



2024:CGHC:36875-DB

**AFR**

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

Judgment reserved on: 06.09.2024

Judgment delivered on: 20.09.2024

**CRA No. 429 of 2021**

Vijay Gandharv S/o Rohit Gandharv Aged About 24 Years R/o Ward No. 01, Ram Nagar, Kawardha, Police Station-Kawardha, District-Kabirdham, Chhattisgarh

---- **Appellant**

**versus**

State Of Chhattisgarh Through Police Station-Thankhamhariya, District-Bemetara, Chhattisgarh., District : Bemetara, Chhattisgarh

---- **Respondent**

**CRA No. 352 of 2021**

Jaypal @ Palu Kaushik S/o Late Dhanush Ram Kaushik, Aged About 36 Years R/o Pendrikhurd, P.S. Sahaspur Lohara District Kabirdham (Chhattisgarh)

----**Appellant**

**Versus**

State Of Chhattisgarh Through Police Station P.S. Thankhamariya, District Bemetra Chhattisgarh

--- **Respondent**

**CRA No. 464 of 2021**

1. Harish Sahu S/o Koduram Sahu, Aged About 25 Years R/o Village-Dargaon, Police Station- Sahaspur Lohara, District- Kabirdham (C.G.)
2. Vikas Sahu S/o Jageshwar Sahu, aged about 21 years, R/o Village –

Okhar, Police Station – Pachpedi, District – Bilaspur (CG)

----Appellants

**Versus**

State Of Chhattisgarh Through- Station House Officer, Police Station-  
Thankhamhariya, District- Bemetara (C.G.)

---- Respondent

**CRA No. 562 of 2021**

Siyaram Saiyyam S/o Late Rajaram Saiyyam Aged About 38 Years R/o  
Village Baijalpur, P.S. Bodla, District Kabirdham Chhattisgarh

----Appellant

**Versus**

State Of Chhattisgarh Through Police Station Thankhamhariya, District  
Bemetara Chhattisgarh

---- Respondent

**CRA No. 620 of 2021**

Pawan Nirmalkar S/o Kapil Nirmalkar, Aged About 20 Years R/o Village  
- Palansari, Thana - Pandatarai, District - Kabeerdham Chhattisgarh

----Appellant

**Versus**

State Of Chhattisgarh, Through Police Station - Thankhamhariya,  
District - Bemetara Chhattisgarh

---- Respondent

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For Appellant-Vijay Gandharv:

Mr.Uttam Pandey, Advocate in CRA No.429/2021

For Appellants-Jaypal @ Palu Kaushik and Harish Sahu:

Mr.Rahil Kochar, Advocate in CRA Nos.352/2021  
and CRA No.464/2021

For Appellant-Vikas Sahu:

Mr.Dharmesh Shrivastava, Advocate in CRA No.464/2021

For Appellant-Siyaram Saiyyam:

Mr.Siddharth Pandey, Advocate in CRA No.562/2021

For Appellant-Pawan Nirmalkar:

Mr.Mohd.Irshad Hanif and Mr.Prasoon Agrawal, Advocates

For Respondent/State:

Mr.Sangharash Pandey, Government Advocate

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**Hon'ble Shri Ramesh Sinha, Chief Justice**  
**Hon'ble Shri Bibhu Datta Guru, Judge**

**C.A.V. Judgment**

**Per Ramesh Sinha, Chief Justice**

1. Since the aforesaid five criminal appeals have been filed against the impugned judgment dated 5.2.2021 passed by the Additional Sessions Judge, Bemetara in Sessions Case No.19/2019, they were clubbed & heard together and being disposed of by this common judgment.
2. Appellants-Vijay Gandharv (A1), Jaypal @ Palu Kaushik (A2), Harish Sahu (A3), Vikas Sahu (A4), Siyaram Saiyyam (A5) and Pawan Nirmalkar (A6) have preferred these five criminal appeals under Section 374(2) of the CrPC questioning the impugned judgment dated 5.2.2021 passed by the Additional Sessions Judge, Bemetara in Sessions Case No.19/2019, by which they have been convicted for offences under Sections 364/34, 120B, 201 and 302/34 and sentenced undergo RI for three years and fine of Rs.500/-, RI for five years and fine of 500/-, RI for two years and fine of Rs.500/-, imprisonment for life and fine of Rs.500/-, in default of payment of fine to further undergo SI for two months for each defaults. The trial Court has also convicted appellant-Vikas Sahu for offence under Section 170 of the IPC and sentenced to undergo RI for one year and fine of Rs.500/-, in default of payment of fine to further undergo SI for two months.

3. Heard Mr.Rahil Kochar, learned counsel for the appellant as well as Mr.Sanghrash Pandey, learned Government Advocate appearing for the respondent/State on I.A.No.02/2024, which is an application for permission to change the counsel for appellant No.1 No.1-Harish Sahu.
4. On due consideration, I.A.No.02/2024 is allowed. Mr.Rahil Kochar is permitted to argue on behalf of appellant No.1-Harish Sahu in CRA No.464/2021.
5. Case of the prosecution, in nutshell, is that complainant Hiralal Yadav went to Police Station Thankhamhariya and made a report on 04.02.2019 stating that on 03.02.2019 at 21:30 P.M., he and his family members were resting inside after dinner, meanwhile, someone knocked on the door of his house, calling out his father's name, Feru. Upon hearing the voice, the complainant opened the door and at that time, his brother Chetan Yadav also came and stood near the door, asking who had come. Three persons wearing khaki clothes were standing outside the house, who told the complainant that they were from Police Station Thankhamhariya, they have caught a thief in a gold theft case, who during questioning, named Chetan Yadav, the complainant's brother. Therefore, they need to take Chetan Yadav to Police Station Thankhamhariya for questioning. They will question him for an hour and then bring him back home and drop him off. They gave the complainant a handwritten agreement letter regarding taking his brother Chetan Yadav. After that, three men took

Chetan Yadav to Hanuman temple in the village on foot. One of them walked ahead near the temple and then other two men took Chetan Yadav, seating him between them, on a motorcycle parked near the temple. After waiting for two hours for Chetan Yadav to return, complainant Hiralal along with his elder brother Mukesh Yadav and village resident, Ghanshyam Dau went to Police Station Thankhamhariya to inquire if three men in khaki clothes had brought Chetan Yadav to the police station for questioning. However, it was found that Chetan Yadav had not arrived at the police station. They then inquired in Gram Barga but could not find Chetan Yadav. Since Chetan Yadav did not return home till morning, they made a report at Police Station Thankhamhariya.

6. On 05.02.2019, Sarju Sahu, a forest guard at Police Station Singhanpuri, District Kabirdham reported that he was working as a guard in the forest and was returning home after his regular beat patrol on 04.02.2019, at around 4:45 A.M. he reached near Dhobni Patharra and saw an unknown person lying on the side of the road, badly burned and soaked in blood. On approaching, he saw a serious head injury mark and the person was dead, aged around 23 years. An unknown person had inflicted serious head injuries and burnt the deceased, killing him. He informed Beat Incharge Kumbhalal Verma and village Sarpanch Makhanlal Sahu about this. Based on Sarju Sahu's information, Marg No. 02/2019 was registered at Police Station Singhanpuri vide Ex.P-36 and

Police of Police Station Shinghanpuri registered the offence in Crime No. 03/2019 under Section 302 of the IPC vide Ex.P-35.

7. After registering the crime, scene was inspected and body was sent for postmortem after the inquest. When the deceased was identified as Chetan Yadav, the case was sent to Police Station Thankhamhariya for further investigation. FIR was registered by Hiralal vide Ex.P-1. Inquest was prepared over the body of the deceased vide Ex.P-3. Spot map was prepared by the investigating officer vide Ex.P-4. Patwari also prepared spot map vide Ex.P-5. Documents with regard to motor-cycle were seized vide Ex.P-6. Registration of vehicle No. CG 10 ED 3761 was seized vide Ex.P-7. Agreement which was given by accused Siyaram Saiyyam to complainant Hiralal Yadav was seized vide Ex.P-8. Dead body was handover to Hiralal Yadav on Supurdnama vide Ex.P-9. Test identification parade was conducted by the Tahsildar / Executive Magistrate in Tahsil Office on 6.2.2019 in which Hiralal Yadav has identified appellant Siyaram vide Ex.P-10 and appellant Vikas Sahu vide Ex.P-11. Copy of agreement which was given by accused Siyaram Saiyyam to complainant Hiralal Yadav was seized vide Ex.P-12. Further test identification parade was conducted by the Tahsildar / Executive Magistrate, Police Station Khamhariya in Sub-Jail, District Bemetara on 19.3.2019 in which Hiralal Yadav identified Jaypal @ Palu vide Ex.P-15, Harish Sahu vide Ex.P-16 and Vijay Gandharv vide Ex.P-17. However, Hiralal Yadav has not identified

appellant Pawan Nirmalkar vide Ex.P-18. Bloodstained soil, plain soil, two slippers, cloth and three buttons were seized from the spot vide Ex.P-19. Memorandum statement of appellant Harish Sahu was recorded vide Ex.P-20, memorandum statement of appellant Jaypal @ Palu Kaushik was recorded vide Ex.P-21. Mobile, motor-cycle and registration card were seized from appellant Vikas Sahu vide Ex.P-22. Mobile and motor-cycle were seized from appellant Pawan Nirmalkar vide Ex.P-23. Motorcycle was seized from appellant Jaypal @ Palu Kaushik vide Ex.P-24. Shock absorber of motor-cycle stains with blood, one black colour belt in which Chhattisgarh Police has been written, one pair steel batch in which C.G. Police has been written and one bag was seized from appellant Jaypal @ Palu Kaushik vide Ex.P-25. One mobile was seized from appellant Harish Sahu vide Ex.P-26. One mobile was seized from appellant Vijay Gandharav vide Ex.P-27. Dead body was sent for postmortem to Community Health Center, Sahaspur Lohara where Dr.Sanjay Kharsan (PW-5) conducted postmortem over the body of the deceased vide Ex.P-29 and found following symptoms:-

- i. The entire body of the deceased was burnt and redness was visible in his skin and there were blisters on his body.
- ii. There was infection in the body of the deceased and pus was coming out.
- iii. No smoke in respiratory of the deceased. Carbon in the blood of the deceased. There was no fracture.

- iv. Both the hands of the deceased were stiff (pugilistic attitude).
- v. The back part of the head of the deceased was fractured. The bone at the back of the head of the deceased was broken and his back part of the brain had come out.
- vi. The lungs of the deceased were compressed, all four chambers of the heart were empty.
- vii. The stomach of the deceased was empty. There was stool present in the deceased's small intestine.
- viii. Gas and feces were present in the large intestine of the deceased. The kidney of the deceased was compressed and the external genitals were burnt.

The doctor has opined that cause of death of the deceased was shock due to severe head injury. There were postmortem burn injuries on the body of the deceased which could have occurred during 24 hours before death. The doctor has opined that manner of death is homicidal in nature vide Ex.P-32. Statements of Ghanshyam Das Vaishnav, Mukesh Yadav and Feru Yadav were recorded by the police vide Exs.P-33 to P-35. Call details of the mobiles used in crime were obtained. As per FSL report (Ex.P-63), blood was found on shock absorber of motorcycle (Article 'C') seized from appellant Jaypal @ Palu Kaushik. Appellants were arrested on 6.2.2019 vide arrest memos Exs.P-70 to P-74. Appellant Jaypal @ Palu Kaushik was arrested on 24.02.2019 vide arrest memo Ex.P-75.



8. After due investigation, all the appellants were charge-sheeted for the aforesaid offences in which they abjured their guilt and entered into defence stating inter-alia that they have not committed any offence and they have falsely been implicated in crime in question.
9. In order to bring home the offence, the prosecution examined as many as 22 witnesses and exhibited 82 documents Exs.P-1 to P-82. None was examined on behalf of the defence nor any documents have been exhibited.
10. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment dated 5.2.2021, proceeded to convict the aforesaid accused persons for the aforesaid offences and sentenced them as aforementioned, against which, these criminal appeals have been preferred.
11. Mr. Uttam Pandey, learned counsel for the appellant-Vijay Gandharv in CRA No.429/2021 would submit that it has been stated by Hira Lal (PW-1) (brother of the deceased) that the FIR (Ex.P-1) was reduced in writing as per dictation of the police. In para 17 he admits that the accused persons five in number were shown to him by police at Police Station and in para 18 it has been stated that when he saw the accused persons their faces were open, which facilitated him to identify the accused persons at Tahsil Office and Sub-Jail, Bemetara. In para 20 he has stated that he did not identify accused Vijay Gandharv before the

Tahsildar Thankhamariya and further stated that accused Vijay Gandharv was not carried at Tahsil office. He would further submit that Tahsildar Uma Raj (PW-2) in para 12 of her evidence has admitted that in the documents (Ex.P-17) (identification memo) there is some kat chant in the age of appellant Vijay Gandharv. The witness of TIP in connection with the appellant has not signed on the documents (Ex.P-17). In para 16 this witness has stated that no persons from Police Department, Jail Police or Police Officers were present at the site where TIP was conducted, whereas Shiv Ram Singh (PW-10) and Gajendra Dhritlahre (PW-12) are jail police who were witnesses in TIP and Gajendra Dhritlahre (PW-12) has stated that two persons in police uniform were present there. He would further submit that Ashok Vaishnav (PW-3) in para 1 has admitted that he had seen the accused persons at police station. Jail Prahari Shiv Ram Singh (PW-10) (witness to TIP) has stated in para 2 that in the proceeding of TIP, two persons in khaki uniform were present. In para 3 he has clearly admitted that Vijay Gandharv was called from inside the jail and was shown to Hira Lal and thereafter Hiralal was sent outside the jail and thereafter Vijay Gandharv was brought covered and again the identifier was called who identified the appellant by putting his hand on the shoulder of appellant. He contended that investigating officer Jitendra Banjare (PW-21) in para 29 has stated that only two persons were identified and the remaining three persons were not it has

been denied by him that for the second time TIP was conducted on 13.03.2019 contradicting the self-statement, he says that as they were not interrogated and remand could not be obtained, they were not sent for identification. He further contended that in the present case, motive has not been established. According to the prosecution, there had been some affair between one of the appellants with one Keshar Bai and later on the engagement of Keshar Bai with deceased Chetan Yadav was fixed which was the cause of this offence. Investigating officer Jitendra Banjare (PW-21) has stated in para 22 that he had gone to village Dargawon to record the statement of Keshar Bai and her father, but they denied to give their statements but could not say as to whether this fact has been entered in Rojnamcha or not. He also contended that Sarju Sahu (PW-11) was the witness who saw dead body for the first time early in the morning and vide para 4 it has been clearly stated by him that the dead body was not identifiable since it was burnt fully and also admitted that none of the witnesses of panchnama had identified dead body. As such, the criminal appeal deserves to be allowed and the judgment impugned so far as it relates to the present appellants deserves to be set aside. He relies upon the judgment of the Supreme Court in the matter of **Mahabir v. The State of Delhi**<sup>1</sup>.

12. Mr. Rahil Kochar, learned counsel for the appellants-Jaypal @ Palu Kaushik and Harish Sahu in CRA No.352/2021 and CRA

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1 (2008) 16 SCC 481

No.464/2021 would submit that the prosecution has failed to prove the motive of the appellants to assault the deceased. There are major inconsistency regarding the statement of Hiralal Yadav (PW-10) in his Sections 161 and 164 CrPC statements and other details are also variance, which clearly shows that the theory of the informant's being interested, was a concocted story full of disturbing features about the manner in which the occurrence has allegedly taken place. The instant case is based on circumstantial evidence. There was no dispute at all among them on the date of incident, hence conviction cannot be based in absence of any adverse circumstances chain is incomplete and the prosecution has failed to prove its case. Hiralal Yadav (PW-1) is an interested witness. In his Court statement he has stated that co-accused namely, Siyaram, Vikas and Vijay were the people who came to his house. He would further submit that test identification parade conducted by the prosecution does have any evidentiary value because in para 25 of Hiralal Yadav (PW-1) he has stated that he has identified three persons and rest persons were shown to him at the police station. The statement of Hiralal Yadav (PW-1) is completely at variance with the FIR and there is material contradictions about the incident. In para 18 Hiralal Yadav has stated that three persons who came to his house, whereas even the Court statement he has categorically deposed that police men has made him seen present appellant Jaylal in the police station, that is why he could identify the present appellant, which means

the TIP vitiated. He also submits that where identification parade is not held in accordance with law and by taking care and precaution and when there is no other evidence to connect the accused persons for commission of crime, the case of the prosecution is doubtful. Shiv Ram Singh (PW-10) has deposed in his Court statement in para 7 that the present appellant was called before identification and he was shown to Hiralal Yadav (PW-1) and thereafter a TIP was conducted. As such, the criminal appeals deserve to be allowed and the impugned judgment so far as it relates to appellants Jaylal @ Palu Kaushik and Harish Sahu deserves to be set aside.

13. Mr.Dharmesh Shrivastava, learned counsel appearing for appellant-Vikas Sahu in CRA No.464/2021 would submit that there is no eyewitness in the present case and entire case is based on circumstantial evidence, but chain of circumstances to implicate the accused persons with the aforesaid crime could not be completed by the prosecution. He would further submit that the entire case is based on the statement of Hiralal Yadav (PW-1) and identification of the accused persons, but the entire investigation is vitiated as the accused persons were shown to Hiralal Yadav by police in the Police Station and thereafter the accused persons and identifier were taken to Tahsil Office for identification parade and the identification parade were conducted in presence of jail constables, kotwar, peon of the Tahsil Office. He would also submit that the memorandum and

seizure witnesses also could not support the prosecution case, therefore, the appellants are entitled to be acquitted and the impugned judgment dated 5.2.2021 is liable to be set aside. The evidence of the prosecution witnesses have not supported the case of the prosecution and there are material contradiction, omission and improvement in the version of the statements of the witnesses.

14. Mr.Siddharth Pandey, learned counsel for appellant-Siyaram Saiyyam in CRA No.562/2021 would submit that no memorandum statement of the present appellant has been recorded nor has any seizure been made from his possession. There is a substantial gap between the last seen together alive and found dead as on 3.2.2019 at about 9.30 P.M. the deceased was alive whereas on 4.2.2019 at about 4.45 A.M. he was found dead. Thus, there is a substantial time gap. Also, when the identity of the accused/appellants was not known to the complainant, last seen theory would not survive. He would further submit that dead body panchnama was not prepared nor was any identification of the dead body conducted. Thus, it is not proved that the dead body was of the deceased. No DNA test etc. was conducted regarding the identity of the dead body. The chain of circumstances is not complete so as to link the appellant with the crime in question. The identification proceeding is nothing but a farce as it is flawed. There has been no motive against the present appellant. Suspicion howsoever grave cannot be a

substitute for proof. He contended that it has been stated by complainant Hiralal Yadav (PW-1) that he identified the appellant by touching his collar whereas touching anyone through the collar does not establish the identity of any individual. He further stated that he saw three accused persons in the police station which is why he could identify them and his evidence has been corroborated by Uma Raj (PW-2). Ashok Vaishnav (PW-3) stated that he saw the accused persons in police station. Gautam Vaishnav (PW-3) stated that he signed on blank papers and investigating officer Jitendra Banjare (PW-21) has stated that no memorandum statement has been recorded pertaining to Siyamam Saiyyam/appellant and no consequent seizure has been made from him. He relied upon the judgment of the Supreme Court in the matters of **R. Sreenivasa v. State of Karnataka**<sup>2</sup>, (paras 15 to 18) and **Raja Naykar v. State of Chhattisgarh**<sup>3</sup>.

15. On the other hand, Mr.Sanghrash Pandey, learned Government Advocate appearing for the respondent/State would support the impugned judgment and submit that the prosecution has proved its case beyond reasonable doubt and the learned trial Court after considering all incriminating materials and circumstances available against the accused persons rightly convicted them for the aforesaid offences. Hence, the instant criminal appeals being

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2 2023 LiveLaw SC 751

3 (2024) 3 SCC 481

bereft of merits are liable to be dismissed looking to the commission of offence done by the accused persons.

16. We have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

17. The first question for consideration would be, whether death of deceased Chetan Yadav was homicidal in nature ?

18. On behalf of the prosecution, Dr. Sanjay Kharsan who conducted postmortem on the body of the deceased vide Ex.P-29 has been examined as PW-5 and opined that cause of death was due to head injury and manner of death was homicidal. After hearing learned counsel for the parties and after considering the submissions, we are of the considered opinion that the finding recorded by the trial Court that death of deceased Chetan Yadav was homicidal in nature is the finding of fact based on evidence available on record. It is neither perverse nor contrary to record. We hereby affirm that finding.

19. It is the case of no direct evidence, rather conviction is based on circumstantial evidence. Five golden principles which constitute *Panchseel* of proof of case based on circumstantial evidence have been laid down by the Supreme Court in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**<sup>4</sup>, which state as under :-

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4 (1984) 4 SCC 116



“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;

(2) 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;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) 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 show that in all human probability the act must have been done by the accused.”

20. The learned trial Court after appreciating oral and documentary evidence available on record has convicted the appellants for offence under Sections 302/34, 201/34, 364/34 and 120B of the IPC. It is the case of the prosecution that all the appellants conspired together and committed murder of Chetan Yadav and thereupon caused evidence connected to the said crime to disappear in order to screen themselves from the offences.

21. The trial Court found the motive of the offence proved and established holding that accused Harish Sahu told the police in presence of independent witness Ashok Das Vaishnav (PW-3)

that he was in love with a girl named Keshar, with whom Chetan was about to get engaged for four-five years, he along with other co-accused in this case, hatched a criminal conspiracy to kill deceased Chetan Yadav and committed his murder. It is also clear from the evidence available on record that the accused had hatched a criminal conspiracy to commit the murder of deceased Chetan Yadav and in pursuance of that conspiracy, they not only kept petrol and iron shock absorber of motor cycle with them with an intention of killing the deceased, but in pursuance of their criminal conspiracy, on the night of the incident dated 3.2.2019 at 21.30 P.M., they kidnapped deceased Chetan Yadav and took him to the forest of Sutyapath and killed him by inflicting serious injury on his head with an iron rod and sprayed petrol on his body to destroy/conceal the identity of the deceased and destroyed the evidence of murder.

22. Hiralal Yadav (PW-1) has stated in para 1 of his evidence that he recognize the accused by face present in the Court, but do not know their names. Three of them had come to their house and he saw the other three at the police station. (The complainant pointed out Siyaram, Vikas, and Vijay as the three accused who came to their house.) In para 2 of his evidence, he has stated that the incident occurred on the third day of the second month of this year. Around 9 P.M. he along with his parents, his elder brother Mukesh and his younger brother Chetan were at home. Then, accused Siyaram, Vikas and Vijay came to their house. Two of

the accused (pointing to Siyaram and Vikas) were wearing police uniforms and the third accused (pointing to Vijay) was wearing plain clothes. They told them that they had come from Thankhamhariya Police Station. A theft had occurred at Thankhamhariya and they needed to take his brother for questioning. They said they would return him within an hour. The accused had come in a Maruti van. They took his brother Chetan with them in Maruti van and two people wearing police uniforms took Chetan, while the third person walked back. In para 8 he has stated that when the accused came to their house to take his brother Chetan to Thankhamhariya Police Station, they gave him a written note stating that they were taking Chetan to the police station for questioning for one hour and would return him later. (The witness pointed to accused Siyaram indicating that he had written the note.) The seizure memo of the note is Ex.P-8. In para 13 of his cross-examination, he has admitted that he told the police while getting the first information report, Ex.P-1, written that three unknown persons had come to his house at night. He has also admitted that the FIR, Ex.P-1, mentions that three persons wearing khaki clothes came to ask questions to Chetan Yadav. He has also admitted that the police wrote the first information report, Ex.P-1, as per his statement. In para 18 of his cross-examination, he has denied that the police told him to identify the persons in the identification process. He has admitted that when the police took him to the police station and showed

him the accused present there, their faces were uncovered. He has admitted that that is why he identified the accused at the Tehsil office and Sub-Jail Bemetara. He stated on his own that he had seen them at home, so he recognized them.

23. Tahsildar Uma Raj has been examined as PW-2. In para 1 of her evidence, she has stated that she has been posted as Tehsildar and Executive Magistrate at Tehsil Thakurtola, District Bemetara, since January 2019 till today. On 06.02.2019, she received a letter, Ex.P-13, from the Station House Officer, Thakurtola, regarding the identification process of the accused in Crime No. 11/19 under Sections 365, 302, 201, 120B and 34 of the IPC. After receiving the letter, she conducted the identification process at Tehsil office Thakurtola on 06.02.2019. The identification process was conducted for two accused, who were identified by Hiralal Yadav. Other persons were also made to stand along with the two accused, out of which two accused, Siyaram and Vikas Sahu, were identified by Hiralal Yadav by holding their collars. The identification process documents, Exs.P-10 and P-11, bear her signature on part B. Her office peon Swati and village Kotwar Pardeshi were present as witnesses during the identification process and signed Exs.P-10 and P-11 on the witness portion in her presence. The accused who were identified also signed Exs.P-10 and P-11 on part E in her presence. In para 5 of her evidence, she has stated that on 19.03.2019, the identification process of the accused was again conducted at Sub-Jail

Bemetara. On that date, the identifier Hiralal Yadav conducted the identification process of four accused. Four accused were made to stand along with other persons, out of which three accused, Jaypal, Harish and Vijay Gandharv were identified by the identifier Hiralal Yadav by holding their collars. The fourth accused Pawan Nirmalkar was not identified. In para 6 of her evidence, she has stated that the identification process documents Exs.P-15, P-16, P-17 and P-18 bear her signature on part A. Two jail guards were present as witnesses during the identification process and signed Exs.P-15 to P-18 on the witness portion in her presence. The accused who were identified also signed Exs.P-15 to P-18 on part D in her presence.

24. Investigating officer Jitendra Banjare has been examined as PW-21. In para 2 of his evidence, he has stated that during investigation site map of the incident was prepared on 4.2.2019 itself. During investigation, on receipt of the case dairy of Police Station Sighanpuri, District Kabirdham, Crime No.03/2019, Section 302 IPC, through a letter from the Superintendent of Police, Bemetara, the diary related to Crime No.11/19 of Police Station Khamhariya was received and Section 302 IPC was added in the said case. During investigation, after finding the address of accused Harish Sahu, son of Kodu Sahu, resident of Dargaon, Police Station Sahaspur, District Kabirdham, was questioned in front of witnesses under Section 27 of the Evidence Act and his memorandum statement was recorded vide Ex.P-20.

On the basis of memorandum statement of accused Harish Sahu, one Samsung mobile bearing two sims was seized in presence of two witnesses vide Ex.P-26. On 06.02.2019, accused Vikas Sahu, resident of Okhari, Pachpedi Police Station, District Bilaspur, produced a Realme mobile phone with a Jio SIM, a Hero HF Deluxe motorcycle without a number plate, and a registration card with vehicle number CG 10 Z-6025. He signed the seizure memo (Ex.P-22) in the presence of witnesses.

25. In para 6 of his evidence, he has stated that on the same day, accused Pawan Nirmalkar, resident of Palansari, Pandatarai Police Station, District Kabirdham produced an MI mobile phone with Airtel and Idea SIMs and a Hero Honda Splendor Plus motorcycle with number CG 10 ID-3761. He signed the seizure memo (Ex.P-23) in the presence of witnesses. During the investigation, on the same day, accused Vijay Gandharv, resident of Kawardha, District Kabirdham, produced a MI mobile phone with an Airtel SIM. He signed the seizure memo (Ex.P-27) in the presence of witnesses. On the same day, the identification process of accused Siyaram Sayam and Vikas Sahu was conducted at Tehsil office by Tehsildar Thankhamharia. The identification memos are Ex.P-10 and Ex.P-11. On 19.03.2019, the identification process of accused Jaipal Kaushik, Harish Sahu, Vijay Gandharv and Pawan Nirmalkar was conducted by Tehsildar Thankhamharia, which is recorded in Ex.P-15 to Ex.P-18.

26. In para 9, this witness has stated that during the investigation, on 24.02.2019, accused Jaipal @ Palu Kaushik, resident of Pendikhurd, Sahaspur Lohara Police Station, District Kabirdham was questioned in the presence of witnesses and his statement was recorded under Section 27 of the Indian Evidence Act. The memorandum, Ex.P-21, bears his signature. On the same day, based on Jaipal Kaushik's statement, a search was conducted at his old and new residences in Pendikhurd and Hero Honda Passion Pro motorcycle, CG 04 DJ-1939, iron rod, black leather belt with "CG Police" written on a steel buckle, Steel badge with "CG Police" written, blue nylon rope and yellow and white cloth bag were seized from him vide Exs.P-24 and P-25. On 17.02.2019, Constable Mukesh Chandravanshi produced three sealed containers containing the viscera of deceased Chetan Yadav, which were seized in the presence of witnesses. The seizure memo, Ex.P-38, bears his signature. On 14.03.2019, Rohit Kumar Gandharv produced the registration paper and vehicle documents of motorcycle CG-04 DJ-1939, which were seized in the presence of witnesses. The document, Ex.P-06, bears his signature. On 07.04.2019, Kapil Nirmalkar produced the original registration card of motorcycle CG-10 ID-3761, which was seized in the presence of witnesses. The seizure memo, Ex.P-07, bears his signature. On the same day, complainant Hiralal Yadav produced a handwritten agreement letter, which was seized in the presence of witnesses. The seizure memo,

Ex.P-08, bears his signature. During investigation, iron shock absorber of the motor-cycle was seized from accused Jaypal Kaushik. In para 53 of his cross-examination, he has admitted that memorandum statement of accused Pawan Nirmalkar has not been recorded. He has also admitted that no document regarding the mobile and SIM seized from accused Pawan is attached in this case by him. During the investigation of the case, he had observed in the identification memo that accused Pawan Nirmalkar has not been identified by any witness.

27. The Supreme Court in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra**<sup>5</sup> has held that when the death had occurred in his (the appellant therein) custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. It was observed as under:-

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of H.P.*<sup>6</sup> it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with “khukhri” and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v.*

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5 (2006) 10 SCC 681

6 (1972) 2 SCC 80



State of Maharashtra<sup>7</sup> the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife....”

28. The Supreme Court in the matter of **Sandeep Vs. State of Uttar Pradesh**<sup>8</sup> had occasion to deal with such nature of evidence wherein it held that it is quite common that based on admissible portion of the statement of the accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered. That part of the statement which does not in any way implicate the accused but is mere statement of facts would only amount to mere admissions which can be relied upon for ascertaining the other facts which are intrinsically connected with the occurrence, while at the same time, the same would not in any way result in implicating the accused in the offence directly.

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7 (1992) 3 SCC 106

8 (2012) 6 SCC 107

29. The Supreme Court in the matter of **Mehboob Ali & Anr. v. State of Rajasthan**<sup>9</sup> has observed that the discovery of facts under Section 27 information regarding other accused persons, to establish charge of conspiracy, in furtherance of common intention would be admissible. The Supreme Court in such case at para 16, 17 & 18 has held as under:-

“16. This Court in State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600 has considered the question of discovery of a fact referred to in Section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottayha v. King Emperor AIR 1947 PC 67 and held thus : (Navjot Sandhu (2005) 11 SCC 600, SCC p. 704, paras 125-27)

“125. We are of the view that Kottaya case [AIR 1947 PC 67] is an authority for the proposition that “discovery of fact” cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extracted supra was highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu (2000) 6 SCC 269. Thomas J. observed that:

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9 (2016) 14 SCC 640

(SCC p. 283, para 35)

'35 ...The decision of the Privy Council in Pulukuri Kottaya v. King Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.'

In Mohd. Inayatullah v. State of Maharashtra (1976) 1 SCC 828, Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case, AIR 1947 PC 67. The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

'13...Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. King Emperor AIR 1947 PC 67; Udai Bhan v. State of U.P. [1962 Supp (2) SCR 830])."

17. In State of Maharashtra v. Damu AIR 2000 SC 1691 the statement made by the accused that the dead body of the child was carried up to a particular spot and a broken glass piece recovered from the spot was found to be part of the tail lamp of the motorcycle of co-accused alleged to be used for the said purpose. The statement

leading to the discovery of a fact that accused had carried dead body by a particular motorcycle up to the said spot would be admissible in evidence. This Court has laid down thus : (SCC pp. 282-83, paras 35-38)

“35. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in *Pulukuri Kottaya v. Emperor* AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the “fact discovered” envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

36. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which “distinctly relates to the fact thereby discovered”. But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of

information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

37. How did the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.

38. In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji Section 27 that the dead body of Dipak was carried on the motorcycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent.”

18. In *Ismail v. Emperor* AIR 1946 Sind 43 it was held that where as a result of information given by the accused another co-accused was found by the police the statement by the accused made to the Police as to the whereabouts of the co-accused was held to be

admissible under section 27 as evidence against the accused.”

30. In the present case, the prosecution has proved the following circumstances,

1. On 03.02.2019 at 21:30 hours, accused Siyaram Saiyyam, Vikas Sahu and Vijay Gandharv went to the house of the deceased Chetan Yadav and abducted him by saying, "we have come from Khamariya Police Station, there has been a theft in Khamariya Police Station, they need to take his brother for questioning, they will return him within an hour.”

2. Deceased Chetan Yadav was last seen with accused Siyaram Saiyyam, Vikas Sahu and Vijay Gandharv before his death. The accused have not offered any explanation or evidence regarding the death of Chetan Yadav and the circumstances surrounding his death.

3. After deceased Chetan Yadav was abducted by accused Siyaram Saiyyam, Vikas Sahu and Vijay Gandharv on the night of 03.02.2019 and did not return and on the basis of aforesaid incident, brother of the deceased namely Hiralal Yadav (PW-1) on the very next day i.e. 04.02.2019 lodged the FIR (Ex.P-1) at Police Station Khamariya.

4. On 04.02.2019 at 4:45 P.M., the forest guard and prosecution witness Sarjuram (PW-11) saw a blood-soaked and partially burnt body on the roadside in Sutiya Path jungle.

5. On 05.02.2019, during the inquest of the body, the complainant and brother of the deceased, Hiralal Yadav (PW-1) along with prosecution witness Ashok Vaishnav (PW-3), identified the body as that of Chetan Yadav.
6. Complainant Hiralal Yadav (PW-1) not only identified accused Siyaram Saiyyam, Vikas Sahu and Vijay Gandharv by touching them in Court but also clearly stated that he had identified them during the identification process conducted during the investigation.
7. Postmortem of Chetan Yadav's body revealed a fracture in the back of his skull and the protrusion of the brain tissue from the back of his head, which proves that the deceased was seriously injured in the back of the head.
8. The statement of Dr.Sanjay Kharsan (PW-5) who conducted postmortem of body of deceased Chetan Yadav has opined that the death of the deceased was homicidal and after testing the iron shock absorber of the motor-cycle seized in the case, his opinion that serious head injury could have been caused to the deceased by iron shock absorber of the above mentioned motor-cycle, which was seized and sent for examination in the case and the deceased died due to shock caused by the serious injury on the head of the deceased.
31. In the case in hand, test identification parade was conducted by the Tahsildar / Executive Magistrate Uma Raj (PW-2) in Tahsil

Office on 6.2.2019 in which Hiralal Yadav has identified appellant Siyaram vide Ex.P-10 and appellant Vikas Sahu vide Ex.P-11. Further test identification parade was conducted by the Tahsildar / Executive Magistrate Uma Raj in Sub-Jail, District Bemetara on 19.3.2019 in which Hiralal Yadav identified Jaypal @ Palu vide Ex.P-15, Harish Sahu vide Ex.P-16 and Vijay Gandharv vide Ex.P-17. However, Hiralal Yadav has not identified appellant Pawan Nirmalkar vide Ex.P-18.

32. The Supreme Court in the matter of **Malkhansingh and others v. State of M.P**<sup>10</sup>. held as under:-

“7.It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when,

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10 (2003) 5 SCC 746



for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (Emphasis supplied).”

33. The Additional Sessions Judge, Bemetara in para 5 of its judgment has held that his predecessor had framed charges against accused Siyaram Saiyyam, Vijay Gandharv, Jaipal @ Palu, Pawan Nirmalkar and Harish Sahu under Sections 120B, 364, in the alternative to Section 364/34, 302/34 and 201/34 of the IPC and against accused Vikas Sahu under Section 120B, 364, in the alternative to Section 364/34, 302/34, 201/34 and 170 of the IPC and when read out and explained to them, they denied committing the crime and when they were tried under Section 313 of the CrPC, they pleaded innocent.

34. The trial Court in para-16 of its judgment has held that according to the prosecution, no eyewitness has seen the accused killing deceased Chetan Yadav. Rather after the incident, on 04.02.2019 at about 4.45 A.M. when forest watchman prosecution witness Sarjoram (PW-11) was returning home after visiting beat, he saw an unknown person lying half-burnt and soaked in blood on the roadside. When he went closer and saw, he had a mark of serious injury on his head, which indicated that he had died. The above facts of the prosecution have been confirmed by prosecution witness Sarjoram (PW-11) who was examined in the Court. As far as the question is whether the half-burnt body found in Sutiya path was that of the deceased Chetan Yadav. The postmortem report (Ex.P-29) explicitly states that the doctor who conducted autopsy identified the body with the help of Hiralal Yadav (PW-1) and Bihar Singh, who recognized the body as that of Chetan Yadav. The identification of the body is natural because it was identified by Hiralal Yadav (PW-1), brother of Chetan Yadav and signature of Hiralal Yadav (PW-1) is present on both the postmortem report (Ex.P-29) and the inquest report (Ex.P-3). The presence of Hiralal Yadav's signature on both documents confirms that the partially burnt body found was indeed that of Chetan Yadav. The prosecution witness Hiralal Yadav (PW-1), who identified the body, was not challenged during cross-examination, which further confirms that the partially burnt body found was that of Chetan Yadav.

35. Considering the arguments advanced by the learned counsel for the parties, the law laid down by the Supreme Court in the above-stated judgments (supra), evidence of Hiralal Yadav (PW-1), postmortem report (Ex.P-29), evidence of Dr.Sanjay Kharsan (PW-5), recovery of iron shock absorber of motor-cycle stains with blood (Ex.P-25 ) from appellant Jaypal @ Palu Kaushik in which human blood was found as per FSL report (Ex.P-63) and considering the memorandum statements of the accused / appellants, we are of the considered opinion that the trial Court has not committed any illegality or infirmity in convicting and sentencing appellants Appellants-Vijay Gandharv (A1), Jaypal @ Palu Kaushik (A2), Harish Sahu (A3), Vikas Sahu (A4), Siyaram Saiyyam (A5) for offences under Sections 364/34, 120B, 201 and 302/34 of the IPC and appellant-Vikas Sahu for offence under Section 170 of the IPC. As such, their appeals deserves to be **dismissed**.

36. Considering the evidence of Jitendra Banjare (PW-21), particularly para-53 of his cross-examination and the fact that no any incriminating articles have been seized from his possession and in TIP also, Hiralal Yadav has not identified appellant Pawan Nirmalkar vide Ex.P-18 and the prosecution has utterly failed to prove his involvement in crime in question, we are of the considered opinion that the trial Court has committed grave legal error in convicting appellant-Pawan Nirmalkar (A6) for offences

under Sections 364/34, 120B, 201 and 302/34 of the IPC as benefit of doubt ought to have been given to him.

37. For the foregoing reasons, **Criminal Appeal 419/2021** filed on behalf of appellant-**Vijay Gandharv**, **Criminal Appeal No.352/2021** filed on behalf appellant-**Jaypal @ Palu Kaushik**, **Criminal Appeal No.464/2021** filed on behalf of appellants-**Harish Sahu & Vikas Sahu** and **Criminal Appeal No.562/2021** filed on behalf of appellant-**Siyaram Saiyyam** are **dismissed**. However, **Criminal Appeal No.620/2021** filed on behalf of appellant-**Pawan Nirmalkar** is **allowed** and his conviction & sentence under Sections 364/34, 120B, 201 and 302/34 of the IPC are hereby set aside. He is on bail. He is not required to surrender. His bail bonds are cancelled and sureties stands discharged.
38. Keeping in view the provisions of Section 437-A CrPC, the accused-appellant, namely, **Pawan Nirmalkar** is directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in the Code of Criminal Procedure of sum of Rs.25,000/- with two reliable sureties in the like amount before the Court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

39. Appellants-Vijay Gandharv, Jaypal @ Palu Kaushik, Harish Sahu, Vikas Sahu and Siyaram Saiyyam are in jail. They shall serve out their sentence as ordered by the trial Court.

40. The trial court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action forthwith.

Sd/-

**(Bidhu Datta Guru)**  
Judge

Sd/-

**(Ramesh Sinha)**  
Chief Justice

**Judgment Date : 20<sup>th</sup> September, 2024**

Bablu