lane. They visited the place again on 18th or 20th July, 2001 when they met Asif, Amir, Bablu and Khuram. They were introduced to Akib Ali and others who were present as persons who were connected with their business. He claims that they visited the premises at Gorachand Lane again on 24th July, 2001. This witness identified Akib Ali in Court besides the other accused persons, namely, Bablu Zaffar and Asraf, i.e., the two approvers. This witness reiterated his statement made to the police that he saw Akib Ali in the flat at 21B, Gorachand Lane. He denied the suggestion that he was shown a photograph of Akib earlier in the CID headquarters at Bhabani Bhaban and that he had identified Akib Ali on the basis of that photograph.

33. The prosecution has then relied on the evidence of PW 35 Bablu Zaffar @ Sikander to implicate Akib Ali. He has spoken of Akib Ali's presence at 21B, Gorachand Lane when discussions about the

abduction of Partha Roy Barman took place between the conspirators. This witness, as stated earlier, was present at the Bhoot Bungalow when the victim was driven to the entrance of the Bungalow in a Maruti 1000 car. He stated that Asif Reza Khan who was present there told him the next morning that 4 persons had abducted Partha Roy Barman while he (Asif) and Akib were waiting at Basanti Road with a Maruti 1000 car. The witness claims to have been told by Asif Reza Khan that the abduction had been executed by 4 others by pushing the victim into a Maruti 800 car No.DL-6-CD-4964. According to this witness Asif told him either on 27th or 28th July 2001 that Akib Ali had driven away the Maruti 800 car once Partha Roy Barman was shifted to the Maruti 1000 car at Basanti Road. The witness identified Akib Ali and stated that while Akib was fair complexioned, Saukat i.e. Ashabuddin was dark. He denied that he had implicated Akib and Saukat on the instructions of the I.O.

34. PW 50 is the Judicial Magistrate who conducted the T.I. parade in respect of Akib and Aslam. There were two witnesses to the T.I. parade - PWs 12 and 15, who identified the suspect Akib @ Farasat Ali. He has conceded that he had not mentioned the individual description, social status or the distinguishing features of Akib Ali in his report. The witness has stated that he has not mentioned any mark of identification of Akib in his report on the T. I. parade. After seeing Akib Ali in the Court he mentioned that he had a dimple on the chin. This witness was unable to mention the correct provisions of law under which the T.I. parade was held.

35. PW 83 is the proprietor of Amba Leasing and Finance Company. He claimed to have sold a Maruti 800 car bearing No.DL-6-CD-4694 to one Abdul Sultan who was accompanied by two persons on 21st July, 2001. He claims that he asked for photocopies of driving licences of those who were accompanying him. These photocopies were produced in Court and the driving licences were those of Akib and Ashabuddin.

36. PW 85 claims that the owner of a "guild property" executed an agreement to rent the property to Akib in his presence on 30th August 2001. He has mentioned the amount of rent agreed to by the parties. He has identified Akib in Court.

37. PW 90 has stated that both Akib Ali and Saukat were arrested by the C.B.I. in connection with a different case on 28.10.2001. They were both shown arrested in the present case after following the due procedure in law. He has identified as Akib Ali who was also known as Farasat @ Vali and Saukat. The car bearing No.DL-6-CD-4694 was seized by the C.B.I. at the instance of Saukat. It was tagged to this case after making the requisite application. Akib Ali was arrested on 6th November, 2001 by PW 116. Both PW 90 and PW 116 have identified Akib Ali and Saukat in Court. PW 117 intercepted certain telephone calls. The specimen was matched and it was found that Akib was one of the persons involved in the conversation.

38. PW 118 is a wireless operator who printed 23 e-mails from Akib Ali's e-mail account after he had disclosed his e-mail identities and passwords. He claims that Akib Ali was present along with the expert from Webel Technology Ltd, an undertaking of the State Government, i.e., PW 132 in the Computer room when the mails were downloaded and printed. However Akib Ali refused to sign these documents though they were endorsed by both PW 118 and PW 132. He identified Akib in

Court. The witness's testimony has been corroborated by the expert from Webel, PW 132, who is an independent witness.

39. On scanning the evidence we are of the opinion that Akib Ali was certainly involved in the abduction and confinement of Partha. He participated actively and was involved in every stage of the execution of the crime. He was present when the Maruti car used for the abduction was bought in New Delhi. He participated in the confabulations held at 21B, Gorachand Lane and was present when Partha was transferred into the Maruti 1000 car from the Maruti 800 car after his abduction. We will refer to the e-mails a little later to ascertain whether they throw additional light on the involvement of Akib Ali in the present crime.

40. Abdul Rahaman Kunji - This accused has been named by PWs 34, 44, 88, 89 and 92.

41. PW 34, the approver, was the cook at 21B, Gorachand Lane. According to him, he personally heard the plan to abduct Partha Roy Barman. He has spoken about the presence of Rahaman, i.e., Abdul Rahaman Kunji at the meeting held in 21B, Gorachand Lane, besides some of the other accused persons. He denied the suggestion that he identified Rahaman at the instance of the police.

42. PW 44 Swati Paul is the witness on whom the prosecution has relied heavily to support its allegations against Abdul Rahaman Kunji. This witness claimed that she came into contact with Abdul Rahaman in Dubai when she was performing in Dubai Grand Hotel. She has said that she had a relationship with Rahaman. She has spoken about her visit to the office of Rahaman's boss, namely, Raju Bhai @ Farhan in Nihar Building in Dubai. According to her, she overheard Farhan and Rahaman extort money from people by threatening them over the telephones installed in the office. She has mentioned a phone number from which these calls were made and it is included in the call list produced by the prosecution. According to her, the idea to abduct Partha originated in Dubai. She has spoken of returning to Mumbai from Dubai with Rahaman on 6th July, 2001. She claimed that Rahaman left on 19.07.2001 disclosing to her "kalkattaka Khadim Jutawala ko uthane ke lia ja raha hu" (I am going to kidnap Khadim, a shoe merchant of Kolkata). He returned after completing his role on 28th July, 2001 and told her on her probing "Jutawala ka uthana ka come ho gaya" (The job of kidnapping the shoe merchant has been completed). He also informed her that the mission had been planned by Raju Bhai @ Farhan Bhai. She and Rahaman then left for Bangalore on 2nd August, 2001. They returned to Mumbai and were arrested there on 19th August, 2001. She identified Rahaman as well as Raju Bhai @ Farhan who claimed to be Aftab Ansari in Court. She also identified the voice of Farhan @ Raju Bhai from the recordings of the calls which were intercepted when the ransom was demanded.

43. PW 88 is the CID Inspector, who arrested Rahaman and Swati Paul in Mumbai on 19th August, 2001. He seized 4 mobile phones from their possession. He has identified Rahaman in Court. Strangely, he also identified Swati Paul in Court although she was examined as a prosecution witness. There was thus no need for him to identify Swati.

44. PW 89 is a witness to the seizure of the passport of Abdul Rahaman and other articles recovered from his room in Bangalore. He identified Rahaman in Court. PW 92 is the CID Inspector who

prepared the seizure list of the articles seized from Rahaman's room in Bangalore.

45. Thus the aforementioned evidence leaves no room for doubt regarding the complicity of Abdul Rahaman Kunji. He has made an extra judicial confession to PW 44 which has been corroborated by the other circumstances and evidence on record.

Test Identification Parade

46. It has been argued by the learned Counsel appearing for Akib Ali and Ashabuddin that the T.I. parade was not held in accordance with law. He criticised the test identification parade by submitting that the victim was not a witness to the T.I. parade although he would have been the best person to identify the persons who had in fact abducted him or who had kept him captive. He submitted that the evidence of the T.I. parade witnesses cannot be believed because the I.O. had accompanied those witnesses to the T.I. parade and on his way he had shown them the photographs of the suspects. He pointed out from the evidence on record that two accused persons were kept in the same line for identification. According to him, if the T.I. parade is found faulty by this Court, there is no identification of the accused by any person. He points out that the identification in Court after four years by some witnesses is of no use. PW 16 who claims that he used to accompany PW 3 to 21B, Gorachand Lane identified Akib Ali in Court. According to this witness it was Asif Reza Khan who told him about the abduction of a shoe merchant for ransom. However, he was not a witness to the T.I. parade although he said that he had seen Akib Ali and Asif Reza Khan on more than one occasion. The motor van driver PW 9, who said that Akib Ali and Saukat visited the house of Rafiquiddin, i.e., the Bhoot Bungalow, was also not a witness to the T.I. parade. PW 3, who claimed to have seen Akib Ali on 18th and 20th July, 2001 at 21B, Gorachand Lane, was not a witness to the T.I. parade. The prosecution has relied on the evidence of PW 12, the employee of Jashoda Bastralaya and PW 15, the garage mechanic who repaired the tail light of the Maruti 800 car as they were the T.I. parade witnesses. Surprisingly these persons who claimed to have seen the appellant Akib Ali only once were able to identify him in the T.I. parade. However, both these witnesses have not mentioned any special reason for remembering Akib Ali out of the many customers who visited the shop or garage. The learned Counsel for the appellants submitted that the evidence of PW 12 regarding the identification of the accused was based on the photographs shown to him prior to the T.I. parade. The learned Counsel criticised the manner in which the T.I. parade was held by PW 50. Akib Ali admittedly had a dimple on his chin, which was a special identification mark. This mark was not covered when the T.I. parade was held. PW 139 has admitted that being the I.O. of the case he had accompanied the T.I. parade witnesses to the Magistrate who conducted the parade and that he had photographs of Akib Ali in his possession. The learned Counsel for the appellants submitted that we must presume that those photographs were shown to the T.I. parade witnesses prior to the identification of the accused by these witnesses. The learned Counsel has placed reliance on the judgments in the case of Provash Kumar Bose & Anr. v. The King reported in AIR (38) 1951 Calcutta 475, Wakil Singh & Ors. v. State of Bihar reported in 1981 SCC (Cri) 634, Fagu Das & Others v. State of Orissa reported in 1996 Cri.L.J. 2245 and State of Madhya Pradesh v. Chamru @ Bhagwandas etc. etc. reported in 2007 Cri.L.J. 3509. These judgments emphasise that the T.I. parade must be held fairly. Non-suspects with similar features are to be included in the T.I. parade. If a suspect has any prominent features or scars on the face, those marks or scars are to be concealed before such

identification is made. A similar concealment must be made by using a tape on others present in the test identification parade as if they had the same mark. The evidence on record suggests that the T.I. parade was not held in accordance with law as rightly submitted by the learned Counsel for the appellants. Akib Ali was one of the suspects in the T.I. parade. He was known to have a dimple on his chin. However, that was not covered, nor was any such mark placed on the chin of any of the others in the parade.

47. The State has relied on several judgements of the Supreme Court to counter the argument on behalf of the accused that the identification of the accused during the test identification parade is not trustworthy. Reliance has been placed on the judgements in the case of Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh reported in (2012) 3 SCC (Cri) 42, State of Maharashtra v. Lahu alias Lahukumar Ramchandra Dhekhane reported in (2014) 1 SCC (Cri) 395, Ankush Maruti Shinde and Others v. State of Maharashta reported in (2009) 3 SCC (Cri) 308 and Shyamal Ghosh v. State of West Bengal reported in (2012) 3 SCC (Cri) 685. The Supreme Court has in these judgements held, consistently, that the identification of an accused in a T. I. Parade provides corroborative or confirmative evidence. The Court has held that although it is desirable to hold the parade at the earliest, failure to do so is not fatal to the prosecution always. This is because the evidence is not substantive in nature and therefore cannot be rejected if the parade has been held in accordance with law. The Court has also held that publication of the photograph of the accused in the newspaper would not have an effect on the validity of the parade. The learned Counsel for the State has relied on the judgment in the case of Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) reported in (2010) 2 SCC (Cri) 1385 to submit that the Court need not discard the testimony of a witness who identified the accused in the T.I. parade merely because some photographs were shown to him.

48. The learned Counsel for the appellants has also submitted that it is unsafe to rely on the identification of an accused for the first time in Court, especially when it is done after a lapse of several years. He pointed out the decisions in the cases of Raju alias Rajendra v. State of Maharashtra reported in 1998 Cri.L.J. 493, and Har Pal Singh and etc. v. State of U.P. reported in 2000 Cri.L.J. 4552 to support this submission.

49. Mr. Mukherjee the learned Counsel for the State argued that the identification of the accused in the dock need not be disbelieved in every case. He pointed out that in Manu Sharma's case (supra) the Supreme Court approved of such identification. It was held that identification of the accused in the dock even in a case where no TIP is held can be considered to be above board and more than conclusive.

50. Several witnesses in this case have identified the appellants in Court. These witnesses have seen them for the first time in the Court when the deposition was recorded in 2006 after the incident occurred in the year 2001. Many of these witnesses, like the motor van driver PW 9, PWs 80, 81, 82 and 83 had allegedly seen the appellants on one stray occasion. We agree with submission of the learned Counsel for the appellant that it is difficult to believe that these witnesses would have remembered the identity of the appellants after more than 5 years.

51. Mr. Mukherjee has pointed out the decision of the Supreme court in State of Maharashtra vs Lahu reported in (2014) 1 SCC (Cri) 395 to submit that the evidence of these witnesses need not be discarded. He urged that these were independent witnesses with no animosity towards the appellants. Therefore they would not have implicated the appellants falsely.

52. Be that as it may, the identification of an accused in a T.I. parade is merely a corroborative piece of evidence and the involvement of the appellants in the crime cannot be ruled out only because the test identification parade was not held in accordance with law and the accused had been identified by some of the witnesses for the first time before the Court. As mentioned earlier the Test Identification Parade merely gives a direction for conducting the investigation. Evidence of Approvers

53. The learned Counsel for the appellants has then submitted that the reliance placed on the evidence of the approvers and on PW 44 is not valid or in consonance with law. He submitted that the confessional statement of an accused, who after making the statement was subsequently discharged and is not facing trial, cannot be used against the co-accused. He pointed out that if such a statement is exculpatory in nature, it cannot be treated as a confessional statement. According to the learned Counsel, PW 44 Swati Paul was discharged by the Court on the prayer made by the I.O. on the ground that she had made the statement to the Magistrate. He submitted that an accused cannot be discharged on this ground as the possibility of an allurement being offered to her by the investigating agency for making the statement cannot be ruled out. He pointed out that Swati Paul was in custody for 90 days and she was released on bail only after completion of the statutory period. She prayed for being discharged when the charge-sheet was filed and not earlier. He also submitted that all the evidence of Swati Paul shows lack of complicity and that it is exculpatory in nature. Therefore, her statement cannot be treated as a confessional statement. The learned Counsel has relied on the judgment in the case of Suresh Budharmal Kalani alias Pappu Kalani v. State of Maharashtra reported in 1998 Cri.L.J. 4592 where the Supreme Court has observed that under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. The statement which is made by such a person if self-exculpatory is not admissible in evidence as a confession. On the question of pardon, the learned Counsel has relied on the judgment of the Rajasthan High Court in the case of State of Rajasthan and etc. v. Ram Niwas & Anr. reported in 2006 Cri.L.J. 2477 where it has been held as follows:

> 20. It follows, then, that a pardon can be granted only to an accomplice; an accomplice being a person who participates in the commission of the crime charged against a co-accused. He needs to be a "participes criminis." And crime consists of two elements, the actus reus (the actual act of the commission of the offence) and the mens rea (the guilty mind preparatory to the act done). So, the participation has to be in the actus reus and/or in the mens rea. Such participation could be "directly" or "indirectly" linked, or be "a privy" to an offence. Direct participation would consist of mere physical presence, or of actual physical participation. This would include vicarious liability under Section 34, I.P.C., or an offence under Section 149, I.P.C.

Indirect participation could well be mental or physical. Mental, when one has an interest in the outcome of an offence, or when one is involved in the planning. The latter would reflect either a criminal conspiracy or an abetment. Physical, when in a crime consisting of a series of acts, one, or more acts are committed by the person. One is said to be "privy to the offence" when one has secret knowledge of or "is a person who is in privity with another. One who is a partaker or has any part of interest in any action, matter or thing." (per Black's Law Dictionary). In conclusion, there has to be some connectivity between the crime and the accomplice.

21. A person totally unrelated to the offence is deemed to be innocent, and an innocent person cannot be called, or treated as, an approver. Lack of complicity is, indeed, a disqualification for approvership. To be eligible as an approver, there should be some interest, on the part of the person, in the commission of the crime.

22. In the case of Suresh Chandra Bahri v. State of Bihar 1995 Supp (1) SCC 80 : 1994 Cri LJ 3271 the Hon'ble Supreme Court had emphasised the object behind Section 306, Cr. P.C. However, on this specific aspect of the issue the Hon'ble Supreme Court has not weighed in. The most critical analysis of Section 306, Cr.

P.C. has been done by the Hon'ble Gujarat High Court in the case of State of Gujarat v. Ramasi Devasi Bhil alias Bhalaka 1991 Cri LJ (Guj) 2801. But, the Hon'ble Gujarat High Court has held a contrary point of view.

It has held that, "Thus, the very basis of the section is that a person who applies for pardon under the provisions of Sections 306 and 307 of the Code of Criminal Procedure can be assumed to be directly or indirectly concerned in the offence. Similarly, he may be assumed to be privy to an offence. The assumption does not mean that he is party to the offence. Thus the person applying may not be actual culprit. If he is not an actual culprit there does not arise any question of exculpating one's own self."

(Emphasis added).

23. However, we respectfully disagree with this interpretation of the provision. The very word

"accomplice" means that the person who seeks pardon, or for whom pardon is sought, has been 'complicit,' an "associate," connected with the offence. For, in case he is unconnected, then he is innocent. And an innocent person does not need any pardon. Moreover, the supposition of his connection cannot be imagined or assumed as suggested by the Hon'ble Gujarat High Court. "Suppose," means "likely to be" or "some probability of." However, the "likelihood" of a connection is a question of fact. The existence of a fact has to be found in some evidence. A judicious mind has to examine the relevant evidence to arrive at a supposition that the person was "directly," or "indirectly," connected to, or was "privy" to, the offence. In order to see the existence of the connection, there has to be some inculpation by the accomplice about his role in the commission of the offence. Unless there is some inculpation, the difference between an accomplice and an

eye-witness gets blurred. The inculpation might be ever so slight, but the accomplice cannot paint himself totally as a protestor, as a victim, as an innocent person, and place the entire blame on the other co-accused persons for the commission of the crime. In case he were to do so, then he removes himself from the category of an accomplice and places himself as an eye-witness.

54. In P. V. Narasimha Rao v. State through CBI reported in 2002 Cri.L.J. 2401 the Delhi High Court has observed that to make a statement of a co- conspirator relevant under Section 10 of the Evidence Act, the accused should be the agent of any other co-conspirator to make him an approver. The evidence of the approver is liable to be discarded if he was not present at the particular place where the meeting was allegedly held as that testimony would be hearsay and barred under Section 60 of the Evidence Act.

55. From the record, it appears that Bablu Zaffar - PW 35 and Noor Ahmed Molla - PW 34 filed separate petitions on 20th April, 2004 for permission to depose as witnesses/approvers in the case. They sought pardon. The prosecution on 21st May, 2004 informed the trial Court that it had no objection if PWs 34 and 35 were tendered pardon on condition that they made a true and full disclosure relating to the offence and the offenders. The appellants here submitted a joint written objection on 21st May, 2004 to the application for tendering pardon to Bablu Zaffar and Noor Ahmed Molla. After hearing the parties and on considering several judgments cited at the bar, the Court recorded that it had examined both Bablu Zaffar and Noor Ahmed Molla to ascertain whether they had presented petitions under any threat, allurement or promise. After being satisfied, the Court granted pardon to Bablu Zaffar and Noor Ahmed Molla and they were treated as approvers.

56. Noor Ahmed Molla - PW 34 was arrested on 3rd May, 2002. He was forwarded to the SDJM, Alipore on 4th May, 2002 and remanded to custody till 17th May, 2002. Police interrogated him on 3rd, 5th, 11th and 16th May, 2002. Thereafter on 18th May, 2002 he was forwarded to the Court for jail custody with a prayer for recording his statement under Section 161 Cr.P.C. On 20th May, 2002 he made a confessional statement before the Judicial Magistrate, 2nd Court, Alipore which was recorded under Section 164 Cr.P.C. He was charge-sheeted along with the others on 30th May, 2002 under Sections 364A, 307, 326, 341, 379, 411 and 120B IPC and 27 of the Arms Act. He was granted pardon on 24th June, 2004 but remained in jail custody till he deposed before the trial Court on 4th May, 2006 and 3rd July, 2006.

57. Bablu Zaffar, was also arrested on 3rd May, 2002 at Beniapukur, Kolkata. He was forwarded immediately to the SDJM, Alipore. He was remanded to custody till 17th May, 2002. Bablu Zaffar was interrogated by the police on 3rd, 5th, 11th and 16th May, 2002. He was forwarded on 18th May, 2002 in the Court for jail custody with a prayer to record his statement under Section 164 Cr.P.C. His confessional statement was recorded by the Judicial Magistrate, 2nd Court, Alipore under Section 164 Cr.P.C. on 20th May, 2002. He was similarly charge- sheeted on 30th May, 2002. He was granted pardon along with Noor Ahmed Molla on 24th June, 2004 and deposed in Court while he was in jail custody.

58. In the case of Mohd. Khalid v. State of West Bengal reported in (2002) 7 SCC 334 the Supreme Court has observed that the acceptability of a confession is based on the twin tests of whether the

confession was truly voluntary and whether it is trustworthy. If the confessional statement satisfies these two tests it can be used against a co-accused who is being tried along with the maker of the statement. It has been held further that the Court must decide what weight should be attached to such evidence.

59. On considering these arguments relating to the admissibility of the evidence of the approvers, we do not find any merit in them. PW 34 and PW 35, the two approvers in this case had applied for pardon in accordance with the provisions of law and the Sessions Court has granted their application. We have perused that order of the Sessions Court and find that it is a well-considered order which requires no interference. The approvers were not released immediately after the Sessions Court granted their application and their confessional statements were recorded, but were kept in custody till they deposed in Court. While there cannot be any quarrel with the proposition of law enunciated in the aforesaid judgements, they do not come to the rescue of the appellants for discarding the evidence of the approvers. We have noticed that the confessional statements of the approvers were made voluntarily. The learned Magistrate recorded their confessional after informing both these approvers the consequences of making such statements and ensuring that there was neither any inducement nor threat nor coercion from the prosecution which prompted them to confess to the crime. They have been examined in Court as prosecution witnesses and their testimonies have been tested by searching cross- examinations on behalf of the appellants. Their evidence would naturally have to be scrutinised carefully and accepted if it is corroborated.

60. The criticism regarding the acceptance of the evidence of Swati Paul is unfounded. She was arrested along with Abdul Rahaman Kunji on 19.08.2001. Her statement under section 161 Cr.P.C. was recorded on six different occasions between 22.08.2001 and 30.08.2001. On 01.09.2001 her statement was recorded by PW 51, the Judicial Magistrate, under section 164 Cr.P.C. A statement made by the accused or any other person may be recorded under this provision of law by any magistrate during the course of investigation. She was released on statutory bail due to the non-compliance of Section 167 of the Cr.P.C. As the police did not find a case against her she was not sent up for trial and was discharged. It is well settled that it is within the domain of the police to decide who among the arrested persons in a given case should be tried. If there is no case against an arrested person at all the police need not file a charge-sheet against that person. Swati Paul was then examined as a witness in Court. She was not considered an approver by the Court obviously because she was discharged as there was no case against her. Therefore her evidence cannot be discarded on the ground that it is exculpatory. The evidence of an approver may be ignored when it is exculpatory but Swati Paul was not an approver nor did she submit any application to be treated as one. Her evidence will have to be assessed in the same manner as any other piece of evidence.

61. The prosecution has tried to implicate the appellants by relying on e-mails which, according to the prosecution, were exchanged between the appellants and other accused persons. These e-mails, according to the prosecution, corroborate the theory that the appellants were part of an organised crime syndicate with international ramifications. It was argued by the learned Counsel for the State that the money extorted by these persons from several businessmen was used to advance the cause of Jihad. The learned Counsel submitted that some of the accused before the trial Court were Pakistani nationals and the accused were also involved in several other cases of conspiracy where

bombs exploded killing several people. These submissions of the learned Counsel for the State are not based on any evidence led before the trial Court and, therefore, this theory of the money being extorted for Jihad cannot be accepted in this case. However on a careful scrutiny of the e-mails produced by the prosecution, it is evident that the accused persons along with a few others were involved in cross border organised crime.

Electronic Mails

62. We will now turn to the electronic mails which the prosecution has relied on. It has sought to prove this evidence by relying on the testimonies of PW 132, the expert from the West Bengal Electronics Ltd. (Webel), PW 118, the wireless operator and the I.O. According to these witnesses, Akib Ali disclosed his e-mail identities and passwords in their presence in the computer room at Bhabani Bhawan (the C.I.D. headquarters). They claim to have downloaded these e-mails from Akib Ali's e-mail account. The e-mails were then printed in their presence. All these printed e-mails have been signed by the aforesaid witnesses. It has been noted on these e-mails that Akib Ali refused to endorse the printed copies of the mails. Under Section 88A of the Evidence Act the Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed in the computer for transmission. However, the Court cannot draw any presumption about the person who sent the message. The term 'originator' has been defined in the Information and Technology Act, 2000 under Section 2(za) as a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary. Thus on analysing Section 88A of the Evidence Act and the relevant provisions of the Information and Technology Act, it is apparent that the Court may presume the veracity of the message fed into the computer for transmission by the originator through his mail server to an addressee, that is, the person who is intended by the originator to receive the electronic record and does not include any intermediary. However, this is a rebuttable presumption. Besides, no presumption can be drawn about the person who has sent such a message. Therefore, even if we accept the fact that these e-mails have been downloaded as stated by the Webel expert or sent by using the e-mail address of Akib Ali, it was necessary for the prosecution to prove that Akib Ali was in fact the originator of these e-mails. The disclosure, if any, made by Akib Ali of the e-mail address and password would have to be made under Section 27 of the Evidence Act. PWs 118 and 132 have both stated that Akib Ali has disclosed his e-mail identities and passwords in their presence. They have signed the seizure list under which the e- mails accessed from these accounts and printed have been seized. Therefore, in our opinion, these e-mails are admissible in evidence.

63. The learned Counsel for Akib Ali submitted that there was no certification of the e-mails by the Certifying authority as mandated by Section 65B of the Evidence Act and therefore these e-mails are not admissible. The Section provides as follows:

65B. Admissibility of electronic records.-

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section(1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that pert of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statements and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

64. The learned Counsel for the State has relied on the judgment of the Delhi High Court in the case of Rakesh Kumar and Ors. v. State reported in 183 (2009) Delhi Law Times 658. The Delhi High Court dealt with call records and the question as to whether they were genuine. After considering the provisions of the Evidence Act and the Information Technology Act, the Court observed as follows:

> 198. Sub-section (1) of Section 65B makes admissible as a document, paper print-out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub-section (2) of Section 65B. Following are the conditions specified by Sub-section (2):
>
> a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over

the period, and relates to the period over which the computer was regularly used;

b) Information was fed in the computer in the ordinary course of the activities of the person having lawful control over the computer;
c) The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
d) Information reproduced is such as is fed into computer in the ordinary course of activity.

199. Under Sub-section (3) of Section 65B, Sub-section (1) and (2) would apply where single or combination of computers, is used for storage or processing in the regular course of activities and the computers used shall be construed as a single computer.

200. Under Sub-section (5), information shall be taken to be supplied to a computer by means of an appropriate equipment, in the course of normal activities intending to store or process it in the course of activities and a computer output is produced by it whether directly or by means of appropriate equipment.

201. The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act. Under Sub-clause "d" of Section 65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerised operating systems and support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-section (1) of Section 65B makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section. The conditions are mentioned in Sub-section (2). Thus compliance with Sub-section (1) and (2) of Section 65B is enough to make admissible and prove electronic records.

202. Sub-section (4) of Section 65B provides for an alternative method to prove electronic record. Sub-

section (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub-section 4 and certifying contents in the manner set out in the sub-section.

The sub-section makes admissible an electronic record when certified that the contents of a computer printout are generated by a computer satisfying the conditions of Sub-section 1, the certificate being signed by the person described therein.

65. We are in respectful agreement with the view taken by the Delhi High Court in the aforesaid judgement. Section 65B provides that any electronic data which is printed on a paper, stored, recorded or copied in optical or magnetic image produced by a computer shall be deemed to be a document. The document is admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original, if the conditions mentioned in the Section are satisfied. These conditions are:

> (i) the computer output during which period the computer was used regularly to store or process information for the purposes of any activities regularly carried on over the period by the person having lawful control over the use of the computer;
>
> (ii) the electronic record sought to be derived was regularly fed in the computer in the ordinary course of activities;
>
> (iii) the computer was operating properly, continuously without affecting the electronic record or the accuracy of its contents;
>
> (iv) information contained in the electronic record reproduced or is derived in the ordinary course of activities.

66. The section covers those cases where an electronic record is generated from a computer which is used regularly in the normal course of business. A certificate is to be issued in that regard by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities. The documents which are produced in this case are downloaded and printed from an e-mail account of an individual on a computer which was not used by that individual in his normal course of activities. Those documents can be proved by leading evidence to show that the and were then printed. A witness would have to testify that such a procedure was carried out. This has been done by the prosecution in this case. It is true that merely sending e-mail from a particular e-mail address would not lead to a presumption that the particular e-mail was sent by the originator, i.e., the person from whose e-mail address a mail emanates. Hacking is not an unknown phenomenon in the world of electronic records. Therefore, the salutary provision in law is that the presumption relating to the genuineness of an electronic message is rebuttable and the Court cannot presume that the message has been sent by a particular person. The prosecution has proved that Akib Ali was in fact the originator of these mails as they were recovered at his instance when he disclosed his e-mail identities and passwords. It was suggested by Mr. Bhattacharya the learned Counsel for the Akib Ali that anybody could create an e-mail account and send mails through that account by impersonating the originator. This is the line of cross-examination of PW 118 and PW 132. However the depositions of these witnesses in the examination-in-chief have not been shaken in their respective cross-examinations. There is no reason to doubt that the e-mails were sent and received by Akib Ali through the e-mail accounts and passwords that he mentioned. It has been suggested in the cross examination of these witnesses that the e-mails were doctored and Akib Ali was not the originator. There is no evidence on record to suggest that the Internet Protocol (IP) addresses found on the e-mails were not those of the accused. Moreover besides denying everything in his statement recorded under section 313 Cr.P.C. Akib Ali

has not given any specific explanation about his e-mail accounts and passwords or about the contents of the e-mails. Therefore, in our opinion, these e-mails are admissible in evidence under section 65B of the Evidence Act and have been duly proved.

67. The learned Counsel has then submitted that even assuming the e-mails sent or received by Akib Ali are admissible in evidence unless they are proved like any other document, they cannot be relied on by the Court to convict Akib Ali. He argued that secondary evidence relating to the contents of the documents is admissible if it is proved in consonance with sections 63 and 65 of the Indian Evidence Act. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact true copy of the original. The Court is required to decide the question of admissibility of a document in secondary evidence before accepting the evidence.

68. This submission of the learned Counsel is fallacious. The Indian Evidence Act contains special provisions with regard to proving electronic evidence. These provisions have been inserted by Act 21 of 2000 with effect from 17-10-2000 by way of sections 65A and 65B. Electronic evidence is admissible and is required to be proved only under these provisions. Section 65B starts with a non obstante clause and appears to be a complete code in itself governing the proof of electronic evidence. The question of proving the printed mails as secondary evidence therefore does not arise.

69. The other criticism of Mr. Bhattacharya about these e-mails is that the PW 118 and PW 132 have spoken about downloading the e-mails from the account of Akib Ali. He submitted that it is not possible to download an e-mail and only an attachment to the e-mail can be downloaded. It is trite that when an e-mail is sent it is initially saved on the server used by the e-mail account holder. It has read it. A temporary path is created showing its exact location on the computer. This path is shown at the foot of every e-mail when it is printed. All the e-mails produced by the prosecution show a definite path which is mentioned at the foot of every page evidencing that the e-mail was temporarily downloaded from the server on to the computer which was used to print the same. Therefore the term downloaded is not a misnomer as suggested by Mr. Bhattacharya.

70. As we have held that the prosecution has been able to prove that Akib Ali was the originator of 23 e-mails the contents must be presumed to be correct under section 88A. Apart from this provision the e-mails have been proved under Section 65B. On perusal of these e-mails as well as those accessed from the accounts of Asif Reza Khan and Akram in a similar manner by the prosecution, there is no doubt at all that there was a conspiracy to abduct "Khadim Jutawala". In fact the e-mails dated 17th and 18th December 2000 exchanged between Asif Reza Khan and Aftab Ahmed indicate that the initial target was "Haldiram" and was later changed to "Khadim Jutawala". The e-mails also direct that a safe house should be organised to further the plot. There is a thread showing the e-mails exchanged between "babaali" i.e. Akib Ali and "baba firdous". Akib Ali has mentioned the receipt of `3.75 crores and complained about having to account for every paisa spent when according to him he had contributed equally in the successful abduction in the Khadim case. The e-mails also mention that "jobs" were to be carried out in various other Indian cities. Thus the contents of these e-mails which can be presumed to be correct leave no manner of doubt that there was a conspiracy to abduct somebody from the Khadim organisation for ransom, that a safe house was to be selected, that an amount of `3.5 crores was received by the conspirators, Akib Ali being

one of them.

71. With the rise in crimes involving electronic communications, whether by using the Ethernet, Wi-Fi (wireless fidelity) connections or mobile networks, we are of the opinion that a competent officer from the Cyber Police Station, which has been formed on 08.09.2010, must be inducted mandatorily into the investigating team immediately such a case arises. This would ensure that the originator of the electronic communication is nabbed swiftly and appropriate evidence is collected and led to prove the e-mails, telephone calls, or electronic messages during trial of the case. In cases such as the present one it would be more useful perhaps in future for the prosecution to pursue leads from the Internet Protocol (IP) address from which the mails are sent. This would provide the exact location of the computer or smartphone or other devices from where the mails are sent. Thus even if an e-mail or electronic communication were to be sent from a computer in a cybercafé, a coffee shop or any location where a local area network (LAN), Wi-Fi (wireless fidelity) connection or mobile network is available it would be possible to identify the originator. Today, closed circuit television cameras are being installed in most areas where computers are accessible or where it is possible to use one's own devices which access Wi-Fi connections, or mobile networks, e.g., personal computers, mobile phones, tablet computers etc. The evidence obtained from such video recordings could be used to corroborate the identity of the originator of the electronic communications who sends such communications especially from a closed area. This would make it easier for the investigating officers in future to unearth the truth in crimes involving electronic messaging and communications with more certainty. It is necessary for the investigation agencies to keep pace with the technological advances in the world of electronics and to prove their case in accordance with the Evidence Act by making the best use of such technologies. Ransom

72. The entire story of the prosecution is based on the theory that the accused have all conspired to abduct Partha Roy Barman and seek ransom. The oral evidence on record does not prove that the ransom was actually paid in order to release Partha Roy Barman. The prosecution has sought to prove the payment of ransom through the testimony of PWs 60, 61, 62, 63, 64 and 65 who were either related to the victim or friends of the victim. However, all of them have been declared hostile. Faced with this situation, the prosecution has then relied on the evidence of the Duty Manager at Taj Krishna Hotel where PWs 61, 62 and 63 stayed overnight for the alleged payment of ransom. It must be recorded here that the trial Court has acquitted those who the prosecution alleges were the conduits for paying the ransom money. This would not necessarily lead to the inference that the abduction was not for the purpose of ransom. The meaning of ransom in Concise Oxford English Dictionary, 11th Edition, is (n.) a sum of money demanded or paid for the release of a captive; (v.) obtain the release of (someone) by paying a ransom; hold (someone) captive and demand a ransom for their release. Thus, the word ransom need not be given a restrictive meaning as argued by Counsel for the Appellants as it is the amount either demanded or paid. In Vinod v. State of Haryana reported in (2008) 1SCC (Cri) 338 and Malleshi v. State of Karnataka reported in (2004) SCC (Cri) 2115 the Supreme Court has observed that offence under Section 364A of the IPC is committed even though there may not be any actual payment of ransom but a demand has been made. In the present case as mentioned earlier the e-mails exchanged between the appellants and the other accused speak of the receipt of the ransom money and the equal contribution of all in the "arduous task" undertaken.

Conspiracy

73. The next issue is whether the conspiracy is proved and the appreciation of evidence in such a case. The Learned Counsel for the State has pointed out the judgements in the case of Devender Pal Singh v. State N.C.T. of Delhi and another reported in AIR 2002 SC 1661, Mohd. Khalid v. State of West Bengal reported in (2002) 7 SCC 334, Govt. of NCT of Delhi v. Jaspal Singh reported in (2003) 10 SCC 586, Suman Sood alias Kamal Jeet Kaur v. State of Rajasthan reported in (2007) 2 SCC (Cri) 637, Gulam Sarbar v. State of Bihar reported in (2014) 2 SCC (Cri) 195 to fortify his contention that the criminal conspiracy has been proved. The Supreme Court has articulated the manner in which evidence is to be assessed to ascertain whether there is a criminal conspiracy in a given case and how such a conspiracy is to be proved.

74. In the case of Suman Sood alias Kamal Jeet Kaur (supra) the Court considered several of its earlier judgments and the term "conspiracy" as described in Halsbury's Laws of England thus:

> 48. In Halsbury's Laws of England (4th Edn., Vol. 11, para 58), it has been stated:
>
> "58. Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court.
>
> The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."
>
> 49. In Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra4 this Court stated: (AIR p. 687, para 8) "The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence."

(emphasis supplied)

50. In Baburao Bajirao Patil v. State of Maharashtra5 this Court observed that there is seldom, if ever, that direct evidence of conspiracy is forthcoming.

Conspiracy from its very nature is conceived and hatched in complete secrecy, for otherwise the whole purpose would be frustrated.

51. In Kehar Singh v. State (Delhi Admn.)6, Shetty, J.

said: (SCC pp. 732-33, para 275) "275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement.

The express agreement, however, need not be proved.

Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

52. In Nazir Khan v. State of Delhi7 this Court observed: (SCC p. 477, para 18) "18. Privacy and secrecy are more characteristic of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference."

75. In Gulam Sarbar v. State of Bihar (supra) the Supreme Court observed that the essential ingredients of criminal conspiracy are (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act, or (b) an act which is not illegal in itself but is done by illegal means. After referring to its earlier judgments the Court observed that it was not necessary for the accused to know each detail of the conspiracy. The knowledge of main object of the conspiracy would suffice for the guilt of the accused to be established. Thus, what is essential is that all the alleged conspirators must be privy to an agreement to either perform an illegal act or an act which is legal but through illegal means. By the very nature of the offence, a conspiracy would be hatched in total secrecy. If there is sufficient material to reasonably believe that there was concert between the persons charged with a common design, it is immaterial as to whether they were strangers or ignorant of the role ascribed to each of them.

76. In the case Mohd. Khalid v. State of West Bengal (supra) the Supreme Court held that the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act for the offence punishable under Section 120-B. An agreement between the perpetrators which is the foundation for the offence of criminal conspiracy can be proved through necessary implication. If the design rests only in the intention, it is not indictable. When two or more persons agree to carry out the design into effect, the very plot or agreement is an act in itself. If the agreement is for completion of an act which constitutes an offence then no overt act is necessary to be proved by the prosecution. It can establish the criminal conspiracy by proving the agreement itself. This is sufficient to bring about a conviction under Section 120- B. The Court has further observed in Mohd. Khalid's case (supra) that the evidence of conspiracy can be proved either by direct or circumstantial evidence. Privacy and secrecy are the characteristics of a conspiracy. Therefore, direct evidence to demonstrate a conspiracy is seldom available. The circumstances proved before, during and after the occurrence of the incident have to be considered to decide the complicity of the accused. If there is trustworthy evidence establishing the links in the general or circumstantial evidence the confession of a co-accused about the conspiracy even without corroborative evidence can be taken into consideration. A criminal conspiracy can in some cases be inferred from the acts and conduct of the parties.

77. The learned Counsel for Akib Ali and Ashabuddin has submitted that PW 34 does not mention the name of either Akib Ali or Ashabuddin @ Saukat being present at 21B, Gorachand Lane. He pointed out that PW 35 has mentioned that Akib Ali and Ashabuddin had visited 21B, Gorachand Lane. This witness sought to implicate Akib Ali by stating that Asif Reza Khan told him that Akib Ali was waiting in the Maruti 800 car. However, PW 35 has not mentioned the name of Akib Ali when his statement was recorded by the Magistrate under Section 164 of the Cr.P.C. The learned Counsel pointed out that even assuming this statement was true it is not admissible in evidence as it amounts to hearsay evidence. PW 35 had no direct knowledge about the presence of Akib Ali in the Maruti car.

78. Both Mr. Sandip Kumar Bhattacharya and Mr. Jayanta Narayan Chatterjee, appearing for the appellants, have criticised the evidence of Swati Paul. They pointed out that the prosecution had failed to establish that there was any conspiracy or that the appellants here were privy to the plan to abduct Partha Roy Barman for ransom. They have urged that the prosecution has failed to establish the payment of ransom through any credible witness, and therefore the entire theory of there being a conspiracy to abduct Partha Roy Barman for ransom fails. They have been vehement in their condemnation of the prosecution case by pointing out that neither the victim, Partha Roy Barman, nor the members of his family nor his friends have supported the case of the prosecution with regard to abduction for ransom. The learned Counsel urged that even assuming the story of Partha Roy Barman as stated by him is to be believed, at best, the prosecution case would be that he was abducted and confined in the Bhoot Bungalow. According to them, the entire case against the appellants is concocted and the appellants have had no role to play at all. They have pointed out that there was no unbroken chain of events which would lead to the unmistakable conclusion that there was a conspiracy hatched which led to the abduction of Partha Roy Barman for ransom. Mr. Bhattacharya has then drawn our attention to the several inconsistencies and contradictions in the evidence of the witnesses and that of the I.O. He pointed out that these are major contradictions

which cannot be ignored. According to him, the witnesses on whose evidence the prosecution relies heavily have embellished their versions in Court after their statements recorded by the police earlier. Such evidence, according the learned Counsel, has to be disbelieved, as there are material improvements in the evidence recorded in Court. He relied on the judgment of the Supreme Court in the case of Vijay Kumar v. State of Rajasthan reported in (2014) 2 SCC (Cri) 205, and Sampath Kumar v. Inspector of Police, Krishnagiri reported in (2012) 2 SCC (Cri) 42. The Supreme Court in the case of Sampath Kumar (supra) has observed that minor contradictions or discrepancies are bound to appear in statements of truthful witnesses as memory sometimes plays false and the sense of observation differs from person to person. However, the Court has observed that it is unsafe to rely upon a version with material improvements unless it is corroborated by some other independent evidences.

79. As regards circumstantial evidence, the learned Counsel has pointed out the judgments in the case of Ghurey Lal v. State of Uttar Pradesh reported in (2009) 1 SCC (Cri) 60, Arun Bhanudas Pawar v. State of Maharashtra reported in (2009) 1 SCC (Cri) 112, Asraf Sk and Anr. v. State of West Bengal reported in 2008 (4) Crimes 288 (SC), A. Jayaram and Another v. State of A.P. reported in 1995 SCC (Cri) 864, Roop Singh @ Rupa v. The State of Punjab reported in 2008 (3) Crimes 52 (SC). In the case of Mohd. Faizan Ahmad alias Kalu v. State of Bihar reported in (2013) 1 SCC (Cri) 872 where the Supreme Court has observed that suspicion, however grave, cannot take the place of proof. The criminal Courts cannot be swayed by the gravity of the offence and proceed to hand out a punishment on that basis unless the conviction is based on legally admissible evidence and not far-fetched conjectures and surmises.

80. The learned Counsel submitted that when the entire case is based on circumstantial evidence, the motive for the crime must be established unmistakably by the prosecution. He relies on the judgment in the case of Smt. Omwati etc. v. Mahendra Singh and Others reported in 1998 Cri.L.J. 401 where the Supreme Court has observed that though the proof of the motive is not necessary to sustain a conviction when the prosecution has put forward a specific case for the motive for the crime. The evidence regarding the same must be acceptable motive for a crime is a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of a co-accused person but it cannot fill up a lacuna in the evidence.

81. The learned Counsel has also pointed out that there was no corroboration between the I.O. and PW 60 regarding the presence of the I.O. when the alleged ransom call was made. He also pointed out that out of the 22 accused persons 17 had been acquitted, some of whom were Pakistani nationals.

82. The learned Counsel for the State had, as mentioned earlier, submitted that the accused had demanded ransom in order to use the money for Jihad. Mr. Bhattacharya, learned Counsel for the appellants, urged that this submission on behalf of the State is made without there being any foundation on record. He pointed out, rightly, that none of the appellants have been charged under Section 121A of the IPC, nor is there any evidence, according to him, regarding the fact that the ransom money was to be used for Jihad. Therefore, according to Mr. Bhattacharya, this submission of the learned Counsel for the State is merely a conjecture or speculation and has been advanced to

prejudice the mind of the Court against the appellants.

83. Mr. Chatterjee, the learned Counsel for Abdul Rahaman Kunji, has submitted that the charge has not been framed properly as it does not stipulate where and when the alleged conspiracy was hatched. He submitted that the FIR does not disclose that there was any demand for ransom made and therefore the appellants should not have been charged under Section 364A. He also submitted that no incriminating article had been seized at the instance of Abdul Rahaman Kunji. According to him, the evidence of Swati Paul that she was privy to the conversation between Aftab Ansari and Abdul Rahaman Kunji has not been established beyond doubt. Furthermore if the alleged conspiracy was hatched in 21B, Gorachand Lane then Swati Paul could not be aware of the plan as no prosecution witness has spoken of her presence in these premises. The learned Counsel has pointed out that no T.I. parade was held for Abdul Rahaman Kunji. He relied on the judgment in the case of State of Tamil Nadu v. Nalini and Others reported in 1999 Cri.L.J. 3124 where the Supreme Court has observed in the facts of that case that mere association with hard-core militants or the fact that those militants turned out to be the persons responsible for the killing of the victim would not make a person member of a conspiracy to kill him. The learned Counsel has submitted that Swati Paul's evidence regarding the talk between Aftab Ansari and Abdul Rahaman Kunji has to be treated as hearsay evidence and therefore is not admissible. He relies on the judgment in the case of Vijender v. State of Delhi reported in (1997) 6 SCC 171.

84. The learned Counsel for the State has pointed out that the prosecution has been able to prove the abduction and confinement of the victim by several pieces of evidence. He pointed out that the articles seized at the place of captivity, i.e., the Bhoot Bungalow and that the bloodstains found in the premises matched the blood of the victim. According to him the plot was hatched at 21B, Gorachand Lane. Amir Reza Khan and his brother Asif Reza Khan were the prime movers of the plot and were working under the instructions of Aftab Ansari. Asif Reza Khan was killed in an encounter. The victim has proved the abduction and his consequent confinement and release. He then pointed out that the evidences of PWs 5, 9 and 11 show the involvement of the appellants in the conspiracy. He then submitted that the prosecution had a herculean task to prove the charges against the appellant because the witnesses of the prosecution had turned hostile. He relied on the judgment in the case of Ramesh Harijan v. State of Uttar Pradesh reported in (2012) 2 SCC (Cri) 905 in support of his submission that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution has chosen to treat him as a hostile witness. He also drew our attention to the observations of the Supreme Court in Shyamal Ghosh (supra). The learned Counsel submitted that though the victim was found to be hostile, his testimony proves his abduction and confinement. However, this witness was unable to identify any of his captors. We have noticed that besides the victim, the members of his family, his friends and his employees who have all been examined as witnesses have been declared hostile. The reason for this is not far to seek. When the evidence of these witnesses was recorded in the latter part of the year 2006 and thereafter, some of the accused in this case were being tried for grievous offences in this State as well as in other parts of the country. It is not impossible that these witnesses felt intimidated by the situation and therefore did not answer the questions relating to the payment of ransom.

85. The learned Counsel for the State has then relied on the judgments in State of West Bengal v. Mir Mohammad Omar and Others reported in 2000 SCC (Cri) and State of U.P. v. Krishna Master reported in 2010 Cri.L.J. 3889 which expound on the appreciation of evidence in a criminal trial. The Supreme Court has opined that minor discrepancies which do not touch the core of the case cannot be considered to be fatal to the case of the prosecution. The Court observed that when a witness is subjected to gruelling cross-examination for a long period some inconsistencies are bound to occur. Such inconsistencies or discrepancies should not be blown out of proportion while evaluating the evidence, if they do not go against general tenor of the evidence.

86. The judgements of the Supreme Court which have been cited before us elucidate that the evidence with regard to a conspiracy may be direct or circumstantial. The Court has observed that it is generally difficult to find direct evidence given the nature of the crime. The participants in the conspiracy must have a common object even though each of them may not know the role ascribed to the others for furtherance of the plot. Indeed, the conspirators need not physically meet in order to chalk out the plan. The meeting of the minds of the conspirators to execute their ultimate goal must be reflected from the evidence on record.

87. Bearing in mind the observations of the Supreme Court with regard to the appreciation of evidence in a case of conspiracy we will now consider the chain of events from which it can be unmistakably deduced that there was a conspiracy to abduct Partha for ransom and that the appellants were participants in the commission of the crime.

88. As mentioned earlier there is evidence on record which proves that there was a plan to abduct the chief of Khadim Shoe Company. This idea which occurred to Aftab Ansari and Asif Reza Khan took shape at 21B, Gorachand Lane. Akib Ali and Ashabuddin were present at the meetings which were held at the aforesaid premises. Besides the approvers, there are other witnesses who have seen them in the premises. The appellants have not been able to explain their presence at 21B Gorachand Lane in their statements recorded under section 313 Cr.P.C. Swati Paul has spoken about Abdul Rahaman Kunji leaving for Kolkata from Mumbai on arriving there from Dubai. He mentioned to her that a shoe manufacturer was to be abducted. On his return to Mumbai he informed her that the task had been completed successfully. The approvers have vouched for his presence in 21B Gorachand Lane. Separate acts were assigned to each of the conspirators. Akib Ali and Ashabuddin were responsible for procuring the Maruti 800 car for the abduction. Akib Ali was waiting with Asif Reza Khan to transfer the victim from this car to a Maruti 1000 which the latter drove to the Bhoot Bunglow. Akib Ali then drove the Maruti 800 to a garage to get the tail light repaired. The car was seized from Ashabuddin in New Delhi in November 2001 by a CBI officer in another case. This officer has identified Ashabuddin in Court. Partha Roy Barman has testified about being abducted and confined in a dark room. Three prosecution witnesses have seen the manner in which the abduction occurred. They have spoken about a tall bearded man being pulled out of his car and being pushed into a waiting white Maruti 800 car. Both of them visited the Bhoot Bungalow where the victim was confined. The police produced the CFSL report relating to the DNA test of the bloodstained clothes found in the Bhoot Bungalow. The bloodstains matched with the victim's blood. The motive for the abduction has been proved both through oral evidence as well as the electronic evidence. The abduction of Partha Roy Barman was undertaken for ransom. The demand

was made by one of the conspirators as evident from the call records. The e-mails prove that the ransom was received and that Akib Ali claimed to have participated in equal measure as the others in the abduction. These circumstances prove the prosecution case beyond all reasonable doubt. There is thus a complete chain of circumstances which admits no other conclusion but that the appellants are guilty of commission of the criminal acts alleged against them.

89. The Sessions Court has assessed the evidence on record correctly and found the appellants guilty as charged. We do not find any reason to differ with the findings of the Sessions Court. The appeals therefore fail and the conviction of and the sentence imposed on Akib Ali, Ashabuddin and Abdul Rahaman Kunji is upheld. As mentioned earlier the appeal of Happy Singh has abated.

90. The appeals are dismissed.

91. The LCR be sent to the trial Court, i.e., the Court of Additional Sessions Judge, 2nd Court, Alipore, immediately as the trial in respect of some of the accused is still pending.

92. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

(Tapash Mookherjee, J.) (Nishita Mhatre, J.)