
(2014) 06 BOM CK 0113
In the Bombay High Court
Case No : Criminal Appeal No. 864 of 2012

Salman Sufiyan Shaikh	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 09-06-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 123, 34, 341, 342, 363

Citation : (2014) ALLMR(Cri) 2792 : (2014) 3 BomCR(Cri) 1

Hon'ble Judges : A.S. Gadkari, J

Bench : Single Bench

Advocate : Mateen Shaikh i/b Sharif Shaikh, Afroz Siddiqui, Chirag Shah, Jammu Shaikh and Abhishek Ramde, Advocate for the Appellant; S.D. Shinde, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.S. Gadkari, J.—The present appeal has been filed by the appellant against the Judgment and Order dated 25 July 2012 passed by the learned Additional Sessions Judge, Borivali Division, Dindoshi, Goregaon, Mumbai in Sessions Case No. 138 of 2011 arising out of C.R. No. 148 of 2011 registered at Dindoshi Police Station, thereby convicting the appellant u/s 363 of the Indian Penal Code and sentenced to suffer R.I. for a period of 5 years and to pay fine of Rs. 20,000/-, in default of payment of fine to suffer further R.I. for a period of 3 months. By this appeal, the appellant has questioned the correctness of the said conviction and sentence awarded by the impugned judgment and order dated 25.7.2012.

The Appellant was originally charged u/s 363, 364-A, and 342 of the Indian Penal Code. The Court of Sessions by the present impugned judgment and order dated 25.7.2012 acquitted the Appellant from the charges punishable under Sections 364-A and 342 of the Indian Penal Code. The co-accused namely Khalim Faiyaz Shaikh (Khalim) is absconding since 21.4.2011 and therefore the present Appellant was alone tried in the present sessions case.

2. The facts which are enumerated from the record of the present appeal can briefly be stated as under:

(i) On 20.4.2011, Police Sub-Inspector Shri Shelke, then attached to Dindoshi Police Station, registered a complaint bearing no. 28/11 which was filed by PW-1 Anwar Khan Abdul Wahid Khan about missing of his son by name Sufiyan aged about 3 and 1/2 years. Subsequent to the lodging of the said complaint of missing of child, the mother-in-law of the complainant received phone calls from unknown person thereby claiming that the son of the complainant was in his custody and threatened of dire consequences if the said fact is disclosed to anybody. The complainant thereafter immediately informed the said fact to the police, of Dindoshi Police station and it recorded the detailed statement of the complainant (PW-1) on 20.4.2011. On the basis of the said statement which was treated as first information report, C.R. No. 148 of 2011 under Sections 363, 364-A, 341 and 342 read with Section 34 of the Indian Penal Code was registered at Dindoshi Police Station, Mumbai. Initially, Assistant Police Inspector Shri Shelke has recorded the statements of the complainant and other witnesses. The investigation was transferred to Assistant Police Inspector Smt. Jyoti G. Bagulbhople. Assistant Police Inspector Smt. Jyoti Bagulbhople recorded the supplementary statement of the complainant.

(ii) PW-10 Assistant Police Inspector Shri Ranaji S. Khade on 20.4.2011 was attached to Dindoshi Police Station as PSI. On 20.4.2011 when he was on duty, Police Inspector of the Dindoshi Police Station informed him and the other staff, that a case of kidnapping of a child by name Sufiyan has been registered with the said Police Station. Therefore, the staff members of Dindoshi Police station formed groups to search the kidnapped child Sufiyan. The complainant accompanied the police team and proceeded to Sakinaka by car. The complainant after reaching to Sakinaka contacted the present Appellant who, inter alia, informed the complainant that he knew about the child Sufiyan and therefore the present Appellant was apprehended on the basis of suspicion by the police. During enquiry it was revealed that the child Sufiyan was taken to Silvasa, State of Gujarat by the absconding accused Khalim. During further enquiry it was revealed that the absconding accused Khalim from his mobile phone number 8291861682 had contacted the appellant on his mobile bearing no. 9321572057 on two occasions. From the said mobile number 8291861682, the mother-in-law of the complainant namely Mumtaz Begum Nisar Ahmed Khan had received a call from an unknown person thereby informing him that the child namely Sufiyan was in the custody of the said person and had extended threats. This fact has been mentioned by the complainant (PW-1) in his First Information Report dated 20.4.2011. After the appellant was taken into custody, the police contacted the absconding accused Khalim through the appellant and got the information about the whereabouts of the said child Sufiyan. Under the direction of police, the appellant subsequently contacted Khalim and came to know about the fact that the child Sufiyan is with Khalim at Silvasa and therefore Khalim was requested to come at Silvasa Bus Depot. When the complainant, the Appellant and the police

personnel went to the Bus Depot at Silvasa, they noticed that the child Sufiyan was with accused Khalim. Though all the necessary steps to conduct an effective raid to apprehend Khalim was arranged by the police, after sensing the danger, Khalim left the child Sufiyan on the spot and ran away on 21.4.2011. The police tried to nab him, however, Khalim could not be traced out and the accused Khalim is absconding since 21.4.2011. Thereafter, PW-11 Smt. Jyoti Bagulbhople recorded the statements of various witnesses.

(iii) The Appellant when was in custody, expressed his willingness to point out the spot/house where the child was kept by the absconding accused Khalim during the period of his kidnapping. Accordingly, on 21.4.2011 PW-10 PSI Shri Ranaji Khade recorded the memorandum statement of the appellant. The said statement is at Exhibit 35. The appellant thereafter led the police and panch-witnesses to Silvasa and pointed out the house where the child Sufiyan was confined by the absconding accused Khalim. In the said house, the cousin sister of Khalim and her husband were present. The statement of PW-4 Naim Umar Shaikh i.e. the brother-in-law of Khalim was recorded by the police wherein he disclosed that on 20.4.2011 the absconding accused Khalim had been to his house with a small child and left the house on 21.4.2011. In view of the fact that the appellant showed the house wherein the child Sufiyan was confined, discovery panchanama was accordingly effected by the police. The said discovery panchnama is at Exhibit 36.

(iv) PW-11 Smt. Jyoti Bagulbhople during the course of investigation collected all the necessary documents. She also called for call details of mobile number 8291861682 and 8291861686 which were in use of the absconding accused Khalim, from Uninor Company. The call details of mobile number which was in use by the appellant bearing no. 9321572057 was also collected by the Investigating Officer. During the course of investigation, it was revealed to PW-11 Smt. Jyoti Bagulbhople that the appellant along with absconding accused Khalim, in furtherance of their common intention kidnapped the child namely Sufiyan and committed offence punishable under Sections 363, 364-A, 341 and 342 read with Section 34 of the Indian Penal Code. After completing the investigation, PW-11 Smt. Jyoti Bagulbhople filed chargesheet against the appellant in the Court of Additional Chief Metropolitan Magistrate, 24th Court at Borivali, Mumbai.

(v) The learned Magistrate by its order dated 29.7.2011 committed the case of the appellant to the Court of Sessions as the alleged offence u/s 363 and 364-A of the Indian Penal Code was exclusively triable by the Sessions Court. The learned Trial Court i.e. the Additional Sessions Judge, Dindoshi, Goregaon, Mumbai framed charge below Exhibit-4 on 13.9.2011 under Sections 363, 364-A and 342 of the Indian Penal Code. The contents of the said charge were read over and explained to the appellant in vernacular to which he denied and pleaded not guilty and claimed to be tried. The defence of the appellant was of total denial and false implication at the behest of the complainant. The learned Trial Court after recording the evidence and after hearing the parties to the said trial

has convicted the appellant u/s 363 of the Indian Penal Code by the present impugned judgment and order as stated hereinabove.

3. Heard Shri Mateen Shaikh, the learned Counsel appearing for the appellant and Smt. S.D. Shinde, the learned APP.

4. The learned Counsel for the appellant has submitted that the appellant has been falsely implicated in the present crime. The Appellant has been implicated only on the basis of suspicion which was initially expressed by the complainant and there is no evidence on record to show that the appellant either actively or passively helped the absconding accused Khalim in kidnapping the said child Sufiyan. The learned Counsel for the appellant has urged before me that as per evidence on record there are only two phone calls from mobile no. 8291861682 of absconding accused Khalim which were received by the appellant on his mobile no. 9321572057 on 19.4.2011 and/or 20.4.2011. He has further urged that receiving phone calls from a friend is nothing abnormal. In support of his contention, he relied on the judgment in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, . The learned Counsel for the appellant has further urged before me that the discovery panchanama at Exhibit 36 recorded at the behest of the Appellant is not a reliable piece of evidence. The aforesaid two pieces of evidence are not only weak in nature but are also legally not sufficient to base the conviction on the same and he prayed that the present appeal may be allowed and the appellant may be acquitted from charge u/s 363 of the Indian Penal Code.

On the other hand the learned APP in her argument supported the impugned judgment and order passed by the learned Trial Court and urged that the present appeal may be dismissed and the conviction and sentence imposed on the appellant by the Trial Court may be confirmed.

5. In order to effectively deal with the submissions advanced before me by Shri Mateen Shaikh, the learned Counsel appearing for the appellant and Smt. S.D. Shinde, the learned APP, it would be useful to refer in brief to the evidence of the prosecution witnesses.

6. PW-1 Mr. Anwar Khan Abdul Wahid Khan is the complainant and father of the child Sufiyan. PW-1 Anwar Khan in his testimony has stated that he was knowing the appellant. The appellant had a shop/gala at Khairani Road and the relatives of PW-1 are residing in that area. The complainant was also residing near the shop of the appellant and therefore the appellant was acquainted with the complainant for last 7 to 8 years. PW-1-Complainant has further deposed that he was also knowing Khalim (absconding accused). Khalim was closed associate of the appellant. The in-laws of the complainant are residing at Santosh Nagar. His son Sufiyan was on many occasions taken to the house of his father-in-law by the complainant. On 19.4.2011 the complainant's son Sufiyan was with his in-laws at their house. That on 19.4.2011 at about 10.00 p.m. when the complainant was at his working place, his father-in-law informed him on

telephone that Sufiyan was missing since 7 p.m. on the same day. Thereafter the complainant along with his wife went to the house of his father-in-law and tried their level best to search his son Sufiyan. The complainant has further deposed that the appellant was also with him and his relatives at the time while search of the child Sufiyan was being taken. As Sufiyan was not found despite the search in the vicinity, the complainant thereafter reported the said fact to Dindoshi Police Station at about 12.00 o'clock in the night.

At about 1 a.m. on 20.4.2011, the mother-in-law of the complainant received a call on her mobile phone no. 9324230661 from a unknown person thereby informing that the child Sufiyan was with the said person and extended threats to the mother-in-law of the complainant that the said fact should not be informed to the police otherwise life of Sufiyan will be in danger. The caller from the other side also told the mother-in-law of the complainant that he will allow Sufiyan to talk with her at about 6 p.m. The complainant has further stated that he tried to contact the person on the mobile no. 8291861682 from which number the call was received by the mother-in-law of the complainant. The said number was of the person who had called the complainant's mother-in-law and had extended threats. The complainant thereafter lodged first information report with Dindoshi Police station and same was numbered as C.R. No. 148 of 2011. The said F.I.R. is at Exhibit 12. The statement of the complainant dated 20.4.2011 is at Exhibit 11. PW-1 the complainant has further deposed that after lodging of FIR on 20.4.2011, a SMS was received on the mobile number 9324230661 which was being used by his mother-in-law wherein it was mentioned that the complainant should pay Rs. 7,00,000/- (rupees seven lacs only) at Banaras Junction at about 7.30 a.m. on 22.4.2011. PW-1 the complainant thereafter immediately gave information about the same to the police and also handed over the mobile phone on which the said SMS was received.

PW-1 the complainant has further deposed that the police made inquiry with him about his friends and he had informed about the appellant and another person who was working with him. PW-1 the complainant has further deposed that the police thereafter took him towards the shop of the appellant, situated at Sakinagar, Khairani Road at about 2 a.m. in the night of 20.4.2011. That the appellant was present in the shop. The police checked his mobile phone. The mobile phone number of the absconding accused Khalim was noticed in the received call list of the mobile phone of the appellant. Police asked the appellant to point the place where the kidnapped boy was kept. The police took the appellant to the police station. PW-1 the complainant has further stated that in the police station, the appellant told that Khalim had taken the boy Sufiyan to Silvasa. PW-1 the complainant has further stated that the appellant told to the police that he had sent Khalim and the said child Sufiyan to Gujarat for ransom. PW-1 the complainant in his testimony thereafter has narrated the steps taken by the police, the trap laid down by them to rescue the child Sufiyan and to arrest Khalim. It has been further deposed by the complaint that Khalim along with child Sufiyan came at the Bus Depot at Silvasa and after sensing danger at

the hands of police, Khalim left the child and ran away from the spot. The complainant has further deposed that the police tried to nab Khalim, however, Khalim could not be traced out. It has been further deposed by PW-1 the complainant that while running away from the spot, the cellphone of Khalim had fallen at the spot. That the custody of child Sufiyan was handed over to the complainant by Police and a detailed supplementary statement dated 22.4.2011 was recorded by the police.

7. PW-1 Anwar Khan was cross-examined at length by the appellant. PW-1 Anwar Khan has given startling admissions in his cross examination. PW-1 Anwar Khan has admitted that when the police apprehended the appellant from his house the child Sufiyan was not found with the appellant. PW-1 has further admitted that as the appellant was a friend of the absconding accused Khalim, therefore he had doubt about the involvement of the appellant with Khalim. PW-1 Anwar Khan has voluntarily given an admission that at Silvasa bus depot the absconding accused Khalim brought the child Sufiyan. PW-1 has further admitted that after the release of child Sufiyan, his detailed supplementary statement came to be recorded by the police. PW-1 has further voluntarily given an admission that he only had a doubt about the involvement of the appellant in the crime due to the appearance of the mobile cell number used by absconding accused Khalim on the mobile handset of the appellant.

It is pertinent to note here that the child Sufiyan was dropped by the absconding accused Khalim at Silvasa bus depot and thereafter the custody of the said child was handed over to PW-1 Anwar Khan. On the basis of the suspicion expressed by PW-1 and because of the cell number 8291861682 of Khalim which was reflected on the mobile handset of the appellant, the appellant was apprehended by the police. It is only after the release of the boy Sufiyan and arrest of the appellant, the detailed supplementary statement dated 22.4.2011 of PW-1 Anwar Khan was recorded by the police.

8. PW-2 Mumtaz Begum Nisar Ahmed Khan is the mother-in-law of PW-1 Anwar Khan. PW-2 has stated in her testimony that master Sufiyan the son of PW-1 was staying at her house for taking education in Montessori. PW-2 has further deposed that on the day of incident her husband came at home at about 6 p.m. and left the home at about 7 p.m. for offering prayers. At that time Sufiyan was playing outside the house. She thereafter sent Meifuz to call Sufiyan. The said Meifuz did not find Sufiyan near the house and therefore PW-2 along with other persons took search of Sufiyan. PW-2 thereafter gave phone call to her daughter i.e. wife PW-1 Anwar Khan. She has further stated that after taking the due search, as Sufiyan was not found, she informed the said fact to the complainant. She has further stated that on the next day she received call on her mobile at about 12 O'Clock and the person talking from the other side informed her that Sufiyan was with him and also informed that said person will allow Sufiyan to have talk with PW-1 Anwar Khan and other relatives at about 6 p.m. PW-2 has further deposed that at about 6 p.m. on the same day, she received a message

on her mobile phone thereby placing demand of Rs. 7,00,000/- for release of Sufiyan and the person who sent the message informed that the said amount should be paid at Banaras Railway station. The said person also informed her that only mother of Sufiyan should come at Banaras railway station with the said amount.

PW-2 was cross-examined by the appellant. However, it appears to me that as nothing incriminating against the appellant has come on record in the examination-in-chief, the cross-examination has been proceeded in a general format. A suggestion was put to PW-2 by the defence in the cross-examination that she had given the statement before the police as per the information supplied by PW-1 Anwar Khan and her husband to which this witness has denied. In the cross-examination this witness has admitted that she had not seen any person kidnapping Sufiyan.

9. PW-3 Ajij Ahmed Abdul Hamid Shaikh is the co-occupant/partner of PW-1 Anwar Khan who runs his business jointly with PW-1. PW-3 has stated that the appellant was the friend of the complainant Anwar Khan and the appellant used to sit in the garage of the appellant. He has further deposed that the appellant was jobless. That the complainant was likely to receive a huge amount from a land deal. He has further deposed that the accused wanted to purchase Indica Car.

From the testimony of this witness, it appears to me that this witness has been examined from the point of proving the motive behind the kidnapping of Sufiyan by the appellant along with the absconding accused Khalim. PW-1 Anwar Khan was supposed to receive substantial amount from and out of a land deal and with a view to extort money from PW-1 the appellant alleged to have kidnapped child Sufiyan in connivance with the absconding accused Khalim.

In the cross-examination, this witness has denied the suggestion put to him that he is deposing falsely at the behest of PW-1 Anwar Khan as PW-3 is business partner of PW-1 Anwar Khan. This witness has admitted in the cross-examination that the appellant was friend of PW-1 Anwar Khan for last 8 years.

10. PW-4 Naim Mohd. Umar Shaikh is the brother-in-law of the absconding accused Khalim. In his testimony he has deposed that he was residing at the address at Silvasa for last 25 years. Smt. Jamilabanu Shaikh is his wife. The absconding accused Khalim was the maternal brother of his wife. He has further deposed that on 20.4.2011, Khalim the maternal brother of his wife came to him along with a child and told him that there was quarrel between a Maharashtra couple and that child belong to them and therefore Khalim had brought with him the said child to the house of PW-4 at about 11 p.m. They resided at his house in the said night and on 21.4.2011 at about 10.30 a.m. Khalim went away along with the said child.

In the cross-examination, this witness has admitted that he does not remember when he was called by the police of Dindoshi Police Station and made enquiry

about the child with him and his wife. This witness has admitted in the cross-examination that except Khalim and the said child, there was nobody else with Khalim.

11. PW-5 is Mahendra Shankar Surve, a panch-witness to the spot i.e. the house allegedly discovered at the instance of the Appellant. The said spot is the house of PW-4 Naim Mohd. Umar Shaikh at Silvasa. PW-5 in his testimony has deposed that on 27.4.2011 he was called by the police of Dindoshi Police station to act as pancha. The appellant Salman Shaikh was present in the police station. The appellant in the presence of police told that he had kidnapped a boy at the instance of his friend Khalim and said boy was kept at Silvasa and he was ready to show the place at Silvasa. He has further deposed about the fact of reaching at Silvasa and pointing of the house of PW-4 Naim Shaikh by the Appellant. He has proved panchanama effected in that behalf which is at Exhibit 23.

In the cross-examination, this witness has admitted that his mobile number was available at Dindoshi Police station and he was acquainted with the police officers of Dindoshi Police station. No other material which is useful to the Appellant has been elicited from this witness.

It is pertinent to note here that the panchanama about the fact of discovery of the residence of PW-4 Naim Shaikh was drawn on 27.4.2011 between 8.55 a.m. to 4.30 p.m. and the statement of PW-4 came to be recorded by the police on the same day i.e. 27.4.2014. The child was released from the custody of absconding accused Khalim on 21.4.2011 at Silvasa.

12. The learned Counsel for the appellant has argued that the appellant was arrested on 21.4.2011 and the victim boy namely Sufiyan was released on 21.4.2011 by the absconding accused Khalim at Silvasa and therefore a prudent Investigating Officer might have already taken the search of the place where the victim Sufiyan was kept at Silvasa. He has further argued that the police were having the knowledge about the house of PW-4 Naim Shaikh and the present panchanama dated 27.4.2011 and recording of statement of PW-4 Naim Shaikh dated 27.4.2011 was drawn subsequently only to seal the loopholes in the chain of circumstances against the Appellant, as the police did not succeed in apprehending the absconding accused Khalim on the spot i.e. at Silvasa bus depot on 21.4.2011. He has further argued that the appellant has been made a mere scapegoat in the present crime. I find substance in the argument of the learned Counsel for the Appellant.

13. PW-6 is Yadas Subhash Kevad whose documents were used by the absconding accused Khalim for purchase of SIM card of Uninor company bearing No. 8291861682. This witness has stated in his testimony that he is not aware about the fact as to how his documents were used by the absconding accused Khalim for procuring the said mobile number from Uninor Company.

14. PW-7 is Sumar Adam Nagor. He is friend of the father of the appellant. He has stated in his testimony that he has taken the shop on rental basis at the rent

of Rs. 4000/- p.m. from the father of appellant and therefore he was having acquaintance with him. He has further deposed that the father of the appellant namely Sufiyan Shaikh requested him to give his papers namely his identity card and residential proof to obtain SIM card for his son i.e. the appellant herein. He has stated that he accordingly gave the copies of licence card, ration card and photograph. The appellant on the basis of the said documents obtained SIM card. He has further deposed that he was not aware about the number of the said SIM card taken by the appellant.

The mobile phone number which was in use of the appellant having no. 9321572057 was taken by submitting the documents of this witness. It appears that the evidence of this witness is of formal nature and is of not much relevance from the point of deciding the present appeal.

15. PW-8 is the victim boy Sufiyan Anwar Khan aged about 4 years. The learned Trial Court after coming to the conclusion that the said boy was able to give reply properly, recorded his statement which is at Exhibit 26. PW-8 Sufiyan has stated that he had been to house of his grandmother (Nani). He has further stated that he was taken by Khalim chacha from the house of his Nani. He was taken to the house of Khalim at his village by Bus.

It appears from the record that the statement of this child witness was recorded by the Investigating Officer on 5.5.2011 in question and answer form and this witness has stated in the said statement also that (absconding accused) Khalim chacha has taken him to the village at his residence from the house of his Nani.

16. PW-9 is the noddle officer of the Uninor Company. This witness has produced the call details of mobile phone no. 8291861682 and 8291861686 which were being in used by the absconding accused Khalim.

17. PW-10 is the API Ranaji S. Khade who has drawn the discovery panchanama at the behest of the appellant about the place i.e. the residence of PW-4 Naim Shaikh at Silvasa, State of Gujarat which is at Exhibit 36.

In his cross-examination, he has admitted that the police are still in process of searching the absconding accused Khalim.

18. PW-11 is Smt. Jyoti G. Bagulbhople, API then attached to Dindoshi Police Station and was the Investigating Officer of the present crime. In her testimony, she has stated the fact about receipt of phone call by the mother-in-law of the complainant from mobile no. 8291861682 and demand of ransom. This witness has narrated about the steps taken by her in apprehending the present appellant, going to Silvasa and the other necessary measures taken by her during the process of completion of investigation.

In her cross-examination, the defence has put a specific suggestion to this witness that as the police had not succeeded in arresting the absconding accused Khalim and the trap led by the police had failed, the police has falsely implicated the appellant in the present case to which this witness had denied.

19. It appears to me from the testimonies of these two witness namely PW-10 and PW-11, the police officers, that their evidence is vague in nature and lacks about the particulars of the dates of recording of the statements, the dates of recording of panchanama, timing and dates of apprehending the Appellant and dates of recording of statements of witnesses. It further appears that their evidence is absolutely of no help to the prosecution except from the point of placing few facts on record. The evidence is also vague about the particulars of the mobile phone numbers from which calls were given and who has received the calls, so also though documents are placed on record about mobile no. 8291861686, it has not been proved in the evidence that whether this number was used in the present crime or not by the absconding accused Khalim. It is to be noted that these two witnesses were not firm on their stand about the usage of the mobile phone numbers by the absconding accused person while contacting the appellant.

20. Thus after taking into consideration the testimonies of the witnesses on record, it is clear that there are three circumstances which have been put-forth by the prosecution against the Appellant to prove the charge levelled against him and the same are as under:

(i) The strong suspicion expressed by PW-1 Anwar Khan i.e. the father of victim boy Sufiyan against the Appellant;

(ii) The Discovery dated 27.4.2011 as per panchanama recorded at the behest of the appellant which is at Exhibit 36 wherein the appellant had shown the place of PW-4 Naim Shaikh i.e. the brother-in-law of Khalim, where the kidnapped boy Sufiyan was kept on 20.4.2011.

(iii) The mobile phone no. 8291861682 of absconding accused Khalim which appeared on the mobile no. 9321572057 used by the appellant on 19.4.2011 and/or on 20.4.2011;

(A) As far as the circumstance (I) above is concerned, which deals with the strong suspicion expressed against the appellant, the PW-1 Anwar Khan, in his cross-examination has in unequivocal terms admitted that he had only strong suspicion against the appellant and therefore he gave the name of the Appellant to the police. It is the settled position of law that the suspicion however strong it may be, cannot be the basis for conviction and therefore this circumstance against the appellant is of no avail to the prosecution.

The learned Counsel for the appellant has relied on a judgment delivered by the Supreme Court in Criminal Appeal No. 11 of 2013 in the case of Md. Faizan Ahmad @ Kalu Vs. The State of Bihar (Criminal Appeal. 11 of 2013 decided on 3.1.2013) wherein the Supreme Court in para 11 has held that the Criminal Courts recognize only legally admissible evidence and not farfetched conjectures and surmises. The Supreme Court has further held that the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. The Supreme Court has further held that if a criminal court allows

its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence.

I therefore hold that the circumstance of grave suspicion expressed by PW-1 Anwar Khan against the appellant about his involvement in the crime lacks legal sanctity and the said circumstance cannot be held to be a credible piece of evidence against the appellant.

(B) As far as circumstance (ii) above is concerned, as I have already observed in paragraph 12 above that there is substance in the argument advanced by the learned Counsel for the appellant, that the appellant was arrested on 21.4.2011 and the child viz. Sufiyan was released on 21.4.2011 itself by the absconding accused Khalim at Silvasa and therefore a prudent Investigating Officer undoubtedly might have already taken search of the place where the victim Sufiyan was kept at Silvasa. There is every probability that the police were having the knowledge of the place i.e. the house of PW-4 Naim Shaikh which was discovered under the panchanama dated 27.4.2011 i.e. Exhibit 36. The trap laid by the police for arresting Khalim had failed on 21.4.2011 and as has been admitted by the Investigating Officers i.e. P.W. 10 and P.W. 11 that till date they could not trace out the absconding accused Khalim, there is every probability that on 20.4.2011 itself, the police were aware about the place of residence of P.W. 4 Naim Shaikh. I therefore find substance in the submission of learned counsel appearing for the Appellant that as the police had failed to arrest the absconding accused Khalim, who is the real culprit behind the crime, the police have implicated the Appellant on the basis of weak pieces of evidence.

In my view, the discovery panchanama of the house of P.W. 4 Naim Shaikh at Silvasa at the instance of the Appellant which is at Exhibit 36 does not inspire confidence in the mind of the Court. The said piece of evidence i.e. the panchanama dated 2.1.4.2011 is not trust-worthy and reliable.

(C) As far as the circumstance (iii) above is concerned, this circumstance lacks credibility and cannot be treated as a substantive piece of evidence. The finding of mobile number 8291861682 of absconding accused Khalim in the call log of the mobile number of the Appellant itself would not be an incriminating circumstance against the Appellant to base conviction. Learned counsel appearing for the appellant has relied on a judgment of the Supreme Court in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, , wherein in para 21 of the said judgment, the Supreme Court has observed that:

As rightly observed by the High Court it shows that "Shaukat and Afsan were talking between the lines. Afsan was scared." An inference can be drawn that she was concerned about the safety of Shaukat and that she was aware that Shaukat and Afzal did something that attracted police surveillance. But from this circumstance alone, no inference can be drawn with a reasonable degree of certainty that she was having knowledge of the plan to attack the Parliament

before it happened. The scanty evidence on record does not justify her conviction either on the charges framed against her or u/s 123 IPC for which she was held guilty by the trial court. The High Court's view is unexceptionable.

Thus, it has been held by the Supreme Court that appearance of mobile number of the accused person on the mobile phones of other accused persons or witnesses cannot by itself be termed as a circumstance alone and no inference can be drawn with a reasonable degree of certainty that the accused was having knowledge of the plan to attack the parliament before it happened. It has been further observed that the scanty evidence on record does not justify the conviction either of the charge framed against the appellant or u/s 123 of IPC for which she was held guilty by the Trial court.

Therefore in the present case, mere appearance of the mobile phone number of the absconding accused Khalim on the mobile phone of the appellant itself cannot be treated as a substantive piece of evidence which would lead to the conviction of the appellant and in my view in the absence of any other substantive and cogent evidence produced by the prosecution, the conviction of the appellant cannot be upheld.

21. The first and second circumstances mentioned above cannot be considered to be relevant either separately or collectively for basing conviction of the Appellant u/s 363 of the Indian Penal Code. As far as the third circumstance is concerned, it cannot be solely relied upon in view of the observations made by the Supreme Court in the case of State (N.C.T. of Delhi) v/s. Navjot Sandhu @ Afsan Guru (supra).

22. On the basis of rickety evidence, the prosecution has failed to establish, beyond reasonable doubt, the involvement of the Appellant in the present crime. I, thus, find that the chain of circumstances put forth by the prosecution is not complete which excludes every hypothesis of the innocence of the accused and the chain is not complete to the effect that the only inference which can be drawn is that, it is the Appellant and the Appellant alone who had committed the crime. The other links of evidence are also absent in the present case. Thus on appreciation of entire evidence laid by the prosecution, according to me, the prosecution has failed to prove the offence charged u/s 363 of the Indian Penal Code against the Appellant beyond reasonable doubt. The Appellant therefore is entitled to be given the benefit of doubt and is acquitted from the charges framed against him.

23. Accordingly, the Criminal Appeal preferred by the appellant is allowed and the order of conviction and sentence of the appellant passed by the learned Trial Court by the impugned judgment and order dated 25 July 2012 u/s 363 of the Indian Penal Code is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged. Fine, if any, paid by the Appellant be refunded to him. The Appellant be released from jail forthwith, if not required in any other case.