



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

D.B. Murder Reference No. 1/2022

State of Rajasthan, through Public Prosecutor

----Petitioner

Versus

1. Sharafat son of Saleem Khan, aged about 20 years, resident of H.no. 9, Nagarpalika Karmchari Colony Nawab Ka Nimbahera Thana Kotwali, Nimbahera Dist. Chittorgarh (Rajasthan).
2. Rajesh Kumar son of Ratan Lal, aged about 35 years, resident of Choudhary Mohalla, Kukdeshwar, Thana Kukdeshwar Dist. Neemuch (Madhya Pradesh).

----Respondents

Connected With

D.B. Criminal Appeal (DB) No. 126/2022

1. Sharafat son of Sh. Saleem Khan, aged about 20 years, resident of House No. 9, Nagarpalika Karamchari Colony, Nawab Ka Nimbahera, police Station Kotwali, Nimbahera, District Chittorgarh (Rajasthan) (Presently lodged in Central Jail, Bhilwara)
2. Rajesh Kumar son of Sh. Ratan Lal, aged about 35 years, resident of Choudhary Mohalla Kukdeshwar, police Station Kukdeshwar, District Neemuch (Madhya Pradesh) (Presently Lodged In Central Jail, Bhilwara)

----Appellants

Versus

State Of Rajasthan, Through Public Prosecutor

----Respondent

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|                  |   |                                                                            |
|------------------|---|----------------------------------------------------------------------------|
| For Appellant(s) | : | Mr. Vineet Jain, Sr. Advocate assisted by Mr. Harshvardhan Singh, Advocate |
| For State        | : | Mr. Deepak Choudhary, AAG                                                  |

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**HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR**  
**HON'BLE MR. JUSTICE CHANDRA SHEKHAR SHARMA**  
**JUDGMENT**

**Reserved on :        27/03/2025**

**Pronounced on :    30/05/2025**

*Per, Shree Chandrashekhar, J.:*

D. B. Murder Reference No.01/2022 has been registered on the basis of the communication dated 06<sup>th</sup> August 2022 from the Additional Sessions Judge (Atrocities against Women cases), Bhilwara for confirmation of the sentence of death awarded to Sharafat son of Salim Khan and Rajesh Kumar son of Ratan Lal in Sessions Case No.12/2015 (35/2021). These convict-appellants have preferred D.B. Criminal Appeal No.126/2022 to lay a challenge to the judgment of conviction under sections 364, 302 and 201 read with section 34 of the Indian Penal Code delivered on 30<sup>th</sup> July 2022 and the order of sentence passed against them on 06<sup>th</sup> August 2022.

2. On 06<sup>th</sup> August 2022, the Additional Sessions Judge heard the convict-appellants on the point of sentence and passed the order of sentence of death against them. The Additional Sessions Judge considered the aggravating and mitigating circumstances in the case and arrived at a conclusion that the aggravating circumstances against the convict-appellants outweigh the mitigating circumstances in their favor and the crime committed by them falls under the category of rarest of the rare case. While deciding to award the sentence of death to the convict-appellants, the Additional Sessions Judge held that the convict-appellants are menace to the society who cannot be let off free and it would



pose a serious danger to the society if they are rehabilitated in the society.

3. In Sessions Case No.12/2015, the convict-appellants have been awarded a sentence of death under section 302 read with section 34 of the Indian Penal Code; rigorous imprisonment for ten years with fine of Rs.10,000/- each under section 364 read with section 34 of the Indian Penal Code with a default stipulation to undergo simple imprisonment of three months each and; rigorous imprisonment for seven years and a fine of Rs.5,000/- under section 201 read with section 34 of the Indian Penal Code with a default stipulation to undergo simple imprisonment of one month each. The Additional Sessions Judge (Atrocities against Women cases), Bhilwara further ordered that the sentences awarded to these convict-appellants shall run concurrently and the sentence of death by hanging shall be executed on receipt of the warrant of execution. As to disposal of the seized *Tavera*, the Additional Sessions Judge issued a direction to the effect that the said vehicle shall remain in possession of the mother of Sharafat and the crime articles, clothes, etc. shall be destroyed on expiry of the period of appeal but, in case an appeal is preferred, these articles shall be preserved in '*malkhana*' and disposed of as per the direction of the appellate Court.

4. In a judgment running across forty-two pages, the Additional Sessions Judge discussed the chain of circumstances connecting the convict-appellants with the crime and held that Sharafat and Rajesh Kumar committed



murder of six persons. While recording such finding and, in connection therewith, the Additional Sessions Judge considered the evidence leading to recovery of the dead bodies of four children by the accused persons, their confessional statements, testimony of the employees of the Toll Plaza, motive for the crime and scientific evidences such as FSL reports and call detail reports.

5. Mr. Vineet Jain, the learned senior counsel appearing for the convict-appellants challenged the findings recorded by the Additional Sessions Judge with reference to the prosecution evidence and submitted that the prosecution failed to prove the charge of abduction and murder against the convict-appellants by producing clear and cogent materials. The learned senior counsel for the convict-appellants submitted that the prosecution failed to establish that the chain of circumstances is so complete that the only inference which can be drawn therefrom is the guilt of the convict-appellants after excluding every reasonable hypothesis of innocence of the convict-appellants. He relied on the decisions in "*Alauddin & Ors. v. State of Assam & Anr.*"<sup>1</sup>, "*Jafarudheen & Ors. v. State of Kerala*"<sup>2</sup>, "*Pohalya Motya Valvi v. State of Maharashtra*"<sup>3</sup>, "*Pulukuri Kottaya & Ors. v. Emperor*"<sup>4</sup>, "*Ravishankar Tandon v. State of Chhattisgarh*"<sup>5</sup>, "*Anwar Ali & Anr. v. State of Himachal Pradesh*"<sup>6</sup>, "*Ramanand @ Nandlal*

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1 2024 SCC OnLine SC 760

2 2022 (4) SCC 732

3 1980 (1) SCC 530

4 1946 0 Supreme(SC) 49

5 2024 (3) Supreme 690

6 2020 (10) SCC 166





*Bharti v. State of Uttar Pradesh*<sup>7</sup> and "*Dadulla & Ors. v. The State of M.P.*"<sup>8</sup>.

6. This is a case of gruesome murder of six persons in respect to which Crime No.240/2015 was registered under section 302 of the Indian Penal Code. This First Information Report was registered against unknown on the basis of a written report submitted on 28<sup>th</sup> July 2015 by Babulal son of Banshilal given at the place of occurrence to the Officer-in-Charge of Mandal P.S. On 28<sup>th</sup> July 2015, a seizure memo was prepared around 06.00 PM at House No.209, New Housing Board Colony, Nimbahera which is the residence of Md. Yunus. From this house (a) photo I.D. of Md. Yunus, (b) photo I.D. of Chand Tara, (c) Pan Card of Md. Yunus, (d) driving license of Md. Yunus, (e) Aadhar Card of Md. Yunus and (f) family photograph of Md. Yunus, his wife and the children, namely, Ashraf, Gudia, Sazia and Asida were seized (exhibit P-21), in presence of Dilip Singh resident of 3/109 New Housing Board Colony, Nimbahera and Satish Kumar resident of 2/212 New Housing Board Colony, Nimbahera. On 29<sup>th</sup> July 2010, the dead bodies of one male and three female children were recovered from a ditch adjacent to the grazing ground near the Supertech Brick Factory, and '*fard*' inspection report of the place of recovery was prepared. In this sketch map, on one side of the ditch was the barren Government grazing ground and on the other side is also a barren Government land. PW-38 has recorded in

7 2022 (8) SCC 581

8 1961 SCC OnLine MP 176



exhibit P-22 that the distance between the place of occurrence and N.H. 79 is around 200 meters.

7. In course of the investigation, the Investigating Officer collected the post-mortem report of Chand Tara vide exhibit P-53, Asraf vide exhibit P-54, Sazia vide exhibit P-55, Sakina vide exhibit P-56, Md. Yunus vide exhibit P-57 and Gudiya vide exhibit P-58. The Investigating Officer recorded the disclosure statements of Sharafat and Rajesh Kumar and seized blood-stained clothes of Sharafat vide exhibit P-47 and of Rajesh Kumar vide exhibit P-46. The prosecution story that the crime committed by Sharafat and Rajesh Kumar using a sword is sought to be corroborated by the testimony of PW-39 Dr. Omprakash Sharma who deposed in the Court that the injuries found on the dead bodies of Md. Yunus, Chand Tara and their four children were caused by sharp cutting weapon. The seizure memo of *Tavera* having registration No.RJ-27-TC-0323 vide exhibit P-38 was prepared on 28<sup>th</sup> July 2015 in the presence of PW-14 and PW-17. On 30<sup>th</sup> July 2015 around 08.00 AM, samples of (a) blood stains on the driver seat vide mark 'L', (b) blood on the inside handle of the driver door vide mark 'M', (c) blood on the right side of the driver seat vide mark 'N', (d) soil on the mat near the driver seat vide mark 'P', (e) hair found behind the driver seat vide mark 'Q' and (f) hair found from the back seat vide mark 'R' were prepared in the presence of Shabir Mohammad and Kanhaiya Lal. The details of vehicles which passed through Toll Plaza between 7:49:17 and 01:56:52 on 28<sup>th</sup> July 2015 vide exhibit P-64 is a printed sheet for Shift-1. This document was



produced by the prosecution to establish that a new car had passed through the Toll Plaza at 1:22:19 on 28<sup>th</sup> July 2015 and return journey ticket was purchased for that car. This printed sheet provided by Prakash Asphaltings and Toll Highways (India Limited) does not seem to contain the details of all the vehicles that crossed the Toll Plaza going towards Jaipur on 28<sup>th</sup> July 2015. This printed sheet contains details of only 4 vehicles which had passed the Toll Plaza and there is no description of the vehicle over exhibit P-64.

8. In the trial, the prosecution examined Forty-one witnesses to establish the charge of abduction and murder and of attempting to conceal the evidence. PW-2 Rameshwar Lal and PW-15 Jagdish are the recovery witnesses at the place of occurrence but PW-15 did not support the prosecution case and turned hostile. PW-7 Satish Kumar and PW-11 Dilip Singh were produced by the prosecution to prove recovery from the house of Md. Yunus but both of them did not support the prosecution case. PW-6 Mukesh, PW-8 Suresh Kumar and PW-18 Ramlal came in the dock to support the prosecution story that the deceased Md. Yunus was identified through the label on his shirt which was stitched at Shri Morwar Tailors. PW-14 Ramprasad, PW-17 Sabir Khan and PW-19 Tahir were examined to establish that the *Tavera* and the pocket diary of Md. Yunus were recovered from the houses of Sharafat at New Housing Board Colony and Municipality Employees Colony at the instance of Sharafat. PW-21 Shabir Mohammad and PW-24 Kanhaiyalal witnessed the sample collection by the Forensic team from *Tavera*. They



are also witnesses to the seizure of cloths and weapon at the instance of the accused persons vide exhibits P-44, P-45, P-46, P-47 and P-48. Exhibit P-111 which was prepared in connection to recovery of dead bodies of four kids has been proved through PW-40 Shaitan Singh and PW-41 Hari Ram.

9. The Additional Sessions Judge started with the prosecution story how the dead bodies could be identified by PW-38. The learned Judge then turned to motive for the crime and recovery of the incriminating materials on the basis of the confessional statements given by Sharafat and Rajesh Kumar. The trial Judge held that a portion of the disclosure statements by Sharafat and Rajesh Kumar could have been utilized by the prosecution as piece of admissible evidence to support the charge of abduction and murder against them. Moving further, the trial Judge scrutinized the evidence of last-seen together sought to be established by the prosecution against Sharafat and Rajesh Kumar and held that such evidence was clinching and conclusive as to the guilt of Sharafat and Rajesh Kumar and delivered the judgment of conviction against them under sections 364, 302 and 201 read with section 34 of the Indian Penal Code.

10. Section 386 of the Code of Criminal Procedure confers wide powers in the appellate Courts to reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by Court of competent jurisdiction subordinate to the High Court. However, in "*Deb Narayan Halder v. Anushree Halder (Smt.)*"<sup>9</sup>, the Hon'ble Supreme

9 2003 (11) SCC 303



Court observed that appellate Court or revisional Court would not interfere with the findings recorded by the Court below unless it is shown that such findings are perverse or the Court has acted with material irregularity. In paragraph no.11 of the reported judgment, the Hon'ble Supreme Court has observed as under :-

*"11..... It is well settled that the appellate or revisional court while setting aside the findings recorded by the court below must notice those findings, and if the appellate or revisional court comes to the conclusion that the findings recorded by the trial court are untenable, record its reasons for coming to the said conclusion. Where the findings are findings of fact it must discuss the evidence on record which justify the reversal of the findings recorded by the court below. This is particularly so when findings recorded by the trial court are sought to be set aside by an appellate or revisional court. One cannot take exception to a judgment merely on the ground of its brevity, but if the judgment appears to be cryptic and conclusions are reached without even referring to the evidence on record or noticing the findings of the trial court, the party aggrieved is entitled to ask for setting aside of such a judgment....."*

11. With the aforesaid principles in mind, we would now examine whether the prosecution case against the convict-appellants is based on cogent materials and proved beyond reasonable doubt or not. This is the case of the prosecution that the Investigating Officer came to Shri Morwar Tailors and enquired about the deceased who was wearing the shirt



stitched by Shri Morwar Tailors. On the basis of the information supplied to him by PW-6 Mukesh Kumar, the Investigating Officer came to the house of the deceased person who was identified as Md. Yunus by Mukesh Kumar. When he arrived at the Housing Board Colony at Nimbahera, the Investigating Officer found that the house of Md. Yunus @ Yunus Bhai was locked. However, his neighbour PW-5 Dali Bai informed him that Md. Yunus has gone to Ajmer with his family to offer prayers. She identified the photograph of Md. Yunus and his wife Chand Tara. As per the prosecution, the Investigating Officer could see the telephone number of the father of Md. Yunus written on the wall of his house and he then made a call to PW-28 Haider Ali. To prove that Sharafat had a motive to commit murder of Chand Tara, the prosecution projected a case that Haider Ali informed the Investigating Officer that Sharafat had a dispute with his son. This is the further case of the prosecution that the information about illicit relationship of his son with Chand Tara was given by Seema who was the younger sister of Chand Tara and was staying with her for the last few years. To establish the charge of murder, the prosecution relied on the disclosure statements made by Sharafat and Rajesh Kumar before the Investigating Officer on 29<sup>th</sup> July 2015 and subsequent dates. The prosecution relied on the circumstances of the recovery of dead bodies of four children, blood-stained clothes of Sharafat and Rajesh Kumar, recovery of *Tavera* and other incriminating materials, such as, blood and hair found inside the *Tavera*. The prosecution has also



relied on recovery of the crime weapon which was a sword, the medical evidences and the FSL reports.

12. PW-1 Babulal received a telephonic information around 6 AM on 28<sup>th</sup> July 2015 that two dead bodies were lying on highway NH-79 around the near Hiraji Ka Khera. He arrived at the place of occurrence with Udaylal Gurjar, Bhanwarlal Gurjar, Shankar Gurjar and others. He stated that he spoke to the Officer-in-Charge of the police station around 7 AM and then the police came to the place of occurrence after about 15 minutes. He further stated that he gave a written report to the police at the place of occurrence around 7:30 AM and identified his signature marked between "A" to "B" over exhibit P-1. He also admitted having his signature over exhibit P-2 which was inquest report of a woman and exhibit P-3 in relation to unknown male person. He admitted in the cross-examination that there were about ten persons present at the place of occurrence when he came to the place of occurrence. He further stated in the Court that about hundred persons had assembled at the place of occurrence and he identified Jagdish, Rameshwar, Udaylal, Bhanwarlal Gurjar and Shankar Gurjar among the persons present at the place of occurrence. PW-2 is another witness who gave a narration of the events after the dead bodies of unknown male and female were recovered. He stated as under :-

"पीडब्ल्यू 2

घटना करीब 7-8 महीने पहले की है। गांव हीरा जी का खेडा के रोड के पास में 2 लाशें पड़ी थी, जिसकी सूचना सुनकर पूरे गांव के लोग वहां पर गये मैं भी 8-9 बजे वहां पर गया। पुलिस ने मेरे सामने अज्ञात मृतक की खून आलूदा



कमीज की कॉलर की फोटोग्राफी कर फर्द बनाई जो प्रदर्श पी 5 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती कपड़े महिला प्रदर्श पी 6 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती खून आलूदा कपड़े अज्ञात मृतक पुरुष प्रदर्श पी 7 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती खून आलूदा कंट्रोल सेंपल सादा मिट्टी घटना स्थल अज्ञात मृतका महिला प्रदर्श पी 8 है, जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती खून आलूदा मिट्टी व कंट्रोल सेंपल मिट्टी घटनास्थल अज्ञात मृतक पुरुष प्रदर्श पी 9 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती बाल अज्ञात मृतक पुरुष प्रदर्श पी 10 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती बाल घटना स्थल पर पड़े अज्ञात मृतक पुरुष के शरीर पर पहने हुए कपड़ों पर से प्रदर्श पी 11 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती सिर के बाल अज्ञात मृतक पुरुष के प्रदर्श पी 12 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती अज्ञात मृतका महिला के सिर के बाल प्रदर्श पी 13 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती मृतका महिला के घटनास्थल पर पड़े टूटी चूड़ियां, रबड़ बेण्ड, लेडी चप्पल, पर्स प्रदर्श पी 14 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द जब्ती अज्ञात मृतक पुरुष के घटनास्थल पर बिखरी हुई हाथ की घड़ी व उसका ढक्कन, अंगूठी, एक चप्पल की जोड़ी, टोपी, चाबियां, 500 रुपये का नोट प्रदर्श पी 15 है जिस पर ए से बी मेरे हस्ताक्षर है। फर्द निरीक्षण घटना स्थल प्रदर्श पी 4 है जिस पर सी से डी मेरे हस्ताक्षर है।

#### English Translation

#### PW-2

The incident happened about 7-8 months ago. Two dead bodies were lying near the road of village Heera ji ka Kheda. On hearing the news, people of the village went there and I also went there at 8-9 o'clock. The police took photographs of the collar of the blood-stained shirt of the unknown deceased in front of me and prepared a



report which is exhibit P-5 on which my signatures are from A to B. The report of seizure of clothes of a woman is exhibit P-6 on which my signatures are from A to B. The report of seizure of blood-stained clothes of an unknown deceased male is exhibit P-7 on which my signatures are from A to B. The report of seizure of blood-stained control sample plain soil from the scene of an unknown deceased female is exhibit P-8 on which my signatures are from A to B. The report of seizure of blood-stained soil and control sample soil from the scene of an unknown deceased male is exhibit P-9 on which my signatures are from A to B. The report of seizure of child of an unknown deceased male is exhibit P-10 on which my signatures are from A to B. The seizure hair found at the crime scene is exhibit P-11 of the clothes worn on the body of the unknown deceased man on which my signatures are from A to B. The seizure hair from the head of the unknown deceased man is exhibit P-12 on which my signatures are from A to B. The seizure hair from the head of the unknown deceased woman is exhibit P-13 on which my signatures are from A to B. The seizure broken bangles, rubber band, lady slippers, purse of the deceased woman found at the crime scene is exhibit P-14 on which my signatures are from A to B. The seizure wrist watch and its cover, ring, a pair of slippers, cap, keys, 500 rupee note scattered at the crime scene of the unknown deceased man is exhibit P-15 on which my signatures are from A to B. The seizure inspection crime scene is exhibit P-4 on which my signatures are from C to D.”





13. While revisiting the prosecution story, we observe that the identification of the accused persons involved in the crime is not free from suspicion. As the prosecution story goes; PW-38 came to the house of Md. Yunus and found the telephone number of Haider Ali written on a wall. At this place, PW-5 Dali Bai informed him that Sharafat has a house at the Housing Board Colony and PW-38 reached there around 06:15 PM. Mr. Vineet Jain, the learned senior counsel for the convict-appellants referred to the remand application moved by PW-38 and several documents which had cutting or over-writing over the time mentioned thereon to submit that on suspicion only the convict-appellants were implicated in the crime.

14. PW-5 Dali Bai who was a resident of Nimbahera Housing Board Colony denied any acquaintances with Md. Yunus and she was declared hostile. In the cross-examination, she stated that she did not know Md. Yunus or his wife Chand Tara or even Salim. This witness was recalled at the instance of the prosecution and she stated in her re-examination that she did not know how to put a signature. PW-6 stated in the Court that he has a shop at Dak Bangla Road, Nimbahera by the name of Shri Morwar Tailors. According to PW-6, the police came to him on 28<sup>th</sup> July 2015 and showed a label and asked him whether he knew any person by the name of Md. Yunus. He further stated that he identified the cloth from the label and found from the bill book that Yunus Bhai was a customer. PW-6 identified his signature over exhibit P-17 which was the original bill. The cross-examination of this



witness was deferred for another day on the request of the Public Prosecutor. On the next day, this witness stated in the Court contrary to the prosecution case and was declared hostile. In course of cross-examination by the prosecution, PW-6 stated that the police told him the name of Yunus Bhai and showed him label on the shirt. He admitted that exhibit P-17 was prepared in the name of Yunus Bhai but he did not remember who that Yunus Bhai was. He denied that he ever disclosed to the police that Yunus Bhai was a resident of New Housing Board Colony, Nimbahera. He further stated that PW-7 Satish Kumar had told him that the police took his signature over a plain paper and no seizure was made in his presence.

15. PW-8 Suresh Kumar is the owner of Shri Morwar Tailors. He identified exhibit P-17 and his signature thereon. However, this witness further stated that exhibit P-17 was initially not signed by him and he put his signature thereon at the instance of the police.

16. PW-16 stated in the Court that the police had asked him about the deceased person showing the label of the tailoring shop. At the same time, this witness stated that the police had disclosed the name of deceased person as Yunus and informed him that Yunus had met with an accident. As per PW-16, he checked the bill books and found that there was one entry in the name of Yunus; the said bill has been marked as exhibit P-17. This bill did not bear the address of Md. Yunus and PW-16 admitted in the Court that he had no idea about Md. Yunus and his family and he denied that he



had disclosed the address of Md. Yunus at New Housing Board Colony, Nimbahera. PW-8 stated in the Court that exhibit P-17 was affixed on a paper and his signatures were obtained later on. PW-16 stated in the cross-examination that PW-8 was not present at the shop when the Investigating Officer came there. PW-38 who is the Investigating Officer admitted that he came to the tailoring shop around 05:15 PM on 28<sup>th</sup> July 2015 and showed the photographs to PW-6. However, no such photograph was found in the records nor was there any mention about that fact in exhibit P-18. According to PW-38, the convict-appellants were arrested on 8:00 PM at the Police Station and he came to their house at Municipal Colony after he had conducted inquiries at New Housing Board Colony. He took the convict-appellants in custody around 06:30 PM and took them to the Police Station. He further stated that Haider Ali had disclosed him about the involvement of the convict-appellants and, that, they had admitted their guilt before they were formally arrested by him.

17. The application for remand vide exhibit P-8 moved by PW-38, when the convict-appellants were produced before the Judicial Magistrate on 29<sup>th</sup> July 2015 reveal that remand of the convict-appellants was sought on the ground that the weapon of offence, clothes worn by the accused persons at the time of occurrence and vehicle used in the crime were still to be recovered. Mr. Vineet Jain, the learned senior counsel for the convict-appellants pointed out that the aforesaid materials were already collected by PW-38 before the convict-



appellants were produced before the Judicial Magistrate on 29<sup>th</sup> July 2015 and, therefore, the recoveries made by PW-38 after 29<sup>th</sup> July 2015 were concocted. According to the learned senior counsel, the convict-appellants were kept at the Police Station for about two hours before drawing the memo of arrest and PW-38 had made the convict-appellants suffer disclosures statements under duress.

18. PW-38 Mukund Singh was the Officer-in-Charge at Mandal P.S. He described the steps in the course of investigation. In the cross-examination, PW-38 admitted that it is not recorded in exhibits-P 19 and 21 that he rang up Haider Ali on the telephone number which was written on the wall of the house belonging to Md. Yunus. He further admitted that the said telephone number is not mentioned in the Court's records. He further stated that it is not recorded in the records that he rang up Haider Ali at 05:35 PM According to PW-38, he arrived at Bhilwara Hospital at 08:00 AM on 30<sup>th</sup> July 2015 and at that time Haider Ali and his wife Seema and her brother and sister had arrived there. He recorded his statement on 30<sup>th</sup> July 2015 at Bhilwara Government Hospital. He further admitted in the Court that Haidar Ali did not inform him about animosity of Md. Yunus with Salim and his family. We have carefully examined the materials on record and find that there are several discrepancies in the sequence of events as to how PW-38 nabbed Sharafat and Rajesh Kumar and they, in turn, gave the alleged disclosure statements before him on different dates and time.



19. In a criminal trial, generally motive is considered a weak piece of evidence but it cannot be said that it is not at all relevant to decide culpability of an accused and, therefore, its importance cannot be undermined. May be motive is not a decisive factor by itself and only on the basis of motive an accused cannot be convicted for a crime like murder but it is difficult to say that in a criminal trial motive is irrelevant. Rather, motive plays an important role in a case based on circumstantial evidence. In "*Surinder Pal Jain v. Delhi Administration*<sup>10</sup>", the Hon'ble Supreme Court has observed, thus:-

*"11. .... In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof."*

20. Haider Ali who is the father of Md. Yunus was examined as PW-28. He stated in his examination-in-chief that his son Md. Yunus lived at Nimbahera. He received an information from the police about two and a half years ago that his son was murdered. He then visited Bhilwara Government Hospital and identified the dead body of his son, daughter-in-law and their four children. He deposed in the Court that his wife used to tell him that Sharafat and Khatik had some grudge against their son. He further stated that was the reason he suspected

<sup>10</sup> 1993 Supp. (3) SCC 681





that Sharafat and Khatik had killed his son. What is important to notice in the testimony of PW-28 is that Seema who is the sister-in-law of Md. Yunus lived at Nimbahera with Md. Yunus for about six years had left Nimbahera much before the occurrence took place.

21. PW-28 stated in his examination-in-chief thus :-

“पीडब्ल्यू 28

करीबन ढाई साल पहले की बात है। मैं मेरे गांव कटरा बाजार में अपने घर पर था। हमारे गांव के थाने वालों को चौकी वालों ने बताया कि तुम्हारा लड़का निम्बाहेड़ा में रहता है जिसका मर्डर हो गया है। तुम्हारे लड़का और एक औरत का पता लगा है कि मर्डर हो गया है। तो मैंने बोला कि मेरे पोती-पोता कहा है कि तो उन्होंने कहा कि पुलिस खोज रही है। मेरे बच्चे का नाम युनुस था। उसकी पत्नी का नाम चांदतारा था। पोते-पोतियों का असरत, गुड़िया, सज्जो और छोटी वाली जिसे हम टिमी टामिया कहते थे। पुलिसवालों से हमने पूछा कि मर्डर कहा हुआ है तो उन्होंने कहा कि चले आओ माण्डल थाने के पास में मर्डर हुआ है। मेरा बच्चा युनुस निम्बाहेड़ा में रहता था। मैं निम्बाहेड़ दो बार अपने बच्चे के पास गया था। मेरी पत्नी भी मेरे साथ में गई थी। मैंने मर्डर की सूचना अपनी औरत से अपने परिवार से बोले, सीमा से बोले। सीमा युनुस की साली थी। भीलवाड़ा में, मेरी पत्नी, मेरी मां और युनुस की साली, साला और सास और गुड्डु आया था, कलाम आया था। भीलवाड़ा में हम सरकारी अस्पताल में पहुंचे। फिर वहां हमने लाशें देखी। लाशों में मेरे लड़के की, बहु की और बच्चों की लाशें देखी। पुलिसवालों ने पोस्टमार्टम किया, लाश अंतिम संस्कार हेतु हमें सुपुर्द की जिसकी सुपुर्दगी फर्द बनाई जो प्रदर्श पी-36 है जिस पर एक्स स्थान पर मेरी अंगुठा निशानी है। मालुम पड़ा कि शराफत व खटीक ने इन लोगों को मर्डर किया है। मेरी औरत कहती थी कि पहले उनसे कुछ रंजीश थी इसलिये



मर्डर किया था। इसलिये मुझे शंका हुआ कि इन लोगों ने मारा या मरवाया है। ये बात मैंने सीमा को बताई तो सीमा ने कहा कि हां ऐसा हो सकता है। शराफत के पिता का नाम सलीम है। सीमा निम्बाहेड़ा में यूनुस के साथ छह साल रही थी। शराफत निम्बाहेड़ा का रहने वाला है।

#### English Translation

PW-28

*This happened about two and a half years ago. I was at home in my village Katra Bazar. The police post person informed the police station that my son who was living at Nimbahera has been murdered. My son and a woman were found murdered. So I asked where were my grandchildren then they said that the police were searching for them. My son's name was Md. Yunus. His wife's name was Chand Tara. The grandchildren were Asrat, Gudiya, Sajjo and the younger one whom we called Timmy Tamia. When we asked the police where the murder took place, they said come, the murder took place near Mandal police station. My son Md.Yunus lived in Nimbahera. I went to Nimbahed twice to see my son. My wife also went with me. I informed my wife, my family, Seema about the murder. Seema was Md. Yunus's sister-in-law. In Bhilwara, my wife, my mother and Md. Yunus's sister-in-law, brother-in-law and mother-in-law and Guddu had come. Kalam had come. In Bhilwara we reached the government hospital. Then we saw dead bodies there. Among the dead bodies, I saw the dead bodies of my son, daughter-in-law and children. The policemen did the post-mortem and handed over the dead bodies to us for the last rites. They prepared the delivery report which is*



*exhibit P-36 on which my thumb impression is at the X place. We came to know that Sharafat and Khatik had murdered these people. My wife used to say that they had some grudge against them earlier and that is why they murdered them. That is why I suspected that these people had killed them or got them killed. When I told this to Seema, Seema said that yes, this can happen. Sharafat's father's name is Salim. Seema had lived with Md. Yunus in Nimbahera for six years. Sharafat is a resident of Nimbahera."*

22. In the cross-examination, PW-28 stated that his son Md. Yunus was living at Nimbahera in a rented house. He had come to Nimbahera about 15 years after his son came to live there. He admitted that there was no discussion about any dispute between his son and daughter-in-law Chandrakala at the time he visited Nimbahera. He further stated in the cross-examination that Seema had telephonic conversations with him and his wife and that mainly related to household matters. He further stated that, if at all, Seema had any discussion about any dispute or enmity with someone that might have been discussed with his wife but not with him. This is also the statement of PW-6 that he and his wife had a talk last with Seema about two and a half years ago on the occasion of Eid. PW-6 also stated that Seema had a conversation with him and his wife about four days after she went back to her village. Most importantly, PW-6 admitted in the Court that he had no clue about any conversation between Seema and his wife regarding any dispute. He further admitted that he had no knowledge about



the person(s) with whom Md. Yunus had any dispute or quarrel.

23. Seema who is the sister-in-law of Md. Yunus was produced by the prosecution as PW-32. She stated in her examination-in-chief that she lived with the family of her sister Chand Tara at Nimbahera Housing Board near Chittorgarh. She further stated that Salim who was a neighbour of her sister Chand Tara used to visit her house and would take meal with her. She further stated that he would call her sister to his house whenever he got a chance. According to this witness, Salim would call her sister in the night and her sister had food at his place. She had told Sharafat whom she met once to speak to his father about this relationship then he had told her that he would kill her sister and brother-in-law. She further stated that she spoke to her sister but she did not listen and then she had a fight with her and left Nimbahera and went to her village. PW-32 deposed in the Court as under :-

"पीडब्ल्यू 32

यह करीब तीन साल होने वाले है। मैं निम्बाहेडा, हाउसिंग बोर्ड में रहती थी। निम्बाहेडा चित्तौडगढ़ के पास है। मेरे साथ मेरे जीजा युनुस मोहम्मद, मेरी बहन चांद तारा और मेरा भान्जजा और भाजणी असरफ व गुडिया व शाजिया और शकिना रहते थे और बहने के सात महिने का गर्भ था। और हम भी बहन के साथ ही रहते थे। हमारे मकान के पास सलीम का भी मकान था। सलीम और मेरी बहन का गलत संबंध थे। मेरे घर पर सलीम आते थे, खाना वाना खाते थे। मेरी बहन को भी अपने घर पर जब मौका मिलता तब बुलाते थे। जब सलीम को मौका मिलता तब मेरी बहने को रात में



भी बुलाते थे। मेरे घर पर खाना खाते थे, मेरी बहन भी उनके घर खाना खाने जाती थी। सलीम का लड़का शराफत एक बार मेरे को मिला, मेरे को बोला अपनी बहन को मना कर दे कि मेरे बाप से संबंध मत रख। तो हम बोले कि तुम अपने बाप को मना कर। फिर वो मेरे को बोला कि तेरे बहन और जीजा को मार डालूंगा। तो फिर मैंने अपनी बहन को मना किया कि ऐसे मत कर, मेरी बहन नहीं मानी। जब मेरी बहन नहीं मानी तो इसी बात को लेकर मेरी बहन से मेरा झगड़ा हो गया, और मैं अपने गांव चली गयी। फिर मेरे को गांव में पता चला कि सलीम की मृत्यु हो गयी है। फिर उसके बाद मेरे को पता चला कि मेरी बहन चांद तारा, और युनुस और गुडिया, असरफ, शाजिया और शकिना की मृत्यु हो गयी, पुलिस वालों ने फोन से बताया। उसके बाद मेरी अम्मी, शकिला और मेरे दो भाई कलाम और कलीम और हैदर अली, और मेरी बहन की सास भी बनारस से भीलवाड़ा हॉस्पिटल आये। फिर उसके बाद में सबकी लाश देखी। छ जनों की लाशें देखी। फिर मेरे को शक हुआ कि शराफत ने चांद तारा, युनुस, गुडिया, शज्जों को मार डाला। फिर उसके बाद पता चला की सभी को मार डाला। इसका कारण था कि वह शराफत बोला था कि मेरा मकान घर सब हड़प लेगी। मेरी बहन का नाजायज संबंध कारण था इस कारण शराफत ने सबको मार डाला।

#### English Translation

PW-32

*It has been almost three years. I used to live in Nimbahera, Housing Board. Nimbahera is near Chittorgarh. My brother-in-law Md. Yunus, my sister Chand Tara and my nephew and sister-in-law Asraf and Gudiya and Shazia and Shakeena lived with me and my sister was seven months' pregnant. And we also lived with my sister. Salim also had a house near our house. Salim and my sister had an illicit relationship. Salim*



*used to come to my house, eat food. He used to call my sister to his house whenever he got a chance. Whenever Salim got a chance, he used to call my sister even at night. He used to eat food at my house, my sister also used to go to his house to eat food. I met Salim's son Sharafat once, he told me to convince my sister not to have relations with my father. So I told him to stop his father. Then he told me that he would kill my sister and brother-in-law. Then I told my sister not to do this, but my sister did not listen. When my sister did not listen, I had a fight with her over this issue and I went to my village. Then I came to know in the village that Salim had died. Then after that I came to know that my sister Chand Tara, Md. Yunus, Gudiya, Asraf, Shazia and Shakeena had died, the police told me over the phone. After that my mother, Shakeela and my two brothers Kalam, Kaleem and Haider Ali, and my sister's mother-in-law also came from Banaras to Bhilwara Hospital. Then after that everyone's dead bodies were brought to the hospital. I saw them. I saw the bodies of six people. Then I suspected that Sharafat had killed Chand Tara, Md. Yunus, Gudiya, Shajjo. Later I came to know that he had killed everyone. The reason for this was that Sharafat had said that he would usurp my house and everything. The reason was my sister's illicit relationship, that's why Sharafat killed everyone."*

24. The prosecution story of motive for the crime revolved around so called illicit relationship between Salim Khan who is father of Sharafat and Chand Tara who is wife of Md. Yunus.



PW-28 Haider Ali and PW-32 Seema are the witnesses who were examined by the prosecution to establish that Sharafat has a doubt that Chand Tara would grab his family properties by exercising undue influence over his father Salim Khan. PW-28 said that he has no personal knowledge about any animosity between his son and Sharafat. He admitted in the cross-examination that he became aware about the dispute between his son and Sharafat about two or two and a half years back when Seema informed his wife about such dispute. As to the statement of PW-32, who is the sister-in-law of Md. Yunus, Mr. Vineet Jain, the learned senior counsel for the convict-appellants submitted that this witness substantially improved upon her previous statement made before the Investigating Officer.

25. A crime can take place without premeditation or with planning and it may happen at the spur of the moment and therefore many a times motive may remain closeted in the chest of accused. However, if the prosecution leads reliable evidence on motive it significantly strengthens its case. PW-32 had left Bhilwara about a month back and she was not residing with the family of Md. Yunus at the time of occurrence. Her testimony that Sharafat was apprehensive about the intention of Chand Tara was no longer subsisting when Md. Yunus and Chand Tara were murdered. This is the specific case of the prosecution that Md. Yunus, Chand Tara and their children were murdered because Sharafat thought that Chand Tara would grab the properties of his father. However, after Salim Khan passed away about a month back,



Sharafat could not had any such apprehension. The evidence tendered by the prosecution witnesses on motive is weak and the defence has demonstrated that so-called motive on part of the convict-appellants was non-existent and they have been falsely implicated in this case. On the basis of the materials brought on record, it is difficult to hold that the prosecution established motive for the crime. Otherwise also motive is a weak circumstance and, as held in "*Keshav v. State of Maharashtra*"<sup>11</sup>, motive alone is not sufficient to prove the guilt of an accused.

26. This is the case of the prosecution that around 02:50 PM on 29<sup>th</sup> July 2015, Sharafat suffered a disclosure statement before PW- 38 that he and Rajesh Kumar had picked up Md. Yunus, his wife Chand Tara and their four children on the pretext of taking them to Ajmer and committed their murder. After committing their murder, they came back to Nimbahera on the same *Tavera* and parked outside the house of Sharafat. In this disclosure statement, Sharafat told PW- 38 that he can get *Tavera* recovered from that place. Around 9:15 AM on 3<sup>rd</sup> August 2015, Sharafat gave another disclosure statement to PW- 38 while in police custody that he can get his cloths recovered from his house at Housing Board Colony which he was wearing at the time of committing the murder of Md. Yunus, his wife and their four children.

27. PW-9 Arjun and PW-10 Badri affirmed in the Court that they were present in the field from where blood-soaked soil was collected. They deposed in the Court that exhibits P-22

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11 2007 (13) SCC 284



and P-23 were prepared in their presence but they were not aware about the contents thereof. PW-11 Dilip Singh stated in the Court that his signatures over the documents vide exhibits P-19 and P-20 relating to recovery and seizure of photo identity card and Aadhar Card were taken at Mandal P.S. He further stated that no search was conducted in his presence and he did not know Dali Bai. PW-12 Gulam Nabi proved the packets containing hair and clothes of the deceased person. He also proved the inquest memo and blood-stained clothes of Sazia, Sakina, Gudiya and Ashraf. PW-13 Jogendra Singh who was aged about 70 years identified his signatures over exhibits P-24, P-25, P-26 and P-27.

28. PW-9, PW-10 and PW-12 deposed in the Court in the following manner :-

"पी डब्ल्यू -9

आज से करीब साल भर पहले की बात है। सुबह 09-10 बजे हम हमारे खेत पर गाय-भैंसे चरा रहे थे। वहां पर माण्डल से पुलिस की गाड़ी आई थी। हम पुलिस की गाड़ी देखकर वहां गये। पुलिसवाले वहां से मिट्टी ले रहे थे। पुलिसवालों ने हमारे सामने वहाँ मिट्टी ली। वहाँ पर लिखापढ़ी कर रहे थे तो वहाँ बरसात आने से हम खड़े हो गये। पुलिसवालों ने हमारे सामने लिखापढ़ी की तथा हमारे हस्ताक्षर करवाये। उस समय वहाँ पर बद्री भी था। मेरे तथा बद्री के पुलिसवालों ने लिखापढ़ी पर हस्ताक्षर करवाये। फर्द बरामदगी स्थल प्रदर्श पी. 22 है जिस पर ए से बी मेरे हस्ताक्षर हैं। दो कागजों पर हमारे हस्ताक्षर करवाये थे। फर्द जप्ती खून आलूदा प्रदर्श पी. 23 है जिस पर ए से बी मेरे हस्ताक्षर हैं। इस फर्द पर मेरा भाई बद्री भी मौजूद था जिसने भी हस्ताक्षर किये थे।



### English Translation

PW-9

It was about a year ago. We were grazing cows and buffaloes in our field around 00-10 in the morning. A police vehicle had come from Mandal. We went there after seeing the police vehicle. The policemen were taking soil from there. The policewoman took soil in front of us. While they were doing this paperwork, we stood there as it started raining. The policewoman did the paperwork in front of us and got our signatures. Badri was also there at that time. My and Badri's policemen got the papers signed. The recovery report is exhibit P-22 on which my signatures from A to B are there. Our signatures were taken on two papers. The seizure report is exhibit P-23 on which my signatures from A to B are there. My brother Badri was also present on this report and he also signed it.

पी डब्ल्यू -10

आज से करीब साल भर पहले की बात है। हम हमारे खेत पर सुबह गाय-भैंसे चरा रहे थे। वहाँ पर माण्डल के पुलिसवालों की गाड़ी आई थी। जो गाड़ी को आगे-पीछे कर रहे थे। इस पर मैं तथा मेरा भाई अर्जुन पुलिस की गाड़ी के पास गये। पुलिसवालों ने जो कार्रवाई की वह उन्होंने ही की थी। हमसे तो मौके के हस्ताक्षर करने के लिये कहा था। निरीक्षण बरामदगी स्थल प्रदर्श पी. 22 पर सी से डी मेरे हस्ताक्षर हैं। फर्द जप्ती खून आलूदा मिट्टी प्रदर्श पी. 23 पर सी से डी मेरे हस्ताक्षर हैं।

### English Translation

PW-10

It was about a year ago. We were grazing cows and buffaloes in the morning on our farm. A police vehicle from Mandal came there. They



were moving the vehicle back and forth. So I and my brother Arjun went to the police vehicle. The police took whatever action they did. We were asked to sign for me. My signatures C to D are on the inspection recovery site exhibit P-22. My signatures C to D are on the seizure report blood-soaked soil exhibit P-23.

पी डब्ल्यू 12

दिनांक 29/2015 को महात्मा गांधी चिकित्सालय में स्थित चीरघर में छः लाशें तेज धारदार हथियार से कटी हुई आई थी। वहां पर मेरे सामने पुलिस ने उनके बाल व कपड़े लिये थे तथा थैलियों में पैक किये थे। फर्द पंचायतनामा लाश सुश्री साजिया प्रदर्श पी. 24 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द पंचायतनामा लाश सुश्री सकीना प्रदर्श पी. 25 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द पंचायतनामा लाश अशरफ प्रदर्श पी. 26 है जिस दिनांक 29/2015 को महात्मा गांधी चिकित्सालय में स्थित चीरघर में छः लाशें तेज धारदार हथियार से कटी हुई आई थी। वहां पर मेरे सामने पुलिस ने उनके बाल व कपड़े लिये थे तथा थैलियों में पैक किये थे। फर्द पंचायतनामा लाश सुश्री साजिया प्रदर्श पी. 24 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द पंचायतनामा लाश सुश्री सकीना प्रदर्श पी. 25 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द पंचायतनामा लाश अशरफ प्रदर्श पी. 26 है जिस ए से बी मेरे हस्ताक्षर हैं। फर्द पंचायतनामा लाश गुडिया प्रदर्श पी. 27 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती खून आलूदा कपड़े मृतक अशरफ प्रदर्श पी. 28 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती खून आलूदा कपड़े मृतका गुडिया प्रदर्श पी. 29 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती खून आलूदा कपड़े मृतक साजिया प्रदर्श पी. 30 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती खून आलूदा कपड़े मृतका सकीना प्रदर्श पी. 31 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती सिर के बाल मृतक अशरफ प्रदर्श पी.

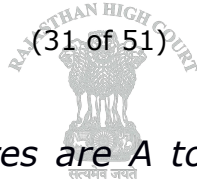


32 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती सिर के बाल मृतका गुडिया प्रदर्श पी. 33 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती बाल मृतका बालिका सुश्री साजिया प्रदर्श पी. 34 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द जप्ती सिर के बाल मृतका सुश्री सकीना प्रदर्श पी. 35 है जिस पर ए से बी मेरे हस्ताक्षर हैं। फर्द सुपुर्दगी लाश मृतक मौहम्मद यूनुस, मृतका चांद तारा, मृतक बालक अशरफ, मृतका सुश्री साजिया, मृतका गुडिया व मृतका सकीना प्रदर्श पी. 36 है जिस पर ए से बी मेरे हस्ताक्षर हैं।

#### English Translation

PW-12

Dead bodies cut with sharp edged weapons were found in the square situated in Mahatma Gandhi Hospital on 29/2015. There in front of me the police took their hair and clothes and packed them in bags. Fard Panchayatnarna of dead body Ms. Sazia is exhibit P-24 on which A to B are my signatures. Fard Panchayatnama of dead body Ms. Sakina is exhibit P-25 on which A to B are my signatures. Fard Panchayatnama of dead body Ashraf is exhibit P-26 on which A to B are my signatures. Fard Panchayatnama of dead body Gudiya is exhibit P-27 on which A to B are my signatures. Fard seizure of blood-stained clothes of deceased Ashraf is exhibit P-28 on which A to B are my signatures. The seizure of blood-stained clothes of deceased Gudiya is exhibit P-29, on which my signatures are A to B. The seizure of blood-stained clothes of deceased Sazia is exhibit P-30, on which my signatures are A to B. The seizure of blood-stained clothes of deceased Sakina is exhibit P-31, on which my signatures are A to B. The seizure of hair from the head of deceased Ashraf is exhibit P-32, on



*which my signatures are A to B. The seizure of hair from the head of deceased Gudiya is exhibit P-33, on which my signatures are A to B. The seizure of child, deceased girl Ms. Sazia is exhibit P- 34, on which my signatures are A to B. The seizure of hair from the head of deceased Ms. Sakiina is exhibit P-35, on which my signatures are A to B. The individual delivery of dead bodies of deceased Md. Yunus, deceased Chand Tara, deceased child Ashraf, deceased Ms Sazia, deceased Gudiya and deceased Sakina is exhibit P-36 on which are my signatures from A to B.”*

29. The Mobile Forensic Science Unit, Bhilwara inspected the *Tavera* parked at P.S. Mandal in the presence of PW-38 and an inspection report was prepared which was signed by Dr. Pankaj Purohit. The observations of the Mobile Forensic Science Unit are that (i) Chevrolet *Tavera* bearing registration No.RJ-27-TC-0323 was carrying a number plate on the rear side only, (ii) suspected blood-stains were observed at different places at the rear handle of the driver’s door and over driver seat and parts of the floor mat and found positive for “Benzidine Test” and (iii) soil on the floor mat near co-driver’s seat and few hair on the middle row of the seats were found. The recovery of *Tavera* which was found in front of the house of Sharafat and its inspection by the forensic expert team do not inspire confidence of the Court. The statement made by the prosecution witnesses and PW-38 do not go well and create serious doubt on the veracity of the prosecution evidence as to collection of blood and hair samples. Similarly, the recovery of diary from the house of



Sharafat at Municipal Colony on 30<sup>th</sup> July 2015 around 03:30 PM is not free from suspicion. It has come on record that the distance between place of occurrence and house of Md. Yunus was about 100 kms and there seems no reason why the convict-appellants would take out the diary of Md. Yunus and preserve the same with them. Blood-stained clothes of the convict-appellants are recovered from the Housing Board residence of Sharafat. The said house was closed and any memo regarding seizure of lock and keys was not drawn. The FSL reports reveal that the various articles recovered by PW-38 contained two blood samples viz. AB and A.

30. PW-14 Ramprasad who was posted at Mandal P.S. as Constable was accompanying the Officer-in-Charge of Mandal P.S. to Mahatma Gandhi Hospital where post-mortem examination over the dead body of one male and three females was conducted. He identified his signatures on seizure memo of *Tavera* vide exhibit P-38, a pocket diary vide exhibit P-40 and another diary vide exhibit P-41. In his cross-examination, PW-14 stated that the seizure memo vide exhibit P-39 was prepared around 6:30 PM on 29<sup>th</sup> July 2015. He admitted that there was cutting over the date in exhibit P-39 from E to F. As regards exhibit P-41, this witness stated in the Court that it was prepared around 03:00-03:30 PM on 31<sup>st</sup> July 2015. He stated that there was heavy rain on the day of occurrence and lot of water had accumulated at the place of occurrence. This witness was unable to tell the Court whether the *Tavera* was registered with RTO; the *Tavera* was



lying on a road which was open place and, that, the place was accessible to general public.

31. As noticed above, Sharafat gave a disclosure statement around 10:15 PM on 28<sup>th</sup> July 2015. In this disclosure statement given before PW- 38, Sharafat stated that he can show the place where he along with Rajesh Kumar had killed Md. Yunus and his wife Chand Tara and threw the dead bodies in the water. His disclosure statement that "मैं उस स्थान को चलकर दिखा सकता हूँ जहाँ मैंने एवं राजेश कुमार ने युनुस एवं सोनिया की हत्या कर शवों को पानी में डाल दिये थे।" is similar to the disclosure statement of Rajesh Kumar recorded around 11:25 PM on the same day. The disclosure statements given by both the convict-appellants are strikingly similar and both contain exactly twenty-seven words. Similarly, the disclosure statement of Sharafat recorded at 01:25 AM on 29<sup>th</sup> July 2015 and the disclosure statement of Rajesh Kumar recorded at 2:00 AM on the same day regarding the information where dead bodies of Asraf, Gudiya, Sazia and Sakina were thrown both are identical versions.

32. Section 27 of the Indian Evidence Act provides that statement the statement of an accused whether it amounts to a confession or not is admissible in evidence provided such statement relates distinctly to the fact discovered in consequence of the information provided by the accused while in custody. This provision is based on the doctrine of confirmation that if any fact is discovered on the strength of any information from the accused such discovery is a guarantee that the information supplied by the prisoner was



true when such evidence is taken by complying with other requirements in law then the Court shall permit the police to prove so much of the information received from a person accused of any offence in the custody of a police Officer which relates distinctly to the discovery of a fact in "*Suresh Chandra Bahari v. State of Bihar*"<sup>12</sup>, the Hon'ble Supreme Court observed as under paragraph no.71:-

*"71. The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence and (2) he must also be in police custody. In the present case it cannot be disputed that although these essential requirements existed on the date when Gurbachan Singh led PW-59 and others to the hillock where according to him he had thrown the dead body of Urshia but instead of the dead body the articles by which her body was wrapped were found. The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. In the present case as discussed above the confessional statement of the disclosure made by the appellant Gurbachan Singh is confirmed by the*

<sup>12</sup> 1995 Supp. (1) SCC 80



*recovery of the incriminating articles as said above and, therefore, there is reason to believe that the disclosure statement was true and the evidence led in that behalf is also worthy of credence."*

33. The provisions under section 27 of the Evidence Act are in essence a proviso to sections 25 and 26 under which a complete ban on admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody has been imposed. Section 27 permits a portion of the statement of an accused made to a police officer to be proved and thus making that portion of the statement of an accused admissible in evidence. However, before a portion of the statement of an accused made to a police officer while in custody is admitted in evidence his statement must distinctly relate to discovery of a fact. It is a settled law that recovery of an incriminating article or even production of such article(s) by itself may not necessarily result in discovery of a fact. In "*Pulukuri Kottaya v. Emperor*"<sup>13</sup>, speaking for the Privy Council, Sir John Beaumont has said that; "it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced". In "*Pandurang Kalu Patil & Anr. v. State of Maharashtra*"<sup>14</sup>, the Hon'ble Supreme Court observed that: "No doubt in a given case an object could also be a fact, but discovery of a fact cannot be equated with recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information

13 AIR 1947 PC 67

14 2002 (2) SCC 490



elicited from the accused". The issue that falls for consideration in this case is admissibility of the confessional statement of the appellants. In "*Rex v. Warickshall*"<sup>15</sup>, it was ruled that; "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, that it is to be considered as the evidence of guilt, that no credit ought to be given to it". In "*Pulkuri Kottaya v. Emperor*"<sup>16</sup>, the Privy Council observed that discovery of a fact in consequence of the information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information leading to discovery of fact may be proved.

34. Mr. Vineet Jain, the learned senior counsel appearing for the convict-appellants referred to the cross-examination of PW-14 wherein he stated that he had gone to the house of Sharafat at Municipality Employees Colony around 03:00-03:30 PM to fetch the keys of the car. At that time, Mukund Singh, Munir Ji and Sabir Diwan were also with him. He further stated that when they went inside the house of Sharafat he found the mother, wife and sister of Sharafat present in the house. He admitted in the Court that no seizure memo was prepared when the key of *Tavera* was brought from the house of Sharafat. PW-17 is the seizure witness who identified his signature over exhibits P-38 and P-39 which are relating to seizure of the *Tavera*. In the cross-examination, PW-17 admitted that the said vehicle was parked at Mandal P.S. He did not find any blood-stains inside

<sup>15</sup> 1783 (1) Leach 263

<sup>16</sup> AIR 1947 PC 67



the car. He further stated that he was asked to sign the papers on a pretext that the vehicle had met with an accident. PW-21 Sabir Mohammad was posted at Mandal P.S. as Head Constable. He stated in the Court that the FSL Officer Pankaj Kumar had inspected the car from inside and found blood-stains at several places. This witness further stated that the FSL Officer had prepared samples. PW-21 identified his signatures over exhibits P-45, P-46, P-47, P-48 and P-49. He stated that the sword was wrapped in a newspaper and there were blood-stains at some parts of the sword. This witness was not able to recollect whether the room in which the cooler was lying was locked or not.

35. PW-38 affirmed that no witness had spoken before 13<sup>th</sup> July 2015 about complicity of the accused persons in the crime nor had he found a clue in any document. He further admitted that he found the accused persons guilty on the basis of their disclosure statements and recovery of dead bodies of four children at their instance. PW-38 has, however, also stated that Haider Ali had informed him about complicity of the accused persons in the crime before he arrested him. The accused persons admitted their involvement in the crime before they were arrested in the case. He reached at the house of Salim at Municipality Employees Colony at 6:15 PM on 28<sup>th</sup> April 2015. He headed to Municipality Employees Colony immediately after conducting inquiry in the house of Salim at New Housing Board Colony. He left this place around 6:30 PM-6:45 PM and went to the police station with Sharafat and Rajesh Kumar. He produced them in the Court after



lunch on 29<sup>th</sup> July 2015. After preparing seizure memo of *Tavera* vide exhibit-P 37, PW-38 started for Nimbahera and reached there by 6:00 PM He also admitted that *Tavera* was lying in open space on a road and it was locked. The house was open and Sharafat had himself gone in his room and brought the keys. At that time, the mother, wife and three sisters of Sharafat were present in the house. He had gone inside the house with Sharafat and his room was not locked. He did not enter the room of Sharafat and thus did not know where the keys were lying in the room. He did not prepare the seizure memo and the keys were not deposited in *malkhana*. He further stated that he deposited the keys in *malkhana* after conducting inspection of the vehicle. Exhibit P-52A did not contain any entry regarding date and time when the vehicle and keys were deposited in *malkhana*. He offered an explanation for overriding and stated that he had attempted twice as the pain was not working. He further admitted that he did not conduct inspection of the car for presence of the accused persons and exhibit P-45 was not signed by the accused persons. There was no signature of Dr. Pankaj Purohit on exhibit P-45. He started for house No.9 at Municipality Employees Colony, Nimbahera on 31<sup>st</sup> July 2015 to recover the pocket diary from the said house of Sharfat. Exhibit P-47, the house number and address of Sharafat are not recorded in any of the documents prepared by him.

36. In the trial, the prosecution tendered circumstantial evidence to prove the charge under sections 364, 302 and



201 read with section 34 of the Indian Penal Code against the appellants. In a long line of judgments, the Hon'ble Supreme Court held that conviction can be recorded on the basis of circumstantial evidence but great care must be taken in evaluating the evidence in a case based on circumstantial evidence. In "*Sharad Birdhichand Sarda v. State of Maharashtra*"<sup>17</sup>, the Hon'ble Supreme Court has held that in a case based on circumstantial evidence the prosecution must prove that: (i) the circumstances from which conclusion of the guilt is to be drawn are fully established, (ii) the circumstances are of a conclusive nature and tendency, (iii) the facts so established are consistent only with the hypothesis of guilt of the accused, (iv) every possible hypothesis of innocence of the accused is completely excluded, and (v) the chain of circumstances is so complete that it does not leave any reasonable ground for a conclusion consistent with innocence of the accused. In "*Sukhram v. State of Maharashtra*"<sup>18</sup>, the Hon'ble Supreme Court has held that the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but all the circumstances so established should be of conclusive nature and consistent with the hypothesis of the guilt of the accused.

37. PW-29 Shailender, PW-30 Tehsildar and PW-35 Hitesh are the witnesses who were produced in the trial to establish that Md. Yunus, Chand Tara and their four children were last seen alive in the company of Sharafat and Rajesh Kumar. As we have seen, PW-29 and PW-30 did not support the

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<sup>17</sup> 1984 (4) SCC 116

<sup>18</sup> 2007 (7) SCC 502



prosecution story and they were declared hostile at the instance of the prosecution. The trial Judge permitted the prosecution to cross-examine them but nothing material and significance could be elicited from them and their testimony is not at all relevant for the prosecution to support the charge against the convict-appellants. PW-35 Hitesh deposed in the Court that a white *Tavera* coming from Chittorgarh and heading towards Jaipur crossed the Toll Plaza around 01:22 AM in the intervening night of 27/28 of July 2015. The said vehicle passed through booth no.2 and was heading towards Jaipur. According to PW-35, there were 2-3 male, one female and 2-3 children travelling in the said *Tavera*. He further deposed that he provided a transaction sheet and the video clip in a pen drive to the Investigating Officer. While no document could be produced by the prosecution to establish that PW-35 was working at the Toll Plaza as a manager and whether he had any fixed duty hours, the prosecution failed to produce the said video clip in the trial. Murarilal who is said to have shown the video clip to PW-38 and provided the said video clip in a pen drive was not examined during the trial. There was no material to show that the same *Tavera* came back and crossed the Toll Plaza coming from Jaipur. Looking at the testimony of PW-35 as a whole, it is not established that he had seen the occupants of the said *Tavera*. In our opinion, there is absolutely no material to establish that Md. Yunus, Chand Tara and their children were travelling in the fateful night on the seized *Tavera*.



38. PW-29 Shailendra is a person who was working at *Jojro Ka Khera* Toll Plaza. He stated in the Court that his duty period span over eight hours and he had no recollection about his duty hours on the date of the occurrence because it had happened about two years ago. He seems to have resiled from his statement before the police and stated in his examination-in-chief that he was not aware about any *Tavera* passing through Toll Plaza on the day of the occurrence. Therefore, this witness was declared hostile at the instance of the Additional Public Prosecutor and permission to cross-examine him was granted by the Court. But in the cross-examination also PW-29 flatly refused that the police had taken statement from him or that the police had made any inquiry from him. PW-29 has stated thus :-

"पीडब्ल्यू-29

करीबन दो साल पहले की बात है। मैं टोल कम्पनी में काम करता था। जोजरो का खेड़ा टोल नाके पर काम करता था। मेरी ड्यूटी व टॉल पर काम करने वालों की ड्यूटी आठ-आठ घंटे की होकर तीन सीफ्ट में चलती थी। उस दिन मेरी ड्यूटी कितने बजे से कितने बजे की थी। यह मुझे आज याद नहीं है क्योंकि छह साल दो साल पहले की है। उस दिन मौसम सादा था बारिश नहीं आ रही थी। उस दिन गाड़िया टोल से निकल रही थी। मेरे पास ऐसी कोई जानकारी नहीं है गाड़ी के संबंध में। मेरी जानकारी में नहीं कि उस दिन कोई टवेरा गाड़ी निकली हो।

*English Translation*

*PW-29*

*It was about two years ago. I used to work in a toll company. I used to work at the Jojron ka Kheda toll post. My duty and the duty of the people working at the toll post used to be of eight hours each and were*



*in three shifts. I don't remember from what time to what time my duty was that day because the incident happened two years ago. The weather was clear that day and it was not raining. That day vehicles were passing through the toll. I don't have any such information regarding the vehicle. I am not aware that any Tavera passed through that day."*

39. PW-30 is another witness who was working at Gangarar Toll Plaza at *Jojrao ka Khera*. PW-30 denied that any *Tavera* had passed through Toll Plaza on the day of occurrence. As PW-35, Hitesh Kumar Singh who was the Manager at the Toll Plaza deposed in the Court that he provided video recording clips at the Toll Plaza to the police. According to this witness, the video recording at about 01:22 AM in the intervening night of 27<sup>th</sup>/28<sup>th</sup> July 2015 showed that a white *Tavera* coming from Chittor and heading towards Jaipur had passed through booth no.2. According to PW-35, there were 2-3 men and a woman along with 2-3 children travelling in the said vehicle. He had provided a copy of the transaction sheet (vide exhibit P-64) and video clip in a pen drive. PW-30 in his examination-in-chief stated thus :-

"पीडब्ल्यू 30

सन् 2015 में मैं टोल प्लाजा गंगरार में नौकरी कर रहा था। टोल नाका जोजरां का खेड़ा में है। मेरी नौकरी में आठ घंटे प्रति दिन की ड्यूटी होती थी। उस दिन मेरी किस बूथ नं. पर ड्यूटी थी यह मुझे नहीं मालूम। भीलवाड़ा से चित्तौड़गढ़ जाने वाले वाहनों के टोल काटने बूथ पर मैं बैठता था। मेरे आठ घंटे की ड्यूटी के वक्त बहुत सी गाड़ियां टोल से निकलती थी। जो गाड़िया आती थी उनका टोल काटता था, जो रिटर्न गाड़ी होती थी उनकी मैं पर्ची चैक करता था। गाड़ियां सभी तरह की निकलती थी जैसे कार और अन्य, मैं गाड़ियों का नाम नहीं बता



सकता। घटना वाले दिन, दिन में पुलिस वालें मुझसे पूछताछ करने आये कि कोई गाड़ी निकली क्या तो मैंने कहा कि मुझे नहीं मालूम कई गाड़ियां निकलती है। फिर पुलिसवालों ने कम्प्यूटर चेक किया तो रात को गाड़ी निकली उसका रिटर्न रात को ढाई-तीन बजे के लगभग का रिटर्न आया। रिटर्न का पैसा कितना था यह मुझे आज याद नहीं। पुलिस ने मेरे बूथ के कम्प्यूटर को चेक नहीं किया उसने ऑफिस के कम्प्यूटर को चेक किया था। घटना वाले दिन टवेरा गाड़ी नहीं निकली। अजखुद कहा कि मुझे याद नहीं कि घटना वाले दिन टवेरा गाड़ी निकली अथवा नहीं।

#### English Translation

PW-30

In 2015, I was working at Gangarar Toll Plaza. The toll booth is in Jojaron Ka Kheda. I had to work for eight hours a day. I don't know which booth number I was on duty at that day. I used to sit at the booth to collect toll for vehicles going from Bhilwara to Chittorgarh. During my eight-hour duty, many vehicles passed through the toll. I used to collect toll for the vehicles that came and I used to check the slips of the return vehicles. All kinds of vehicles passed through, like cars and others. I cannot tell the names of the vehicles. On the day of the incident, the police came to question me whether any vehicle passed through, I said that I don't know, many vehicles pass through. Then the police checked the computer and the return of the vehicle that passed through at night came at around 2:30-3:00 in the night. I don't remember today how much the return amount was. The police did not check the computer of my booth, they checked the computer of the office. The Tavera did not pass through on the day of the incident. Ajkhud said that I do not remember whether the Tavera came out on the day of the incident or not.



पी डब्ल्यू -35

मैं सन 2015 में जोजरो का खेड़ा, तहसील गंगरार, जिला चित्तौड़गढ़ में टॉल प्लाजा पर प्रबंधक था। 10 अगस्त, 2015 को शाम के करीब 08 बजे पुलिस वाले आये थे, उन्होंने बताया कि एक मर्डर हुआ है और आपके यहां से 27 जुलाई 2015 को एक सफेद रंग की टवेरा निकली है इस पर हमने पुलिस वालों को टॉल नाके की वीडियो क्लिप दिखायी। वीडियो क्लिप में पाया गया कि 27/07/2015 व 28/07/2015 को मध्य रात्रि के बाद 01:22 मिनट पर एक सफेद टवेरा गाड़ी चित्तौड़ साइड से जयपुर साइड में निकली थी, जो कि बूथ नं. 02 से निकली थी। उस गाड़ी में दो-तीन आदमी, एक महिला व दो-तीन बच्चे बैठे हुए थे। इन्होंने जाने-आने की टिकट कटायी थी। पुलिस वालों ने हमसे साक्ष्य मांगा तो हमने ट्रांसजेक्शन सीट की कॉपी थी, एक पेन ड्राइव में वीडियो की क्लिप दी। जो ट्रांसजेक्शन सीट प्रदर्श पी 64 है जिस पर ए से बी मेरे हस्ताक्षर हैं, एक्स स्थान उक्त टवेरा गाड़ी की टिकट नं. की आईडी है जिससे गाड़ी निकलने का मैच होता है।

English Translation

PW-35

In 2015, I was the manager at the Toll Plaza in Jojaro ka Kheda, Tehsil Gagrar, District Chittorgarh. On 10 August 2015, at around 8 pm, the police came to us. They told us that a murder has taken place and a white Tavera passed through our place on 27 July 2015. On this, we showed the video clip of the Toll Plaza to the police. It was found in the video clip that on 27/07/2015 and 28/07/2015, at 01:22 after midnight, a white Tavera passed through Chittor side to Jaipur side, which had passed through booth no. 02. Two-three men, a woman and two-three children were sitting in that car. They had bought tickets for going and coming. When the police asked us for evidence, we gave them a copy of the transaction



*sheet and a video clip in a pen drive. The transaction sheet is exhibit P-64 on which my signatures are from A to B, the X place is the ticket ID of the said Tavera which matches with the departure of the car."*

40. The importance of last-seen-together evidence cannot be over emphasized in a criminal trial as this by itself is not sufficient to record conviction of an accused. It is quite a settled proposition in a law that before onus shifts on the accused by operation of section 106 of the Evidence Act it must be held that the prosecution has established a prima-facie case against the accused. In "*Bodhraj @ Bodha v. State of Jammu and Kashmir*"<sup>19</sup>, the Supreme Court explained the law on last-seen-together, thus :-

*"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....."*

41. In "*Rajender @ Rajesh @ Raju v. State (NCT of Delhi)*"<sup>20</sup>, the Hon'ble Supreme Court has observed as under :-

<sup>19</sup> (2002) 8 SCC 45

<sup>20</sup> 2019 (10) SCC 623



"12.2.4. .... Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. Section 106 only lays down the rule that when the accused does not throw any light upon facts which are specially within his/her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances."

42. Like in every criminal trial, to prove the charge under sections 364, 302 and 201 read with section 34 of the Indian Penal Code the prosecution must lead cogent and consistent evidence establishing complicity of the appellants in the occurrence. This must always be kept in mind what has been observed by the Hon'ble Supreme Court in "*Shambu Nath Mehra v. State of Ajmer*"<sup>21</sup>, that section 106 of the Evidence Act cannot be used to

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21 AIR 1956 SC 404



undermine the well established rule of law that, save in a very exceptional class of cases, the burden is on the prosecution and never shifts. A person who is facing a charge of murder may be a close relative, friend, co-worker or co-villager of the deceased and there may be circumstances, purely casual or accidental, in which both have been seen together. For example, a person is seen with a friend/co-worker/ co-villager in a market place, fair, movie show, or at the Airport or Railway Station and this may be just a coincidence and chance meeting, but, that by itself would not become an incriminating circumstance so as to fuel the last-seen-together theory. Therefore, as a general rule in every case an inference on complicity of the accused cannot be raised by invoking section 106 of the Evidence Act. The provisions of section 106 of the Evidence Act are very clear and do not admit any ambiguity. It clearly lays down that when any fact is especially within the knowledge of the person, the burden of proving that fact is upon him. Therefore, it must be first shown that the facts are pre-dominantly and without exception within the knowledge of the accused still he has failed to furnish an explanation which is probable and satisfactory. In "*Babu v. State of Kerala*"<sup>22</sup>, the Hon'ble Supreme Court has held that a Court must be on guard to see that the application of presumption in a case does not result in any injustice or mistaken conviction. This is a cardinal principle that the weight of evidence is to be considered and not the number

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22 2010 (9) SCC 189



of witnesses. A presumption in law does not mean that the Court cannot look into the special features of the case, such as, patent absurdity, inherent infirmity or improbability in the prosecution case. Having regard to the materials produced by the prosecution against Sharafat and Rajesh Kumar, we have no hesitation at all to record that the prosecution miserable failed to establish that Md. Yunus, his wife and four children were last-seen alive in the company these convict-appellants.

43. Sharafat and Rajesh Kumar were charged under sections 364, 302 and 201 of the Indian Penal Code with the aid of section 34 of the Indian Penal Code. A common intention which necessarily implies a pre-arranged concert must be distinguished from same or similar intention. The law on the subject was authoritatively decided by the Privy Council in "*Barendra Kumar Ghosh v. King Emperor*"<sup>23</sup>. In that case, the argument was that: in section 34 a criminal act in so far as murder is concerned means an act which takes life criminally within section 302 because the section concludes by saying is liable for that act in the same manner as if the act were done by himself alone. It was argued that where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Lord Sumner captured the appellant's argument in an illustration, thus; "if three assailants simultaneously fire at their victim and lodge three bullets in

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23. 1924 SCC OnLine PC 49



his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one". Speaking for the Board, Lord Sumner concluded that: Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". This is also quite well settled that merely because it is shown that all the accused persons carried the same intention but independently of each other it is not enough to attract application of section 34 IPC (refer, "*Pandurang v. State of Hyderabad*"<sup>24</sup>). In "*Bharwad Mepa Dana & Anr. v. The State of Bombay*"<sup>25</sup> the Hon'ble Supreme Court observed that the principle which section 34 of the Indian Penal Code embodies is participation in action with the common intention of committing a crime and once such participation is established section 34 of the Indian Penal Code is at once attracted. There is no iota of evidence to establish that Rajesh Kumar had any motive or reason to join hands with Sharafat to commit murder of six persons. The prosecution has completely failed to establish that Sharafat and Rajesh Kumar shared common intention to abduct Md. Yunus, Chand Tara and their four children, to kill them and cause disappearance of their dead bodies.

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24. AIR 1955 SC 216

25. AIR 1960 SC 289



44. In summation, the prosecution evidence is completely hazy and testimony of the prosecution witnesses creates serious doubt on their credibility and veracity of the prosecution case against the convict-appellants. The Investigating Officer made serious mistakes in course of the investigation and such lapses on his part left yawning gaps in connecting the convict-appellants with the crime. It was the duty of the trial Judge to record specific findings on each incriminating circumstance whether or not that particular circumstance was established beyond reasonable doubt. The trial Judge failed to adopt the proper tests and extended unwarranted benefits to discrepant statements of the prosecution witnesses. Furthermore, the trial Judge did not focus on the basic rules of evidence and over-looked the serious lacuna in the prosecution case. In the end, we would close these discussions by observing that the judgment of conviction against Sharafat and Rajesh Kumar rendered by the Additional Sessions Judge in Sessions Case No.12/2015 (35/2021) is based on assumptions and presumptions which could not have been raised in law and therefore warrants interference by this Court.

45. Based on the aforesaid discussions, we conclude that the prosecution failed to establish the charge of abduction and murder framed against the convict-appellants and therefore their conviction under sections 364, 302 and 201 read with section 34 of the Indian Penal Code and the order of sentence passed



thereon are set aside. Consequently, Sharafat son of Salim Khan and Rajesh Kumar son of Ratan Lal are acquitted of the charges framed against them in Sessions Case No.12/2015 (35/2021).

46. In the result, D.B. Criminal Appeal No126/2022 succeeds and thus allowed and D. B. Murder Reference No.01/2022 is dismissed. We therefore direct that Sharafat son of Salim Khan and Rajesh Kumar son of Ratan Lal who are in jail custody shall be released forthwith if not wanted in connection to any other criminal case.

**(CHANDRA SHEKHAR SHARMA),J (SHREE CHANDRASHEKHAR),J**

Whether fit for reporting : Yes/No