PETITIONER:
STATE OF WEST BENGAL

Vs.

RESPONDENT:
MIR MOHAMMAD OMAR & ORS.

DATE OF JUDGMENT: 29/08/2000

BENCH:
R.P.Sethi, K.T.Thomas

JUDGMENT:

J U D G M E N T THOMAS, J. A young businessman ofCalcutta was abducted and killed. The kingpin of the abductors and some of his henchmen were later nabbed and were tried for the offences. The trial court convicted them under Section 364 read with Section 34 of the Indian Penal Code, but not for murder, and sentenced them each to rigorous imprisonment for 10 years. A Division Bench of the Calcutta High Court rejected the State appeal against the acquittal for murder and reduced the sentence to a short term imprisonment restricting it to the period which the convicted persons had already undergone. The State of West Bengal as well as the convicted persons filed these appeals against the said decision of the Calcutta High Court, the former mainly challenging the acquittal for murder charge and the latter challenging the very conviction entered against them.

Narration of material facts of this case, in a brief manner, is necessary before considering the contentions raised. The victim of the offence was one Mahesh Kumar Aggarwal ('Mahesh' for short). He was doing some small business at Bow Bazar area (Calcutta). He was a bachelor aged 29 and he was residing with his sister Anushila Devi (PW-9) in an apartment situated on the Westen Street which was re-christened as Banbuk Gali. First accused Mir Mohammad @ Omar and 7th accused Sajid Ali were friends and associates in many activities indulged in at Bow Bazar area and the other accused were all the henchmen of Omar.

Sajid Ali (7th accused) wanted Mahesh to part with a sum of Rs. 50,000/-, almost as a ransom, for allowing him to deal with his business unobstructed. But the deceased did not capitulate to the demand and such refusal led to a dig between the two. It seems Mahesh scored an upper hand in the dig. The above episode happened about 10-12 days before the death of Mahesh.

The night of 4.11.1984 became horrendously eventful for Mahesh. The events started with the gate-crashing made by some assailants led by A-7 Sajid Ali, into the apartment of Anushila Devi (PW-9) in search of her brother Mahesh. Having failed to see him there the assailants left the apartment after hurling threatening words at the housewife. About an hour later, Mahesh reached the apartment and was told by his sister of what happened. Mahesh got frightened and left the house lest the assailants might come back to that place.

By about 11.00 P.M. Mahesh reached the residence of his friend Abdul Aziz (PW-4) and took asylum therein. But hardly an hour passed he heard the sound of knocking at the door and when it was opened they saw one fruit-seller (by name Moin) standing at the doorstep for conveying a message that A-1 Omar was waiting outside to see Mahesh. When he stepped outside he saw A-1 Omar who then asked him to accompany him. But Mahesh refused to do so. Then A-1 Omar forcibly took him to a rickshaw to be taken away from that site, but Mahesh managed to escape therefrom and ran away towards Giri Babu Lane.

Mahesh reached the place where PW-5 (Mohd. Sayeed) was residing on Giri Babu Lane and sought asylum therein. He narrated to PW-5 all what had happened till then. He was allowed to sleep in that room, and concealed himself beneath the Chowki of that room.

The time was about 2.30 A.M. when there was knocking at the door of PW-5's room. He opened the door and found A-1 and other accused standing just outside. Four of the accused sneaked into the room and made a prowl for Mahesh and traced him out in that snoop. The victim was dragged out of the room. A-1 yelled at the victim: "You escaped earlier. Now let me see how you would escape again."

Hearing the commotion some of the neighbours woke up from sleep. PW-6 (Mohd. Idris) went out to see what happened and then saw some of the assailants (including the 7th accused in this case) forcibly dragging Mahesh towards the Central Avenue. In the course of such towing A-1 was showering lathi blows on Mahesh saying "I will beat you and kill you like a pig". A-7 was heard saying, "As you did not give the money which we asked for we would finish you today." They took Mahesh away from the sight and ken of the residents of that area. Thereafter, Mahesh was not seen alive by his kith and kin or his friends.

On the same night Mohd. Sayeed (PW5) went to Bow Bazar Police Station and lodged a complaint regarding the abduction of Mahesh. An FIR was registered on the strength of the said complaint. On the next morning PW-9 Anushila Devi (sister of Mahesh) told her nephew Pawan Kumar(PW-29) about the abduction of Mahesh. Sometime later, Pawan Kumar learned that his uncle Mahesh was admitted in Islamia Hospital. So he rushed to that hospital and made inquiries and came across the mangled body of his uncle lying in the hospital with his head tonsured.

PW-3 (Dr. Debabrata Chaudhary) a Reader in Forensic Medicine conducted post-mortem examination on the dead body of Mahesh and expressed his opinion that Mahesh was murdered. Subsequently, all the accused were arrested at different times. Some articles were recovered on the strength of the statements elicited from the accused. After conclusion of the investigation final report was laid against the seven accused. The case as against the 7th accused Sajid Ali was split up due to some reasons and hence the trial proceeded as against the remaining accused.

There is abundant evidence for showing that Mahesh was abducted by the accused on the night in question. It is unnecessary to dwell upon that aspect in this appeal, particularly since the trial court and the High Court have

held that issue in unison and since no serious attempt was made before us for disrupting that finding. Sri P.S. Misra, learned Senior Counsel contended that there would only be a case of abduction simplicitor, even assuming that the above position stands unassailable, but such abduction by itself is not punishable by any provision of the Penal Code. We are not inclined to consider the said contention in an academic perspective now, for, prosecution in this case has put forward a case of abduction for the purpose of committing murder. It was that case which was found against the accused by the trial court which finding remained undisrupted by the High Court.

Abduction takes place when a person is compelled by force (or such person is induced by any deceitful means) to go from any place. In this case Mahesh was dragged away by the accused from two places, first at Chittaranjan Avenue and when he escaped from the grip of the abductors and perched himself in a hide out selected by him at Giri Babu Lane, from there also he was hauled out.

Section 364 IPC says, whoever abducts any person "in order that such person may be murdered or disposed of as to be put in danger of being murdered" he commits the offence punishable under the Section. So the important task of the prosecution was to demonstrate that abduction of Mahesh was for murdering him. Even if the murder did not take place, the offence would be complete if the abduction was completed with the said objective. Conversely, if there was no such objective when the abduction was perpetrated, but later the abductors murdered the victim, Section 364 IPC would not be attracted, though in such a case the court may have to consider whether the offence of culpable homicide (amounting to or not amounting to murder) was committed.

If the words attributed to the abductors can be believed we have no doubt that the abduction was done for the purpose of finishing him off. Knowing this position well, Sri P.S. Misra, learned Senior Counsel made a frontal criticism on the aforesaid evidence and contended that it is easy for interested witnesses to put such words in the mouth of the accused in order to aggravate the dimension of the offence. No doubt, witnesses can do so. But the question here is whether the aforesaid version of those witnesses was a concoction to embroil the abductors into the cobweb of a serious offence like Section 364 IPC. The reliability of that part of the evidence can be tested from different angles.

First is, even in the FIR PW-5 had quoted those words as spoken to by A-1. It must be noted that when FIR was given PW-5 had no reason to believe that Mahesh was not alive. If Mahesh had come back alive it is doubtful whether police would have seriously followed up the FIR. Next is, the temper which the assailants exhibited in the house of the deceased's sister (when she was the sole inmate present therein), is broadly indicative of the truculence of the intruders that they went there with some definite purpose. Mahesh was once caught by them on that night itself by PW-4 and then he was badly handled by them. If their intention was only to inflict some blows on the victim they would have stopped with what they did to him at that stage. But when Mahesh struggled and extricated himself from their clutches and escaped to another place at Giri Babu Lane these accused did not stop and they persisted in prowling for their prey

and succeeded in tracing him out from that different area and hauled him out violently. Such repeated chase for Mahesh could, in all probabilities, be for his blood. Thus, all the broad features of this case eloquently support the version of the witnesses to conclude that the words attributed to the accused were really uttered by them.

For the aforesaid reasons, we have no difficulty to conclude that all the accused abducted Mahesh in order to murder him.

Now we have to consider the more serious aspect whether Mahesh was murdered by the abductors. On this aspect Sri P.S. Misra led his most vocal contention that the identity of the corpus delicti has not been established in this case. In other words, the contention is that the prosecution failed to establish that the dead body on which PW-30 (Dr. Debabrata Choudhury) conducted the autopsy could not have been that of Mahesh.

Learned counsel highlighted two seeming inconsistencies in the evidence to bolster up his contention on the above score. First is that PW-8 (Dr. Adhikari) who saw the dead body first estimated the age as 40, whereas Mahesh was only 29 according to his own kith and kin. Second is that Dr. Adhikari had noted that the penis of the dead body had undergone "religious circumcision".

The argument advanced by Sri P.S. Misra, learned senior counsel on the above material appeared, at the first blush, formidable. But on a closer scrutiny the said contention turned out to be very feeble. It must be pointed out that the doctor who conducted post-mortem examination (PW-30 Dr. Debabrata Choudhury) did not find any evidence of such circumcision on the dead body. That doctor is a specialist in Forensic Medicine and was a senior person. On the other hand, PW-28 (Dr. Adhikari) was only a stripling in the profession who had just completed his internship after his graduation. He said in his evidence that when he examined the patient he found "the glands penis exposed; foreskin was rolled back; thus it appeared to be a case of early circumcision". We do not think that such a slipshod observation regarding such a vitally important identification mark can be taken as a seriously observed feature, particularly when PW-30, a senior doctor, did not notice any such thing. Similarly, the age estimated by this novice medical practitioner without conducting any medical tests in that regard is hardly sufficient to conclude that the dead body was that of a person aged 40. Even otherwise the approximation of the age made by looking at the dead body is not enough to offset the age spoken to by the kith and kin of the deceased.

On the other side, there is overwhelming evidence to show that the autopsy conducted on the dead body by PW-30 was that of Mahesh. We find little scope even to doubt the possibility of some other dead body being mistakenly treated as that of the deceased while conducting the post- mortem examination. PW-9 (Anushila Devi) sister of Mahesh, said that she saw the dead body of Mahesh before it was cremated and she had absolutely no doubt that it was her brother's. PW-29 (Pawan Kumar Agarwal) a nephew of Mahesh went to Islamia Hospital and it was he who first identified the dead body of his uncle. PW-4 (Abdul Aziz), PW-5 (Mohd. Sayeed), PW.6 (Mohd. Idris) and PW-11 (Mohd. Afjal) saw the same

dead body and they had no doubt at all that it was that of Mahesh.

The post-mortem report made by PW-30 (Dr. Debabrata Choudhury) shows that the victim was murdered. He noticed as many as 45 injuries on the dead body which included fracture of 5 ribs (2 to 6) on he left side towards sternal end, fracture of some of he fingers and extravasaion of blood on he night side of occipital region and also on he situs of the rib fractures. The remaining injuries included a few lacerated wounds, contustions and aberrations. There was just one minor incised wound on he left pinna. The right lung was congested. The doctor opined that death of that deceased had resulted from multiple injuries and injuries of vital organs and I was homicidal in naure.

The trial court made a fallacious conclusion regarding the death of the deceased on the premise that the public prosecutor did not elicit from the doctor as to whether the injuries were sufficient in the ordinary course of nature to cause death. The Sessions Judge concluded thus on the said issue: "There being no evidence on record to show that the injuries were sufficient in the ordinary course of nature to cause death, it cannot be said that the injuries noticed by the autopsy surgeon (PW-30) were responsible for causing the death of the deceased Mahesh."

No doubt it would have been of advantage to the court if the public prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach a wrong conclusion. Though not an expert as PW-30, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death. No sensible man with some idea regarding the features of homicidal cases would come to a different conclusion from the injuries indicated above, the details of which have been stated by the doctor (PW-30) in his evidence.

We have no doubt that homicidal death of Mahesh had happened on the same night of his abduction. Now we have to deal with another crucial issue. Having found that Mahesh was abducted by the accused in order to murder him and he was in fact really murdered very soon thereafter can the accused escape from the penal consequences of such murder. The trial court has stated on the said crucial issue thus: "From the discussions made by me in the earlier part of the judgement it would appear that the accused persons had forcibly taken away the deceased Mahesh from the premises at 29/2/2A, Giri Babu Lane, Calcutta. There is no iota of evidence to show that the deceased Mahesh was in the custody of the accused persons along from 2.30 A.M. to 5.45 A.M. of 5.11.86.....There is no evidence worth the name to show that the accused persons had carried the dead body of Mahesh to Islamia Hospital and then abandoned it at the Emergency Department."

The High Court unfortunately did not deal with this aspect at all. Learned judges made scathing criticism on the flaws incurred in the investigation and without any reference to the evidence confirmed the conviction passed by the trial court.

Before we consider the said crucial aspect we have to point out another important circumstance. Sri K.T.S. Tulsi, learned counsel who argued for the State highlighted the said circumstance that when A-1 Omar was interrogated by the Investigating Officer(PW-34) on 12.11.1986 he told the officer that "I have kept it (a full sleeve bush shirt) underneath the mattress on the ground in my club room". Pursuant to the said statement the shirt was recovered therefrom. It is marked as Ext.XV in this case. It is now in a torn condition. The statement attributed to A.1 Omar, and extracted above would fall within the purview of Section 27 of the Evidence Act. If it is believable, it would show that the said shirt was concealed by the said accused. We do not find any reason to disbelieve the evidence of the investigating officer regarding recovery of Ext.XV - shirt.

There are two significant features relating to the said shirt. One is that PW-5 said that he supplied a shirt to Mahesh on the same night when he found his wearing apparels shabby and torn. PW-5 said that when Mahesh was abducted from his room he was wearing that shirt and PW-5 identified Ext.XV as the said bush shirt. No explanation whatsoever was offered by A-1 Omar regarding Ext.XV (bush shirt) except a bare denial regarding it. We have no difficulty to believe the evidence of PW-34 on that score. It goes a long way in focussing at the first accused Omar for the murder of Mahesh.

The other feature has been highlighted by Sri K.T.S. Tulsi that the bush shirt was subjected to serological examination at the Forensic Sciences Laboratory and it was found stained with human blood (vide Ext.40 series). Sri Harsh Kumar Puri, learned counsel for the appellants in one of the appeals filed by the convicted persons, pointed out in his written submissions that the aforesaid circumstance (FSL test result on the shirt) was not put to the accused when they were questioned by the Sessions Judge under Section 313 of the Code of Criminal Procedure. When we scrutinised the records we noticed that no question was put to the accused on that score. Consequently we are disabled from using that feature on the shirt as a circumstance against the accused.

Even barring that, the following circumstances have now been well set against the accused: (1) Mahesh was abducted around 2.30 A.M. by the abductors proclaiming that he would be finished off. (2) The abductors took Mahesh out of the sight of the witnesses. He was then wearing a bush shirt Ext.XV. (3) Within a couple of hours the murdered body of Mahesh was found in Islamia Hospital without a shirt. (4) The bush shirt which Mahesh was wearing at the time of abduction was concealed by A-1 Omar.

The abductors have not given any explanation as to what happened to Mahesh after he was abducted by them. But the learned Sessions Judge after referring to the law on circumstantial evidence concluded thus: "On a careful analysis and appreciation of the evidence I think that there is a missing link in the chain of events after the deceased was last seen together with the accused persons and the discovery of the dead body of the deceased at Islamia Hospital. Therefore, the conclusion seems irresistible that the prosecution has failed to establish the charge of murder against the accused persons beyond any reasonable doubt."

The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

In this case, when prosecution succeeded in establishing the afore narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if accused would tell the court what else happened to Mahesh at least until he was in their custody.

During arguments we put a question to learned senior counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned senior counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases

where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra vs. The State of Ajmer (1956 SCR 199) the learned Judge has stated the legal principle thus: "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

In the present case, the facts which prosecution proved including the proclaimed intention of the accused, when considered in the light of the proximity of time within which the victim sustained fatal injuries and the proximity of the place within which the dead body was found are enough to draw an inference that victim's death was caused by the same abductors. If any deviation from the aforesaid course would have been factually correct only the abductors would know about it, because such deviation would have been especially within their knowledge. As they refused to state such facts the inference would stand undisturbed.

The Division Bench of the High Court instead of dealing with the circumstances of the case and issues involved made only some general comments and after castigating the investigating officers in severe language reached the final part of its judgment upholding the conviction under Section 364/34 IPC and reduced the sentence to the period which the convict had already undergone. The Division Bench used unkind remarks against the investigating officer saying "investigation of the case was perfunctory and suffered from serious lacuna and irregularity". Learned Judges of the Division Bench did not make any reference to any particular omission or lacuna in the investigation. Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation. Courts should bear in mind the time constraints of the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward

for giving evidence in criminal cases which are realities the police force have to confront with while conducting investigation in almost every case. Before an investigating officer is imputed with castigating remarks the courts should not overlook the fact that usually such an officer is not heard in respect of such remarks made against them. In our view the court need make such deprecatory remarks only when it is absolutely necessary in a particular case, and that too by keeping in mind the broad realities indicated above.

In the present case we have not come across any such serious flaw in the investigation which had affected the case or which would have impaired the core of the prosecution case justifying or warranting the pejorative remarks made by the Division Bench of the High Court against the investigating officers. In the result, we allow the appeal filed by the State and dismiss the appeals filed by the convicted persons. While maintaining the conviction of the offence under Section 364/34 IPC and restoring the sentence passed by the trial court on the accused we also convict the six appellants/accused of the offence under Section 302 read with Section 34 of IPC and impose a sentence of imprisonment for life on each of them. The sentences under all counts will run concurrently. We direct the Sessions Judge, Calcutta City, to take immediate steps for putting the convicted persons back in jail for undergoing the remaining portions of the sentences imposed by this judgement.