



2024:CGHC:38409-DB

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1368 of 2021

1 - Bhojraj Nand S/o Makhansai Nand, aged about 30 years R/o Village Batki, Police Station Saraipali, District Mahasamund Chhattisgarh at Present R/o Saddu Colony, Chandani Chowk (on rent of house of Ganesh Sinha), Police Station Mowa, Pandri, District Raipur Chhattisgarh

2 - Anil Kumar Behra S/o Udaynath Behra, aged about 33 years R/o Tikrapara, Basna, Behind Rest House Police Station Basna, District Mahasamund Chhattisgarh

3 - Chitrasen Behra S/o Vishwanath Behra, aged about 22 years R/o Parampur Ganjam (Odisha) At Present Tikrapara, Basna, Behind Rest House Police Station Basna, District Mahasamund Chhattisgarh

---- Appellants

versus

State of Chhattisgarh Through Station House Officer, Police Station D.D. Nagar, Raipur District Raipur Chhattisgarh

---- Respondent

CRA No. 1461 of 2021

Amrit Sharma, S/o Rajnarayan Sharma, Aged About 22 Years R/o Gram Sitapur, Post Rasoda, Police Station Basna, District Mahasamund (C.G.) Presently R/o Om Society, Near V.L.M. School, House Of Manoj Pandey, Sunder Nagar, Police Station D.D. Nagar, Raipur Chhattisgarh

---- Appellant

Versus

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State of Chhattisgarh Through District Magistrate, Raipur Chhattisgarh

---- **Respondent**

For Appellant- Bhojraj Nand : Mr. Vikash Pradhan, Advocate
For Appellants – Anil Kumar Behra : Ms. Sakshi Dewangan, Advocate
& Chitrasen Behra
For Appellant – Amrit Sharma : Mr. Kshitij Sharma, Advocate
For Respondent/State : Mr. R.K. Gupta,
Additional Advocate General

Hon'ble Shri Ramesh Sinha, Chief Justice

Hon'ble Shri Bibhu Datta Guru, Judge

Per Ramesh Sinha, Chief Justice

27.09.2024

1. Since the above-captioned appeals have arisen out of one and same judgment and since common question of fact and law is involved in these appeals, they have been heard together and are being disposed of by this common judgment.
2. These criminal appeals preferred under Section 374(2) of the Criminal Procedure Code, 1973 (for short, 'CrPC') are directed against the impugned judgment of conviction and order of sentence dated 11.10.2021 passed by the learned Sixth Additional Sessions Judge, Raipur (C.G.) in Sessions Trial No. 159/2018, by which the appellants have been convicted for offences punishable under Sections 302/34 and 120B of the Indian Penal Code (for short 'the IPC') sentenced them to undergo life imprisonment and fine of Rs.5,000/-, in default of payment of fine, one year additional R.I. (each appellants) and rigorous imprisonment for 07 years and fine of Rs. 1,000/-, in

default of payment of fine, three months additional R.I. (each appellants) with a direction to run both the sentences concurrently.

3. The prosecution's case, in brief, is that on 16.04.2018, complainant Manoj Pandey lodged a Dehati Nalishi (Ex.P-3) before DD Nagar Police Station, Raipur that he lives with his family in Om Society Sundar Nagar House No. 28. His house is two storeyed and he lives with his family in the ground floor. There are two blocks on the first floor. Rakesh Pandey lives on rent in one block. The second block is vacant. There are two single rooms on the second floor. Amrit Sharma lives in one room and Rahul lives on rent in the other room for the last one and a half years. On 16.04.2018, at around 05:00 a.m., Harishchandra Nirmalkar of the locality informed his wife Sangeeta Pandey over phone that there is a crowd near his house and may be someone has been beaten up. His wife told him about it. When he went out of the house, he met with tenant Amrit Sharma. He told that at night, 4-5 unknown boys came to the upper room and tied him and his brother Prakash Sharma's hands and feet with a cloth and took them to the room of Rahul, beat him up and locked the door from outside and fled. He opened the door and came back. He told them that Prakash has to be taken to the hospital, then when he called 108 ambulance, call was connected to Madhya Pradesh, it took 5-10 minutes to transfer the call to Chhattisgarh. When the ambulance did not

arrive, he came to Sundar Nagar Chowk with the residents of the locality for the doctors of the locality. When 108 ambulance was found at the Chowk, he came back with them. On checking by the ambulance doctor, Prakash Sharma was declared dead. It seems to have been murdered by some unknown person. On the report of the above, a Dehati Merg Intimation at Crime No. 0/18 was registered and on the basis same, First Information Report No.129/2018 was registered vide Ex.P-33 by Police Station DD Nagar on 16.04.2018 against the unknown accused under Section 302 of the Indian Penal Code and investigation was done.

4. Investigating officer left for scene of occurrence and after summoning the witnesses vide Ex.P-5, inquest over the dead body of the deceased was prepared vide Ex.P-6 and the dead body of the deceased was sent to Mekahara Hospital, Raipur for conducting postmortem vide Ex.P-32, wherein postmortem was conducted by Dr. Shivnarayan Manjhi (PW-14) and Dr. O.P. Tandon vide Ex.P-21 and found following injuries over the dead body of the deceased :

- (i) A horizontal contusion wound of size 2 x 0.5 cm on the anterior part of the upper lip;
- (ii) A contusion wound of size 1 x 1 cm on the tip of the nose, on cutting which blood was collected in the nasal septum;
- (iii) Three contusion wounds of 1 cm width present on both wrists and around the forearm;

(iv) Injuries on the dorsum of both ears and a contusion of size 2 x 2 cm was present on the right scapular region.

(v) Redness due to injury on the left parietal and temporal part of the head.

All injuries were caused by hard and blunt objects.

All injuries were antemortem in nature and red ecchymosis were present. The injuries present on the body of the deceased were sufficient to cause death in the normal course of nature.

Opinion for cause of the death was given vide Ex.P-29, whereby it has been opined that death was due to asphyxia as a result of smothering and duration of death was within 24 hours, prior to postmortem examination.

5. Spot map was prepared by patwari Narendra Pandey (PW-1) vide Ex.P-2. During the course of investigation, accused Amrit Sharma taken into custody and on interrogation, confessed the guilt, stating that his cousin brother, Prakash Sharma, who had been staying with him since 11.04.2018, hatched a plan with his friends, Bhojraj Nand, Anil Kumar Behra, and Chitrasen Behra. They conspired to kidnap Prakash Sharma, take him to a secluded area in Raipur, and demand a ransom of ₹2 crores from his father, Satyanarayan Sharma, expecting to receive around ₹50 lakhs. They planned to share the money and start a business. As part of their plan, they gathered at Amrit's rented house and knocked Prakash Sharma unconscious using

chloroform while he was asleep then, they gagged Prakash Sharma's mouth with cloth and tied his hands and feet with his scarf, and laid him on the bed in Rahul Kumar's rented room and to avoid suspicion, his friends also tied Amrit Sharma's hands and feet with a scarf and left him in the room and before leaving, they locked the room from the outside using a new lock and departed from there. After some time, when Prakash Sharma didn't show any movement, Amrit Sharma freed himself and on checking Prakash he found him dead.

6. During course of investigation, memorandum statement of accused Amrit Sharma was recorded vide Ex.P-8 and on the basis of same, at his instance polythene stuffed in the mouth, pieces of scarf and scarf used to tie hands and legs were seized vide Ex.P-13 and one touch screen mobile of M.I. Company was also seized at the instance of accused Amrit Sharma vide Ex.P-14.
7. On the basis of memorandum statement of accused Amrit Sharma, other co-accused namely, Bhojraj Nand, Anil Kumar Behra and Chitrasen Behra were taken into custody and their memorandum statements recorded respectively vide Exs. P-9, P-10 and P-11 and at the instance of accused Bhoraj Nand, one steel lock, pulsar bike belonging to deceased Prakash Sharma bearing registration No. CG-06 GK 1327, motorcycle of accused bearing registration No. CG-06 GH 5120 and one CXTEL company keypad mobile of accused were seized vide Ex.P-15

and one empty bottle of chloroform was also seized at the instance of accused Bhojraj Nand vide Ex.P-16. At the instance of accused Anil Kumar Behra, one touchscreen mobile of Samsung Company belonging to deceased Prakash Sharma and one touchscreen mobile of MI company belonging to the accused Anil Kumar Behra have been seized vide Ex.P-17. At the instance of accused Chitrasen Behra, one keypad mobile of Samsung Company belonging to deceased Prakash Sharma and one touchscreen mobile of Samsung company belonging to the accused Chitrasen Behra have been seized vide Ex.P-18. Documents relating to purchase of pulsar bike belonging to deceased Prakash Sharma bearing registration No. CG-06 GK 1327, its online tax payment bill and bills relating to purchase of two mobiles belonging to deceased Prakash Sharma were seized at the instance of deceased's father Satyanarayan Sharma vide Ex.P-20. Thereafter, all the accused/appellants were arrested vide Exs. P-25 to P-28 and information of their arrest were given to their family members vide Exs. P-35 to P-38.

8. A memo was sent to the Senior Superintendent of Police, Raipur for sending the seized articles for FSL vide Ex.P-42 and by whom seized articles were sent to Forensic Science Laboratory, Raipur vide Ex.P-43, wherefrom FSL reports were received vide Ex.P-39 and Ex.P-44.
9. After completion of the investigation, charge sheet was presented against the accused under Sections 302, 120B, 34 of the IPC

before the Court of Judicial Magistrate First Class, Raipur, wherefrom the case was transferred to the Court of Sessions and after receiving the case on transfer for due disposal, the case was tried by the Court of 6th Additional Sessions Judge, Raipur.

10. When charges were framed against the accused under Sections 120B and 302 read with Section 34 of the IPC and were read out to them, they rejected the charges and wanted trial. The accused were examined under Section 313 of CrPC, in which they have stated that they were innocent and have been falsely implicated in crime in question.
11. In order to bring home the offence, the prosecution examined as many as 19 witnesses and exhibited 44 documents Exs. P-1 to P-44. None was examined on behalf of the defence nor any documents have been exhibited.
12. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment dated 11.10.2021, proceeded to convict the aforesaid accused persons for the aforesaid offences and sentenced them as aforementioned, against which, these criminal appeals have been preferred.
13. Mr. Kshitij Sharma, learned counsel for appellant - Amrit Sharma in CRA No. 1461/2021 would submit the judgment passed by the learned trial Court is bad in the eye of law. The FIR was lodged against unknown person, there is no eye witness and the case is based upon circumstantial evidence only, the prosecution has failed to complete the chain of circumstances beyond all

reasonable doubt to prove the guilt of the appellant. He would further submit that the prosecution has committed grave illegality by not believing the statement of appellant – Amrit Sharma that at night, 4-5 unknown boys came to the upper room and tied him and his brother Prakash Sharma's hands and feet with clothes and took them to the room of Rahul, beat him up and locked the door from outside and fled and only because the rented house belongs to the appellant, wherein the deceased was residing with him, a concocted story of kidnapping and demand of ransom has been created by the prosecution and only on basis of memorandum statement prior to arrest, he along with other co-accused have been falsely implicated in the crime in question. He further submitted that the learned trial Court has failed to appreciate that the case of the prosecution is *per se* unbelievable, incredible and illogical, as it appears from the record that though the appellant Amrit Sharma was taken to the police station, be it on 17.04.2018 or even earlier, he could not be said to be in 'police custody' till he was arrested at 19.05 hours on 17.04.2018, as he did not figure as an 'accused' in the FIR and was not 'accused of any offence' till his arrest. Therefore, it was his arrest which resulted in actual 'police custody' and the memorandum statement given by him on 17.04.2018 at 8.10 am and seizure at 09.15 am, before his arrest and prior to his being 'accused of any offence', would be directly hit by Section 26 of the Evidence Act and there is no possibility of applying the

exception under Section 27 to any information given by him in the course of such confession, even if it may have led to the discovery of any fact, which creates the case of prosecution highly doubtful. Even the memorandum witnesses have not supported the case of prosecution. In support of his submission, learned counsel placed reliance in the matter of ***Rajesh and Another Vs. State of Madhya Pradesh***, reported in ***2023 SCC OnLine SC 1202***. He also submitted that it should have been seen by the learned trial Court that the prosecution has failed to produce any admissible evidence against the appellant on the basis of which he could be convicted in the offences in question. He contended that the learned trial Court has failed to see that the entire case of the prosecution is based on circumstantial evidence and the chain is not complete so as to establish the involvement of the appellant in the offence. The learned trial Court has also failed to see that prosecution has not produced any witness to establish the theory of conspiracy, neither any meeting of mind between the appellant and other co-accused persons nor any Call Detail Report has been produced. He further contended that conviction of the appellant on the basis of Section 106 of the Evidence Act is bad in law as the prosecution on the basis of information provided by the present appellant has arrested and then prosecuted three other persons. In support of contention, he relied upon the judgment passed by Co-ordinate Bench of this Court in the matter of ***Shekhrum Kaushik Vs.***

State of Chhattisgarh, reported in ***2024 SCC OnLine Chh 3132***.

He lastly submitted that the trial Court has erred in ignoring that the prosecution has failed to prove its case beyond reasonable doubt and the case of prosecution is based on presumption/probability in the absence of any concrete medical and forensic evidence. Therefore, the judgment passed by the trial Court is liable to be set aside and the accused/appellant is liable to be acquitted in the interest of justice.

14. Mr. Vikash Pradhan, learned counsel for appellant – Bhojraj Nand in CRA No.1368/2021 would submit the learned trial Court has committed serious error of law in convicting the appellant only on the basis of memorandum statement, whereas the memorandum witnesses have not supported the case of prosecution. He further submitted that there is no eye witness and the learned trial Court has failed to appreciate that the prosecution agency has not adduced any evidence to show that the appellant hatched conspiracy for committing murder of deceased Prakash Sharma. Therefore, he prays that the appellant be acquitted in the interest of justice.
15. Ms. Sakshi Dewangan, learned counsel for appellants Anil Kumar Behra and Chitrasen Behra submitted that so far as these appellants are concerned it is alleged that they travelled from Basna, District Mahasamund, however, no motor-cycle has been recovered from them or any CCTV footage of the route of the accused reaching the spot of incident and the CCTV footage near

the place of seizure, Collectorate Garden, has been seized has been produced and only grounds against these appellants are that mobile phones have been recovered from them, however, the seizure witnesses have been turned hostile, as such, the involvement of these accused in the incident is not proved. She further submitted that there is no evidence of any criminal conspiracy. She also submitted that there is no eyewitness in the instant case and the whole case is based on the circumstantial evidence and the prosecution has failed to prove the chain of circumstantial evidence. As such, these appellant be acquitted giving them benefit of doubt. Reliance has been placed by her with regard to circumstantial evidence on the judgment passed by the Hon'ble Supreme Court in the matter of ***Digamber Vaishnav Vs. State of Chhattisgarh***, reported in ***AIR 2019 SC 1367*** and the judgment passed by this Court in the matter of ***Lavkush Shukla Vs. State of Chhattisgarh (CRA No. 1153 of 2022)***. With regard to Criminal Conspiracy, she placed reliance on the judgments passed by the Hon'ble Supreme Court in the matter of ***Surendra Kumar and Anr. Vs. State of Uttar Pradesh***, reported in ***(2021) 20 SCC 430*** and ***Praveen alias Sonu Vs. State of Haryana***, reported in ***AIR 2022 SC 270***. In relation to Recovery Evidence, she placed reliance on the judgment passed by the Hon'ble Supreme Court in the matter of ***Ravinder Singh alias Kaku Vs. State of Punjab***, reported in ***AIR ONLINE 2022 SC 620***; and and the judgment passed by this Court in the matter of

Manoj Kumar Soni Vs. State of Madhya Pradesh, reported in ***2023 SCC Online 948*** and in relation to the memorandum, she placed reliance on the judgment passed by this Court in the matter of ***Krishna Jali Vs. State of Chhattisgarh (CRA No. 2172 of 2023)***.

16. On the other hand, Mr. R. K. Gupta, learned Additional Advocate General appearing for the respondent/State would support the impugned judgment and submitted that He further submitted that the incident occurred between 00.05 and 05.00 in the night. How did an unknown person reach the room of accused Amrit Sharma without any hindrance, that too in the second floor, there is no fact and evidence of accused Amrit Sharma entering inside by damaging the door of the room and accused Amrit Sharma has not revealed that he struggled to save himself while being beaten up and that he got injured due to the beating, due to which the explanation given by accused Amrit Sharma that at night, 4-5 unknown boys came to the upper room and tied him and his brother Prakash Sharma's hands and feet with clothes and took them to the room of Rahul, beat him up and locked the door from outside and fled is not satisfactory and there is a strong basis to presume that accused Amrit Sharma had helped the person who entered the room of accused Amrit Sharma and caused the incident. He also submitted that as per the evidence of Constable Kuleshwar Sahu (PW-5) he had taken a sniffer dog to the crime scene Sundar Nagar Om Society on the date of

incident i.e. 16.04.2018, wherein a piece of towel was lying at the crime scene. The dog had identified the accused Amrit Sharma by touching that towel. In cross-examination he has stated that on his questioning Amrit Sharma had told that he had taken the towel from the deceased. It has been further submitted that the investigating officer has made a note report (Ex.P-23) that during inspection, the dog gave signals to Amrit Sharma and stopped near him, due to which he was thoroughly interrogated and accused Amrit Sharma accepted committing the crime with his accomplices Bhojraj Nand, Anil Kumar Behera, Chitrasen Behera residents of Basna Mahasamund. Thereafter, the accused were taken into custody and their memorandum statements were recorded and incriminating articles have been seized at their instances. Thus, 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 bereft of merits are liable to be dismissed looking to the commission of offence done by the accused persons.

17. We have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
18. It is the case of no direct evidence, rather conviction is based on circumstantial evidence. It has been consistently laid down by the

Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063**; **Eradu and Ors. v. State of Hyderabad, AIR 1956 SC 316**; **Earabhadrapa v. State of Karnataka, AIR 1983 SC 446**; **State of U.P. v. Sukhbasi and Ors., AIR 1985 SC 1224**; **Balwinder Singh v. State of Punjab, AIR 1987 SC 350**; **Ashok Kumar Chatterjee v. State of M.P., AIR 1989 SC 1890**). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In **Bhagat Ram v. State of Punjab, AIR 1954 SC 621**, it was laid down by the Supreme Court that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

19. We may also make a reference to a decision of the Hon'ble Supreme Court in **C. Chenga Reddy and Ors. v. State of A.P., (1996) 10 SCC 193**, wherein it has been observed thus:

“In a case based on circumstantial evidence, the settled law is that the circumstances from which the

conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....”.

20. In **Padala Veera Reddy v. State of A.P. and Ors., AIR 1990 SC**

79, it was laid down by the Supreme Court that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

“(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

21. In **State of U.P. v. Ashok Kumar Srivastava, 1992 CrLJ 1104**, it was pointed out by the Supreme Court that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.
22. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".
23. 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, (1984) 4 SCC 116**, which state as under:-

“(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.”

24. In the matter of **Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 1 SCC 681**, the Supreme Court has held as under:-

“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is

sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.”

25. The principles of circumstantial evidence is reiterated in **Nizam and another vs. State of Rajasthan, (2016) 1 SCC 550**, wherein the Supreme Court has held that:-

“8. Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his innocence.”

26. The learned trial Court after appreciating oral and documentary evidence available on record has convicted the appellants for offence under Sections 302/34 and 120B of the IPC. It is the case of the prosecution that all the appellants conspired together and committed murder of deceased Prakash Sharma.

27. The trial Court found the motive of the offence proved and established holding that prosecution witnesses Satyanarayan Sharma (PW-12) and Smt. Sanyogita Sharma (PW-9) have stated in their statement that in December, 2017 accused Amrit Sharma had come to ask for Rs. 2 lakh. Even before this accused Amrit Sharma and come 2-4 times to ask for money, but they do not give it saying they do not have any money. Further, accused Amrit Sharma told the police in presence of independent witness Sanjay Thakur (PW-10) that his uncle is rich and he wanted to kidnap Prakash Sharma and extort money from his uncle and for the said purpose, he made a plan / conspiracy to kidnap Prakash Sharma with his friends / accused Bhojraj Nand, Anil Kumar Behra and Chitrasen Behra. He further stated that to execute the said plan, he called Bhojraj, Anil Kumar Behera, Chitra Sen Behera through his mobile number 8435206601 and called all three on 15.04.2018. All three left came Raipur at around 02.00 in the night by motorcycle, all three came to his room at around 2.30 am, he was sleeping with Prakash Sharma, brought the above three to the room, Prakash Sharma was sleeping on the bed at that time, according to plan, chloroform was made to inhale Prakash Sharma in sleeping state, after some time he became unconscious, then all four of them together put plastic and cloth in his mouth and tied his mouth with cloth, also tied his hands and legs with scarf, broke the lock of Rahul's room next door and made him sleep on the bed, then all three

tied his hands and legs, locked it from outside and kept the key under the cooler and went away, at around 3.30 am, after hearing the sound of Prakash Sharma's throat getting strangled, he suddenly became quiet, then he opened the scarf from his hands and legs and removed the cloth and plastic from Prakash Sharma's mouth and opened the scarf from both hands and legs, as Prakash Sharma's body became cold, informed the landlord Manoj Pandey at around 4.30 am to take him for treatment. He had given the broken lock and the bottle of chloroform to Bhojraj while leaving, and Bhojraj has kept Prakash Sharma's Pulsar motor cycle with himself, and Prakash Sharma's touch screen Samsung mobile has been kept by Anil Behera and Samsung company's key paid mobile has been kept by Chitrasen Behera. He had kept the scarf with which Prakash Sharma was tied and the plastic put in his mouth hidden in his room under the mattress on the bed.

28. On the basis of aforesaid memorandum statement (Ex.P-8) of accused Amrit Sharma, at his instance polythene and piece of scarf stuffed in the mouth of the deceased and scarf used to tie hands and legs were seized vide Ex.P-13 and one touch screen mobile of M.I. Company was also seized at the instance of accused Amrit Sharma vide Ex.P-14.
29. The Supreme Court in the matter of **Sandeep Vs. State of Uttar Pradesh**¹ had occasion to deal with such nature of evidence

1 (2012) 6 SCC 107

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.

30. The Supreme Court in the matter of **Mehboob Ali & Anr. v. State of Rajasthan**² 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)

2 (2016) 14 SCC 640

“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: (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.”

31. Since the dead body of the deceased Prakash Sharma was found in the rented house of accused Amrit Sharma, the question would be, whether Section 106 of the Indian Evidence Act, 1872 (for short, the Evidence Act) would be applicable or not?
32. Section 106 of the Evidence Act, states as under: -

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

33. This provision states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. This is an exception to the general rule contained in Section 101, namely, that the burden is on the person, who asserts a fact.

The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the other side. To invoke Section 106 of the Evidence Act, the main point to be established by prosecution is that the accused persons were in such a position that they could have special knowledge of the fact concerned.

34. In the matter of ***Shambhu Nath Mehra v. The State of Ajmer***³, their Lordships of the Supreme Court have held that the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 of the Evidence Act is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution, to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The Supreme Court while considering the word “especially” employed in Section 106 of the Evidence Act, speaking through Vivian Bose, J., observed as under: -

“11. ... The word "especially" stresses that it means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he

3 AIR 1956 SC 404

whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried.”

Their Lordships further held that Section 106 of the Evidence Act cannot be used to undermine the well established rule of law that save in a very exceptional class of case, the burden is on the prosecution and never shifts.

35. The decision of the Supreme Court in ***Shambhu Nath Mehra*** (supra) was followed with approval in the matter of ***Nagendra Sah v. State of Bihar***⁴ in which it has been held by their Lordships of the Supreme Court as under: -

“22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of

4 (2021) 10 SCC 725

circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”

36. Similarly, the Supreme Court in the matter of **Gurcharan Singh v. State of Punjab**⁵, while considering the provisions contained in Sections 103 & 106 of the Evidence Act, held that the burden of proving a plea specially set up by an accused which may absolve him from criminal liability, certainly lies upon him, but neither the application of Section 103 nor that of 106 could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It was further held by their Lordships that it is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. Their Lordships also held that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certain lies upon him.
37. The principle of law laid down by their Lordships of the Supreme Court in **Gurcharan Singh** (supra) has been followed with approval by their Lordships in the matter of **Sawal Das v. State of**

5 AIR 1956 SC 460

*Bihar*⁶ and it has been held that burden of proving the case against the accused was on the prosecution irrespective of whether or not the accused has made out a specific defence.

38. Manoj Pandey (PW-2) has stated in his statement that he recognizes the present accused Amrit Sharma, but does not recognize the other accused. Accused Amrit Sharma lived on rent in a room on the third floor of his house. On 16.04.2018 at 05.00 am, his wife received a call on her mobile that some people were arguing outside their house. Then when he came out of his house, he found accused Amrit Sharma. This witness also says that accused Amrit Sharma had told him that his brother was unconscious and had to be taken to the hospital. The statement of this witness was not challenged by the defense during cross-examination.
39. Aditya Sharma (PW-6) has stated that he recognizes the accused present in the court. He also knows Prakash Sharma who is his cousin who has died. The incident is of 16.04.2018. On 16.04.2018 morning he received a call on his mobile phone which was from a new number. The said phone number is 87702-71947. His step brother Amrit Sharma while crying told that some people have beaten him and his brother Prakash Sharma and they have called an ambulance and the ambulance person told that Prakash Sharma has died. Thereafter his step brother gave the phone to his landlord and when he spoke to the landlord he told that Amrit

6 AIR 1974 SC 778

Sharma told that at night a big incident has happened and you all should come immediately. After that, he called Prakash's father Satyanarayan Sharma who is his uncle and informed him about the incident. Then the uncle said that both of you brothers should come home, we will go together. After that, they hired a Sumo vehicle and went straight to Raipur to Sundar Nagar where Prakash lived. The statement of this witness has not been challenged in cross-examination.

40. Bhupendra Kumar Sharma (PW-7) has stated that he recognizes the accused present in the Court. He also knows Prakash Sharma who is his cousin who has died. He was sleeping in his house. It was about 5.30 in the morning when his younger brother Aditya Sharma came running and knocked on the door and told that some people have come and beaten up Prakash Sharma. Then the younger brother called uncle and told that some people have beaten up Prakash and he has to be taken to the hospital, such a call has come from Amrit. Uncle said that you people come to his house, we will go together. Then they went to uncle's house and hired a Sumo and came directly to Raipur Om Society Sundar Nagar where Prakash and Amrit Sharma lived. This witness has stated that he was told about the incident by prosecution witness Aditya Sharma (PW-6), which is confirmed by the statement of witness Aditya Sharma (PW-6). He has stated that he informed his brother Bhupendra Sharma about the conversation over the phone and witness Aditya Sharma's statement has not been

challenged in cross-examination, hence there is no reason to disbelieve the said statement of this witness.

41. Smt. Sangeeta Pandey (PW-8) has stated that she knows accused Amrit Sharma but does not know the other accused. On the date of the incident, her neighbour Horilal called her and told her that there was a fight going on above her house. Then she woke up her husband to inform him about this. They have given the upper floor on rent in which Amrit Sharma lives on rent. Her husband had gone upstairs. In cross-examination, she has stated that there is a watchman in the society. The statement of this witness that accused Amrit Sharma lives on rent in his house was not challenged during cross-examination.
42. Smt. Sanyogita Sharma (PW-9) has stated that she knows the accused present in the Court. Prakash Sharma is her son who has passed away. Accused Amrit Sharma is her nephew. Accused Amrit Sharma is the son of Rajnarayan Sharma. Her son Prakash was studying B.Sc. in Kalyan College in Bhilai. Her husband had gone to Bhilai on 11.04.2018 to pick up his son Prakash and her son came to Raipur with his father. Since her son had to take English coaching, he told his father that he would stay in Raipur for English coaching. Then her husband told her son to stay in the lodge and shift to the room after seeing the room. Then Amrit Sharma came and told her son not to stay in the lodge but stay with him in his room and Amrit Sharma took her son to keep him with him. She had forbidden her son to stay with

Amrit. On 11.04.2018 in the evening she called her son and asked him where he was and he told her that he was with Amrit. Thereafter her son used to call her on phone. On 15.04.2018 at lunch time she spoke to her son from her husband's mobile. On 16.04.2018 in the morning when she came out after taking bath her husband told her in a hurry that son Prakash has been beaten up and he has to go to Raipur quickly and he left without brushing his teeth. She further stated that when she and her father reached Mekahara Hospital, her nephew Aditya was standing outside the hospital and took them to the platform of the mortuary, then her husband told that son Prakash is no more. In paragraph 14 of the cross-examination, she has admitted that she and her husband knew that Prakash was staying in Raipur with Amrit.

43. Sanjay Thakur (PW-10) has stated that he knows the accused present in the Court. He also knows Prakash Sharma who has died. Amrit Sharma lives on rent in Manoj Pandey's house next to his house. On the 16th, Amrit Sharma came to his house at night and knocked on the door and shouted that he needed help, he needed help, then he opened the door. Amrit Sharma said that 3-4 boys came to his house and beat him badly and also tied his brother Prakash's hands and legs and beat him badly. After that he called his neighbor Bhushan Sahu on mobile and asked Bhushan to come quickly and told him about the incident. There he also woke up Harishchandra Nirmalkar by knocking on the door. After that they came out of their house, then some people

called Manoj Pandey but his phone was not answered, then his wife was called and woke up and then told her about the incident. At around 5 in the morning Amrit told him that Prakash had to be taken to the hospital. Prakash was then taken to the hospital in 108 ambulance and it stayed there.

44. Bhushan Sahu (PW-11) has stated that he knew Amrit Sharma present in the Court prior to the incident and had seen the rest of the accused for the first time in the police station. He also knows Manoj Pandey. He did not know Prakash Sharma before the incident, but knows him after his death. The incident is of 16.04.2018. At about 04.00-04.30 in the night, Sanjay Thakur called him and Harischandra and woke them up, then they came out of the house. Then accused Amrit Sharma came down and told them that at about 2 o'clock in the night, 3-4 boys had come and beat him and Prakash. Amrit also told that he and Prakash's hands and legs were tied and locked in the adjacent room and they ran away, then after 5-10 minutes Amrit freed his hands and legs and came out of the room. All the above things were told to him by Amrit Sharma. He further stated that thereafter Harishchandra called the landlord Manoj Pandey but Manoj Pandey's phone was switched off. Thereafter he called Manoj Pandey's wife and Harishchandra spoke to Manoj Pandey's wife. Thereafter Manoj Pandey came out after some time and accused Amrit told the above things to his landlord Manoj Pandey. He also stated that Amrit also told that his brother Prakash Sharma is in a

serious condition and unconscious, you people should call 108. When they called for ambulance, first Madhya Pradesh ambulance got connected. Then when they called again, the ambulance person got connected and he came there after some time. The doctor present in the ambulance checked Prakash Sharma and told that he had died. Then Manoj Pandey gave the above information to the police station, then the police came for investigation.

45. Harischandra Nirmalkar (PW-13) has stated that he knows the accused. On the night of the incident dated 16.04.2018, he was sleeping in his house. At about 04.30 in the morning, his neighbour Sanjay Thakur knocked on the door of his house. On opening the door, Sanjay and his neighbour Bhushan Sahu and Amrit Sharma were standing outside his house. He went to Amrit Sharma's house with these three. In Amrit Sharma's house, he saw that the dead body of Prakash Sharma was lying in the room.
46. Satyanarayan Sharma (PW-12) has stated that he knows the accused present. He also knows Prakash Sharma who was his son who has died. They are two brothers and three sisters. His elder brother's name is Rajnarayan Sharma. His elder brother had married a second time after his first wife from whom accused Amrit Sharma was born. Amrit lived in a rented house in Raipur and told that he does vegetable business and also works in getting jobs. He further stated that his son Prakash was studying B.Sc. in Kalyan College of Bhilai by renting a house in Bhilai. On

09.04.2018, his son Prakash's exam was over, so on 11.04.2018, he went to Bhilai from Basna to pick up his son. On reaching Raipur, his son Prakash said that he would stay in Raipur and take English coaching. Since there was no room here in Raipur, he would stay for 2-3 days and look for a rented room, then he also took Prakash to MP Lodge where he was asked to take a room. There itself, accused Amrit Sharma called and asked where he was, to which they told him that he was in MP Lodge, so he reached there.

47. Satyanarayan Sharma (PW-12) has further stated that Amrit told him that his room has AC etc. Prakash will not have any problem. He will find a room for him in 2-4 days. He told accused Amrit that Prakash will stay here in MP Lodge for 2-4 days, don't take him. Then Amrit pleaded a lot and coaxed Prakash. Then Prakash said that brother is saying so much so he should stay with him for one day. After that Prakash and Amrit came to Om Society Amrit Sharma's rented house on their motor cycle. He followed Amrit in his car and stopped at Amrit Sharma's room. He did not like Amrit's room so he asked to take Prakash with him. Amrit started pleading and pleading a lot. Then he agreed to his words and left Prakash there and asked the driver to bring breakfast etc. They ordered breakfast and had it there. He has also stated that after that they left for Basna. He used to talk to Prakash on phone everyday and repeatedly told him not to eat anything from anyone else, eat only what he has. On 15.04.2018 at about 08-09 pm he

talked to Prakash at that time he had come to the market to buy vegetables and told that there is a storm and it is raining. Next day on 16.04.2018 in the morning he was plucking flowers when his nephew Aditya Sharma called and told that Amrit Sharma is telling that Prakash has been beaten up a lot, they have to go to Raipur and after that Aditya and Bhupendra both came to his house and then he, Aditya, Bhupendra and the driver came to Raipur by renting a Sumo and went directly to Om Society Amrit Sharma's house, there was a crowd around there and he was shaken to see the police. After that he went to Amrit's house where he lives on rent, Prakash was lying dead in the other room of the house. When he went to Amrit Sharma's house in Raipur and saw, Prakash Sharma's fingers and body had turned blue and it seemed as if someone had strangulated him to death.

48. Satyanarayan Sharma (PW-12) has further stated that Aditya had told him that he had received a call from Amrit and he had told that three boys had come from outside and had killed Prakash and had also beaten him. Later he came to know that accused Amrit and his companions had killed his son Prakash by stuffing polythene in his mouth, tying his hands and legs and making him smell chloroform. The police had taken his statement after interrogation. He has stated in paragraph 15 of the cross-examination that he had told in his police statement that when they had gone to MP Lodge, Amit had pleaded a lot there and coaxed Prakash, then Prakash had said that brother is saying so

much, I will stay with brother one day. If the above things are not written in his police statement, then he cannot give the reason, but in his police statement Ex.D-3 it is mentioned that while he was going to MP Lodge with his son, as soon as he reached in front of MP Lodge, Amrit Sharma also reached there and started insisting that Prakash should stay with him for two-three days.

49. Thus, from the above statements of witnesses Manoj Pandey (PW-2), Aditya Sharma (PW-6), Bhupendra Kumar Sharma (PW-7), Smt. Sangeeta Pandey (PW-8), Smt. Sanyogita Sharma (PW-9) Sanjay Thakur (PW-10), Bhushan Sahu (PW-11), Harischandra Nirmalkar (PW-13) and Satyanarayan Sharma (PW-12), it is proved that accused Amrit Sharma lived on rent in the house of the said witness Manoj Pandey and on the date of incident *i.e.* 16.04.2018, Satyanarayan Sharma's son Prakash was also with accused Amrit Sharma in the said house. Prakash Sharma's dead body was lying in the second room, which accused Amrit Sharma said was unconscious and asked to take him to the hospital and call an ambulance. The ambulance person checked Prakash Sharma and told that he had died. The above evidence remained uncontested during the cross-examination of the said witnesses. Since deceased Prakash Sharma was with accused Amrit Sharma in his rented room at the time of the incident, the provisions of Section 106 of the Indian Evidence Act are attracted. In such a situation, the responsibility was on the accused Amrit Sharma to explain how Prakash Sharma became

unconscious and how his death was caused. Accused Amrit Sharma has stated in his statement recorded under Section 313 CrPC that he and Prakash were in the room and some unknown persons came and beat him and Prakash and took away his and Prakash's purses and tied them after beating. Prakash was taken to another room and after some time when they left, he freed his hands and legs and looked in Rahul's room, Prakash was found unconscious, then he woke up the landlord and neighbours for help, on which they all approached Prakash where the people of 108 ambulance said that Prakash was dead, but it is noteworthy that the incident occurred between 00.05 to 05.00 in the night. How did an unknown person reach the room of accused Amrit Sharma without any hindrance, there is no fact and evidence of accused Amrit Sharma entering inside by damaging the door of the room and accused Amrit Sharma has not revealed that he struggled to save himself while being beaten and that he got injured due to the beating, due to which the above explanation given by accused Amrit Sharma is not satisfactory and there is a strong basis to presume that accused Amrit Sharma had helped the person who entered the room of accused Amrit Sharma and caused the incident.

50. On the basis of memorandum statement of accused Amrit Sharma (Ex.P-8), other co-accused Bhojraj Nand, Anil Kumar Behra and Chitrasen Behra were also taken into custody and their memorandum statements have been recorded respectively

vide Exs. P-9, P-10 and P-11, whereby they have admitted to commit the aforesaid crime and at the instance of accused Bhoraj Nand, one steel lock, pulsar bike belonging to deceased Prakash Sharma bearing registration No. CG-06 GK 1327, motorcycle of accused bearing registration No. CG-06 GH 5120 and one CXTEL company keypad mobile of accused were seized vide Ex.P-15 and one empty bottle of chloroform was also seized at the instance of accused Bhojraj Nand vide Ex.P-16. At the instance of accused Anil Kumar Behra, one touchscreen mobile of Samsung Company belonging to deceased Prakash Sharma and one touchscreen mobile of MI company belonging to the accused Anil Kumar Behra have been seized vide Ex.P-17. At the instance of accused Chitrasen Behra, one keypad mobile of Samsung Company belonging to deceased Prakash Sharma and one touchscreen mobile of Samsung company belonging to the accused Chitrasen Behra have been seized vide Ex.P-18.

51. The aforementioned memorandum statements of the accused Exs.P-8, P-9, P-10 & P-11 and recovery of aforesaid incriminating articles at their instances vide Exs.P-15, P-16, P-17 & P-18 have been duly proved from the evidence of independent witness Sanjay Thakur (PW-10). Moreover, as per the evidence of this witness, police had arrested the accused in his presence. He has admitted his signatures in the arrest sheets of the accused Exs. P-25, P-26, P-27 & P-28, Thus, the arrest of the accused is also proved.

52. So far as the contention of the accused/ appellants that the call detail report regarding accused Amrit Sharma calling the co-accused on mobile has not been seized and the CCTV footage of the route of the accused reaching the spot of incident and the CCTV footage near the place of seizure, Collectorate Garden, has not been seized, due to which the fact of involvement of the accused in the incident is not proved, but the seizure of the mobile of deceased Prakash Sharma from accused Anil Kumar Behera and Chitra Sen Behera and the seizure of the motor cycle of deceased Prakash Sharma on the identification of accused Bhojraj Nand is proved. In such a situation, the responsibility of explaining how the mobile and motor cycle of the deceased came to them is on the accused, which they have failed to explain. Therefore, mere non-seizure of call detail report and CCTV footage will not have any adverse effect on the case of prosecution.
53. The accused, Anil Kumar Behra and Chitrasen Behra, were responsible for explaining how the deceased Prakash Sharma's mobile phone came into their possession. If they denied owning it, they should have clarified that the mobile belonged to someone else. However, they failed to provide this clarification in their statements.
54. Similarly, accused Bhojraj Nand was responsible for explaining how he acquired the deceased Prakash Sharma's Pulsar motorcycle. If he denied ownership, he should have clarified that

the motorcycle belonged to someone else. However, Bhojraj Nand also failed to provide this clarification in his statement.

55. Thus, after 16.04.2018, accused Bhojraj Nand possessed the deceased Prakash Sharma's Pulsar motorcycle, accused Anil Behra had Prakash Sharma's golden touch-screen Samsung mobile, and accused Chitrasen Behra had Prakash Sharma's black keypad Samsung mobile. The recovery of these items establishes a crucial circumstance of the accused being involved in the incident.
56. Chloroform was found in a glass bottle seized at the instance of accused Bhojraj Nand and a small broken steel lock of the room adjacent to the rented room of accused Amrit Sharma was seized from accused Bhojraj Nand. Pieces of membrane and scarf were seized when accused Amrit Sharma produced them. Witness Dr. Shivnarayan Manjhi (PW-14) in his statement has stated that the death of deceased Prakash Sharma was due to smothering (breathing obstruction) and has also stated that there were antermortem injuries on the front part of the upper lip, the tip of the nose, both wrists and around the forearm, the back of both ears and the left parietal and temporal part of the head. Due to this, there are strong grounds against the accused to presume that on the incident date 16.04.2018, the accused Bhojraj Nand, Anil Behera and Chitrasen Behera went to the rented room of accused Amrit Sharma at night and with the help of accused Amrit Sharma, the accused together made the deceased Prakash

Sharma unconscious by making him smell chloroform while he was sleeping and stuffed a cloth and piece of plastic in his mouth and tied his hands and legs with a scarf and broke the lock of the rented room of Rahul next door and took him to the room due to which the deceased Prakash Sharma died due to suffocation and thus the murder of deceased Prakash Sharma was caused by the accused.

57. As per the above, it is clear from the entire discussion that the accused had formed a common intention to kill the deceased Prakash Sharma and in furtherance of this, they made the deceased Prakash Sharma unconscious by giving him chloroform nectar while he was sleeping, stuffed a cloth and membrane in his mouth, tied his hands and legs with a scarf, due to which his breathing got obstructed and he died, thus committing intentional murder. It is also proved that the accused, by mutual agreement, hatched a criminal conspiracy to kidnap the deceased Prakash Sharma and used him for ransom and demanded money from his father, but it is not proved that Prakash Sharma was kidnapped in pursuance of the said criminal conspiracy. The judgments relied upon by learned counsel for the appellants are distinguishable on the facts and circumstances of the instant case, as such, they are not helpful for them.
58. The view taken by the learned trial Court that the appellants are the author of the crime is a pure finding of fact based on evidence available on record and we are of the opinion that in the present

case, the only view possible was the one taken by the learned trial Court.

59. From the above analysis, we are of the considered opinion that the prosecution has been successful in proving its case beyond reasonable doubt and the learned trial Court has not committed any legal or factual error in arriving at the finding with regard to the guilt of the appellants.
60. Accordingly, both the appeals, being devoid of merit, are liable to be and are hereby **dismissed**.
61. The appellants are stated to be in jail. They shall serve out the sentence awarded by the trial Court by means of the impugned judgment and order dated 11.10.2021.
62. Let a certified copy of this order alongwith the original record be transmitted to trial Court concerned forthwith for necessary information and action, if any.

Sd/-
(Bidhu Datta Guru)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice