

PAVAN VASUDEO SHARMA

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v.

STATE OF MAHARASHTRA THROUGH SECRETARY

(Criminal Appeal No.519 of 2019)

MARCH 25, 2019

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[UDAY UMESH LALIT AND INDU MALHOTRA, JJ.]

Penal Code, 1860 – ss.302 and 392 – Bombay Police Act – s.37(1) r/w. s.135 – Arms Act – s.3 read with s.25 – Prosecution case that four persons including accused Nos.1 & 2 kidnapped a boy and called for a ransom – Police raided a building and apprehended four persons including the accused persons – During the personal search of Appellant-accused No.1, a pistol, 2 live cartridges and two cell phones were recovered – Pistol recovered from accused No.1 was a service weapon which was entrusted to PW-11 - Police Naik, which was earlier snatched from him by unknown persons in a separate incident – Cartridges recovered from the accused No.1 was test fired by the forensic analyst from the same pistol – The features of the firing pin impression on the cartridge tallied with from a bullet recovered from body of a deceased ‘B’ in a different incident – When the body of ‘B’ was recovered, it was alleged that his two mobile phones were robbed – Further, it was alleged that ransom call in the kidnapping case was made by accused persons from the mobile number of deceased ‘B’ – Accused no.1 & 2 were tried for murder of ‘B’ and other offences u/ss.302, 392 r/w. s.34 of IPC, s.37(1) r/w. s.135 of the Bombay Police Act and s.3 read with s.25 of the Arms Act – Trial court convicted accused no.1 & 2 – High Court acquitted accused no.2 u/s. 302, 392 of IPC – Aggrieved, appellant-accused no.1 filed appeal – Held: It is a settled principle that circumstances relied upon must rule out every single hypothesis except the guilt of the person accused of an offence – The first circumstance regarding mobile phone was not proved – The mobile number was not subscribed by deceased ‘B’ but was subscribed by one ‘S’ and there was no link between the two – The second circumstance was regarding bullet recovered from the body of the deceased – It is true that bullet recovered from the body of ‘B’ matched with the

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- A *service weapon which was allocated to PW-11-Police Naik but theory that the weapon was snatched by accused was not proved – No Test Identification of accused persons was held – Both circumstances were not sufficiently established against the accused – There were too many missing links and the material on record does not exclude every single hypothesis except the guilt of the man – Therefore, benefit of doubt given to the appellant – Appellant-accused no.1 acquitted of the charges levelled against him.*
- B *does not exclude every single hypothesis except the guilt of the man – Therefore, benefit of doubt given to the appellant – Appellant-accused no.1 acquitted of the charges levelled against him.*

Allowing the appeal, the Court

- C **HELD:** 1. Two circumstances which are principally relied upon by the prosecution are the recovery of a mobile phone which was allegedly used for making demands of ransom; and Seizure of 9 mm pistol. The first circumstance regarding mobile phone is not proved at all. The mobile number was not subscribed by deceased ‘B’ but was subscribed by ‘S’. No link between these two persons has been established nor any bill in the name of said ‘B’ was produced on record. Since the evidence that the mobile number was subscribed by said ‘S’ was led by the prosecution itself, it cannot be assumed that said mobile number was, in fact, subscribed by ‘B’. The connection which would link the accused with the murder of ‘B’, on this front is completely missing. As regards the second circumstance, it is true that the bullet recovered from the body of the deceased matched with the service weapon which was allocated to PW11-Police Naik but the theory that the weapon was snatched by the accused is not sufficiently established. No Test Identification Parade was held and if held, no material in that behalf has been produced on record. The second circumstance, therefore, is not sufficiently established as against the accused. [Paras 9 and 15] [16-G-H; 19-B-D]
2. Applying the principles as culled out in the Sharad Birdhichand Sarda decision, which have stood the test of time, the matter is not free from doubt. The circumstances relied upon must rule out every single hypothesis except the guilt of the person accused of an offence. There are too many missing links in the present matter and the material on record does not exclude every single hypothesis except the guilt of the man.
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Therefore, the benefit of doubt given to the Appellant. The A
Appellant is acquitted of the charges levelled against him.
[Paras 17, 18] [20-E-G]

Sharad Birdhichand Sarda v. State of Maharashtra
(1984) 4 SCC 116 : [1985] 1 SCR 88 – relied on.

Case Law Reference

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[1985] 1 SCR 88 relied on Para 16

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal
No.519 of 2019. C

From the Judgment and Order dated 24.03.2015 of the High Court
of Judicature at Bombay in Criminal Appeal No. 700 of 2013

Ravi Prakash Mehrotra, Ms. Deepti R. Mehrotra, Ankit Agarwal,
Advs. for the Appellant. D

Anoop Kandart, Nishant Ramakantrao Katneshwarkar, Advs. for
the Respondent.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J. 1. Leave granted. E

2. This appeal at the instance of original Accused No.1, challenges the correctness of the judgment and order dated 24.03.2015 passed by the High Court of Judicature at Bombay dismissing his Criminal Appeal No.700 of 2013.

3. According to the prosecution, Police Naik Nagare (later examined as PW11 in the trial) was robbed of his pistol (service weapon) and walkie talkie set by three persons on 20.12.2005 at about 9.00 pm. Accordingly an FIR was registered on 20.12.2005 in respect of said incident, which FIR in the present proceedings was placed on record vide Exhibit 106. The FIR did not name any person but gave description of all the three persons. The said case was separately tried. F G

4. On 04.01.2006 PW1-PSI Dabir received a phone call that one injured person was lying near a motorcycle on Mumbai-Pune highway. Said PW1 went to the spot and took the injured to the hospital where he was declared dead. On the basis of motorcycle driving licence found in H

- A the trousers of the deceased, he was identified as one Bhima Waghmare. The family members were, thereafter, informed and FIR Exhibit 13 was lodged pursuant to which an offence was registered vide C.R.No.5 of 2006. The investigation commenced and body was sent for post-mortem. PW3 Dr. Joshi conducted the post-mortem and found the following external injuries:-
- B “(1) Fire arm injury. Right side inframammary region, 13 cm below and medial to left mammary gland.
- (2) Burn injury due to firm arm on left thigh. Two in number. 9 cm. below iliac left side admeasuring 2 $\frac{1}{2}$ cm. x 1 cm. Superficial to deep. Dark black in colour with red center.
- C (3) Abrasion over 9 cm. below iliac region left side 8 cm below and 5 cm posterior to anterior superior iliac spine, admeasuring 2 $\frac{1}{2}$ cm x superficial to deep.
- (4) Abrasions on body as under:
- D (A) Arm medial third anteriorly;
- (B) Elbow posteriorly and
- (C) Wrist anteriorly:
- E (D) (a) Thigh middle third.
- (b)Knee joint.”

Said PW3 Dr. Joshi found the following corresponding internal injuries:-

- F “Penetrating wound to abdominal wall, peritoneum superior side of left lobe of liver, shattering part of it. Coming out at inferior side, entering into pancreas, shattering out the pancreas, penetrating at two sites at mesentery of small intestine. Two cm. in diameter each, going posterior medial to left kidney with large retro peritoneal and peritoneal region. Fitting lumber spine no. 4 and 5 body with indentation and fracture at left side of body of L 4 and L 5. Changing the direction hitting illiacrest at left Sacra iliac joint. Changing direction, getting embedded into para spinal muscles and fat left side, directed laterally and superiorly. Bullet recovered from above mentioned side. Yellowish metal concavity at its base.”
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5. It is the case of the prosecution that when Bhima Waghmare was shot, the firm arm used in the transaction was the same service weapon which was robbed from PW11 Police Naik Nagare. Soon after the murder, two cell phones belonging to Bhima Waghmare were also allegedly robbed, one of them being a cell phone of Nokia Company with cell number 9850520922. This mobile was later used in the case of kidnapping of a boy named Akash Lokhande, who was kidnapped on 13.01.2006 and the calls for ransom were stated to have been made from the very same cell phone to PW 12 Sanjay Lokhande, father of the boy. An FIR was registered in relation to said kidnapping on 13.01.2006 and said case was also tried separately.

6. During the course of investigation of the kidnapping case, information was received by the police that said Akash Lokhande was confined in a building in Vimannagar, Pune. Accordingly, a raid was arranged and when the police entered said building, they found Pavan Vasudeo Sharma (Accused No.1), Pankaj Ramgopal Jagaria (Accused No.2), Vasudeo Sharma and Rajendra Gaud to be present there. Those persons were apprehended.

During his personal search, a 9 mm pistol (service revolver) and two live cartridges were recovered from Accused No.1. Two cell phones were also found from him. In the search of Accused No.2, a chopper was found. All those four persons came to be apprehended in kidnapping case. The recovered pistol was sent for forensic analysis. The forensic analyst found that the bullet which was recovered from the stomach of deceased Bhima Waghmare, was fired from the same pistol. The live cartridge that was recovered from Accused No.1 was test fired by the forensic analyst from the same pistol and the features of the firing pin impression on the cartridge tallied with those found from the bullet recovered from the body of deceased Bhima Waghmare.

All the four apprehended persons were put up for identification by PW11 Police Naik Nagare and according to the witness he could identify Accused Nos.1 and 2. However, no documentation as regards the Test Identification Parade was produced on record in the present trial.

7. After completion of investigation, Accused Nos.1 and 2 were tried for having committed the offences including the murder of said

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- A Bhima Waghmare, punishable under Sections 302, 392 read with Section 34 of the Indian Penal Code, Section 37(1) read with Section 135 of the Bombay Police Act and Section 3 read with section 25 of the Indian Arms Act.

8. PW2 Seema widow of the deceased Bhima Waghmare stated B in her deposition that her husband was having two mobile numbers and one of them was 9850520922. She accepted that in her first reporting she had expressed suspicion against some other persons including professional rivals of her husband. PW5 Sachin Mahadev Shinde, Nodal Officer of Idea Cellular Company stated that mobile phone number 9850520922 was subscribed by one Sanjay S. Roy having his address as C Sai Prasad Foods Ltd., Telco Road, First Floor, near Raka Gas Company, Chinchwad Station, Pune-411019. He also produced the record of calls details vide Exhibit 55 showing relevant pages of call details with regard to period January 2006 and February 2006 about user of the mobile. PW6 Senior Police Inspector Pandurang Udhavrao Kohimkar D was the Investigating Officer in the matter. He did not depose about any Test Identification Parade nor did he produce any record regarding identification of Accused Nos. 1 and 2 by PW11 Police Naik Nagare. PW12 Sanjay Lokhande, father of Akash Lokhande testified that demands for ransom were made from him and the communication was received from mobile number 9850520922. During his testimony he E also mentioned that the person who was making the demand had casually mentioned that they had killed a person at Karjat.

9. It was the case of the prosecution that the pistol seized from the Appellant-Accused No.1 was a service weapon which was entrusted to PW11 Police Naik Nagare, which weapon was snatched from him on F 20.12.2005. It was the same weapon which was found to be used in the commission of offence of murder of Bhima Waghmare. There was no direct evidence in the form of any eyewitness account which was available on record and the prosecution mainly relied upon certain circumstances in support of its case. The circumstantial evidence in the G matter was based mainly on two features:-

- a) Recovery of mobile phone which was allegedly used for making demands of ransom; and
- b) Seizure of 9 mm pistol as aforesaid.

10. Apart from these two circumstances, reliance was also placed on the alleged extra judicial confession made by those demanding ransom in their telephonic conversation with PW12-Sanjay Lokhande. Considering these circumstances to be clinching and pointing towards nothing but the guilt of the accused, the Additional Sessions Judge, Pune, vide his judgment dated 11.01.2011 convicted said Accused Nos. 1 and 2 for the offences punishable under Sections 302, 392 read with Section 34 IPC, Section 37(1) read with Section 135 of the Bombay Police Act and Section 3 read with section 25 of the Indian Arms Act and sentenced them to suffer life imprisonment under the first count, rigorous imprisonment for two years under the second count, rigorous imprisonment for 15 days under the third count and rigorous imprisonment for six months under the fourth count.

11. Both the convicted accused challenged their conviction and sentence by preferring two appeals being Criminal Appeal No.700 of 2013 and Criminal Appeal No.1056 of 2013. As regards Accused No.1, the High Court found that the prosecution had established its case and there was sufficient evidence to prove that he was involved in the crime relating to the murder of Bhima Waghmare. The High Court, however, found that there was no material to connect Accused No.2 with the crime and, therefore, acquitted him of the charges levelled against him under Sections 302, 392 of IPC and under Section 3 read with section 25 of the Indian Arms Act but maintained his conviction and sentence insofar as offence under Section 37(1) read with Section 135 of the Bombay Police Act was concerned.

12. It is a matter of record that the acquittal of Accused No.2 has not been challenged by the State and has attained finality.

13. The facts narrated above bring out the following features:-

- a) Going by FIR at Exhibit 106, three persons were responsible for robbing PW11 Police Naik Nagare of his service weapon. Though the description of all three persons was given in FIR Exhibit 106, no Test Identification Parade was undertaken when four suspects were apprehended during investigation of the kidnapping case. No material in that behalf is produced on record. Nothing is clear on record as to who was the third person.

- A b) According to PW11 Police Naik Nagare he had lost consciousness for a while after he was assaulted by those three persons; that after he regained consciousness, he dialed 100 from his mobile and intimated about the loss of his service weapon and walkie talkie. It is somewhat incongruent that the persons who robbed him of his service weapon and walkie talkie would leave his mobile intact.
- B c) In terms of version of PW2 Seema, mobile number 9850520922 was subscribed by her husband Bhima Waghmare. On the other hand, the evidence led by the prosecution itself in the form of testimony of PW5 Sachin Mahadev Shinde shows that mobile number 9850520922 was subscribed by one Sanjay S Roy. Again, the prosecution has failed to establish the link, if any, between said Sanjay S Roy and Bhima Waghmare and whether said Sanjay S Roy had ever handed over his mobile to Bhima Waghmare.
- C d) PW2 Seema in her original version had expressed suspicion about certain professional rivals of her husband.
- D e) The assertion that one of the persons making ransom calls had disclosed that they had killed a person at Karjat did not come in the examination-in-chief of PW12 Sanjay Lokhande but appeared in his cross-examination. It was thus not the specific case of the prosecution that any extra judicial confession was made to PW12 Sanjay Lokhande.
- E f) The matter has one more dimension. While ordering acquittal of Accused No.2, insofar as principal charges are concerned, his conviction for offence under Section 37(1) read with Section 135 of the Bombay Police Act was maintained by the High Court. We, thus, have to proceed on the footing that Accused No. 2 was also guilty of snatching the service weapon of PW11 Police Naik Nagare but not of murder.
- F g) There was a gap of about 15 days between the snatching of the service weapon and murder.

14. With the acquittal of Accused No.2 of the principal charge under Section 302, we are now called upon to see whether the material

on record sufficiently establishes that it was Accused No.1 alone who A
was guilty of the offence punishable under Section 302 IPC.

15. Two circumstances which are principally relied upon by the prosecution are already mentioned hereinabove. The first circumstance regarding mobile phone is not proved at all. The mobile number was not subscribed by deceased Bhima Waghmare but was subscribed by Sanjay S. Roy. No link between these two persons has been established nor any bill in the name of said Bhima Waghmare was produced on record. Since the evidence that the mobile number was subscribed by said Sanjay S. Roy was led by the prosecution itself, it cannot be assumed that said mobile number was, in fact, subscribed by Bhima Waghmare. The connection which would link the accused with the murder of Bhima Waghmare, on this front is completely missing. As regards the second circumstance, it is true that the bullet recovered from the body of the deceased matched with the service weapon which was allocated to PW11 Police Naik Nagare but the theory that the weapon was snatched by the accused is not sufficiently established. No Test Identification Parade D was held and if held, no material in that behalf has been produced on record. The second circumstance, therefore, is not sufficiently established as against the accused.

16. The law on the point of appreciation of cases based on E circumstantial evidence is very clear. It was laid down by this Court in *Sharad Birdhichand Sarda vs. State of Maharashtra*¹ as under:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to F be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as G was held by this Court in *Shivaji Sahabroo Bobade v. State of Maharashtra*² where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

¹(1984) 4 SCC 116

²(1973) 2 SCC 793; 1973 SCC (Cri) 1033; 1973 Cri LJ 1783

- A “Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”
 - B (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,
 - C (3) the circumstances should be of a conclusive nature and tendency,
 - C (4) they should exclude every possible hypothesis except the one to be proved, and
 - D (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.”
154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”
- E 17. Applying the principles as culled out in the aforesaid decision, which have stood the test of time, in our view, the matter is not free from doubt. The circumstances relied upon must rule out every single hypothesis except the guilt of the person accused of an offence. There are too many missing links in the present matter and in our considered view, the material on record does not exclude every single hypothesis except the guilt of the man.
 - F 18. We, therefore, give benefit of doubt to the Appellant. This appeal is, therefore, allowed and the Appellant is acquitted of the charges levelled against him. He be set at liberty forthwith unless his presence is required in connection with any other offence.

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Ankit Gyan

Appeal allowed.