

A. F. R.

Reserved

Court No. - 40

Case :- JAIL APPEAL No. - 3367 of 2010

Appellant :- Pawan Mishra

Respondent :- State of U.P.

Counsel for Appellant :- V.P. Gupta, Vindeshwari Prasad

Counsel for Respondent :- A.G.A.

Connected with :

Case :- CRIMINAL APPEAL No. - 3490 of 2010

Appellant :- Dinesh Shahu and Kripal Sahu

Respondent :- State of U.P.

Counsel for Appellant :- Brijesh Kumar Mishra, Anita

Singh, B.N. Singh, M.P. Pandey, Phoolbadan Yadav, Sudhir Mehrotra, Swati

Agrawal Srivastava, Vishal Agarwal, Vishnu Shanker Gupta

Counsel for Respondent :- Govt. Advocate, Sudhir Mehrotra

Hon'ble Siddhartha Varma, J.

Hon'ble Umesh Chandra Sharma, J.

(Per: Hon'ble Umesh Chandra Sharma, J.)

(1) Heard learned counsel for the appellant, Sri Vindeshwari Prasad and the learned A.G.A for the State in Jail Appeal No. 3367 of 2010 and Sri Phoolbadan Yadav along with Sri Vishnu Shanker Gupta (Amicus Curiae) for the appellants and learned A.G.A. for the State in Criminal Appeal No. 3490 of 2010 and perused the material available on record.

(2) The instant appeal has been preferred against the judgement and order dated 13.04.2010 passed by Special Judge (D.A.A), Agra in S.T No. 121 of 2005 (State Vs. Pawan Mishra & Ors), arising out of Case Crime No. 356 of 2005, under Section 364A, 302/201 I.P.C, Police Station New Agra, District Agra whereby the accused-appellants have been convicted under Section 302 I.P.C sentencing them to undergo rigorous imprisonment for life. They were to pay Rs. 10,000/- each as fine. It was further provided that on default of payment of fine the appellants were to further undergo two years of additional simple imprisonment.

(3) The court further convicted the appellants under section 364-A I.P.C. and sentenced the appellants to undergo rigorous imprisonment for life and imposed fine of Rs. 5000/- on each of the appellants. Here again it was provided that in default of payment of fine the appellants would undergo one year additional simple imprisonment.

(4) The trial court has further convicted the appellants under section 201 I.P.C. sentencing the appellants to undergo 5 years of rigorous imprisonment and also imposed fine of Rs. 5,000/- and further provided that in default of payment of fine the appellants would undergo one year additional simple imprisonment. All the sentences were to run concurrently.

(5) **Brief facts of the case are** that informant Banwari Lal Sharma, s/o Rameshwar Lal Sharma resident of Gali Devghar P.S.- Devghar, District-Devghar, Jharkhand lodged an F.I.R. (Exhibit-Ka-15) on 27.06.2005 with the allegation that his nephew Pawan Mishra, s/o Vashudev Mishra, resident of Mausoli Bazar, Raniganj, P.S.- Raniganj, District- Bardhaman, West Bengal presently residing in the house of Natholi Ram Godala, Bizapur Road, District- Agra left Raniganj and came to Agra after killing his cousin there. It was stated in the F.I.R. that occasionally he used to come to the house of the first informant and also used to talk to the informant by his mobile no. 09219799101. In this conversation he also promised to provide job to the informant's nephew Amar @ Jivan Sharma, s/o Puranmal Sharma. Owing to this promise of Pawan Mishra on 11.06.2005, the informant's nephew Amar Sharma and a friend of his Victor @ Potan, s/o Vishnu Dev Varnwal, resident of Kanutola, District- Devghar, Jharkhand reached Agra and on 12.06.2006, Amar @ Jivan informed the first informant that he along with his friend had reached Agra and also informed the first informant about their meeting with Pawan Mishra. After 2-3 days had passed, Jeevan rang up the first informant and told him that there was no arrangement of any job. In response the first informant told him to come back. On 15.06.2005,

Pawan Mishra informed the appellant that he was sending both the boys back via Purva Express. When on 16.06.2005, the boys did not reach home at the given time then the first informant tried to talk to Pawan Mishra to inform him that the boys had not reached home. Pawan threatened the first informant that they would reach only when he would send them and informed that he had abducted both of them. On 17.06.2005, Pawan again informed via telephone that the boys will be released only after the ransom money was paid. On 18.06.2005, the first informant informed the Deputy Superintendent of Police, Devghar regarding the incident who in his turn wrote a letter to the Superintendent of Police, Agra, U.P. In the evening of 18.06.2005, Pawan Mishra demanded Rs. 7,00,000/- ransom via telephone and threatened that he would cut the boys into several pieces if the amount of ransom was not provided to him. On 20.06.2005, Pawan again asked via telephone and asked the first informant to reach Gwalior with the money. He also told him as to who was to be given the money would also be informed. Thereafter, the first informant without giving second thoughts came to Agra and contacted the District Magistrate, Agra who sent him to the Superintendent of Police, Agra. Since then the informant was searching for the boys but they could not be traced out. He requested the police to lodge an F.I.R. The first information report was lodged and also chik F.I.R. was prepared.

(6) Upon receiving the *Tehrir* (written information), a case bring Crime No. 356/05 under Sections 364 I.P.C was registered in Police Station- New Agra, District Agra, and *Chik* F.I.R Exhibit-Ka-3 was prepared and entry of the said F.I.R was made in G.D in Ex. Ka-4.

(7) After recovery of the dead bodies of the abducted deceased persons namely Victor @ Potan and Amar @ Jeewan Sharma, Sections 302 and 201 I.P.C were also added. The Investigating Officer prepared the recovery memo of the dead bodies and proved the same as Exhibit Ka-16. He also prepared Ex. Ka-17 when the two farm Shovels/Hoes and

plain soil were recovered. He also proved the map prepared by him as Ext. K-18.

(8) After completing the investigating he had submitted the charge sheets against all the three accused appellants and had proved them as Ext. Ka-19.

(9) Cognizance was taken on the charge-sheets and trial commenced in the Court of Sessions. From there the case was transferred for trial to the Court of Special Judge (Dacoity Affected Area), presided over by Sri Dileep Singh, who recorded oral evidence. After the closure of the prosecution evidence, the statements of the accused persons were recorded under Section 313 Cr.P.C, in which the accused persons denied the charges. The accused did not come up with any oral or documentary evidence in their defence. After conclusion of the trial and hearing of the arguments, the lower court below found the accused guilty for the commission of offences of under Sections 364A, 302 and 201 I.P.C and convicted and sentenced the accused persons.

(10) Prosecution has produced witnesses to prove the case. In brief evidence of witnesses is reproduced as under:

1. P.W.1 Dr. Amitabh, District Jail, Agra deposed on oath that on 28.6.2005 he was posted in Emergency Department of District Hospital, Agra. That day at 4 p.m. he had done autopsy of the dead-bodies of deceased Amar Sharma alias Jeevan son of Pooran. The dead body of one of the deceased, namely, Amar Sharma alias Jeevan alias was recognized by CP 345 Vijender and C.P. 982 Ram Rautang,P.S. New Agra, The deceased was about 22 years old who had died two weeks ago.

On **external examination** following facts were found. The body was rotten. The teeth were loose and the brain was in a fluid state. The tissues of the body were soft and loose (cracked) and in semi liquid state and had turned black in colour. There was mud all around the bodies. The neck muscles were partially in a fluid state. **The hyoid bone of the**

neck was found to be broken. The stomach of the deceased was stored. One kidney, the whole spleen, liver and some parts of the intestines were also stored.

Decay was present in the skin of the deceased.

In the **internal examination**, it was found that the brain and membranes were in liquid state, Chest and pleura were in liquid state, both lungs and heart were in liquid state, abdominal muscles and membrane were in a liquid state. Red stops were found in the stomach, gas was present in the chest and large intestine. It was soft and loose. Spleen and kidney had become soft. As the cause of death was not fixed the viscera was preserved. According to this witness P.W.1 the deceased had died in between 12.6.2005 and 15.6.2005. This witness recognized his signature and writing on Ext. A-1 and A-2, in both the Post mortem reports. During the course of cross-examination this witness admitted that he could not say as to how these two dead persons had died because their dead bodies were rotten and it was not possible to identify the ante mortem injuries. He admitted that he had mentioned the time of death about two weeks prior to the post mortem in which there may be possibility of three days variations. He admitted that the condition of the dead bodies were such that they were not easily identifiable. He had not mentioned any identification mark on the body of the dead bodies. Further he deposed in cross examination that temperature in the month of June remains 45 degree Celsius and decomposition starts after 24 to 36 hours after death. According to him the bone and flesh were not separated.

On the same day he did post-mortem of the dead-body of deceased Victor alias Potan. According to him the deceased was about 23 years old and had died about two weeks ago.

External Examination:-

There was decomposition in the body. The teeth in the socket were loose. The brain had changed to a fluid state. The tissues of the body had become soft and loose and had turned into a semi liquid state. The stomach and intestine were coming out of the stomach. There was soil on the body. The muscles of the neck were partially liquid. The neck (hyoid bone) was broken (from left side). Viscera was preserved. In Jar-'A' the stomach, in Jar-'B' the kidney, the whole spleen and the piece of intestine were kept in Jar-'C'. Salt solution was also kept. The genital skin had rotten.

Internal Examination:-

The brain and membranes were in liquid state, Chest wall was in a liquid state, both lungs and heart were partially in liquid state. The abdominal muscle and membranes were in a liquid state, red coloured spot were found in the stomach, gas was present in the chest and large intestine, liver was soft and loose. As the cause of death could not be ascertained, therefore, the viscera was preserved.

This Court is of the opinion that from the oral evidence it is established that after administering sleeping pills in lassi to the deceased persons when they became unconscious, they were strangled and thereafter were buried one by one. Thus it is obvious that the cause of death of the deceased persons was the breaking of their hyoid bones. Thereafter they were buried under the earth. In Ka-24 FSL Report Agra no poison has been found in the viscera and other parts of the body of the deceased persons. It is also noteworthy that no suggestion has been given to this witness that dead bodies were not of the alleged persons but of some other persons.

P.W.2 S.I. Satya Veer Singh has deposed that on 27.6.2005 he was posted as constable clerk in P.S. New Agra. He further deposed that on the basis of tahrir of the informant Banwari Lal Sharma written by Amit Kumar a case as Crime No356/2005 under Section 364-A IPC State

Vs. Pawan Mishra was registered and a chick no.224 was prepared. This witness has proved this chick FIR as Ex.Ka-3. Further he deposed that at 6.30 p.m. he had also prepared GD No.62. He also proved it by comparing it with the original GD as Ex.Ka-4. In cross-examination this witness deposed that he had given statement to the IO on 27.06.2005.

P.W.3 Anupam Sharma, SI deposed that on 27/28.6.2005 he was posted as SI at P.S. New Agra and had prepared inquest of deceased Amar Sharma @ Jivan and Victor @ Potan. This witness has proved inquest Ex.Ka-5 and related papers such as challan nash, photonash letter to RI and CMO as Ex.Ka-6 to Ex.Ka-9 and Ex.Ka-11 to Ex.Ka-14. In the cross-examination this witness admitted that skin and flesh of both the dead bodies were rotten. Bones were visible. There was no identification mark on the corpse. The flesh of nose, ear were also rotten.

It is noteworthy that no suggestion has been given to this witness that dead bodies were not of the alleged persons.

P.W.4 Banwari Lal Sharma son of Rameshwar Lal Sharma aged about 50 years resident of Vaijnath, P.S. Devghar, Jharkhand has deposed on oath that deceased Amar Sharma @ Jivan Sharma was his real nephew. Another deceased Potan @ Victor Barnwal was friend of his nephew. Accused Pawan Mishra who was present in the Court is his nephew (sister's son) who after committing murder of his cousin (brother) in Raniganj Bardwan, West Bengal had come to Agra. He used to visit the informant's house regularly. Pawan Mishra called the first informant's nephew Amar Sharma to Agra on the pretext of getting him a job. On 12.06.2005 Amar Sharma reached Agra with his friend Victor @ Potan. His nephew thereafter phoned up the first informant and told him that he and his friend had reached Agra and were with Pawan Bhaiya. When till 15.06.2005 the nephew could not get any job then P.W. 4 told his nephew to come back to Devghar on 15.06.2005. Pawan Mishra told P.W.4 on the phone that both the boys had been sent back by the Purva Express. When on 16.06.2005 they did not reach home on the scheduled

time, the P.W.4 was informed by Pawan Mishra that the children had not reached home yet. Then Pawan Mishra told the first informant that the children would reach only when he would send them. Further he told the first informant that he had kidnapped both the boys and after saying so the accused Pawan Mishra hung up. On 17.06.2005 Pawan Mishra called him up again and said that only if money was given to him would he release the children. On 18.06.2005 he informed DSP, Devghar about the incident who in his turn gave him a departmental letter in the name of the DSP, Agra. On 18.06.2005 in the evening Pawan Mishra again made a call that only if Rs. 7 lac were given would he release the children else he could cut them into pieces. Pawan Mishra used to talk through his mobile phone till the 15th June, 2005 and after 15.06.2005 he called from a P&T booth (STD). Pawan Mishra had again made a call on 20.06.2005 and had said that the money could be delivered in Gwalior. He had said that he would, ofcourse, tell later as to where and when the money would be given. Further this witness deposed that on 22.06.2005 he had left Devghar for Agra and had reached Agra and met the DM Agra and had given the application regarding the incident. The D.M. in his turn sent him to the SP, Agra. Thereafter he, with his companion, Munna Kumar, elder brother of the deceased Victor and others met the S.S.P., Agra and also gave him the departmental letter. Further, he deposed that he with other persons remained busy with the searching of the children. The S.S.P. asked him to report the matter at the PS New Agra. Resultantly on 27.06.2005 he presented a tahrir written by one Sri Amit Kumar on his direction on which a report was lodged in PS New Agra. This witness admitted that Amit Kumar had written what he had told him. This witness has admitted his signature on the tahrir which is exhibited as Ex.Ka-15. According to him IO had recorded his statement. On 27.06.2005 when he and his friends were searching his nephew and his friend with SHO PS New Agra on a government vehicle and were going from Deevani Cross Road to Khandari via Bhagwan Talkies, he found Pawan Mishra who was

coming from the side of the RBS College. On the pointing of the P.W.4 the Inspector saw Pawan Mishra for the first time. Seeing the police Pawan Mishra started running and the police chased him and ultimately caught him and told him that a case was registered against him and brought him to the police station and interrogated him. He admitted his guilt and also confessed that he with his friends Kripal Kumar Sahu and Dinesh Kumar Sahu had administered sleeping pills in lassi and thereafter has strangulated the two boys and had buried them in the temporary hut of Dinesh Sahu near Friends Apartment at Mau Road. When the present witness with the police and Pawan Mishra reached the house of Kripal Sahu and Dinesh Kumar Sahu they were found there. Pawan Mishra recognized them and confessed that he along with them had committed the murder. On the pointing of the accused persons they went to the hut of accused Dinesh Sahu where two shovels/hoes used for digging the earth were also recovered. For hiding the dead bodies, the floor was cemented. When the floor was dug the dead body of Victor appeared first and after some more digging the dead body of Amar Sharma @ Jivan Sharma was also found. Both the dead bodies were taken out and recognized. Police prepared inquest report and made him witness of the inquest. The police had made the recovery memo by taking two shovels and plain soil from the spot. IO had recorded his statement on 28.06.2005.

The witness has been cross-examined by the accused persons Dinesh and Kripal. In the cross-examination this witness admitted that the tahrir was written by Amit Kumar while sitting in the hotel President. On 27.06.2005 he knew that accused Pawan Mishra lives in the house of Natholi Ram at Bichpuri Road. He deposed that Pawan Mishra himself had taken the deceased from the railway station. He had deposed that he had faith in Pawan and had thought bonafidely that he would help the boys in getting the jobs and, therefore, he had sent the two boys. This witness admitted that he had come to Agra on 23.06.2005 and had searched for the accused and the deceased at his own level while staying

at Hotel President. Further he deposed that he was not knowing the accused Dinesh and Kripal prior to the recovery of the dead bodies. He admitted that he had visited the place of occurrence twice, once at the time of recovery and again when IO was preparing the site plan. He admits that at the time of recovery he saw that there was under garment on the body of deceased Victor @ Potan but the dead body of deceased Amar @ Jivan was naked. According to him Pawan Mishra had informed that the hut was of Dinesh. Dinesh and Kripal had admitted before him and the police that they had killed both the boys. Accused Pawan Mishra had not cross-examined the witness in spite of many opportunities being given by the court.

P.W.5 Sawar Mishra has deposed that on 27.06.2005 he had come to Agra after receiving the information of the informant Banwari Lal Sharma. He has deposed that informant Banwari Lal Sharma narrated to him the story that Pawan Mishra had called the deceased Amar @ Jivan and his friend Victor for providing them employment in Agra. When after 2-3 days they had informed that they had not found any job then Banwari Lal Sharma had asked them to come back. When they did not reach then Banwari Lal Sharma had contacted Pawan Mishra who informed that he had sent them by Purva Express. When still both the boys did not reach at the scheduled time, Banwari Lal Sharma again had contacted Pawan Mishra who had informed that the boys had been kidnapped by him. On this information he also came to Agra and had met the District Magistrate who had sent them to SSP, Agra who had assured help and thereafter on 27.06.2005 Banwari Lal went to P.S. New Agra and had given the written tahrir. Thereafter police with their assistance had arrested the accused Pawan Mishra who was present in the court at the time of deposition of this witness. This witness further deposed that Pawan Mishra confessed before him and the police that he with the help of Dinesh and Kripal had killed both the boys. Thereafter when they reached the place of occurrence with him, Dinesh and Kripal were also

found. All the three accused persons also confessed that after killing Jeevan Sharma and Victor they had buried them under the earth and had cemented the floor after keeping bricks below the cement. There were two Shovels inside the hut. On asking by police all three dug the the floor and the earth. First the dead body of Victor was found and there after the dead body of Jeevan was recovered. The legs of deceased Amar and Jeevan were tightened with ropes. They recognized the dead bodies. Recovery memo was prepared on the spot. This witness recognized his signature on the recovery memo. This witness has been cross examined by Accused Dinesh and Kripal where he admitted in the cross examination that he was brother-in-law of Banwari Lal. According to him all the accused persons had pointed out the place of burial of the dead bodies. He admitted that it is not in his memory as to whether the recovery memo was read over or not. He admits that he signed the recovery memo without reading. He admitted that the dead bodies were rotten but they could be recognized. According to him the last ritual of dead bodies were conducted by him, Banwari Lal and Munna on the cremation ghat at Agra. Accused Pawan Mishra did not cross-examine this witness.

P.W. 6 Tejbeer Singh, Inspector, I.O. of the case has deposed that on 27.6.2005 he was posted as SHO New Agra where, in his presence at 6.30 p.m., informant Banwari Lal Sharma had lodged the FIR. He started investigation, copied FIR, G.D., wrote the statements of constable Moharir, Satya Veer Singh and informant Banwari Lal Sharma. According to him informant had told him that Pawan Mishra had demanded ransom money from him. When he, the S.P., Sri R.K. Tiwari with the informant and his companions reached Bhagwan Talkies, the SOG team met there. When he, along with the first informant and his companion, was going towards Khandari Chauraha, Banwari Lal and his friends informed that the person who was coming from the side of the RBS College was Pawan Mishra. Thereafter the vehicle was stopped and after chasing and after using the usual force, arrested him at 7.45 p.m.

Accused Pawan Mishra was lodged in the lockup of New Agra P.S. as per G.D. No. 65 at 8.15 p.m. When Pawan Mishra was interrogated before the informant Banwari Lal and Sawar Mishra, he had informed that due to family enmity he had killed his cousin Shiv Mishra aged about 1-1/2 years. After being released from jail he had gone to Agra for labour work. During the course of construction in Pushpanjali Mariya, Katra he came in contact of Dinesh Sahu and Beldar Kripal Sahu and started labour work together. His house at Raniganj was occupied and sold by his uncle. He therefore wanted to repurchase it and for that he needed money. For this purpose he thought that his maternal Uncle Puran Lal Sharma and Banwari Lal Sharma could be used. He used to talk with Jeevan. On 11.6.2005 Jeevan informed that he was coming to Agra with his friend Victor by express train. They had stayed with him for two to three days in the Shalimar Hotel. On 14.6.2005 he with the two boys had gone to the room of Dinesh Sahu at Mau Road where Dinesh and Kripal met him. They had already made up a plan. After reaching there he procured Lassi and diluted Sleeping Pills therein. After drinking the same they became unconscious. There after a problem arose that where they would be kept. As no proper place was available for hiding them and there was fear of exposure of the plan, they strangled both the deceased persons in the hut of Dinesh and after digging the earth buried them. After keeping some bricks on the dead bodies they cemented the floor. Clothes and shoes of the deceased were burnt in the vacant plot of land. After the confession of the accused Pawan Mishra, he was taken from the lock up to the house of Dinesh Sahu, where on Pawan Mishra's pointing two persons namely Dinesh Sahu and Kripal Sahu were found who also informed that they had killed the Deceased Jeevan Sharma and Victor. The other two accused persons were also arrested. They were apologetic for their act and informed that owing to their greed for money they had killed the deceased persons and had buried them after digging a pit in the hut of Dinesh Sahu. They also pointed out the two shovels and told that with those two shovels

they had dug the pit and had buried the dead bodies. This witness proved both the shovels as material Ext.-1 and 2. All the three accused persons after removing the bricks from the cemented floor had dug further for three feet and took out the corpse of the deceased Victor which was recognized by his brother Munna and informant Banwari Lal. After digging a further one and half feet soil another dead body which was of Jeevan was taken out by the accused persons which was recognized by Banwari Lal Sharma and his friends. After recognizing both the corpses he prepared fard of shovels and plain soil in the hand writing of R.K. Tiwari which was signed by the accused persons also. The witness proved this recovery memo as Ext. Ka-17. Recovery of dead body was also prepared in the hand writing of R.K. Tiwari which has been signed by the witnesses. This witness has proved the recovery memo as Ka-16. The box of plain soil was marked as material Ext.-3 and Soil as material Ext.-4. According to this witness in the night after making arrangement of light, inquest and map of the place was prepared there in his hand writing and signature. Map is exhibited as Ext.-Ka-18. He recorded the statements of Accused Dinesh and Kripal on the spot and also recorded the statements of Munna Kumar elder brother of the deceased Victor and informant Banwari Lal Sharma, Amit Kumar and Sawar Mishra. He copied the inquest on 29.6.2005 and recorded the statements of the witnesses of the inquest. He recorded the statements of SI, Anupam Sharma and Ram Ratan on 3th July, 2005. He again recorded the statements of accused Pawan Mishra on 13.8.2005 with the permission of the Court and on 30.8.2005 he submitted charge-sheet Ext- Ka-19 against the accused Pawan Mishra, Dinesh Sahu and Kripal Sahu.

Only accused Dinesh and Kripal cross-examined the witness. Accused Pawan Mishra was provided ample opportunity but he did not cross-examine this witness also. In cross-examination he has admitted that the copy of the chick FIR was provided to the informant. He admitted that he had taken photographs of the deceased persons but they were not on

record. He admitted that in the map which was Ext. Ka-18 date of preparation had been left but denied the suggestion that it was made prior to the lodging of the FIR. According to this witness there were 10-12 huts in the shape of rooms where labourers used to live. He admitted that except the informant and his companions no other person had been made a witness. He admitted that he had not written the length and width of shovels and its sticks. He admitted that a part of one of the shovels was broken but it is not written in recovery memo. He admitted that no chemical poison was found in the viscera. The rope by which the legs of the deceased were tied was not before him in the Court. He admitted that mobile number 9219799101 was in the name of Ajanta Agarwal and not in the name of accused Pawan Mishra. He denied the suggestion that both the deceased are alive and they had not died. He denied that accused Dinesh and Kripal were caught from the place of thekedar Om Prakash and they were not living at the place of occurrence.

Documentary evidence

(a) Ext. Ka-1 and Ka-2 Post-mortem report of Jeevan Sharma and Victor respectively

Ext. Ka-3 Chik FIR

Ext. Ka-4 kayami GD regarding lodging FIR on 27.6.2005

Ext. Ka-5 Inquest report regarding deceased Amar Sharma alias Jeevan

Ext. Ka-6 Police form-13

Ext. Ka-7 letter to RI

Ext. Ka-8 letter to CMO

Ext. Ka-9 photo nas deceased Amar Sharma alias Jeevan

Ext. Ka-10 Inquest report regarding deceased Victor alias Potan

Ext. Ka-11 Police form-13 regarding deceased Victor alias Potan

Ext. Ka-12 Letter to RI about deceased Victor

Ext. Ka-13 Letter to CMO about P.M. of deceased Victor

Ext. Ka-14 Photo Nas about deceased Victor

Ext. Ka-15 Tahrir

Ext. Ka-16 Recovery memo regarding dead bodies of the deceased persons

Ext. Ka-17 Recovery memo regarding two shovels and plain soil

Ext. Ka-18 map

Ext. Ka-19 Charge-sheet

The FSL report is on record as Paper No. Ka-24 which has not been exhibited but it is liable to exhibited being admissible in evidence under Section 293 Cr.P.C.

Material Exhibits

1- M Ext. 1 and 2- Shovels

2. M Ext. 3 box of the plain soil

3. M Ext. 4 plain soil

Accused Pawan Mishra has denied all the allegations in his statement under Section 313 Cr.P.C. and though he had stated that he was filing papers in his defence but had not filed any documentary evidence in defence. He said nothing about the incident.

Accused Dinesh has also denied all the questions asked under Section 313 Cr.P.C. and has said that he was living in Bichpuri and used to work with Thekar Om Prakash wherefrom the Police had caught him.

Accused Kripal Kumar Sahu has also denied all the questions asked under Section 313 Cr.P.C. and had stated that he had come for doing labour work from Bilaspur and was living with Om Prakash and used to do labour work.

During the course of trial accused Pawan Mishra did not properly participate. He neither arranged for any private counsel nor took the help of any amicus curiae. Lastly, an advocate was arranged by him but he did not permit him to argue the case. On several dates he had not signed the order sheet. He moved several complaints against the investigating officer and the Presiding Officer due to which investigation was also transferred many times. Several times he did not cross-examine the witnesses, therefore, the trial took long to conclude. The trial however had ended in conviction.

(11) Being aggrieved, the present appeals have been preferred.

(12) **The appellants in Criminal Appeal No. 3490 of 2010 have taken following grounds:**

(i) That the conviction and sentence is against the weight of evidence on record, contrary to law and very severe. No independent witness has been examined by prosecution during the trial. The impugned judgment and order is wholly illegal, arbitrary and not sustainable in the eye of law and is liable to be quashed as it has been passed without considering the facts and evidence used by prosecution. The impugned judgment and order is against the principles of law and cannot be sustained in the eyes of law, therefore, the appeal be allowed and the impugned judgment and order dated 13.4.2010 be set aside.

(ii) **In Jail Appeal No. 3367 of 2010 appellant Pawan Mishra** has simply forwarded an application from the jail treating the same to be memo of appeal.

It is noteworthy that the appellant Pawan Mishra has not cooperated during the course of trial. He did not engage any private counsel and when he was asked to take the help of amicus curiae he had refused to take the help of any legal professional as amicus curiae and even he himself did not cross examine any of the witnesses.

Though he had denied the charges as levelled against him and had sought trial but when the lower court provided opportunities for cross examining the witnesses, he refused to do so and lastly the trial court had closed the cross examination on his behalf.

(13) **This appeal is being decided as under :-**

The *Tehrir Ex. Ka -1 5* to lodge F.I.R was lodged before the S.H.O, P.S New Agra, District Agra, by the first informant Banwari Lal Sharma. It was reduced into writing by one Sri Amit Kumar. Thereafter *Chik* F.I.R was prepared as Exhibit *Ka-3*, in which it was mentioned that there was delay in lodging the F.I.R. Under Section 154 Cr.P.C information in cognizable case can be given orally or in writing, which information shall be entered in the General Diary. A copy of the same is given free of cost to the informant. According to the F.I.R, Banwari Lal Sharma his nephew Amar @ Jeewan were residents of Pandey Lane, Deoghar, P.S and District Deoghar, (Jharkhand). Banwari Lal Sharma who was the first informant had a bhanja (nephew, sister's son), Pawan Mishra who was a resident of Musahuli Bazar, P.S. Raniganj, District Burdwan (West Bengal). The informant had mentioned in the FIR that Pawan Mishra had after killing his cousin (brother) he had left Raniganj and had shifted to Agra. It was also mentioned that some times he used to visit the house of the informant and also talked at times from his mobile no. 9219799101. He had assured that he would land a job for the informant's nephew Amar @ Jeewan Sharma son of Puran Mal Sharma. On the assurance of the accused Amar @ Jeewan Sharma had gone to Agra on 11.06.2005 with one Victor @ Potan son of Vishnu Deo Baranbal, R/o Bhanutola, District Deoghar (Jharkhand). On 12.06.2005, Amar @ Jeewan Sharma had informed that he along with Victor had reached Agra and had met Pawan Mishra. Two or three days later Amar had informed the informant on phone that no arrangement for job/service was there. Upon knowing this the first informant had asked him to return.

(14) On 15.06.2005, Pawan Mishra had informed the informant that the boys had been sent back by train Purwa Express. However, when the boys did not reach on 16.06.2005, then the informant contacted Pawan Mishra on his mobile phone regarding the fact that the boys had not returned. Pawan Mishra, therefore, had said that the abducted boys had infact not been sent by him and that they would be only returned once the ransom is paid. This was told by Pawan Mishra on phone on 17.06.2005. On 18.06.2005, the informant informed the C.O. Deoghar regarding the incident. Thereafter C.O. Deoghar had contacted D.S.P. Agra, (UP). In the evening of 18.06.2005, Pawan Mishra again rang up the first informant and demanded Rs.7,00,000/- (seven lac) and also threatened that in case of non-payment of the said money, he shall cut the boys into pieces. On 20.06.2005 Pawan Mishra again rang up the first informant and asked him to give the money in Gwalior. On 23.06.2005 he rang up to inform as to whom the money had to be paid. Thereafter the first informant came to Agra and met the District Magistrate, who in his turn sent the first informant to the Superintendent of Police, Agra. The said information was entered in the G.D and Chik F.I.R was prepared accordingly. About this fact, it has already been enumerated earlier in this judgment.

(15) According to the defence counsel, the F.I.R was ante timed and it was lodged only after the recovery of the dead bodies. In this regard he could not create any substantive doubt in the mind of the Court. As per *Tehrir* Exhibit *Ka-15*, it was moved before the S.H.O, Police Station New Agra on 27.06.2005 and the same was also entered in the G.D (Exhibit *Ka-4*) on the very same day, at 6:30 p.m. at *Rapat no. 62* and *Chik No. 224/2005*. Consequently a Case U/s 364-A I.P.C was lodged.

(16) It is also noticed by this Court that on the back of the *Chik* F.I.R, the contents of *Tehrir* had not been copied. On this basis also the defence counsel had argued that *Chik* F.I.R was not in accordance with law. He, therefore, questions the veracity of the F.I.R. According to the Court, it was the duty of the concerned Constable *Moharrir* to get the

Tehrir copied on the back of *Chik* F.I.R, if it is not so copied then it was not the fault of the informant, and in fact it was the mistake of Constable *Moharrir*. This fact would definitely not affect the merit of the case. On the basis of *Tehrir*, a *Chik* F.I.R was prepared on the same day. In the *Chik* F.I.R only Section 364-A I.P.C, has been entered. This proves that till the lodging of F.I.R, the dead bodies were not recovered on the pointing of the accused persons. If the F.I.R would have been ante timed then Sections 302 and 201 I.P.C would have been mentioned in the *Chik* F.I.R. There is no averment in *Chik* F.I.R that dead bodies of the deceased persons had also been recovered. Another argument of the appellants counsel is that lodging of the FIR in New Agra was unnatural does not find favour with the Court.

(17) It is very much mentioned in the FIR that the informant had informed the Police that accused Pawan Mishra used to call him from Mau Road, which falls under the P.S. New Agra, therefore the F.I.R was lodged in P.S New Agra. It is obvious from the *Tehrir* Exhibit *Ka-15* that before lodging the F.I.R, the first informant had contacted the D.S.P, District Deoghar (Jharkhand), who had contacted D.S.P. Agra. Thereafter initially the informant had gone to District Magistrate, Agra. Thereafter upon the direction of District Magistrate, Agra he had approached Superintendent of Police, Agra, wherefrom he was directed to go to Police Station, New Agra. Therefore there was nothing unnatural in the lodging of the FIR in Police Station, New Agra.

(18) On the basis of aforesaid discussions, the defence plea that why F.I.R was not lodged in any other Police Station, is fully explained.

(19) It is true that no time has been mentioned in Exhibit *Ka-17* which is the ***Recovery Memo***, regarding the recovery of the two Shovels/Hoes, and the sample of the plain soil. Also, no time is mentioned in the recovery memo of the dead bodies which is Ext. *Ka-17*. From the evidence of the Investigating Officer and the case diary it is proved that after lodging of the FIR the Investigating Officer of the case proceeded on

the same day with the complaint for arresting the accused and for searching the abducted persons. Accused Pawan Mishra was arrested on the pointing out of the first informant when he was going past the RBS College. When the informant saw him he recognized the accused and, police, thereafter, chased him and arrested him. As per the case diary the accused was arrested at about 7.45 p.m. and an arrest memo was also prepared and information about it was also entered in the General Diary at serial No. 65. The FIR was lodged on 6.30 p.m. and the accused was thereafter arrested about about 7.45 p.m. It can, therefore, be said that the FIR was lodged prior in point of time and that the arrest had followed the lodging of the FIR. The police upon the arresting of the accused Pawan Mishra interrogated him who thereafter confessed the commission of the offence on 27.6.2005 itself. During the interrogation the accused confessed that he had killed his cousin (mamera bhai) Shiv Mishra aged about 1-1/2 years for which he was in jail for two years. Upon his release he had left home and had gone to Agra and had started working there. At Agra he used to work as a labour. In Agra he came in contact with Dinesh Sahu (Mistri) Kripal Sahu (Beldar). As he was in the need of money for repurchasing his paternal house at Raniganj which was sold away earlier by his uncle, he divulged that he had hatched a plan whereby he would asked for money from Puran Lal Sharma and Banwari Lal Sharma after kidnapping Amar and his friend Victor. For operating in a planned fashion he had purchased a mobile phone and had got the mobile No. 9219799101 at the address of Anjali Agrawal, Sanjai Palace, Agra. From this very phone he used to talk to the first informant, Jeevan Sharma and his friend Victor. Accused during investigation had also narrated as to how Jeevan and Victor were kept in a hotel and how thereafter they were taken on 14.6.2005 to the place where Dinesh Sahu and Kripal had taken rooms on rent. Upon reaching the rented accommodation, they mixed sleeping pills in the lassi. After consuming the lassi they became unconscious. Thereafter they were stripped off their clothes, strangulated to death and

then were buried in the room. Thereafter the dead bodies were covered with mud. Bricks were laid and the floor was plastered with cement. The clothes and the shoes were burnt in the neighbouring plot. On 21.6.2005 upon reading in the newspaper about the abduction the accused destroyed the sim cards and threw the mobile in the nala (sewer) near Kaushalpur. On 27th June, 2005 he made a call from Belanganj STD booth and made the demand for ransom.

(20) On the pointing of the accused—Pawan Mishra, two other accused persons Dinesh Sahu and Kripal Sahu were also arrested from the place they were staying at Mau Road, near Friends Apartment. The three accused, thereafter, took the police to the place of occurrence where from the dead bodies of the deceased persons were recovered along with the Shovels/Hoes, which were used in digging and burying the two dead bodies; Jeevan and Victor.

(21) As noted earlier in the judgment, recovery memo of dead bodies was marked as Exhibit *Ka-16*, the recovery of the two Shovels/Hoes and that of the plain soil was marked as Exhibit *Ka-17*. After ascertaining that the abducted persons had been killed, the I.O. added Sections 302 & 201 of I.P.C in the *Parcha* of C.D. and therefore these two Sections were mentioned in the above two recovery memos.

(22) Thus, from the above discussion, it is crystal clear that the F.I.R is not ante timed. Certainly in the inquest of Amar @ Jeevan Sharma Exhibit *Ka-5* and in the inquest of Victor @ Potan Exhibit *Ka-10*, the I.O. had not mentioned the Sections and Case Crime Number regarding which the F.I.R was lodged but at the bottom of both these inquest reports, a mention was there of the fact that copies of *Chik* F.I.R, were entered as Annexure. This goes to prove that when the inquest was initiated, the copy of *Chik* F.I.R which was prepared on the basis of *Tehrir* was there with the I.O. of the case. Though the defence counsel had not pointed out these defects, the Court is dealing with them as it occurred to it at the time of the passing of the judgment. It may be noted that it is an

established principle of law that *Chik* F.I.R and inquest reports are not substantive pieces of evidence.

(23) In the case of *Bable @ Gurdeep Singh vs State Of Chattisgarh A.I.R 2012 S.C. 2621*, the Hon'ble Supreme Court has held that an FIR is not a substantive piece of evidence. In this case the scribe Amit Kumar of the *Tehrir* (informant) had not been examined. It has also been held by the Supreme Court in the case of *Moti lal Vs. State of U.P. (2010) 1 SCC 581* that non examination of the scribe would not be fatal for the prosecution.

(24) In *Jarnail Singh Vs. State of Punjab (2009) 9 SCC 219*, the Hon'ble Supreme Court has held that F.I.R. is not an encyclopedia of all the facts relating to the FIR.

(25) Similarly in the case *Radha Mohan Singh alias lal Saheb Vs. State of U.P, (2006) 2 SCC 450 (Hon'ble Supreme Court (Three Judges Bench)*, it has been held that there is no requirement in the law to mention the details in the F.I.R. Names of the accused or names of the eye witnesses or the gist of their statements need not be mentioned in the report.

(26) In the instant case it is noteworthy that in the *Tehrir* and the *Chik* F.I.R the name of Pawan Mishra was mentioned as an accused. If the F.I.R would have been ante timed, the names of the remaining two accused persons would also have been mentioned.

(27) On the basis of aforesaid discussions till now, this Court is of the opinion that in the present case, the F.I.R is not ante timed and the cause of delay has been properly explained.

(28) The importance of an inquest report has been discussed in the case of *Brahm Swaroop Vs. State of U.P., A.I.R 2011 S.C. 280*, by the Hon'ble Supreme Court and has held that it is not a substantive piece of evidence. Omission of crime number, name of the accused persons, provisions under which the offence was being investigated etc would not

be fatal for the prosecution case. Such omission would definitely not lead to the inference that F.I.R was ante timed. The whole purpose of preparing the inquest report under Section 174 Cr.P.C. is to investigate into the cause of death and also to draw up a report of the apparent cause of it. The object of the proceedings under Section 174 Cr.P.C is only to ascertain whether a person had died under suspicious circumstances or on account of an unnatural death. The effort is also to find out the apparent cause. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, or who were the witnesses of the assault is foreign to the ambit and scope of such proceedings.

(29) The occurrence and the case both are based on circumstantial evidence and the **motive** for the crime from all the evidence present is also established. As the evidence is dealt with it becomes clear that Pawan Mishra had made several demands on the phone from Sri Jeewal Lal Sharma. Details of the phone calls are mentioned in the case diary. The informant P.W-1, Jeewan Lal Sharma, was informed by his deceased nephew through telephone on 12.06.2005 regarding the fact that he and his friend had contacted the accused Pawan Mishra. After 2- 3 days, his nephew had again informed through the telephone that he would not get any job.

(30) On 15.06.2005, according to the first informant P.W 4, Pawan Mishra, the accused had informed him that he had sent back the boys by Purwa Express Train and when they did not reach home then on 16.06.2005, the informant had called up Pawan Mishra and had informed him about the fact that boys had not reached home. Thereafter the first informant that Pawan Mishra had narrated that the accused had told him that the boys would reach home only if he would send them. He told him that in fact he had kidnapped them. According to informant, accused Pawan Mishra had made a demand of ransom on the 17th 18th & 20th June of 2005. The accused Pawan Mishra had not cross-examined the

informant P.W 4 Banwari Lal Sharma and other witnesses. Rest accused persons did the cross-examination. However, there is no cross examination on the point of motive from the side of any of the accused. However, the informant P.W 4 had constantly deposed about the fact that there was demand of ransom from the side of the accused Pawan Mishra. Thus, this fact about the demand and ransom has remained unrebutted and uncontroverted. It is, therefore, proved that the co-accused persons had motive to kill the deceased persons as has been held in *Nagaraj Vs. State Rep. (2015) 4 SCC 739 (para 13)* and in *Babu Vs. State of Kerala (2010) 9 SCC 189*. If a conviction is to be based on circumstantial evidence motive should be clear and proved.

(31) In this case electronic documents are also very relevant and which also assisted the Investigating Officer in submitting the charge-sheet against the accused persons. During the course of investigation the investigating officer found following electronic evidence through C.D.R. against the main mastermind accused Pawan Mishra.

(32) Followings are the the details of telephone and mobile numbers of the informant and the accused Pawan Mishra. Call details have been annexed by the Investigating Officer with Charge-sheet (Paper No. 10B/9 and 10B/23 and 24). From the papers attached with charge-sheet and case diary it is established that followings are the telephone and mobile numbers of **informant Banwari Lal Sharma:-**

(i) Telephone No. - 06432222399, 06432225476,

(ii) Mobile No.- 9431150613

Mobile number in the possession and use of the accused Pawan Mishra:-

(i) 09219799101 (Tata Indicom, in the name of Smt. Ajali Agarwal, 36, Bhagya Nagar, Agra. It has come in evidence that Accused Pawan Mishra was working as a thekedar for the construction of the house of Smt. Anjali

Agarwal. Since accused Pawan Mishra was not having proper ID proof, therefore, a mobile sim was provided to him by her on her ID)

In connection of commission of crime accused Pawan Mishra had contacted the informant Banwari Lal Sharma on following dates and time. The mobile and telephone numbers namely number 06432222399 are being reproduced herein below:

S.No	Date	Time	Mobile and Telephone Numbers used by the accused Pawan Mishra	Purpose of the conversation
1	15.6.2005	2.10 pm	9219799101	Telephone No. 06432222399 that boys are sitting in the train at 8.30 p.m.
2	16.6.2005	8 p.m.	0562 2253256	Children have been kidnapped
3	17.6.2005	6.40 p.m.	0562 2253148	I will tell later, how much money is needed.
4	17.6.2005	6.50 p.m	0562 2253148	Do
5	18.6.2005	7.50 p.m.	9219799101	Seven lac rupees are needed otherwise the body of the boys shall be spread in 150 pieces.
6	20.6.2005	5.05 p.m.	9219799101	Missed call
7	20.6.2005	5.10	9219799101	Missed call

		p.m.		
8	20.6.2005	7.35 p.m.	0562 2524679	Money has to be sent at Gwalior
9	Do	8.30 p.m.	0562 2524773	When and where money has to be sent, will inform on Thursday (23.6.2005)

From the above, paper No. 10B/23 and 24 it is also established that during the relevant period and with respect to commission of crime accused Pawan Mishra had talked with the informant Banwari Lal Shamra 17 times from the mobile number 9219799101 at his telephone number 06432 222399 (16 times) and 06432 225476 (once).

(33) In this case, there are no eye witnesses. Only P.W.4, P.W.5 and police witnesses were the witnesses of recovery of the dead bodies and that too on the pointing out of the accused. Thus the chain of evidence also gets completed. In the case of *G. Parshwanath vs State of Karnataka A.I.R 2010 S.C 2914*, it was held that in a case of circumstantial evidence the chain of evidence should be complete and should be proved by cogent evidence.

(34) The Hon'ble Supreme Court in the Case of *Sadik Vs. State of Gujarat (2016) 10 SCC 663* and in *Dasin Bai Vs. State of Chhattisgarh (2015) 89 ACC 337 SC* has held that in the event the link of chain of circumstances is well established, proof of motive or ill-will is always not necessary. In the case of *Sanjeev Vs. State of Haryana (2015) 4 SCC 387 (para 16)*, the Supreme Court has held that to establish an offence (murder) by an accused, motive is not required to be always proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of the crime. It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence

of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused.

(35) In this case the motive of the accused persons to get the ransom has been proved beyond doubt by cogent oral and documentary evidence.

(36) In this case only two witnesses of fact P.W. 4 informant Banwari Lal Sharma and P.W. 5 Sawar Mishra have been examined. The occurrence was committed far away from the residences of P.W 4 and P.W 5. When the deceased boys did not reach home, the informant P.W 4 and P.W 5 Sawar Mishra started their journey to Agra after informing the C.O. Police in District Deoghar (Jharkhand). It is from no where established that the informant P.W 4 and P.W 5 had any intention of falsely implicating the accused persons. Only the accused Pawan Mishra was known to the first informant and when Pawan Mishra had promised job for the boys the first informant had sent the boys in the hope that the accused Pawan Mishra shall provide them jobs. They had absolutely no dispute or enmity with the accused person. Therefore there is no occasion of false implication from the side of informant and Sawar Mishra.

(37) In *Mahavir Singh Vs. State of Haryana (2014) 6 SCC Page 716 Para 16*, the Supreme Court has settled the legal proposition that in the event a witness is not cross-examined with regard to a particular issue, the correctness or legality of that issue cannot be questioned. Undoubtedly, it is the prosecution's duty to prove its side of story. However, in the light of section 3 of the Indian Evidence Act, the Apex Court has observed in *Harendra v. State of Assam AIR. 2008 Supreme Court 2467 & Himanchal Prashasan v. Om Prakash AIR. 1972 Supreme Court page 975* that benefit of doubt should be given only on the basis of logical, reasonable and honest conclusion.

(38) Further in *Ramanand v. State of Himanchal Pradesh AIR 1981 Supreme Court page 3617* the Apex Court held that proving a case beyond reasonable doubt is a guideline not a-fetish.

(39) In the case of *State of U.P. v. Ramveen Singh and another 2007 (6) Supreme Court page 164* the Apex Court has held that the ultimate object of any court is to avoid miscarriage of justice.

Hence, in the light of above analysis we embark upon the evaluation of the evidence as is available in the case.

(40) The defence counsel has questioned the identity of the deceased persons by arguing that the dead bodies were in such a state that no person could have recognized them and it was not proved beyond reasonable doubt that these two dead bodies were of Amar @ Jeewan Sharma and Victor @ Potan. In this respect it has to be kept in mind that the dead bodies were recovered upon the pointing of accused persons especially on the pointing of the accused Pawan Mishra, who had called the deceased to Agra for giving them employment. He had informed the informant on phone that both the boys had been sent back by Purwa Express Train, but the fact was that they never reached their destination. Nobody else claimed the dead bodies to be known to them.

(41) From perusal of the Exhibit *Ka-6*, recovery memo regarding dead bodies, it is evident that the accused had confessed about the killing of the two and had also definitely pointed to the place where the deceased persons were buried. On their pointing the pit was dug and the dead bodies of Victor alias Potan and Amar were exhumed and were also recognized by Munna and the informant Banwari Lal Sharma and the friends of the deceased. Though the dead bodies were in a rotten stage but they were not in the form of skeleton. During cross-examination also no question was raised with regard to the identity of the dead bodies. This question cannot now be allowed to be raised in this appeal. It was never the case of the defence/appellants that the police had recovered the dead

bodies of some other persons and that the deceased persons were still alive.

(42) It is also noteworthy that family members recognise their near and dear ones even in very bare conditions, on account of their height, weight, colour, hair, toe, fingers nails, face, arms etc.

(43) From a perusal of the inquest Exhibit *Ka-5* and Exhibit *ka-10*, it is clear and proved that before sending the dead bodies for post mortem, the dead bodies were recognized by their family members. Exhibit *Ka-5* is the inquest report regarding deceased Amar @ Jeewan Sharma, in which it is mentioned that after seeing the dead body of the deceased Amar @ Jeewan Sharma, the informant Banwari Lal Sharma, was convinced that it was the dead body of Amar @ Jeewan Sharma. Similarly, as per the inquest report of Victor @ Potan his brother was convinced that it was the dead body of his brother Victor @ Potan therefore we are of the opinion that no question regarding identity of the deceased persons arises. Therefore the contention of the defence counsel regarding non-identification of the dead bodies is not tenable, hence is being rejected.

(44) The appellant's counsel argued that though viscera was preserved and the same was sent to the forensic laboratory for expert opinion/examination, it was not evaluated in its correct perspective as no poison was found in it. Quite contrary to what the appellant's counsel has argued, the court finds that prosecution case is based on the confessional statements of accused persons which was that the sleeping pills were used to make the deceased unconscious. The sleeping pills were diluted in the *Lassi* and the same was given to the deceased to drink, therefore, they became unconscious. The two boys were put to death and thereafter buried. The dead bodies were exhumed from the place where they were buried in the same sequence as it was mentioned by the accused. Thus, non-finding of poison in viscera does not adversely affect the prosecution case.

(45) The post mortem report also corroborates the oral evidence. Except the accused person none else saw the commission of crime. The hyoid bones and the necks were broken, therefore there was no occasion to opine by the Doctor that the cause of death could not be ascertained. Hyoid bone can only be broken if the deceased has been strangled forcefully. There was no injury whatsoever on the rest part of the body of both the deceased person. Thus, it is concluded that the deceased persons were strangled by which the hyoid bones of both the deceased persons were broken, which caused death of both of the deceased persons and, thereafter they were buried there.

(46) It is a case based on **circumstantial evidence**. None else has seen the commission of crime but the witnesses are not inimical to the accused persons.

(47) In cases *Nathiya Vs. State (2016) 10 SCC 298*, *Bhim Singh Vs. State of Uttarakhand (2015) 4 SCC 281 (para 23)*, *Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116 (paras 120 and 121)*, *State of West Bengal Vs. Dipak Halder, (2009) 7 SCC (Three Judge Bench)* the Supreme Court has laid down the following principles regarding cases based on circumstantial evidence:

- (i) The circumstance from which the conclusion of guilt is to be drawn must or should be and not merely “may be” fully established;
- (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (iii) the circumstances should conclusive in nature and tendency;
- (iv) they should exclude every possible hypothesis except the one to be proved, and
- (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must be so that in all human probability the act must have been done by the accused.

(48) In **Bhim Singh (supra)** it is held that when the conclusion is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances.

(49) In **State of Goa Vs. Pandurang Mohite, AIR 2009 SC 1066** and in **State of U.P. Vs. Satish, 2005 (3) SCC 114** the Supreme Court held that circumstances of “last seen together” do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

(50) In **Rohtash Kumar Vs. State of Haryana, 2013 (82) ACC 401 (SC)** (para 25) and in **Prithipal Singh Vs. State of Punjab (2012) 1 SCC 10** the Supreme Court held that if it is established that victim and the accused were lastly seen together then the burden of proof shifts on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

(51) In **Ashok Vs. State of Maharashtra, (2015) 4 SCC 393** the Supreme Court held that initial burden of proof is on the prosecution to adduce sufficient evidence pointing towards the guilt of the accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exactly as to what happened in the incident as the accused himself would have special knowledge of the incident and would have the burden of proof on himself as per Section 106 of the Evidence Act. But last seen together itself is not a conclusive proof. Along with other circumstances surrounding the incident like relations between accused and deceased, enmity between

them, previous history of hostility, recovery of weapon from accused etc. non-explanation of death of deceased, etc. may lead to a presumption of guilt of the accused.

(52) In this case the conversation between the informant Banwari Lal Sharma and the deceased Jeevan alias Amar Sharma with regard to their reaching Agra for employment and with regard to the fact that the latter was received by the accused Pawan Mishra, and that both the deceased boys stayed in hotel arranged by the accused and that the accused demanded of ransom everything is part of the same transaction. So, the connected facts and evidence thereon are relevant and admissible in evidence under Section 6 of The Indian Evidence Act and conversation of the deceased Jeevan alias Amar to the informant while coming from Devghar and also from Agra to the informant at Devghar is also relevant and admissible in evidence under Section 32 of the Indian Evidence Act. All evidence on the above facts shall be read against the accused appellants only. For reference Section 6 of the Indian Evidence Act is noted hereinbelow.

S.6: Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the 1[Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

(53) Though hear-say evidence is not admissible in evidence but in the event the victim dies, his previous statements to any living person become relevant and admissible in evidence under Section 32 (1) of The Indian Evidence Act if it relates to cause of his death. If he had made any statement in this regard the same can be taken into consideration. The statement would be relevant in every case or proceeding in which the cause of death of that person is in issue. In Indian Law it is not necessary that the person who made any declaration was actually expecting an assault which would kill him. It is, therefore, unlike the English Law. (**Sharad Birdichand Sarda Vs. State of Maharashtra AIR 1984 SC 1622**), In **Bhagirath Vs. State of Haryana (1977) 1 SCC 481**, Supreme Court held that if the declarant has in fact died and the statement explains the circumstances surrounding his death, the statement will be relevant even if no cause of death was stated at the time of the making of the statement.

(54) In **Pakla Narayan Swami Vs. Emperor AIR 1939 Privy Council 47**, the wife of the accused had taken a debt of Rs. 3,000 from the deceased at 18% interest about a year before the tragedy. A number of letters signed by the accused's wife were discovered from the house of the deceased had clearly proven this fact. On 20nd March, 1937, the deceased whose name was K.N. received a letter which was not signed by anybody but from which, it was reasonably clear that it had come from the wife of the accused, inviting him to come that day or next day to Berhampur. K.N.'s widow told the court that on that day her husband showed her a

letter and said that he was going to Berhampur as Swami's wife had written to him, inviting him to come to receive payment of his dues. K.N. and the wife of accused were known to each other as she was the daughter of an officer in whose office K.N. was employed as a peon. K.N. left his house the next day in time to catch the train to Behrampur. On Tuesday, 23rd March, his body, cut into seven pieces, was found in a steel trunk in a third class compartment of a train at Puri, where the trunk had been left unclaimed.

The accused was convicted of murder and sentenced to death. The evidence against him was, **firstly** his indebtedness to the deceased, **secondly**, the statement of the deceased to his wife that he was going to the accused, **thirdly**, the steel trunk was purchased by a Dhobi (washerman) for and on behalf of the accused. **Some other details** about arrival of the deceased at the accused's house, discovery of blood stained clothes and transportation of the trunk to the station were also proved. The accused appealed to the Privy Council on the ground that the statement of the deceased to his wife that he was going to the accused was wrongly admitted under Section 32 (1) and that the statement of the accused to the police that the deceased arrived at his place was admittedly in violation of Section 162 Cr.P.C. **Lord Etkin and other Lordships** were of the opinion that the natural meaning of the word used do not convey any of these limitations. The statement may be made before the cause of death had arisen or before the deceased had any reason to anticipate his murder. The circumstances must be circumstances of the same transaction; general expression including fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death would not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or any such statement which might give reasons for so proceeding, would be "circumstances" in the same transaction and would be so whether the person was known or was unknown to the accused. "Circumstances of the same transaction" is

a phrase which no doubt conveys some limitation. It cannot be analogous to the term “circumstantial evidence”, which includes evidence of all relevant facts. It is on the other hand narrower than “res gestae.” Circumstances must have proximate relations to the actual occurrence.

If we compare the fact of the case in hand with the facts of the case, of Pakla Naraya Swami (supra) we find any number of similarities. In Swami's case the deceased K.N. had gone to Behrampur in the hope getting the money lent back. Similarly in the case in hand both the deceased boys had gone to Agra in the hope of employment. Thus the information given by the deceased persons before their death to the informant was admissible in evidence against the accused persons under Section 32 (1) of The Indian Evidence Act and on this score also the accused persons are liable to be convicted and sentenced.

(55) After establishment of the fact that the deceased persons had gone to Agra where they were in the direct control of the accused Pawan Mishra and others, the burden of proving that what happened to the deceased persons and how they died, lay on the accused Pawan Mishra and others. It is also established that deceased persons were in company of all the three accused persons, therefore, it is the burden of all the accused-appellants to discharge their burden of proof under section 106 of The Indian Evidence Act.

Section 106 of The Indian Evidence Act is as under:

S: 106. Burden of proving fact especially within knowledge-

When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

Where a fact is specially within the knowledge of a party the burden of proving that fact lies upon him. In a case of similar fact **Sucha Singh Vs. State of Punjab AIR 2001 SC 1436** the victim was first abducted and later on murdered. It was held that the court, depending on the factual situation, could draw the presumption that all the abductors

were responsible for the murder. It was upon the abductor to explain that they were not guilty of the murder.

Here the abductors/appellants have not been able to give any explanation of the death of the deceased persons.

In **Sunder Vs. State AIR 2013 SC 777** the accused kidnapped a child of seven years for ransom, annihilated him on not receiving the ransom amount. There was no enmity between the accused and the child, nor the child was a stranger, nor there was any proof that the accused had released the child, yet it was held that Section 106 was attracted and the accused was under the responsibility to explain as to what happened to the child, failing which he became liable for the murder. The facts of the case cited are similar to the case in hand, therefore, the principle laid down in the cited case applies to the case at hand.

(56) During the course of investigation and recovery accused persons had admitted that legs of deceased Jeevan Sharma were tied with a rope and as there was no place to hide them, therefore, both were strangled and buried one by one. Accused persons had also accepted in the recovery memo that they had administered sleeping pills in the *Lassi* and therefore both the deceased had become unconscious and they were easily strangled.

(57) This admission and contents of recovery memo also finds support from the post-mortem report in which Hyoid bones of both the deceased were found broken and this occurs only when the dead are strangled.

(58) From perusal of the facts and the evidence brought in case it is established that the accused had *mens-rea* to kidnap and abduct the deceased persons for obtaining ransom. For this first of all they prepared a plan and in furtherance of the plan, the accused Pawan Mishra contacted his maternal uncle to send the boys for employment which was never

available for them and when they came to Agra they were killed and thereafter buried.

(59) From the prosecution evidence it is established that the deceased persons had not been seen in the company of any other criminal or group of criminals other than the accused persons before or after the commissioning of the crime and there was no one else known to them.

(60) It is further established from the evidence of P.W.4 and P.W. 5 that ransom was demanded by the accused Pawan Mishra on his behalf and on behalf of the other two accused persons who had actively participated in the crime. For Pawan Misra it was not possible to handle both the deceased persons all by himself.

(61) Thus the evidence in totality goes to prove that there was motive as also evidence for the accused to kill the two deceased persons.

(62) The course of this case began on 11.6.2005 when the deceased commenced their journey and reached Agra on 12.6.2005. Thereafter they ended in the hands of accused persons. In between the chain of all the facts and evidence have been fully connected and established by the prosecution. The chain of circumstantial evidence is intact and established without breaking. Therefore, this Court is of the opinion that by proving motive, *Mens-rea*, demand of ransom and lastly recovery of the dead bodies from the person who had demanded ransom, the prosecution has successfully proved the case beyond all reasonable doubt against the accused persons. It is established that except the accused persons none else would have committed the murder and have buried both the deceased persons under the earth at the place of occurrence. Therefore, we find no infirmity in the appreciation of evidence in connection with conclusion drawn by the trial court.

(63) In this case charges were framed under Sections 364A, 302 and 201 IPC. From the evidence produced by the prosecution it is fully proved that deceased were cleverly called by the accused persons and

after they reached Agra they were kidnapped and abducted. There they were administered sleeping pills, and thereafter their hyoid bones were broken by strangulation and were buried under the earth. Thus the ingredients of Section 364A IPC is completed. They were thereafter buried alive and in an unconscious state of mind. The accused persons while committing such acts were always knowing that their acts were so imminently dangerous that they would in all probability, cause death. Thus the act of convicted accused persons is covered under Section 300 (4) IPC. By burying the deceased persons and by burning their clothes and shoes the accused persons had also committed the offence under section 201 IPC. Thus this court is of the considered view that charges against the all accused appellants have been proved beyond reasonable doubt and they were correctly convicted by the learned trial court.

(64) So far as the sentencing is concerned the lower court had opined that it is not a rarest of the rare cases and therefore awarded them minimum sentence. The State or the informant have not preferred any appeal against the order of sentencing. Under Sections 302 and 364A IPC the minimum sentence is life imprisonment and fine which has already been awarded by the trial court. The trial court has already awarded five years rigorous imprisonment and 5,000/- fine each under Section 201 IPC. Thus the sentence awarded by the trial court is neither excessive nor harsh.

(65) On the basis of above discussion, both the appeals fail and are liable to be dismissed accordingly.

(66) Accordingly, Jail Appeal No. 3367/2010 (Pawan Mishra Vs. State of U.P) and Criminal Appeal No. 3490 of 2010 (Dinesh Sahu & Kripal Sahu Vs. State of U.P.) are hereby dismissed. The order of conviction and sentencing passed by Special Judge (D.A.A.), Agra in ST No. 121 of 2005 (State Vs. Pawan Mishra and others) Crime No. 356/2005 under Section 364, 302/ 201 IPC, P.S. New Agra, District-Agra is hereby confirmed.

(67) Let a copy of this Judgement be sent to Jail Authorities and court concerned for compliance. Lower court's records along with a copy of this judgment be also sent back to the court concerned.

Order Date: 26.9.2022

Manish Tripathi

(Umesh Chandra Sharma,J.)

(Siddhartha Varma,J.)