

(2006) 01 BOM CK 0017
In the Bombay High Court
Case No : Criminal Appeal No. 515 of 2000

Mohammed Ali Hasan Siddiqui

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-01-2006

Acts Referred:

Evidence Act, 1872 — Section 106, 114, 27

Penal Code, 1860 (IPC) — Section 201, 302, 34, 364, 386

Citation : (2006) CriLJ 2010

Hon'ble Judges : J.P. Devadhar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : B.G. Tangsali, for the Appellant; V.R. Bhonsale, for the Respondent

Judgement

H.L. Gokhale, J.—Criminal Appeal No.515 of 2000 and Criminal Appeal No.572 of 2000 arise out of the judgment and order dated 29.4.1999 passed by the III Additional Sessions Judge, Thane in Sessions Case No.522 of 1996. Appeal No.515 of 2000 is filed by original accused No.1 and Appeal No.572 of 2000 is filed by original accused Nos.2 and 4. The three appellants are hereinafter referred to as "accused Nos.1, 2 and 4" for the sake of convenience.

2. (i). All these three accused have been convicted u/s 364 read with Section 34 of Indian Penal Code, Section 302 of Indian Penal Code and Section 201 read with Section 34 of Indian Penal Code. For these three offences, they have been sentenced to suffer RI for seven years, imprisonment for life and RI for two years respectively. They have also been fined for each of the three offences and have been directed to pay a fine of Rs.5,000/-, Rs.7,000/-and Rs.1,000/-and in default, have been directed to undergo SI for six months, three months and further three months.

(ii). Accused Nos.1, 2 and 4 (as well as accused No.3) were additionally found guilty u/s 386 read with Section 34 of IPC and were sentenced to suffer RI for five years. They were directed to pay a fine of Rs.2,000/- additionally and in default, they had to suffer SI for three months.

(iii). These substantive sentences were to run concurrently.

(iv). Accused No.3 was acquitted of offences under Sections 364, 302 and 201 read with Section 34 of Indian Penal Code.

3. The short facts leading to the filing of both these Appeals are as follows:-

It is the case of the prosecution that on 9th May 1996, accused No.4 came to the residence of one Mohammed Hasan Immam Shabbir Siddiqui, the complainant (P.W.1) residing on 2nd floor of Shama Apartment, Rashid Compound at Kousa, a crowded locality near Mumbra when P.W.1 was away to his place of work. P.W.1 runs a factory manufacturing caps and on that day he had gone to Pune. His wife Shahajan Mohammed Hasan Siddiqui (P.W.2) and his mother Zubheda Khatun Mohammed Siddiqui (P.W.5) were then at home. Accused No.4 introduced himself as a person coming from their native village in Bihar. He was received in the house and was given a cup of tea. Subsequently he took the daughter of P.W.1 Nargis and son Shahatab, aged about 9 years for buying chocolates. Nargis returned back after sometime but Shahatab did not. He was kidnapped by accused No. 4. Accused Nos.4, 1 and 2 are charged to have taken the child from Mumbra to Kalyan and then to the Haji Malang hill and to have killed him by throwing down the hill leaving no trace whatsoever except his chappals which were recovered later on. They have, therefore, been charged for kidnapping the minor, murdering him and destroying the evidence. Early morning of the next day onwards, a ransom amount has been demanded from the complainant to the tune of Rs. Five Lakhs for bringing back the child. This was done by making a telephone call at his residence and later at the factory of the P.W.1. On receiving the complaint, the Police led the trap and accused No.2 was arrested on 16.5.1996 while making the phone call to the complainant and demanding the ransom. He was accompanied at that time by accused No.3. The lead given by accused No.2 led to the arrest of accused Nos.1 and 4. All the four accused were, therefore, charged for extortion also u/s 386 read with Section 34 of Indian Penal Code.

4. The questions which arise for our determination are as follows:-

(i) Whether the prosecution had proved the charge of kidnapping for ransom, murder and destroying the evidence under Sections 364, 302 and 201 read with Section 34 of Indian Penal Code against all the three accused Nos.1, 2 and 4 ?

(ii) Whether the prosecution had established the charge of extortion u/s 386 read with Section 34 of IPC against all the four accused ?

(iii) If the charges are so proved, what should be the punishment ? Alternatively, whether the learned Sessions Judge had erred on any of these points and if so, what should be the order ?

5. Although P.W.1 i.e. the father of the kidnapped child is the complainant, his testimony is relevant to the extent of the phone calls for ransom received by him. The testimonies of P.W.2 and P.W.5 are relevant on the aspect of the child

being taken away by accused No.4 on 9.5.1996. P.W.14 is another relevant witness since he is the witness to accused No.2 being nabbed on 16.5.1996 along with accused No.3 when he was making the phone calls to demand the ransom. Thus, as far as the charges of kidnapping and extortion are concerned, there is evidence on record which could be said to be direct evidence. As far as the murder of the child is concerned, however, the charge is sought to be proved entirely on the basis of circumstantial evidence and the depositions of various witnesses leading to the discovery of the chappals of the child at the foot of the Haji Malang hill. It is in this background that we have to examine as to whether the prosecution had successfully established the charges against the accused.

6. As far as the mother of the child, P.W.2-Shahajan Mohd. Hasan Siddiqui, is concerned, she had identified the accused in Test Identification parade ("TI parade" for short) held on 26th July 1996 which was after about two and half months from the date of kidnapping. She deposed that on 9.5.1996 when her husband had gone out for work to Pune she was alone at home along with her mother-in-law and three children, one of them being a child in arm. At about 4 p.m. accused No.4 had come to her residence and he stated that he had come in connection with taking advance from her husband who was running a factory of manufacturing caps. He stated that he had come from their native village in District Madhubani in State of Bihar. He had brought a box of sweet. She asked him to visit the factory of her husband since he was not at home. The accused sat on the chair but while sitting he fell down and minor injury was caused to his right elbow joint. At that time her son was taking meal. So the accused took her daughter Nargis to a Chemist to bring bandage which P.W.2 applied. At about 6 p.m. he took the daughter and son for bringing some chocolates. After sometime the daughter came back but not the son. The daughter informed that accused No.4 had taken the son with him. She searched for him but could not find him. She then made a phone call to her brother-in-law Aaftab in the factory. Thereafter he came over as also her husband and then a complaint was lodged to the Police.

7. P.W.2 further deposed to the fact that on the next day morning there was a phone call demanding Rs. Five Lakhs for release of the child. She identified accused No.4 in Court also.

8. Nothing is brought out in her cross-examination to disturb her evidence in chief. It has, however, come on record in the cross- examination that accused No.1 is the son of one Nasima who is stated to be the sister of the mother of P.W.2. It is relevant to note that as far as this accused No.1 is concerned, P.W.2 has failed to identify him in the identification parade.

9. The evidence of P.W.2 is supported by her mother-in-law, Zubheda Mohd. Siddiqui, P.W.5. She stated that on that day accused No.4 had come to her residence at about 5 p.m. She also stated that he had informed that he was coming from the native village. He had carried one box of sweet. He was given a cup of tea. Thereafter he sat on the chair and had fallen down. He had gone out

and brought one bandage which was applied to his forearm by P.W.2. Thereafter accused No.4 had taken the child Shahatab and the grand-daughter Nargis with him. After sometime Nargis had come back alone. This witness stated that the boy who visited to her house was about 18/19 years old. He was fair and having black hair. She identified him in Court. She stated that she had identified him in TI parade also. As far as this testimony is concerned, also there is nothing to disturb it in the cross-examination.

10. The evidence of both these witnesses is supported by that of P.W.4-Zahir Ahmed Ali Hasan Siddiqui who is having a bakery and general stores opposite to Shama Manzil in Rashid compound wherein the complainant stays. He stated in his deposition that accused No.4 had come to his shop between 5 and 6 p.m. on 9.5.1996 with the son and daughter of P.W.1 and had purchased two Cadbury chocolates which were given to the two children. He further stated that after about three months from the date of the incident, he was called by the Police for TI parade where he had identified accused No.4. Inasmuch as the shop of this witness is situated in front of the residence of the complainant, it is natural for him to know the children of the complainant who would be buying various articles from his shop from time to time. It is true that nearly three months had gone by the time the identification parade was held, yet it is possible for this witness to remember the accused since he was accompanied by these children when they came to buy the chocolates. One need not discard his testimony identifying accused No.4 merely because so much time had gone by the time the TI parade was held.

11. There is one more witness which is relevant in this behalf i.e. one Husain Kagajwalla Ajgarali, P.W.6 from whose shop bandage was purchased by accused No.4 on 9th May 1996. He was accompanied by a small girl when he came to buy bandage. His shop is situated in Rashid compound. He knew the complainant, P.W.1. He identified the accused on 9th August 1996 in TI parade and also in Court.

12. It is relevant to note in this connection that when accused No.4 received an injury on his elbow while sitting on the chair, his blood had spilled over on to the chair. That was collected by the prosecution and the blood group of the sample collected from there matched with that of accused No.4. The evidence was led to that effect in Court.

13. All this evidence is quite credible on the aspect of the visit of accused No.4 to the residence of the complainant on 9th May 1996. P.W.2 and P.W.5 were with him for more than two hours. He was given a cup of tea. He fell down from the chair while sitting and so the daughter Nargis went with him to buy bandage. The person running the General Stores who sold the bandage i.e. P.W.6, has confirmed having seen this person along with the daughter when he came to buy bandage. Similarly, when he went to buy the chocolates with two kids, P.W.4, who sold the chocolates, has also identified him. They have both identified him in TI parade. Inasmuch as accused No.4 was accompanied by the children of the

complainant to the shop from where he bought the chocolates and the bandage and since the children were from the same locality, the concerned storekeeper could remember the person who accompanied them. Besides, the blood group of accused No.4 matched with the blood which was found spilled over on to the chair. That apart, there is no reason for P.W.Nos.2 and 5 to falsely implicate accused No.4 who is a young man of 19 years unless he had really come to their residence and had taken the children with him and from amongst whom son - Shahatab did not come back. In our view, as far as the kidnapping of the child by accused No.4 is concerned, there is sufficient evidence to conclude to that effect.

14. Accused Nos.2 and 3 were nabbed when accused No.2 was making phone calls to the complainant on 16.5.1996. P.W.14-Mohamad Aktar Abdul Razak Pathan has deposed to that effect. He is a person running the business of arranging decoration (Mandap Contractor). On that date he had gone to the Mumbra Police Station along with one Iqbal Ismile, when Police told them that one boy was kidnapped by some persons and they were demanding Rs. Five Lakhs as ransom. Demand was made to the parents on phone No.5355469. This phone call was made from the Govandi area. The Police transferred that phone number 5355469 to mobile. This witness went to Shivaji Nagar area, Govandi where the Police party was kept at different points. At about 6.40 p.m. a call was received on that mobile number from the person demanding money. The phone call was received by the father of the child. The number from which the call was made was 5575250. The Police asked the complainant to go on talking with the person on mobile. So they got sufficient time to locate him. One of the Constables from the Shivaji Nagar area, informed that the said number viz. 5575250 was installed in a booth behind the Rafique Nagar Police Chowky. On receiving this information, the Police and the complainant went near that Police chowky when accused Nos.2 and 3 were seen talking on the phone and were then apprehended. When search of these persons was taken, a chit was found with accused No.2 on which the telephone No.5355469 was written. A railway ticket dated 9.5.1996 was also found. Another paper was found on which the words "Nasik-Bhusawal and Itarsi and S-3" were written. On the same paper, the words "Imam Husain, Karkhana" and one telephone number were also written. It is relevant to note in this connection that P.W.1 had stated in his deposition that he had received various phone calls from time to time and he was given ultimatum until 18.5.1996. The person had asked him to send his younger brother with money to Mahanagari Express and had asked to tell his brother to meet them either at Nasik, Itarsi or Jabalpur.

15. This witness, P.W.14, further stated that the Police had asked the two persons as to where was the kidnapped boy. They told the Police that there were two other persons who were involved. They took Police to the Rafique Nagar Zopadpatti where accused Nos.1 and 4 were found and were arrested.

16. As far as the testimony of this P.W.14 and the arrest of accused Nos.2 and 3 while making phone calls is concerned, nothing has come in the cross-

examination to disturb the same. Hence, as far as the charge of extortion is concerned, the same would get proved against accused Nos.2 and 3 as well as accused No.4 who had kidnapped the child and in connection with that the ransom was being demanded.

17. Thus, the prosecution can be said to have established the kidnapping of the child by accused No.4 and the demand for ransom by accused Nos.2, 3 and 4. However, as far as the murder of the child and destroying the evidence is concerned, they have relied upon a chain of witnesses. They have thus relied upon the evidence of one Ahmed Sharif Rehmatulla Shaikh, P.W.8, a Richshaw driver. He has stated for the first time in Court on 3rd April 1998 that on 9.5.1996 accused Nos.1, 2 and 4 had hired his rickshaw at Rashid compound and asked him to take to Mumbra Railway station. One small boy was with them who was weeping. His photograph was shown to this witness in Court who had identified that child as the one who was with them.

18. Thereafter it appears that according to the prosecution these accused with the child had travelled from Mumbra to Kalyan by train. At Kalyan, it is claimed that they hired the rickshaw of one Sunder Badkane Gupta, P.W.9 to go to Haji Malang. He has stated that these three persons hired his rickshaw on that date at about 6.45 p.m. and one small boy was with them. He was shown the photograph of the child in Court which he identified. He does not however mention that the child was crying.

19. The third person examined by the prosecution is one Rahim Mohammad Khan Pathan, P.W.10. He has stated that on 9th May 1996 he had gone to Haji Malang and on return to Kalyan, accused Nos.1, 2 and 4 had hired his taxi. In the cross-examination, he has stated that he left Kalyan for Haji Malang at about 10 p.m. and the three persons boarded his taxi at Haji Malang at about 11.30 in the night. These two rickshaw drivers and the taxi driver have come to depose in the above manner with respect to the involvement of accused Nos.1, 2 and 4 and use of their vehicles for the first time when their evidence was recorded on 3rd and 4th April 1998. The taxi driver had deposed that only three persons had come with him when he returned from Haji Malang indicating thereby that the child was not there on the return journey, they having killed him at Haji Malang.

20. The prosecution has of course led the evidence with respect to the efforts made to search the child at the top of Haji Malang as well as the bottom of the hill and as to how the pair of chappals of the child was found in the jungle below the Haji Malang hill. The chappals do have the blood stains and the blood group found thereof is "O" group which is that of the child as well as that of accused Nos.1 and 4. The pair of chappals has been identified by the father of the child as that of the child.

21. The two witnesses for the aforesaid search are P.W.16-Chandrakant Balkishan Nair who has stated that he resides at Haji Malang hill. On 17th May 1996, he had seen the crowd near Lambi Bavadi i.e. at top of the hill. There were

persons of fire brigade and the Police. He had gone down the valley along with the Police where he found pair of the chappals.

22. P.W.17 is one Ragho Kalu Shinde who stays at the bottom of the Haji Malang hill. He had participated in the search on 23rd May 1996 for the child but could not find anything. He said that he saw jackal running in the valley and the forest was very thick, and consisted of tigers, tigers and wild pigs. The boy was not traced in the valley.

23. As far as the visit of the accused to the Haji Malang is concerned, the prosecution has examined one Indirabai Narayan Kharkar, P.W.20, who is supposed to be having her shop opposite the bus stop at Haji Malang. She has stated that the three accused had come to her shop with one boy and had purchased sticks and chanas at about 8 p.m. on 9.5.1996. One Abdul Ahmed Shaikh Kadir, P.W.18, having his shop at the top of Haji Malang is also examined who said that on 9.5.1996, three persons had come with the boy to his shop at about 7/8 p.m. and purchased some chocolates and Manikchand Ghutaka. He has identified the boy on showing the photograph. It is material to note that these two rickshaw drivers, one taxi driver i.e. P.W.Nos.8, 9 and 10, Indirabai, P.W.20 and Abdul Kadir, P.W.18 were not even called for TI parade. They have appeared directly in the Court after a period of two years to make statements with respect to their having seen the three accused and the child.

24. Mr. Tangsali, learned Counsel appearing for the appellants, submitted that assuming that any such incident of kidnapping had taken place on 9.5.1996, all these witnesses are deposing after two years i.e during May to June 1998. The two rickshaw drivers and one taxi driver would be having so many customers in the meanwhile. Only the first rickshaw driver has stated that the child was crying. As far as the taxi driver is concerned, the three accused had engaged his taxi at 11.30 p.m. on 9th May 1996. Indirabai, P.W.20 has deposed that the particular day was a Thursday and on that day there is lot of crowd. There was no special reason for her to remember the three persons with the child coming to buy channa and sticks. Similarly there was no such special reason for Abdul Kadir, P.W.18 to remember them from whom they bought the chocolates and Gutkha. There would be so many customers buying on that date and more than two years have gone thereafter. Besides, there is nothing independently available to link these persons with the particular incident except their own depositions which are led obviously when they were approached by the Police with the help of the accused.

25. In the circumstances, it can safely be said that the child was kidnapped by accused No.4 and accused Nos.2 and 3 did attempt to extort money. As far as the murder of the child is concerned, the only available evidence is the discovery of the chappals of the child at the bottom of the Haji Malang hill which had the blood stains thereon. The blood stains are of "O" group which is the group of accused Nos.1 and 4 as well as that of the child. As far as involvement of accused No.4 is concerned, there should be no difficulty. However, as far as

accused No.1 is concerned, the evidence with respect to him is little doubtful. He is supposed to be related to P.W.2 but she did not identify him in the TI parade. He is not identified by P.W.5 either in the TI parade or in Court. Besides, he is supposed to have had some nail injuries on his neck but the medical evidence does not show any such injuries. P.W.14 has stated that there were scratches on his throat and had injury to his right elbow joint. The medical evidence does not support the same. It does not speak of any such injuries on the throat. There are only a few abrasions on the wrist joint, little left finger and right index finger. This is as per the evidence of Dr. G.M. Jadhav, P.W.21.

26. The evidence of a hotelier one Yasin Imbrahim Patel, P.W.13, is to the effect that his cousin is having a pan stall in Rashid compound and that accused No.1 had come over there on 9th May 1996 and was seated in an adjoining hotel for half an hour. Not much benefit can be drawn by the prosecution from this evidence.

27. Certain pieces of papers were found with accused No.1 when he was arrested. On one piece of paper, it was written "Mahanagari Express 18.5.1996 Nasik Itarsi Bhusawal." Similar chits were found with accused Nos.2 and 3. They were sent for examination by handwriting expert who gave an opinion that they were in their own handwriting. However, the chit with accused No.1 was not sent for examination. Thus, as far as accused No.1 is concerned, there does not appear to be much evidence against him except the chit found on his person with similar contents written thereon. He is arrested while sitting in a hut in Rafique compound. That handwriting is not proved. Assuming that there are some injuries on his fingers and wrist as stated by Dr. Jadhav, it is not possible to ascribe them to any scuffle since nobody has seen the murder. Besides, two of his relatives i.e. the mother and the grand-mother of the child have not identified him even in TI parade. P.W.5-grandmother has not identified him in Court also. In these circumstances, it is not possible to say that there is sufficient evidence to implicate accused No.1 in the charge of kidnapping, murder and destroying evidence. However, the contents of the chit found with him have a bearing to the deposition of P.W.1 that the person making phone call had asked him to send his brother to Mahanagari Express with money either at Nasik, Itarsi or Bhusawal. In his statement u/s 313 of Criminal Procedure Code, he has not given any explanation with respect thereto. The charge u/s 386 read with Section 34 will, therefore, get established against him.

28. It is however clear that accused No.4 did visit the residence of the complainant on 9.5.1996 and took the child with him to buy chocolates whereafter the child did not return. It is also clear that accused No.2 was nabbed while making the phone calls to the father of the child demanding the ransom amount on 16.5.1996. He was nabbed in the company of accused No.3. The prosecution case however is that it is only accused Nos.1, 2 and 4 who took the child to Haji Malang where the child was killed. Accused No.3 was not involved in it and has, therefore, been convicted only for extortion and not for the other

charges. Accused No.1 will also get convicted for extortion u/s 386 read with Section 34, Indian Penal Code.

29. As far as accused Nos.1, 2 and 4 are concerned, they are said to have taken the child to the Haji Malang and killed him over there and the chappals of the child were found at the bottom of the hill after the trace. It was not possible to trace the body of the child in the jungle which was full of wild animals. The chappals were identified by the father of the child as that of the child and the blood stains were of the same group as that of the child and accused Nos.4 and 1 viz. group "O". However, as far as accused No.1 is concerned, in the absence of anything more, it is difficult to say that he was involved in all this plan particularly when he was not identified by P.W.Nos.2 and 5 in TI parade and by P.W.5 in Court. As far as accused No.4 is concerned, he must explain as to what happened to the child who went along with him on 9.5.1996. Similarly accused No.2 must explain as to where was the child when he was demanding the ransom on 16.5.1996. The chappals of the child have been found at a place as per the lead given by the accused.

30. In any such case of circumstantial evidence, there are always three possibilities as was aptly stated by the Apex Court in State of Maharashtra Vs. Suresh, . Appropriate inference based on Section 106 and Section 114 of the Evidence Act read with Section 27 thereof would certainly be permissible. In paragraph 26 of that judgment, the Apex Court has observed as follows:-

We too countenance three possibilities when an accused points out the place where a dead boy or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

31. In the circumstances, in view of disappearance of the child who was last seen with accused No.4, the subsequent demand made by accused No.2 for ransom read with the discovery of the chappals at the bottom of Haji Malang hill at the instance of these accused would lead to the conclusion that these two accused are involved in the murder of the child and disappearance of his body. The charges under Sections 302 and 201 read with Section 34, apart from Section 364 of Indian Penal Code would, therefore, get established against these two accused only. That answers the question No.(i) framed above. As far as question

No.(ii) is concerned, our answer is that the charge u/s 386 read with Section 34, Indian Penal Code is established against all the four accused. Hence, the following order on question No.(iii):-

ORDER

(a) Criminal Appeal No. 515 of 2002 filed by accused No.1 is partly allowed. His conviction and sentence u/s 386 read with Section 34, Indian Penal Code is maintained. He is acquitted of rest of the charges. Accused No.1 be set at liberty, if not required in any other matter since he has already undergone that punishment.

(b) Criminal Appeal No.572 of 2000 filed by accused Nos.2 and 4 stands dismissed.