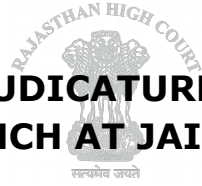




[2023/RJJP/002625]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



D.B. Criminal Appeal No. 785/2016

Nirbhay @ Natto S/o. Shri Fatehsingh, R/o. Reta, Police Station,
Kathumar, District Alwar (Rajasthan) (At present confined in
District Jail, Alwar)

----Appellant

Versus

State Of Rajasthan Through P.P.

----Respondent

Connected With

D.B. Criminal Appeal No. 867/2016

Anil Kumar S/o. Pooran, R/o. Noorpur, Police Station, Kathumar,
District Alwar (At present lodged in the District Jail, Alwar)

----Appellant

Versus

State Of Rajasthan Through P.P.

----Respondent

For Appellant(s)	:	Mr. Kapil Gupta with Mr. Chitransh Saxena, Mr. Adarsh Singhal, Ms. Nidhi Sharma, Ms. Anisha Yadav in Criminal Appeal No.785/2016 & Mr. Ashvin Garg in Criminal Appeal No.867/2016
For State(s)	:	Mr. Javed Choudhary, Addl.G.A.
For Respondent(s)	:	None present

**HON'BLE MR. JUSTICE PANKAJ BHANDARI
HON'BLE MR. JUSTICE BHUWAN GOYAL**

Judgment

JUDGMENT RESERVED ON :: 13/02/2023
JUDGMENT PRONOUNCED ON :: 28/02/2023

1. The appellants have preferred these criminal appeals against the judgment dated 22.06.2016 passed by the Special Judge, SC/ST (Prevention of Atrocities) Cases, Alwar in Sessions Case



No.92/2013 whereby accused appellant – Nirbhay @ Natto has been convicted for the offence under Section 302/34 IPC and accused appellant – Anil Kumar has been convicted for the offence under Section 302 IPC and both were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- each, in default of payment of fine, to further undergo 1 year simple imprisonment.

2. Succinctly stated the facts of the case are that on 27.04.2013 complainant–Jagdish Prasad Verma submitted a tehriri report (Ex.P-1&2) at Police Station, Kathumar, District Alwar, upon which, an FIR bearing No.166/2013 has been registered for the offences under Section 364 IPC and Section 3(2)(v) of the SC/ST Act. It was submitted in the report that on 23.04.2013 his son Amit Verma, who is a Teacher in Government Senior Secondary School, Jodhpura (Kathumar) went on the motorcycle of the complainant and that he was called by Anil Kumar at Teetpuri Bus Stand. It is also mentioned in the complaint that at about 09:58 p.m., he received a message from his son's mobile No.8058854429 that his son is with them and if he want to see him alive, then till 09:00 a.m., he has to arrange Rs.5 Lacs. It is also mentioned in the complaint that he did not take the matter seriously as it was received from his son's mobile. On the next morning also, he received a missed call from his son's mobile and upon waiting till evening of 24.04.2013, he lodged a missing person report (Ex.P-4) in the police station.

3. It is mentioned in the complaint that his son was abducted by Anil Kumar, Bobby, Rakesh, Dinesh and Sanjay and other three or more persons and that a ransom of Rs.5 Lacs was demanded



from him. After receiving the complaint and concluding the investigation, the police submitted charge-sheet against the present accused appellants for the offence under Sections 364, 302, 120-B IPC and Section 3(2)(v) of SC/ST Act. Investigation was kept pending against co-accused-Bobby, Rakesh, Dinesh, Sanjay, Rahul Singh and Tinku @ Hemant under Section 173(8) Cr.P.C. Learned trial Court framed charges against the accused appellants for the offence under Sections 364, 302 IPC and Section 3(2)(v) of the SC/ST Act. As many as 21 witnesses were examined and 41 documents were exhibited on behalf of the prosecution and in defence, statement of complainant-Jagdish Prasad was exhibited as Ex.D-1. Explanation of the accused appellants was recorded under Section 313 Cr.PC. The trial Court after hearing both the parties vide its judgment dated 22.06.2016 acquitted the appellants for the offence under Section 364 IPC and Section 3(2)(v) of the SC/ST Act and convicted appellant-Nirbhay for the offence under Section 302 read with Section 34 IPC and appellant-Anil Kumar for offence under Section 302 IPC.

4. It is contended by counsel for the appellant - Nirbhay that he was neither named in the FIR nor any of the witness except Investigating Officer has uttered his name in the evidence recorded before the trial Court. It is also contended that without there being an iota of evidence, the trial Court has convicted appellant - Nirbhay for the alleged offence.

5. It is contended by the counsel for appellant - Anil Kumar that as per the written report (Ex.P-2), a message was received on the same day when Amit went missing and the demand of ransom was also made on the same day and he also received a



missed call from Amit's phone on the next morning. However, in the missing person report (Ex.P-4), which was lodged on 24.04.2013, there is no mention about the names of the accused nor is there any mention about demand of ransom and missed call. It is also contended by the counsel for the appellant that the mobile phones were not seized and the call details have not been exhibited before the Court to establish that messages/calls were received by the complainant from his son's mobile. It is further contended that the trial Court has disbelieved the theory of demand of ransom and of abduction. It is also contended that the case of the prosecution rests on circumstantial evidence and there is no last seen evidence to connect the accused-appellants with the crime. It is argued that the trial Court has passed the impugned judgment of conviction only on the basis of recovery of dead body and an axe at the instance of appellant – Anil Kumar.

6. It is contended that the written report (Ex.P-2) is doubtful and there is clear indication that the Investigating Officer has suppressed the original written complaint and the same was replaced by the written report. This was done because in the police proceedings drawn below the written report, no time has been mentioned and Sarjeet Singh (PW-11), Investigating Officer has admitted in his cross-examination that it is not mentioned as to at what time the written report was entered. This witness has also admitted that in the report, no time is mentioned after "karyavahi police". It is also contended that the prosecution has not placed on record the copy of *Rojnamcha* Report No.765 dated 27.04.2013 to establish that the report was submitted on 27.04.2013.



7. It is argued that the FIR was sent to the Magistrate on 29.04.2013 and the time gap between the submission of the report and sending it to the Magistrate, afforded time to the police to replace the report. It is also contended that if the written report (Ex.P-2) would have been submitted on 27.04.2013 at 3:15 p.m., the police would have come into motion on the same day and have recorded the statement of complainant- Jagdish Prasad (Ex.D-1). There is no reason coming forth as to why the statement of complainant, who was present in the police station, was not recorded on 27.04.2013. It is further contended that in written report (Ex.P-2), complainant has mentioned that some of the villagers had seen the deceased with the accused-appellants on 23.04.2013, but the police neither recorded the statement of these villagers nor any investigation was made from them.

8. It is argued that the written report appears to have been submitted on 28.04.2013 after discovery of the dead body and it was ante-dated on 27.04.2013 with oblique motive to falsely implicate the appellants by concealing true facts. It is also contended that the missing person report (Ex.P-4) does not contain any allegations with regard to the demand of ransom, with regard to the names of the persons with whom the deceased was last seen and it also does not name the villagers, who had seen the deceased with the appellants and other persons. If the complainant had received messages and demand of ransom, there was no reason for filing a missing person report, rather, he should have filed the FIR at the first instance. It is further contended that the recovery memo of the dead body of the deceased has not been placed on record. If the dead body would have been



recovered at the instance of the accused-appellants, then the signatures of the appellants must have appeared on the recovery memo and the same should have been placed on record.

9. It is also contended that the information given under Section 27 of the Evidence Act is very vague and unspecific, which has been prepared by the Investigating Officer just after the arrest of the accused-appellants. The details of the well where it was located were not given in the alleged information memo. The prosecution has thus failed to prove any such specific information given by the accused-appellants, which relates to the discovery. It is also contended that complainant - Jagdish Prasad (PW-1) has admitted in his cross-examination that when he reached the well, there was a crowd and the dead body was taken out of the well in his presence and that he recognised the dead body. However, from perusal of the record, it is evident that there is no signature of the complainant on the recovery memo.

10. It is next contended by counsel for the appellants that Dr. Gunjan Sharma (PW-15) has admitted that the accused-appellants were not present at the place of recovery of the dead body. The prosecution has not examined any witness to corroborate the fact that the dead body was recovered in presence of the accused-appellants. Sabu Jat, owner of the well, from which the dead body was recovered, was not examined by the prosecution. With regard to pointing out to the place where the offence was committed, it is contended that the same does not tantamount to discovery of fact, as the disclosure was made on 29.04.2013 whereas, the place was already known to the police, as the recovery of dead body was made on 28.04.2013.



11. It is next contended by the counsel for the appellants that the Investigating Officer has recovered an axe and a handkerchief. The Investigating Officer was not sure as to the manner in which the offence was committed. It is also contended that the Investigating Officer has made fake recovery. Ex.P-28 is the information memo under Section 27 of Evidence Act about two sims and Ex.P-17 is recovery memo of two sims of Idea and Airtel Companies belonging to the deceased. The fake recovery is established from the fact that two sims of Idea and Airtel Companies were already shown as recovered vide Ex.P-7 – seizure memo of one leather purse from the part of the deceased prepared on 28.04.2013. The above clearly shows that the Investigating Officer was bent upon to falsely implicate the accused-appellants.

12. It is next contended that false memos were prepared by the Investigating Officer. As per the Investigating Officer, Sarjeet Singh (PW-11), the dead body was recovered from the well of Sabu Jat, the recovery memo of dead body was not prepared and there is no witness to the alleged recovery. The site plan (Ex.P-15) was prepared on 28.04.2013 at 12:30 p.m. in the jungle of Noorpur, however, memo of *Panchayatnama* of dead body (Ex.P-6) was prepared on 28.04.2013 at 5:30 p.m. in jungle of Titpuri and not in jungle of Noorpur and so, both were not prepared simultaneously. The *Panchayatnama* (Ex.P-6) was prepared under Section 174 Cr.P.C. and not for offence under Sections 364 & 302 IPC. If the report was already with the police, there is no reason why the *Panchayatnama* was not prepared for offences under Sections 364 & 302 IPC. The description of corpse and



identification memo of dead body was prepared at the place of the incident i.e. near the well of Sabu Jat. Thus, in all these memos, the location of the dead body has been shown at different places.

13. With regard to the discovery of Samsung mobile instrument, it is contended that the prosecution has utterly failed to lead any evidence that the said mobile belongs to deceased-Amit Kumar. No identification of the mobile instrument was got conducted from Jagdish Prasad (PW-1) and he has also not stated in the missing person report (Ex.P-4) that the deceased was possessing a Samsung mobile instrument. In this regard, it is contended that Sarjeet Singh (PW-11) has admitted that in the investigation, it was not revealed that mobile number 8058854429 was in the name of deceased Amit. It is contended that yet another important thing, is that a crowd collected at the place of incident and the villagers forcefully took away the dead body. If the statement of Investigating Officer, Sarjeet Singh (PW-11) is to be believed, then as to from where the dead body was recovered from the villagers is also not evident from the evidence on record.

14. It is contended that from perusal of seizure memo of leather purse (Ex.P-7), it is evident that four coloured photographs of four different girls were found in the purse of the deceased. The prosecution has failed to explain as to why the deceased had kept the photographs of four different girls. The Investigating Officer has not even examined these girls to prove as to how these photographs came in the hands of the deceased. It is also contended that the photographs of the girls which were found in the purse were not related to the deceased. The possibility that the father refused to perform the marriage of the deceased with



the girls whose photographs were found in the purse and on refusal being made, the deceased committed suicide cannot be ruled out.

15. Learned Additional Government Advocate appearing for the State has admitted that the name of appellant-Nirbhay appears only in the statement of Investigating Officer and that nothing has been recovered from him. There is not a single witness, who has named appellant – Nirbhay or has shown his presence at the time of occurrence. With regard to appellant-Anil Kumar, it is contended that in the report lodged by the complainant, name of appellant – Anil Kumar is mentioned. There is recovery of axe and a handkerchief from him and that the trial Court after considering the entire evidence, has rightly concluded that accused appellant-Anil Kumar is guilty of the said offence.

16. We have considered the contentions and have carefully perused the impugned judgment passed by the trial Court.

17. Learned trial Court has come to the conclusion that there is no evidence that appellant – Anil Kumar and other co-accused abducted deceased Amit Verma. The trial Court has also come to the conclusion that there is no evidence that deceased Amit Verma was murdered because he belonged to SC/ST Category. Learned trial Court has thus acquitted the accused-appellants for offences under Section 364 IPC and under Section 3(2)(v) of the SC/ST Act. It is pertinent to note that Amit went missing on 23.04.2013 and a missing person report was filed on the next day i.e. 24.04.2013 by the father of the deceased. In the missing person report, there was no mention about the demand of ransom and no allegation was levelled against any person. From perusal of the



written report (Ex.P-2) dated 27.04.2013, it is not ascertained as to at what time this written report was received in the police station. No *Rojnamcha* has been exhibited to establish that the complainant came to the police station to lodge the report. In the report, there is specific allegation on appellant – Anil Kumar and on 3-4 other persons with regard to abduction and with regard to demand of ransom. Time has also been mentioned when the message was received from the phone belonging to Amit. However, Investigating Officer has not cared to place on record the messages received on the mobile. No effort has been made by the Investigating Officer to collect the call detail report to establish that calls or messages were made from the phone belonging to deceased-Amit to the phone of the complainant, to establish the demand of ransom and also to establish that deceased was abducted by the appellants and other persons.

18. In the complaint, names of Anil, Bobby, Rakesh, Dinesh and Sanjay have been mentioned. If this report is considered to be given by the complainant on 27.04.2013 and if this report is considered to be correct, then on the date when Amit went missing i.e. on 23.04.2013, a message was received by the complainant with regard to abduction and demand of ransom and on the next date, a missed call was also received on his phone from his son's mobile, however, this fact is not mentioned in the missing person report lodged by the complainant on 24.04.2013 at 6:30 p.m. The complainant has not been able to explain as to why the names of the appellants and other persons mentioned in the report dated 27.04.2013 were not mentioned in the missing person report. This written report was sent to the Magistrate on



29.04.2013. Prior to the sending of the report to the Magistrate, the body was recovered on 28.04.2013, thus the possibility that the written report was given after the recovery of the dead body was ante-dated and was given after the recovery of the dead body cannot be ruled out, as no time is mentioned after the *karyavahi* police in Ex.P-2. If the written report dated 27.04.2013 was actually given at 3:15 p.m., on the same day, the police would have come into action and would have at least recorded the statement of the complainant. From the perusal of statement of the complainant recorded under Section 161 Cr.P.C. (Ex.D-1), it is apparent that the same was recorded on 28.04.2013. Thus, the possibility of the report being ante-dated cannot be ruled out.

19. It is also evident to note that in the written report (Ex.P-2), the complainant has mentioned that some of the villagers have seen the deceased with accused-appellants on 24.03.2013, though investigation has been done in this regard, but no witness has come forth to establish last seen theory. From perusal of the judgment, it is also evident that the Court has passed the order of conviction on account of recovery of the dead body on 28.04.2013 at the instance of the accused-appellants. The other ground for conviction is the recovery of axe, motorcycle and mobile sims.

20. As far as recovery of dead body at the instance of accused appellant – Anil Kumar is concerned, it may be noted that the information given by him under Section 27 of the Evidence Act, was given at 11:15 a.m. on 28.04.2013. In the information given, it was merely mentioned that I can get the body recovered from the well. There was no mention about the place where the well was situated and the person to whom the well belonged. As per





the Investigating Officer - Sarjeet Singh (PW-11), dead body was recovered from the well of Sabu Jat. However, no recovery memo of the dead body was prepared and there is no witness to the alleged recovery. From perusal of *Panchayatnama* (Ex.P-6), prepared under Section 174 Cr.P.C., it is apparent that it was not prepared for the offence under Sections 364 & 302 IPC. From the evidence of Investigating Officer-Sarjeet Singh (PW-11), it is also evident that after the body was recovered from the well, the villagers snatched the body from the police and took it away. As to from where the body was recovered is not evident from the perusal of the evidence, as from the site plan, it was in the jungle of Noorpur, however, *Panchayatnama* (Ex.P-6) of dead body was prepared in the jungle of Titpuri and not in the jungle of Noorpur. Thus, the location of the dead body is shown at three different places; (i) near the well of Sabu Jat, (ii) in the jungle of Noorpur and (iii) in the jungle of Titpuri. It is also evident from the statement of Investigating Officer - Sarjeet Singh (PW-11) that report was also lodged against the villagers, who have taken away the dead body. If the statement is to be believed that a crowd came near the well and took away the dead body, the chances of any articles being recovered from the place of incident was thus remote.

21. From the perusal of the record, it is also evident that the Investigating Officer was not sure as to the manner in which offence was committed as he has recovered an axe and a handkerchief. The axe was also not sent for FSL to establish that the same was used to cause injury to the deceased. No sharp injury was found on the person of the deceased.





22. The fact that the Investigating Officer was bent upon to implicate the accused-appellants is also evident from the fake recovery of two sims vide Ex.P-17 and information that was taken from accused under Section 27 of the Evidence Act (Ex.P-28) with regard to two sims of Idea and Airtel Companies. The fact that fake recovery was made is established from perusal of seizure memo of one leather purse (Ex.P-7) from the pant of the deceased, which was prepared on 28.04.2013. Two sims of Idea and Airtel Companies were already recovered vide Ex.P-7. This clearly shows that the Investigating Officer had made a fake recovery of the sims. The prosecution has further failed to lead any evidence that the mobile belonged to the deceased and no identification of the mobile was got conducted by the Investigating Officer. Investigating Officer - Sarjeet Singh (PW-11) has also admitted that in the investigation, it was not revealed that mobile No.8058854429 was in the name of the deceased.

23. The present case rests on circumstantial evidence. There is no last seen evidence. The fake recoveries have been made by the Investigating Officer. No call detail records have been produced with Certificate under Section 65B of the Evidence Act to establish that calls were made by the appellants to the father of the deceased claiming ransom. The recovery of the dead body at the instance of the appellant- Anil Kumar is not established as there is no recovery memo of the dead body and from the evidence of the doctor, who had conducted the postmortem report, it is clear that the accused-appellants were not present at the time when the dead body was recovered. The probability of the written report (Ex.P-2) being ante-dated cannot be ruled out as the Investigating





Officer has made fake recovery of sims after the same were already recovered on the date when the dead body was recovered.

24. Yet another possibility which appears from perusal of the evidence is the recovery of four photographs of girls vide Ex.P-7 which had names of the girls and their fathers mentioned on them. All these girls, as per the Investigating Officer belonged to Alwar and were between the age group of 18 to 25 years. As per the complainant, these girls were not related to his son. As to why these photographs were in the purse of the deceased has not been properly investigated by the Investigating Officer. The Investigating Officer has not recorded the statement of these girls and has not investigated from the complainant as to how the photographs of the girls came in the possession of the deceased. There can be a number of innumerable possibilities which we need not go into as it was for the prosecution to establish that the accused alone had committed the offence.

25. As far as conviction of appellant – Nirbhay is concerned, from perusal of the entire evidence on record, it is clear that his name does not appear in the evidence of any witness except the Investigating Officer. There is not an iota of evidence against him and the learned trial Court has not assigned any reason for convicting appellant – Nirbhay. We, therefore, deem it proper to allow the appeals and set aside the impugned judgment of the trial Court to the effect of sentencing the accused appellant – Nirbhay for the offence under Section 302 read with Section 34 of IPC and appellant – Anil Kumar for the offence under Section 302 IPC.



26. The appeals of the appellants are accordingly, allowed. The appellants are acquitted of the charges levelled against them. The appellants be set at liberty forthwith, if not required in any other case.

27. Appellants are directed to furnish personal bond in the sum of Rs.50,000/- each and a surety bond in the like amount in accordance with Section 437-A of Cr.P.C. before the Registrar (Judicial) within two weeks from the date of release to the effect that in the event of filing of Special Leave Petition against this judgment or on grant of leave, the appellants on receipt of notice thereof, shall appear before the Hon'ble Apex Court. The bail bond will be effective for a period of six months.

28. Since the Court below has convicted appellant – Nirbhay without there being an iota of evidence and appellant – Nirbhay has to remain behind bar for 10 years, judgment of the Officer be marked as below standard.

(BHUWAN GOYAL),J

(PANKAJ BHANDARI),J

SUNIL SOLANKI