

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 813 OF 2012

Bharat Parshuram Bhise ... Appellant

Versus

The State of Maharashtra ... Respondent

Mr. Daulat G. Khamkar for the appellant.

Mr.J.P. Yagnik, APP for the State.

**CORAM : B.P. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.**
DATE : OCTOBER 18, 2019

ORAL JUDGMENT (Per Dharmadhikari,J.):

Accused no. 1 in Sessions Case No. 32 of 2011 has filed this appeal under section 374(2) Cr.P.C. challenging his conviction under section 302 of IPC on 13/4/2012 by Additional Sessions Judge, Pune. Along with him, there are two more accused persons namely Popat and Dinkar. However, they have been acquitted of the offences punishable under sections 364A, 302, 201 with 120B IPC. It is to be noted that the present appellant has also been acquitted of the offence punishable under section 120B and 364A IPC. The acquitted accused nos. 2 and 3 were relatives of deceased boy Vinayak then aged about 10 to 11 years.

2. The incident has taken place on 11/09/2010. The case of

prosecution is the complainant father of deceased boy Vinayak was on duty on 11/09/2010. At around 9 pm he received a phone call from Anjana (maternal aunt) informing that his son Vinayak did not return home. PW 1 therefore left for his village Vinjar at about 10.00 pm by Omni van of one Appa Sathe. He was accompanied by his friends including accused no. 3 Dinkar and his cousin brother. On way, PW 1 received anonymous call in Hindi demanding ransom of Rs. 2 lacs if he wanted his son. PW 1 was asked to arrive at Velu Phata with the money near Sonal Wines in front of Kailash Hotel. The caller informed him that the kidnapping was at the instance of accused no. 3 Dinkar and accused no. 2 Popat. Thereafter, he called again and changed the venue of meeting i.e. payment of ransom. It is the case of prosecution that the voice of caller was recognized as that of the accused no. 1 i.e. present appellant. As at the place of the proposed meeting PW 1 did not find anybody, he went to Velhe police station and lodged a missing report. PW 1 then returned home.

3. At home, he learnt that his son was playing with the son of appellant Bharat and in the night Bharat absconded. PW 1 realized that the anonymous caller was nobody else but Bharat. He went to Velhe Police station and lodged a report.

Supplementary statement was recorded which mentioned that the accused no.2 Popat and accused no.3 Dinkar hatched the conspiracy to commit the murder of Vinayak.

4. Bharat was then arrested on 12/09/2010 at 16.30 hours and he made a disclosure statement. It was recorded and under section 27 of the Evidence Act body of Vinayak in gunny bag concealed near stream-let near the field of the appellant was taken out. The police also recorded statement of PW 9 Lalita with whom the appellant had illicit relations. She stated that in the night between 11/09/2010 and 12/09/2010 the appellant had arrived at her house and wanted to stay there. He then told that at the instance of accused nos. 2 and 3, he had killed Vinayak and he was to get balance amount on the next day. However, he was driven away. According to the prosecution, this is an extra judicial confession.

5. Though there are certain other events like tracking of CDR, we need not go into that aspect since the parties at the outset submit that the conviction here is on the basis of recovery of body under section 27 of the Evidence Act and extra judicial confession.

6. We have accordingly heard advocate Khamkar for the appellant and APP Mr. Yagnik for the State.

7. Advocate Khamkar submits that the evidence given by PW 9 Lalita does not inspire confidence since no person would make a statement as claimed by the prosecution. She has been traced out and her statement under section 161 Cr.P.C. has been recorded belatedly. According to PW 9, along with her, her son Lakhan and other persons were also present but they have not been examined. The deposition shows that Bharat was not on visiting terms with her and Lakhan did not like his mother having any concern with the appellant Bharat.

8. On recovery under section 27, Advocate Khamkar submits that there is no independent or impartial witness examined. The family of accused was taken to police station because of doubt expressed by PW 1 and thus pressure was brought on the appellant accused. Appellant accused himself went to police station. Though his disclosure at Exh. 28 mentions specific spot, PW 3 could not depose about it. The facts stated by PW 3 and Investigating Officer in this respect materially vary and therefore, the same appear to be doubtful.

9. To buttress this submission, he invites attention to the evidence of PW 1 Vitthal, PW 6 mother and PW 2 sister of the deceased. He submits that there are material contradictions in

their evidence. It creates a doubt whether PW 1 was at home in the night between 11/09/2010 and 12/09/2010 or was in search of Vinayak as stated by PW 3. The narration by PW 3 reveals that the voice of caller was recognized by accused no. 3 Dinkar and PW 3 spoke with the caller on the phone. According to PW 2 Shital, the call was received on mobile at home which was then with sister Vanita. That call was also demanding ransom amount and Vanita did recognize the voice of caller. However, this fact that the ransom call made by Bharat was not disclosed by PW 2 Sheetal to their mother PW 5 or PW 1 at all. All this therefore, creates a serious doubt about the story of the prosecution.

10. The contention that the caller disclosed that accused nos. 2 and 3 were to pay to him Rs. 2 lacs for killing Vinayak is a figment of imagination. No culprit would disclose this. The prosecution could not collect the mobile handset either of PW 1 or one used by Vanita and the trial court has already rejected the CDR. The entire story of receiving the phone call from unknown person in the night, PW 1 visiting the proposed meeting place or then PW 1 realizing later that the caller was the present appellant therefore, is far from truth and shows fabrication. Because of this fabrication only, the farce of recovery of dead body under section 27 of Evidence Act has been arranged.

11. He pointed out that nobody saw deceased Vinayak playing with the son of Bharat lastly. Nobody saw the accused with deceased Vinayak or accused carrying any gunny bag to his field which is about 30 km away. He therefore, submits that the entire material on record is faulty and cannot be relied upon.

12. It is ponied out that PW 5 Prakash is a panch of inquest, of recovery of cloths of accused and of recovery of motor cycle of accused. He claims that the voice of caller was recognized by Ashish and not by accused Dinkar.

13. According to him, therefore, the prosecution should have examined Vanita or Ashish to show that the caller was accused no.1 Bharat. He further submits that PW 7 was examined to show presence of accused at Kailash Hotel but this witness has not supported the prosecution. He therefore, seeks acquittal.

14. Learned APP has taken us through the evidence of PW 12 Dr. Hemant to point out injuries seen on the body of the deceased Vinayak. He states that the death was because of throttling i.e. manual contraction of neck. He submits that the evidence already read out by Advocate Khamkar brings on record the phone calls made by Bharat at the residence of PW 1 Vithal and also Vithal on his mobile. After Bharat was arrested, during interrogation, his visit to PW 9 in the night surfaced. PW

9 was therefore, questioned and she disclosed an extra judicial confession given by accused to her. The story narrated to her by accused corroborates the recovery under section 27.

15. He submits that the accused throttled Vinayak and put his body in a gunny bag which he carried on motor cycle to the place where it was concealed.

16. According to him, not proving CDR is not fatal in this situation.

17. The homicidal nature of death of Vinayak is not in dispute before us. As such we do not find it necessary to look into the evidence of Dr. Hemant Udavant (PW 12).

18. PW 1 Vithal is the father of deceased Vinayak. His deposition shows that when he was on way back to home, he received a phone call from unknown person on his cell phone. He was asked to come at Velu Phata with Rs. 2 lacs. However, immediately thereafter the said person disclosed that he was standing near Kailash Hotel. He then disclosed that on the say of Popat and Dinkar who were brothers of PW 1, Vinayak was kidnapped.

19. Perusal of evidence of PW 5 Prakash shows that on 11/09/2019 he after getting knowledge from Ashish about the disappearance of Vinayak, boarded the vehicle and started for

Vinjar where Vinayak and Vitthal were residing. On the way to Vinjar, PW 1 received phone call which he gave to Ashish. At that time in the vehicle PW 5 Prakash, Ashish, PW 1 Vitthal, Dinkar, Bhausahab, Appa, Suresh and Bharti wife of Dinkar were sitting. Ashish could not recognize voice of the person calling. He put it on speaker and then accused Dinkar sitting in the Omni Van and Ashish recognized the voice. The other persons sitting in the van also recognized that it was the voice of accused no.1 Bharat.

20. Thus there is material variance between the story of PW 1 who received the call and two more calls thereafter and PW 5 Prakash.

21. According to PW 5 Prakash when they could not trace out, Bharat, for entire night on 11/09/2010 they searched for Vinayak and came to Vinjar in the morning on 12/09/2010. A missing complaint was already lodged during the night hours. Even in the morning of 12/09/2010, he, Ashish, Dinkar, Popat, PW 1 and Appa Sathe went in search of Vinayak.

22. As against this PW 1 submits that after they could not find anybody at the proposed place where they were called, he came back to his home at Vinjar. Before that he had lodged a police complaint. At home, he asked his wife and wife told him

that Vinayak, at about 6.00 pm, went for installation of Ganpati. It appears that 11/09/2010 was holiday for the schools because of Ganesh Chaturthi. During night time, accused Bharat ran away from the village by his two wheeler. Therefore, PW 1 realized that the voice of person who gave phone calls was of Bharat. Accordingly the complaint was lodged.

23. PW 2 Shital is sister of deceased. Vanita is other sister. They brought Vinayak back home at about 2.30 pm. She claims that at that time Vinayak was playing with the son of accused Bharat. Vinayak again left the house between 5 to 5.30 pm. Thereafter, her mother arrived. Till 7.00 pm Vinayak was not back and hence, they started searching for him. Vinayak could not be traced out at the house of Bharat. Her maternal aunt (Anjana) gave this news to PW 1. PW 1 came back home between 2.30 to 3.00 am.

24. Vanita, her sister was having cell phone which was kept at house. On that phone they received a call on the same lines demanding ransom of Rs. 2 lakh. She recognized that voice as that of accused/appellant Bharat.

25. However, the entire evidence does not show that this fact was informed by her to mother or to PW 1. Police have not taken this cell phone in custody.

26. PW 6 mother is the next witness. Her deposition is on the same lines. However, she does not state that PW 2 Shital or Vanita informed her about the demand of Rs. 2 lakh or then informed her about the fact that ransom call was made by accused no. 1 Bharat. She states that her husband had lodged a police complaint and returned home. In the morning police arrived and took family members of Bharat with them. Thereafter Bharat arrived in police station and admitted that he killed Vinayak. Thus the evidence of PW 1 and PW 12 Prakash who were in Omni van vary with each other. The evidence of PW 2 Shital and PW 6 mother Suvarna also does not tally with each other. Vanita who received phone call and recognized voice or then Ashish who recognized voice as that of accused no.1 Bharat, have not been examined by the prosecution. Not informing PW 1 the fact that call was made by Bharat demanding ransom itself exposes falsity in the evidence being tendered by PW 1 Vithal, PW 2 Shital and PW 6 Suvarna. PW 1 claims that when he learnt about the fact of absconding of Bharat, he realized that the call was made by Bharat. This narration therefore, militates with other material on record and creates a serious doubt about the story of the prosecution.

27. PW 3 Vinayak Jadhav (hereinafter referred to as Jadhav

only) has witnessed the recovery under section 27 of the Evidence Act. He claims that at about 4.00 pm he himself and village people of Vinjar went to police station at Velhe. There police requested him to act as pancha on discovery. His evidence shows that accused Bharat told them that he had kept the dead body of one child at the place and he would show that place and the dead body. Accordingly panchanama was drawn and that panchanama is at Exh. 28. This panchanama at Exh.28 records that the accused disclosed that the body was tied in gunny bag and that gunny bag was placed at the distance of about 30 ft from the stream-let in the field of accused. Grass was put up on it. PW 13 Rangnath is the Investigating Officer who has effected this recovery under section 27. He has deposed that Bharat disclosed that he had thrown the dead body by putting it in gunny bag in the stream-let which was near agricultural land. Thus narration in panchanama at Exh. 28 is different. PW 3 Jadhav does not support the words used by PW 13 Rangnath or then the language in Exh. 28.

28. The recovery panchanama Exh. 29 shows that the accused showed the body put in gunny bag by the side of bandh in the field. The gunny bag was taken up by the police. Police opened it.

29. As against this, PW 3 Jadhav has stated that the body was kept in gunny bag on bank of field near the stream and grass was put on it. The accused removed the grass and did show gunny bag. There is no such recording in Exh. 29. PW 13 has stated that the accused Bharat took out one gunny bag from the grass and had shown the dead body thereunder. Thus it does not show that the gunny bag was concealed beneath the grass put on it and that grass was removed by accused.

30. Thus even in relation to actual recovery, there is some variance between PW 3, PW 13 and Exh. 29.

31. As the fact that accused disclosed specific place exclusively within his knowledge beforehand and then took police to that place along with panch witnesses, has not been established beyond reasonable doubt, recovery in the present matter cannot be seen as an incriminating circumstance which can be put to use against the accused no.1 Bharat. Even otherwise, recovery under section 27 is not viewed as substantive piece of evidence. From the entire gamut of inconsistencies noted supra, it becomes totally unsafe to rely upon it.

32. It is in this backdrop that the extra judicial confession given to PW 9 Lalita needs appreciation. The claim of PW 9 is her statement under section 161 was recorded after she came back

from Kolhapur. If her version is presumed to be correct, she had gone to Kolhapur on 12/09/2010 and returned back after 8 days. i.e. on 19th or 20th September, 2010. Her statement under section 161 is dated 16/09/2010. She accepts that she was having illicit relations and there is no cross examination about it. She speaks of visit at around 11.00 pm by Bharat and disclosure by him that he had committed murder of one child in his village. At that time, PW 9 her son Lakhan and 3 to 4 other persons drove him away. As she did not support the prosecution, she was declared hostile and learned APP was permitted to cross examine. She accepted the suggestion that Bharat was frightened and that he told about the discussion with accused Popat and Dinkar, 15 to 20 days before the incident. It is important to note that here son Lakhan or 2/3 persons who were present, have not been examined.

33. In her cross examination, she has stated that accused Bharat had beaten her daughter and son-in-law about two months before the incident. After said beating, Bharat was not visiting her house. She stated that four persons gathered were landlord Dashrath, Baba Londhe and Deepak Sakat. She had narrated whatever was told by Bharat to these persons. She was called by police on phone and asked to come back. Accordingly

she came back after about eight days.

34. Her examination-in-chief shows that her son Lakhan had told her not to have any relations with the accused. This statement also therefore, does not inspire confidence. No conviction can be recorded only on the basis of extra judicial confession.

35. We therefore, find the appellant Bharat entitled to benefit of doubt and proceed to pass the following order :

(a) The Judgment and order dated 13/04/2012 passed by the Additional Sessions Judge, Pune in Sessions Case No. 32 of 2011 is quashed and set aside.

(b) The Appellant Bharat Bhise is given benefit of doubt and is acquitted for the offences punishable under sections 302 and 201 of Indian Penal Code.

(c) He shall be set free, if his custody, is not required by the State in any matter.

(d) Muddemal property be dealt with as directed by the Trial Court after appeal period is over.

(e) Parties to act upon authenticated copy of this order.

(SANDEEP K. SHINDE, J.)

(B.P. DHARMADHIKARI, J.)