
(2022) 07 CAL CK 0009
In the Calcutta High Court
Case No : Criminal Appeal No. 231 Of 2009

Bablu Pal & Ors

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 07-07-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 201, 302, 364A
Code Of Criminal Procedure, 1973 — Section 31, 161, 164, 313, 386, 482
Arms Act, 1959 — Section 25, 25(1)(a), 25(1B)(a), 27, 27(1), 35
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 42, 67
Evidence Act, 1872 — Section 24, 27, 30

Citation : (2022) 07 CAL CK 0009

Hon'ble Judges : Debangsu Basak, J; Bibhas Ranjan De, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharya, Sukla Das Chandra, Swarnali Saha, Sumanta Ganguly, Aniruddha Bhattacharya, Anasuya Sinha, Pinak Kumar Mitra

Final Decision : Disposed Of

Judgement

Bibhas Ranjan De, J

Background:

1. Dr. Jayanta Kumar Ghosh (since deceased) being resident of GD-322, Sec-3, Salt Lake, Kolkata-6, was a practicing Doctor in a room of Masjid Building at 23/2 Raja Moninda Road, Belgachia, Kolkata-37.

2. On 06.03.2006 Dr. Jayanta Ghosh went to his chamber at about 10.00 a.m. At about 3.45 to 4.00 p.m. his wife received one call at her residence in their telephone with CLI facilities. She was informed that Dr. Jayanta Ghosh would return late and the said caller number shown in CLI as 033-55186437 which was known to be a number of telephone booth at Kalyani, which she verified by making a call back to that number. However, Jayanta Ghosh was found missing from then on.

3. The matter was informed to Tala Police Station under GDE no. 409 dated 6.03.2006 at 5.10 P.M.

4. On the next day that is on 07.03.2006 at about 9.30 A.M. wife of Dr. Jayanta Ghosh again received a phone call from an unknown person claiming himself as custodian of Dr. Jayanta Ghosh and demanded Rs. 4 lac. The fact was immediately informed to Tala Police Station. Deputy Commissioner of Police (North) came to the residence of Dr. Jayanta Ghosh for inquiry.

5. Learned Additional Sessions Judge, Fast Track (1st Court) Kandi, in the District of Murshidabad while disposing of the Sessions Case No. 75 of 2006 convicted Bablu Pal, Jaganath Naskar @ Jaga @ Jagu, Raju Misra, Swapan Kahar and Somnath Mistri under Section 364A/302/201/34 of the Indian Penal Code (for short 'IPC') and finally, passed an order of sentence to imprisonment for life under Section 302 IPC and imposing no separate sentence under Section 364A/201 IPC in view of substantive sentence for the major offence under Section 302 IPC.

6. The Sessions Case No. 75 of 2006 arose out of a written complaint filed by one Poltu Khan (P.W.18) Son of Ajfar Hossain Khan, village Chaitpur under Police Station Burwan, District Murshidabad. Poltu Khan lodged the FIR on 7th March, 2006 contending inter alia that on 07.03.2006 at about

4. 20 a.m. he came to know about one unknown person aged about 45 years lying injured on 'Maliyandi Bandh'. He rushed to the spot and saw the injured person lying with cut throat injury. Nobody could identify that person. Injured was taken to Burwan Hospital where doctor declared him dead.

7. On receipt of the written complaint Burwan Police Station Case No. 29/06 dated 07.08.2006 under Section 302/34 IPC was started against unknown miscreants and S.I. of Police, Subrata Sarkar (P.W. 51) took up investigation of this case after preparing formal FIR. Investigating Officer (for short I.O) visited the place where the body was reported to have been found lying with cut throat injury. I.O seized one black colour spectacle with black film glass, one pair chappal, one paper with a phone Number and one red colour nylon rope, under a seizure list in presence of witnesses. Inquest report was prepared at Burwan Hospital. Post Mortem was held by Dr. Bidyut Mondal (P.W.46) attached to Kandi Sub Divisional Hospital. I.O seized the wearing apparels of dead body and one wrist watch under a seizure list.

8. Aninda Ghosh, son of Dr. Jayanta Kumar Ghosh (P.W.7) went to Burwan Police Station on 07.03.2006 at night and on the next day he went to Kandhi Hospital and identified the dead body of his father i.e Dr. Jayanta Ghosh and received the dead body after complying all the formalities therefor.

9. On 08.03.2006 C.I.D West Bengal took up the investigation of this case. Gouri Sankar Kanjilal, Inspector of Police (P.W. 54) attached to C.I.D West Bengal as Officer-In-charge Homicide took up investigation of this case by the order of

Deputy Inspector General on 08.03.2006. He visited chamber of Dr. Jayanta Ghosh and examined Tarun Sarkar, Rofik Khan, Smt. Madhumita Das and Swarup Hati and came to know that on 06.03.2006 at about 13/14 hours two persons came to the doctor's chamber and requested him to attain one emergency call. One of them was wearing orange colour T-shirt.

10. Mr. Kanjilal (P.W. 54) also met wife of deceased (P.W. 1) and examined her about phone call received. He went to PCO booth at Kalyani and examined the owner of telephone booth, Abdul Alim Haque (P.W. 8) and got information about one person wearing light orange colour T-shirt came to his booth at about 3.45 p.m. on 06.03.2006 and used the phone in low voice. Then Mr. Kanjilal, Investigation Officer of this case, visited the place where body of Dr. Jayanta Ghosh was found lying and examined some persons by recording their statements. He also examined one Deben Sarkar (P.W.6) owner of the Hotel at Dighipar, Halisahar. He received the case docket from Burwan Police Station on 14.03.2006.

11. During a raid on 16/17.03.2006 Police Officer attached to Posta Police Station arrested seven suspects including the appellants and during interrogation it was revealed that appellants were involved in the case of murder of Dr. Jayanta Ghosh. Accordingly, the matter was informed to C.I.D on 18.03.2006 and Investigation Officer (for short I.O) (P.W. 54) reached Posta Police Station and received all the appellants and recorded their statements.

12. During investigation, I.O (P.W. 54) recovered one Maruti Van being no. WB02Q/3053 from the house of one Pradip Singh (P.W. 11), owner of the vehicle, as shown by appellant Raju Misra and prepared a seizure list in presence of Prassunno Kumar and Sourav Mokim. I.O also seized wearing apparels of Raju Misra and Somnath Mistri under a seizure list. I.O visited the residence of appellant Jaganath Nasker wearing apparels one Silver ring and some cut portion of X-ray films as shown by the accused and prepared a seizure list in presence of witnesses. I.O also visited the residence of appellant Bablu Pal at 23/1 Michel Coloney under Lake Town Police Station and seized one red colour nylon rope, one prescription pad of Dr. Jayanta Ghosh, one LG Mobile and one Orange colour T-shirt with missing of one button as shown by appellant Bablu Pal, under a seizure list in presence of witness. At the time of production of all five appellants before Kandi Court I.O reached one Petrol Pump under the name and style of 'Dayamayee Filling Station' at Gokorno under Kandhi Police Station as shown by appellant Bablu Pal and Raju Misra and seized petrol slip bill book dated 06.03.2006 against vehicle no WB02Q/3053 showing filling of 10 ltrs of petrol, under a seizure list in presence of owner of the petrol pump, Bikash Saha (P.W.-17). There he examined one Osman Sekh (P.W. 34) who saw the movement of the said vehicle and also came to know the name of the driver. He also examined one Biren Ghosh (P.W. 37) who also noticed the vehicle at the Petrol Pump.

13. I.O visited the residence of appellant Swapan Kahar and seized one black

colour full pant and one shirt as shown by appellant Swapan Kahar, under a seizure list in presence of witnesses. As per statements of appellants Bablu Pal, Jaganath Naskar and Raju Mishra, I.O reached near 'Biplabi Nodi Setu' under Burwan Police Station and recovered one knife from soil mixed water of Mayurakhi River as shown by the appellants, under a seizure list in presence of witnesses.

14. Appellant Swapan Kahar and Somnath Mistri made confessional statements under Section 164 of the Criminal Procedure Code (in short 'Cr.P.C') before the Ld. Judicial Magistrate on 31.03.2006. Following the statements so made before the Ld. Magistrate I.O visited the residence of one Bikhas Mondal at Dholla Para in Kandi and recovered one country made fire arm from the kitchen as shown by Bikhas Mondal and Bidyapati Mondal. Investigation Officer seized the fire arms in presence of witness and arrested said Bidyapati Mondal and Bikash Mondal and a separate case bearing Kandhi Police Station Case No. 73/2006 dated 13.04.2006 under Section 25/35 of the Arms Act was started.

15. Finger print expert collected finger prints from the vehicle seized by the Investigation Officer and also collected finger prints of the appellant for comparing. Officer attached to Forensic Science Laboratory recovered some articles from the vehicle and I.O seized those articles under a seizure list.

16. During investigation on prayer of I.O Learned Additional Chief Judicial Magistrate, Kandi tagged Kandi Police Station Case No. 73/2006 dated 13.04.2006 under the provision of Arms Act with this case by the order dated 07.06.2006.

17. I.O (P.W. 55) of this case, on completion of investigation submitted charge sheet against all seven accused including the appellants under Section 302/364A/201/120B/34 of IPC read with section 25(1) (a)/27(1)/35 of the Arms Act. Thereafter, Ld. Magistrate committed the case to the Ld. Additional Sessions Judge, Kandi on 16.06.2006. Thereafter, pursuant to the order of Learned Sessions Judge, Murshidabad bearing no. 389 dated 24.07.2006 the entire case record was transferred to the Court of Learned Additional Sessions Judge ,Fast Track Court, Kandi for disposal.

18. On receipt of the record Learned Additional Sessions Judge, Fast track Court, Kandi, framed charges under Section 364A/120B/302/201/34 of the IPC read with Section 25(1B)(a)/27/35 of the Arms Act against all five appellants. A separate charge was also framed against Dol Mondal and Bidyapati Mondal under Section 25(1B)(a)/35 of the Arms Act read with section 201/120B/302 of the Indian Penal Code and this case was put into trial. All the appellants pleaded not guilty and claimed to be tried. Accordingly trial started.

19. In course of trial prosecution examined as many as 55 witnesses and during examination of those witnesses a good number of documents were admitted in evidence as Exhibit 1-74.

20. Linking the chain of circumstantial evidence from the point when Dr. Joyonto Ghosh was found missing from his chamber to the stage when he was found lying on 'Maliandi Bandh' with cut throat injury wherefrom he was taken to Burwan Hospital and doctor declared him dead and finally, some of the witnesses saw the deceased doctor to leave his chamber along with the appellants by one Maruti Van and some of the witnesses saw the appellants to drink tea in a hotel and some of the witnesses saw the appellants on the way to 'Maliandi Bandh' on different occasions whereby Learned Trial judge returned his findings for inculcating all six accused/appellants in this case on the following basis:

20.1. P.W.1 (wife of the deceased Dr. Ghosh) P.W. 2 (nephew of the deceased) P.W. 7 (son of the deceased) supported the fact of missing of Dr. Joyonto Ghosh on and from 06.03.2006 when Dr. Ghosh went to his chamber in the morning at 10.a.m. P.W. 3, 4 and 5 saw Dr. Ghosh leaving his chamber along with the appellants by a steel colour Maruti Van.

20.2. On 07.03.2006 body of Dr. Ghosh was found lying with cut throat injury near 'Maliandi Bandh' and P.W. 18 along with Kausik Dey, Kalu Sk and Khokon Sk brought the injured Dr. Ghosh to Burwan hospital where the Doctor declared him dead. Doctor Bidyut Mondal P.W. 46 conducted Post Mortem over the dead body and in his opinion it was a Homicidal death. P.W. 7 (son of the deceased) identified the dead body and took away to their residence.

20.3. P.W. 1 (wife of the deceased of Dr. Ghosh) received phone call after missing of Dr. Ghosh from a PCO booth at Kalyani District Nadia. Owner of the said booth, P.W. 8 supported the facts. All five appellants took a brief halt in a hotel near Shibdaspur More for drinking tea and that fact was supported by the owner of the hotel (P.W.6).

20.4. One Liltu Pal (P.W. 10) supported the facts that he met with an accident with the vehicle bearing no. WB02Q/3053 near 15 Rail Gate crossing on the way to Kalyani from Barackpure on 06.03.2006 and he had altercation with appellant Bablu Pal and Jaganath Naskar who were identified in Court.

20.5. On way to 'Maliyandi Bandh' appellants collected 10 ltrs petrol from a petrol pump (Dayamayee Filling Station) at Gokorno under Police Station Kandi to the vehicle. This fact was supported by Bikash (owner of the Petrol Pump) and Polash Kumar Bagdi (employee of the Petrol Pump).

20.6. One Raju Show (P.W. 9), supported the fact that on 06.03.2006 near Jonpur More one of the accused/appellants made a query to know the exact way to NH 34. He identifies Bablu Pal and Raju Mishra.

20.7. Test Identification parade was held at Correction Home at Berhampore in presence of Ld. Judicial Magistrate where all five appellants were placed and identified by the witnesses. Vehicle alleged to have been used in commission of offence was recovered from the house of one Pradip Kumar Singh (P.W.11) and Suman Das (PW-19) driver of the vehicle supported the facts that appellant Raju

Misra hired the vehicle being WB02Q/3053 on 06.03.2006 and returned the same on 07.03.2006 at about 10.30 a.m.

20.8. Finger prints of the appellants found on the vehicle were examined by the finger print expert (P.W. 31) with the admitted finger print of the appellants. Wearing apparels of the appellants were seized in course of investigation and after examination by the Senior Scientific officer of Biology division of state FSL (P.W. 50) blood stain was detected in the wearing apparels of appellant Swapan Kahar and Jaganath Naskar.

20.9. Learned Judicial Magistrate recorded confessional statement of appellant Swapan Kahar and Somnath Mistri under Section 164 of the Criminal Procedure Code after complying of all formalities and being satisfied that those appellants/accused gave statement voluntarily.

21. Ld. Trial Judge convicted all the five appellants for the offence of abduction for ransom under Section 364A/34 Indian Penal Code and also for the offence of murder Under Section 302/34 IPC read with Section 201 Indian Penal Code. Learned Trial Judge sentenced all the five appellants to imprisonment for life under Section 302 Indian Penal Code each along with fine of Rs. 10,000/- each in default rigorous imprisonment for two months each. But the Learned Judge acquitted accused Dol Mondal and Bidyapati Mondal from the charge under Section 25/35 of the Arms Act read with Section 302/120B/201 of the Indian Penal Code, as, according to Learned Judge, prosecution failed to prove the seizure of fire arms from the possession of those accused.

22. Being aggrieved by the order of conviction and sentence passed by Learned Additional Sessions Judge, Fast Track Court, Kandi, Murshidabad on 19.01.2009 and 21.01.2009 this appeal has been preferred.

Argument Advanced:

23. Ld. Advocate Mr. Sumanta Ganguly has appeared in this appeal as amicus curiae for the appellant nos. for A2 and A5. He refers to the evidence of PW 3,4 and 5 who saw the deceased, Dr. Jayanta Kumar Ghosh, leaving his chamber in a Maruti Van on 06.03.2006. It is submitted that though the witnesses saw some persons sitting in the chamber of Doctor but they could not identify all of them in Test Identification Parade and among them even P.W. 5 did not tell about Maruti Van. Mr. Ganguly has further pointed out that the evidence of P.W. 54 (2nd I.O) and P.W. 55 (3rd I.O) and submitted that the said IO's did not examine any local people over there and during investigation though it was learnt that four persons were already present in side chamber of the deceased doctor but none of them was examined in this case.

24. Mr. Ganguly assailed the credibility of the Test Identification Parade by referring to the evidence of P.W. 7 who stated that after arrest of five persons in connection with this case their photographers were shown in the news in Television.

25. Mr. Ganguly further assailed the alleged phone call received by the PW1 (wife of the deceased doctor) by referring to the evidence of P.W.1, P.W. 2 and P.W. 7 (son of the deceased). It is submitted that though PW 26 (Nodal Officer) exhibited call details made to the house of deceased on 6.3.2006 showing two calls but none of the witnesses (P.W. 1, 2 and 7) told about 2nd call . That apart, P.W. 54 (2nd I.O) did not seize the telephone having CLI facilities from the residence of deceased or any data from PCO at Kalyani. P.W. 54 also did not make any inquiry regarding owner of the PCO booth at Kalyani.

26. Mr. Ganguly further refers to the evidence of P.W. 6 Dhaba owner who identified A1 in Test Identification Parade and also in Court and submitted that P.W. 6 stated about five persons coming to his Dhaba on 06.03.2006 at 9.30 a.m. but it is specific case of the prosecution that Dr. Jayanta Ghosh was found missing on and from 06.03.2006 at about 2.30 p.m. Mr. Ganguly has further submitted that according to prosecution case appellants came across P.W. 9 who told them about specific direction to NH 34 and also appellants met with an accident with P.W. 10 at the railway crossing at 15 no Rail gate, Barrakpur and appellants also took a halt in a Petrol Pump for fueling the Maruti Van on 06.03.2007 at 7.00 to 7.30 p.m. in course of their journey. According to Mr. Ganguly P.W. 9 could not say the number of persons inside the vehicle or time when he met the appellants. Though P.W. 10 noted the number of Maruti Van but that was not supplied to the Police. P.W. 17 (owner of the petrol Pump) has not been examined by the police at the first instance. P.W. 15 (employee of the petrol pump) could not depose about the number of Maruti Van or any other specification.

27. Mr. Ganguly referred to the evidence of P.W. 18 (complainant) and P.W. 51 (1st I.O) and submits that four persons namely Kaushik Dey, Kalu Sk., Khokon Sk. And Arun Ghosh saw the deceased lying with injury but none of them was examined in this case. It has been further submitted that P.W. 46 (Post Mortem Doctor) said in course of evidence that injury was not so fatal. But in Post Mortem report injuries were written are sufficient in ordinary course of nature to cause death.

28. Mr. Ganguly further refers to evidence of P.W. 54 (2nd I.O) and submitted that no Test Identification Parade was held regarding seized articles belonging to the deceased. P.Ws 40 and 41 (seizure witnesses) did not support the prosecution case. It is alleged by the prosecution that the Maruti Van was recovered in presence of two persons namely Prasunno Kumar and Sourav Mokim but they were not examined. It is further submitted that Maruti Van was never placed in Test Identification Parade. Regarding seizure of wearing apparels and knife Mr. Ganguly pointed out that A1 never made any discloser statement and Mr. Ganguly has pointed out about contradictions and omissions in the evidence of prosecution witnesses with regard to seizure of wearing apparels and knife.

29. Mr. Ganguly has further submitted that confessional statement of A4 and A5

has to be examined in the light of the parameters in Haricharan Kurmi Vs. State of Bihar reported in (1964) 6 SCR 623. It is submitted that both A4 and A5 pleaded their innocence in course of examination under Section 313 Cr.P.C.

30. Mr. Ganguly finally assailed evidence of P.Ws 31, P.W 32 and P.W. 50 and submitted that though finger prints on the vehicle were examined in presence of witnesses but they were not examined and moreover finger print report (Exhibit 31) was not prepared by P.W. 31 and maker of the report has not been examined in this case. Mr. Ganguli also harps on the same string of argument on the point of report of serologist (Exhibit 60).

31. Mr. Ganguly refers to evidence of P.W.19 and has tried to make this court to disbelieve the allegation of hiring of said Maruti Van as the persons who were present at the point hiring vehicle were not examined in this case.

32. Mr. Partha Sarathi Bhattachary, Ld. Advocate appearing on behalf of the A1 and A3 has adopted the argument advanced on behalf of A2 and A5. Mr. Bhattacharya submits that though prosecution tried to establish the issue of 'last seen together' by adducing evidence of P.Ws 3,4,5. It is submitted that though these witnesses deposed in their evidence that they saw appellants but in course of Test Identification Parade they could not identify all the appellants. It is submitted by Mr. Bhattacharya that on the basis of theory of 'last seen together' conviction cannot be sustained in our case due to long time gap between the deceased last seen with the appellants and recovery of the dead body. Besides, the circumstances emanating from the evidence are not so much connected with each other so as to complete the chain of circumstances.

33. Mr. Bhattacharya also pointed out that some questions put to the appellants under Section 313 of Cr.P.C in respect of confessional statement are highly prejudicial to the rights of the appellants. He also assailed the evidence regarding identification of the appellants either in Test Identification Parade or in Court by referring to evidence of PWs 3,4,5,6,8 and 10. Mr. Bhattachary further submits that confessional statement of A4 and A5 were recorded under compulsion as they inclined to make such statement after they were interrogated by the investigating Officer in the jail.

34. Mr. Aniruddha Bhattachary Ld. Advocate appearing on behalf of the A4 submits that no incriminating article was recovered from the possession of A4 ever except one black fool pant and one shirt. It is further submitted that A4 was not identified in Court. It is submitted that A4 replied to a question put to him under Section 313 Cr.P.C that he was forced to touch the vehicle (Maruti Van) to obtain his finger prints. It is further submitted that maker of finger print report (exhibit 31) was not proved by the maker itself.

35. As per contra, Ms. Anasuya Sinha appearing on behalf of the State has submitted that persecution has succeeded to establish the fact of abduction of Dr. Joyonto Ghosh (since deceased) by the evidence of P.Ws 1,3,4,5 on 6.3.2006 from his chamber. Prosecution has also proved the demand of ransom by the A1

by the adducing evidence of P.W26 who proved the call details made to the house of deceased.

36. Ms. Sinha has also referred to evidence of PWs 6,9,34,37 and submitted that the fact of appellants proceeding towards place of occurrence where body of Dr. Jayanta Ghosh was found lying with cut throat injury, has been proved beyond reasonable doubt. She further refers to the evidence P.W.11 and P.W. 19 to show that hiring of vehicle by A3 on 06.03.2006 and seizure thereof has been proved by these witnesses. She has also referred to seizure of wearing apparels of the appellants and confessional statement (exhibit 27, 28) of A4 and A5.

37. Ms. Sinha has relied on the ratio of *Kanhaiyalal Vs. Union of India* reported in (228) 4 SCC 668 on the issue of evaluation of confessional statement recorded under Section 164 of CR.PC.

Decision:

38. We have carefully assessed the evidence, adduced by the prosecution. This case rests on circumstantial evidence. No one had seen the assault by the appellants on the deceased Doctor.

39. It is a well establish law that in cases of the circumstantial evidence , all circumstances relied upon by the prosecution must be established by cogent and reliable evidence and all the proved circumstances must provide a complete chain. The chain of evidence should be complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. So, on the basis of the above well settled principles, we proceed to examine whether the appellants can be held to be guilty.

40. P.W. 1 (wife of the deceased) deposed in her evidence that Dr. Jayanta Kumar Ghosh (since deceased) was her husband and a practicing doctor having a chamber in the premises no. 23/2 of Raja Moninda Road, Belgchia, Kolkata 37 and he was practicing thereat for 30/35 years. He used to go to his and practice at 10.00/10.30 a.m. till 2.30 p.m. and thereafter he used to go to his brother in laws house for lunch and again he used to start practice from 7.00/7.30 p.m. till 10.30 p.m. and return home situated at GD 322 Sec 3, Salt Lake, Kolkata-106, at about 10.30/11.00 p.m. From her evidence it appears that on 06.03.2006 her husband did not go to his brother in laws house till 3.45/ 4.00 p.m. while she received a phone call on her land phone having CLI facilities and she heard a male voice and informed her that Dr. Jayanta Ghosh would return late and she would further be informed after 8.00 p.m. She immediately informed her 'Vasur' (P.W. 2) for inquiring into the matter and for informing Tala Police Station. She has further deposed that she immediately called back to the number appearing in CLI and came to know that it was Telephone booth at Kalyani. On that night she did not receive any further call. Next day i.e on 07.03.2206 at about 9.30 a.m. she received another phone call from same voice informing her that Dr. Jayanta Ghosh was in their custody and demanded ransom of Rs. 4 lac

to be delivered near the railway cabin of Dumdum Circular Rail. She already lodged missing diary (Exhibit-1) with Tala Police Station. Deputy Commissioner of police (North) came to her house at 10.30 a.m. and inquired about Dr. Jayanta Ghosh and informed her about a dead body lying near 'Mayurakhi Dam' and the body might of Dr. Jayanta Ghosh. Then Aninda Ghosh (P.W.7) Son of the deceased and one Dr. Prasun Ghosh went to Burwan Police Station with the assistance of Tala Police Station and son of the deceased identified the dead body of his further and informed his mother (P.W.-1). On 8th March, 2006 P.W. 7 and Dr. Prasun Ghosh returned with the dead body. P.W. 1 identified wearing apparels of her husband including the 'kolapuri chappal' and all those articles were marked as material Exhibit I to V.

41. The fact of missing Dr. Jayanta Ghosh stated by P.W. 1 has been corroborated by P.W. 2 (Son of the deceased). The fact of phone call alleged to have been received by P.W. 1 has been corroborated by P.W. 26 (Ranjan De), assistant Manager of Tata Tele Services Limited. He deposed that their computer Generating System clearly showed outgoing call phone telephone no. 55183437 to the telephone no 23217429. He further deposed that their generation system further showed another call from 23217429 to 55186437. On requisition of DIG, CID he handed over the call details report with his endorsement (Exhibit 22).

42. P.W.8 (Abdul Alim Haque), a resident of Kalyani, deposed that on 6.03.2006 at about 3.30/4.00 p.m. one boy came to his telephone booth for making call. That boy took the telephone placed in a corner. He deposed that his telephone number is 55186437 he also deposed that the boy was wearing orange colour T-shirt. This witness also confirmed the telephone call he received from P.W. 1. On 08.03.2006 Police came to his house and took his statement.

43. P.W. 54, Inspector of Police attached to C.I.D West Bengal as O.C Homicide took up investigation of this case on 08.03.2006 by the order of DIG, CID. During investigation he met P.W. 1 (wife of deceased) and came to know that she received telephone call from telephone booth having phone number 55186437 at Kalyani. Accordingly, he collected the address of telephone booth from Special Control Room CID and reached there and enquire about a person making call on 06.03.2006 at about 3.45 hours. He also came to know about the telephone call received by the booth owner from P.W. 1.

44. From the evidence of P.W. 18 (complainant of this case) it is found that on 7.3.2006 at about 8.15/8.20 a.m. he along with other villagers noticed a person lying beneath Maliandi Bandh and that person was not known to that villagers. Thereafter, he along with Kausik Dey, Kalu Sk, and Khokon Sk. took him to Burwan BPHC where doctor declared him dead. He went to Burwan Police station and submitted complaint (Exhibit 17). He further stated in his evidence that Officer in charge of Burwan Police Station went to place of occurrence and seized spectacle, chappal, red colour nylon rope and controlled earth from that place. He identified his signature (18/1) on the seizure list

45. Therefore, if we read the evidence of P.W.-1, 8, 18, 26 and P.W.-54 it is clearly revealed that Dr. Jayanta Ghosh was found missing on 06.03.2006 and his wife (P.W.1) received phone call from a telephone booth situated at Kalyani. P.W. 1 specifically stated in her evidence that on 07.03.2006 she received a phone call with the demand of ransom of Rs. 4 lac and that was neither challenged nor denied in her cross-examination. Consequently, abduction of Dr. Jayanta Ghosh and demand of ransom for his release stands established.

46. Next we propose to come to the allegation of missing of Dr. Jayanta Ghosh from his chamber at 23/2 Raja Moninda Road, Belgachia, Kol-37. In this regard we can discuss the evidence of P.Ws 3, 4 and 5.

47. P.W. 3 has stated in evidence that on 06.03.2006 at about 2.45 p.m. he was going to LIG quarter for meet some people. He knew the chamber of Dr. Jayanta Ghosh. He came across one of his friend namely Amin (P.W. 4) proceeding towards chamber of Dr. Jayanta Ghosh. Then he asked Amin to go to the chamber of Dr. Jayanta Ghosh and he will be waiting in a nearby tea stall for him. Amin came out of the chamber subsequently and told him that doctor was about to go out of his chamber. He saw the Dr. Jayanta Ghosh coming out of his chamber accompanied by two persons and proceed towards one steel colour Maruti Van stationed inside the LIG quarter. He further deposed that three persons were also sitting in the Maruti Van and they were going towards Tala Park. He further deposed that one of those two persons was wearing orange colour shirt and other wearing ganji. This witness identified A1 and A2 in Court. She also identified A1 and A2 in the Test Identification Parade held at Beharumpur Correctional Home.

48. P.W. 4 being resident of 29/30 Khelat Babu Lane Kol-37 has deposed that on 06.03.2006 he went to doctors Chamber at about 2.20/2.25 p.m. he found two boys sitting in the chamber of Dr. Jayanta Ghosh and doctor told him that he was going to visit on 'call' and he will be coming back within one hour. He came out the camber of doctor and met with P.W. 3 near LIG quarter. He saw the doctor accompanied by those two boys towards a steel colour Maruti Van and three boys were standing near Maruti Van and all those persons along with doctor proceeded towards Tala Park with said Maruti Van. He identified three photographs of Dr. Jayanta Ghosh. In cross examination he was specifically stated that A1 wearing orange coloured shirt but could not recollect the dress of others. He was examined by Investigation Officer. He identified A1 in the court room as well as in Test Identification parade held in Beharumpur Correctional Home.

49. P.W. 5 a resident of 551 Suriakulla, Kol- 06 has deposed in this case that on 06.03.2006 at about 2.00/2.30 p.m. he was waiting in front of Mosjid to meet one his friend. Then he saw Dr. Jayanta Ghosh coming out of his chamber along with two boys. One of the boy was of short height and another having tall figure and short height boy was wearing orange colour shirt. He identified both of them in the Test Identification Parade held in Beharumpur Correctional Home he was examined by the Investigating Officer.

50. P.W. 29 Ld. Judicial Magistrate of Kandi has stated that she held Test Identification Parade at Central Correctional Home at Beharumpur by the order of Ld. Additional Chief Judicial Magistrate, Kandi on 21.03.2006, in respect of three suspects namely Bablu Pal @ Bablu Jaganath Nasker @ Jagu and Raju Mishra after complying all formalities she held Test Identification Parade and prepared a memo thereof (Exhibit 26).

51. All aforesaid evidence of P.Ws 3, 4, 5 and 29 clearly shows that on 6.03.2006 doctor left the chamber with the appellants and there is no such circumstances on record that why these statements of the witnesses should not be accepted that the deceased doctor had gone with the appellants for the last time, from where he did not return, when the statements of the witnesses are found natural and reliable in absence of any evidence of enmity. That apart, we do not find any substantial change in course of cross examination of these witnesses. Consequently, abduction of Dr. Jayanta Ghosh by the appellants stands proved.

52. It is needless to mention that some discrepancy is bound to occur in the evidence of witnesses. On this issue we cannot restrain ourself from referring to a case of Krishna Mochi Vs. State of Bihar (2002) 6 SCC 81, where the Hon'ble Apex Court ruled that the Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case, discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that society suffers by wrong convictions and it equally suffers by wrong acquittals.

53. Now, we propose to come to the use of Maruti Van by the appellant for commission of offence alleged in this case. P.W. 6 a resident of village Bisna Dighirpar, Halisahar, deposed that he was owner of Hotel near Shivdaspur More, Kalyani Highway and it remained open for 24 hours. On 6th March, Tuesday at about 9.30 a.m. 5/6 boys came to his hotel along with one ash colour Maruti van. They were intoxicated mood and asked for tea. One of them was wearing rose colour ganji. He identified appellant A1 in the Court. Police interrogated him. He also identified the A1 during Test Identification parade held in Beharumpur Correctional Home as it is found from memo of Test Identification Parade (Exhibit 26). During cross-examination several questions were put to discredit the witness but nothing substantial contradiction has come out.

54. Mr. Ganguly appeared as amicus curiae has submitted that though doctor Jayanta Ghosh was found missing on 06.03.2006 since 2.30 p.m. but hotel

owner (P.W. 6) saw appellants with Maruti Van at about 6.30 a.m. on 06.03.2006 and thereby Mr. Ganguly tried to make this Court understand that evidence of P.W. 6 is liable to be ignored.

55. We are sorry not to subscribe to the view of Mr. Ganguly as P.W. 6 never stated about any aged person along with the appellants came to his hotel. Therefore, it can safely be presumed that appellants entered into the hotel of P.W. 6 on way to doctor's chamber.

56. P.W. 9, resident of Gokulpur Bazar under Kalyani Police Station, Nadia, has stated in his evidence that on 6th March, 2006 when he was coming from Kanchpara after completion of his job through highway and near Jonpur More one Maruti Van with black coloured window came to a halt and one person getting down from the vehicle asked him about the road towards NH 34. He showed the road leading towards NH 34. He heard some noise from the Maruti Van. He had been to Beharumpur Correctional Home after receiving notice and identified two boys one who asked him regarding the route and another was the driver of said Maruti Van from the memo of Test Identification parade (Exhibit 26) it is found P.W. 9 identified A1 and A3. This witness denied all the suggestions put to him during cross examination and this witness cannot be said to be untrustworthy.

57. P.W. 11 claiming himself to be the owner of the vehicle no. WB02Q3053, He said that on 18.03.2006 Police came to him along with one person who identified this vehicle. Police called him as 'Raj'. Police seized his Maruti Van under a seizure list where he put his signature (exhibit 3/1). Police also seized Blue book under a seizure list where and he put signature (exhibit 4/1). He disclosed his driver's name as Suman (P.W.19).

58. P.W. 19 stated in his evidence that he has been employed under P.W. 11 as driver of Maruti Van being no. WB02Q3053. The vehicle was purchased for school on rent but no such rent was available and that's why owner asked him to search for rent. He further deposed that Raju Misra (A3) was a resident of the same area and in the month of February 2006 he made a proposal for rent of the vehicle. On 06.03.2006 at about 8.00 a.m. he came to him for hiring the vehicle. Then he took Raju Misra to the owner and with his consent he handed over the vehicle on rent. On the next day that is on 7.03.2006 at about 10.30 a.m. he handed over the Maruti Van to this witness and out of total rent of Rs.2500/- Raju Misra gave him Rs. 700/-only with the promise to pay rest amount later. Witness identified Raju Misra in the Court.

59. During Cross-examination of P.W. 19 defence tried to discredit the witness by putting several questions and suggestions but no result was yielded as A3 gave a statement before Police Officer leading to discovery of Maruti Van and relevant portion of the statement was admitted in evidence as Exhibit 70 which is relevant within the purview of Section 27 of the Evidence Act. It is true that no confession made by any person while he was in custody of the Police shall be proved against

him, but, even when an accused being in custody of Police makes a statement that reveals some information leading to the discovery of material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. The recovery is a part of investigation and permissible under Section 27 of the Evidence Act. Section 27 is brought into operation when a person in police custody produces from some place of concealment some object, said to be connected with the crime of which the informant is accused, and this admissible in law.

60. In the instant case, the recovery of vehicle made, when A3 was in custody has been established. The recovery is founded on the statement of the disclosure. On a studied scrutiny of the evidence produced by the prosecution regarding this recovery, we do not find anything that this recovery has really not been made on the information of the A3 and has been planted by the Police.

61. Next we come to evidence of P.Ws 10,15 and P.W. 17 P.W.10 has stated that on 06.03.2006 he was returning from Barrackpore towards Kalyani with his Motor Cycle being no WB 24A 1385. When he reached at 15 no Rail Gate crossing he met an accident with Maruti Van. When said Maruti Van dashed his motor bike he protested and two persons came out of the vehicle and they were in drunken stage. One boy was wearing orange colour ganji and another boy was wearing check shirt. When Maruti Van crossed his Motor Cycle he noted the number of the Maruti Van. He identified two suspects (A1& A2) in Correctional Home at Beharumpur as it appears from the memo of Test Identification Parade (Exhibit 26).

62. From the evidence of P.W. 15 employee of a Petrol pump namely, 'Maa Dayamayee Filling Station' at village Mothra and also the evidence of owner of the said petrol pump it is found that on 06.03.2006 at about 7.00/7.30 p.m. the cash memo was issued against selling of 10 ltrs petrol for one Maruti Van. It is further found that on 20.03.2006 Police came to the petrol pump and seized bill books (Exhibit 14 & 15) of the Petrol Pump. Two persons having covered their face with cloth also along with Police on that date and both the witnesses identified their signatures (Exhibit 13/1 & 13/2) on the seizure list.

63. The aforesaid evidence of P.W. 15 and 17 have been corroborated by the relevant portion of the statement (Exhibit 72) of A1 leading to discovery of fact.

64. Mr. Ganguly in course of argument, has pointed out the relevant portion of the evidence of P.W. 7 and submits that after arrest of all five appellants photographers of those appellants were shown in the in the news in television. It is not the prosecution case that P.W. 7 had ever seen any of the appellants and he was never summoned in Correctional Home to identify any of the appellants. Therefore, the evidence of P.W. 7 regarding showing of photographs cannot give rise to any presumption that witnesses identifying the appellants in Correctional Home also watched the photographs of the appellants shown in the news on the television.

65. Mr. Ganguli assailed the evidence of P.W. 51 (1st I.O) P.W. 54 (2nd I.O) and pointed out some latches appearing in the evidence of those two witnesses. It is submitted that PW 51 did not examine Arun Ghosh and Kaushik Dey who reported to have seen the deceased lying at place of occurrence with cut throat injury.

66. Mr. Ganguly has further submitted that P.W. 54 (2nd I.O) did not seize the telephone with CLI facilities from the house of the deceased and no steps were taken for conducting TI parade of seized articles belonging to the deceased. P.W. 54 could not tell about one stethoscope and one attaché of the deceased doctor as deposed by P.W. 5 who saw the deceased doctor leaving his chamber in a Maruti Van with the appellants. It is further submitted that wearing apparels seized from the residence of A1 and A2 have not been recovered pursuant to any disclosure statement.

67. Exhibit 6 shows that nylon rope, one old diary, one prescription, one LG mobile, one orange colour half sleeve T-shirt were recovered from house of A1 in presence of witnesses namely Mahadeb Saha and Bidyut Dey. Among the two seizure witnesses Mahadeb Saha (P.W. 13) proved the seizure the list prepared in his presence and his signature was marked as Exhibit 6/1 such recovery was made following disclosure statement of A1 (Exhibit 72). From the evidence of PW 13 it is further seen that wearing apparels seized from the house of A2 has been made in his presence and he put signature of the seizure list marked as exhibit 5/2. Exhibit 5 shows that wearing apparels, one silver coloured finger ring were recovered from the house of A2 in presence of P.Ws12 and 13. P.W. 12 also supported the seizure of wearing apparels and finger ring from the house of A2 and he signed on the seizure list marked as exhibit 5/1. The seizure was made from the residence of A2 following disclosure statement marked as Exhibit 71. So, I do not find any merit in the submission of Mr. Ganguly that articles seized from the house of A1 and A2 was not followed by any disclosure statement.

68. P.Ws 51 (1st I.O), 54 (2nd I.O) and P.W. 55 (3rd I.O) deposed in their respective evidence regarding investigation of this case. P.W. 51 stated in this case that on 07.03.2006 after receiving written complaint from one Paltu Khan (P.W. 18) the Burwan Police Station Case No. 29/2006 dated 7.03.2006 was started under Section 302/34 IPC. He investigated the case and seized few articles including Kolapuri 'Choti', spectacles, red colour nylon rope in presence of witnesses. He prepared rough sketch map with index (Exhibit 66). He examined witnesses and seized wearing apparels of the deceased under seizure list dated 07.3.2006 (exhibit 16) and wrist watch marked as (Exhibit 42). All wearing apparels of the deceased was marked as material exhibit I-IV. Finally on 13.03.2006 he handed over the case docket to one Bivas Ganguli (D.D.I Murshidabad) as per order of Superintendent of Police, Murshidabad.

69. P.W. 54, Inspector of Police attached to CID, took up investigation of this case and he visited doctor's chamber, residence of deceased and met the wife of deceased and recorded her statement he collected the phone number of

telephone (PCO) booth situated at Kalyani and the examine the owner of the booth. He visited place of occurrence as well as Burwan Police Station and recorded statement of witnesses over there under Section 161 Cr. P.C. He examined witnesses reported to have seen the doctor leaving his chamber. He collected case docket from Burwan Police Station on 14.03.2006. On 18.3.2006 he received information from Posta Police Station through Control Room, CID that five persons were detained during raid in connection with the involvement of the murder of Dr. Jayanta Ghosh on 06.03.2006, and they admitted their involvement in the case. He rushed to the Posta PS and took them into custody in connection with Burwan PS case no 29/2006. He recorded statement of all the accused/ appellants under Section 161 Cr.P.C. He recovered the Steel coloured Maruti Van (being no. WB02Q/3053) alleged to have been used in commission of crime following statement of A3. He also seized wearing apparels of the appellants following discovery statement from their respective residence. He also collected Petrol slip bill book from a Petrol pump namely 'Dayamoyee Filling Station' at Gokorno, Mathura Under Police Station Kandi showed by the Appellant A1 and A3 in course of their production to Kandi Court and seized the bill books under a seizure list (Exhibit 13) . On his prayer section 364A/ 201 IPC was added in the case. He proved statement of appellants leading to discovery (Exhibit 71, 72 and 73). All articles seized by him were admitted in evidence as material exhibits.

70. P.W. 55, another Police Officer attached CID Bhabani Bhawan he took up investigation in this case on 27.03.2006. He prepared seizure list (Exhibit 40) in respect of wearing apparels recovered from the house of A4 in presence of witnesses. He recorded statement of all appellants. He visited placed of occurrence as well as Burwan Police Station. He recovered knife following a statement of A1, A2 and A3 from Biplabi Noni Setu under Police Station Burwan in presence of witnesses (exhibit 8/5). On his prayer Ld. Magistrate recorded confessional statement of A4 and A5 on 31.03.2006 (Exhibit 27, 28). He collected Post Mortem Report and finger prints expert report. He seized RC book of seized vehicle from the owner (P.W. 11) under a seizure list.

71. P.W. 55 further deposed that finger prints detected from the seized vehicle were along with the finger prints of the appellants collected with the permission of the Court and sent to the finger print expert for comparing. He collected FSL report. After completion of investigation he submitted charge sheet.

72. Finger Print expert (P.W. 31) has stated that he received the requisition from the Director of finger print expert in connection with Burwan Police Station case 29/2006 dated 07.03.2006 for examination of finger prints. He after examination of the finger prints submitted a report (exhibit 31). According to report he found similarity of the finger prints collected from the vehicle with that of the specimen finger print of the appellants.

73. Mr. Ganguly appearing on behalf of the A2 and A5 assailed the confessional statement of A4 and A5 (exhibit 27, 28) and refers to the case of Kashmira Singh

Vs. State of Madhy Pradesh reported in 1952 SCR 526. After carefully going through the decisions particularly, para 26, 27 and 28 we are of the view that the facts and circumstances of the reported decisions is not at all identical with that of ours. Therefore, it would be appropriate to reproduce those relevant paras as under:

" 26. However, eventually Guru Bachan was allowed to go away and he went to Balaghat. Then, on the 16th of February the Station Officer PW 44 went to Balaghat, brought Gurubachan back with him to Gondia and handed him over to the CID. Inspector Guha. Guha PW 50 tells us that from then till the 20th of February, when he was arrested, he was kept under observation but was allowed to go home at night. He did not confess till the 25th and the Station Officer PW 44 tells us that from the 20th to the 25th he was taken back to Guha's custody for a couple of days and then only was he sent to the magisterial lock up. (see Guha's evidence). He was kept in this lock up till the conclusion of the committal proceedings, that is, till the 30th June, instead of being sent to jail custody in Bhandara where there is a jail. The other accused including pritipal who had by then confessed, were sent to Bhandara.

27. Now though Gurubachan was kept in the magisterial lock up the distinction between the magisterial lock up and police custody in Gondia is only theoretical. In practice, it is no better than police custody, Police constable Lalbahadur, PW 55 tells us that-

" The Station House Officer Gondia deputed constables for duty in the lock up. The constables in-charge take the prisoners out to the latrine and also arrange for their food... The Head Constable in fact is in-charge."

Also, Guha admits that he interrogated Gurubachan in the lock up twice within the ten days which succeeded the confession. This is in disregard of the Rules and Order (Criminal) of the Nagpur High Court which enjoin at P.25, para 84, of the 1948 Edn.

"After a prisoner has made a confession before a Magistrate he should ordinarily be committed to jail and the Magistrate should note on the warrant for the information of the Superintendent of the jail that the prisoner has made a confession."

No explanation has been given why these directions, which were made for good reason, were disregarded in Gurubachan's case. As we have said, the other prisoners were all committed to jail custody in the usual way, so there was no difficulty about observing the rule. All this makes it unsafe to disregard the rule about using accomplice testimony as corroboration against a non-confessing accused. None of the Judges who have handled this case has given any reason why this rule could safely be departed from in this particular case. In the circumstances, we do not feel that the confession by itself can be used to corroborate the rickshaw coolie Sannatrao, PW 14. But there is other corroboration. It consists of the sari border, and this is the next point on which

the prosecution relies.

28. There is one argument about this confession advanced on behalf of the appellant with which we shall have to deal. The prosecution were criticized for not calling the Magistrate who recorded the confession as a witness. We wish to endorse the remarks of Their Lordships of the Privy Council in *nazir Ahrnad V. Kind Emperor* regarding the undesirability of such a practice. In our opinion, the Magistrate was rightly not called and it would have been improper and undesirable for the prosecution to have acted otherwise”

74. On the issue of acceptance of confession Mr. Gangli further relies on the ratio of *Harichan Kumari* (supra) wherein Hon’ble Apex Court observed in Para 15 as follows:

“The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against and accused person, the Court cannot begin with the examination of the said statements. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the court has to adopt in dealing with these two types of evidence is thus clear, well understood and well-established.....”

75. Facts and ratio of both the decisions relied on behalf of the appellants, in our view, cannot support the argument advanced on behalf of A2 and A5.

76. On this issue Ms. Sinha relies on the case of *Kanhaiyalal* (supra) wherein Hon’ble Apex Court observed in Para 40 as follows:

“ It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the high Court had no option but to proceed on the basis of the confession as made by the appellant under Section 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.”

77. In our case, appellant A4 (Swapan Kahar) and A5 (Somnath Mistri) made confessional statement recorded by the Ld. Magistrate (P.W. 29) under Section 164 Cr. P.C. from the evidence of P.W. 29 and that of the P.W. 55 (3rd I.O) it appears that P.W. 55 interrogated A4 and A5 in the Correctional Home and made

a prayer for recording their statement under Section 164 of Cr.P.C. His prayer was allowed and Ld. Magistrate (P.W. 29) recorded confessional statement of A4 and A5 after observing all formalities prescribed in Section 164 of Cr.P.C. The confessional statements were also admitted in evidence as Exhibit 27 and 28. Further it is pertinent to note that none of those two appellants (A4 and A5) ever retracted from their confessional statement during trial.

78. Settled Proposition of law is that the confessional statement of the accused is admissible under Section 30 of the Evidence Act, on fulfillment of the following conditions:

- 78.1. more accused persons than one are being tried jointly,
- 78.2. the joint trial of the accused persons is for the same offence,
- 78.3. confession is made one of the accused persons,
- 78.4. such confession affects the maker and other accused persons, and
- 78.5. confession is proved in Court.

79. It is settled principle of law that the confessional statement made by an accused after his arrest can be used against a confessor as substantive evidence, but its use against the other co-accused would be limited only for the purpose of corroboration of other evidence.

80. Ld. Advocates appearing on behalf of the appellants pointed out some lapses on the part of the investigating Officer either in examining witnesses or in seizing incriminating articles or in holding Test Identification Parade seized articles including Maruti Van.

81. It is well settled that even if the investigation is not proper or defective, the rest of the evidence must be scrutinized independently of the impact of it. In the instance case, the prosecution has succeeded in establishing the guilt of the appellants beyond all reasonable doubt. Appellants have not placed any material before us to show that any prejudice was caused to him for the reason of defective investigation. The said defective investigation for lapses in the investigation does not go to the root of the prosecution case.

82. In our case, prosecution by adducing evidence has succeeded to prove that chain of circumstances against the appellants as under:

- 82.1. Appellant no. 3 hired the said Maruti Van from P.W. 19 (driver of the vehicle) and P.W. 11 (owner of the vehicle) on 06.03.2006 at about 8.00 a.m.
- 82.2. Appellants on way to doctor's chamber entered into a Dhaba owned by P.W. 6 at 9.30 a.m. on 06.03.2006.
- 82.3. Dr. Jayanta Ghosh (since deceased) was taken away by the appellants with help of one Maruti Van and doctor did not return.

82.4. One of the appellants used telephone booth of P.W. 8 situated at Kalyani to call P.W. 1 (wife of the deceased).

82.5. P.W. 1 (wife of the deceased) lodged missing diary.

82.6. On 07.03.2006 doctor with cut throat injury was found lying at "Maliandi Bandh" within District of Kandi, Murshidabad and taken to hospital where he was declared dead.

82.7. All appellants were arrested in course of investigation and leading to their statements the vehicle, wearing apparels, etc. were recovered and seized under seizure lists.

82.8. In course of their journey appellants came across P.W. 9 who showed them the way leading to NH 34 and 10 who was riding a motor cycle at railway crossing nearing Barrackpor.

82.9. Appellants were identified by the witnesses in test Identification Parade held in Beharumpur Correctional Home.

83. The aforesaid chain of circumstances against the appellants is of conclusive nature. There is a complete chain of circumstances which show that in all human probabilities, the offence has been committed by the appellants. And to add to that confession made by A4 and A5 under Section 164 Cr.P.C. further buttressed the prosecution case beyond any shadow of doubt.

84. Therefore, having re-appreciated the entire evidence on record, we concur with the Ld. Trial Court. It is not a fit case where impugned order of conviction requires any interference.

85. Mr. Bhattacharya, appearing on behalf of the appellant numbers 1 and 3 submits that Learned Judge did not pass any separate sentence for the offence under Section 364A/ 201 IPC and order of sentence is not sustainable in law.

86. Before pronouncing our opinion it would be appropriate to reproduce the order of sentence passed by the Learned Judge dated 21. 01.2009:

"The convicted persons, mentioned above, all are produced from J/C and present in court.

Ld/Advocate, appeared for the convicted persons, all are present in court.

Ld/P.P. Appeared in this case, all are present in court.

To day is fixed for hearing on the point of hearing of sentence as provision referred u/s 235 (2) Cr.Pc. that the accused named 1) Bablu Pal 2) Jaganath Naskar @ Jaga @ Jagu 3) Raju Misra 4) Swapan Kahar and 5) Somnath Mistri have been found guilty of offence of abducting for ransom u/s 364A/34 IPC and in the offence of murder u/s 302/34 IPC and in the offence u/s 201 IPC.

They have been convicted for offence of abducting for ransom u/s 364A/34 IPC

and in the offence of murder u/s 302/34 IPC and in the offence u/s 201 IPC in judgement passed dt. 19/01/2009.

It was also held that all the convicted persons are liable to be punished for their offence.

It is established the accused persons can be convicted for offence of abducting for ransom u/s 364A/34 IPC and in the offence of murder u/s 302/34 IPC and in the offence u/s 201 IPC in judgement passed dt. 19/01/2009.

So, no separate sentence need be awarded u/s 364A/201 IPC in view of substantive sentence for the major offence u/s 302 IPC.

Accused persons, convicted here in, are not entitled to get benefit u/s 360 Cr.P.C. and any benefit under any provision of the Probation of the Offenders Act.

The Sec 302 IPC prescribes the punishment of the offence of murder and punishment is either death or life imprisonment and shall also be liable to fine.

The lesser punishment is life imprisonment and capital punishment is death.

Prosecution side claimed death sentence.

Ld/Advocates appeared for the convicting persons claimed lesser punishment.

Persons, convicted, also claimed lesser punishment.

Considered the case of prosecution, which is based on confessional statement of the accused, supported by Circumstantial evidences.

There is no eye witness, actually who used sharp cut weapon (knife) on throat of Dr. Ghosh.

Considered present the age of convicted persons (age of -21,27,28,30,30),

Considered the their background that they had no criminal history.

Considered the offence was committed for the first time with a view to earn money.

And the offence of murder was committed in exceptional circumstances out of fear to save themselves from offence.

So it is better to award the minimum sentence to imprisonment for life and to a set-off u/s 428 Cr.P.C in respect of detention in J/C Prior to conviction.

Hence,

It is,

ORDERED

That accused persons names 1) Bablu Pal 2) Jaganath Naskar @ Jaga @ Jagu 3) Raju Misra 4) Swapan Kahar and 5) Somnath Mistri are convicted of offence of

abducting for ransom u/s 364A/201 IPC and in the offence of murder u/s 302/34 IPC and in the offence u/s 201 IPC. And they are sentenced to imprisonment for life U/s 302 IPC, each and to a set-off u/s 428 Cr.p.c in respect of detention in J/ C prior to conviction. (I.E 18/03/06 to 19/01/2009) and each is fined Rs. 10.000/-i.d. RI of 2 months.

The Case is thus disposed of U/s 235 (2) Cr.p.c.

Let the copy of judgement and order be supplied free of cost to each convicted person.

Let the copy of judgement and order be sent to the District Magistrate, at Berhumpur, Murshidabad."

87. The provisions of Section 31 of the Cr.P.C deal with the sentence in cases of conviction of several offences at one trial. Section 31 runs as follows:

" S.31. (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other punishments shall run concurrently.

(2).....

Provided that-

(a).....

(b).....

(3)....."

88. Therefore, in case of conviction for several offences at one trial it is an obligation on the part of the Court to pass separate sentence for all offences. The word 'may' cannot be construed as discretionary power of the Court, rather it is mandatory direction upon the Court to pass separate sentence for each offences for which accused is convicted at one trial.

89. Here in the case in hand, all appellants were found guilty and convicted for the offence of abduction for ransom under Section 364A/34 and for the offence of committing murder under Section 302/34 of Indian Penal Code and also for the offence under Section 201 IPC. But at the time of passing sentence Ld. Judge only imposed sentence of imprisonment for life for the offence under Section 302 of the Indian Penal Code for the reason as follows:

"no separate sentence need be awarded u/s 364A,201 IPC in view of substantive sentence for the major offence u/s 302 IPC."

Aforesaid reason is not at all proper within the purview of Section 31 of the

Cr.P.C. Therefore we need to addresses the issue.

90. This is an appeal for the year 2009 and if we remand the case again to the Trial Court for passing separate sentence for all offences, it will take further time to dispose of this appeal causing abuse of process of justice. In this trying situation, we deem it proper to exercise power under Section 386 read with Section 482 of the Criminal Procedure Code for imposing separate sentence for the offence under Section 364A/201/34 of the Indian Penal Code as Ld. Judge has already passed sentence for the offence under Section 302/34 IPC after convicting all the appellants under Section 302/34, 364A/34 and 201 IPC.

91. This course of action of awarding sentence against the appellants would not prejudice any of the appellants. We have heard the appellants on the sentencing part as noted in this judgment. The issue of no sentence being awarded had been raised at the behest of the appellants and they were heard on the same.

92. Therefore, all the five appellants are also sentenced to suffer imprisonment for life under Section 364A/ 34 IPC each and also to pay a fine of Rs. 10.000/- each in default to suffer further rigorous imprisonment of two months each. That apart, all five appellants are also sentenced to suffer rigorous imprisonment for seven years each and also to pay a fine of Rs. 5,000/- each in default to suffer further imprisonment for one month each.

93. All the sentences imposed under Section 302/34, 364A/34 and 201 of the IPC shall run concurrently.

94. Since we have directed all the sentences to run concurrently and have not awarded a sentence of a higher denomination than already awarded by the learned Trial Judge none of the appellants stands prejudiced on such course of action being adopted.

95. The appeal stands disposed of for the reasons, as discussed above.

96. Before parting with the judgment we must place on record our appreciation for the assistance rendered by Mr. Sumanta Ganguly as amicus curiae, learned Counsel appearing for the A2 and A5. We request Secretary, State Legal Services Authority, to regularize his appointment.

96. Interim applications, if there be any, stand disposed of.

97. Let a copy of this Judgment along with the Lower Court record be communicated to the Trial Court at once.

98. All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.

99. Urgent photostate certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

100. I Agree.