

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.194 OF 2009

Shri Satish Keshav Doifode)
r/at Kagal, Dist.Kolhapur)
presently lodged Solapur Central Jail,)
Solapur) ... Appellant

Vs.

The State of Maharashtra) ... Respondent

WITH
CRIMINAL APPEAL NO.269 OF 2009

Shri Ganesh Jayling Gunjawane)
r/o. Dattanagar, Barshi)
Dist.:Solapur)
presently lodged in)
Yerawada Central Prison, Pune) ... Applicant

Vs.

The State of Maharashtra) ... Respondent

Mr.A.P. Mundargi i/b Mr.J.J. Bardeskar for the Appellant in Apeal/194/2009

Mr.Ujwal Agandusurve for Appellant in Apeal/269/2009

Mrs.U.V. Kejriwal, APP, for Respondent – State

CORAM: **SMT.V.K. TAHILRAMANI &**
MRS.MRIDULA BHATKAR, JJ.

DATE: **JUNE 9 & 10, 2016**

ORAL JUDGMENT (PER MRS.MRIDULA BHATKAR, J.):

1. These two appeals are directed against the impugned judgment and order dated 31st January, 2009 passed by the learned Sessions Judge,

Pandharpur in Sessions Case No.4 of 2007. The appellants/accused are convicted for the offences under sections 364A r/w 120B of the Indian Penal Code and are sentenced to undergo R.I. for life and to pay fine of Rs.10,000/- each and in default to suffer imprisonment for 6 months. They are also convicted for the offences under section 363 r/w 120B of the Indian Penal Code and sentenced to suffer R.I. for five years with payment of fine of Rs.2,500/- each and in default, to suffer imprisonment of two months each. They are further convicted under section 365 r/w 120B of the Indian Penal Code and sentenced to suffer R.I. for 5 years and fine of Rs.2500/-, in default two months imprisonment.

2. It is the case of the prosecution that a minor boy Akshay Sadashiv Wadgave, aged approximately 5 years, was kidnapped by accused persons on 26.8.2006 for ransom of Rs.10 lacs. It is the case of the prosecution that Sadashiv Panditrao Wadgave, who was a building contractor and resident of Pandharpur, was residing with his wife and minor son – Akshay. On 23.8.2006, he went to his native place for festival. He stayed there till 26.8.2006. During his stay at his village Khanapur, he received phone calls on his cell No.9422068104 for a number of times from one person who disclosed his identity as a Manager of one Reddy and the person enquired as to when he would be returning as he wanted to hire his Poklane machine on rent. Sadashiv was having two Poklane machines and he used to give them on hire. On 26.8.2006, at around 4pm,

he was returning from Kolhapur to Pandharpur. While he was coming back, he received four phone calls from the Manager of Reddy and he was continuously asking as to when he would be reaching to Pandharpur. The complainant reached home at Pandharpur at around 6pm. His son Akshay went out to play with neighbouring children. 15 minutes thereafter, the friends of Akshay informed the complainant that some persons had taken away Akshay on a motor cycle by pressing his mouth. He immediately came down but did not notice his son. Therefore, he went to police station and gave report. Pursuant to that information, the offence was registered at C.R. No.120 of 2006 with Pandharpur police station for kidnapping. It is the case of the prosecution that thereafter, the complainant received anonymous phone calls demanding Rs.10 lakhs if he wanted his son back. During that night, many such demand calls were received by him. He collected Rs.10 lakhs during that night from his friends. He kept Rs.750,000/- in one suitcase and Rs.250,000/- in one bag. He alongwith his brother, as directed by the police, agreed to give money to those persons. The kidnappers had told him that in the early morning, the complainant should hand over Rs.10 lakhs at Kolhapur. The complainant alongwith his brother proceeded towards Kolhapur in his jeep. The police and the panch followed them in plain clothes. When the complainant reached the destination, as informed by the kidnappers, they asked him to come near a bridge at Mayur Dhabha and accordingly, his

brother and he both stopped near the bridge. After some time, two persons arrived there on a motor cycle alongwith his son Akshay. The complainant gave them the suitcase and the bag containing money and those two persons handed over Akshay to the complainant. As those two persons proceeded on motor cycle, the police who were waiting and had taken position around, immediately apprehended both the accused. At that time, they threw the suitcase and the bag. The police picked up the suitcase and the bag. The police found a knife with them. They seized the Hero Honda motor cycle bearing No.MH-09/AN/1037 and also a cellphone. The arrested persons were accused No.2 Satish Doifode and accused Nitin Chavan. At that time, Satish received a phone call from Ganesh Jayling Gunjawane, accused No.1. Pursuant to that call, the police found the appellant accused No.1 Ganesh standing near Kagal, Kolhapur, waiting for money from the arrested accused. The police realised that Ganesh, accused No.1, was the mastermind behind this plot of kidnapping. He was related to the complainant and, therefore, he wanted to stay away from the entire scene. The police arrested him and seized his mobile under the panchanama. Thereafter, the police recorded the statements of many witnesses on the point of the incident of kidnapping. They also collected evidence of the Call Data Records of the cellphone of the accused Nos.1 and 2 and the father of the victim boy. The police also recorded the statements of the persons from the vicinity

where the boy was kept on 26th August evening for few hours till he was taken to Kolhapur. Test identification parade was conducted by the police and after completion of the investigation, police filed chargesheet in the Court of the Judicial Magistrate. As the offence under section 364A was registered, it was committed to the Court of Sessions. As the accused pleaded not guilty, the learned Sessions Judge framed charge against the accused Nos.1, 2 and 3 under sections 363, 364A, 365, 368 and 384 and also under section 120B of the Indian Penal Code. The accused Nitin Chavan at the time of the incident was below 16 years, and hence, he was not tried before the Sessions Court, but he was sent to juvenile Court.

3. The prosecution examined 29 witnesses and after considering the evidence – oral and documentary, the learned trial Judge convicted the accused as mentioned above. Hence, these appeals.

4. Both the learned Counsel for the accused No.1 and the learned Senior Counsel for accused No.2 have submitted that the conviction is based on insufficient evidence, surmises and conjectures should not sustain. The evidence of the witness i.e., PW8 Rohini Balasaheb Mirajkar, on the point of actual kidnapping of the child Akshay cannot be believed. At the time of recording of evidence i.e., on 16.6.2007, Rohini was 16 years old and the incident has taken place on 26.8.2006. So, she was 15 years old at that time. As per her evidence, she had seen two motor

cyclists arriving at the place where Akshay was playing. She has described the motor cyclists, by clothes what they were wearing and they were 20 to 22 years old persons. However, she was not called for test identification parade. She identified the accused persons in the Court hall and such identification cannot be believed. The learned Counsel further submitted that on 18.9.2006, the test identification parade was conducted by PW15 one Ajay Pawar, Tehsildar. However, in the cross-examination, the defence could bring the admissions about the visibility of the accused persons when he was brought for the parade. The learned Senior Counsel argued that PW15 has conducted test identification parade in a most objectionable manner without following the rules of the test identification parade. He further submitted that the memorandum of test identification parade (exhibit 72) cannot be believed. In the evidence of PW13 Ms.Vimal Madhukar Kadam, who was security guard and who was residing in the vicinity, where the complainant was residing claimed that she had seen the victim being kidnapped by two motor cyclists. It was submitted that her evidence may not be given any importance as she was a chance witness. The manner in which the test identification parade was conducted, the learned Counsel submitted, that the prosecution could not establish the identification of the accused persons, who picked up the boy and that is the main lacunae in the case of the prosecution. The learned Counsel submitted that the evidence of Sadashiv, the father of the victim,

is also not reliable as it is full of material omissions and contradictions in respect of the phone calls and the arrest of the accused persons. The learned Counsel further submitted that though it is the case of the prosecution that the complainant, the father of the victim, had received a number of phone calls in the night intervening between 26.8.2006 and 27.8.2006, the witnesses on the point of phone calls made by the accused persons from the coin box phones did not support the case of the prosecution. PW4 Sangram Ashok Solanki, the owner of the Coin Box Phone at Kolhapur, PW5 Deepak Suryawanshi, owner of Coin Box Phones at different places in Kolhapur, have turned hostile in respect of the identification of the accused and phone calls made by them from the coin box are not proved. It is further submitted that the police have collected CDR, in respect of the phone calls i.e., phone of Sadashiv, also other phone Nos.222583 and 325881 from hotel Sadguru for which prosecution has examined PW12 Pandurang Mahadev Bapat. However, it is further submitted that the original copies of CDRs are not produced and, therefore, the call records could not be exhibited and read in evidence. It is further submitted that the prosecution failed to establish the place where the boy was kept after he was kidnapped. As per the case of the prosecution, Akshay was kidnapped at late evening on 26.8.2006 and was kept in one flat at Chavan building. However, PW1 Kusumaben Chavan, the owner of the Chavan building and so also PW2 Jaya @ Ashwini Anil

Ranbhise, maid in the Chavan building, did not support the case of the prosecution on the point of keeping Akshay in the house by accused Nos.1 and 2. It is further submitted that the evidence Raju Teli, owner of a paav bhaji stall at Pandharpur, cannot help as he turned hostile. The evidence of PW12 Pandurang Bapat, owner of Sadguru hotel, suffers in absence of corroboration, as no connection between the landline calls to the mobile phone of the complainant could be established. It is further submitted that there is no evidence against the accused No.1 Ganesh who was not caught by the police at the spot. Hence, it is submitted that the accused are to be acquitted.

5. The learned Prosecutor while opposing the appeal, has argued that the prosecution has produced cogent and credible evidence. It is a case where the accused No.2 alongwith the juvenile accused were arrested red handed with the ransom amount and the boy. She submitted that the judgment and order passed by the learned trial Judge is to be maintained.

6. We have perused the evidence of all the witnesses carefully. At the outset, we express that it is a very bad case for both the appellants/accused. The accused No.2 Satish alongwith the juvenile accused were caught red handed under the bridge near the Mayur Dhabha at Kolhapur in the early morning. On the point of raid, the evidence of Sadashiv, the father of the boy, so also the evidence of two

independent witnesses, namely, PW10 Revnath Bhujangrao Patil and PW9 Irfan Mujawar, the panchas of the trap panchanama and the police witnesses, is found absolutely consistent and that itself made the case of the prosecution water tight. PW17 Sadashiv gave details of kidnapping of his son. His evidence is corroborated with the FIR (exhibit 79). He has stated that there were continuous calls since two days prior to the actual date of kidnapping. These calls were for hiring Poklane machine from the father of the victim. However, after reading entire evidence, it is clear that the accused persons were trying to find out when and at what time the complainant was coming back to Pandharpur alongwith the boy. After kidnapping of the boy, no calls of Manager of Reddy were received by the complainant.

7. The boy was picked up on 26.8.2006 from the outside of his house. He is examined as a child witness. He has stated that when he was playing, he was lifted by two persons riding a motor cycle. Then, he was kept in a room on the second floor. He was also beaten up at that place and thereafter he was taken to Kolhapur. He met his father on the next date at 7am near the bridge at Mayur Dhaba in Kolhapur. He was brought there on the motor cycle. The evidence of the boy was recorded on 21.4.2008, that means 1½ year after the incident. However, it appears that he could depose the important facts, which as per his tender age, has noted down in his memory. His evidence fully fortifies the case of

kidnapping as it corroborates in all the material particulars of the evidence of his father and Rohini. Therefore, though Rohini was not called for identification parade, her evidence does not lose credibility on the point of kidnapping. It is true that the CDR of the cellphone of the complainant and the phone calls made by the accused persons from different places could not be properly proved and exhibited, yet, the evidence of the complainant that he has been receiving phone calls continuously in the late evening and the night intervening 26.8.2006 and 27.8.2006 is sufficient to believe the fact that there was a demand of ransom of Rs.10 lakhs from the anonymous person or the kidnapper and he was told to reach Kolhapur alongwith ransom money.

8. A point of omissions and contradictions in the evidence of PW2 was pressed but after going through the evidence, we felt that these omissions are not correctly recorded. Hence, we checked it from the statement under section 161 which we generally do not look into. However, we found that alongwith many insignificant omissions, the material evidence is also craftily brought on record in the nature of omissions and contradictions in the cross-examination, which ought not to have been recorded at all. The trial Judge has to be cautious while taking omissions and contradictions on record. If insistence is made by the defence Counsel of taking insignificant omissions on record, then, the trial Judge needs to point out in bracket, which is the omission and which is not. The recording

of the evidence by the trial Court should be like a mirror so that the appellate Court gets the exact idea as to what witness has deposed and what has taken place at the time of the trial. The appellate Court has to go alongwith the matter with faceless evidence and so the recording of the evidence is a vital part of the trial, as assessment is entirely based on it.

9. We would like to observe that the trial Court has not recorded properly the evidence in respect of omissions and contradictions on the basis of the previous statements of the witnesses. Statement of a witness is recoded under section 161 of the Code of Criminal Procedure by the police and generally after 2 to 3 years, the witness stands in the box and gives evidence. It is impossible for any human being to remember the previous statements by-heart and, therefore, his expression in respect of events which he has witnessed may vary to certain extent. Such variance is neither a contradiction nor a material omission and therefore, the cross-examination on each and every minor variation cannot be allowed by labelling it as a contradiction or omission. A variation which is expected to be brought on record should be really affecting the veracity of the witness rendering his evidence unreliable. The witness is bound to use different terminology and expression.

10. On the point of omission, we rely on the judgment of Supreme Court in the case of **Rammi alias Rameshwar vs. State of M.P [(1999) 8 SCC**

649] and on the Division Bench judgment of this Court in the case of **Raghunath Krishna Mujumale & Ors. vs. State of Maharashtra**¹. In the case of **Rammi alias Rameshwar (supra)**, it was held thus:

“26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be contradicted would affect the credit of the witness. [Section 145](#) of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to contradict the witness the cross-examiner is enjoined to comply with the formality prescribed therein. [Section 162](#) of Code also permits the cross-examiner to use the previous statement of the witness (recorded under [Section 161](#) of the Code) for the only limited purpose, i.e. to contradict the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness, (vide *Tahsildar Singh and anr. vs. State of U.P.*, AIR 1959 SC 1012).”

11. The prosecution has examined the police personnel on the point of trap and also investigation. PW28 P.I. Sandipan Kerba Londhe, who had recorded the FIR and also filed the chargesheet, has deposed that on that night itself, he fixed the Caller ID to the phone of the complainant and it was tracked that those telephone calls were received from Miraj, Sangli and Kolhapur area. As per the evidence of the boy, he was taken on the motor cycle towards Kolhapur. The father collected the amount of Rs.10

1 1987 Mh.L.J. 412

lakhs; put it in a suitcase and one bag and he proceeded alongwith the raiding party of the police, panch and his friend. They went near the bridge at Mayur Dhaba. The police party took positions for the raid. The complainant and his friend Revnath Patil, panch Irfan Mujawar – all were waiting for the kidnappers to arrive to take money. Two kidnappers arrived there with Akshay on the motor cycle. There was exchange of the boy and the money between the father and the kidnappers. As they were about to proceed, the raiding party apprehended them on the spot. They threw the box consisting of money. A knife was found with the accused No.2. Thus, the trap was successful and the police could apprehend the accused No.2 red handed. This is the most important and unshaken evidence against the appellants/accused.

12. At that time, as per the evidence of the witness No.17, the panch PW9 Revnath, PW18 Appa, PW19 Jadhav, PW27 Sandanand Belsare and also PW25 Chandrakant Shinde, who were all the members of the trap party, accused No.2 received phone on his cellphone in the presence of panch. As per the evidence of Irfan Mujawar, the said call was confirmed as the call from accused No.1 Ganesh, who asked accused No.2 to come to the spot with money where he was waiting. Accused No.1 informed the place where to come and accordingly, the police party alongwith accused No.2, proceeded to the spot near Kolhapur where accused No.1 was waiting. He was apprehended by the police in the presence of the

panchas. The cellphone of the accused No.1 was seized. The seizure panchanama (exhibit 58) and arrest panchanama were drawn by the police. The phone call made by accused Nos.1 and 2 is a clinching evidence in establishing the link between the accused Nos.1 and 2 in respect of the plan of kidnapping. It was submitted by the learned Prosecutor that accused No.1 was distantly related to the father of the victim boy and, therefore, he wanted to be in the backdrop and he planned the kidnapping through accused No.2 and the other juvenile accused. The arrest of accused No.2 in the morning at Kolhapur and thereafter the immediate arrest of accused No.1 near Kolhapur in the early morning itself is a material fact and most incriminating circumstance against the accused No.1 and 2. This cannot be considered at all as a coincidence or a chance. Thus, considering the evidence of the prosecution, we are of the view that the prosecution has proved the case on all the three counts i.e., under sections 363, 365 and 364A of the Indian Penal Code. It is a fit case to confirm the impugned judgment and order. There is evidence to show that the boy was not only kidnapped but the complainant was threatened of life of his son and the demand of ransom of 10 lakhs was made.

13. In these circumstances, the appeals are dismissed.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)