

vks

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.387 OF 1995

The State of Maharashtra

] ... Appellant

V/s.

Shankar Anaji Kulawade,
Age 20 years, Occn. Agri.
Residing of Auti Male,
Narayangaon, Tal.Junnar,
District: Pune.

] ... Respondent
] Ori. accused
]
]

Mr. A. S. Shitole, APP for Appellant State.

Mr. S. P. Nikam a/w Smt. Anita A. Agarwal, A.P.P., for the
Respondent-State.

**CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATE : 22nd JULY, 2015.

ORAL JUDGMENT : [Per: Dr.Shalini Phansalkar-Joshi, J.]

1. The State has preferred this appeal, challenging the acquittal of respondent, by the learned Additional Sessions Judge, in Sessions Case No.55 of 1993, by judgment and order dated 13.4.1994, for the offences punishable under Sections 364, 302, 201 of Indian Penal Code.

2. The facts, as are necessary, for deciding this appeal may be stated as under :-

P.W. 11 Sharda is the mother of child Rajendra @ Raju, who at the time of incident was of the age of 8 years and studying in 3rd Std. On 21.6.1992, at about 6.15 p.m., Raju returned to the house after playing in the field. He changed the clothes and again went out. However, he did not return upto 8.00 p.m. Hence his search was taken for the whole night and on the next day, his father Gajanan went to police station and lodged missing report (Exh.11).

3. On the next day, P.W.11 Sharda went to police station and lodged complaint against respondent and one Vilas Darandale, alleging that they have kidnapped her son. On the basis of her complaint (Exh.37), P.W.13 API registered C.R.No.71 of 1992, against respondent and Vilas Darandale for the offence punishable under Sections 363 and 365 of IPC and recorded statements of two witnesses.

4. On 23.6.1992, Gajanan, father of Raju came to

police station alongwith respondent alleging that respondent has kidnapped his son and handed over the child to Vilas Darandale. Respondent was thereafter arrested on 26.6.1992; whereas Vilas Darandale came to be arrested on 6.7.1992. Till then missing child Raju, was however, not traced and found. During custodial interrogation of the respondent on 8.7.1992, he expressed his willingness to show the place where the dead body of child was buried. His statement was reduced to memorandum panchanama (Exh.15). Thereafter respondent guided P.W.13 API Jadhav and the panch to one dilapidated well and from that well he produced the dead body of a male child which was buried underneath the water. The said dead body was identified as that of child Raju by P.W.12 PSI Daule, the son-in-law of Gajanan. As the dead body was in highly decomposed condition, after inquest panchanama, the postmortem was also conducted at the spot itself by P.W.10 Dr. Jaysing Dhake.

5. After postmortem, the dead body was handed over to the parents of the child. The spot panchnama (Exh.17) was made accordingly. The clothes of the dead body were seized under panchnama (Exh.19). The seized muddemal articles viz

rope, spade, cycle, citrus bottle and one poison bottle, recovered at the instance of respondent were then sent to Chemical Analyzer. The Chemical Analyzer's reports are at Exh.41 to 44. Further to completion of investigation, chargesheet was filed against respondent on 25.11.1992; whereas the report under Section 169 of Code of Criminal Procedure, was filed for release of Vilas Darandale.

6. On committal of the case to Sessions Court, the trial Court framed charge against respondent vide Exh.2. Respondent pleaded not guilty and claimed trial, raising the defence of being falsely implicated on suspicion.

7. In support of its case, prosecution has examined in all 13 witnesses and on appreciation of their evidence, the trial Court was pleased to hold that the prosecution has failed to bring sufficient evidence on record to prove guilt of the respondent beyond reasonable doubt. The trial Court, therefore, acquitted respondent of all the charges levelled against him.

8. This judgment of the trial Court is challenged in this

appeal by learned APP whereas supported by learned counsel for respondent.

9. With the able assistance of learned APP, we have perused the entire evidence on record and also gone through the impugned judgment of the trial Court which reveals that the prosecution case stands on two sets of circumstances, first set is of the witnesses who had "*last seen*" the respondent and the deceased together and the second set is of witnesses who have deposed about "*the recovery of the dead body of child*" at the instance of the appellant.

10. As to first set of circumstance, prosecution has relied upon the evidence of P.W.3 Shankar, P.W.5 Vaijanath, P.W.6 Nivrutti and P.W.7 Sachin to prove that deceased Raju was last seen in the company of respondent. However, out of these four witnesses, only P.W.6 Nivrutti and P.W.7 Sachin have deposed about seeing the deceased lastly alongwith respondent. As regards evidence of P.W.3 Shankar and P.W.5 Vaijanath, they have seen the child alone and not in the company of respondent.

11. According to evidence of P.W. 3 Shankar a child of 11 years, on the day of incident after playing in the field at about 5. p.m., he, Raju and other children went to see picture on T.V. 30 to 45 minutes thereafter Raju left saying that he would go to his house. Thereafter he had not seen Raju. P.W.5 Vaijanath has deposed that while he was sitting in the grocery shop, at about 5.00 p.m. Raju came to his shop and purchased bobby sweet and biscuits, then Raju left. Therefore, he is also not saying anything about witnessing the deceased in the company of respondent.

12. The evidence of P.W.11 Sharda, Raju's mother, depicts that Raju after playing in the field has returned to the house at about 6.00 p.m., then he was in the house for sometime, changed his clothes and went out. She has not told the time at which Raju has left the house. However, as per her evidence, Raju did not return upto 8.00 p.m., hence they started taking his search. Thus, she has also not stated anything about in whose company Raju left the house or was seen lastly. The evidence of these three witnesses is therefore not at all helpful to the prosecution to prove the first circumstance of "*last seen together*".

13. P.W.6 Nivrutti has deposed that at about 5.00 p.m. he had gone to Carpenter Bhimashankar Somwanshi to repair his agricultural equipments. While he was returning, he saw respondent and Raju walking in front of him. Respondent was having cycle with him. However, both of them were walking on foot on the road which goes to village by short-cut. According to his evidence, when he returned to house, he saw that it was around 7.30 p.m. and he might have seen the deceased and respondent together about half an hour before he reached home.

14. As against it, the evidence of P.W.7 Sachin reveals that at about 6.30 p.m. when he was proceeding on the road towards the house of Panchal, he saw respondent and Raju proceeding on the road. However, in his cross-examination an omission is elicited that in his statement recorded by police he has not stated that he saw that Raju and respondent were going by the road and Raju was having bobby sweet packet; whereas respondent was having cycle in his hand. Hence his evidence being in the nature of improvement is not of any help to the prosecution to prove the circumstance of "last

seen".

15. The evidence of P.W. 8 Lokhande goes to reveal that he and Raju's father were together to take search of Raju in between 7 to 7.30 p.m. Therefore, the evidence of P.W.6 Nivrutti that he had seen the child and respondent together at about 7.00 p.m. cannot be accepted as correct.

16. In our view, therefore, this circumstance of Raju being "*last seen*" in the company of respondent cannot be held to be proved with satisfactory and convincing evidence on record. Otherwise also, the circumstance of "*last seen*" together is by itself not incriminating as such. Unless prosecution establishes the approximate time of death of the deceased, this circumstance does not become inculpatory. Especially in the present case, this circumstance has absolutely no incriminating significance because as per prosecution case, respondent was working as a driver on the tempo of father of Raju since his childhood. Therefore, there was nothing unnatural or incriminating as such, if Raju was found or seen in the company of the respondent. There should have been something more to make this circumstance

incriminating, like the proximity link between the time of death and last seen. This proximity link is not established by prosecution in the present case.

17. The second circumstance relied upon by the prosecution is about the recovery of the dead body of the child Raju at the instance of respondent. In this respect, prosecution has laid emphasis on the evidence of P.W.1 panch Dnyaneshwar and P.W.13 API Jadhav. However, the evidence of P.W.13 API Jadhav goes to prove that only after respondent has made such disclosure statement, panchas were called. As per admission given by him in para 11 of his cross-examination, immediately after disclosure, he called panhas and then statement was reduced to writing. Therefore, the alleged disclosure statement being not made in the presence of panchas, it loses its evidentiary value to rely upon as sole incriminating circumstance against respondent.

18. Further, the evidence of P.W. 13 API Jadhav proves that at the time of interrogation of the respondent, on that day, P.W.12 PSI Daule was very much present in the police station with them. The evidence of P.W.12 PSI Daule, who is

the son-in-law of the father of deceased reveals that he had taken leave of one month from 24.6.1992 in order to help in investigation of this case. He has stated that at the relevant time, he was attached at Nasik Police Station. However, when he came to know about the missing of Raju, he came to Narayangaon and took leave of one month. During this period, he was present through-out with the police at Narayangaon in the course of investigation. He has further admitted that he was present with police when P. W. 13 API Jadhav interrogated the respondent.

19. As regards disclosure statement, there are certain other feathers brought out in the cross-examination of P. W. 13 API Jadhav which create doubt about voluntary nature of such disclosure statement and also as to whether really disclosure statement was given by the respondent or by some other person. As a matter of fact, there are several suspicious circumstances in this case which prosecution has not dispelled. They can be elaborated to the effect that in the complaint lodged immediately on the next day after missing of child, by the mother P.W.11 Sharda, she has stated that respondent has kidnapped her child. Even then no effort was

made by police to arrest respondent. Not only that, on 24.6.1992 as admitted by P.W.13 API Jadhav, that Gajanan the father of the child has produced respondent before him at the police station. Despite that on that day also respondent was not arrested. He was arrested only two days thereafter i.e. on 26.6.1992 and since 26.6.1992, he was in police custody till 8.7.1992. During that period no such disclosure was made.

20. The evidence of P.W.13 API Jadhav reveals that on 6.7.1992, he learnt that Vilas Darandale was arrested by Junnar Police Station. Hence on 7.7.1992, he obtained transfer warrant to bring him to Narayangaon Police Station and accordingly on 8.7.1992, he brought Vilas Darandale to Narayangaon Police Station. It is, thus, clear that only after Vilas Darandale was arrested and brought to Narayangaon Police Station, the alleged disclosure and recovery of the dead body at the instance of respondent is stated to have been made.

21. In this respect also there is one curious feature which is the remand report submitted to the Court seeking police custody of Vilas Darandale. The said remand report is

produced on record (Exh.46). In the said remand report it is stated that as the whereabouts of missing child are yet to be known and as accused Vilas Darandale was giving evasive replies, it was necessary to obtain his police custody. The order passed by the Magistrate on the said remand report reveals that Vilas Darandale was produced before him at 3.00 p.m. It is significant to note that the medmorandum panchanama, following disclosure statement given by the respondent, was started at 10.45 a.m. and completed at 11.00 a.m. Thereafter the dead body was recovered and inquest panchanama of the dead body was conducted in between 12.15 to 13.36 hrs; whereas recovery panchnama of the dead body is in between 13.45 to 14.30 hrs. Hence it follows that much before Vilas Darandale was produced before Magistrate for seeking his police custody remand, the whereabouts of the child, as per prosecution case itself, were known in view of the disclosure statement given by the respondent at about 9.00 a.m, as admitted by P.W. 13 API Jadhav. Thus the contents of remand report are either not true or the evidence relating to alleged recovery of dead body at the instance of respondent is not true.

22. In our considered opinion, therefore, the trial Court has rightly disbelieved the evidence relating to both the alleged incriminating circumstances that of deceased last seen in the company of respondent and discovery of the dead body of deceased at the instance of respondent.

23. Except for these two circumstances, prosecution has not brought any other evidence on record to implicate the respondent. Though prosecution has also relied upon panchanamas to prove recovery of some incriminating articles like rope, spade, cycle, citrus bottle and poison bottle at the instance of respondent, those panchanamas are conspicuously silent about sealing of those articles. There is also no evidence that the clothes of respondent or deceased child were sealed when they were seized. The Chemical Analyzer's Reports show that the blood grouping of the deceased could not be ascertained. The clothes of the respondent are alleged to be seized after his arrest on 26.6.1992 and also again on 8.7.1992. However, those clothes are not established to be having any connecting incriminating link.

24. The prosecution has also failed to prove that there

was any motive on the part of respondent to commit such an offence. When the case is based on circumstantial evidence alone, the evidence as to motive assumes significance which is conspicuously absent in the instant case. Though there is allegation that respondent has kidnapped the child for ransom of Rs.40,000/-, as admitted by P.W. 13 API Jadhav, except the statement of respondent, there was no other evidence to that effect.

25. The prosecution has also failed to establish beyond reasonable doubt the identity of the dead body as that of missing child. Neither the father nor mother of child were present for identification of the dead body, though the distance between their house and the well from where dead body was removed was hardly 2 Kms. Only P.W.12 PSI Daule was present and he has identified the dead body as that of Raju. However, as the body was completely decomposed, he has identified it only on the basis of the clothes found on the dead body and the height of dead body. As regards the clothes, P.W. 10 Dr. Dhake, who has conducted the postmortem has stated that the clothes on the dead body were also decomposed. Moreover, admittedly P.W. 12 PSI

Daule has not seen Raju when he went missing. Therefore, he did not know which clothes Raju was wearing. Moreover, the description of Raju's clothes, as given by the witnesses is not at all consistent. As per missing report, he was wearing ash colour full pant and green colour shirt; whereas P.W. 1 panch Dnyaneshwar has stated that when the dead body was removed from the well, one half pant and bluish colour shirt was found on the dead body. As per evidence of Raju's mother, when Raju left house, he was wearing ash colour full pant and full shirt of same colour. P.W.13 API Jadhav has deposed that the dead body was not having shirt of the description given in the missing report. Hence the evidence of P.W.12 PSI Daule, that he has identified the dead body on the basis of clothes is creating suspicion.

26. As regards evidence of P.W. 12 PSI Daule that he has identified the dead body on the basis of height, he has admitted in his cross-examination that he cannot tell height of Raju in feet. Height of Raju, as given in the missing report is 3½ feet i.e. 105 cms; whereas in the postmortem report (Exh.34) in column No.9, height of the dead body is given as 140 cms. Therefore, the height of dead body and height of

missing child are not tallying with each other.

27. Even as regards the age of Raju as deposed by her mother and as stated in the missing report was 8 years. The evidence of P. W. 10 Dr. Jaysing Dhake who has conducted postmortem reveals that the dead body was not having any milk teeth. Though he found 24 teeth, he had not given the description or particulars of those teeth. He has also not mentioned number of molars or whether those teeth were permanent or milk teeth. He has admitted that he did not send the bones of the dead body for ossification test to determine the age. He has also admitted that except palpitation test, he has not conducted any other test to examine the teeth or to determine the age. As per his own opinion mere palpitation test is not sufficient to determine the age. Hence even as regards the age of the dead body, it is not specifically ascertained.

28. This evidence about identification of dead body becomes important in the instant case, in view of the evidence on record that two other male boys were kidnapped from the same village and the allegation in respect of

kidnapping of those children were against Vilas Darandale. P.W. 13 API Jadhav has also not stated anything as to what investigation he has carried out against Vilas Darandale after his arrest and how he came to be released under Section 169 of Code of Criminal Procedure.

29. In view of all these suspicious features in the case, there is no option but to hold that the prosecution has failed to prove its case against respondent beyond reasonable doubt. Hence the appeal fails and stands dismissed. Bail bonds of the accused stand cancelled.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

[SMT. V.K.TAHILRAMANI, J.]