

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 21/06/2018****Pronounced on 04/07/2018****CRIMINAL APPEAL No. 364/2009**

Khemraj Agrawal, S/o. Late Ramdhari Agrawal, aged about 48 years, occupation- Business, R/o. Khagesh Bhawan, Sattigudi Chowk, Mattagali, Raigarh, P.S. City Kotwali, Tahsil Distt. Raigarh (CG)

-Versus-

State of Chhattisgarh through District Magistrate, Raigarh, Police Station – Kotra Road, Raigarh, Tah. And Distt. Raigarh (CG)

CRIMINAL APPEAL No. 470/2009

Ashok Kumar Mishra, aged about 40 (49) years, son of Shri Sharda Prasad Mishra, occupation Advocacy, R/o. Beladula, Raigarh, P.S. Chakradharnagar, Tah. And Distt. Raigarh (CG)

-Versus-

State of Chhattisgarh through SHO Police Station – Kotra Road, Raigarh, Tah. And Distt. Raigarh (CG)

CRIMINAL APPEAL No. 474/2009

Harish Patnaik, S/o. Radheshyam Patnaik, aged about 34 years, occupation Business, R/o. Beladula, Police Station Chakradharnagar. Presently residing at Danipara (House of Jagdish), Police Station Kotwali, Tahsil and Distt. Raigarh (CG)

-Versus-

State of Chhattisgarh through SHO Police Station – Kotra Road, Raigarh, Tah. And Distt. Raigarh (CG)

CRIMINAL APPEAL No. 489/2009

Amit Mishra, S/o. Indramani Mishra, aged about 25 years, occupation Nil, R/o. Beladula, P.S. Chakradhar Nagar, Tah. and Distt. Raigarh (CG)

-Versus-

State of Chhattisgarh through Police Station – Kotra Road, Raigarh, Distt. Raigarh (CG)

CRIMINAL REVISION No. 350/2009

Smt. Kuldeep Kaur Kalia, W/o. Late Sudershan Kalia, aged 72 years, Retd. Block Development Officer, R/o. Chota Atarmura, Panchayat

Office Road, Raigarh, Distt. Raigarh (CG)

-Versus-

1. State of Chhattisgarh through Police Station – Kotra Road, Raigarh, Distt. Raigarh (CG)
2. Ashok Ku. Mishra, aged about 40 years, son of Shri Sharda Prasad Mishra, Profession Advocate, R/o. Beladula, P.S. Chakradharnagar, Tah. And Distt. Raigarh (CG)
3. Harish Patnaik, S/o. Radheshyam Patnaik, aged about 34 years, occupation Shopkeeper, R/o. Beladula, Police Station Chakradharnagar. Present address Danipara (in House of Jagdish), Police Station Kotwali, Tahsil and Distt. Raigarh (CG)
4. Khemraj Agrawal, S/o. Ramdhari Agrawal, aged about 41 years, occupation- Business, R/o. Khagesh Bhawan, Sattigudi Chowk, Masta Gali, Raigarh, P.S. Kotwali, Tahsil Distt. Raigarh (CG)

For appellant Khemraj Agrawal	:	Shri A.K. Athaley, Adv.
For appellant Ashok Kumar Mishra	:	Shri Kishore Bhaduri, Adv.
		Shri Pawan Kesharwani, Adv.
		Shri Sunny Agrawal
		Sushri Shriya Mishra
		Sushri Swati Upadhyay
		Sushri Juhi Jaiswal,
For appellant Harish Patnaik	:	Shri Sudhir Verma, Adv.
For appellant Amit Mishra	:	Smt. Hameeda Siddiqui, Adv.
For applicant Kuldeep Kalia	:	Shri H.S. Ahluwalia, Adv.
For respondent No. 1/State	:	Shri U.N.S. Dev, Govt. Adv.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

Per Sharad Kumar Gupta, Judge

1. As these criminal appeals and the criminal revision arise from judgment dated 27.04.2009 passed in S.T. No. 26/2004, they are being disposed of by this common judgment.
2. In these cases, the challenge levied is to the judgment of conviction and order of sentence passed by the Fourth Additional Sessions Judge (FTC), Raigarh on 27.04.2009 in S.T. No. 26/2004 whereby and whereunder the appellants were convicted and sentenced as under:-

Appellant Khemraj Agrawal

Under Section	Sentence RI	Fine	Default
201/34, IPC	7 years' RI	Rs. 1,000/-	1 month's RI

Appellants Ashok Kumar Mishra, Harish Patnaik and Amit Mishra

Under Section	Sentence RI	Fine	Default
302/34, IPC	Life imprisonment	Rs. 5,000/-	5 months' RI
120-B, IPC	Life imprisonment	Rs. 5,000/-	5 months' RI
201/34, IPC	7 years RI	Rs. 1,000/-	1 month RI

All the sentences are to run concurrently.

3. The material facts admitted by the accused Ashok Mishra are that the police had seized an Ambassador car in which his name was inscribed on its number plate, he was an advocate of the cases of the deceased Sangita Kalia and her mother Kuldeep Kalia, Ex. P-30 to Ex. P-37 are in his hand writing, he had sentimental relation with Sangita Kalia, affidavit Ex. P-23 was notarized by P.W. 12 Gopal Mishra, Qtr. No. 6 of the Anathalaya Colony was taken by him on rent, he had given the said house to her, documents A-1 to A-24 are in his hand writing, P.W. 36 Dr. P. Dubey had examined the deceased, Ex. P-101 is admitted by him, her pregnancy test was confirmed, prescription Ex. P-102 is admitted by him.

4. In brief, the prosecution story is that on 22-10-2003 Kotwar P.W.1 Guha Ram and some other persons saw a female dead body in Ramlal's field. On the intimation of P.W. 1 Guha Ram merg intimation Ex. P-1 was lodged in police station Kotraroad. Inquest report Ex. P-9 was prepared. P.W. 9 constable Danial Toppo, P.W. 43 Ramakant Sharma had told to P.W. 55, T.I. Sachin Dev Shukla that on 21-10-2003 at about 1.30 am they had seen all the four accused near the accused Ashok Mishra's Ambassador car which was stuck near the scene of crime. Spot map was prepared. FIR was registered. Autopsy was conducted on the dead body of the deceased. Plain and blood stained soil were seized. Soil having marks of moving tyre of four wheeler and paddy plants were also seized. On the memorandum of accused

Harish Patnaik one pestle and one pair of slippers were seized. On memorandum of accused Ashok Mishra, some articles and affidavit Ex. P-23 were seized. One Ambassador car bearing number CG 13 ZD 1075 was seized from accused Ashok Mishra. Inside the car stains, hair, un-husked rice grain, green leaf of paddy were present. Soil was present on the disc of the left wheel. One stained wrist watch was seized from accused Ashok Mishra. Blood stained materials of the car and filter paper were seized. Notary register was seized from P.W.12 Gopal Mishra. Statements of the witnesses were recorded under Section 161 Cr.P.C. Reports were obtained from the Chemical examiner, the RFSL and the Central Forensic Science Laboratory. After completion of the evidence, a charge sheet was filed against all the four accused.

5. The Trial Court framed the charges against all four accused under Section 302 read with Section 34, 120B read with 34, 201 read with Section 34 of IPC. Accused abjured the charges and faced the trial. To bring home the charges against the accused persons, prosecution examined as many as 55 witnesses.

6. The accused Ashok Mishra took specific defence that he had got registered so many cases against the police officers, thus, they were keeping animosity with him. The radiator of his car was heated, his brother-in-law Mitramani Tripathi had taken the vehicle for repair and got repaired from the mechanic. During this period he was in his office. Mitramani Tripathi had taken his vehicle for trial towards the place of occurrence where it was stuck. When he reached there his vehicle was pulled out and they moved it from there. Accused Khemraj Agrawal took specific defence that at the time of alleged incident he was present along with Jagdish Chouhan to help him for sonography being done for his wife. Accused Ashok Mishra examined as many as 12 witnesses, accused Khemraj Agrawal examined as many as 3 witnesses in their defence.

7. After conclusion of the trial, the Trial Court convicted and sentenced the appellants as aforesaid. Being aggrieved, the appellants and the revisioner preferred these appeals and the revision.

8. Shri Kishore Bhaduri, counsel for accused Ashok Mishra vehemently argued that the trial Court has not appreciated the evidence in proper perspective, the accused has proved plea of alibi which has been overlooked by the trial Court. He had no motive for the commission of alleged offences. Deceased had inimical relation with other persons hence possibility of commission of offences by such persons cannot be ruled out. The trial Court has given unnecessary weightage to the evidence of brother of the deceased, mother of the deceased and their maid. He had got initiated proceedings against police officers and administrative officers. The links of the circumstances do not form the complete chain.

9. Shri Sudhir Verma, Counsel for accused Harish Patnaik argued that alleged memorandum and seizure regarding this accused are dis-believable.

10. Shri A.K. Athaley, counsel for accused Khemraj Agrawal argued that no cogent evidence is available against him. He was present in the hospital at the relevant time. The trial Court wrongly disbelieved his defence witnesses. He has been falsely implicated in this case.

11. Smt. Hameeda Siddiqui, Counsel for the accused Amit Mishra argued that he is the nephew of accused Ashok Mishra and was called at the place where the car was stuck. No evidence regarding his complicity in the offence is available on record.

12. On the other hand, Shri U.N.S. Dev, Govt. Advocate appearing for the State supported the impugned judgment and argued that aforesaid conviction and sentences are based on clinching evidence available on record and do not call for any interference.

13. Shri H.S. Ahluwalia, Counsel for the revisioner argued that the prosecution has proved the circumstantial evidence for killing the deceased against the all four accused. The trial Court failed to apply the provisions of Sections 34 and 120-B of the IPC against accused Khemraj Agrawal. Deceased was brutally murdered. Thus, all four accused should be awarded with death sentence.

14. **Points for determination** :- There are following points for determination in this case -

(1) Whether in the intervening night of 21st and 22nd of October, 2003, accused Ashok Kumar Mishra, Harish Patnaik, Khemraj Agrawal and Amit Mishra had the common intention to cause murder of deceased Sangita Kalia and in furtherance thereof they murdered her.

(2) Whether at the same time all 4 accused had hatched criminal conspiracy of murder of deceased Sangita Kalia.

(3) Whether all 4 accused in furtherance of common intention caused disappearance of evidence of the murder of deceased Sangita Kalia by throwing her dead body in field.

Points for determination no. 1, 2, 3 and 4 :- Finding with reasons

15. Looking to the convenience, points for determination No. 1 to 4 are being decided simultaneously.

16. The case of the prosecution regarding murder of the deceased Sangeeta Kalia is based on circumstantial evidence.

NATURE OF DEATH OF THE DECEASED

17. First and foremost question for consideration before us is that, whether death of the deceased Sangita Kalia was culpable homicide.

18. As per the alleged document regarding post-mortem of deceased Sangita Kalia Ex.P-98, P.W. 22 Dr. V.K. Mehta and P.W. 23 Dr. Usha Kiran

Bhagat had conducted the autopsy of deceased Sangita Kalia on 22-10-2003 at 3.50 pm. P.W. 22 Dr. V.K. Mehta says in para-2 of his statement given on oath that in her internal examination one L.W. was found on her scalp of size 10 cm x 3cm x deep bone, one L.W. on her left ankle of size 1/2 cm x 1/2 cm x 1/2 cm. Parietal bone was fractured on both sides. The injuries were ante mortem in nature caused by hard and blunt object. He opined that death was homicidal in nature, caused due to coma and shock due to head injury. Duration was within 18-24 hr. Deceased was pregnant by 20-22 weeks .

19. As per Ex. P-98 the death of deceased Sangita Kalia occurred between 3.50 pm to 9.50 pm of 21-10-2003.

20. P.W. 22 Dr. V. K. Mehta says in paras 13 and 15 that head injury of deceased may be caused by accident if deceased falls downright facing her head on a hard object. Head injury of deceased may be accidental.

21. There is no material available on record on strength of which it could be said that allegedly the deceased fell downright facing her head on a hard object. Thus, appellants do not get any help from the statements of Para 13 and 15 of P.W. 22 Dr. VK Mehta.

22. There is no such evidence on record on strength of which it could be said that Ex. P-98 is not believable. Thus, this court believes on Ex. P-98.

23. After appreciation of the evidence discussed herebefore this Court finds that prosecution has proved beyond reasonable doubt that death of deceased Sangita Kalia was homicidal in nature.

24. Looking to the head injury of deceased Sangeeta Kalia it is very clear that head injury was caused with intention to cause death or it is caused with the intention of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. Thus, this Court finds that the culpable homicide of deceased Sangita Kalia is murder.

MOTIVE

25. Second question for our consideration is that, whether accused Ashok Kumar Mishra had motive to cause murder of deceased Sangita Kalia.

26. As per the alleged opinion of the State Examiner Of Questioned Document, Government of Chhattisgarh, Raipur Ex. P-59, P.W. 21 hand writing expert N.K. Sikkewar had examined the documents and opined that the person who wrote the red enclosed writings and signature stamped and marked A-1 to A-24 also wrote the red enclosed writings and signatures similarly stamped and marked Q1-Q3. In this case A-1 to A-24 have been exhibited as Ex.P-33 to Ex.P-52 which are the handwriting samples of accused Ashok Kumar Mishra. Q-1 is alleged agreement dated 1-4-99 marked as Ex.P-30, Q-2 is alleged letter dated 04-09-98 marked as Ex.P-31, Q-3 is alleged letter marked as Ex. P-32.

27. He also opined that the person who wrote the red enclosed writings stamped and marked S-1 to S-11 also wrote the red enclosed writings similarly stamped and marked Q-4 to Q-6. In this case, S-1 to S-11 have been exhibited as Ex. P-55 to Ex.P-58 which are the letters of deceased Sangita Kalia, Q-4 to Q-6 are exhibited as Ex. P-53 and Ex.P-54.

28. There is no such evidence on record on strength of which it could be said that Ex. P-59 is not believable. Looking to this fact and concerned admitted fact, this court believes on Ex. P-59.

29. P.W. 31 Rajeev Kalia who is the brother of deceased Sangita Kalia says in para 2, 3, 4, 7, and 8 of his statement given on oath that love affair was developed between deceased Sangita Kalia and accused Ashok Kumar Mishra. They lived together in Rajmahal Hotel and in quarter No. 6 of Anathalay. He was beating and harassing her. She was conceived by that relationship. He was giving threatening to her to abort otherwise he would kill her. Few days ago from the incident he had come in his house and gave

same threatening.

30. P.W.50 Smt. Kuldeep Kalia who is mother of the deceased gives similar statements in para 2, 3, 4, 6 and 7 of her statement given on oath.

31. P.W. 36 Dr. V. Dubey says in para 2 of her statement given on oath that on 13-7-2000 she examined deceased Sangita Kalia. Her pregnancy test was positive. To avoid miscarriage she had prescribed medicines to her, the prescription is Ex. P-102.

32. There is no such evidence on record on the strength of which it could be said that aforesaid statements of P.W. 31 Rajeev Kalia, P.W. 50 Kuldeep Kalia in this reference that allegedly deceased Sangita Kalia and accused Ashok Kumar Mishra had intimate relationship, he was harassing her, deceased Sangita Kalia was carrying pregnancy, he was giving threatening to her to abort lest he will kill her, few days ago he had given same threatening, aforesaid statement of P.W. 36 Dr. V. Dubey, her prescription Ex. P-102, are not believable. Looking to these circumstances and concerned admitted facts, this Court believes on them.

33. From the aforesaid reference of statements of P.W. 31 Rajeev Kalia, P.W. 50 Kuldeep Kalia and P.W. 36 Dr. V. Dubey, and Ex. P-102, report of the handwriting expert Ex. P-59 this Court finds that prosecution has proved beyond reasonable doubt that accused Ashok Mishra had motive to cause death of the deceased Sangita Kalia.

34. Shri Kishore Bhaduri, counsel for the accused Ashok Kumar Mishra placed reliance on ***Mohd. Inayatullah v. State of Maharashtra* [(1976) 1 SCC 828,], *Bodhraj v. State of J&K* [(2002) 8 SCC 45], *Khekh Ram v. State of H.P.*, [(2018) 1 SCC 202], Shri Sudhir Verma, counsel for accused Harish Patnaik placed reliance on ***Mangal Singh v. State of MP (Now CG)* [2009(1) CGLJ 303 (DB)]**, wherein Hon'ble Supreme Court and a division bench of this Court have laid down that the facts proved by the prosecution,**

particularly the admissible portion of the statement made by the accused, could give rise to two alternative hypotheses equally possible, namely – (1) that it was the accused who had himself deposited the stolen drums in the Musafirkhana, or (2) the accused only knew that the drums were lying at that place. The second hypothesis was wholly compatible with his innocence. Under Section 27 of the Evidence Act, as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact it becomes a reliable information. Only those components or portion which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected.

35. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, also placed reliance on **Ganesh Bhavan Patel v. State of Maharashtra**, [(1978) 4 SCC 371], **Sudershan Kumar v. State of H.P.**, [(2014) 15 SCC 666], wherein Hon'ble Supreme Court laid down that delay in examining eyewitnesses by the investigating officer can on the peculiar facts of a case amount to serious infirmity in the prosecution case. For delay in recording the statement of witnesses under Section 161 Cr.PC., no explanation was given. This factor also shakes credibility of witnesses.

36. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, further placed reliance on **Jaharlal Das v. State of Orissa**, [(1991) 3 SCC 27], **Bharat v. State of M.P.**, [(2003) 3 SCC 106], **Vinay D. Nagar v. State of Rajasthan**, [(2008) 5 SCC 597], **State of U.P. v. Shyam Behari**, [(2009) 15 SCC 548], **State of Karnataka v. Chand Basha**, [(2016) 1 SCC 501], **Nizam v. State of Rajasthan**, [(2016) 1 SCC 550], **Anjan Kumar Sarma v. State of Assam**, [(2017) 14 SCC 359], **Satish Nirankari v. State of Rajasthan**, [(2017) 8 SCC 497], Shri Sudhir Verma, counsel for accused Harish Patnaik, placed reliance on **Gurpreet Singh v. State of Haryana**, [(2002) 8 SCC 18],

wherein Hon'ble Supreme Court has laid down that the circumstantial evidence in order to sustain the conviction must satisfy three conditions that (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) 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 it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. Mere non-explanation of accused under Section 313, CR.P.C. leads to the proof of the guilt against the accused only last seen is not sufficient to hold that the accused is guilty. There must be chain of evidences so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Close proximity between last seen evidence and death, should be clearly established.

37. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, further placed reliance on **Mahavir Singh -v- State of Madhya Pradesh [(2016 (10) SCC 220)]** wherein Hon'ble Supreme Court had laid down that investigating officer dealing with a murder case, is expected to be diligent, truthful, and fair in his approach and his performance should always be in conformity with the police manual and a default or breach of duty may prove fatal to the prosecution case.

38. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, further placed reliance on **Varkey Joseph v. State of Kerala, [1993 Supp (3) SCC 745]** wherein Hon'ble Supreme Court has laid down that suspicion is not the substitute for proof. There is long distance between “may be true” and “must be true” and the prosecution has to travel all the way to prove its case beyond

reasonable doubt.

39. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, further placed reliance on **Yanob Sheikh v. State of W.B., (2013) 6 SCC 428**, wherein the Supreme Court has held that quality of evidence, not quantity is to be produced by prosecution to prove its case beyond reasonable doubt.

40. Shri Kishore Bhaduri, counsel for appellant Ashok Mishra, further placed reliance on **Harjinder Singh v. State of Punjab, [(2004) 11 SCC 253 at page 256]**, in which the Hon'ble Supreme Court has held that the evidence of chance witness cannot be discarded if the court finds assurance from the prosecution evidence pointing to the guilt of the accused.

MEMORANDUMS AND SEIZURES

41. P.W. - 55 Sachindev Shukla says in para 8 and 9 of his statement given on oath that on 22-10-2003 he had seized blood stained soil, plain soil from near the spot, blood stained soil from the field near the dead body of deceased, plain soil at little distance from field, soil from the field where the prints of the four wheeler were present, soil from near brick kiln where prints of four wheelers were present, paddy plants from the paddy field where the prints of four wheeler were present.

42. There is no such evidence on record on strength of which it could be said that said statement of P.W. 55 Sachindev Shukla, alleged seizure Ex. P-10, Ex. P11 are not believable. Thus, this court believes on said statement of P.W. -55 Sachindev Shukla, Ex. P10, Ex. P-11.

43. P.W. 55 Sachin Dev Shukla says in para 17 that on 22-10-2003 he had seized one Ambassador white colour car No. CG 13 ZD 1075. Inside the car stains and long hairs were present, grains of paddy were present below the left door of front side, green leafs of paddy stuck in left door of rear side, soil present on the disc of left wheel of back side was collected by scratching.

44. There is no such evidence on record on the strength of which it could be said that said statement of P.W. 55 Sachin Dev Shukla, alleged seizure Ex. P-19 are not believable. Looking to the facts and concerned admitted fact, this Court believes on said statement of P.W. 55 Sachin Dev Shukla and Ex. P-19.

45. P.W. 55 Sachindev Shukla says in para 19 that on 31-10-2003 he had seized handles of left doors of front and back side, two packing rubber of left door, 14 pieces of stained regzine, specimen on scrap filter of stains of glass of doors front and back of right side of car.

46. There is no such evidence on record on the strength of which it could be said that said statement of P.W. 55 Sachindev Shukla, seizure Ex. P-21 are not believable. Thus this Court believes on the said statement of P.W. 55 Sachindev Shuka and Ex. P-21.

CHEMICAL EXAMINATION REPORT

47. As per the alleged chemical examination report Ex. P-22 , P.W.-8 S.P. Rai had conducted benzidine test on small brown dots found on the window glass of driver's seat, regzine of roof of back seat, left door of back seat, handle of front left door, handle of back left door, packing rubber (door beat) of the two doors, steel ring of steering, and roof of the front left seat of Ambassador car no. CG13/ZD1075. The test was positive.

REPORT OF CENTRAL FORENSIC SCIENCE LABORATORY

48. As per the alleged report of Central Forensic Science Laboratory, Chandigarh Ex. P-137, P.W. 53 D. Prashad opined that on the basis of physical examination under microscope, density gradient distribution analysis and ignition loss, the Ex. A (Article A- 51) containing soil sample stated to have been collected from the disc of back left side wheel of the car No. CG 13 ZD 1075 has been found to be similar to the Ex. B(Article A-52) - containing soil sample stated to have been collected from the track to the field

of scene of crime where aforesaid car was found.

49. As per the alleged report of Central Forensic Science Laboratory, Chandigarh Ex. P-139, P.W. 53 Dr. D. Prasad opined that on the basis of examination under microscope Ex. A contained unhusked ripe grain and grass stated to have been collected from the aforesaid car and Ex. B containing rice plant sample stated to have been collected from the field of scene of crime site, have been observed to be similar in length/ breadth ratio.

50. There is no such evidence on record on the strength of which it could be said that Ex. P-137 and Ex. P-139 are not believable. Thus, this Court believes on Ex. P-137 and Ex. P-139.

51. P.W. 55 Sachindev Shukla says in para 10 and 11 that on 23-10-2003 he had taken accused Harish Patnaik in custody, who had told that he had concealed a pestle near the Mahua tree in water filled pit about 200-300 steps away from the dead body. Accused Harish Patnaik taken out the pestle from that water filled pit and produced it before him.

52. There is no such evidence on record on strength of which it could be said that said statement of P.W. 55 Sachindev Shukla, alleged memorandum Ex. P-13, alleged seizure Ex. P-14 are not believable in that reference. Thus, accused Ashok Mishra and Harish Patnaik do not get any help from the case laws of **Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828,], Bodhraj v. State of J&K [(2002) 8 SCC 45], Khekh Ram v. State of H.P., [(2018) 1 SCC 202], Mangal Singh v. State of MP (Now CG) [2009(1) CGLJ 303 (DB)]**. Thus, this court believes on said statement of P.W. 55 Sachindev Shukla ,Ex. P-13 and Ex. P-14 in that reference.

53. P.W. 55 Sachindev Shukla says in para 12 and 13 that on 25-10-2003 accused Harish Patnaik had told that he had thrown slippers near the spot in paddy field. Accused Harish Pattnaik had produced two slippers after taking out from the paddy field of Ramlal at Kalarmuda road.

54. There is no such evidence on record on strength of which it could be said that said statement of P.W. 55 Sachindev Shukla, alleged memorandum Ex. P-15, alleged seizure Ex. P-16 are not believable in that reference. Thus, accused Ashok Mishra and Harish Patnaik do not get any help from the case laws of **Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828,], Bodhraj v. State of J&K [(2002) 8 SCC 45], Khekh Ram v. State of H.P., [(2018) 1 SCC 202], Mangal Singh v. State of MP (Now CG) [2009(1) CGLJ 303 (DB)]**. Thus, this court believes on said statement of P.W. 55 Sachindev Shukla , Ex. P-15 and P-16 in that reference.

55. P.W. 55 Sachin Dev Shukla says in para 18 that on 22.10.2003 he had seized one stained lady wrist watch from the right pocket of the coat of accused Ashok Mishra.

56. There is no such evidence on record on strength of which it could be said that said statement of P.W. 55 Sachindev Shukla and seizure Ex.P-20 are not believable. Thus, this Court believes on them.

57. P.W. 55 Sachindev Shukla says in paras 15 and 16 that in custody on 25-10-2003 accused Ashok Mishra had told that affidavit of Sangita Kalia is on his office table at home. He produced one stained file containing notarized affidavit (Ex. P-23) which was seized from him.

58. There is no such material on record on the strength of which it could be said that said statements of P.W. 55 Sachindev Shukla, alleged memorandum Ex. P-17 and seizure Ex. P-18 are not believable in that reference. Thus, accused Ashok Mishra does not get any help from the case laws of **Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828,], Bodhraj v. State of J&K [(2002) 8 SCC 45], Khekh Ram v. State of H.P., [(2018) 1 SCC 202], Mangal Singh v. State of MP (Now CG) [2009(1) CGLJ 303 (DB)]** Thus, this Court believes on said statements of P.W. 55 Sachin Dev Shukla and Ex. P-17 and Ex. P-18 in that reference.

RFSL REPORTS

59. As per the RFSL report Ex. 145 and Ex. 146 blood was found on Article A -salwar, Article B- pestle, Article C -soil Article E -hair, Article G-handle of the car, Article H -packing rubber, Article I -regzine, Article K- filter paper, Article M- watch, Article N -file cover.

60. There is no such evidence on record on the strength of which it could be said that Ex. 145 and 146 are not believable. Thus, this Court believes on Ex. P-145 and Ex. P-146.

IDENTIFICATION OF WRIST WATCH AND SLIPPERS OF DECEASED

61. P.W. 49 Naib Tehsildar Ajay Kishore Lakra says in para 2 of his statement given on oath that he had conducted the test identification parade of a wrist watch which was identified by P.W. 33 Rajesh Kalia and P.W. 15 Kuldeep Kalia.

62. There is no such evidence on record on the strength of which it could be said that said statement of P.W. 49 Ajay Kishore Lakra, test identification parade Ex.P-110, Ex.P-129 are not believable. Thus, this Court believes on said statement of P.W. 49 Ajay Kishore Lakra, Ex. P-110, Ex. P-129.

63. P.W. 49 Ajay Kishore Lakra says in para 3 that he had also conducted test identification parade regarding one pair of lady slipper. P.W. 33 Rajeev Kalia had identified the slippers.

64. There is no such evidence on record on the strength of which it could be said that the said statement of P.W. 49 Ajay Kishore Lakra, Test Identification Parade Ex. P-112 are not believable. Thus, this Court believes on said statement of P.W. 49 Ajay Kishore Lakra, Ex. P-112.

LAST SEEN

65. As per the alleged seizure Ex. P-130 dated 22-10-2003, letter Ex. P-32 was seized from P.W. 50 Smt. Kuldeep Kalia. In Ex.P-32 it has been written

that -:

“I am sorry!
 Tomorrow I will make sure come to you after court hour.
 Please wait for me tomorrow at 5 p.m to 6 p.m.
 After completing my court work I will come to you.
 Again sorry.”

66. There is no such evidence on record on strength of which it could be said that Ex. P-130 is not believable thus this court believes on Ex.130.

67. P.W. 31 Rajiv Kalia says in Para 9 that on 21/10/2003 between 5.30-6.00 p.m. accused Ashok Mishra had come to his house by his Ambassador car and taken away deceased Sangita Kalia in his car saying that they would compromise the matter.

68. P.W. 50 Smt. Kuldeep Kalia says in Para 9 that on 21/10/2003 between 5.30-6.00 PM accused Ashok Mishra had come to her house by Ambassador car and taken away deceased Sangita Kalia in his car saying her that they would compromise. At that time she had worn white dial wrist watch.

69. P.W. 42 Guruwari Bai who is maid of P.W. 50 Smt. Kuldeep Kalia says in Para 2 of her statement given on oath that near about 1 year ago at 5/6 p.m. accused Ashok Mishra had come in white car in the house of Rajiv Kalia, deceased Sangita Kalia had gone away along with accused Ashok Mishra in his car.

70. P.W. 12 Gopal Mishra who is the Notary says in Para 1 of his statement given on oath that on 21/10/2003 at about 8 p.m. deceased Sangita Kalia had come along with accused Ashok Mishra and Harish Patnaik to notarize affidavit, he had notarized the affidavit Ex. P-23.

71. As per the alleged seizure Ex. P-24 a register Ex. P-25 was seized from P.W. 12 Gopal Mishra.

72. In Ex. P-25 in serial no. 8467 dated 21/10/2003 it is mentioned that the deceased Sangita Kalia had got notarized an affidavit.

73. The handwriting in the entries of serial No. 8467 is different. There is overwriting in that serial number. These circumstances are not sufficient to impeach the credibility of P.W. 12 Gopal Mishra, seizure Ex. P-24, aforesaid entry of Ex. P-25.

74. In the case in hand, statement of P.W. 12 Gopal Mishra under Section 161, Cr. P.C. has been recorded on 12-4-2004, but alleged notary register Ex. P-25 was seized from this witness on 28-10-2003 by alleged seizure Ex. P-24, thus accused Ashok Mishra does not get any help from the case laws of **Ganesh Bhavan Patel v. State of Maharashtra, (1978) 4 SCC 371, Sudershan Kumar v. State of H.P., (2014) 15 SCC 666.**

75. P.W. 9 constable Daniel Toppo says in Para 3, 4, 5 of his statement given on oath that on 21/10/2003 his night patrolling duty was from 12 to 4 a.m., at about 1.30 a.m. Town Inspector Chakradharnagar Shri Sharma who was in the Jeep met him at Kothra road, he sat on his jeep. They went for the darshan of Shankar Baba. At the Kalarmuda road he saw that one white ambassador car was standing there. Accused Ashok Mishra, Khemraj Agrawal, Harish patnaik, Amit Mishra were present there. Accused Ashok Mishra told that car had stuck, the Registration No. of car was CG13ZD1075. When he reached on the Spot next day along with the P.W. 55 Sachin Dev Shukla after the registration of the merg, he found that where the car was stuck, near to that the dead body of deceased Sangita Kalia was found.

76. P.W. 43 Ramakant Sharma says in Para 2 to 5 and 7 of his statement given on oath that his general check patrolling duty was from 12 am of 21/10/2003 to 4 am of 22/10/2003. He and P.W. 9 constable Daniel Toppo had gone in his jeep to get darshan of Shankar Baba. In Kalarmuda road he saw that one Ambassador car was standing. Near the Ambassador car accused Ashok Mishra, Khemraj Agrawal, Harish Patnaik, Amit Mishra were standing. Accused Ashok Mishra told him that his car has been stuck. On

22/10/2003 when he reached to the spot under the direction of CSP he found that where all the four accused were standing, near the spot dead body of deceased Sangita Kalia was found.

77. As per the alleged Ex. P-29 Roznamcha Sanha number 462 P.W. 43 Ramakant Sharma departed at about 12 pm for general check patrolling for entire Raigarh town. As per no. 466 he returned back after patrolling of Police station Chakradhar Nagar Kotwali and Kothraroad.

POSSIBILITY OF COMMISSION OF OFFENCE BY SOME OTHER PERSON

78. From Ex. D-3 to Ex. D-44, Ex D-46, Ex D-47 ,Ex D-48 ,Ex D-86,Ex D-94 it appears that deceased Sangita Kalia and his family members had animosity with so many persons. There is no such evidence on record on the strength of which it could be said that there is possibility of commission of crime by such persons. Thus, accused does not get any help from Ex. D-3 to Ex.D-44 to Ex. D-48, Ex. D-86, Ex. D-94.

ACTION TAKEN BY ACCUSED ASHOK MISHRA AGAINST POLICE AND ADMINISTRATIVE OFFICIALS

79. From Ex D-98, Ex D-100, EX D-104,Ex D-105 ,Ex D-106 ,Ex D-107,Ex D-108,Ex D-109,Ex D-110,EX D-111 to Ex D-123 it is clear that accused Ashok Mishra had initiated actions against the police and administrative officials.

80. Copy of Log book Ex. D-131 which does not contain any entry regarding details of petrolling in the fateful night.

81. There is no such evidence on record on strength of which it could be said that P.W. 9 constable Daniel Toppo, P.W. 43 Ramakant Sharma had allegedly animosity with accused Ashok Mishra, Harish Patnaik, Khemraj agrawal, Amit Mishra thus they had given aforesaid statements.

82. There is no such evidence on record on strength of which it could be said that P.W. 12 Gopal Mishra had allegedly animosity with accused Ashok

Mishra thus he had given aforesaid statement.

83. There is no such evidence on record on the strength of which it could be said that P.W. 42 Gurvari Bai who is the chance witness had given aforesaid statement because she was interested with deceased side or she had prejudice from accused Ashok Mishra due to such reason. Thus accused Ashok Mishra does not get any help from the case law of **Harjinder Singh v. State of Punjab, [(2004) 11 SCC 253]**.

PLEA OF ALIBI

84. This is the case of accused persons that the Ambassador car of the accused Ashok Mishra was stuck near the scene of occurrence.

85. P.W. 54 Murli Mehar says in para no. 7, 8 and 10 of his statement given on oath that this is true that he had seen the mechanic where the vehicle was stuck, mechanic had told him that he had come there for the trial. Prior to it he had seen the car at garage at about 9.00pm. On very day he had seen the deceased Sangita Kalia at 9-9.30 pm going towards bus stand along with 3 persons by marshal vehicle. On very day he left the deceased Sangita Kalia to Anathalaya colony.

86. D.W. 7 Smt. Kiran Agrawal who is the wife of accused Khemraj Agrawal says in Para 2-3 of her statement given on oath that on 21/10/2003 her husband came at 10.30 pm and told that the health of the wife of Jagdish Chauhan was unwell thus he was in government hospital at Raigarh for help in her treatment.

87. D.W. 8 Jagdish Kumar Chauhan says in Para 2 of his statement given on oath that on 21/10/2003 his wife Dhaneshwari Bai was brought to Govt. Hospital near about 4.30pm due to labour pain. Accused Khemraj met him outside the hospital. He helped him till 9.30 pm at hospital.

88. D.W. 9 Dr. Madhumati Dubey says in Para 1 of her statement given on oath that she had done the sonography of Dhaneshwari Sahu aged 18 years.

Sonography report is Ex D-52.

89. D.W. 10 Smt. Girja Dubey says in Para 2 of her statement given on oath that at about 9.45 pm deceased Sangita Kalia had come in her house and given her one file for submitting to State Bar Council at Bilaspur.

90. D.W-11 Umesh Chandra Sharma says in para 3 and 4 of his statement given on oath that on 21-10-2003 at about 9-9.15 pm he had taken the advice regarding debenture certificates of N.B. Plantation from Ashok Mishra. Draft application prepared by accused Ashok Mishra is Ex. D-77, letter of N.B. Plantation Ltd. is Ex. D-78, debenture certificates are Ex. D-79 and D-80.

91. D.W. 13 Anand Bahidaar says in para 2 and 4 of his statement given on oath that deceased Sangita Kalia had alone gone to the house of P.W. -12 Gopal Mishra and after 20 minutes she alone returned back and went towards Anathalaya colony by bolero jeep along with P.W. 54 Murli Mehar.

92. D.W. -14 Mintramani Tripathi says in Para-2 and 3 of his statement given on oath that on 21-10-2003 at about 8.30-9.00 pm, he saw that the car of her brother-in-law Ashok Mishra was standing at Shattigudi Chowk, he told him that radiator is heated. He had taken car to the garage, got it repaired for about 2-3 hours. During the trial near the Sarangarh bypass the wheel of the car diverted from the road. P.W. -54 Murli Mehar came and got back the car on the road and taken away.

93. D.W. - 15 Shiv Vishal says in Para 1 of his statement given on oath on 21-10-2003, that he had repaired the radiator of Ambassador car no CG/13Z/D/1075 brought by D.W. -14 Mitramani Tripathi at about 9- 9.30 pm. 2 ½ -3 hours were spent for its repairing. The receipt is Ex. D-81, the bill book is Ex. D-82.

94. D.W. 16 Ashok Kumar Mishra says in para 49, 51, of his statement given on oath that on 21.10.2003 at about 08.30 pm – 9.00 pm near the Sattigudi Chowk his car was heated, his brother-in-law D.W. 14 Mitramani

Tripathi had taken away the car for repairing, he returned back in his house where he gave the advice to D.W. 11 Umesh Chandra Sharma when he reached Sarangarh bypass, his car was pulled out and taken away.

95. D.W. 14 Mitramani Tripathi, D.W. 16 Shiv Vishal Singh do not say that when the accused Ashok Mishra's Ambassador car was stuck, D.W. 16 Shiv Vishal Singh was present near the aforesaid car, D.W. 16 Shiv Vishal Singh had taken the aforesaid car for trial in that place. Moreover P.W. 54 Murli Mehar does not explain under what circumstances he allegedly saw the deceased going in a marshal vehicle along with three persons, where was he present and what was he doing, why deceased Sangita Kalia sat in his vehicle.

96. D.W. 10 Smt. Girja Dubey says in Para-22 during her cross-examination that she had not obtained the degree of L.L.B., her no relative is working in C.G. Bar Council at Bilaspur. In page no. 6 of application form Ex D-53, allegedly which was given by deceased Sangita Kalia to this witness, the date is 19/12/2002, in page no. 7 the date is 21/10/2003. Accused Ashok Mishra failed to explain why the Ex D-53 was kept pending and did not send to State Bar Council before 21/10/2003. Moreover, it is significant that as per the post mortem report Ex P-98 deceased Sangita Kalia died between 3.30 pm to 9.30 pm of 21/10/2003.

97. D.W. 11 Umesh Chand Sharma says in Para 5 during his cross examination that letter of N B Plantation Ltd. Ex. D-78, debenture certificates Ex. D-79, Ex. D-80 are in the name of his younger brother Dinesh Chandra Sharma. He does not explain why his younger brother Dinesh Chand Sharma had not gone along with him in the office of accused Ashok Mishra. Moreover no call records have been proved regarding alleged meeting.

98. D.W. 9 Dr. Madhumati Dubey does not say about Dhaneshwari Chouhan. In Ex. D-52 the name is Dhaneshwari Sahu. D.W. 14 Mitramani

Tripati says in Para 3 during his cross-examination that he was waiting for accused Ashok Mishra at the scene of crime because he had told him to come with toe chain. Instead of waiting for accused Ashok Mishra, he could have communicated him that vehicle has already been pulled out and had been moved, thus there was no necessity of his coming and he also could have moved from there without waiting for accused Ashok Mishra. Moreover, he is unable to explain why he allegedly took the car for trial in such an inapproachable place. He says in Para 13 that this is true that if he would have brought the vehicle from garage to house of accused Ashok Mishra that itself would have the trial of the said car. He says in Para 26 that this is true that he was not acquainted with D.W. -15 Shiv Vishal Singh earlier. D.W. -15 Shiv Vishal Singh does not say how he recollected the aforesaid time.

99. After the appreciation of evidence discussed herebefore, this court believes on Ex P-32, aforesaid statements of Para 9 of P.W. 31 Rajiv Kalia, Para 9 of P.W. 50 Smt. Kuldip Kalia, Para 2 of P.W. 42 Guruwari Bai, Para 1 of P.W. 12 Gopal Mishra, Ex.P-23, Ex.P-25, Para 3, 4, 5 of P.W. 9 constable Daniel Toppo, Para 2, 3, 4, 7 of P.W. 43 Ramakant Sharma, Ex P-29 and disbelieves Para 7,8,10 of P.W. 54 Murli Mehar, Para 2 of D.W. 7 Smt. Kiran Agrawal Para 2 of D.W. 8 Jagdish Kumar Chauhan, Para 2 of D.W. 10 of Smt. Girja Dubey, Para 3 D.W. 11 Umwesh Chandra Sharma, Para 2,4 of D.W. 13 Anand Bahidar, Para 2,3 of D.W. 14 Mitra Mani Tripati, Para 1 of D.W. 15 Shiv Vishal Singh, Para 49, 51 of D.W. 16 accused Ashok Mishra. Accused Ashok Mishra does not get any help from Rojnamcha Sanha Ex. D-132 to Ex. D-136, and accused Khemraj Agrawal does not get any help from para 1 of D.W. 9 Dr. Madhumati Dubey and Ex. D 52.

CIRCUMSTANCES PROVED BY THE PROSECUTION -

100. After appreciation of the evidence discussed herebefore, this Court finds that prosecution succeeded to prove beyond reasonable doubt following circumstances-

A- Accused Ashok Kumar Mishra had the motive to kill deceased Sangita Kalia;

B- On 21-10-2003 at about 5.30 to 6.00 pm accused Ashok Mishra had taken away deceased Sangita Kalia from the house of P.W. 53 Smt. Kuldeep Kalia in his Ambassador car;

C- On 21-10-2003 by 8 pm accused Ashok Mishra, Harish Patnaik, deceased Sangita Kalia had gone in the house of notary Gopal Mishra where an affidavit Ex. P-23 was notarised;

D- Deceased Sangita Kalia was found dead and his death was culpable homicide, her dead body was thrown in the field of Ramlal;

E- There is the proximity between 8 pm of 21/10/2003 and when deceased died, therefore there is no long gap between these two circumstances;

F- P.W. 9 Constable Danial Toppo, P.W. 43 Ramakant Sharma saw the accused Ashok Mishra Harish Patnaik, Khemraj Patel, Amit Mishra, on 22-10-2003 at about 1.30 am near the scene of occurrence where Ambassador car was stuck;

G- On 23-10-2003 on the memorandum of Harish Patnaik one blood stained pestle was seized from him;

H- On 25-10-2003, on the memorandum of Harish Patnaik, one pair of blood stained slippers was seized from him;

I- On 22-10-2003, an Ambassador car No. CG 13 ZD-1075 was seized from accused Ashok Mishra, inside the car stains in so many places, hair, half-ripe grains of paddy, green leaf of paddy were present, soil was also present on the disc of the left wheel;

J- Soil sample collected from the wheel of the aforesaid car was found to be similar with soil sample collected from the track of the field of scene of

crime site where aforesaid car was found;

K. Unhusked rice grain and grass collected from the aforesaid car and rice plant sample collected from the field of scene of crime site have been observed to be similar in length / breadth ratio;

L On 25-10-2003 on the memorandum of accused Ashok Mishra, an affidavit Ex. P-23 was seized from him;

M. On 22-10-2003 one blood stained wrist watch was seized from Accused Ashok Mishra which was identified by P.W. 31 Rajesh Kalia, P.W. 50 Smt. Kuldeep Kaur Kalia.

101. Looking to the above mentioned facts and circumstances of the case, looking to the concerned aforesaid believable statements of prosecution witnesses, motive, memorandums, seizures, chemical examiner report, RFSL report, reports of Forensic Science Laboratory, this Court finds that, it could not be said that there is material defect in investigation. Thus, accused does not get any help from the case law of **Mahavir Singh -v- State of Madhya Pradesh [(2016 (10) SCC 220)]**.

102. Looking to the above mentioned facts and circumstances of the case, this Court finds that the prosecution proved aforesaid circumstances beyond reasonable doubt thus, accused persons do not get any help from the case laws of **Varkey Joseph v. State of Kerala, [1993 Supp (3) SCC 745]** and **Yanob Sheikh v. State of W.B., (2013) 6 SCC 428**.

103. After appreciation of the evidence discussed herebefore, this Court finds that the accused Ashok Mishra and Harish Patnaik had a common intention to kill the deceased Sangita Kalia and in furtherance of such common intention, she was killed. But there is no such evidence on record on the strength of which it could be said that accused Khemraj Agrawal and Amit Mishra had also shared the common intention and in furtherance thereof the deceased Sangita Kalia was killed.

104. There is no material available on record on the strength of which it could be said that accused Ashok Mishra, Harish Patnaik, Khemraj Agrawal, and Amit Mishra were agreed to kill or cause to kill deceased Sangita Mishra. Thus, this Court finds that all the four accused are not guilty of hatching criminal conspiracy.

105. Looking to the above mentioned facts and circumstances this Court finds that accused Ashok Mishra, Khemraj Agrawal, Harish Patnaik and Amit Mishra, are guilty of causing disappearance of evidence of offence of murder of the deceased Sangita Kalia by throwing her dead body in the scene of crime.

106. Looking to the facts and circumstances of the case this Court finds that it is not the rarest of rare cases where capital punishment may be awarded to accused Ashok Kumar Mishra and Harish Patnaik.

Per Thottathil B. Radhakrishnan, Chief Justice

107. I concur with the findings and the conclusions arrived at by my learned brother Justice Sharad Kumar Gupta who has meticulously and elaborately stated the facts, the relevant evidence and the legitimate inferences, to arrive at the conclusions stated hereinabove. I propose to add on, certain further aspects.

108. IA No. 2 of 2018 is an application filed by the Revision Petitioner for taking further evidence or to direct it to be taken under Section 391 CrPC. The attempt is to have a further forensic examination by way of DNA test since the report before the Trial Court was to the effect that the sample was insufficient. The adjudication by the Trial Court and appreciation of evidence by us are not dependent on any scientific evidence and forensic material, to connect the 1st Accused-Ashok Kumar Mishra to the foetus harvested from the dead body of the deceased. The findings arrived at in this judgment are not based on the contents of the FSL report in that regard, either in favour of

the prosecution or in favor of the accused. In that view of the matter, there is no room for any further consideration of the said application notwithstanding the fact that even according to the Public Prosecutor, no material is now available as relatable to that foetus for any further scientific investigation. That application is only to be dismissed.

109. The learned counsel for the Revision Petitioner pointed out that the proviso to Section 372 CrPC confers a right of appeal on the victim. He, therefore, pleaded that the revision may be treated as an appeal in terms of that provision.

110. Appeal is a statutory remedy. Right of appeal is created and conferred through statutory provision and is regulated and controlled thereby. Section 372 CrPC excludes all modes of appeal from any judgment or order of a criminal court except as provided for by the Code or by any other law for the time being in force. Appeal against acquittal is provided for as per Section 378 CrPC and it is made conditional on leave being granted by the High Court. Through **Satya Pal Singh v. State of Madhya Pradesh**; (2015) 15 SCC 613 and **Roopendra Singh v. State of Tripura**; (2017) 13 SCC 612, the Hon'ble Supreme Court of India laid down the law that an appeal against the order of acquittal under the proviso to Section 372 CrPC cannot be maintained without obtaining leave as required under Section 378(3) CrPC. The right to question the correctness of the judgment and order of acquittal or order of conviction for a lesser offence, as available under the proviso to Section 372 CrPC can be exercised by a "victim" as defined in Section 2(wa) CrPC, only after obtaining leave of the High Court as required under Section 378 CrPC.

111. The quality and content of the revisional jurisdiction of the High Court while dealing with a revision under Section 397 CrPC is not to be equated with that of the Court hearing a criminal appeal, including one referable to the

proviso to Section 372 CrPC. Notwithstanding the scope and ambit of Section 401 CrPC, the revisional jurisdiction of the High Court is not to be treated as coextensive with the powers of the Appellate Court as delineated in Section 386 CrPC. This is so, notwithstanding the wider jurisdictional gamut available to the High Court in terms of Section 401 CrPC. It is also sound, as a principle, that distinction has to be maintained between converting an appeal to a revision and converting a revision to an appeal; be it in any jurisdiction which provides for appellate and revisional interference.

112. For the reasons stated in the immediately preceding two paragraphs, the revision invoking Section 397 CrPC cannot be converted to an appeal under the proviso to Section 372 CrPC at the instance of the victim as against an order of acquittal or an order of conviction for a lesser offence.

113. The proviso to Section 372 CrPC was inserted as per the Code of Criminal Procedure (Amendment) Act, 2009, Central Act No. 5 of 2009, which obtained the assent of the President on 05.01.2009 and was published in the Gazette of India on that date. Sub section 1(2) of that Amending Act provides that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act. As per notification No. S.O. 3313(E) dated 30.12.2009, published in the Gazette of India dated 30.12.2009, the Central Government appointed 31st day of December, 2009 as the date on which the provisions of the said Act, except Section 5, Section 6 and clause (b) of Section 21, shall come into force. Thus, the proviso to Section 372 CrPC, as inserted by the Act 5 of 2009, came into force only on 31.12.2009. The incident which led to the prosecution of the accused persons in this case occurred on 21/22.10.2003. The Court of Session has recorded the date of institution of the proceeding as 05.02.2004. The findings, sentence and order which are challenged in these appeals, and subjected to the revision as well, were delivered through the judgment dated 27.04.2009. All

these events occurred before 31.12.2009, the date on which the proviso to Section 372 CrPC came into force. Larger questions may arise for consideration in the backdrop of the different constitutional provisions including those in Part III of the Constitution if we were to consider whether the victim's right of appeal under the proviso to Section 372 CrPC would be available in cases where the occurrence, cognizance, trial and acquittal or conviction for a lesser offence occurred prior to 31.12.2009, the date of coming into force of the insertion of the proviso to Section 372 CrPC. An order which is final on the date on which it is made gives rise to vested rights and a subsequent change in law, giving rise to new right of appeal or revision, is presumed not to affect the finality of the orders already made. Conferral of wider jurisdiction, by an Amending Act, on the High Court to interfere in revision, is not a mere matter of procedure but one that relates to substantive rights; and the wider jurisdiction cannot be invoked against an order made before commencement of the Amending Act. {See: **Dafedar Niranjan Singh v. Custodian, Evacuee Property**; AIR 1961 SC 1425 and **Keshavlal Jethalal Shah v. Mohanlal**; AIR 1968 SC 1336}. The acquittal of a person following trial in a criminal case is an order which is final. Such finality carries with it the substantive right of the accused persons to rest assured that the order of acquittal or conviction for lesser offence would remain intact unless interfered with by duly authorised appellate or revisional procedure in accordance with law. Before the insertion of proviso to Section 372 CrPC, an order of acquittal could have been interfered with, only through appeal as provided for by the Code; or, through a revision under Section 397 CrPC to the extent to which the revisional jurisdiction may permit. Whether that situation could be altered by insertion of the proviso to Section 372 CrPC through the Amending Act, to the disadvantage of the accused who stands acquitted is a question which may call for deeper consideration in the light of the second limb of Article 20(1) of the Constitution which enjoins that no

person shall be subjected to a penalty greater than that might have been inflicted under the law in force at the time of commission of the offence. This appears to be relevant because the phrase "under the law in force at the time of commission of offence" includes substantive law and such procedural law which relates to substantive rights which would have crystallised at the conclusion of the trial and verdict by the trial Court. The provisions by way of appeal or revision against an order of acquittal or an order of conviction for lesser offence, are essentially pieces of substantive law, whereby the accused would be open to conviction and sentence over and above that which was handed down by the trial Court before coming into force of the Amending Act. That way also, we do not see our way to hold that the revision filed by the mother of the deceased victim, and now being prosecuted by her son, could be treated as an appeal under the proviso to Section 372 CrPC.

114. Insofar as revision under Section 397 CrPC is concerned, on a thorough examination of the entire materials on record, no ground or reason is seen to hold that the findings, sentence and order, to the extent challenged through the revision are liable to be interfered with, on the ground that they are wrong, illegal or improper. The proceedings carried before the Court below cannot, also, be impeached as irregular on any ground referable to the issues involved in the revision. The acquittal of Accused No. 3-Khemraj Agrawal of charges referable to Sections 302 and 120-B read with Section 34 IPC cannot be held to be wrong or improper on the basis of materials on record. There is no ground to hold that the learned trial Judge acted contrary to law in confining the punishment handed down to Accused No.1, 2 and 4, namely Ashok Kumar Mishra, Harish Patnayak and Amit Mishra, respectively on counts under Sections 302 and 120-B read with Section 34 IPC to be life imprisonment and not capital punishment. The findings of the Court below and the reasons stated in support of the conclusions, order and sentence are sustainable in law, on the basis of the materials on record. The impugned

order does not warrant interference in revision, either in relation to the findings, and/or order of sentence. The revision therefore fails.

Per Sharad Kumar Gupta, Judge

115. I am in respectful agreement with the findings given by Hon'ble Chief Justice from para 108 to para 114. Hon'ble Chief Justice has dealt with the situation as to why the revision petitioner's revision cannot be converted into criminal appeal, by giving sound reasons and applying settled principles of law.

RESULT & ORDER OF THE COURT

116. IA No. 2 of 2018 is dismissed.

117. Criminal Appeal No. 470/2009 filed by accused Ashok Kumar Mishra, is partly allowed. He is acquitted of the offence punishable under Section 120-B/34, IPC. However, his conviction under Sections 302/34 and 201/34 of IPC and sentences as awarded by the trial Court for these offences are affirmed.

118. Criminal Appeal No. 474/2009 filed by accused Harish Patnaik is partly allowed. He is acquitted of the offence punishable under Section 120-B/34, IPC. However, his conviction under Sections 302/34 and 201/34 of IPC and sentences as awarded by the trial Court for these offences are affirmed.

119. Criminal Appeal No. 364/2009 filed by accused Khemraj Agrawal is dismissed. The impugned judgment of conviction and order of sentence passed against him are affirmed.

120. Criminal Appeal No. 489/2009 preferred by accused Amit Mishra is partly allowed. He is acquitted of the charges under Sections 302/34 and 120-B/34 of the IPC but his conviction under Section 201/34, IPC and sentence are affirmed.

121. Criminal Revision No. 350/2009 preferred by Smt. Kuldeep Kaur Kalia is dismissed.

122. The accused persons who are on bail, their bail bonds are cancelled. They are directed to surrender forthwith for undergoing the remaining part of the sentences.

Sd/-

(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-

(Sharad Kumar Gupta)
Judge