

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 39 OF 2013

Mohammad Imdar Ali @
Rithul M. R.
s/o Mohammad Umed Ali,
N/o Guwahati, Distt. Kampur,
Village Mandakatta Kampur,
Police Station Bahihato Sai Ali,
Assam and temporary residing at
Pirni backside of football ground,
Verna,Goa, and presently undergoing
sentence at Central Jail, Aguada. Appellant

Versus

State
through P.P.
High Court of Bombay at
Panaji Goa. Respondent

Mr. Arun Bras De Sa and Mr. S. Shet, Advocates for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

WITH
CRIMINAL APPEAL NO. 3 OF 2018

Srinivas Gauramkondu,
C.P. No.72/2011,
Presently lodged in
Central Jail, Colvale, Goa. ... Appellant

Versus

The State of Goa,
Through Police Inspector,
Mapusa Police Station,
Mapusa, Bardez Goa. ... Respondent

Ms. Suzette Pereira, Advocate for the Appellant under Legal Aid Scheme.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

WITH
CRIMINAL APPEAL NO. 50 OF 2018

Suraj Kumar Jha,
s/o Mahesh Jha,
N/o Sepole Zill, Lalit Gram Station,
Dist. Lakshmina Police Station,
Balwaa Bazar, Bihar and
presently staying at Pirni,
backside of football ground,
Verna Goa. ... Appellant

Versus

The State of Goa,
Through Police Inspector,
Vasco Police Station,
Vasco-Da-Gama, Goa.

... Respondent

Mr. Pavithran A. V., Advocate for the Appellant under Legal Aid Scheme.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

***Coram : M. S. Sonak &
Prithviraj K. Chavan, JJ.***

***Reserved on : 25th January, 2019
Pronounced on: 8th February, 2019***

Judgment (Per M. S. Sonak, J)

In all these appeals, the Appellants, challenge the judgment and order dated 20th May, 2013, in Sessions Case No.38 of 2009 by which the Appellants came to be convicted by the Additional Sessions Judge, South Goa, Margao, for offences punishable under Section 364-A read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life and pay a fine of Rs.10,000/- each or in default to undergo rigorous imprisonment for

three months. By the same judgment and order, the Appellants came to be acquitted for offence punishable under Section 506(ii) read with 34 of the Indian Penal Code as also Section 3 read with Sections 25 and 28 of the Arms Act.

2. Criminal Appeal No.39 of 2013 has been instituted by Mohammad Imdar Ali (Ali) who was arrayed as Accused No.4 (A-4) in Sessions Case No.38/2009; Criminal Appeal No.3 of 2018 has been instituted by Srinivas Gauramkondu, (Srinivas) who was arrayed as Accused No.2(A-2) in Sessions Case No.38/2009 and Criminal Appeal No.50 of 2018 has been instituted by Suraj Kumar Jha (Suraj) who was arrayed as Accused No.3 (A-3) in Sessions Case No.38/2009. The learned counsel for the parties agree that since the challenge in all these appeals is to the common judgment and order dated 20th May, 2013 in Sessions Case No.38/2009, it is only appropriate that these appeals are disposed of by a common judgment and order.

3. The charge was framed on 15th January, 2010 against all the Appellants that on 23rd July, 2009, they, along with one juvenile Parikhrit Handique with common intention kidnapped Ayaz Sayyed, r/o Chicalim, in a maruti van bearing registration No. GA-01-R-7954,

changed the number plate of maruti van to GA-01-S-8404, took Ayaz to Cabo-de-Rama, demanded ransom of Rs.15,00,000/- from the brother of Ayaz, Aamir Sayyed, threatened the said Aamir with dire consequences that Ayaz would be killed if Aamir reports the matter to the police. For all these acts, the Appellants were charged for offences punishable under Section 364-A read with Section 506(ii) read with Section 34 of Indian Penal Code. The Appellants were also charged that they, with common intention carried/used fire arms without licence, thus committing offence punishable under Section 3 read with Sections 25 and 28 of the Arms Act. The Appellants pleaded “ not guilty” to all the aforesaid charges and claimed to be tried.

4. The learned Additional Sessions Judge, for convicting the Appellants under Sections 364-A read with Section 34 of the Indian Penal Code has mainly relied upon the testimonies of Mrs. Alka Sayyed (PW2), sister in law of the victim Ayaz, Aamir Sayyed (PW10), brother of the victim Ayaz, Ayaz Sayyed (PW17), the victim himself, Nilesh Sawant (PW11) and Nagendra Parit (PW12), police constables who, on 24th July, 2009, actually reached at the site at Cabo-de-Rama, and witnessed the Appellants confining the victim Ayaz in a maruti van and also made attempts for rescuing Ayaz, before

they were fired upon by the Appellants and had to run for their life. The Additional Sessions Judge has also, to a limited extent relied upon the testimonies of PW14 and PW15, pancha witnesses who deposed that Accused No.4 Mohammad Imdar Ali showed them the place where the number plate of the maruti van was painted/repainted and discovery of clothes of Accused No.4 from the dust bin at Gandhi Market, Margao. The Additional Sessions Judge has also relied upon the testimonies of Sahil Khan (PW4) and Ms. Sharon Abranches (PW5), on the issue of motive of the Appellants for kidnapping the victim Ayaz. Based upon all such testimonies/evidence, the learned Additional Sessions Judge concluded that all the ingredients of Section 364-A of IPC are proved by the prosecution beyond reasonable doubt against all the Appellants.

5. Heard Mr. Arun Bras De Sa, learned counsel for Accused No.4 in CRIA No.39 of 2013, Ms. S. Pereira, learned counsel for Accused No.2 under Legal Aid Scheme in CRIA No.3 of 2018 and Mr. Pavithran A.V., learned counsel for Accused No.3 under Legal Aid Scheme in CRIA No.50 of 2018 and Mr. S. R. Rivankar, learned Public Prosecutor for the Respondents.

6. The learned counsel appearing for the Appellants contended that this is a case where the prosecution has failed to truthfully and candidly explain the genesis of the offence. They submit that there are inherent and irreconcilable contradictions in the theory put forward by the prosecution. They point out that the prosecution, on one hand alleges that the motive for the crime was alleged love triangle between the Accused Srinivas, Sharon and Vijay. It was the case of the prosecution that Ayaz was the friend of Vijay and was therefore kidnapped by Srinivas and other accused persons because Srinivas suspected that Vijay and his friends were responsible for break up between him and Sharon. On the other hand, the prosecution also alleges that this was a case of kidnapping for demand of ransom. They point out that there is no evidence in support of either of the two irreconcilable theories.

7. The learned counsel for the Appellants point out that there is absolutely no legal evidence to establish any demand for ransom. They point out that the victim Ayaz, in his statement to the police made no reference to any demand for ransom though, it is the case of the prosecution that such demands were made from Ayaz's mobile phone, in the presence of Ayaz. They point out that though

the prosecution had addressed letters to the mobile phone agencies to provide call details (CDR), the prosecution failed to produce any material with regard to the CDR. They submit that this aspect has been completely overlooked by the learned Additional Sessions Judge and no adverse inference has been drawn against the prosecution. They submit that there is absolutely no evidence that any calls were made by the Appellants, either from their own mobile phone or from the mobile phone of the victim Ayaz, much less, any evidence that demands for ransom were made by means of such calls. They submit that the ingredients of Section 364-A of IPC were thus not complied with.

8. The learned counsel for the Appellants submit that the theory regarding rescue put forward by the prosecution is too fantastic to be even regarded as probable much less, proved. There are serious contradictions in the depositions of the police constables. There are serious discrepancies on the theory of rescue. The version of the I.O., is at totally variance from the evidence of victim Ayaz. They point out that all these serious discrepancies have not been adverted to by the learned Additional Sessions Judge and therefore, the impugned judgment and order to the extent, it convicts the Appellants suffers

from perversity.

9. The learned counsel for the Appellants point out that it is a specific case of the prosecution that at least one of the Appellants was armed and in fact shot at the police constables. However, there is no clear evidence as to the nature of fire arms held by the Appellants or any of the Appellants. There are contradictions as to which of the Appellants used the alleged fire arms. Neither any arms were recovered nor any empty cartridges recovered from the site. All these discrepancies have again been overlooked by the learned Additional Sessions Judge, which render the findings recorded in the impugned judgment and order totally perverse.

10. The learned counsel for the Appellants point out that it was the case of the prosecution that even the police officials involved in the so called rescue of the victim, fired four rounds in air in order to disperse the Appellants or to apprehend the Appellants. However, the prosecution failed to examine the police officer who is alleged to fired four rounds in air or to produce any ballistic evidence in support of such a theory. They point out that the learned Additional Sessions Judge failed to appreciate that the prosecution by setting up such a

fantastic theory, thereafter failing to adduce any evidence in support of this theory, has clearly suppressed the truth from the Court and in any case miserably failed to prove that the Appellants have committed any offences in the present matter.

11. The learned counsel for the Appellants submit that the so called recoveries of neither link the Appellants with the crime nor can the said recoveries be said to be the recoveries under Section 27 of the Evidence Act. The learned Additional Sessions Judge has failed to examine the impact of acquittal of the Appellants under the Arms Act. The learned Additional Sessions Judge has failed to discuss the evidence in proper perspective, but has merely chose to rely upon some stray sentences or paragraphs from the deposition in order to convict the Appellants and sentence them to life imprisonment.

12. The learned counsel for the Appellants point out that in the present case, the testimonies of PW11 and PW12 inspire no confidence in whatsoever. They point out that no station diary entries have been produced by the prosecution to show that these constables indeed visited the site at Cabo-de-Rama. They point out that there are serious contradictions in the testimonies of these two witnesses

inter se as well as between the statement made by these witnesses before the police and their depositions before the Court. They point out that the version of these witnesses does not match with the version of the victim Ayaz. They point out that the entire incident as deposed to by these witnesses is inherently improbable and too fantastic to be true. They submit that the learned Additional Sessions Judge has not at all appreciated the testimonies of these two witnesses in proper perspective.

13. The learned counsel for the Appellants finally submit that there is absolutely no evidence to bring home the charge under Section 34 of IPC. They point out that in the impugned judgment and order as well there is absolutely no discussion on applicability of Section 34 of IPC and yet this provision has been routinely invoked to convict the Appellants.

14. For all these reasons, the learned counsel for the Appellants submit that the conviction recorded against the Appellants deserves to be quashed and set aside and the Appellants be acquitted for offence punishable under Section 364-A read with Section 34 of IPC.

15. Mr. Rivankar, learned Public Prosecutor defends the impugned judgment and order for the reasoning reflected therein. He points out that this is not a case of circumstantial evidence but a case of direct evidence. In support, he lays great emphasis upon the testimony of victim Ayaz (PW17) as well as the testimonies of the police constables PW11 and PW12. He submits that once the learned Additional Sessions Judge came to the conclusion that the testimonies of PW17, PW11 and PW12 were trustworthy, then, the evidence of I.O. or other witnesses, was to the great extent, irrelevant. He submits that based upon some minor discrepancies in the testimonies of such witnesses, the Appellants cannot be acquitted of the serious offences alleged against them.

16. Mr. Rivankar submits that the witnesses cannot be expected to give perfect picture of the incident and minor discrepancies have to be ignored as held by the Hon'ble Apex Court in *Surajsinh Vs State of Gujarat*¹. He submits that irregularities and illegalities, if any, committed by the I.O. will not render the prosecution case untrustworthy where the testimonies of eye witnesses are found to be reliable and trustworthy. He relies on the decision of

¹ 2017(4) Supreme 375.

the Apex Court in *State of Rajasthan Vs Kishore*¹.

17. Mr. Rivankar submits that in the present case the testimony of the victim Ayaz (PW17) is more than sufficient to convict all the Appellants. He further submits that the testimony of victim Ayaz (PW17) is sufficiently corroborated by the evidence of police constables PW11 and PW12. He submits that in the present case, the prosecution has also established the motive for offence though, such establishment was not strictly speaking necessary. For all these reasons, Mr. Rivankar submits that there is no good ground to interfere with the impugned judgment and order made by the learned Additional Sessions Judge.

18. Mr. Rivankar, also submits that the mere fact that the Appellants may have been acquitted for offence under the Arms Act does not mean that the ingredients of offence under Section 364-A read with Section 34 of IPC cannot be proved or have not been proved. He submits that attempts were made to recover the arms but such attempts were unsuccessful. This by itself, does not render the prosecution case untrustworthy or unreliable as alleged by the

1 1996 CRI L J 2003

Appellants.

19. Finally, Mr. Rivankar submits that even if it is assumed that the demands for ransom are not established there is enough evidence on record to establish that the Appellants indeed kidnapped Ayaz with threats to murder him. He therefore submits that the offence under Section 364 of IPC is clearly made out. He relies on the provisions of Section 221 of the Criminal Procedure Code to submit that in such a situation, this Court can always convict the Appellants for offence under Section 364 of IPC, instead of 364-A of IPC. He relies on *Narwinder Singh Vs State of Punjab*¹ in support of such a course of action.

20. The rival contentions now fall for our determination.

21. Section 364-A of IPC provides that whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State

¹ 2011(2) SCC 47

or international inter-governmental organisation or *any other person* to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

22. The expression “*any other person*” as it appears in Section 364-A of IPC fell for interpretation before the Hon'ble Apex Court in *Vikram Singh @ Vicky & Anr Vs Union Of India & Ors*¹. The contention that such expression must be read *ejusdem generis* with the expression preceding the said words, was expressly rejected. The Apex Court held that the term “*person*” used in the expression “*any other person*”, appearing in Section 364-A of IPC must be understood as referring to “*person*” as defined in Section 11 of the IPC. The tenor of provisions, context and statutory definition of expression “*person*” all militate against any attempt to restrict the meaning of the term ‘*person*’ in Section 364-A of IPC to the ‘*government*’ or ‘*foreign State*’ or ‘*international inter-governmental organisations*’ only. Thus, expression “*any other person*” in Section 364-A would also include a private person.

23. So far as the present case is concerned, one of the

¹ 2015(9) SCC 502

necessary ingredients, which the prosecution had to establish, in order to secure conviction of the Appellants under Section 364-A of IPC was that the Appellants kidnapped Ayaz (PW17) for “ransom”.

24. In order to conclude that there was demand for ransom, the learned Additional Sessions Judge has mainly relied upon the evidence of Mrs. Alka Sayyed (PW2), sister in law of the victim Ayaz, evidence of Aamir Sayyed (PW10), brother of the victim Ayaz and the deposition of Ayaz himself (PW17).

25. Mrs. Alka (PW2) deposed that at around 00.50 hours on 24th July, 2009 she received a call on her mobile set from the mobile set of Ayaz (PW17) the victim. She has deposed that one person, who identified as Munna spoke to her and told her that he had kidnapped Ayaz and demanded Rs.15,00,000/- for the release of Ayaz. She has also deposed that the said Munna threatened her against informing the police and stated that otherwise he would kill Ayaz. PW2 did not indicate whether the said Munna informed her of the place or time at which such ransom was to be paid.

26. Aamir Sayyed (PW10), brother of the victim has also deposed that at around 00.50 hours on 24th July, 2009, he too received a phone call on his mobile set from the mobile set of Ayaz. He too has deposed that caller stated that Ayaz has been kidnapped and demanded Rs.15,00,000/- for his release. Again, PW10, has not indicated that caller informed him of the time or place at which such amount was to be paid. In fact, PW10, has deposed that he thought that the caller was joking

27. The victim Ayaz (PW17), in his examination in chief made no reference whatsoever to any demand for ransom. This is important because it is the case of the prosecution that such demand was made from the mobile hand set of Ayaz (PW17), in the presence of Ayaz (PW17). In the cross examination, Ayaz stated that the accused demanded Rs.15,00,000/- as ransom from his family members. To the question (not clear, posed by whom) Ayaz answered that his mobile phone was in the hand of Srinivas (A-2) but he does not know which of the accused demanded ransom from his family members. A-2 Srinivas, was charged for an offence under Section 302 of IPC in Sessions Case No.50/2009. The said case has close nexus with the present case i.e. Sessions Case No.38/2009. The deposition of

Ayaz (PW17) in Sessions Case No.50/2009, where he was examined as PW7 has been brought on record in the present case i.e. Sessions Case No.38/2009. In his deposition, Ayaz (PW17) in the course of his cross examination, has deposed that on 23rd July, 2009, on his way from Vasco to Cabo-de-Rama, he could not inform anything to his family members since his mobile set was not with him. There is evidence on record that Ayaz (PW17) had in fact spoken to his family members on 23rd July, 2009. There is certainly some discrepancy in the deposition of Ayaz in Sessions Case No.50/2009 and the present case i.e. Sessions Case No.38/2009. Even if such discrepancy is ignored the case of the prosecution that the Appellants made a demand for ransom cannot be said to have been proved by the prosecution beyond reasonable doubt.

28. The record very specifically indicates that the prosecution had attached mobile hand set of Ayaz (PW17), Alka (PW2) and Aamir (PW10). The record also indicates that necessary communication was sent to the concerned agencies requiring them to produce call detail records (CDR) however, the prosecution, has failed to produce on record any evidence as regards the CDR either by examining the Nodal Officer or producing the actual call detail

records through any other competent witness. The evidence in the form of CDR was most crucial, inasmuch as the same would have made it clear as to whether any calls were indeed made from the mobile hand set of Ayaz (PW17) to PW2 and PW10 at the times indicated by the said two witnesses or even otherwise. Non production of CDR or non examination of any witnesses who would be in a best position to depose to the CDRs clearly warranted the drawal of adverse inference against the prosecution. The learned Sessions Judge has not even adverted, much less, considered this crucial aspect of the matter. In the facts of the present case, we are satisfied that an adverse inference was liable to be drawn against the prosecution for non production of CDRs or non examination of witnesses like Nodal Officer etc., who could have deposed to the call detail records.

29. Although the statement made by Ayaz (PW17) the victim to the police soon after his mysterious rescue will not be substantive evidence, it is nevertheless necessary to note that when this statement makes no reference whatsoever to any demand for ransom though it is the case of the prosecution that such demands were made through the hand set of Ayaz (PW17) and in his presence by the Appellants.

Therefore, upon cumulative consideration of the evidence on record, including in particular the circumstance that CDR records were called for but not produced in evidence by the prosecution, an adverse inference was liable to be drawn against the prosecution. We therefore, do not agree with the learned Sessions Judge that the demand for ransom was established beyond reasonable doubt in the present case. Since the demand for ransom is one of the most essential ingredients under Section 364-A of IPC and since the said ingredient has not been established by the prosecution beyond reasonable doubt, we regarded as quite unsafe to convict the Appellants under Section 364-A of IPC.

30. Mr. Rivankar, learned Public Prosecutor, in the alternative submitted that even if the demand for ransom is not established beyond reasonable doubt, there is evidence on record which establishes that the Appellants committed offence under Section 364 of IPC, in that the Appellants kidnapped Ayaz with threats to murder him. He relied upon Section 221 of the Criminal Procedure Code as explained by the Hon'ble Apex Court in *Narwinder Singh* (supra) to urge that this Court can always convict the Appellants for offence under Section 364 of IPC instead of Section 364-A of IPC.

31. Section 364 of IPC provides that whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Admittedly, no such charge under Section 364 of IPC was ever framed against the Appellants. However, by invoking the provisions of Section 221 of Criminal Procedure Code as explained by the Hon'ble Apex Court in *Narwinder Singh* (supra), it is necessary to examine whether on the basis of evidence on record, no case has been made out to convict the Appellants for offence under Section 364 of IPC.

32. At the outset, it is necessary to note that in the present case, a charge was also framed against the Appellants for having committed an offence under Section 506(ii) of IPC. However, learned Sessions Judge, in the impugned judgment and order (para 17) has noted that the threats were given by the Appellants to Ayaz (PW17) as well as Ayaz's brother, (PW10) was part of ingredients to Section 364-A of IPC and, without such threats, the ingredients of Section 364-A of IPC would not be complete. Hence, the learned Sessions Judge has concluded that any separate conviction under Section

506(ii) of IPC was not warranted, *“especially when there is no cogent and reliable evidence on record that any of the accused persons threatened to kill or hurt the complainant examined as PW10”*

33. Even otherwise, we note that the entire thrust of the prosecution case was to establish that the Appellants were involved in kidnapping for ransom. There is hardly cogent or reliable evidence to be found on record to establish beyond any reasonable doubt that the Appellants were involved in kidnapping Ayaz with threats to murder him. Except for stray sentences in the deposition of Ayaz there is no legal evidence to bring home the charge under Section 364 of IPC.

34. Again, the prosecution is not at all clear as to whether the threats to kill Ayaz (PW17) were given by A-2-Srinivas or A-3 Suraj. Even Ayaz (PW17) is not clear on this aspect. The case of the prosecution was that the threats to kill Ayaz was made to Ayaz's brother Aamir (PW10). This case has been disbelieved by the learned Additional Sessions Judge as well. Besides, coupled with the circumstances that no CDR was produced; discrepancy arising out of deposition of Ayaz (PW17) in the present case and in Sessions Case No.50/2009 and absence of any such statements by Ayaz (PW17)

either in his statement to the police or in his examination in chief, we cannot say that the prosecution has established beyond reasonable doubt that the Appellants have committed an offence under Section 364 of IPC, even though they were never charged for commission of offence under Section 364 of IPC. In this state of evidence, we are unable to hold that the prosecution has established beyond reasonable doubt the commission of any offence under Section 364 of IPC by any of the Appellants.

35. The prosecution in the present case, is not at all clear as to the motive of the Appellants to kidnap Ayaz (PW17). The first theory put forward by the prosecution is that A-2-Srinivas had a grudge against Vijay because A-2-Srinivas held him responsible for the rift between himself and Sharon (PW5). It was the case of the prosecution that Ayaz (PW17) was a friend of Vijay and had assisted Vijay in causing rift between A-2-Srinivas and Sharon (PW5). The second theory proposed by the prosecution is that A-2-Srinivas, in fact wanted to kidnap or eliminate Vijay (PW8) and in order to get to Vijay, A-2-Srinivas hatched a conspiracy to kidnap Ayaz (PW17), a friend of Vijay. In fact, Ayaz (PW17) in his deposition stated that the Appellants assured him that they would release him if Ayaz directed

them to Vijay (PW8). As if these two theories were not sufficient, the prosecution introduced yet another theory that this was a case of kidnapping for ransom. The prosecution in the present case has been unable to establish any of the theories beyond reasonable doubt. In any case, since the prosecution in the present case, is not quite clear or not quite sure of its own case, obviously it cannot be said that the prosecution has succeeded in establishing the motive for commission of offence, beyond any reasonable doubt.

36. There is yet another reason which fortifies our view that the prosecution in the present case has failed to prove any charges against the Appellants beyond reasonable doubt. The prosecution in the present case has completely failed to make good circumstances leading to rescue of Ayaz (PW17). According to us, there are gaping holes in the theory put forward by the prosecution on the issue of rescue of Ayaz (PW17) on 24th July, 2009. This creates a very serious doubt on the case of the prosecution and renders it extremely unsafe to sustain the conviction of the Appellants.

37. According to the prosecution, Ayaz (PW17) was kidnapped by the Appellants on 23rd July, 2009 from near his house at

around 8.40 p.m., in maruti van. Ayaz (PW17) was then taken by the Appellants in the same maruti van near the beach at Cabo-de-Rama and made to sleep in the same van for the entire night. It is the case of the prosecution that on 24th July, 2009, a team of policemen rescued Ayaz (PW17) after pursuing the Appellants and succeeding even in apprehending one of the Accused persons, while in flight. In this regard, the learned Additional Sessions Judge has almost entirely relied upon the deposition of Ayaz (PW17), Nilesh Sawant, police constable (PW11), Nagendra Parit, police constable (PW12) and finally, P.I. Sagar Ekoskar, Investigating Officer (PW22). Upon analysis of the testimonies of these witnesses, we find that there are gaping holes in the theory put forward by the prosecution, which the learned Additional Sessions Judge has failed to notice and appreciate.

38. Ayaz (PW17) deposed that he was kidnapped on 23rd July, 2009 from near his house at about 8.40 p.m., in a maruti van by the Appellants; forced to sleep in a maruti van for entire night while the van was parked near a beach at Cabo-de-Rama. He has deposed that between 7.00 a.m., to 7.30 a.m. on 24th July, 2009, two of the Appellants brought breakfast for him. Thereafter, at lunch time one of the Appellants brought lunch for him. Ayaz (PW17) has then

deposed that at about 3.30 to 4.00 p.m., two policemen in civil dress came on a motorcycle near maruti van and told him that they were policemen. He has then deposed that two policemen overpowered two of the Appellants who were sitting near the van and forcibly pushed them into the maruti van, in which Ayaz (PW17) was already sitting and thereafter locked the maruti van.

39. Ayaz (PW17) has then deposed that two policemen in civil dress then saw A-2-Srinivas and another Appellant coming towards the van and when one of the policemen asked A-2-Srinivas and other person who they were and what they were doing and “*at that time accused no.2 removed a gun and fired at the said policemen due to which the said policemen ran away from the spot. Thereafter the said persons including accused no.2 pushed me outside the van, left the van there and started running towards jungle and also told me to run with them. After running at a distance, we saw policemen and accused no.2 along with the other persons ran away on seeing the policemen however I remained with the policemen. Policemen took me in their custody then.*”

40. According to the prosecution, two policemen referred to

by Ayaz (PW17) were Nilesh Sawant (PW11) and Nagendra Parit (PW12). In order to establish the prosecution version of rescue, the minimum that was expected, was that the version deposed to by Ayaz (PW17) is at least substantially corroborated by the evidence of Nilesh Sawant (PW11) and Nagendra Parit (PW12). However, upon analysis of the evidence of these two witnesses, it is apparent that there is no corroboration. Therefore, there is no conclusive evidence to establish the precise circumstance of rescue. The evidence of PW17, PW11 and PW12 does not indicate with clarity the circumstance of rescue. If the evidence of these witnesses is compared with the evidence of P.I. Ekoskar (PW22), then again, there are serious contradictions which the prosecution has failed to explain. In these circumstances, we cannot say that this circumstance has been proved beyond reasonable doubt by the prosecution.

41. Nilesh Sawant (PW11) has deposed rather vaguely that he and Nagendra Parit (PW12) were informed by P.I. Ekoskar at about 3.00 p.m., that a crime of kidnapping for ransom was registered at Vasco Police Station and showed them the photographs of the kidnapped male person. Nilesh Sawant (PW11) has also deposed that P.I. Ekoskar informed them that he has traced the location of the

Appellants and Ayaz (PW17) and they are within the vicinity of Agonda area. Nilesh Sawant (PW11) has then deposed that they proceeded to Agonda Outpost, requested one P.C. Ramesh Gaonkar from Agonda Outpost and made inquiry at Bar and Restaurant and thereafter proceeded to Cabo-de-Rama fort. He has deposed that Sagar Ekoskar (PW22) along with two constables and P.C. Ramesh Gaonkar waited at Cabo-de-Rama fort to search the area and Nilesh Sawant (PW11) along with Nagendra Parit (PW12) proceeded to Rajbag beach on motorcycle.

42. Nilesh Sawant (PW11) has then deposed that he and Nagendra Parit (PW12) saw one Omni van lying in the bushes and one person was sitting therein whom they recognized the victim in the kidnapping case. He has deposed that there were two persons seen in the vicinity and therefore, Nilesh Sawant (PW11) along with Nagendra Parit (PW12) apprehended those persons by overpowering them and pushed them inside the van and locked the doors. He has deposed that Nagendra Parit (PW12) informed the P.I. Sagar Ekoskar from the spot about the apprehending of the two persons and discovery of the victim and requested him to rush to the spot. He has deposed that necessary directions were given to P.I. Sagar Ekoskar.

43. Nilesh Sawant (PW11) has then deposed that after necessary intimation was given to P.I. Sagar Ekoskar, (PW22), he and Nagendra Parit saw two persons approaching the van having beer bottles with them. He has deposed that Nagendra Parit (PW12) told him to wait near the van and himself proceeded to confront the said two persons as they were part of the gang of kidnappers. He has deposed that this fact was told to them by the victim boy.

44. Nilesh Sawant (PW11) has then deposed that one of the appellants while confronting Nagendra Parit lifted a beer bottle to assault him but Nagendra avoided the same. He then deposed that next person “ *removed a **revolver**, silver in colour and pointed it on Nagendra Parit however, managed to push him on the ground and ran for his life. The said person who was having a **pistol** in his hand started firing pointing out towards us. At that time, he heard other assailant who was in the van shouting that they were policemen as they over heard the conversation of P.C. Nagendra with P.I. Sagar Ekoskar. On hearing this they shot one round which could be heard from a distance.*”

45. Nilesh Sawant (PW11) has then deposed that P.I. Sagar

Ekoskar (PW22) came with staff and were informed of the incident and thereafter all of them made efforts to nab them after getting combing operation. He has deposed that thereafter all four assailants went along with the victim in maruti omni van in the jungle.

46. Nagendra Parit (PW12) has deposed that after he and Nilesh Sawant (PW11) apprehended two persons near the van and locked into them in the maruti van along with the victim. He phoned P.I. Sagar Ekoskar from the spot and told him that they have found the victim along with two persons who kidnapped him. He has deposed that while he was waiting at the spot along with Nilesh Sawant (PW11) they saw two persons approaching the van both carrying small size Kingfisher beer bottles in their hands. He has then deposed that he confronted two persons and caught hold of the hand of one of the persons but the said person hit a beer bottle on his head but the said bottle hit him on the shoulder. He has then deposed that he has pushed the said person and other person removed a revolver of silver colour from his banian and aimed at him. He has deposed that he pushed this person and ran away shouting to Nilesh Sawant to run away as the said persons were carrying fire arms. He then pointed out to A-3 Suraj Kumar Jha as the person who pointed out a revolver to

him but stated that he does not know the name of the accused. He has then deposed that while he and Nilesh Sawant (PW11) were running away, he heard shooting with the said “*revolver*” but did not know who had fired from the revolver. He has deposed that after the aforesaid incident within 5 to 10 minutes, P.I. Sagar Ekoskar along with the police constables and stated that “*all of us went in pursuit of the said persons including the P.I.*”

47. In the first place, there are discrepancies in the versions deposed to by Ayaz (PW17), Nilesh Sawant (PW11) and Nagendra Parit (PW12) on the events that are alleged to have taken place at the spot or near the van. However, even if such discrepancies are overlooked, it is pertinent to note that all these witnesses have deposed to have been shot at. All the witnesses have specifically deposed that Appellants shot at Nagendra Parit (PW12) and thereafter at both Nagendra Parit and Nilesh Sawant (PW11) when they were running away. The prosecution has however failed to discover the weapon with which such shots were allegedly fired.

48. Mr. Rivankar, learned Public Prosecutor pointed out that efforts were made to discover the weapon, in pursuance to a statement

made by one of the Appellants, that the weapon was hidden among some rocks, however, the weapon was not traced. Even if some leeway is extended to the prosecution, there is absolutely no explanation forthcoming from the prosecution as to why no efforts of whatsoever were made to even trace the empty cartridges at the site where according to the prosecution the shooting took place on 24th July, 2009.

49. Besides, Nilesh Sawant (PW11) and Nagendra Parit (PW12) were police constables, who claimed to have shot at from close range. These witnesses have described the weapon as “*gun*”, “*revolver*”, “*pistol*” and finally “*katta*”. It is inconceivable that these police constables were unable to identify at least the make of such weapon particularly since Nagendra Parit (PW12) claimed that he actually pushed one of the Appellants who was carrying weapon in his hand. If really a '*gun*' or '*pistol*' or '*katta*' was used for firing, and if, several rounds were indeed fired by the Appellants on the constables, certainly, empty cartridges were bound to be available at the spot.

50. The prosecution has led evidence that no sooner the Appellants ran away along with the victim Ayaz (PW17), some of the

policemen commenced the attachment panchanama in relation to van at the spot. If this be true, then nothing prevented the prosecution from at least undertaking a search for the empty cartridges at the site. No efforts of whatsoever were made in this regard and all this renders the prosecution version of shooting at the spot extremely doubtful.

51. Nilesh Sawant (PW11) categorically deposes that he saw A-2 Srinivas firing at Nagendra Parit (PW12). However, Nagendra Parit (PW12) pointed out to Suraj Kumar Jha and stated that it was Suraj who fired the shot at him. Ayaz (PW17) speaks nothing about beer bottles and assault on the police constables with the beer bottles. The prosecution has not even bothered to scan the spot for broken beer bottles or attach such beer bottles in the present case. In this state of evidence, we cannot say that the prosecution has succeeded in proving its case beyond reasonable doubt.

52. Another important circumstance, which renders doubtful, the version of rescue put forth by the prosecution emerges from the deposition of P.I. Sagar Ekoskar (PW22). According to deposition of Ayaz (PW17) – victim, he was forced to run away along with the Appellants in the jungle and the police team, which was in pursuit,

rescued him while apprehending one of the Appellants. Nilesh Sawant (PW11) and Nagendra Parit (PW12) deposed nothing about the actual rescue operation though, one of them state that they set off in pursuit of Appellants and the victim Ayaz (PW17). Sagar Ekoskar (PW22), the Investigating Officer however deposes that while he was at the spot conducting the panchanama to attach the van, he received *“a phone call from P.I. Angle that the victim and one of the accused were apprehended by them at **Khola near ONGC** and that P.I. Siddhanth Shirodkar had fired four rounds in air from his revolver in order to nab them.”*

53. Now distance between the spot at Cabo-de-Rama where the van was parked and from where the Appellants and the victim ran away at *“**Khola near ONGC**”* is quite considerable. The prosecution has in fact failed to produce any evidence on record as regards this precise distance, though this was a very important aspect. In any case, if according to P.I. Sagar Ekoskar (PW22); the victim Ayaz (PW17) and one of the Appellants were indeed nabbed at Khola near ONGC by either P.I. Angle or P.I. Siddhanth Shirodkar after firing four rounds in air from his revolver, then minimum that was expected of the prosecution was to examine P.I. Angle and P.I. Siddhanth Shirodkar

and to produce some ballistic evidence in support of the theory of firing of four rounds by P.I. Siddhanth Shirodkar from his service revolver in the air. The prosecution has failed almost entirely on this score. Neither were the two P.Is examined as witnesses nor was any ballistic evidence produced by the prosecution.

54. As noted earlier, Ayaz (PW17) victim, in his version of his own rescue, makes no reference of whatsoever to P.I. Angle or P.I. Siddhanth Shirodkar. Assuming that Ayaz (PW17) did not know the names of these police officials, Ayaz (PW17) makes no reference of his rescue at Khola near ONGC which is at a considerable distance from the spot where the van was parked and from where Ayaz (PW17) is alleged to have run away along with the Appellants. In any case, if at the time of rescue of Ayaz (PW17), one of the police officers fired four rounds from his revolver in the air it is unlikely that Ayaz would have missed this all important aspect relating to his dramatic rescue. Ayaz (PW17) however makes no reference to any firing in the air at the time of his rescue.

55. According to us, examination of P.I. Angle and P.I. Siddhanth Shirodkar were absolutely crucial because these officers

could have thrown considerable light on the circumstance leading to the alleged rescue of Ayaz (PW17). If P.I. Siddhanth Shirodkar had indeed fired four rounds in air from his service revolver then ballistic evidence would certainly have been available and it was duty of the prosecution to produce the same. Non examination of these police officers by the prosecution or non production of any ballistic evidence with regard to the alleged firing rounds in air in order to nab the appellants and to rescue the victim Ayaz (PW17), warrants drawal of adverse inference against the prosecution. The learned Additional Sessions Judge has not even adverted to this significant aspect, much less, considered the same.

56. The learned Additional Sessions Judge, in the impugned judgment and order has mostly quoted the depositions of PW17, PW11 and PW12 and thereafter made a bald observations that the testimonies of these witnesses have not been shaken in the cross examination. Several relevant circumstances like non production of CDR by the prosecution, lack of any efforts on the part of the prosecution to trace the empty cartridges at the spot where the Appellants were alleged to have fired at the police constables, contradictory theories regards the motive, contradictory theories

regards the version of rescue, non examination of P.I. Angle and P.I. Siddhanth Shirodkar, who are alleged to have rescued Ayaz (PW17) and apprehended one of the Appellants by firing four rounds in the air, totally absence of any ballistic evidence have been ignored by the learned Additional Sessions Judge. The circumstance that the prosecution failed to explain the rescue at Khola near ONGC which is at a considerable distance from the van was parked at Cabo-de-Rama has also been completely ignored by he learned Additional Sessions Judge. In this state of evidence, we are not prepared to accept that the prosecution has succeeded in establishing its case beyond reasonable doubt.

57. Besides, we find that there is hardly any evidence to bring home the charge under Section 34 of the IPC. Non consideration of such a vital aspect renders the findings recorded by the learned Sessions Judge infirm. Ultimately, this is a case where the Appellants have been convicted for life imprisonment. In this state of evidence, we are not prepared to hold that the prosecution has succeeded in proving the guilt of the Appellants beyond reasonable doubt.

58. As against Mohammad Imdar Ali (A4) and Srinivas

Gauramkondu (A2), the Prosecution had instituted Sessions Case No.50/2009 alleging that they engaged the Maruti van involved in the present case, and murdered the driver Sudan in order to kidnap Vijay and Ayaz because Srinivas had a grudge against them. Mr. Rivankar, the learned Public Prosecutor tried to contend that hiring of the Maruti van and the murder of the driver Sudan, were in order to acquire the van for kidnapping Vijay. He then submitted that once the van was acquired, the accused persons hatched conspiracy to kidnap Ayaz for ransom. On this basis, Mr. Rivankar contended that there is no connection as such between the two offences and, therefore, the prosecution was justified in registering the separate FIRs and in instituting two separate charge-sheets. On perusal of the material on record in both the cases, it does appear that both the FIRs relate to two or more parts of the same transaction and therefore there was no justification for registering two separate FIRs.

59. In Sessions Case No.50/2009, it was the case of the Prosecution that all the accused persons hatched a criminal conspiracy and in furtherance of the same, hired a Maruti Van of the deceased Sudan from Mapusa Bus Stand on 17 July 2009, bearing registration No.GA-01-R-7954 under the pretext of transporting household

goods/articles from Birlanagar to Mapusa and thereafter took the said Sudan, along with his Maruti Van to Cuelim, Cansaulim at an isolated spot, committed his murder, robbed his articles, together with the Maruti Van itself and then dumped said Sudan's dead body at an isolated spot in Cuelim, Cansaulim. It is also the case of the Prosecution that thereafter, the accused persons used the said Maruti Van for kidnapping on Ayaz, by replacing the number plate of the Maruti Van with a fake number plate.

60. Contrary to what was contended by Mr. Rivankar, in the present matter it was not specific case of the Prosecution that acquisition of the Maruti van by the accused persons, after murdering Sudan, was for the purposes of kidnapping Vijay and the same had no nexus whatsoever with kidnapping of Ayaz. In any case, the Prosecution itself has led evidence that Vijay and Ayaz were part of the same group and Srinivas (A2) was keen to eliminate them because he believed that this group was responsible for the break-up between himself and Sharon. Even, the Police Inspector Sagar Ekoskar (PW.22) in the present case has clearly deposed that three different crimes were registered against Accused No.4 '*in different police stations regarding same series of offence*'. In fact, it was the case of the Prosecution itself that both the FIRs relate to two or more parts of

the same transaction. In such circumstances, we are satisfied that the Prosecution was not right in instituting two FIRs in respect of two or more parts of the same transaction.

61. Such a course of action adopted by the Prosecution in the present case is contrary to the law laid down by the Hon'ble Apex Court in the case of *Babubhai vs. State of Gujarat*¹ and *Amitbhai Anilchandra Shah vs. State of Gujarat*². We are unable to agree with Mr. Rivankar that the Appellants in the present case have failed to demonstrate any prejudice on this score. According to us, the prejudice is writ large in the facts and circumstances of the present case, particularly if the material produced on record by the Prosecution in Sessions Case No.50/2009 is to be considered in conjunction with the material produced on record by the Prosecution in the present case i.e. Sessions Case No.38/2009. The investigations were undertaken by two different Investigating Officers posted at two separate Police Stations. There were several common witnesses in both the matters. There are several contradictions between the version placed by these common witnesses in the two matters. Accordingly, this is yet another reason which renders it quite unsafe to maintain the

1 (2010) 12 SCC 254

2 (2103) 6 SCC 348

conviction recorded by the learned Sessions Judge in the present matter.

62. Mr. Rivankar, the learned Public Prosecutor submitted that to the best of his knowledge and belief, no false prosecutions are launched in the State of Goa. He submitted that the material on record is sufficient to at least reverse the onus upon the appellants. He submits that since the Appellants have failed to offer any convincing explanation in their statements under Section 313 Cr.P.C., the conviction recorded by the learned Sessions Judge is required to be maintained.

63. In a matter of this nature, we have to remind ourselves of the principles laid down by the Hon'ble Apex Court in *Rajiv Singh vs. State of Bihar and another*¹ that it is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction, however grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established canon of criminal justice is “fouler the

¹ (2015) 16 SCC 369

crime higher the proof”. In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge beyond all reasonable doubt. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that '*may be*' proved and '*must be proved*'. The mental distance between '*may be*' and '*must be*' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The Court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

64. In *Kali Ram vs. State of H.P.*¹, the Apex Court has held that if two views are possible on the evidence adduced in the case, one pointing out to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

65. Similarly, the Apex Court has held that presumption of

¹ (1973) 2 SCC 808

innocence serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.

66. Applying the aforesaid principles, in the facts and circumstances of the present case, we are satisfied that the impugned judgment and order dated 20th May, 2013 in Sessions Case No.38/2009 is required to be set aside. Accordingly, we set aside the impugned judgment and order dated 20th May, 2013 in Sessions Case No.38/2009. The Appellants are acquitted and directed to be released forthwith if not required in connection with any other case. The bail bonds executed by the Appellants in this case stand discharged.

Prithviraj K. Chavan, J.

M. S. Sonak, J.

*at**