

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 801 OF 2013

Pavan Vasudeo Sharma

Central Prison Pune-6

.. Appellant

Vs.

The State of Maharashtra

..Respondent

WITH
CRIMINAL APPEAL No. 1057 OF 2013

Pankaj @ Rahul Ramgopal Jagaria

Residing at Nayagaon, Post Sadikpur,

Rajasthan.

Yerwada Central Jail Pune

.. Appellant

Vs.

The State of Maharashtra

..Respondent

Smt. Rohini Dandekar appointed for the Appellants in both matters.

Smt. A. S. Pai, Additional P.P. for State in both matters.

CORAM :- **SMT. V. K. TAHILRAMANI AND
SHRI. B. P. COLABAWALLA, JJ**

DATE :- **MARCH 19, 2015.**

ORAL JUDGMENT (PER : SMT. V. K. TAHILRAMANI, J.)

1 The Appellant-Pavan Sharma has preferred Criminal Appeal No. 801 of 2013 and Appellant-Pankaj @ Rahul Jagaria has preferred Criminal Appeal No. 1057 of 2013. Both the appeals are directed against the judgment and order dated 12.01.2011 passed by the learned Additional Sessions Judge, Pune in Sessions Case No. 538 of 2006. By the said judgment and order, the learned Sessions Judge convicted both the appellants who are original accused nos.1 and 2 for the offences under Section 364(A) read with Section 34 of IPC and sentenced them to suffer RI for life and to pay a fine of Rs. 1000/-, in default to suffer RI for one month. For the sake of convenience we shall refer to the Appellants as they were referred before Trial Court i.e. Appellant Pawan Sharma will be referred to as accused No.1 and Pankaj @ Rahul Jakaria will be referred to as accused No.2.

2 The prosecution case briefly stated, is as under:

P.W. 1 Sanjay Lokhande was the father of P.W. 6 Akash. Sanjay was residing along with his wife and two children at

Chinchwad in Pune. At the relevant time, his son Akash was studying in first standard. The school timing of Aakash was 8.00 a.m. to 3.30 pm. On 13/01/2006 Akash, as usual went to school. He returned home at about 3.30 p.m. Then he went for tuition. He returned from tuition at about 6.00 pm. Then Akash was playing on a bicycle on the road in front of his house. Other children were also playing on the road. At that time, two persons came on motorcycle. They called Akash and asked mobile number of his father. One of the persons picked up Akash. Akash was made to sit on the motorcycle in between the said two persons. They shut Akash's mouth by hand. Thereafter they took him to a hut.

It is prosecution's case that meanwhile P.W. 1 Sanjay received call from his wife informing him that Akash has not come home and he should come home earlier. Hence, Sanjay reached home at 6.45 pm. They searched for Akash, however, Akash could not be traced. Sanjay lodged missing compliant with Chinchwad Police Station. Thereafter a call was received by P.W. 1 Sanjay, father of Akash at about 9.15 pm. The caller informed Sanjay on phone that “mai Khanbhai bol raha hu. Apke dushmanane apke familyko khalas karneka panch lakh ka

supari hamko diya hai, aur apka bachcha hamare pas hai". Then the said person gave phone to Akash. Akash spoke to his father, then Sanjay was sure that his son was kidnapped. Hence, Sanjay went to Chinchwad Police station and lodged FIR in relation to kidnapping of his son. He handed over photograph of Aakash to the police. On the next day i.e. 14.01.2006, Sanjay again received a call on his cell phone. The caller on the cellphone demanded Rs.Ten lakhs from Sanjay. Sanjay informed him that he did not have that much money and Sanjay requested the caller to grant him two days time for collecting the said amount. The person then said that he would call Sanjay afterwards and cut the call. Thereafter, the said person again called on the cell phone of Sanjay and threatened that if he failed to pay the amount demanded by the caller, then, his son would be killed. The kidnapper gave him time till Sunday i.e. 15.01.2006 to pay up the said amount. The kidnapper again called Sanjay on his phone. At that time, Sanjay told the kidnapper that he could not collect Rs.Ten lakhs and he had collected Rs. Three lakhs. The Kidnapper, then,asked him to bring the said amount to Hanuman Temple at Wagholi. He also warned Sanjay not to call the Police.

Sanjay then took Rs.Three lakhs in a bag and went on his motorcycle to the said temple. He reached there at about 6.30 p.m. After five minutes, he received a call on his cellphone and the caller told him to come to a company situated at Wadjai. Sanjay reached the company gate at about 7.00 to 7.15 p.m. He again received a phone call on his cellphone and the caller told him to walk ahead for a distance of about one Kilo-meter and stop near one tin shed. The caller also told him to keep the amount in the tin shed. Sanjay then went to the spot as directed. When he reached the spot, one person came on motorcycle and enquired with him whether he had brought the amount, to which Sanjay replied in the affirmative. Sanjay further informed that he had brought Rs.Three lakhs. Thereafter, the motorcycle rider asked him to sit on the pillion seat on the motorcycle and proceeded to Viraj Super Market, at Manjari road. The person on motorcycle asked Sanjay to get down from the motorcycle. After about 10 minutes, two persons came on motorcycle near Sanjay. Both of them informed Sanjay that “you will get your son back and he is kept on the Otta of grocery shop”. Sanjay handed over the bag containing Rs.Three lakhs to the motorcycle rider, who met

him at Wadjai. Thereafter, Sanjay went towards Viraj Super Market. He saw that his son was kept on Otta (platform) of the shop. He lifted his son. He then gave a call to the Police. The Police arrived within a short time.

On 16.01.2006, information was received by the Police that the accused involved in kidnapping Akash were residing in the building known as Silver Nest in Vimannagar. Hence, a raid was conducted at the said premises. Four persons were found in the premises. The Appellants were among the four persons found in the said premises. The Appellant-accused no.1 was found in possession of a pistol and two live cartridges. Accused No.2 was found in possession of a chopper. Cash of Rs.2,99,900/- was found in the room. The accused came to be arrested. After completion of investigation, chargesheet came to be filed.

3 Charge came to be framed against the Appellants-original accused nos.1 and 2 as well as original accused nos. 3 and 4 under Sections 364(A) read with 120B and under Section 387 read with 34 of the Indian Penal Code. All the accused

pleaded not guilty to the said charge and came to be tried. Their defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted original accused nos.3 and 4 of all the offences charged and convicted both the Appellants as stated in paragraph no.1 above, hence, these appeals.

4 We have heard the learned counsel for the Appellants and learned APP for the State. We have carefully considered the facts and circumstances of these cases, the submissions made by both sides, the judgment and order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the matter, we are of the opinion that the prosecution has proved its case only against Appellant-original accused no.2 Pankaj @ Rahul Jagaria.

5 The conviction is based mainly on the evidence of PW-6 Akash who was kidnapped by the accused persons. Akash has stated that at the relevant time he was studying in first standard. At the time of the incident he was six years old. Akash has stated that his school timing was from 8.30 a.m. to 3.00 p.m. On 13.01.2006, he returned home from school at

about 3.30 p.m. Thereafter, he went for tuition. He returned from tuition at about 6.00 pm. Then he was playing on the road in front of his house. Other children were also playing on the road. At that time, two persons came on motorcycle. They called Akash and asked mobile number of his father. One of the persons picked up Akash. Akash was made to sit on the motorcycle in between the two persons. They shut Akash's mouth by hand. Thereafter they took him to a hut. They spent the night in the hut. Akash has identified both accused nos. 1 and 2 before the court as the persons who picked him up and took him away on a motorcycle to a hut where they spent the night. On the next day, they took him to a building under construction on motorcycle. They spent the night in the building under construction. On the next morning i.e. on 15.01.2006, these accused left him near a shop and thereafter both of them left. Thereafter, his father came to the shop and took him.

7 However, the learned Advocate for the Appellants submitted that as far as accused no.1 is concerned, Akash has not identified him in the parade which was held on 29.03.2006. She pointed out the evidence of PW-7 (Executive Magistrate)

Shri Vitthal Joshi, who has stated that on 29.03.2006, he conducted a test identification parade in Yerwada Prison. In the said parade, Akash was called as a witness and Akash only identified Pankaj - Accused No.2 in the said parade. She submitted that in such case, identification in the Court by Akash of accused no.1 more than four years after the parade, cannot be believed and relied upon. We also find much merit in this submission. Thus, looking to the over-all evidence, we see that Akash has only identified accused no.2 Pankaj as one of the persons who kidnapped him. There is no other reliable evidence against accused no.1-Pavan to show that he was one of the kidnappers.

8 The prosecution has tried to place reliance on the evidence of PW-1 Sanjay, father of Aakash to show the involvement of accused No.1 Pawan in this case of kidnapping. Sanjay has stated that at the relevant time his son was studying in the 1st standard. On 13.01.2006 at about 6 to 6.30 pm he received call from his wife that Aakash was not found in the vicinity. They traced Aakash till 8.15pm, however Aakash could not be traced, hence they lodged a missing complaint at Chinchwad police station.

9 It was pointed out on behalf of the prosecution that PW-1 Sanjay has identified both accused No.1 & 2 as well as original accused nos. 3 & 4, however, on going through the evidence of PW-1 Sanjay, we find that Sanjay has not stated, in what connection he has identified any of the present accused. According to Sanjay, he received a telephone call. Thereafter, Sanjay has stated that on 14.01.2006 he received a telephone call threatening him that if he failed to pay the amount, then, his son would be killed. Sanjay was granted time till Sunday i.e. 15.01.2006 to collect the said amount. Sanjay has not identified any one of these accused as the one, who made the calls to him. On 15.01.2006 Sanjay told the person on the phone that he could collect only Rs. Three lakhs. Then that person asked him to come with the amount to the temple at Wagholi. Then that person asked him to stop near a tin shed. Then one person on motorcycle came near him and he enquired with Sanjay whether he had brought ransom amount. Sanjay told him that he has brought Rs. Three lakhs. Then the motorcycle rider asked Sanjay to sit on the pillion seat. The person then took Sanjay on motorcycle near S. K. Traders.

Thereafter, two persons came on motorcycle and both of them informed Sanjay that his son is kept on the otta of grocery shop. It is pertinent to note that Sanjay has not identified any of the accused persons, as being any of these three persons to whom he has made a reference. Sanjay has made reference to only three persons i.e. the person who first came on the motorcycle and enquired whether he had brought the amount. Thereafter, Sanjay has stated that two persons came later-on and told him that he would get his son and his son was kept on the otta of grocery shop. Sanjay has made reference to only three persons, however, before the Court, Sanjay has identified four persons. Sanjay has not given any specific role to any of the accused persons. As stated earlier, Sanjay has made a reference to only three persons however, he has identified four persons before the court. He has not stated in what connection he has identified the accused persons nor has he stated any role in relation to accused persons. It is also to be noted that even in the test identification parade Sanjay has not stated the role played by any of the present accused persons. In such case, it is not known in what connection Sanjay has identified present accused. Looking to these facts, we find it risky to rely

on the evidence of Sanjay in relation to identification of any of the present accused. There is no recovery at the instance of any of these accused persons. Though there is seizure of weapon from the accused persons, these weapons are in no way connected to the present case. Neither Sanjay nor the victim boy Aakash has stated that any weapon was used to threaten or frighten him or that any weapon was used during the course of the incident.

10 As stated earlier, the victim boy Aakash has identified accused no. 2 Pankaj @ Rahul Jagaria in the test identification parade as well as before the Court. As far as accused No.2 Pankaj is concerned, we find the evidence of Akash to be trustworthy and reliable, hence we have no hesitation in relying the evidence of Aakash which clearly implicates accused no. 2 Pankaj @ Rahul Jagaria. In this view of the matter, the following order is passed.

ORDER

(I) Appeal no. 1057 of 2013 preferred by Pankaj @ Rahul Ramgopal Jagaria is dismissed. The conviction and sentence imposed on appellant original accused no. 2 Pankaj alias Rahul

Jagaria is confirmed.

(II) Criminal Appeal No. 801 of 2013 preferred by Pavan Vasudeo Sharma is allowed. The conviction and sentence imposed on appellant original accused no. 1 Pavan Vasudev Sharma is set aside. He is acquitted of the said offence. He be released forthwith, if not required in any other case.

(III) Office to communicate this order to the appellants who are in jail.

(IV) Writ of order is expedited.

(V) We quantify legal fees to be paid to Advocate Smt. Rohini Dandekar by the High Court Legal Services Committee at Rs.5,000/-.

[SHRI.B.P.COLABAWALLA ,J.] [SMT. V.K.TAHILRAMANI, J.]