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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: April 10, 2018
Date of decision: April 18, 2018

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CRL.A. 562/2017

MANISH SHARMA @ PAPPAN Appellant
Through: Mr. Sameer Chandra, Advocate with
Mr. Manoj Lohia and Mr. Deepak
Mahajan, Advocates.

versus

THE STATE NCT OF DELHI Respondent
Through: Mr. Kewal Singh Ahuja, APP for
State.

AND

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CRL.A. 696/2017 & Crl.M.(Bail) 2196/2017

ANIL KUMAR SHARMA Appellant
Through: Mr. Sumer Kumar Sethi and
Ms. Dolly Sharma, Advocates.

versus

STATE Respondent
Through: Mr. Kewal Singh Ahuja, APP for
State.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

JUDGMENT

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Introduction

1. These two appeals are directed against the common judgment dated 4th February 2017 passed by the learned Additional Sessions Judge, Shahdara, Karkardooma Court, Delhi in Sessions Case No.30/2011 arising out of FIR No.288/2010 registered at Police Station ('PS') Vivek Vihar, convicting both the Appellants, Anil Kumar Sharma @ Sethi (A-1) and Manish Sharma @ Pappan (A-2) of the offences under Sections 363, 364A, 302, 201, 120B, 34 Indian Penal Code ('IPC').

2. These appeals are also directed against the order on sentence dated 27th February 2017 whereby for the aforementioned offences each of the Appellants was sentenced as under:

- (i) For the offence under Section 302 IPC, both Appellants were sentenced to life imprisonment with a direction that they would not be released on remission before 25 years of actual incarceration with a fine of Rs. 50,000/-, and in default of payment of fine, to further undergo simple imprisonment (SI) for six months;
- (ii) For the offence under Section 364A IPC, both Appellants were sentenced to life imprisonment with a fine of Rs. 50,000/-, and in default of payment of fine, to further undergo SI for six months;
- (iii) For the offence under Section 363 read with Section 120B IPC, both Appellants were sentenced to seven years of rigorous imprisonment (RI) with a fine of Rs. 25,000/-, and in default of payment of fine, to further undergo SI for three months;

- (iv) For the offence under Section 201 IPC, both Appellants were

sentenced to seven years of RI with a fine of Rs. 10,000/-, and in default of payment of fine, to further undergo SI for one month.

3. The sentences were directed to run concurrently. By the same order, the trial Court also directed that all the fine amounts were to be released in favour of the father of the victim child as compensation under Section 357 Cr PC. Furthermore, considering that the deceased victim child was an only child and keeping in view the financial condition of his family, the trial Court directed that appropriate compensation be awarded to the family of the victim child under the Victim Compensation Scheme under Section 357A Cr PC.

The charges

4. By an order dated 4th July 2011, the trial Court framed charges against the two Appellants as under:

- (i) That before 15th December 2010, both Appellants along with Nikhil [who was declared to be a juvenile in conflict with the law ('JCL')] entered into a criminal conspiracy to kidnap Vikas (the deceased minor) for ransom from his lawful guardian and thereby committed an offence punishable under Section 120B IPC;
- (ii) That on 15th December 2010, both Appellants along with the JCL pursuant to the aforesaid conspiracy and in furtherance of their common intention kidnapped the deceased minor, Vikas, from D-45, Jhilmil Colony, Vivek Vihar, Delhi from the lawful guardianship of his father, Dharam Singh (PW-1), and thereby committed an offence punishable under Section 363/34 IPC;

- (iii) That after kidnapping Vikas (deceased) both Appellants along with the JCL, pursuant to the aforesaid conspiracy and in furtherance of their common intention, kept him detained with the intention that he will be murdered and in order to compel his father to pay a ransom amount, several ransom calls were made by them between 23rd-31st December 2010 demanding Rs.15,00,000/- from Dharam Singh (PW-1), thereby committing an offence punishable under Section 364A/34 IPC.
- (iv) That after kidnapping Vikas (deceased), both Appellants and the JCL, pursuant to the aforesaid conspiracy and in furtherance of their common intention, committed the murder of the deceased minor by intentionally causing death and thereby committing an offence punishable under Section 302/34 IPC.
- (v) That after committing the murder of the deceased minor, both Appellants along with the JCL, pursuant to the aforesaid conspiracy and in furtherance of their common intention, disposed of the dead body at the Sub-Station, BSES adjacent to House No.87, Gali No.7B, Karawal Nagar and thereby committed an offence punishable under Section 201/34 IPC.

5. The trial against the JCL was separated and proceeded before the Juvenile Justice Board ('JJB'). By an order dated 9th August 2011, the JJB acquitted the JCL.

Background

6. The background to the present case is that PW-1, father of the deceased, is

a junk dealer (*kabari*) having three children, two daughters and a son aged 14 years, i.e. the deceased. The deceased was studying in 7th standard in a public school at Jhilmil. According to the prosecution, the deceased was previously known to A-2. He used to perform the role of *Hanuman* in Ramlila in which A-1 was also doing an act. According to the prosecution, the deceased would refer to A-1 as ‘*uncle ji*’, and touch his feet as a sign of respect. It is further stated that A-1 also taught the deceased to ride a motorcycle as A-1 had a motorcycle.

7. According to PW-1, 15th December 2010 was a very cold day. At around 6.30 pm when he was going to the market to purchase *besan*, he noticed that the deceased was playing in the nearby park. PW-1 brought the deceased back home. The deceased told him that he was going back to the park to collect his ball which he had left there. At 7.30 pm, PW-1 noticed that the deceased had not returned home. He searched for him in the colony, bus stand and station but could not find him. At around 10-10.30 pm, PW-1 went to PS Vivek Vihar and asked the police personnel there to search for the deceased. The family members and friends of PW-1 searched for the deceased while he kept sitting in the PS as he had difficulty in walking. According to PW-1, at around midnight, the Station House Officer (SHO) came to the PS and enquired from PW-1 as to whether he suspected anyone. At that stage PW-1 answered in the negative. The SHO then directed the police staff to register the FIR and asked PW-1 to return in the morning.

The ransom calls

8. PW-1 went the next day to the PS with the photograph of his

son/deceased and gave it to the police. According to PW-1, for a week thereafter, he did not have any information of the deceased. After about a week, he received a call from an STD booth on his mobile phone No. 9312894771 (hereinafter referred to as '4771') at around 11 am/12 noon with the caller informing PW-1 that the deceased was in their custody. According to PW-1, two police officials of Special Staff were sitting in his house as they had come to investigate. The caller demanded a ransom of Rs. 15 lakhs and did not disclose his name or the place from where he was calling. Despite PW-1's request that he be made to talk to the deceased, the caller declined to put the deceased on the line. Instead the caller asked PW-1 to come to the Bheta pipeline, Loni with a ransom of Rs. 15 lakhs and that he would find the deceased there. PW-1 then went to the PS and informed the police about the above development. The police asked him to inform them if and when he received a second ransom call.

9. After three or four days PW-1 received the second ransom call at around 11 am/12 noon where the caller again demanded a ransom of Rs. 15 lakhs. PW-1 informed the caller that he did not have so much money and also that he would first have to sell all his property and would then pay the money. PW-1 requested that he should be allowed to talk to the deceased. The caller however refused and again asked PW-1 to come with the ransom money at the Bheta pipeline.

10. PW-1 again went to the PS and along with 5-6 police men went to the Bheta pipeline in Loni. Despite staying there for about 20-25 minutes, they did not find the deceased. After PW-1 along with the policemen had just left

from there, the caller called again and asked him why he had not come to the Bheta pipeline at 4 pm, the given time. When PW-1 informed the caller that he was in fact present at the Bheta pipeline itself, the call was disconnected. PW-1 then showed the police men accompanying him the number from which he had received the call.

11. The very next day, PW-1 received a call asking him why he had come to the Bheta pipeline with the police. Two police men who were stationed in the house of PW-1 took away the mobile phone of PW-1 and asked him not to pick up the phone again and that his wife should talk with the kidnappers instead. It was noticed that this call received by PW-1 on his mobile number was from another mobile SIM number and not from the STD booth.

12. After about one and half hours, another call was received on the mobile phone of PW-1 and was answered by his wife. When the caller asked his wife to hand over the phone to PW-1, she told the caller that PW-1 was ill and unable to talk. When the caller made a demand of Rs. 15 lakhs, she told the caller that PW-1 was ill and that she would sell her jewellery and their house to arrange the money and sought some time. The police present there asked the wife of PW-1 to continue talking with the kidnappers. The caller then started abusing the wife of PW-1.

13. According to PW-1, in the evening on 30th December 2010 he and his wife went to Vijay Nagar to the *ashram* of a religious head. There again a call was received on his mobile phone. His wife picked up the phone, told the caller that she was at an *ashram* and asked the caller to call after about an hour or an hour and a half.

14. A further call was received. This time the caller told PW-1's wife that he wished that the deceased would return to his parents for the New Year and asked them to pay the ransom and take the deceased away. This time the police informed PW-1 and his wife that the kidnappers would be apprehended.

15. According to PW-1, on the intervening night of 30th/31st December 2010 at around 4 am his friend Satish Ahuja (not examined) informed PW-1 that the SHO had told Satish Ahuja that the son of PW-1 had been killed at Karawal Nagar and the kidnappers had been apprehended. PW-1 also received a call from the police telling him that his son had been killed and his body was in Karawal Nagar. On the following morning, the family members of PW-1 went to Karawal Nagar and informed him that there was no dead body and what was found was only the skeleton of a dead body.

16. PW-1 then went to the PS and noticed that the three accused were already present there and he was able to straightaway identify A-1 since he was known to him prior to the incident.

17. PW-1 then handed over to the police two locks, one lock of the room and the other of the cycle, the keys of which used to remain with the deceased. Both of the locks were put in a box and his signature was taken at point A. After the deceased was kidnapped, the lock of the room was broken and the lock of the cycle was opened by preparing a duplicate key by a key maker.

Investigation

18. In the meanwhile, as far as the police were concerned, Inspector Yogesh Malhotra (PW-23) who, at the relevant time, was Inspector (Investigation) at PS Vivek Vihar was assigned with the case on 18th December 2010 prior to which the investigation was conducted by Sub Inspector ('SI') Amarjeet Singh (PW-26). According to PW-26, on 17th December 2010 itself he issued a wire transmission (WT) message and hue and cry notices and also passed on the information to the 'missing persons' squad. Since PW-23 proceeded on leave the case was again marked to PW26 on 22nd December 2010. When PW-1 on 24th December 2010 had walked into PS Vivek Vihar and informed them of having received a ransom call, PW-26 verified it and found the call to have been made from a STD booth from Loni/Ghaziabad side. On 28th December 2010, PW-23 returned from leave and PW-26 handed over charge of the investigation back to him. PW-23 was informed that an application had already been moved for intercepting the mobile phone calls of PW-1.

19. On 29th December 2010, PW-1 came to the PS and informed PW-23 that he had received two ransom calls on that day demanding Rs. 15 lakhs and that the caller had asked him to come to Bheta pipeline at 4 pm. After sending Assistant Sub Inspector ('ASI') Desh Raj along with some other staff to accompany PW-1, PW-23 went to DCP's office to ascertain the status permission sought to intercept the calls. The police staff that had accompanied PW-1 informed PW-23 that no one had come to the Bheta pipeline, Loni and that ransom calls had been made from STD booths in the area of Loni and Shiv Vihar, Delhi. They had made enquiries from the local

STD booth but no clue could be found.

Interception and CDRs

20. With due permission, on 30th December 2010, PW-23 started intercepting the calls made on the mobile phone of PW-1 through PW-26 who had recording facility on his mobile phone on which he had set up a parallel line with the number of PW-1. In other words it was explained by PW-26 that the phone 4771 of PW-1 was put on interception, and its parallel line was taken on mobile phone No. 9716389553 (hereafter '9553').

21. According to PW-26, on 31st December 2010 he had recorded six ransom calls made on the mobile phone of PW-1 on his own mobile phone, i.e., 9553. According to the prosecution, IMEI number of the SIM used by A-2, i.e., 8750116038 (hereafter '6038') was the same IMEI number of SIM No. 9953202208 (hereafter '2208') from which the ransom calls were made to the mobile of PW-1 on 31st December 2010. It is on this basis that SI Vinay Yadav (PW-22) obtained and scrutinized the call detail records (CDRs) of mobile no. 2208 which was a Reliance company number. This phone was in frequent contact with mobile no. 4776 which belonged to the father of A-2. PW-22 then came to know the model number of the mobile phone of both IMEI number of 4776 and 2208 was the same, i.e., GILD 7700 and therefore it could be a dual SIM mobile phone. He analysed the CDRs and the customer application form (CAF) and handed it over to IO.

22. According to Ayush Jain (PW-2), he was running a mobile shop in the name of Jain Computer and Mobile Solutions at Raghuvar Pura where A-2 had been coming for around 2 months in order to recharge his mobile. In

December 2010 A-2 had come there to purchase a new SIM. When PW-2 demanded ID proof from him, A-2 said he would give his ID proof in the evening as his mother was ill. After getting a new Vodafone SIM from PW-2 on this assurance, A-2 did not return to the shop or give his ID proof as claimed by him.

23. The CAF (Ex.PW-10/F) showed that A-2 was allotted the mobile number ending 6038. The father of A-2, Raghunandan Sharma (DW-1) had also given SIM Number 9213232528 (hereafter '2528') as his alternate number in the CAF of mobile number 4776. The CDR of 4776 showed that IMEI number of 6038 of A-2 ending 9790 was used for making calls on 9th and 10th December 2010. According to the prosecution, this proved that the mobile phone number 2208 from which ransom calls were made to PW-1 was used on a handset having dual SIM having two IMEI Numbers ending 9790 and 9708 and on the handsets of 4776 (of DW-1) and 6038 of A-2.

Arrests of the accused

24. PW-23, on 1st January 2011 at about 3 am organized a raiding party of policemen from the Special Staff, East District and conducted a raid at the house of A-2 at Rama Garden, Karawal Nagar. It is stated that because of winter season and the late hour, no public person was available to join the investigation at the time. A-2 was present in his house and was apprehended.

25. According to the prosecution, on his apprehension A-2 was asked about the victim and disclosed that the victim was with A-1. He then took the police to the house of A-1 at Prem Nagar, Karawal Nagar. A-1 was present there and on interrogation disclosed that the child was with Nikhil (JCL).

A-1 and A-2 then took the police to the house of JCL. JCL Nikhil was found there, however, the child could not be recovered.

26. A-1, A-2 and the JCL were brought to Gali No. 7 and separately interrogated. They purportedly gave disclosure statements (Ex.PW-14/A to C) after which all three were arrested. They are supposed to have disclosed that they could get the body of the child recovered from the BSES substation. According to PW-26, both A-1, A-2 and the JCL took the police to the BSES substation where the head of the body was found in a skeletal condition in a trench there. In a different trench on the right hand side, the rest of the skeleton of the body was found buried under some debris.

Recoveries

27. After waiting for the light to improve, the skeleton which was in a burnt condition was taken out from the trench. The entire exercise was video graphed and photographed. The earth control and oily soil lifted from the spot were kept in a plastic container. The remains of the body including the head were kept in a body bag and sent to the mortuary. PW-1 and the victim's cousin, Praveen Kumar (PW-4), were put forth as non-official witness to the recovery of the body at the instance of the accused.

28. According to prosecution on 2nd January 2011, A-1 got recovered the motorcycle of red and black colour bearing registration No. DL 1ST 5726 from the backyard of his house which was used to bring the deceased. It was subsequently seized. He also got recovered the mobile phone of dual SIM make which was lying under the mattress in his bed room. A-1 also got

recovered the SIM of 2208 which had purportedly been used to make a ransom call on 31st December 2010 to PW-1. These were seized. As far as A-2 was concerned, he too got recovered dual SIM Chinese mobile phone which was used to make ransom calls on 31st December 2010 from the pocket of his pant which was hanging on the wall in his room. This mobile phone was seized.

29. On 3rd January 2011, PW-26 handed over a memory card of his mobile phone having SIM number 9716389553 (hereinafter '9553') in which six ransom calls were recorded, to PW-23. The said SIM card was kept in a match box sealed with the seal 'YM', then taken into possession.

Post mortem

30. The post-mortem of the deceased was performed on 6th January 2011 by the medical board chaired by Dr. Sreenivas M. (PW-6) as Chairman. She was assisted in this exercise by Dr. Vijay Dhankar and Dr. J.V. Kiran Kumar. The body was found to be in an advanced stage of putrefaction and due to putrefaction and liquefaction of the relevant structure, it was not possible for them to make any definite comment regarding presence of injuries, as would be caused by smothering and strangulation. It was however noticed that "possibility in this case of death having occurred as a result of smothering and strangulation cannot be ruled out." The probable time since death was about 22 days. In the course of post-mortem, the doctors came across a key ring and pieces of cloth.

31. At the end of investigation, a charge sheet was filed. Charges were framed against both the accused by the learned trial Court by an order dated

4th July 2011 in the manner indicated hereinbefore.

Trial

32. On behalf of the prosecution, 27 witnesses were examined. When the incriminating circumstances were put to the accused each of them denied them.

33. A-1 took the stand that he had been been falsely implicated and stated that he came to know from the news paper 'Dainik Jagran' dated 18th February 2012 whilst he was in judicial custody that the dead body of the deceased was recovered from a drain (*nala*) 8 days after the deceased had first gone missing. A-1 also claimed that he was attending the marriage ceremony of his brother-in-law at Shiv Vihar on 15th and 16th December 2010 along with his family. He also stated that there were always 3-5 employees of BSES present at the sub-station and the prosecution story about the death of the deceased and subsequent recovery of the body was false.

34. A-2 claimed that he had been arrested from his residence on 31st December 2010 itself and the question of his arrest on the date shown by the prosecution did not arise. A-2 too claimed to have been falsely implicated.

Defence witnesses

35. Raghunandan Sharma, father of A-2 was examined as DW-1. He stated that on 29th December 2010 at around 9 - 9.30 pm he had a quarrel with A-2 at his house as a result of which he visited PS Karawal Nagar in order to make a complaint about A-2. ASI Desh Raj who was present with other

officials met him there, asked DW-1 his name and address, and told DW-1 that he would call A-2 at PS Vivek Vihar on the next day.

36. According to DW-1, on 30th December 2010 police persons of PS Vivek Vihar took away A-2 and brought him back at 5 - 5.30 pm. A-2 then informed his mother that the police had again called him on the next day. A-2 then left the house on the next day but he did not return even till 10 pm. When DW-1 visited the PS Vivek Vihar, some police officials there assured DW-1 that A-2 would be released the next morning. However, A-2 did not return home even the next morning and was falsely implicated in the present case. In his cross-examination, DW-1 stated that he had not given any written complaint against any police officer as regards the false implication of A-2. He did not have any documentary proof to show that he had visited PS Karawal Nagar or PS Vivek Vihar on 29th December 2010.

37. Ram Babu Singh (DW-2), Senior Manager Operation & Maintenance, BSES YPL Karawal Nagar, Delhi stated that at each substation of BSES, a board with the 'danger mark' was always there at the front gate. All the substations are locked with a common key and the said key remained with the officers of BSES. He admitted as correct that that no public persons were allowed to enter inside of the substation and that they remained locked unless opened for some special reason or due to a complaint. No record was maintained of opening and closing of the substations.

38. DW-2 could not say whether the lock of the sub-station was in a proper condition between 15th December and 31st December 2010. He could not say

whether “the said substation was accessible during this period by anybody or not.” He volunteered that “some portion of said substation is always opened and anybody can enter after jumping the wall.”

Impugned judgment of the trial Court

39. In the impugned judgment, the learned trial Court came to the following conclusions:

(i) The CDRs showed that a new SIM 2208 was used for making ransom calls on 31st December 2010 was purchased by A-2 from Gandhi Nagar and given to A-1;

(ii) Recovery of the SIM 2208 from the possession of A-1 was effected in the presence of Mohan Lal (PW-8), brother-in-law of the deceased, who despite lengthy cross-examination remained firm;

(iii) Although the accused had taken the plea that the aforementioned SIM 2208 was originally allotted to one Anju Alam (was not examined), he failed to explain how it could have been recovered from their possession. Therefore, the recovery of the SIM 2208 from A-1 was an incriminating circumstance;

(iv) It was proved beyond reasonable doubt that six ransom calls were made on 31st December 2010 by mobile 2208 to the phone of PW-1. It was also proved that the ransom calls were in the voice of A-2 and matched with the specimen as per the report of the FSL;

(v) It was pursuant to the disclosure statements of three accused that the half

burnt remains of the deceased could be recovered from under a trench of BSES substation. The dead body itself was headless but the head of the body in a burnt condition was lying separately in trenches and recovered. It was clarified by PW-8 that the house of A-1 was adjacent the boundary wall of the transformer from which the body of the deceased was recovered;

(vi) The plea that the recovery was pursuant to the joint statements of two accused which were *per se* inadmissible was rejected. Both the accused were interrogated separately and therefore, the plea of the defence in this regard was without merit;

(vii) Although the video showing the digging out of the skeletal remains of the dead body did not show the presence of the accused, the remains were recovered in the presence of PW-8. He specifically deposed that the accused persons and the JCL were present at the time of the recovery. No suggestion was put to PW-8 that the accused were not present at the spot at the time. In fact the CD which was played in Court mainly focused on the trenches and the persons who were carrying out the recovery of the remains and therefore, the failure to depict the accused persons in the video was not fatal to the case of the prosecution. The DNA unit of the FSL confirmed the dead body was that of the deceased.

(viii) The FSL report confirmed that the dead body which was recovered was of the deceased. The independent witness PW-8, in whose presence the dead body was recovered, remained firm in his cross-examination. The post-mortem of the deceased confirmed that the death was homicidal. It was also proved that the keys recovered along with the remains of the body were in

fact the lock of the bicycle and room of the deceased.

(ix) As regards the conspiracy, it was proved that A-1 was known to the deceased from earlier. The CDR showed that A-1 had made a call at mobile '4776' (belonging to the father of A2) on 15th December, 2010 at 6.59 pm. Thereafter, a number of calls were exchanged between the accused persons till 21.58 hours and the location is at Karawal Nagar. This corroborated their disclosure that after kidnapping the child, A-1 had called A-2 at the relevant time i.e. 7 pm on the day of the incident, who asked A-1 to bring the child to Karawal Nagar.

(x) The remains of the deceased were recovered from the BSES sub-station pursuant to the disclosure statements of the accused and there was a common wall between the BSES transformer room and the house of A-1.

(xi) It was probable that due to the build of the child and the fact that he used to play the role of Hanuman, it was not "probable that someone could kidnap him without his resistance or shouting, unless the kidnapper was known to him and kidnapped him on some other pretext".

(xii) Although A-1 took the plea of *alibi* of attending a marriage at Shiv Vihar on 15th and 16th December, 2010, no evidence was led to support such *alibi*. The fact that the skeleton and severed head of the child were separately recovered from the trenches of the BSES sub-station was also comprehensively proved. Therefore, the prosecution had successfully proved the guilt of the accused beyond any reasonable doubt.

40. The trial Court proceeded to convict and sentence the Appellants in the manner indicated hereinbefore.

41. This Court has heard the submissions of Mr. Sameer Chandra and Mr. Sumer Kumar Sethi, learned counsel appearing for the Appellants and Mr. Kewal Singh Ahuja, learned APP appearing for the State.

Law relating to circumstantial evidence

42. This is a case of circumstantial evidence. Before discussing the evidence on record in light of the above submissions, it is necessary to recapitulate the settled legal position regard circumstantial evidence. The law in relation to circumstantial evidence is well settled.

43. In ***Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116***, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (3) The circumstances should be of a conclusive nature and tendency.
- (4) They should exclude every possible hypothesis except the one to be proved, and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have

been done by the accused.”

44. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679* the Supreme Court held:

“... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused.”

45. In *Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC 681*, the Supreme Court held:

“The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.”

Proving the ransom calls

46. First and foremost is the circumstance of receipt of ransom calls by PW-1 on his mobile phone one week after the child went missing. It must be recollected that according to PW-1, the child went missing at around 6.30 pm on 15th December, 2010 when he left for fetching his ball which he had left behind at the park. The mobile number of PW-1 ended in ‘4771’. According to him, about one week after the child went missing i.e. around

21st/22nd December, 2010, he received a ransom call in which the caller asked him to bring a ransom of Rs.15 lakhs and come to the Bheta Pipeline, Loni. The second ransom call was after 3-4 days i.e. approximately 24th/25th December, 2010 again asking PW-1 to come with the ransom money at the same place. The third call was received immediately on the following day i.e. around 25th/26th December, 2010 questioning PW-1 as to why he had brought the police with him to Bheta Pipeline. The last set of ransom calls were purportedly made on 31st December, 2010.

47. It is strange that the Investigating Officer ('IO') did not consider it necessary to collect the CDRs of the phone of PW-1 i.e. 4771 for the entire period till 31st December, 2010 in order to verify if indeed it received ransom calls on the aforementioned three occasions, as claimed by PW-1. The only time the police is supposed to have done something in this regard was on 30th December, 2010 when the police started intercepting the calls received on the phone of PW-1.

48. It is claimed that "the parallel line of the complainant's phone was taken on the mobile phone number 9716389553 (hereafter '9533') of PW26 SI Amarjit Singh." Six ransom calls were received on the mobile phone 4771 on 31st December, 2010 and are sought to be shown in Ex.PW11/D. All these seven calls are shown to have been made from the mobile phone 2208. The timings of these seven calls were 1.32 pm, 1.33pm, 1.44 pm, 3.14 pm, 4.52 pm, 5.32 pm and 6.13 pm.

49. This appears to be the truncated CDRs of one day of the mobile number

2208. Going by this CDR, it would appear that on the entire day i.e. 31st December, 2010, from mobile number 2208 only six calls overall were made and all those six calls were made only to mobile number 4771. This seems improbable. It was incumbent on the prosecution to produce the entire CDR of 2208 for a longer period. That would have shown whether the mobile number 2208 had been used to make a ransom call on the mobile number 4771 even prior to 31st December 2010.

50. Further, it was important for the prosecution to have picked up the CDRs of 4771, again to cross verify if there were earlier ransom calls made to 4771 from 2208. There is no valid explanation given by the prosecution for its failure to carry out this obvious step in order to verify that the ransom calls were in fact made on the mobile bearing number 4771.

51. The explanation given by the prosecution is that from the CDR for the mobile connection ending in 2208, it was seen that calls were made to mobile number ending in 4771 on 31st December, 2010. That similar calls were made from the mobile phone number 6038 standing in the name of A2 on 9th December, 2010 might show that the mobile phone of the father of A-2 was in fact being used by A-2. However, this does not show that it is A-2 who was making even the earlier ransom calls to the number 4771. Instead of this laborious way of establishing the link, the simpler way would have been to get the CDRs of 4771 itself for the entire month of December, 2010.

52. Therefore, contrary to what the trial Court appears to have concluded, there is something to be said for the fact that the mobile phone 2208 was in

fact not allotted to either A-1 or A-2, but to one Anjum Alam who was not even questioned by the police. How A-1 could have caught hold of the above SIM card from Anjum Alam had to be explained by the prosecution.

53. The above question attains significance on account of two important factors, which again have not been noticed by the trial Court. PW-2 was put forth by the prosecution to prove that A-2 had purchased a new SIM card of Vodafone from him. However, this witness turned hostile. He simply stated that he did not remember the SIM number or the date on which it was activated. In fact this number 2208 was already activated on 11th December, 2010 i.e. prior to the calls made on 31st December, 2010. Further, this witness stated “I do not also remember that accused Manish had come to my shop on 31st December, 2010 at around 11 am.” In his further cross-examination on behalf of A-2, PW-2 stated that he had no proof to show that he had sold the concerned SIM to A-2.

54. The mobile phone recovered from A-2 was not having any IMEI number at all. This was plain from the recovery memo of the said mobile phone. Therefore, by merely demonstrating from Ex.PW11/D that the SIM card of number 2208 was used on a mobile instrument having an IMEI number of 9790 did not reveal that the said phone was used by A-2 to make any ransom call. The important aspect of linking A-2 to the mobile phone 2208 was overlooked by the trial Court.

55. The second difficulty, apart from PW-2 turning hostile, was the fact of the date on which A-2 was actually arrested. According to his father, who was examined as DW-1, A-2 was arrested on 30th December, 2010 itself

whereas according to PW-23 he was arrested in the early hours of 1st January, 2011. If indeed A-2 was already arrested and was with the police on 31st December, 2010, then the whole question of ransom calls having been made on 31st December, 2010 gets falsified. However, the fact is that the mobile phone was already available with A-2. If in custody, A-2 could have been asked to make calls from the mobile phone 2208 or calls were made from his phone on the phone of PW-1 i.e. 4771 at regular intervals between 1 pm and 6 pm (as reflected in Ex.PW11/D), then in the absence of the entire CDRs of number 4771 and 2208, this document becomes highly suspicious. It does not eliminate the possibility of these calls having been made after A-2 was taken into custody.

56. For the same reason, even the fact that the voice recording of these seven ransom calls matched the specimen voice of A-2 also breaks down. In this regard, it must be noticed that PW-26 claims that he could get a parallel line to that of 4771 on his mobile (Ex.PW26/E). How this could be technologically possible is not sought to be explained.

57. Importantly, when he was cross-examined by counsel for A-1, PW-26 stated “No other material except the ransom calls have been recorded in this memory card.” This was unusual considering that both PW-1 and for that matter, PW-26 would have received several calls on 31st December, 2010. PW-26 added, “I do not have any evidence to show that the memory card (Ex.P10) used exclusively in my phone for recording of ransom calls.” This would imply that when the memory card was sent for examination to FSL, other calls were erased from it.

58. The FSL report has only confirmed the voice samples of these seven ransom calls as matching the voice of A2. However, it was confirmed by Dr. C.P. Singh (PW24), as stated in his report, that there were no other calls on that memory card.

59. The above evidence does not lend any assurance to the Court that in the above circumstances the mere fact that the ransom calls made on 31st December, 2010 were shown to match the voice of A2 proves his connection with the crime and, therefore, his guilt beyond reasonable doubt.

60. The fourth factor that makes the prosecution case improbable is the statement of PW1 himself who states in his cross-examination that “I did not receive any ransom call after 6.00 am on 31st December, 2010, after the discovery of the dead body.” Although this witness was recalled by the prosecution more than a year thereafter to clarify that he had made an error about the date of discovery of the dead body by stating that it was in the early hours of 31st December, 2010 whereas it was in the early hours of 1st January, 2011, there was no clarification by this witness of the above statement that he did not receive any ransom calls after 6 am on 31st December, 2010.

61. This statement therefore falsified the document Ex.PW11/D which shows seven ransom calls having been made between 1.32 pm and 6.13 pm on 31st December, 2010. All the above factors make it extremely doubtful that the prosecution was able to prove that it was A2 who made the above

seven ransom calls to PW1 on 31st December, 2010. The CAF of A-2 shows that the SIM 2208 was activated on 1st November 2010 itself. This further complicated the issue as regards the CDR of the said phone and its linking to the ransom calls made on 31st December 2010.

62. Therefore, the Court is unable to concur with the conclusion reached by the trial Court that the prosecution was able to prove the ransom calls having been made from 2208, which was ultimately recovered from the possession of A1.

Recovery of the SIM card

63. The next circumstance is the recovery of the SIM card of mobile number 2208 from A-1. The learned trial Court has pointed out that this was done in the presence of PW-8 (Mohan Lal) whose cross-examination did not yield anything much in relation to the accused.

64. As noted by the trial Court itself, 2208 was allotted to one Anjum Alam. How it managed to reach A-1 was not explained by the prosecution. Therefore, the mere fact that the SIM card may have been recovered in the presence of PW-8 does not take the case of the prosecution very far. Moreover, PW-8 himself was an interested witness. He was the brother-in-law of the deceased. His evidence therefore does not lend the Court any assurance regarding the above recovery of SIM card from A-1.

Recovery of the skeletal remains

65. The recovery of the skeleton and the half-burnt remains of the deceased from the BSES sub-station is again shrouded in mystery. In the first place, it

must be understood that although the case of the prosecution is that it was the accused who made disclosure statements and offered to get the dead body recovered after their arrest and therefore, were present at the time of the recovery of the skeletal remains of the deceased, the evidence on record depicts a very different picture.

66. In the first place it requires to be noticed that the entire recovery of skeleton remains was video graphed. The videographer was Ct. Sube Singh (PW-20). In his cross-examination, PW-20 stated that he reached at the spot at about 6.45 am and that about 8-10 police officials were present at the spot. The other police witness speaks about this process. Ct. Narender (PW-15) who was also present at the spot stated that the videography was taken. Although in his examination-in-chief, he stated that on the pointing out of both the accused, the body of the deceased was recovered from the BSES sub-station, in his cross-examination, he clearly states “only police staff was present at the spot. I do not remember whether anyone from the family of the deceased was present at the spot.”

67. This Court has viewed the entire video recording by playing the CD (Ex.PW-20/A) in the Court in the presence of counsel. The presence of the accused is not shown in the entire video. For that matter the presence of PW-4 who is supposed to have witnessed the recovery of the skeletal remains is not shown in the video. Further, although the police appeared to have reached the place in the earlier hours of 1st January 2011 to effect the above recovery, the video does not contain the electronic date or time stamp. The video appears to have been shot during daylight. This comes across in the

evidence of PW-23 who states that “the skeleton had been dug by 9 am.” Indeed it appears that it took about 1 – ½ hours in digging the skeletal remains of the body from the trench.

68. The story of the prosecution about PW-4 being present at the time of recovery of the body in the presence of the accused has not been proved. PW-4 does not say that in his presence the accused pointed out the place where the skeletal remains were buried. PW-4 is the one who supposedly identified the dead body of the deceased. He states that when he went to Karawal Nagar the dead body was already taken out and he identified it to be that of the deceased.

69. The Court while viewing the video did not find PW4 present in any frame identifying the dead body of the accused. On the other hand as soon as the skeletal remains were lifted from under the cables, they were placed in the body bag and zipped up. The skeletal remains are totally covered by mud and grime. With the head of the body severed and only the skull remaining with no trace of any face, it would have been next to impossible to identify the skeletal remains as that of the deceased. The video also does not show that any keys or torn cloth were present with the skeletal remains.

70. The materials on record show that the police had already recovered skeletal remains of the dead body. The accused were perhaps brought to the spot later.

Joint recovery inadmissible

71. It was important for the prosecution, for the purpose of Section 27 of the Indian Evidence Act (IEA), to show that it was the accused who pointed out the place where the dead body was buried. As explained by the Supreme Court in *Mohd. Abdul Hafeez v. State of Andhra Pradesh AIR 1983 SC 367* it was obligatory on the IO for the purpose of Section 27 of IEA, when more than one accused were present, to indicate “what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide the incriminating evidence against that person.”

72. Here the prosecution has tried to show that an identical disclosure was made by each of the three accused and pursuant thereto the recovery was effected. It virtually amounts to a joint recovery which in the present circumstances is not very convincing.

73. Had there been no video of the recovery, it may have been possible to argue that the oral testimonies of the police witnesses were sufficient to prove the recoveries. However, having placed the video on record and with it not showing even the presence of the accused, the evidence of disclosures made by the accused leading to the recovery of the skeletal remains of the deceased cannot be said to have been convincingly proved by the prosecution.

Doubts concerning recovery of skeletal remains

74. It is seen that the skeletal remains were recovered from an inner room

and that too from under the cables. Therefore, merely because the house of A-2 shared a common wall with the BSES sub-station does not automatically lead to the presumption that it would have been simple for the three accused to carry the dead body and bury in the sub-station under the cables. Nearly 1 and ½ hours was taken to recover the skeletal remains by digging up the trench. If the body had remained there from 15th December 2010 onwards then clearly it would have been emanating a foul smell. In such an event, the BSES staff would have been alerted.

75. However, there was no evidence to show that any BSES staff were questioned by the police on this aspect. It was in fact the defence who examined Ram Babu Singh (DW-2) who said that entry to the BSES station was not easy. According to him, the substations were locked with the common key and the key remained with the officers of the BSES. He agreed as correct that “all said sub stations remained locked unless opened for the special reason or complaint.” If according to him, “no public persons are allowed to enter inside of the said substations” the prosecution had to demonstrate how it was possible for the three accused to have simply opened the substation and buried the dead body inside. They could not have done so without the active help of some staff of the BSES. In any event this aspect ought to have been investigated by questioning the staff of BSES. Why this was not done is a mystery. This adds to the doubts surrounding the recovery of the skeletal remains of the dead body.

76. The trial Court has then discussed the identification of the dead body. It appears to the Court that it is only in the evidence of the post-mortem the

keys of the dead body emerges. Those keys perhaps led to the fact that these keys belonging to the deceased. Added to this was the DNA test which confirmed that the skeletal remains were of the deceased. However, the Court is not prepared to accept the case of the prosecution that as soon as the skeletal remains were discovered PW-4 was able to identify them to be that of the deceased. Viewing of the video record makes it apparent that no such identification would have been possible by anyone.

Motive not proved

77. Another important link in the chain of circumstance was the motive of killing the child. Although through the evidence of PW-9 the prosecution was showing that the deceased was acquainted with A-1 and in fact he respected him as '*uncle ji*', that *per se* did not explain why A-1 want to kidnap the deceased. That apart if indeed A-1 was in dire need of money no purpose would be served by straightaway killing the child on the first day, itself, i.e., 15th December 2010. Yet, according to the prosecution, the child was killed on that day even before the first ransom call was made. In fact the ransom call was not made till one week thereafter. This is wholly inconsistent with three kidnappers being in desperate need of money and therefore, resorting to kidnapping the deceased. If indeed, money was the main motive, it would make little sense for them to kill the child on the very first day.

78. Secondly, PW-1 is only a junk dealer. A-2 would have known he simply could not afford this kind of money. Therefore, the story of demand of Rs. 15 lakhs as ransom appears a far reach and wholly unrealistic. The motive

plays an important role in a case of circumstantial evidence where the other circumstances are not proved convincingly by the prosecution. As explained by the Supreme Court in *Surinder Pal Jain v. Delhi Administration 1993 Supp (3) SCC 681*:

“In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.”

79. In *Arjun Mallik v. State of Bihar 1994 Supp (2) SCC 372* the Supreme Court further explained the position and the following words:

“...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

80. It is, therefore, not as if proof of motive is unnecessary or irrelevant in all cases. While in the case of direct evidence, motive may not assume much significance, in a case of circumstantial evidence, the failure to prove motive

would not be fatal only if all other circumstances have been established beyond reasonable doubt by the prosecution.

81. In the present case the conduct of the accused in killing the child on the very first day, as alleged by the prosecution, is wholly inconsistent with the story of their being desperately in need of money and that leading to the kidnapping and killing of the child.

Conspiracy not proved

82. Before discussing the evidence in this regard, it is necessary to briefly recapitulate the law in regard to the offence of criminal conspiracy under Section 120 B IPC. In ***Devender Pal Singh v. State NCT of Delhi 2002 Crl LJ 2035***, it was held:

“For an offence punishable under Section 120B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

14. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal.

Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

15. In Halsbury's Laws of England (Vide 4th Ed., Vol. 11, page 44, para 58), the English Law as to conspiracy has been stated thus,

Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

83. In *Gulam Sarbar v. State of Bihar (now Jharkhand)* 2014 Crl LJ 34, the Supreme Court explained:

“The essential ingredients of criminal conspiracy are (i) an agreement between two or more persons; (ii) agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence.

The offence takes place with the meeting of minds even if nothing further is done. It is an offence independent of other offences and punishable separately. Thus, the prosecution is required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of proving criminal misconduct on the part of an accused. Criminal conspiracy is generally hatched in secrecy thus direct evidence is difficult to obtain or access. The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them between the parties. Agreement is essential.”

84. The burden lies on the prosecution to show that each of the accused had agreed to commit the offence. As cautioned by the Supreme Court in *State v. Nalini (1999) 5 SCC 253*:

“A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused.

Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.”

85. In the present case, there is no evidence whatsoever to show that the three accused conspired prior to 15th December 2010 to kidnap the child and killed. The evidence in this regard is virtually non-existent.

Homicidal death not proved

86. The trial Court appears to have been carried away by the purported disclosures of the accused while in police custody which were not admissible in evidence. It has proceeded to surmise that the child must have offered stiff resistance and therefore, was smothered with a pillow. There was no recovery of any blanket or pillow from any of the accused. There is nothing to show in fact child was in fact strangled by any of the accused. Interestingly, even the post-mortem report does not conclusively prove the death was due to strangulation. The detailed post-mortem report (Ex.PW-6/A) prepared by a team of three doctors states as under:

“In view of the police investigations establishing the circumstantial evidence of the deceased child having been abducted and his dead body later being found abandoned; in conjunction with the confession

of the accused that the deceased, was smothered and strangled to death it stands to reason that injuries caused by smothering and strangulation would have been produced on the body of the deceased. However due to putrefaction and liquefaction of the relevant structures it has not been possible to make any definite comment regarding the presence of such injuries, as would be caused by smothering and strangulation. By the same token neither can they be said to have been absent, only they could not be assessed due to putrefaction of the dead body.”

87. The above opinion therefore shows that the medical opinion was guided by what the police investigation had put forth as theory and not the other way round. It can therefore also not be said that in the present case medical evidence corroborates the circumstantial evidence gathered by the prosecution and conclusively establishes that the death of the deceased was by strangulation.

Conclusion

88. With so many links in the chain of circumstances not having been established by the prosecution it is difficult for the Court to conclude that it is the accused alone and no one else who abducted and murdered the child of PW-1.

89. In *Kashmira Singh v. State of Madhya Pradesh AIR 1952 SC 159*, the Supreme Court cautioned that if a murder is “a particularly cruel and revolting one”, then “for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law”. Also, in *Akhilesh Hajam v. State of Bihar 1995 Supp (3) SCC 357*, it was observed:

“though it appears to us that in all probability the appellant may be the culprit but probabilities and moral convictions have no place or any role to play to convict a person in the absence of legal evidence. There is a long distance to be travelled between the expression “may be” and “must be”. However strong emotional considerations may be, but the same cannot take the place of proof.”

90. For all the aforementioned reasons, the Court grants benefit of doubt to the accused and acquits them of the aforementioned offences for which they have been charged. The impugned order of the trial Court and the order on sentence are hereby set aside. Unless wanted in some other case, the Appellants shall be released forthwith. They will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

91. The appeals are allowed and the application is disposed of. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 18, 2018
Rm