
(2011) 04 GAU CK 0024

In the Gauhati High Court

Case No : Criminal Appeal No's. 193, 207 and 146 (J) of 2008

Yuvraj Kalita and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 9

Penal Code, 1860 (IPC) — Section 34, 364, 364A

Citation : (2011) 3 GLT 761

Hon'ble Judges : I.A. Ansari, J;C.R. Sharma, J

Bench : Division Bench

Advocate : AM Mazumdar, . Ms. D Borgohain, Amicus Curiae, Ms. J Chetry, Mr. KD Chetri, Mr. B Baruah, Mr. KM Choudhury, Mr. S.S Dey and Ms P Chakravorty, Amicus Curiae, for the Appellant; K. M. Majumder, Addl. PP, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—By this set of appeals, the appellants have challenged the judgment and order, dated 22.9.2008, passed by the learned Addl. Sessions Judge (F.T.C.) No. 4, Kamrup, Guwahati, in Sessions Case No. 88(K)/07 (arising out of GR case No. 3945/1992).

2. All these appeals, arising out of the same judgment and order, involving similar facts and questions of law, with the consent of the learned counsel, appearing for the parties, were heard together and for the sake of convenience and brevity, we propose to dispose of the said appeals by this common judgment and order.

3. By the impugned judgment and order aforesaid the learned Addl. Sessions Judge convicted the appellants, who were the accused persons, in Sessions Case No. 88(K)/ 2007, u/s 364A read with Section 34 of the Indian Penal Code (hereinafter referred to as "IPC) and accordingly sentenced, each of them, to suffer life imprisonment and pay fine of Rs. 5000/-, in default suffer rigorous

imprisonment for another period of six months each for their convictions, u/s 364A/34 IPC.

Aggrieved by the said conviction and the sentence, the appellants have individually come up with the present appeals.

4. We have heard Mr. A.M. Mazumdar, learned senior counsel, assisted by Ms. D. Borgohain, learned Amicus Curiae, appearing for Mr. Yubaraj Kalita, appellant in Criminal Appeal No. 193/2008, Mr. K.D. Chetri, learned counsel, appearing for Sri Chandiram Kalita, appellant in Criminal Appeal No. 207/ 2008 and Ms. P. Chakravorty, learned Amicus Curiae, appearing for, Sri Dipak Talukdar, appellant in Criminal Appeal No. 146(J)/2008. We have also heard Mr. K.M. Majumder, learned Addl. Public Prosecutor, appearing for the State.

5. The facts of the prosecution case, in brief, as may be required for disposal of the appeals at hand, are as below:

6. Sri Adwita Avatar Chakravorty, aged about 6 years (as he then was), son of Sri Jibo Das Chakravorty, President of the International Society for Krishna Consciousness (for short "ISKON"), was a student of Class I, of the Sister Nibedita School, Silpukhuri. As usual, on 24.9.1997, he was escorted to the school, at about 9.15 A.M., by a disciple of ISKON. Though his school hour was up to 1 P.M., Sri Adwita was required to remain at the school up to 4.30 P.M., for attending tutorial classes. On the same day, at about 4.30 P.M., a security staff of ISKON went to the school to fetch Adwita Avatar Chakravorty, but he was informed by the school authority that Adwita had already been taken by somebody. The said security staff reported the matter to Sri Jibo Das Chakravorty @ Sanjib Chakravorty (PW. 1) and, on being so informed, Sri Jibo Das, along with his wife, rushed to the school aforesaid and they were informed, by the Principal (PW. 4) of the school, that their son had been taken away by somebody from the school. The Mid wife (PW. 2) of the school, who had handed over the child, to the kidnapper, informed PW. 1 that she would be able to identify the person, who had taken his son from the school.

In view of the above, the father of Adwita Chakravorty i.e. PW. 1 informed police, by lodging an FIR (Ext. 1), with the officer-in-charge, Chandmari Police Station, Chandmari. On receipt of the said FIR, police registered Chandmari P.S. Case No. 264/ 97, u/s 364 IPC and launched investigation into the matter.

7. On the following day, i.e. on 25.9.1997, someone, identifying himself as a representative of a farmers, organization, telephonically demanded Rs. 10,00,000/- from the informant i.e. the father of the said child, as ransom towards the release of the said kidnapped boy and this was brought to the notice of the police. Again, on 27.9.1997, PW. 1 received telephonic information to the effect that his son would be released if an amount of Rs. 80,000/- was paid on the same day, of course, subject to the condition that the balance amount should be paid later on. The said caller asked the informant to go to a place, namely, "Bangsar", with the money. Accordingly, after arranging Rs. 81,000/-, the

informant went to the police station to inform the matter and, there from, proceeded to Bangsar, along with Sri J.C. Barman (PW.8), the then Addl. S.P., in a sumo vehicle, driven by Mr. Akhil Lahkar (PW. 7), who was known to the informant. On their arrival at Bangsar, at 5 P.M., a boy, who came by riding a bicycle, approached and asked them to follow him into the village; but, as the informant and his party expressed their reluctance to proceed further into the village, the said boy went back and returned with another boy and insisted upon the informant to go with them inside the village. However, after negotiation, they agreed to hand over the child, at the said place, and accordingly, the said two boys brought Adwita on a bicycle and handed him over to PW. 1, who, immediately, put him into the vehicle. In the meantime, another boy came flashing torchlight at their vehicle. Thereafter, PW. 1 handed over the bag, containing the money, to one of the boys, who handed over the same to the other boy and the boy, to whom the money was initially given, shook hands with the informant chanting "Hare Krishna". Thereafter, when the said boy shook hands with Sri J.C.Barman, the latter tightened grip holding the hand of the boy and signaled the driver to move the vehicle ahead and, thus, the said boy, who was, subsequently, identified as Yubaraj Kalita, was dragged along with the vehicle and he was arrested by the waiting police party and the police commandos. The bag, containing the money, was found by police, at the place of negotiation. When Sri Yuboraj Kalita was dragged by Mr. J.C. Barman, the other boy (i.e. the second boy) continued to pull Sri Yuboraj to get him released, from the grip of Sri Barman and this boy was identified as Sri Dipak Talukdar i.e. the appellant in Criminal Appeal No. 164(J)/2008.

8. During the course of investigation, police examined the witnesses, seized the bag containing Rs. 38.830/- from the place of occurrence and a revolver with two live cartridges, a pair of spectacles, a radio and a pocket diary from the possession of Sri Yuboraj. At the close of the investigation, police laid charge sheet, against the accused-appellants and one Niranjana Kalita for the offence under Sections 364A/34 IPC.

9. The offence being exclusively triable by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate, by his order, dated 01.03.2007, committed the case to the Court of Sessions for trial.

10. The learned Sessions Judge, by his order, dated 16.6.2007, framed charge, u/s 364A read with Section 34 IPC, against the appellants and Sri Niranjana Kalita. The charge was read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried.

11. In order to bring home the charge, prosecution examined as many as ten witnesses including the investigating officer. At the conclusion of the examination of the prosecution witnesses, the accused persons were examined, u/s 313 Cr.P.C. They denied the allegations brought against them. Their plea was that of total denial, Sri Yuboraj Kalita, in his statement, given u/s 313 Cr.P.C, pleaded that, from 17.9.1997 to 25.9.1997, he was undergoing treatment at the Gauhati

Medical College Hospital and that the relevant papers, relating to his ailment, were taken by the police. He also stated that he was arrested on suspicion.

12. Mr. A.M. Mazumdar, learned Senior counsel, assisted by Ms Borgohain, learned Amicus Curiae, appearing for the appellant, Sri Yuboraj Kalita, took us through the evidence on record and also the impugned judgment and order and submitted that the learned trial Judge committed error by recording the conviction without sufficient and cogent evidence on record. The learned Senior counsel further submitted that though the occurrence took place on 24.09.1997, submission of the charge sheet after about 10 years and the inordinate delay, in completion of the investigation, sufficiently indicate that the prosecution story, regarding involvement of the appellants, is false and concocted. It has also been submitted by Mr. Mazumdar, learned Senior counsel, that the evidence, regarding identity of the appellants, given by the PW 5 (i.e., the victim boy), who was 6(six) years old, at the relevant time, and Smt. Giribala Das and Smt. Devi Dey, who had allegedly claimed to have seen the appellant, Sri Yuboraj Kalita only once, that too for a moment, i.e., on the date of alleged kidnapping of the child from the school and the evidence of the informant (i.e., PW 1), PW 3 and PW 7 (Sri Akhil Lahkar) and PW 8 (Sri J.C. Barman), who claimed to have seen the said accused persons, on the date of alleged recovery of the boy, are not at all believable inasmuch as it is not humanly possible to remember the identity of a person, seen for a moment and that too, after 10 long years. The learned Senior counsel further submitted that the evidence on record reveals that at the time of alleged handing over of the child, by the accused persons, darkness had descended, because P W-1 states that the third boy had used torchlight to see the vehicle as well as PW. 1 and his party.

Therefore, it is contended, on behalf of the appellant, Yuboraj Kalita, that, due to insufficient light, it is not believable that it was possible to identify the appellants at the time of recovery of the boy. The learned Senior counsel further submitted that, as the police officer (PW.8) was sitting on the rear seat, the evidence of PW.8 that he had shaken hands with Sri Yuboraj Kalita, through the front door, is not at all believable. The learned Senior counsel has also contended that, the evidence, that the victim boy had informed the school authority, on being asked, that the person, who had gone to the school to take him, was from his house and the fact that he had spent three days, playing with them, after the alleged kidnapping, indicate that there was a conspiracy behind the arrest of the appellants and that they have been falsely implicated in this case. The learned Senior counsel further submitted that, the appellant, Sri Yuboraj, had been undergoing treatment, from 19.09.1997 to 25.09.1997, as an indoor patient in the Guwahati Medical College Hospital, and as such, the prosecution story, that this appellant was involved in kidnapping as well as the recovery of the boy, is not at all believable. It has also been submitted by Mr. Mazumdar that it was the duty of the Court to call for and examine the medical papers regarding hospitalization of the appellant Sri Yuboraj.

The learned Senior counsel further submitted that as no Test Identification Parade was held, immediately after the arrest of the accused persons, the evidence of the prosecution witnesses, regarding the identity of the accused persons, that they could identify them, after about 10 years, cannot be accepted. The learned Senior counsel further submitted that no ingredients of Section 364A IPC has been established against the appellants and as such, the conviction and the sentence recorded, u/s 364(A) IPC, cannot be allowed to stand in the eye of law.

13. In support of his contentions, the learned Senior counsel has relied on the decision held in the case of State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others,

14. Adopting the arguments, advanced by the learned Senior counsel, appearing for appellant, Sri Yubaraj Kalita, Mr. K.D. Chetri, learned counsel, appearing for appellant, Sri Chandiram Kalita, and Ms. P. Chakravorty, learned Amicus Curiae, appearing for appellant Sri Dipak Talukdar, have submitted, that the prosecution failed to prove, beyond all reasonable doubt, the involvement of the said appellants and that their identity has also not been properly established to show that they had committed the alleged offence.

15. Mr. Chetri, learned counsel, has further submitted that it is not safe to rely on the evidence of PW. 5, who was a six years old child at the relevant time. In support of his contention, the learned counsel has relied on the decisions in the cases of Raju alias Rajendra Vs. State of Maharashtra, and Panchhi and others Vs. State of UP,

16. Mr. K. M. Majumder, learned Addl. Public Prosecutor, appearing for the State, supporting the impugned convictions and the sentences, has submitted that the involvement of the appellants has been well established by the prosecution witnesses and that there is no material contradiction in their evidence rendering their evidence unbelievable. The learned Addl. Public Prosecutor further submitted that PW. 1, PW. 7 and PW.8 met the appellants, namely, Sri Yubaraj Kalita and Sri Dipak Kalita, at about 5 pm i.e. during the time, when there was sufficient sun light to identify them, and that PW. 1 had conversation and negotiation for quite long and as such, there was no difficulty to identify the said appellants. It is also submitted that the said conversation, as well as the negotiation, facilitated PW. 7 and PW.8 to observe and recognize the said appellants. It is also submitted, by the learned Addl. Public Prosecutor, that the kidnapped boy, though six years old, had attained sufficient maturity and acquired intelligence and, therefore, it is submitted that, as he had spent 4(four) long days in the company of the appellants, he got sufficient opportunity to keep their identity in his mind. Therefore, it is submitted that, in view of the undemolished evidence, given by PW. 1, PW. 7, PW.8, PW. 2, PW. 3 and PW. 4, the evidence of PW. 5 cannot be disbelieved only on the ground that he was a child witness.

17. In order to appreciate the rival arguments, advanced by the learned counsel, appearing for the parties, and to examine the correctness of the impugned judgment and order, we feel it necessary to, briefly, scan the evidence on record.

18. Smti. Giribala Das, who deposed as PW. 2, was the one, whose job was to take care of the children, at the Sister Nibedita School, wherein at the relevant time, the kidnapped boy (PW. 5) studied. PW 2, in her evidence, has stated, that P W 5 was a regular student of their school, that on the relevant day, a man came to the school and enquired as to whether Adwita's class was over and that, she, after informing the teacher about such enquiry, continued to attend her duty. PW. 2, identifying Sri Yubaraj i.e. the appellant, who was present in the dock of the court, stated that he was the person, who came to the school to take Adwita. She has further stated that, later on, Adwita's parents came to the school and informed that Adwita did not reach home. In her cross examination, this witness stated that she could not exactly remember who had gone to the school to take Adwita.

19. Ms Devi Dey, a maid of the said school, deposing as PW. 3, stated that Adwita Chakravorty was a student of their school and that after the school hour, a person came to the school to take Adwita and as directed by the Madam, she had handed over Adwita to that man. She further stated that, as the man was not known to her, she had asked Adwita if he knew the man and Adwita replied by saying that the man was from his house. According to PW. 3, on getting such response from Adwita, she handed over the boy to the said man. PW. 3 identified the appellant, Yubaraj Kalita, as the person, who had come to the school to take Adwita from the school. She has further stated that subsequently, a security staff from the temple, followed by parents of Adwita, came to the school, in search of Adwita. In her cross-examination, she categorically stated that the appellant, Yuboraj Kalita, had taken Adwita from the school. She denied the suggestion that Yuboraj Kalita was undergoing treatment, in the hospital, on that day.

20. Smti. Dulon Guha Mallick, who was the Head Mistress of Sister Nibedita School, deposing as PW. 4, stated that Adwita Chakravorty and his father were known to her. She also stated that usually, a disciple, or a security staff, or some other person, from ISKON, used to bring Adwita to the school. She has further stated that she could identify the accused person, who had taken away the boy from the school, when the said accused was brought to the school by the police after his arrest. In her cross-examination, she further stated that, subsequently, she came to know that Yubaraj Kalita had taken Adwita from the school on that day. She denied the suggestion that Yubaraj was in the hospital on the date of occurrence.

All the said witnesses, in clear terms, stated that it was Yubaraj, one of the appellants, who had taken away the victim boy from the school on the date of occurrence. Though the said witnesses were cross-examined, on behalf of the defense, no contradiction, to demolish their evidence, regarding identity of Yubaraj could be elicited. Therefore, their evidence that it was Yubaraj, who had

taken away the boy from the school, remained undemolished.

21. Supporting the evidence of P Ws. 2, 3 and 4 aforesaid, Sri Adwita Avatar Chakravorty, who is the star witness in this case, deposing as PW. 5, stated that Yubaraj was the man, who had taken him away from the school and that he had brought him away to his father on a cycle. Identifying Yubaraj, in the court, he stated, that it was Sri Yubaraj, who told him, in the school, that his father had sent him to take him home and that, as he too was willing to go home, he had told the school maid, Smti Devi Dey (PW 3), on being asked by her, that the said person was known to him. This evidence of PW. 5 lends support in favor of the evidence of PW. 3, who stated that, on being asked, Adwita had told her that the said man was from his house. PW. 5 further stated that he was taken, from the school, in an auto rickshaw and, then, in a bus, to a temple. According to Adwita, after alighting from the bus, he was taken to a thatched house in a rickshaw and, thereafter, he was shifted from one house to another house. He further stated that, during his stay, in the custody of the accused persons, Dipak Talukdar (identified in court) used to stand on guard and the appellant Chandiram (identified in court), while guarding him, used to play with him.

22. Relying on the decision of Panchhi (supra), Mr. K.D. Chetri, learned counsel, appearing for the appellant, Sri Chandiram Kalita, has submitted that, PW. 5 being a child, at the relevant time, his evidence cannot be, safely, relied on. The learned counsel, relying on the decision of Raju @ Rajendra (supra), has also submitted that, as no test identification parade was held, immediately after the occurrence, the identification of the accused person, for the first time in the court, by the witnesses, cannot be basis for conviction.

In the case of Panchhi (supra), it was argued that it was risky to accept the evidence of PW. 1, who was a child. The Supreme Court, in the above mentioned case, observed:

11. Shri R.K. Jain, learned senior counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law. *Prakash and another Vs. State of Madhya Pradesh*, *Raja Ram Yadav and others Vs. State of Bihar*, and *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra*,

(Emphasis is added)

23. Fact remains that, in the case at hand, PW. 5 was a student of Class-I at the relevant time and his age was about 6(six) years. He was taken by the miscreants, on 24.9.1997, from his school and, thereafter, kept in their custody till the evening of 27.9.1997. Thus, he spent almost four days with the persons, who had kept him in their custody. PW. 5, i.e. the victim boy, clearly stated that Yubaraj Kalita had taken him from the school and that he was brought, on a bicycle, to his father. He further stated that during his stay in the custody of the appellants, appellant, Sri Dipak Talukdar, used to guard him and Chandiram Kalita, while guarding him, used to play with him. As the said child had spent considerable period with the appellants, there is sufficient reason to believe that he had no difficulty in identifying the appellants in the court. That apart, his evidence that he was taken from the school by Yubaraj has been duly corroborated by PWs. 2, 3 and 4.

The father of PW. 5, who deposed as PW. 1, stated that, Sri Yubaraj Kalita, who was apprehended at the time of recovery of the boy and Dipak Talukdar brought his son on a bicycle. This evidence of PW. 1 lends sufficient corroboration to the evidence, given by PW. 5, PW. 2, PW. 3 and PW. 4 regarding taking away of Adwita by Yubaraj Kalita, from the school and keeping him in confinement. Also there is sufficient corroboration of the evidence of PW. 5 by PW. 1 to make one believe that Yubaraj had brought PW. 5, on a bicycle, to his father.

PW. 5, in his cross-examination, made on behalf of the appellant Yubaraj Kalita, denied the suggestion that Yubaraj was not the person, who had gone to his school to take him there from. From the cross-examination of PW-5, no contradiction could be elicited to discredit his evidence. Therefore, the evidence of PW. 5, regarding the identity of the appellants and their involvement, remained undemolished. PW. 1 (i.e. the father of the victim), PW. 7 (i.e. the driver of the vehicle) and PW.8 (i.e. the police officer), who accompanied the informant, clearly stated that appellant, Yubaraj Kalita, had brought the child to them and that he was apprehended after the money was handed over to him in exchange of PW-5. Therefore, we find sufficient corroboration in the evidence of the said witnesses regarding identity of the appellants.

In view of the above, the evidence of PW 5 cannot be discarded only on the ground that he was a child at the relevant time. There is nothing on record to show that the said child was not in a position to remember the identity of the persons, who had taken him and kept him in their custody for four long days.

24. Relying on the decisions in the cases of Sukhdev Singh (supra) and Raju @ Rajendra (supra), Mr. A. M. Majumder, learned Senior counsel, appearing for Yubaraj, and Mr. K.D. Chetri, learned counsel, appearing for Chandiram, have submitted that, as no identification parade was held, immediately after the arrest of the accused- appellants, the identification made by the witnesses, in the Court, after about ten years, cannot be accepted as evidence, which is safe to rely upon.

25. In the case of Raju @ Rajendra (supra), on 14.3.1985, at about 6 P.M., A1 and A2 went to the house of Raju along with the deceased and took him to the house of Ganesh, where all of them consumed liquor. Thereafter, they proceeded towards Ramnagar along the Rastrabhasha Road. When they reached the Ganesh Temple, situated on the road, A1 and A2 started beating Ramkrishna, the former with a hockey stick and the latter with a stone. When, owing to such beating, he fell down, they took him behind the house of Timande in a rickshaw and dumped him there. In the meantime the two boys had gone to the house of Ramkrishna and told his father Yadaorao (PW 1) about the incident. P W1 immediately rushed to the spot and found his son lying in a rickshaw. A1 and A2, challenging the conviction and sentence, carried the appeal to the Supreme Court. The question regarding identification of A1 and A2 being raised, the Supreme Court, while allowing the appeal, preferred by A2 and dismissing the Appeal, filed by the A1, observed as follows:

7. That brings us to the question whether their identification of the two appellants as the miscreants can be safely relied upon. So far as the identification of A-1 is concerned we find that he (A-1) was known to both of them from before. In such circumstances their identification of A-1 as one of the two miscreants who assaulted the deceased with a stone cannot be questioned. Resultantly, we need not deal with or delve into the circumstantial evidence pressed into service by the prosecution to buttress the evidence of the eyewitness in proof of the accusation leveled against A-1.

8. The same cannot, however, be said about their identification of A-2 as the other miscreant for they admitted that they saw him for the first time on that day. In view of their above admission and in absence of any TI parade held for identification of A-2 immediately after his arrest, we find it difficult to solely rely upon the identification of A-2 by the witnesses for the first time in court and. that too after a lapse of almost one and half years after the incident.

9. It is of course true that the prosecution led evidence through PW 1, father of the deceased, to prove that about an hour before the incident both A-1 and A-2 came, and accompanied by the deceased left his house. The evidence of PW 1, so far as it relates to identification of A-1, cannot also be relied upon for even though he claimed to have known A-2 from before, in the FIR he did not mention the name of A-2. When he was confronted with his material omission he asserted that he mentioned the name of A-2 but he could not assign any reason why it did not find place in his report. The evidence of P W 1, therefore, does not come in aid of the prosecution to prove that A-2 was the other miscreant. As from the other circumstantial evidence such an irresistible conclusion cannot be drawn, he is therefore entitled to the benefit of doubt.

26. In the case of Sukhdev Singh (supra), the Supreme Court observed:

17. From the above facts it is not possible to infer that Sukhi and Sukha were in occupation of the flat. This gap is sought to be filled through PW 48 H.S. Bhullar

who claims to be a friend of the inmates of the flat. This witness deposes to have taken three prostitutes to the flat to satisfy the sexual urges of Sukhi, Sukha and another who were living therein. Now this witness is said to have identified Sukha in court. Ex. 318 dated December 8, 1988 is an application given by Accused 5 Jinda alleging that when he and Sukha were being taken to court they were shown to the prosecution witnesses. Before we examine this allegation it is necessary to bear in mind that PW 48 was apprehended by the police on May 10, 1986 and was booked as a co-accused but was later released and used as a witness. Great care must be exercised before acting on such a belated identification in court by a witness who cannot be said to be an independent and unbiased person. Corroboration is sought to be provided through the maid servant PW 49 Lalita who was working in the flat. She too had identified the accused in court only. She was candid enough to accept the fact that the accused Sukha and Jinda were shown to her and PW 48 when they were being taken to court. This admission nullifies the identification of the two accused by these two witnesses in court. No weight can be attached to such identification more so when no satisfactory explanation is forthcoming for the investigation officer's failure to hold a test identification parade. So also PW 50 Hira Sinha, one of the prostitutes, also identified him in court but she too was not called to any test identification parade to identify the inmates of the flat. She too admits that Sukha was shown to her when he was in the lock-up. The other prostitute Jaya who is said to have had sex with Sukha was not called to the witness-stand though she attended court, When PW 50 could not identify the person with whom she had sex what reliance can be placed on her identification of Sukha in court after a lapse of almost two years? Besides, it is an admitted fact that there was considerable change in the appearance of the accused, earlier they were clean shaven and later they were attired like Sikhs making identification all the more difficult. No neighbor, not even the laundryman, was examined to establish their identity. In this state of the evidence if the learned trial Judge was reluctant to act on such weak evidence, no exception can be taken in regard to his approach.

25. From the facts discussed above it becomes clear that the direct evidence, if at all, regarding the identity of the persons who moved about in different assumed names is either wholly wanting or is of such a weak nature that it would be hazardous to place reliance thereon without proper corroboration. As pointed out earlier the direct evidence regarding identity of the culprits comprises (i) identification for the first time after a lapse of considerable time in court or (ii) identification at a test identification parade. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. In the present case it was all the more difficult as indisputably the accused persons had since changed their appearance. Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance, which the court ordinarily seeks to act on it.

In the absence of such test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time and that too of persons who had changed their appearance. We, therefore, think the learned trial Judge was perfectly justified in looking for corroboration. In *Kanan and Others Vs. State of Kerala*, this Court speaking through Murtaza Fazal Ali, J observed: (SCC p. 320 para 1)

It is well settled that where a witness identifies an accused that is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation. The idea of holding T.I. parade u/s 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court.

We are in respectful agreement with the afore-quoted observations.

27. The background facts in the above referred cases and the case at hand are not similar.

In the case of *Raju @ Rajendra (supra)*, father of the victim, despite seeing A1 and A2 before the occurrence, in the company of the deceased, had not mentioned about A2 in the FIR lodged by him. Though, on being confronted with such material omission, the said witness asserted that he had mentioned the name of A2 in the FIR, A2's name did not, in fact, find place in the said report. That apart, the said witness as well as PWs. 4 and 12, who claimed to have identified A1 and A2, did not disclose the fact of their having seen A1 and A2 to anybody till they were examined by the Investigating Police Officer. As PW. 4 and PW. 12 saw the A2 only once, in the absence of TI Parade, Supreme Court found it difficult to solely rely upon the identification of A2 by the witness for the first time in the Court and that too, after a lapse of almost one and half years after the incident. In view of the above omission, Court held that the evidence of PW. 1 failed to come to the aid of the prosecution.

28. In the case at hand, PW. 5, though a child, spent four long days with the appellants, it is not a case that he had seen the appellants for a short period. Therefore, there is no reason to hold that he had any difficulty in identifying them even after long gap.

29. PW. 1 in his evidence, has stated that, at about 5 P.M., on 27.9.1997, he along with PW. 7 and PW.8 reached the appointed place i.e. Bangsar and found a boy approaching him, riding a bicycle. He further stated that the said boy had led them into the village and, on their reluctance to move further, the boy had gone to the village and, again, came back to inform that unless they go inside the village, the child would not be handed over to them. According to PW. 1, as they informed the said boy that it would not be possible, on their part, to go inside the village, the said boy, again, left the place and returned along with another boy.

This time, both the boys had talk with PW. 1 and upon refusal of PW. 1, to go inside the village, one of the boys asked the driver to get down and hand over the key of the vehicle, but this demand being refused, both the boys left the place and the second boy told that the son of PW. 1 would be handed over at the said place subject to payment of money. Accordingly, PW. 1 had shown the money to the said boy and informed him that the money would be paid only on production of the child.

30. According to PW. 1, both the boys, then, left the place and came back with the kidnapped boy on a bicycle. Thereafter, another boy also came with a torch light and flashed the same at them as well as their vehicle. PW. 1 further stated that, when his son reached the vehicle, he put him inside the vehicle and handed over the bag, containing the money, to one of the boys, who, after taking the bag, passed the same to the other boy. According to PW. 1, after receiving the money, the said boy chanted, "Hare Krishna" and shook hands with him. P W. 1 has further stated that the same boy also shook hands with Sri J.C. Barman, through the door, and, on being signaled by PW.8, the door was half closed to press the hand of the boy and the driver also moved the vehicle and, thus, the boy was dragged. As the said boy was dragged, along with the vehicle, the second boy was pulling him. According to P W1, after being dragged to a little distance, the boy had fallen down and the vehicle was stopped. He further stated that the commandos, who were waiting there, nabbed the boy, named, Yubaraj Kalita. PW. 1 identified accused Yubaraj Kalita as the 1st boy, who was dragged along with the vehicle, and accused Dipak Talukdar as the second boy, who was pulling Sri Yubaraj Kalita.

31. From the above, it appears that PW. 1 had sufficient conversation with both the boys from the time of their 1st meeting at about 5 P.M. till the kidnapped boy was handed over to PW. 1. Thus, the present one is not a case, wherein PW. 1, PW. 7 and PW.8 had fleeting glances of the accused-appellants and/or had seen the said boys only for a moment. In his cross examination, PW. 1 has clearly stated that when they reached the place (i.e. Bangsar), at about 5 P.M., darkness had not descended. Of course, he stated that, later on, it became dark. Therefore, fact remains that PW. 1 and his other companions (i.e. PWs. 7 and 8) had the opportunity to see both Yubaraj and Dipak during the day time i.e. at 5 P.M. PW. 1 denied the suggestion that the boy, who had, first, come on a bicycle, was not Yubaraj. He also denied the suggestion that Yubaraj was not the person, who was apprehended, and that Dipak Talukdar was not the person, who was present at the place of occurrence i.e. the place of recovery of the kidnapped boy.

32. Though P W1 was cross-examined, on behalf of the appellants, no contradiction could be brought out to negate his evidence. Therefore, the evidence of PW. 1, regarding identity of both, Yubaraj and Dipak, and the conversation, which they had with PW. 1, remained unimpeached.

33. Supporting the evidence of PW. 1, PW. 7, who had driven the Tata Sumo vehicle, used by PW. 1 and PW.8, has stated that the boy, who shook hands with

Sri Barman (PW.8), was dragged along with the vehicle and that the police personnel had apprehended him. He identified Yubaraj as the boy, who had talked with PW. 1 and handed over Adwita. He also identified Sri Dipak Talukdar as the boy, who had first led them into the village and received the bag, containing the money. He has also stated that the police seized a revolver, four live cartridges, a pair of spectacles, a diary containing telephone numbers and some writing pads with an old bag, which was seized vide Ext. 2 and his signature, thereon, as Ext. 2.2. This witness was cross-examined on behalf of Sri Yubaraj Kalita. He clearly stated, in his cross-examination, that at the time of their arrival, and, at the time of transaction, it was not dark. He has stated that he saw the accused at the police station as well as at the place of occurrence. According to this witness, he saw the accused-appellants three times till the date of his deposition. This indicates that he had seen the said appellants at the place of occurrence i.e. on the date of recovery of the child, at the police station and, thereafter, in the court i.e. at the time of giving evidence. This witness, who clearly stated regarding the involvement of Sri Yubaraj Kalita and Sri Dipak Talukdar, was not confronted with any suggestion, denying involvement of the said appellants. No contradiction could be elicited to render his evidence disbelievable.

34. PW.8 i.e. the Addl. S.P., City, who had accompanied PW. 1 on the fateful day, has, in tune with the evidence of PWs. 1 and 7, stated that, while shaking hands with Yubaraj Kalita, he caught hold of his hand and dragged him along with the vehicle till he was handed over to the waiting police party. Identifying Yubaraj Kalita, in the court, PW.8 stated that the investigating officer had seized from accused Yubaraj Kalita a pair of spectacles, a leaflet, a pocket diary and a radio and that police seized a black bag and an amount of Rs. 38,830/- from the place of occurrence. In his cross-examination, PW 8 has also stated that Mr. Lahkar (PW. 7) had driven the vehicle. PW 8 has also stated that he did not know how much money was carried by PW. 1 for giving the accused persons. In his cross-examination, he has further stated that the boy, apprehended by him, at the place of occurrence, was Yubaraj. He denied the suggestion that he had not apprehended accused Yubaraj.

35. Supporting the evidence of PW.8, the Investigating Officer (i.e. PW. 10) has stated that he also went to Bangsar, i.e. the place, from where the kidnapped boy was recovered from the custody of the appellants. He stated the he was waiting with his team at a little distance and saw one of the abductors talking to the complainant i.e. P W 1. He further stated that the Addl. SP, who was inside the vehicle, caught hold of one of the abductors and that they had arrested him. He further stated that, upon search, he found one revolver with four live cartridges, a pair of spectacles, a leaflet, a pocket diary and a bag containing Rs. 38,830/-, which were seized in presence of PWs. 1, 7 and 8. He further stated that the name of the apprehended youth was Yubaraj Kalita.

36. The Investigating Officer has stated that the said arrested person was

brought to the police station and, then, they came to know that Dipak Talukdar, Niranjan Kalita and Chandiram Kalita were also his accomplices. He has exhibited the FIR, received from PW. 1, as Ext. 1 and the signature of the Officer-in-Charge, thereon, as Ext. 1.1. He also exhibited the seized revolver as material Ext. 1 and stated that the same was seized vide Ext. No. 2. In his cross-examination, he has stated that he did not search the house of Yubaraj Kalita as the latter was found with the victim boy. The Investigating Officer has deposed that he did not find any paper or record to show that Yubaraj Kalita was undergoing treatment, in the hospital, on the date of occurrence. No suggestion was put to this witness indicating that Yubaraj Kalita, on the date of occurrence, or on the date of his arrest, was undergoing medical treatment. As this witness claimed to have arrested Yubaraj Kalita, the failure of the defense to confront him, with the suggestion, that Yubaraj was undergoing medical treatment, belies the defense plea that the said appellant neither kidnapped the boy nor was he available or caught at the place, wherefrom the kidnapped boy was recovered on the fateful day.

37. From the said evidence, it is clearly found that Yubaraj was arrested on the date of recovery of the victim boy. Though the defense cross-examined the investigating officer at length, no contradiction, regarding the arrest of Yubaraj and/or recovery of the incriminating articles from his possession, could be elicited.

38. Therefore, from the above evidence, more particularly, from the evidence of PWs. 7 and 8, sufficient corroboration is found in favor of the evidence of P W. 1 that Yubaraj Kalita and Dipak Talukdar, on 27.9.1997, had detailed discussion/conversation with P W. 1 regarding release of the victim boy and they were persuaded to hand over the boy at the place, where P W. 1 was waiting along with PWs. 7 and 8. There is also sufficient corroboration in the evidence of the said witnesses that Yubaraj Kalita and Dipak Talukdar had brought the victim boy to the said place and that Yubaraj Kalita was arrested, after being dragged along with the vehicle to a little distance, followed by recovery of the said incriminating articles. As PW 1 got sufficient opportunity and time to talk to Sri Yubaraj Kalita and Diapk Talukdar regarding release of his son, there is no difficulty in understanding that he got ample scope to keep the identity of the said two persons in his mind. The conversation made by PW. 1 with the said two persons, prior to recovery of the victim boy and arrest of Yubaraj Kalita, facilitated P W 7 and 8 also to observe the said accused persons. Further, PW.8 had dragged Yubaraj, while Dipak kept pulling Yubaraj, to get him released from the grip of PW.8. Thereafter, Yubaraj was arrested by police in presence of PW. 1, PW. 7 and PW.8 and he was taken to the police station. Therefore, the sequence of events as well as the circumstances, leading to the recovery of the kidnapped boy, inspires confidence in the evidence of P Ws. 7 and 8 that they got sufficient time and opportunity to see the said two accused persons and remember them. That apart, the evidence of PWs. 1, 7 and 8 draws sufficient corroboration from the evidence of PWs. 5, 2, 3 and 4 as aforesaid.

39. In the attending facts and circumstances, and in view of the credible and clinching evidence, given by the said witnesses, we have no hesitation in holding that the said witnesses got sufficient opportunity to remember Yubaraj Kalita and Sri Dipak Talukdar and keep their identity in mind. That apart, the victim boy, who had spent four days with the said appellants, clearly stated that apart from Yubaraj Kalita and Dipak Talukdar, Chandiram Kalita, while guarding him, used to play with him during those days. Therefore, in the absence of any evidence, to the contrary, we find no reason to disbelieve the evidence of PW. 5 regarding the involvement of Sri Chandiram Kalita.

40. In the case of Sukhdev (*supra*), the witnesses had just a fleeting glimpse of the person identified and they had no particular reason to remember the person concerned. That apart, in that case, the accused persons had changed their appearance. In view of these prominently different facts, the Supreme Court, in the absence of test identification parade, observed that the learned trial Judge was perfectly justified in looking for corroboration.

41. As discussed above, in the present case before us, the witnesses were not the persons, who had the opportunity to have just a fleeting glimpse of the accused persons or to see them only for a moment. Rather, from the evidence on record, it is found that they got enough time to observe the said persons, identity and there is sufficient corroboration also in their evidence. Therefore, the facts situation of this case being different from those of the cases relied upon, the decisions cited by the learned counsel, appearing for the appellants, do not come to the aid of the appellants. In view of the above, failure of the Investigating Officer to hold test identification parade cannot negate the believable and trustworthy evidence, given by the said witnesses, regarding identity of the appellants.

42. Another point, raised by Mr. Mazumdar, learned Senior counsel, as well as the other learned counsel, appearing for the appellants, is that the Investigating Agency took long ten years to complete the investigation and that this conduct, on the part of the Investigating Agency, raises doubt about the veracity of the prosecution story. Admittedly, this case was registered u/s 364 IPC and at the close of investigation, police submitted charge-sheet under Sections 364A/34 IPC. Considering the nature of the alleged offence and the prescribed punishment, we find no statutory bar in the submission of the charge-sheet after ten years from the date of occurrence.

43. As discussed above, we have noticed, that the prosecution has been able to successfully establish, beyond all reasonable doubt, that the appellants, in furtherance of their common intention, had kidnapped the victim boy, from his school and kept him in confinement, for realizing ransom, and, accordingly, after receiving the ransom, from the father of the said victim boy, on 27.09.1997, the appellants handed over the victim boy to his guardian i.e. PW. 1. Therefore, we are not inclined to accept the argument, advanced by the learned counsel, appearing for the appellants.

44. In view of the above discussed evidence, ten years, delay in completing the investigation and delayed submission of charge-sheet cannot be sufficient ground to throw away the prosecution's case regarding involvement of the accused-appellants.

45. Mr. Majumder, learned Senior counsel, appearing for the appellants, has also submitted, that Yubaraj Kalita was in the Guwahati Medical College Hospital, undergoing medical treatment as an indoor patient, w.e.f. 19.09.1997 to 25.09.1997, and that the papers, regarding his medical treatment, were obtained by the Investigating Officer. In view of the above, it is contended, that the learned trial Judge committed error by failing to consider the defense plea that, Yubaraj Kalita, having been hospitalized, w.e.f. 19.09.1997 to 25.09.1997, was, in no way, involved with the kidnapping of the victim boy. It is also submitted that Yubaraj Kalita was not the person involved with the receiving of ransom and handing over of the victim boy to his father, at Bangsar.

46. Yubaraj Kalita, in his statement, u/s 313 Cr.P.C, stated that, he was undergoing medical treatment in Guwahati Medical College Hospital w.e.f. 17.09.2009 to 25.09.1997. As the accused had taken the said plea of alibi, it was his burden to establish, by adducing evidence, that during the said period, he was undergoing medical treatment as an indoor patient in the Guwahati Medical College Hospital. Having taken the said plea, the appellant aforesaid, failed to adduce any evidence, in support of his plea of alibi. No suggestion was also put to PW. 2, who identified Yubaraj Kalita to be the person, who had taken the victim boy from the school. The victim boy, who deposed as PW. 5, clearly stated that, he was taken from the school by Yubaraj Kalita, but the said witness was not confronted with the suggestion that Sri Yubaraj Kalita was undergoing medical treatment on 24.09.1997 i.e. the day on which kidnapping was committed.

47. Therefore, in view of failure of the appellant to prove the said plea of alibi, in the face of the above discussed substantive and reliable evidence, adduced by the prosecution, the learned trial Judge committed no error in holding that the appellant, Yubaraj Kalita, was involved in the kidnapping and receiving ransom for the release of the victim boy. This being the position, we find no force in the contention, raised by the learned counsel, appearing for the said appellant that Yubaraj Kalita was not involved with the alleged offence.

48. In the present case, the evidence, on record, lead to us to held that Yubaraj Kalita had taken the victim boy from his school and kept him in the custody of Dipak Talukdar and Chandiram Kalita Subsequently, Yubaraj Kalita and Dipak Talukdar brought the kidnapped boy to the appointed place and released the victim boy after receiving the demanded money. The above facts and circumstances clearly establish that the appellants had entered into an agreement/understanding to kidnap the victim boy for the purpose of realizing ransom. Therefore, it has been well established that they committed the alleged offence in furtherance of their common intention.

49. Considering entire evidence on record, we have no hesitation in holding that the prosecution could successfully establish that the appellants, in furtherance of their common intention to realize ransom, had kidnapped the victim boy i.e. PW. 5 and kept him in confinement and demanded ransom from PW. 1 i.e. the father of the kidnapped boy. It has also been established that the said appellants had released the kidnapped boy, only after receipt of the amount demanded by them.

50. Carefully considering the sequences of the occurrence, as indicated above, and the evidence on record, it is found that the kidnapping was done for the purpose of realizing money i.e. ransom from the guardian of the said victim boy and for compelling the guardians to part with the ransom. The appellants had kept the victim boy, secretly and wrongfully, confining him till the time of his release, after receipt of ransom.

51. Apparently, the kidnapping of the victim boy, who was a minor, followed by his secret confinement and demand of ransom towards his release, raised reasonable apprehension, in the mind of the guardians of the said victim boy, to believe that, unless the ransom was paid, hurt/harm would be caused to the kidnapped boy. This apprehension compelled PW. 1, who was the father of the kidnapped boy, to arrange the demanded money and rush to the place, indicated by the kidnappers, and to pay the ransom for safe release of his minor son. Therefore, there is no difficulty in holding that the appellants committed the offence punishable u/s 364A read with Section 34 IPC.

52. In view of what has been discussed above, we find that the learned trial Judge committed no error by convicting and sentencing the appellants for the offence u/s 364A read with Section 34 IPC. Therefore, we find no merit in these appeals requiring interference.

53. The appeals stand dismissed.

54. Before we part with this set of appeals, we record, with appreciation, the assistance rendered by Ms. D. Borgohain, learned Amicus Curiae in Criminal Appeal No. 193/2008 and Ms. P. Chakravorty, learned Amicus Curiae in Criminal Appeal No. 146(J)/2008. We direct that, remuneration @ Rs. 3,500/- (Rupees three thousand five hundred) only be paid by the State of Assam in favor of the Amicus Curies aforesaid.

55. Return the Lower Court Records.