

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.900 OF 2012

Akhilesh Badriprasad Upadhyay.	]	
Age – 33 years, Occupation – Business,	]	
Residing at Ashish Palace, B-307, S. V. Road,	]	
Navghar, Bhayander (E).	]	
(At present in Thane Central Prison)	]	... Appellant

Versus

State of Maharashtra,	]	
(At the instance of Mira Road Police Station	]	
C.R.No.116 of 2008).	]	... Respondent

Mr. Nitinkumar Hiralal Sejpai for Appellant.
Ms. R. M. Gadhvi, APP for State.

**CORAM :- A. A. SAYED &
SARANG V. KOTWAL, JJ.**

RESERVED ON :- 06 SEPTEMBER, 2017

PRONOUNCED ON :- 10 OCTOBER, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is preferred by the Appellant challenging the Judgment and Order dated 25/07/2012 passed by the District Judge – 6 and Additional Sessions Judge, Thane, in Sessions Case No.231 of 2008 whereby the Appellant was convicted for commission of offence punishable under Section 364-A read with 34 of the IPC and was sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine, to suffer

simple imprisonment for a term of 15 days. The Appellant was further convicted for the offence punishable under Section 386 read with 34 of the IPC and was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/- and in default of payment of fine, to suffer simple imprisonment for a term of 10 days. The Appellant was also convicted for the offence punishable under Section 342 read with 34 of the IPC and was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/- and in default of payment of fine, to suffer simple imprisonment for a term of 5 days. The Appellant was also convicted for an offence punishable under Section 363 read with 34 of the IPC as well as Section 384 read with 34 of the IPC but in view of the sentences awarded under Sections 364-A and 386 of the IPC, no separate sentence was passed for these two offences. The Appellant was acquitted from the charges of commission of offence punishable under Section 324 read with 34 of the IPC. The substantive sentences were directed to run concurrently and the Appellant was given benefit of set off under Section 428 of the Cr.P.C. for the period for which he was detained in custody during investigation and trial.

2. The prosecution case is in respect of abduction of Kalulal Bhimji Patel for ransom. The FIR was lodged on 08/03/2008 by the said Kalulal Patel at Mira Road Police Station. The Appellant was arrested on 08/03/2008 itself. The investigation was conducted and the charge-sheet was filed in the Court of JMFC, 13th Court, Thane. After filing of the charge-sheet, the case was committed to the Court

of Sessions for trial. The charges were framed against the Appellant on 27/06/2011 to which he pleaded not guilty.

3. During the trial, the prosecution examined 6 witnesses. PW 1 Kalulal Patel was the victim and the first informant. PW 2 Rupjibhai Patel was the brother of the PW 1 who had paid the ransom amount. PW 3 Pramod More is friend of the PW 1 and PW 2 who was examined to corroborate the evidence of PW 1 and PW 2. PW 4 Avinash Pradhan was the Medical Officer attached to Bhagwati Hospital, Borivali, on the relevant date and on 03/06/2008 he had examined PW 1. PW 5 PI Vasant Giri had investigated the offence registered vide C.R.No.I-116/2008 at Mira Road Police Station. This witness had conducted the investigation from 02/06/2008 onwards. PW 6 PSI Dipak Salunke was the initial Investigating Officer who had investigated the offence from 08/03/2008 and had arrested the Appellant on the same day. According to the prosecution case, there were other absconding accused who could not be arrested and the present Appellant is the only accused who had faced the trial.

4. The prosecution case obviously rests on the evidence of PW 1 Kalulal Patel. He has deposed that since 2008, he was dealing in the business of scrap material and was having his shop by name Jay Rathod Old Paper at Golden Nest, Sector 11, Mira Road. He has deposed that originally he is from Rajasthan. On 10/01/2008, two persons had sold 100 kgs. of steel material to him for Rs.2,500/- and again on 13/01/2008, they had sold 54 kgs. of steel for Rs.1,300/-.

Thereafter on 17/01/2008 at about 4.00 a.m., somebody knocked on the shutter of his shop. The two persons who had sold the steel material as mentioned earlier, were present along with the present Appellant. He has further deposed that the Appellant questioned him regarding purchase of 153 kgs. of steel material. He has further deposed that the Appellant took him forcibly in a four wheeler towards steel company at Bhayander. He was detained there and was beaten by steel rods. Thereafter, this witness had called his cousin Rupjibhai and had asked him to bring the steel material. The said Rupjibhai brought the material in the morning of 18/01/2008. Till then, this witness was kept locked in the premises of the company belonging to the Appellant. He has further deposed that the Appellant and his companions asked for Rs.2 Lakhs for his release but the settlement was arrived at and Rupjibhai paid Rs.60,000/- and Rs.70,000/- respectively in two installments. This witness has further deposed that 10 days after this incident when he was at his shop, the Appellant again came there with 4 other persons in a car. They again forcibly took this witness to the same company. On this occasion, one Nathuji who was a friend of this witness, was also taken with them. He has further deposed that both of them were beaten in the said company. Then there was a talk between Rupjibhai and the Appellant over telephone. Rupjibhai was not in town and he was to return after 3 to 4 days. The Appellant thereafter applied some inflammatory oil on the body of this witness. This witness and Nathuji were released at 8.00 p.m. PW 1 has further deposed that Rupjibhai came back from his native place. After discussing the matter with the community, the

PW 1 lodged his FIR in the month of March against the Appellant and others. The FIR was exhibited at Exh.17 which shows that it was lodged on 08/03/2008. PW 1 received medical treatment at Bhagwati Hospital.

In the cross-examination, this witness has admitted that he was not knowing the Appellant before the incident. He has further deposed that he had gone to the hospital for treatment after four days of lodging of the FIR.

5. PW 2 Rupjibhai Patel is the cousin of the PW 1. He has deposed that the incident had occurred on 17/01/2008 and at 5.00 a.m. he received a phone-call from PW 1 Kalulal about the requirement of money to pay the ransom amount. This witness met some of the accused near Swagat Hotel at Bhayander as per their directions and then he was taken to Dhanalaxmi Industrial Estate where the PW 1 was detained. He was told that PW 1 had purchased stolen steel material and that had to be returned. Thereafter, this witness came to the shop of the PW 1, took 153 kgs. of scrap steel material from the shop and gave it to the Appellant and others. He has further deposed that the Appellant asked Rs.2 Lakhs for releasing Kalulal. By the evening, this witness could collect Rs.60,000/- which was paid to the Appellant and then the PW 1 was released. He has further deposed that he paid further Rs.70,000/- after 5 days. He has further deposed that in February 2008, he had gone to his native place in Rajasthan. On 25/02/2008, he had received a phone-call from Kalulal at 3.00 p.m. This time again, Kalulal informed him that he

was abducted by the same persons and they were demanding Rs.1 Lakh for his release. This witness then had a talk with the Appellant and promised to talk to them after 2-3 days on his return. When he returned from his native place, PW 1 and Nathulal were already released. Thereafter, they decided to lodge the FIR.

6. PW 3 was knowing PW 1 and PW 2. He has deposed that on 08/03/2008, PW 2 approached him and told him that PW 1 had stolen material from the Appellant's factory and the Appellant had kept PW 1 in the factory. This witness has further deposed that he then went to the factory of the Appellant with PW 2. He has further deposed that the Appellant then demanded Rs.2 Lakhs. The material which PW 1 had stolen, was returned to the Appellant. He has further deposed that the Appellant threatened them not to lodge the complaint. He has also deposed that PW 2 requested the Appellant not to lodge a complaint with the police (for theft) and requested to settle the matter. This witness has further deposed that Rupjibhai paid Rs.60,000/- and Rs.70,000/- on two separate occasions and the dispute was settled. He has deposed that 10 days after that, again the Appellant abducted PW 1 and Nathuji and demanded Rs.1 Lakh for their release. This time this witness, along with Rupjibhai, went to the police station to lodge the complaint.

7. PW 4 Dr. Avinash Pradhan had examined PW 1 on 03/06/2008 and had found a scar on his left hip. PW 5 PI Giri had conducted part of the investigation from 02/06/2008. He had asked

for call record details from the mobile phone company. However, the call records were not collected and were not produced before the trial Court. PW 6 PSI Dipak Salunke had conducted the initial investigation and had arrested the Appellant. The other accused were not found neither the amount allegedly paid was recovered.

8. We have heard Mr. Nitinkumar Sejpal, learned Advocate for the Appellant and Ms. R. M. Gadhvi, learned APP for the State and with their assistance, we have read the evidence and perused the record.

9. According to Mr. Sejpal, learned Advocate for the Appellant, the story put forth by the prosecution through these witnesses does not appear to be true. There is unexplained delay in lodging of the FIR. There is no medical evidence corroborating the version of PW 1 and PW 2. No money was recovered. The other accused were not arrested. The steel scrap material which was the subject-matter, was not recovered. The call details record were neither collected nor produced before the Court. Therefore, the prosecution has failed to prove the case against the present Appellant.

10. As against this, Ms. Gadhvi, learned APP for State, submitted that the statements of PW 1 and his cousin PW 2 are sufficient to hold that the Appellant committed the offence.

11. The FIR in this case was lodged on 08/03/2008. Obviously, there is an unexplained delay of more than a month from the date of the incident. According to PW 1, the first incident had taken place on 17/01/2008 and 18/01/2008 when he was first abducted and was released. At that time, PW 2 had paid Rs.60,000/- and Rs.70,000/- on two separate occasions. This witness has categorically stated that the second incident took place after 10 days. That would mean that the second incident had occurred at the end of January 2008. In that case, there is no explanation as to why the FIR was not lodged immediately and there is no explanation as to why it was lodged on 08/03/2008. This delay has remained unexplained.

12. Even the dates given by PW 1, PW 2 and PW 3 do not match with each other. PW 2 has stated that the second incident had taken place on 25/02/2008 when he was at his native place at Rajasthan. According to PW 1, the second incident had taken place at the end of January 2008. PW 3 has given totally different date i.e. 08/03/2008. From his evidence, it appears that both the incidents had taken place after 08/03/2008 which, obviously, could not be true. Thus, the prosecution has not led cogent and reliable evidence to show as to on which date these incidents had taken place. It is noteworthy that the prosecution has not reexamined PW 3 neither he was treated as a hostile witness. Therefore, it was the duty of the prosecution to explain the apparent discrepancy in the evidence of these 3 witnesses.

13. The FIR was lodged on 08/03/2008. The Appellant was arrested on 08/03/2008. There is absolutely no reason as to why PW 1 was not immediately referred for medical examination either for treatment or for procuring the evidence to corroborate his version that some inflammable substance was applied on the person of PW 1 when he was detained and beaten. His medical examination was conducted on 03/06/2008 and it does not reveal any fresh injury except a scar which cannot be conclusively related to the incident in question. Moreover, PW 1 has stated that he had gone to the hospital for treatment after 4 days of lodging of the FIR. That should mean that he had gone to the hospital on 12/03/2008. However, there is no such record. Therefore, there is no corroborative piece of evidence in this case.

14. The evidence of PW 3 shows that PW 2 himself was requesting the Appellant not to make a complaint to the police and was requesting him to settle the matter. It shows that PW 1 and PW 2 had committed some offence in respect of property of the present Appellant and as a counter-blast and to prevent the Appellant from making a police complaint, this FIR in the present case was lodged. The Appellant, in his statement recorded under Section 313 of the Cr.P.C. has stated thus :

"I was President of steel buffing Association. Subodh Mishra was member of association. 4-5 days before 17 January material was stolen from his factory. On 17 Jan Subodh informed me that he had caught the persons committing theft and purchasers. I went to their company. Rupji, Mandeep and More were there. They had settled

dispute& since the material was sold they agreed to pay money. I advised to go to police. Rupji requested not to give complaint & he would pay money. I left the place when Subodh agreed not to give complaint. I don't know what happened thereafter. Police came to my factory on 6 March.”

15. Thus, we find that the evidence led by the prosecution in the form of PW 3 does probablize the defence of the Appellant to a great extent. We find that PW 1 and PW 2's evidence *inter se* is contrary. There is an unexplained delay, deliberation and false implication. There is no corroborative piece of evidence in the form of recovery of money or the scrap material or even in the nature of medical evidence supporting the prosecution case. No other accused is arrested in the case. The mobile call details record was a crucial piece of evidence in this case which could have been easily made available. Non-production of such evidence indicates either no such data was available or if produced, such data would not be favourable to the prosecution. Non-production of such data compels us to draw such adverse inference against the prosecution.

16. We find that the prosecution has miserably failed to prove its case against the present Appellant. With the result, we allow this Appeal. Hence the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The Judgment and Order dated 25/07/2012 passed by the learned District Judge – 6 and Additional Sessions

Judge, Thane, in Sessions Case No.231 of 2008, are set aside.

- (iii) The Appellant is acquitted from all the charges.
- (iv) The Appellant is in jail. He shall be released forthwith if not required in any other case.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)