

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.124 of 1994

SATISH BALJNATH TIWARI

.. APPELLANT

Versus

**THE STATE OF MAHARASHTRA
& ORS**

.. RESPONDENTS

...

Mr.Anant A. Pandey i/b A.R.Pandey, Advocate for the applicant.
Mr. P.H.Gaikwad, APP for the respondent State.
Mr.Mohd.Jamil Khan with R.A.Shaikh, U.A. Ghawte, Muquim
Khan for respondent no.2.

CORAM : SMT. BHARATI H.DANGRE, J

RESERVED: 19th JANUARY 2018

PRONOUNCED: 15th JUNE 2018

JUDGEMENT:-

1 The present appeal is filed by the appellant Shri Satish Tiwari being aggrieved by the judgment in Sessions Case No.279 of 1989 delivered by the Court of Sessions for Greater Mumbai on 14th February 1994, thereby convicting the appellant under Section 120B read with sections 324, 367, 368, 395, 452, of the IPC and directing him to undergo Rigorous

Imprisonment (RI) for 1(one) month with fine of Rs.25,000/-.

The appellant has been awarded Rigorous Imprisonment for the aforesaid offences for a variable duration and the substantive sentences have been directed to run concurrently.

2 The prosecution case on the basis of which the matter was tried by the Court of Sessions resulting into conviction of the appellant no.1 can be briefly stated as under :-

It is the case of the prosecution that one Rajendra Kumar Bothra has been carrying on his practice as Chartered Accountant since 1974 on the second floor of Air Conditioned Market at Tardeo. In the year 1984, his wife Smt.Shashi Bothra had started a business in fabrics in partnership with one Ratanlal Jain in the name of “Shefali Fabrics” and the address of the office of Rajendra Bothra was recorded as the address of the partnership firm. In the year 1984, the appellant (accused no.1) was introduced to Rajendra Bothra along with Shri N.K. Sharma by the partner of his wife – Ratanlal Jain. At that time, Rajendra Bothra was informed that the appellant Satish Tiwari was a broker in fabrics. It is the case of the prosecution that the

partnership of the wife of Shri Rajendra Bothra in Shefali Fabrics was dissolved with effect from 31/3/1985 and the assets and liabilities of the business of Shefali Fabrics were determined. However, even after dissolution of the partnership, the appellant visited the office of Shri Bothra on 2 – 3 occasions for recovering an amount of Rs.40,000/- which was alleged to be due from Shefali Fabrics. In turn, Shri Bothra told him that he owed no responsibility and had no concern with the partnership firm of his wife, which in any case, was dissolved and he did not owe any responsibility to pay the dues and demands, which can be demanded from Shri Ratanlal Jain who was the exclusive owner of the business.

The specific case of the prosecution is that on 22nd September 1986, when Shri Bothra was working in his office in the presence of his typist Shri Chavan and his other staff had gone for audit and one Shri Kohli and his accountant who were present in his chamber, five unknown persons entered his office. One person remained present near the entrance door of the office. It is the case of the prosecution that after entering

the cabin, three unknown persons who had accompanied the appellant (accused no.1) took out a knife and at the point of knife, asked Shri Bothra to accompany them. Due to fear of his life, Shri Bothra walked out of his cabin, when he was slapped by one of the persons on the back of his neck and the other hit him below his jaw. His shoulders were held by the accused persons and he was pushed down stairs with the knife at his back and then pushed into a taxi. Three unknown persons with open knives got into the taxi with Shri Bothra and the present appellant - Satish Tiwari got into another taxi and followed them. The taxi was driven to a compound at Madanpura and halted near the tin shed of the workshop. Shri Bothra was forced to get down from the car and entered the shed where he was assaulted by four persons who had accompanied the appellant with sticks and the appellant watched them doing so. This resulted into a bleeding injury to Shri Bothra on back of his shoulder. It is the case of the prosecution that the appellant demanded an amount of Rs.83,000/- from Shri Bothra as dues from Shefali Fabrics but since Shri Bothra was not having any money with him, he agreed to make the amount available from

his account in the Corporation Bank, Mumbai Central Branch. The accused no.1 with two persons accompanying him took Shri Bothra in a taxi to a restaurant near Maratha Mandir and from where he was directed to make a telephone call to the Manager of the Corporation Bank and requested him to send a loose cheque with the person who would hand over a note written by Shri Bothra to that effect. Shri Bothra was made to write a note to the Manager for issuance of blank cheque and a note was taken by the appellant to the bank Manager. The appellant, however, returned after some time and informed that the Manager had refused to hand over the cheque. Shri Bothra was thereafter threatened by the appellant that his wife would be kidnapped and in any case, he should make arrangements for the amount. Thereafter, Shri Bothra made a telephone call to his friend Pradeep Jain and directed him to bring the cash amount of Rs.83,000/- at restaurant Cafe Sagar at Nagpada junction. Shri Bothra was detained in the tin shed and was taken out around 4.15 p.m towards Nagpada junction. When they reached Nagpada junction, Shri Bothra noticed Pradeep Jain sitting in a car which had halted on road at traffic signal

and thereupon Shri Bothra proceeded to the car and received the cash wrapped in newspaper and asked Mr.Pradeep Jain to drive away. After that, Shri Bothra was taken back to the tin shed and he handed over the cash to the appellant and he also requested the appellant to pass a receipt for that amount, which he did towards full and final settlement on the bill of M.N.Textiles and thereafter, Shri Bothra was permitted to leave.

3 It is the case of the prosecution that the staff from the office of Shri Bothra reported the matter to Tardeo Police Station who proceeded to the office of Shri Bothra and recorded a panchnama. The Manager from Corporation Bank was also summoned to the police station and his statement was recorded. Similarly, the statement of the watchman at the gate of the compound of Air conditioned Market was also recorded. Shri Bothra returned home after being released. However, he was totally exhausted and under tension on account of the incident and therefore, on the next day, he visited the office of Crime Branch where his statement was recorded and he handed over the receipt issued to him by the appellant. An

Identification Parade was held on 26th September 1986 and Shri Bothra identified five persons in the identification parade, including the appellant. The police also recovered four knives and some cash in the course of investigation. The writing produced by Shri Bothra before the DCB was referred with specimen handwriting of the appellant of the state handwriting expert to give the opinion that the writing claimed by Shri Bothra to have been endorsed by the appellant in his presence in the tin shed and the writing of the person whose specimen was given, was identical. Based on this, a charge was framed against the appellant along with five other persons. The appellant along with five other persons was charged for entering into an illegal agreement to extort cash of Rs.83,000/- and for committing house trespass and for making preparations to cause hurt and to abduct Shri Bothra from his office in Tardeo. The appellant was also charged for wrongful confinement and causing grievous hurt and thereby committing offences punishable under section 120B read with 452, 367, 368, 385, 324 IPC and Section 27 of the Arms Act.

4 A charge-sheet as per C.C.No.855/P/87 was filed against six accused by DCB, CID and cases against accused nos.2, 3 and 5 were kept on dormant file on 19th September 1988. Case against accused nos.1, 4 and 6 were committed to Court of Sessions on 27th February 1989. On an application by accused no.6, he was discharged on 4th September 1992. Charge was framed against accused nos.1 and 4 on 7th October 1992. Accused no.4 absconded and case against him was separated on 22nd June 1993. Thus, only accused no.1/present appellant came to be tried.

4 During the course of the trial, the prosecution examined 15 witnesses which included Shri Rajendra Bothra as Prosecution Witness No.1. Shri Shankar Chavan who was present in the office of Shri Bothra on the date of incident was examined as Prosecution Witness no.2. The watchman at the main gate of the compound of A.C. Market Tardeo where the office of Shri Bothra was located, was examined as PW no.3. The Manager of the Corporation Bank, Mumbai Central branch was examined as PW no.10. Shri Pradeep Jain, the person who

had brought the cash to Shri Bothra, came to be examined as PW no.13. The Sub-divisional Magistrate carrying out the Identification Parade was examined as PW no.12. Remaining witnesses which were examined by the prosecution i.e. PW nos.5, 6 and 7 were examined as panch witnesses.

Accused no.1 (appellant) denied the charges levelled against him and his statement was recorded under Section 313 of the Code of Criminal Procedure. It is the specific case of the appellant under Section 313 of the Cr.PC that he is an established broker in cloth market and has been knowing Bothra since 1984 and it was Shri Bothra who was running the business of Shefali Fabrics in the name of his wife with Shri Narendra K. Sharma as a working partner. According to the said statement, he was acting as a broker for Shefali fabrics and all the payments were arranged by Shri Bothra. According to the accused, whenever there was a delay in making the payment, he had been requesting Shri Bothra to arrange for it and Shri Bothra was postponing the same. However, at one occasion, he was threatened by Shri Bothra that if he would

approach him or telephone him for any payment, he would be met with dire consequences and therefore, he had concocted a false case against him.

The learned Sessions Judge proceeded with the trial by framing the issues and determined on the basis of the material produced before it as to whether the version of the prosecution was so improbable so as to suffer from a reasonable doubt and whether the prosecution had proved that an amount of Rs.83,000/- was paid to the appellant.

5 It is pertinent to note that the original record was not traceable and therefore, the report was submitted to the Sessions Court on 4th September 1992 that the record is not traceable in spite of all serious efforts. Therefore, the Sessions Court also framed an issue as to whether the loss of original record has prejudiced the accused so as to vitiate the trial and has answered the same in the negative. The Sessions Court after a detailed discussion on the said issue arrived at a conclusion that the rules of evidence relating to secondary evidence made it clear that the secondary evidence has to be

accepted by exercising due care and diligence so as to ensure that under the guise of copy, some relevant portion of the original has not been distorted. The learned Sessions Court concluded that since all the copies of the relevant documents were made available to the accused and since no prejudice is caused to the accused by loss of the original, the trial had to proceed.

6 On considering the version of the prosecution witnesses, the Sessions Court arrived at a conclusion that the incident as narrated by the PW no.1 and corroborated by PW nos.2 and 3 as well as PW no.13, led to a conclusion that it was highly improbable that the story was concocted by PW no.1. The learned Sessions Judge did not accept the stand of the accused that the prosecution case was false and the entire version was concocted to falsely implicate him in the serious crime so as to prevent him from making the demand for the dues from Shefali Fabrics against the warning of PW no.1. The Sessions Court observed that it would be highly improbable that a Chartered Accountant would plan to concoct a case and

there was no reason for resorting to such an elaborate concoction as narrated by him in his deposition and it was always open for him to lodge a complaint of robbery against accused no.1 and others alleging that they had entered his office with a knife and under the threat of knife, it compelled him to part an amount of Rs.83,000/- as dues to Shefali Fabrics and he could have done so by mentioning it that it had happened at his residence, where he would have had ready witnesses. The learned Sessions Judge, therefore, concluded that the veracity of the prosecution case did not suffer from any reasonable doubt and cannot be said to be highly improbable. On the serious objection being raised on the part of the accused that the material witnesses have not been examined, the Sessions Judge concluded that sufficient material has been brought on record in form of the prosecution witnesses and there was no need for examining multiple witnesses to corroborate the incident. As far as the flaws in the investigation are concerned, the learned Sessions Judge observed that in light of the apathy of investigation, the victim who seeks justice from the government machinery should not be denied justice

and the course open in the situation is to verify the circumstances and corroboration of the version of the victim and to decide the truth without being prejudiced to the apathy of the prosecution in being precise with the investigation.

In the light of the detailed discussion on the material produced on behalf of the prosecution, the learned Sessions Judge concluded that the fact that the appellant had received cash of Rs.83,000/- from PW No.1 Shri Bothra strongly corroborated the version of PW no.1 about having forced to part with the cash. Resultantly, the Sessions Judge held the accused no.1 to be guilty under Section 120B, 452, 368, 395 of the IPC and convicted him by the impugned judgment.

7 I have heard learned counsel for the appellant Shri A.A. Pandey, Mr.P.H.Gaikwad, learned APP for the State and Shri Mohd.Jamir Khan appearing for respondent no.2. The learned counsel for the appellant would submit that the learned Sessions Judge has seriously erred in convicting the appellant and has not appreciated that the prosecution has failed to establish its case beyond reasonable doubt. The learned

counsel would submit that the learned Sessions Court has failed to consider that none of the prosecution witnesses has supported the case of the prosecution and since the prosecution has failed to establish its case beyond reasonable doubt, the benefit must go to the appellant. Learned counsel would submit that the entire case of the prosecution is only based on assumptions and surmises and the entire prosecution case is highly improbable and great prejudice has been caused to the appellant in the absence of original documents being produced during the course of the trial. It is also submitted that the prosecution has failed to satisfactorily conduct the Test Identification Parade as per the norms of the Criminal Manual for conducting such parade and they have been completely ignored and the witnesses produced by the prosecution did not support the case of the prosecution. In any case, according to the learned counsel for the appellant, the entire version of the prosecution case is highly improbable as Shri Bothra never lodged a complaint and at leisure had visited the Crime Branch office on the next date of the incident after consultation with his counsel and had put up a completely concocted story.

Learned APP as well as the learned counsel for respondent no.2 Shri Bothra, supports the judgment delivered by the learned Sessions Court and would submit that the entire case of the prosecution has been proved by clinching evidence in form of prosecution witnesses and the documents that have been produced during the course of the trial. The learned APP and the learned counsel for the respondents pray for dismissal of the said appeal and prays for upholding of the judgment delivered by the learned Sessions Judge on due consideration of the entire material produced by the prosecution.

8 With the assistance of the learned counsel Shri Pandey appearing for the appellant as well as Mr.PH.Gaikwad the learned APP and the learned counsel appearing for respondent no.2, I have perused the entire paper book, including the deposition of witnesses. The prosecution has relied upon the testimony of PW no.1 which is the basis of its case. PW no.1 is a practicing Chartered Accountant and he has deposed before the Court that he was having his office on the second floor of A.C. Market at Tardeo, and there are five

employees working in the office and working hours were 8.30 a.m to 6.00 p.m, except for Sundays which was a weekly holiday. It is deposed by PW no.1 that one Shankar Chavan was working as typist in his office along with one Prakash Pawar working as Peon, Shri Shailesh Narang, a Chartered Accountant and one Shri Chavan working as another peon along with one assistant in the office. As per the said witness, on the date of incident, i.e. 22nd September 1986 at about 12.45 p.m, he was present in the office along with typist one Mr.Chavan. He further deposed that one Shri Kohli and his lady accountant had been sitting inside his cabin whereas other members of his office had gone out for audit. PW no.1 has deposed that the accused along with four persons who were not known to him, entered his office and came inside his cabin and three persons accompanying the accused, opened a knife and he was forcibly driven out of his office and he was assaulted on his way, on the back of his neck and left side of his jaw. As per the version of PW no.1, he was asked to board a taxi and thereafter was taken to Madanpura and the taxi was parked in a compound in the said locality and there was a workshop

inside the compound with tin shed on all its sides. As per the said witness, he was made to sit on the *charpai* and the four unknown persons started beating him with sticks and the accused no.1 was only watching and he sustained a bleeding injury due to the said blows. As per the deposition, there was a demand of Rs.83,000/- put to him and then this witness has given the details about he writing a note to the Manager of the Corporation Bank. He had also stated that he was taken to a restaurant near Maratha Mandir theatre and again brought back to the tin shed. Thereafter, he was also taken to a nearby shop so as to enable him to make a telephone call, and from where he called his friend Pradeep Jain (PW 13) and requested him to bring the amount of cash of Rs.83,000/- since he was in trouble. This witness has deposed that he asked Shri Jain to bring the cash at restaurant Cafe Sagar at Nagpada junction and PW no.13 Pradeep Jain had agreed to reach there by 4.15 p.m. The witness had then deposed that he was again taken back to the tin shed and at 4.15 p.m, he was taken in the car towards the cafe when at Nagpada junction, he saw PW no.13 sitting in a car and thereupon, he approached him and accepted

the amount, wrapped in a newspaper from Shri Pradeep Jain (PW 13) and he had informed Shri Pradeep Jain that he should drive away and he would return back on his own. This witness has also deposed that he handed over the same amount, after returning to the tin structure to the accused in presence of the four unknown persons and then he requested the accused to atleast pass the receipt for the amount and thereupon, he took out a bill of M.N.Textiles and wrote the receipt and endorsed that amount of Rs.83,000/- was received towards full and final settlement. PW no.1 had further stated that he retained a xerox copy of that bill and the original had been handed over to the police along with his statement. The witness have given sufficient clarification in his deposition about the bill being produced in original. It is pertinent to note that the witness was subjected to an extensive cross-examination as regards the minute deficiencies in the case of the prosecution. In cross-examination he has admitted that once he was brought in the corridor outside his office room, the knives were folded and packed and no knives were pointed out at him when he climbed down the stairs, crossed the compound and pushed into the

taxi. He had then stated in the cross-examination that again the knives were opened and pointed out to him once he was taken in the tin structure. As regards the injuries sustained by him, he had stated that forceful blows were given to him and he was beaten by sticks and not by big lathis and that he was not able to count the blows given by the 4 associates. He has also admitted that he did not sustain any bleeding injury. As regards the presence of the persons in his chamber, he had admitted that Mr.Kohli and his lady assistant present in his cabin were frightened and they went out of the office. The extensive cross-examination of this witness further reveals that he was aware that the accused had trespassed in his office along with his associate for recovering the amount due to Shefali Fabrics. He further admitted that he did not make any attempt to escape, even though many persons crossed him on the way. The witness had further clarified that he did not make any attempt to escape since he knew that the associates of the accused were having knives in their pockets. Further, as regards the incident which took place at Nagpada junction where Shri Bothra received the amount from Pradeep Jain (PW 13) while seated

in a car, he had admitted that he did not make any attempt to escape or raise any alarm at the time when he reached the signal for crossing towards Cafe Sagar and saw Pradeep Jain sitting in the car. He admitted that at that time he was not held by the accused persons and he was not aware that the Nagpada Police Station was 20 paces away from where the car of Pradeep Jain was standing. In cross-examination, he categorically stated that he had been to Bombay High Court to consult his maternal uncle who was a practicing lawyer and then went to the office of CID, on the next day at around 1.00 p.m.

Extensive examination of this witness would reveal the improbability of the entire version sought to be brought on record by the prosecution through this witness. Perusal of the statement of this witness would reveal that it is his version that he was dragged out of his office which is located in crowded place and in official premises of Tardeo Air condition market. On the date of incident, the accused along with his accomplices visited the office of Shri Bothra and it is his case that under the fear of his life, he accompanied them and continued to

accompany them till he received the amount from Pradeep Jain and handed over the said cash amount to the accused no.1 which is the amount due from Shefali fabrics. The version of the said witness would reveal that he did not raise any alarm when he was taken from his office nor did he make any attempt to escape when he was brought to the tin shed and where he was housed, according to him, it was located in Madanpura in a compound where other workshops were located. It is the case of this witness that he was made to sit on a *charpai* in the said tin shed and he was assaulted. However, he did not raise any alarm at that stage also and since it was a place of workshop, it must be frequented and no attempt was made by him to seek any help. Not only this, he was taken out from the said tin shed on two occasions, once in a restaurant from where he made telephone calls and at that time also, he did not seek any refusal and since a restaurant is a public place, it is highly improbable that he could not have raised any alarm. His explanation that since he was aware that the accused persons were carrying knives in their pocket, he did not raise an alarm, appears to be highly improbable. It is the case of this witness

that whenever he was taken out from the tin shed i.e. to a restaurant near Maratha Mandir, he was accompanied only by two persons and it was not impossible for him to raise any alarm. Further, this witness was taken at Nagpada junction in front of Cafe Sagar hotel which is a highly crowded place and a map produced on record would reveal that the place where he was standing is at 20 feet away from Nagpada Police station and it is a highly congested area and it would have been but natural on part of a person confined to make attempt to escape but such an attempt was never made. Such an attempt to escape was not even made when this witness approached Shri Pradeep Jain who was sitting in a car and at that time, it was he alone who approached the car and this was an opportunity for him to board the said car and flee away, but according to him, he did not avail of the said opportunity and told Mr.Jain to drive away and returned back with the said amount.

Examination of PW 2 do not support the case of the prosecution, as Shankar Chavan who was working as a typist in the office of Shri Bothra had categorically stated that he was

not able to see the persons who entered the office and in fact, at about 1.00 pm he had gone inside the cabin to make certain inquiries about the agreement and he did not notice anyone inside the cabin or in the office. This witness has further deposed that 10 – 15 minutes before he went to the cabin he had heard sound of steps from which he had an impression that someone had walked out of the cabin. Thus, according to this witness, there were 3 – 4 persons who had walked out of the cabin. However, he has not witnessed Shri Bothra being forcibly driven out of the office. This witness does not support the case of the prosecution since he had categorically stated that he does not know anything about the incident. In cross-examination, nothing fruitful has been extracted from this witness to support the case of the prosecution as he had categorically denied that he had heard any foot steps and whether he had seen the man and the girl sitting in the chamber of Shri Bothra. Thus, PW no.2 has not supported the prosecution version at all.

9 Another witness on whom the prosecution has

sought to rely to establish that the incident, as alleged, has taken place is one Vasudeo Jadhav who was working as watchman in the premises of Tardeo Aircondition market. He has deposed before the Court that he was on duty on 22nd September 2016 at the main gate and he saw Shri Bothra being taken out of the compound by two persons at around 1.00 p.m. He has deposed that the two persons were walking close to him but neither of those two had been holding any part of the clothing or body of Shri Bothra. He has further deposed that all those three persons, including Shri Bothra crossed the road after getting out of the main gate and got into the taxi which was on the other side of the road. This witness had further deposed that he did not have any suspicion when he saw the two persons taking Shri Bothra out of the compound and rather he thought them to be either his relatives or friends. This witness has also therefore not supported the case of the prosecution of forcible abduction of Shri Bothra and rather he has stated before the Court that there was no pressure or force which could have been said to have compelled Shri Bothra to walk with the accused and other persons.

10 In light of the aforesaid three witnesses, the incident which has alleged to have taken place on 22nd September 1986 appears to be doubtful and the prosecution has failed to bring cogent evidence to support the prosecution version. Further, the case of the prosecution is dispel by PW no.13 and a closer look at his testimony would reveal the improbability of the entire case of the prosecution. Shri Pradeep Jain had deposed before the Court that on 22nd September 1986 at about 2.30 p.m, he received a telephone call from the clerk of Shri Bothra informing him that he has been kidnapped. He had stated that he could not do anything after coming to know about the said incident and he kept waiting in the office and at around 3.30 p.m or 3.45 p.m, he received a telephone call from Shri Bothra. He further deposed that Shri Bothra requested that he wanted a loan of Rs.83,000/- and then PW No.13 informed him that he already knew about the incident and was willing to pay the money whenever required. He was asked to bring the money at Cafe Sagar near Nagpada junction and according to his instructions, he approached Nagpada junction and when his car

had stopped at the traffic signal of Nagpada, Shri Bothra came near the car and the witness handed over the amount wrapped in a newspaper to Shri Bothra. He also deposed that on handing over the cash, Shri Bothra told him that he would come soon and thereafter, this witness drove away towards his office.

If the version of this witness about the truthfulness of the incident is to be relied upon, several questions come to one's mind i.e. as to if Shri Bothra was kidnapped at around 1.00 pm as per the case of the prosecution, why did the office of Shri Bothra informed Mr.Pradeep Jain of the kidnapping at around 2.30 p.m and on receipt of the said call, why did Shri Pradeep Jain keep quiet and did not report the said matter to the police. It is highly improbable that a person whose close friend has been kidnapped and when he was specifically informed about the same, he did not bother to take any steps and says that he could not do anything. Further, it is also to be noted that though Shri Bothra himself telephoned PW no.13 and asked him for money, he did not give any details as to by whom he was kidnapped and he drove with the cash as

demanded and delivered it to Shri Bothra. Even as per this witness, Shri Bothra did not make any attempts to board his car with him, when he met him at the signal of Nagpada junction and rather coolly informed him that he would come soon on his own. This narration makes the prosecution story doubtful. Further, the conduct of Shri Bothra also weakens the case of the prosecution and on return from the custody of the appellant and his accomplice, Shri Bothra did not bother to report to the Police Station on same day, but it was only on the next day in the afternoon after due legal consultation, he approached the police station and got his statement recorded.

The case of the prosecution therefore appears to be highly improbable and the Addl. Sessions Judge who had examined the witnesses in support of the prosecution case did not deal with the loopholes in the case of the prosecution. On the other hand, in a judgment running into 94 pages, the learned Sessions Judge has attempted to patch up various lacunae in the case of the prosecution and has erred in coming to a conclusion that the prosecution has proved its case beyond

reasonable doubt. The learned Judge has not found any flaw in the case of the prosecution on the mere assumption that Shri Bothra who is a Chartered Accountant had no reason to put up a case of abduction when he could have put up such a case of he being robbed. It is also highly surprising as to the statement made on behalf of Shri Bothra that on parting with the amount with the appellant/accused no.1, he demanded a receipt and which was duly given. From the whole case of the prosecution as unfolded, it appears to be apparent that some amount was due from Shri Bothra to the appellant on account of some business transaction and the said amount came to be paid by Shri Bothra for which the appellant has duly issued a receipt towards full and final settlement.

11 The prosecution has examined one Sanchayilal Mehta, a businessman dealing with cloth business in the name of M.N.Textiles from Kalbadevi and knowing the appellant as a broker in cloth business. He had categorically deposed before the Court that there had been one transaction between M.N.Textiles and Shefali Fabrics through the appellant and he

had supplied goods worth Rs.83,000/- to Shefali Fabrics. He had also stated that a challan was sent to the goods supplied and a bill of challan for forwarded letter. The said witness had further deposed that he had received six cheques towards the payment of the amount due to him and except a cheque of Rs.35,000/-, subsequent five cheques were dishonored and were returned to Shefali Fabrics. He had further stated that he had made payment of Rs.38,000/- to a party at Bhiwandi on behalf of Shefali Fabrics and he had asked the accused Satish Tiwari to recover the dues from Shefali Fabrics. He also deposed before the court that after the payment was delayed, he received telephone calls from Shri Bothra that Satish Tiwari was going to him and asking him for payment. However, after expiry of two months, Shri Bothra informed him that he had no concern with Shefali Fabrics and Satish Tiwari should not be sent to him. Subsequently, on 23rd September 1986, he was informed that the amount of Rs.83,000/- was recovered from Shri Bothra by Satish Tiwari i.e. the accused which are dues of M.N.Textiles. From the testimony of this witness, it is clear that some amount was due to this witness from Shefali Fabrics and

the said amount was sought to be recovered through the accused. This witness has specifically stated before the Court that Satish Tiwari had a good reputation as a broker in the market. It is thus clear that the amount was due from Shefali Fabrics and as it has come on record that Shri Bothra was looking after the business of Shefali Fabrics and dealing with the textile suppliers and the brokers. The said amount was recovered by the accused from Shri Bothra and he even passed a receipt under the letterhead of M.N. Textiles. The prosecution has failed to establish the case of kidnapping and abduction of Shri Bothra and has also failed to establish the ingredients of wrongful confinement of Shri Bothra. Since from the evidence adduced by PW no.1, it is clear that he was not physically confined nor his movements were restricted and as already discussed above, he had ample opportunity to raise an alarm about his alleged abduction and had enough opportunities when he was at public places to escape, which he did not prefer to do.

12 In such circumstances, prosecution has failed to prove the ingredients of Section 367, 368, 412, 374 and 395 of the IPC and in absence of any reliable and cogent evidence being adduced to support the case of the prosecution.

13 The prosecution has also failed to prove its case and make out the ingredients of the offence as it can be seen from the testimony of PW no.14 – PI, Crimes, Tardeo Police Station. The unsuccessful attempt to recover the said knives from the accused persons also do not inspire any confidence or trustworthiness in the prosecution case.

14 In such circumstances, the findings recorded by the Addl. Sessions Judge in the impugned judgment are based on his own assumptions and surmises and in no case, lead to an irresistible conclusion of kidnapping and abduction of Shri Bothra at the instance of the appellant nor do it prove the case of illegal confinement of Shri Bothra.

The prosecution has miserably failed to prove its case and in such circumstances, the impugned judgment delivered by the Sessions Court in Sessions case No.279/89 is liable to be set aside.

The present Appeal deserves to be allowed and is allowed.

(BHARATI H. DANGRE, J)