



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 347 OF 2019

1. Mahesh Vinayak Khanjolkar (Bari),
Age : 33 years,
2. Sunil Vinayak Bari,
Age : 33 years,
Both R/o. Balaji Pura, Zhami Chowk,
Amalner, Dist. Jalgaon.
3. Bharat Dasharat Mahajan,
Age : 24 years,
R/o. Shivam Nagar, Bahadarpur Road,
Amalner, Dist. Jalgaon.
4. Shubham @ Shivam Gulab Shingane,
Age : 19 years,
R/o. Bhoi Wada, Amalner,
Dist. Jalgaon.
5. Anil Nana Bhil,
Age : 20 years,
R/o. In front of Marimata Temple,
Amalner, Dist. Jalgaon.
6. Bhatu Hiranman Khanjolkar (Bari),
Age : 20 years,
R/o. Balajipura, Amalner,
At present R/o. Sonipod Wadi,
Badoda (Gujrat)

...Appellants
(Orig. Accused)

Versus

The State of Maharashtra

...Respondent

.....

Mr. Aniket Vagal and Rajesh Mewara – Advocate for Appellant Nos. 1 to 3 and 5 to 6

Mr. S. T. Mahajan – Advocate for Appellant No. 4

Mrs. Uma S. Bhosale – APP for respondent/State

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**CORAM : R. G. AVACHAT
AND
NEERAJ P DHOTE, JJ.**

RESERVED ON : 02ND FEBRUARY, 2024
PRONOUNCED ON : 23RD FEBRUARY, 2024

JUDGMENT [Per : Neeraj P. Dhote, J.] : -

1. This Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the Judgment and Order dated 06.03.2019 passed by the learned Additional Sessions Judge, Amalner in Sessions Case No. 10 of 2017 convicting the Appellants for the offence punishable under Sections 364A and 120B of the Indian Penal Code and sentencing them to suffer imprisonment for life and pay fine of Rs.3,000/-, each, in default, suffer simple imprisonment for three months. The learned trial Court acquitted the Appellants for the offence punishable under Sections 363, 385, 387, 323 and 504 of the Indian Penal Code.

2. The Prosecution's case as revealed from the Police Report is as under : -

2.1. The informant, who is the Medical Practitioner by profession and resides at Dhule Road, Amalner, Dist. Jalgaon, has two sons. Son Parth was studying in 7th Std. He used to attend the school from 07:30 a.m. to 12:30 p.m. and in the evening, he used to attend the

tuition classes. On 03.01.2017, he went to attend the tuition classes as usual. At about 08:20 p.m., the informant received a call over his mobile phone and the person on the other side of the phone told him that his son was with them and if he wants his son alive, he should pay them an amount of Rs. 50.00 lakh, within a period of one hour. The phone was handed over to son Parth, who told the informant that he was brought at unknown place by four unknown persons and he was not aware of the place. Son Parth told him to pay Rs. 50.00 lakh to them, otherwise they would kill him. The person who called the informant warned him not to play trick. When the informant told him that he was not having that much amount, the said person asked him to borrow the money from his relatives and the phone call was disconnected.

2.2. The informant disclosed the said fact to his wife and relatives. One of the friends of the informant informed the Police and the Police came to the informant's house and made inquiry. The Police asked the informant to act according to their instructions. Informant collected Rs. 10.00 lakh from his friends. Again the informant received a phone call from the unknown person from a different mobile number in respect of demand of money. The informant proceeded towards Parola road by the vehicle where the unknown person asked him to come. The informant stopped at the Hedave Phata and waited for half an hour. He again received a phone call from another number and person speaking from the other side asked him as to why he informed

the Police and instructed him to come by Galwade Road. Accordingly, the informant proceeded from that road. He waited there for one and half hour. At about 02:00 a.m. he received a phone call from his friend Amol Pingle that the kidnappers abandoned his son at Annapurna Hotel, Amalgaon. The informant went to the said place and found his son Parth.

2.3. Son Parth disclosed the incident to the informant. The report was lodged with the Police and the Crime came to be registered against four unknown persons for the offence punishable under Sections 363, 364A of the Indian Penal Code with the Amalner Police Station. The Police investigated the Crime, during which they recorded the statement of witnesses, arrested the accused persons, seized the mobile phone from the accused persons, collected call logs from the accused persons, undertook Test Identification Parade [for short 'TIP'] and on completion of investigation, submitted the charge-sheet.

3. The learned trial Court framed the Charge against the Appellants for the offence punishable under Sections 363, 364A, 385, 387, 323, 506 r/w 34 and 120B of the Indian Penal Code vide Exh. 13, to which the Appellants pleaded not guilty and claimed to be tried. To prove the Charge, the prosecution examined in all 9 (nine) witnesses and brought on record the relevant documents. After the prosecution closed its evidence, the statement of the Appellants came to be recorded

under Section 313(1)(b) of the Code of Criminal Procedure. The Appellants denied the prosecution's case and evidence. On appreciation of the evidence on record, the learned trial Court passed the impugned Judgment and Order.

4. Heard learned advocate for the Appellants and the learned APP for the State. Perused the evidence on record.

5. It is submitted by the learned advocate for the Appellants that the offence was registered against unknown persons and, therefore, the identity of the accused persons is required to be established by cogent evidence. He submitted that the TIP conducted during the investigation was not as per the rules and cannot be taken into consideration. He submitted that there is no cogent and sufficient evidence on record to prove the Charge and the learned trial Court has committed an error in convicting the Appellants and the same may be set aside.

6. Learned APP submitted that the informant's son is examined by the Prosecution and he identified the Appellants as the persons who kidnapped him and demanded ransom. He submitted that the impugned Judgment and Order warrants no interference and the Appeal be dismissed.

7. Admittedly, the Crime was registered against four unknown persons on the report lodged by PW1 – Dr. Nikhil Ramesh Bahugune. The evidence of PW8 – Vikas Daulatrao Wagh, who investigated the Crime show that the Local Crime Branch (LCB) arrested the accused / Appellants on 10.01.2017. It is needless to state that when the Crime is registered against the unknown persons, the prosecution is required to establish the identity of the accused persons. The evidence on record show that the TIP of the arrested accused / Appellants came to be conducted. On the point of TIP, prosecution has examined PW5 – Rajesh Madhukar Amrutkar, who was the Naib Tahsildar of Amalner Tahsil and PW6 – Sandip Vasant Patil, who acted as Panch during TIP.

8. Scrutiny of the evidence of PW5 – Rajesh Madhukar Amrutkar show that the TIP was conducted in utter disregard of guidelines and cannot be relied upon. The TIP is conducted on 13.02.2017, which is after a period of one month from the arrest of the accused / Appellants. It is needless to state that the TIP is required to be held at the earliest. Further, the evidence of PW5 – Rajesh Madhukar Amrutkar show that he was aware that holding TIP was a serious and important job and he was aware of the rules in that regard. There were six suspected accused. His evidence show that the suspected accused were different in appearance. Accused no. 1 was healthy and semi bald. Accused No. 2 was healthy. Accused No. 3 was slim. Accused No. 4 was

fair. Accused No. 5 was blackish. Accused no. 6 was weak and having full hairs on his head. His evidence show that same dummies were used for each rotation of TIP. He admits that the suspected accused and dummies should be of same age group and further admits that all the dummies were not of similar age group as that of the accused. It has further come in his evidence that all the dummies did not change their clothes. His evidence go to show that the TIP panchanama which is at Exh. 64 is silent on the point that he inquired with the witness that the Accused were not shown to him prior to TIP. It is thus clear that the TIP was conducted in utter violation of the guidelines laid down for TIP. Hence, the evidence in respect of TIP is discarded and kept out of consideration.

9. The evidence of PW2 – Parth Nikhil Bahugune show that on 03.01.2017, he was studying in 7th Std. After the school, he used to attend the classes. On the said day, when he came in front of the Global High School at 07:30 p.m., there was one Maruti 800 Car and someone called him and so he went near the Car. The driver of the Car inquired about the address of Bhalerao Nagar. The persons sitting at the rear side of the Car came behind him and pushed him into the Car and the Car proceeded. There were four persons inside the Car. One of them pressed the mouth. He was taken to unknown place. One of them asked the phone number of his father and mother. He gave phone

number of his grandfather. His father i.e. PW1 – Dr. Nikhil Ramesh Bahugune was telephonically contacted and he was informed that his son was in their custody and demanded ransom of Rs.50.00 lakh and threatened that if he wants his son alive, he will have to pay the amount. They further threatened that the matter should not be reported to the Police. The car was taken to unknown place. At one place, two of them got down from the Car to have breakfast and their boss was sitting inside the Car. After sometime, two persons got down from the Car. He was asked whether he would take the breakfast to which he refused. They tried to contact his father. The car was not starting. They filled petrol in the Car from one tin pot. The car proceeded further and reached at one square at Amalgaon where the said persons pushed PW2 out of the Car.

10. The evidence of PW2 – Parth further show that he saw one hotel at some distance. He approached one person having camera and standing there and disclosed him his identity and gave phone number of his mother. His mother was contacted and informed about the place where he was standing. After about 15 minutes, his parents, relatives and police came there and took him to the house. On the next day, he went to the Police Station and disclosed the incident to the Police. The evidence further show that he showed the spots to the Police where he was taken. He deposed that on 13.02.2017, he was called in the

Jalgaon Jail where accused were identified in the TIP. He identified the Appellants as the said persons who kidnapped him.

11. The above evidence of PW2 – Parth on whose testimony the prosecution's case primarily rests show that the time of incident was from 07:30 p.m. and thereafter, which was night time. The time when PW2 was left at Amalgaon was midnight. It is therefore clear that the entire episode took place during the late evening and night. The evidence of PW2 – Parth nowhere shows that the Car in which he was kidnapped was having lights or illuminated inside. In absence of this evidence, it is doubtful that PW2 Parth, who was minor at the relevant time, had full and proper opportunity to see the faces of kidnappers. His evidence that the Car was taken to different places show that the vehicle was constantly moving except for some brief stops. His evidence show that some of the accused persons were sitting at the rear side of the car and some were sitting beside him. Thus, the evidence of PW2 – Parth does not give the required assurance that he had sufficient opportunity to register the identity of the persons who kidnapped him so as to identify them at later point of time.

12. Undisputedly, the testimony of PW2 – Parth was recorded on 06.08.2018, which was after a period of 18 months. No doubt true, the identification of the accused persons in the Court is the substantive

piece of evidence, however, when the accused / suspects are unknown persons, the Court look for corroboration in the nature of prior TIP. As discussed earlier, the evidence in respect of TIP has been discarded. The evidence of PW2 – Parth show that he came to know after about 10 days from the incident that the accused were arrested. Though the suggestion that the Police called him in the Police Station and shown the accused has been denied, considering the fact that he knew that the accused were arrested and there was a gap of more than one month in conducting TIP after the arrest, the possibility of the suspects / accused / Appellants being shown to PW2 – Parth cannot be ruled out. Thus, the identification of the Appellants by PW2 – Parth for the first time in the court cannot form the sole basis to hold that the Appellants were the very same persons who kidnapped PW2 – Parth and demanded ransom from PW1 – Dr. Nikhil Ramesh Bahugune.

13. The evidence of PW1 – Dr. Nikhil Ramesh Bahugune show that, during the conversation with the kidnappers he recorded the conversation of the second and third call in his mobile. He prepared the CD/DVD of the said conversation through his Laptop and handed over the same to the Police. The evidence of PW8 – Vikas Daulatrao Wagh, the Investigating Officer, show that the informant i.e. PW1 – Dr. Nikhil Ramesh Bahugune handed over him the DVD in respect of the discussion / conversation took place between the accused and the informant, on

16.01.2017. This shows that the said CD/DVD in which the conversation was copied down was handed over to the Police after a period of 12 days after the incident/registration of the Crime. Secondly, the evidence of PW8 – Vikas Daulatrao Wagh, the Investigating Officer, show that till 16.01.2017 he was not aware about recording of discussion/conversation between the informant PW1 – Dr. Nikhil Ramesh Bahugune and the kidnappers. There is no evidence about explaining the delay in submitting the recorded conversation to the Police. PW8 – Vikas Daulatrao Wagh admits that when he came to know regarding the recording of said discussion between the informant and the kidnappers, it was necessary for him to seize the mobile phone or memory card containing the recorded discussion. He admits that the mobile phone and memory card were not seized. He admits that no recording of discussion between the informant and the kidnappers was handed over to him between 04.01.2017 to 16.01.2017. It is needless to state that the primary document/piece of evidence would be the mobile phone having the recording and the CD/DVD would be the secondary evidence. Therefore, the report of Forensic Science Laboratory dated 16.04.2017 (Exh. 96), which shows specimen voice and the questioned voice in the CDs., Exhs. 1 and 2, were found similar with that of PW1 – Dr. Nikhil Ramesh Bahugune and the Appellant No. 6 - Bhatu Hiranman Khanjolkar (Bari) cannot be relied upon. The Exh. 35 which is the Certificate under Section 65B of the Indian Evidence Act, brought on record in the

evidence of PW1 – Dr. Nikhil Ramesh Bahugune is undated. Moreover, in his evidence it has come that it is not mentioned in Certificate Exh. 35 as to when the conversation in the mobile was loaded in laptop and C.D. was prepared. Thus the electronic evidence and CA report do not take the prosecution's case any further.

14. The other piece of evidence is in the nature of seizure of mobile phones from the accused / Appellants after their arrest, seizure of the vehicles and pointing out the places by Appellant No. 1 - Mahesh Vinayak Khanjolkar (Bari), Appellant No. 4 - Shubham @ Shivam Gulab Shingane and Appellant No. 2 - Sunil Vinayak Bari, during the course of investigation. For this, the prosecution has examined PW3 – Amol Ravindra Patil and PW4 – Sandip Bhagirath Saraf, who acted as the panchas. When the evidence in respect of identity of the accused / Appellants is not worthy of reliance, this evidence takes the case of prosecution no further.

15. The other evidence is that of PW7 – Bhagwan Ganpat Varule to whom PW2 – Parth Nikhil Bahugune met near the hotel after he was abandoned by the kidnappers and PW8 – Vikas Daulatrao Wagh, who is the Investigating Officer. The evidence of PW8 - Vikas Daulatrao Wagh, the Investigating Officer, show that there was no reference of day and time on the script at Exh. 93.

16. The evidence of PW9 – Rangnath Tryambak Dharbale, who was the officer of LCB show that he collected the CDRs during the parallel investigation and admits that the names are not mentioned in the CDRs. He further admits that the names of the accused/Appellants Nos. 1, 2 and 6 were not mentioned in the CDR and further admits that there was no evidence in the charge-sheet to show the accused / Appellant Nos. 1, 2 and 6 made preparation to make the call for demanding ransom. He further admits that there was no evidence on record to show as to on what basis he went to the accused / Appellant Nos. 1 and 2 on 10.01.2017. His evidence further show that PW2 – Parth had disclosed that the kidnappers were having ‘Passion’ motorbike and the motorcycle which was seized was ‘Hero Achiever’. The evidence show that the description of accused/Appellant No. 1 was not matching with the description of kidnappers given by PW2 – Parth. His evidence further show that the mobile of LVF company seized from accused no. 1 was not having memory card. The evidence of PW8 – Vikas Daulatrao Wagh show that there were improvements / omissions in the testimony of PW1 – Dr. Nikhil Ramesh Bahugune and PW2 – Parth Nikhil Bahugune on some aspects.

17. In the light of settled principles in Criminal Jurisprudence that, severe the punishment, stricter the proof and in view of the above

discussion, the Appeal succeeds, as the evidence is neither concrete nor cogent. Hence, the following order.

ORDER

- [1] Criminal Appeal is allowed.
- [2] The Judgment and Order dated 06.03.2019 passed by the learned Additional Sessions Judge, Amalner in Sessions Case No. 10 of 2017, convicting the Appellants for the offence punishable under Sections 364A and 120B of the Indian Penal Code is quashed and set aside.
- [3] The Appellants are acquitted of the offence punishable under Sections 364A and 120B of the Indian Penal Code.
- [4] The Appellants be released forthwith, if not required in any other case.
- [5] R&P be sent back to the trial Court.
- [6] Fine amount, if paid, be refunded to the respective Appellants.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde