**IN THE HIGH COURT OF RAJASTHAN (JAIPUR BENCH)**

D.B. Criminal Appeal No. 151 of 2007 Decided On: 03.06.2016

Appellants: **Sunil Panchal Vs.**

Respondent: **State of Rajasthan**

**Hon'ble Judges/Coram:**

*Mohammad Rafiq and Vijay Kumar Vyas, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: V.R. Bajwa, Asgar Khan and Imran Khan*

*For Respondents/Defendant: Sonia Shandilya, Aladeen Khan, Public Prosecutor, Rinesh Gupta and A.K. Gupta*

**JUDGMENT**

**Mohammad Rafiq, J.**

**1 .** These two appeals are directed against the common judgment dated 21.12.2006 passed by Additional Sessions Judge (Fast Track) No. 1, Kota (for short 'the trial court') whereby the trial court convicted the accused-appellants for offences under Sections 120-B, 364-A and 302, IPC and sentenced each of them as under:

"Section 120-B, IPC: Imprisonment for life with fine of Rs. 1,000/-, in default whereof, to further undergo one month's rigorous imprisonment.

Section 364-A, IPC: Imprisonment for life with fine of Rs. 3,000/-, in default whereof, to further undergo two months' rigorous imprisonment.

Section 302, IPC: Imprisonment for life with fine of Rs. 5,000/-, in default whereof, to further undergo three months' rigorous imprisonment."

Factual matrix of the case is that complainant Subrato Mukherjee (P.W. 3) submitted a written report (Exhibit P-9) to S.H.O., Police Station Vigyan Nagar, Kota on 11.03.2005 inter alia alleging therein that his son Abhishek alias Akash aged nine years, who was student of Class III, had gone for playing with his friends at 5.30

p.m. on 10.03.2005 and did not return back. The police, on that basis, registered a missing person report No. 707 and entrusted the investigation to Harji Lal Yadav (P.W. 22), Sub-Inspector of Police, who after investigation, submitted a written report (Exhibit P-49) stating that his enquiry has revealed that certain unknown persons with intention to extract ransom have abducted Abhishek alias Akash, which attracted offence punishable under Section 364-A, IPC. Police Station Vigyan Nagar, Kota therefore lodged regular FIR No. 123/2005(Exhibit P-50) for the aforesaid offence and commenced investigation. During investigation, dead body of Abhishek alias Akash was recovered at 8.00 p.m. on 14.03.2005. Police, after completion of investigation, filed charge-sheet against accused-appellants. Charges were framed

against them under Sections 120-B, 364-A and 302, IPC. The accused-appellant denied charges and claimed trial. The prosecution produced 24 witnesses and exhibited 72 documents. Thereafter, the accused-appellants were examined under Section 313, Cr.P.C. wherein they pleaded innocence. Defence produced only one witness and exhibited five documents. The trial court on conclusion of the trial vide impugned judgment and order dated 21.12.2006 convicted and sentenced the accused-appellants in the manner as indicated hereinabove. Hence, these appeals.

1. **.** We have heard Mr. V.R. Bajwa, learned counsel appearing on behalf of the accused-appellant Sunil Panchal; Mr. Asgar Khan, learned counsel appearing on behalf of the accused-appellant Arif Khan; Ms. Sonia Shandilya and Mr. Aladeen Khan, learned Public Prosecutor and Mr. Rinesh Gupta, learned counsel for the complainant.
2. **.** Mr. V.R. Bajwa, learned counsel appearing on behalf of the accused-appellant Sunil Panchal argued that entire prosecution case hinges on circumstantial evidence, there being no direct evidence against the accused-appellants. Chain of circumstances against accused-appellants is having various missing links and is not so complete as to point to the guilt of the accused-appellants, especially accused- appellant Sunil Panchal alone. Conviction of the accused-appellant has been recorded by the trial court on the ground that the deceased was lastly seen talking to two young men on the evening of 10.03.2005 and he, thereafter, went missing. The prosecution has miserably failed to establish beyond reasonable doubt the identity of those two young men, who were allegedly seen speaking to the boy in the evening of 10.03.2005. Devi Singh(P.W. 1), domestic help of Subroto Mukherjee(P.W. 3) has stated about the said fact, but no test identification parade was conducted of the accused-appellants at the hands of Devi Singh, so as to ensure that whether he saw the accused-appellants or some other persons talking to the abducted boy. Devi Singh has not identified the accused-appellants in the trial Court also. On the contrary, he, in his court statement, stated that he had seen those two young men only from behind, as their back was towards him. Besides, the factum of Devi Singh having seen two young men with whom the deceased left on a motorcycle was not even mentioned in the FIR (Exhibit P-50), which was lodged after a due inquiry conducted for two days by Harji Lal Yadav (P.W. 22). In this regard, learned counsel drew attention of the Court towards statement of Subroto Mukherjee (P.W. 3), who stated that there was another child, who was also playing with Abhishek at the time when two young men came, with whom Abhishek went away, but the identity of that child never came to be revealed, much less no test identification parade was even conducted at the hands of that child.

**4.** Mr. V.R. Bajwa, learned counsel argued that recovery of dead body at the instance of accused-appellants is completely shrouded in mystery. Accused-appellant Sunil Panchal was arrested on 14.03.2005 at 6.00 p.m. vide arrest memo (Exhibit P-51) and accused-appellant Arif Khan was arrested on 14.03.2005 at 6.15 p.m. vide arrest memo (Exhibit P-52). The police in arrest memos of both the accused had categorically mentioned the offence under Section 302, IPC whereas recovery of dead body (Exhibit P-17) has been shown at 8.00 p.m. on 14.03.2005. Similarly, information under Section 27 of the Indian Evidence Act regarding dead body was obtained from accused Arif Khan on 14.03.2005 at 6.30 p.m. vide Exhibit P-65 and said information was obtained from accused Sunil Panchal (Exhibit P-66) on that day at 6.45 p.m. and in both the memos, offence under Section 302, IPC was indicated. It is further argued that in the seizure memo of motorcycle seized at the instance of Sunil Panchal at 6.20 p.m. on 14.03.2005(Exhibit P-53) again mention of offence

under Section 302, IPC was made. Similarly, in the seizure memo of STD slip allegedly seized from Sunil Panchal at the time of his arrest at 6.20 p.m. on 14.03.2005(Exhibit P-54), offence under Section 302, IPC has been mentioned. If the recovery of dead body was not made till the time the accused-appellants were arrested, i.e. two hours prior of recovery of dead body, how could the police conclude and mention that the offence under Section 302, IPC is attracted. Subir Kumar Mukherjee (P.W. 2) (Uncle-elder brother of deceased's father) has stated about the manner in which recovery of the dead body was effected. He stated that he was summoned at a particular spot, where the police was waiting and thereafter he accompanied the police to the destination from where the dead body was recovered, whereas Rajendra Ojha (P.W. 24), Investigating Officer stated that Subir Kumar Mukharjee (P.W. 2) was summoned through telephone call to the spot for identification of the dead body, after the dead body had been recovered. Besides, dead body was recovered from a house which was open as the same was in a semi- constructed state. Rajendra Ojha (P.W. 24), Investigating officer has also admitted the same in his cross-examination. Since the recovery was made from an open space accessible to all, the same cannot be connected with the accused-appellants. All these circumstances create suspicion with regard to actual time of recovery of dead body as also whether the recovery of dead body was really made pursuant to information under Section 27 of the Indian Evidence Act. Reliance has been placed on the judgment of the Supreme Court in Bakshish Singh v. The State of Punjab, MANU/SC/0074/1971 : AIR 1971 SC 2016 wherein it has been held that recovery of dead body at the instance of accused itself is not a concluding circumstance.

**5 .** Mr. V.R. Bajwa, learned counsel further argued that as per medical evidence, cause of death was manual strangulation(throttling), leading to asphyxia. The aforesaid circumstance in itself is a neutral circumstance. Whosoever was the assailant, as per the prosecution case, he committed murder of the deceased through manual strangulation(throttling). The accused-appellant Sunil Panchal does not get connected with the offence on the strength of the aforesaid circumstance. Neither finger prints of the appellant were found on the neck of the deceased, nor any ruminants of the skin or blood of the deceased were found in the scraping of the nail clipping of the appellant. In fact, no such nail clipping or any other form of scientific evidence was ever collected by the police in the instant case. No finger prints of the accused-appellant were lifted/recovered from the spot where the dead body was recovered.

1. Learned counsel further argued that recovery of silver chain (neckless) and amulet (tabij) belonging to the deceased, at the instance of the accused Sunil Panchal (Exhibit P-55) and recovery of cricket bat belonging to the deceased at the instance of accused Arif (Exhibit P-59) cannot be made basis for recording conviction of the accused-appellants and said recoveries are also doubtful. Recovery of silver chain and silver amulet allegedly belonging to the deceased through information under Section 27 of the Evidence Act (Exhibit P-68) and the recovery memo (Exhibit P-55) is nothing more than an eye-wash. In the description of the boy given in the missing report reproduced in rojnamcha (Exhibit P-9), it has not been mentioned that whether the boy was wearing a silver chain with a silver amulet or not. It also does not mention about the fact that the boy was carrying a cricket bat at that point of time. This fact also does not find mention in the regular FIR (Exhibit P-50) lodged two days after the enquiry (Exhibit P-49). In such a situation, the fact that the deceased was wearing a silver chain with a silver amulet seems to be an improvement introduced by the prosecution at later stage through due confabulation. Niranjan Gautam (P.W. 13), the Police Photographer has categorically stated that while conducting

photography of the dead body on 14.03.2005, he saw a silver chain with a silver amulet lying near the dead body, on the floor. He also took pictures of the same, which are on record as Exhibits P-28, 32 and 33. His testimony and the photographs exhibiting silver chain and amulet with the dead body completely demolishes the case of the prosecution. Recovery of silver chain and silver amulet shown at the instance of accused Sunil Panchal is nothing but result of police padding. If as per testimony of Niranjan Gautam(P.W. 13) and photographs, Exhibits P-28, 32 and 33, these items were found from the place along with the dead body, but there is no explanation why these items were not recovered then and there by the police. The trial Court has given a very strange reasoning to discard this argument by observing that the accused failed to prove that the chain and amulet recovered at his instance vide Exhibit P-55 were the same, which were lying along with the dead body. In the memo of recovery(Exhibit P-55), the police has mentioned that silver chain was recovered in two pieces whereas amulet was in one piece. Said recovery was made at the instance of the accused-appellant Sunil Panchal at 4.00 p.m. on 19.03.2005 and said items were shown to have been wrapped in Rajasthan Patrika dated 10.03.2005, which also clearly proves the manipulations made by the police.

1. Mr. V.R. Bajwa, learned counsel argued that identification of the silver chain and amulet by father of the deceased before Hari Mohan Gupta, Additional Chief Judicial Magistrate, Communal Riots, Kota(P.W. 15) in test identification proceedings is again shrouded in mystery. There is ample material on record to show that the identification proceedings were no more than a farce. The articles, which were added with the subject articles, were not even similar, much less identical to them. Subroto Mukherjee(P.W. 3), in his cross-examination does not state as to whether the silver chains which were mixed with the subject silver chain, were broken or intact. Admittedly, as per the recovery memo(Exhibit P-55), the silver chain was recovered in two broken pieces. Hari Mohan Gupta(P.W. 15), who conducted test identification proceedings, has admitted in his cross-examination that the entire contemporaneous documentary record, which was prepared at the time of identification proceedings, does not speak of the chain either being broken or intact, as also it does not speak of the articles being similar to that effect. He also states that the articles to be mixed with the subject article were brought by the Reader of the court whereas Rajendra Ojha(RW.24), Investigating Officer stated that he had summoned/brought those articles to be mixed with the subject article through Harji Lal Yadav(RW.22). In such a situation, there is complete confusion with regard to the summoning of similar articles as also with regard to mixing of similar/identical articles with the subject articles. In such circumstances, the test identification parade(Exhibit P-11) is completely farcical in nature. Learned counsel in support of his arguments has relied upon the judgment of the Supreme court in Nallabothu Ramulu alias Seetharamaiah & others v. State of Andhra Pradesh, MANU/SC/0337/2014 : JT 2014 (5) SC 404: (AIR 2014 SC (Supp) 1264) and argued that benefit of defective investigation should go to the accused. Learned counsel argued that the Supreme Court in Hiralal Pandey & Ors. v. State of U.P., JT MANU/SC/0310/2012 : 2012 (4) SC 117 : (AIR 2012 SC 2541)

has held that such benefit should go to accused if there is an eye-witness account.

1. **.** Learned counsel argued that FSL report showing that voice of Sunil Panchal matched with the voice recorded in the recording device attached to the land line phone of Suborto Mukherjee(P.W. 3), father of deceased, when ransom calls were made, is of no value at all. The device with caller ID and voice recording as per Exhibit P-2 was obtained from one Sanjay Sharma, S.H.O., Police Station Mahaveer Nagar and was installed at the spot i.e. with the land line telephone of father of the deceased, by P.W. 22, Harzi Lal Yadav. First of all, Sanjay Sharma has not been

produced as a witness in the case by the prosecution, secondly, no witness has been produced to prove the proper functioning and maintenance of the said electronic device. There is no certificate as per Section 65B of the Indian Evidence Act, 1872(for short 'the Evidence Act') that the device was properly working. In such circumstances, the said evidence has to be eschewed from consideration. Even otherwise, evidence of voice identification is not a sure science, completely free from error, for want of any scientific instrument comparison. Relying on the judgment of the Supreme Court in Anvar P.V. v. P.K. Basheer & others, MANU/SC/0834/2014 : 2014 (10) SCC 473 : (AIR 2015 SC 180), it is argued that unless certificate under Section 65-B of the Indian Evidence Act was produced, evidence of voice of accused Sunil Panhal which allegedly matched with the voice recorded in the recording device attached to the land line phone of father of the deceased as per FSL report(Exhibit P-

72) cannot be held admissible in evidence. Learned counsel in this respect referred to definition of 'computer' under Section 2(i) of the Information and Technology Act, 2000 and argued that it includes any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities, which are connected or related to the computer in a computer system or computer network. Reference is also made to the definition of 'computer system' under Section 2(1) of the Act to bring home the point that electronic device attached to the land line for that matter would also be a computer or computer system and therefore, data stored therein are recorded in a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions. Production of any such data for the purpose of evidence would therefore require certificate envisaged under Section 65B of the Evidence Act without which such evidence would not be admissible. Learned counsel in support of his argument also relied upon the judgment of the Supreme Court in R.K. Anand v. Registrar, Delhi High Court, MANU/SC/1310/2009 : JT 2009 (10) SC 1 : (2009 AIR SCW 6876) and Niles Dinkar Paradkar v. State of Maharashtra, MANU/SC/0293/2011 : JT 2011 (3) SC 429

: (AIR 2011 SC (Cri) 911).

1. **.** Mr. V.R. Bajwa, learned counsel argued that recovery of slip of STD booth by accused through his information does not amount to discovery of any new fact and Section 27 of the Evidence Act would not be applicable in such case. Jitendra(P.W. 14), owner of STD/PCO and K.K. Book Depot and Stationery, Dadabari, Kota has turned hostile and refused to the line of prosecution case. Bhoop Singh(P.W. 12), STD/PCO owner of Sainik Telecom has categorically stated that police had visited his STD shop even prior to pointing out of the said shop by the accused through information under Section 27 of the Indian Evidence Act(Exhibit P-62) on 22.03.2005. Harish(P.W. 19), owner of STD/PCO booth and medical store(Hari Om Medical), has also stated that the police had visited his shop prior to the discovery of the said shop through discovery memo (Exhibit P-14) dated 22.03.2005. STD/PCO booth owners of Sualka Telecom and Firdos Telecom have not been produced in the case, so as to lend credence to the version of the police. It is further argued by learned counsel that the link evidence with regard to the alleged recovery of STD/PCO slip from the appellant Sunil Panchal at the time of his arrest is completely missing in the instant case. There is no entry in the Malkhana register with regard to said STD/PCO slip, exhibited by the prosecution in the case. Radha Kishan(P.W. 21), Malkhana In-charge has categorically stated that the said STD slip was never given to

him in a sealed condition to be deposited in Malkhana. Therefore, there is no element of discovery at all.

**10.** Learned counsel argued that no test identification parade of the accused persons at the hands of Bhoop Singh(P.W. 12) was conducted during the course of investigation. Test identification parade serves a corroborative piece of evidence for dock identification in the Court, which is missing in the instant case. Dock identification in the Court for the first time is a weak type of evidence, moreso when in the facts and circumstances of the present case, there was no long interaction between Bhoop Singh(P.W. 12) and the accused persons. The place being a public telephone booth, innumerable number of persons keep on visiting the place to make a call. In such circumstances, a fleeting glimpse of the accused persons cannot lend credence to the dock identification conducted by Bhoop Singh(P.W. 12) in the trial court. Learned counsel relying on the judgment of the Supreme Court in Suresh Chandra Bahri v. State of Bihar, MANU/SC/0500/1994 : 1995 Supp(1) SCC 80 : (AIR 1994 SC 2420) argued that dock identification for the first time in the Court when it is not corroborated either by previous identification or any other evidence, cannot be relied to convict the accused. Relying on the judgment of the Supreme Court in Dana Yadav alias Dahu & others v. State of Bihar, MANU/SC/0763/2002 : JT 2002 (7) SC 68 : (AIR 2002 SC 3325), it is argued that if the witness had seen the accused number of times at different point of time, then only, test identification parade is not necessary. Learned counsel has argued that the Supreme Court in number of cases has held that identification for first time in the court has to be relied in exceptional cases only. Reliance in this connection has been placed on judgments of the Supreme Court in Sheo Shankar Singh v. State of Jharkhand, MANU/SC/0116/2011 : JT 2011(2) SC 367 : (AIR 2011 SC 1403); Mahabir v. The State of Delhi, MANU/SC/2167/2008 : JT 2008 (5) SC 308 : (AIR 2008 SC 2343) and Heera another v. State of Rajasthan, MANU/SC/7822/2007 : JT 2007 (9) SC 175 : (AIR 2007 SC 2425).

**1 1 .** Lastly, drawing attention of the Court towards exculpatory circumstances, learned counsel argued that there is no last seen evidence available on record, of the accused-appellants being seen with the deceased. As per the medical evidence, in the form of statement of Dr. Yogesh Sharma (P.W. 23), death of the deceased from the date of post-mortem examination i.e. 15.03.2005 happened between 72-120 hours, in other words, the death took place 3-5 days prior to the date of post-mortem examination. In such circumstances, the death seems to have taken place between 10.03.2005 to 12.03.2005. When the boy was dead before 12.03.2005, then seeking ransom after 12.03.2005 is highly improbable and the same fails the test of human probability.

1. Mr. Asgar Khan, learned counsel appearing on behalf of accused-appellant Arif Khan largely adopted the arguments advanced by Mr. V.R. Bajwa, learned counsel for the accused-appellant Sunil Panchal. In addition, he argued that the accused Arif has been convicted by the trial court on the basis of recovery of cricket bat made at his instance. Referring to missing person report(Exhibit P-9), learned counsel submitted that it was not mentioned in that report that when the deceased disappeared, he was carrying cricket bat. In the regular FIR(Exhibit P-50) also, no reference of this fact was made. Devi Singh(P.W. 1) also did not state that when the deceased accompanied two unknown young men on motorcycle, he was carrying cricket bat. Referring to statement of Subroto Mukherjee (P.W. 3), informant, learned counsel submitted that this witness has stated that there was insulated tape affixed on the bat and he could not see tape when other bats were mixed therewith at the time and

when the police got the bat identified by him in the presence of Hari Mohan Gupta (P.W. 15), vide Exhibit P-11. He also could not remember whether handles of other bats also had similar rubber tube or not. Exhibit P-11 does not prove the fact that other bats had any insulated tape affixed on them. This witness stated that no specific measurement of the bat was given by him nor was indicated otherwise in Exhibit P-11. This witness has stated that when he lodged missing person report, he told the police that the deceased Abhishek alias Akash was wearing silver chain and silver amulet, but he could not explain why the police did not mention the same in the report.

1. Learned counsel referred to statement of Ram Ballabh(P.W. 11), Assistant Sub- Inspector of Police, who has stated that Circle Inspector of the Police informed him on telephone that he was busy in the investigation of the matter at Bombay Scheme and instructed him(this witness) to go to STD/PCO and seize STD slip and telephone instrument. This instruction was given to him by Circle Inspector at 6.00 p.m., which shows that dead body was already discovered by the investigating officer and Circle Inspector at 6.00 p.m. in Bombay Scheme but arrest of accused was shown much thereafter at 8.00 p.m. And actual recovery of dead body was also shown much thereafter. Bhoop Singh(P.W. 12), owner of Sainik Telecom(STD/PCO) has also corroborated this fact that immediately after phone call was made by the accused, he received return call from Rakesh Pal, Circle Inspector, who enquired from him whether he could identify the accused, who made the phone call and he disclosed their physiognomy. After half-one hour, police personnel brought two accused to STD/PCO for being identified by him. Hari Mohan Gupta(P.W. 15), in his cross- examination stated that he did not indicate length of the bat in proceedings(Exhibit P- 11). He also stated that silver chain and amulet and bat so recovered at the instance of the accused were arranged/mixed by his Reader. Learned counsel argued that recovery of bat vide memo Exhibit P-59 was bad in law because Harji Lal, Yadav, Sub-Inspector of Police(P.W. 22), has been associated as an attesting witness thereto. Chain of circumstances against him is having so many missing links and the same is not so complete so as to point to the guilt of the accused-appellant alone and none else. Learned counsel, therefore, argued that charges against the accused- appellant have not been proved beyond reasonable doubt.
2. Ms. Sonia Shandilya and Mr. Aladeen Khan, learned Public Prosecutors as well as Mr. Rinesh Gupta, learned counsel for the complainant opposed the appeals and submitted that each of the circumstances against the accused-appellants is proved individually and also collectively. The deceased was seen talking to two young men on 10.03.2005 and thereafter, he accompanied them on a motorcycle and went missing. Dead body of the deceased was recovered at the instance of accused- appellants. As per medical evidence, cause of death was manual strangulation(throttling), leading to asphyxia. Recovery of silver chain and amulet belonging to the deceased was made at the instance of accused Sunil Panchal and recovery of cricket bat belonging to the deceased was made at the instance of accused Arif. Aforesaid articles belonging to the deceased were identified by Subroto Mukherjee(P.W. 3), father of the deceased, in the presence of Judicial Magistrate, Hari Mohan Gupta(P.W. 15). FSL report(Exhibit P-72) proved that voice of Sunil Panchal matched with the voice recorded in the recording device attached to the land line phone of father of the deceased, when ransom calls were made. STD/PCO booth was identified by the accused on their information under Section 27 of the Evidence Act. Bhoop Singh(P.W. 12) identified the accused appellants correctly in the trial court. Reference has been made to statement of Devi Singh(P.W. 1), domestic helper of Subroto Mukherjee(P.W. 3), informant, who proved factum of kidnapping of

deceased by two unknown young persons on a motorcycle where after the deceased went missing. Mere fact that he could not see the face of the kidnappers does not render his testimony completely inadmissible. In fact, this fact has been corroborated by Subroto Mukherjee(P.W. 3) and Subir Kumar Mukherjee(P.W. 2), who stated in their statements that it was Devi Singh, who lastly saw the deceased talking to two unknown young persons and deceased went with them on their motorcycle.

1. **.** It is argued that at the time of arrest of Sunil Panchal, one slip of STD/PCO bearing No. 2481660 was recovered from right side pocket of his pant, which was seized vide Exhibit P-54. This slip matched with the slip obtained by the police from STD/PCO named Sainik Telecom(Exhibit P-23). It is with the help of this slip that the police was able to find out the nearby location of accused and thereby nabbed them. They were brought back to STD/PCO so that the police could reassure itself that they are the same persons, who made call from this STD/PCO. Bhoop Singh(P.W. 12) has proved this fact that both the accused were brought to his STD/PCO immediately after half-one hour by the police and he correctly identified them. It is argued that once the accused were identified by Bhoop Singh (P.W. 12) immediately after they were nabbed by the police, evidence of this witness has to be given utmost importance and would be admissible by virtue of doctrine of res gestae. It is argued that when Bhoop Singh (P.W. 12) identified the accused in the course of investigation and thereafter also, in the Court, it cannot be said that he only had a fleeting glimpse of the accused persons and that his statement cannot lend credence to the dock identification. Bhoop Singh (P.W. 12) had ample time and reason to recognize and memorise their faces and he correctly recognised them in the court. Mere fact that identification of the accused by Bhoop Singh (P.W. 12) was not preceded by test identification parade would not in any manner undermine sanctity of his evidence.
2. Learned Public Prosecutor argued that merely because the police, in the memos of arrest and memos of information under Section 27 of the Evidence Act, had indicated offence under Section 302, IPC, which were prepared prior to recovery of dead body, would not be a reason to discard important evidence of recovery of dead body. When the accused were nabbed by the police and when they disclosed the fact of murder of kidnapped boy, mention of offence under Section 302, IPC in their arrest memos and memos of information under Section 27 of Evidence Act was only natural. This minor lacuna cannot be a reason to throw away entire case of the prosecution. Arrest memo of Sunil Panchal (Exhibit P-51) was prepared on 14.03.2005 at 6.00 p.m. Similarly, arrest memo of accused Arif(Exhbit P-52) was prepared on 14.03.2005 at 6.15 p.m. Information memo under Section 27 of the Evidence Act by accused Arif with regard to dead body (Exhibit P-65) was prepared on same day at 6.30 p.m. Information memo under Section 27 of the Evidence Act by accused Sunil Panchal with regard to dead body(Exhibit P-66) was prepared on 14.03.2005 at 6.45 p.m. Likewise seizure memo of STD slip seized from Sunil Panchal at the time of his arrest was prepared vide Exhibit P-54 at 6.20 p.m. on the same day. All these steps were taken by the police at one go and almost within a duration of 45 minutes. When the police had already got the information from the accused about murder, there was nothing wrong in adding offence under Section 302, IPC in all these memos.
3. As regards the argument that dead body was recovered from open space which could be accessible to any one, it is argued that Investigating Officer, Rajendra Ojha (P.W. 24) clarified this position by stating that it was a deserted unfurnished building having multi storied flats where normally no one visits. It is argued that such building cannot be termed as an open place visible and accessible to everyone. The

very fact that duration of death of kidnapped boy Abhishek alias Akash has been opined to be 72-120 hours before the postmortem (Exhibit P-6) clearly proves the fact that dead body could not be seen by anyone for such a long time till the police reached there on the information furnished by the accused-appellant under Section

27 of the Indian Evidence Act. Contention that as per the statement of Niranjan Gautam(P.W. 13), silver chain(neckless) and silver amulet(tabij) of the deceased were already lying near the dead body and therefore, its recovery shown at the instance of accused Sunil Panchal was false cannot be accepted. Learned trial court has dealt with this argument on page 20 of the judgment and held that recovery has been proved by information memo of accused (Exhibits P-68 and 55) and statement of Hari Mohan (P.W. 15). Trial Court has also held that since in the present case there is otherwise overwhelming evidence, this one factor cannot be a basis to discard the entire prosecution case.

1. Learned Public Prosecutor relied on the judgment of the Supreme Court in State of Maharashtra v. Damu Gopinath Shinde, MANU/SC/0299/2000 : AIR 2000 SC 1691 in support of factum of recovery pursuant to information furnished by the accused under Section 27 of the Evidence Act. Learned counsel argued that requirement of certificate under Section 65-B of the Evidence Act for admissibility of evidence of voice of accused Sunil Panchal, which matched with the voice recorded in the recording device attached to the land line phone of father of the deceased as per FSL report(Exhibit P-72) is not necessary. Even according to judgment of the Supreme Court in Anvar P.V. (MANU/SC/0834/2014 : AIR 2015 SC 180) (supra), recording device attached with telephone instrument and the voice recorded therein is primary evidence and factum of recording of such voice is not secondary evidence. Telephone and the caller I.D. device do not fall under the definition of computer. Relying on the judgment of Supreme Court in R.K. Anand (MANU/SC/1310/2009 : 2009 AIR SCW 6876) (supra), it is contended that all the guidelines issued by the Supreme Court in that case have been followed in the present case while recording voice of the accused. FSL Report(Exhibit P-72) clearly depicts that the voice of the speaker has been duly identified by the maker of the record by other who recognizes his voice and showed similarity with respect of frequency, intonation pattern, linguistics and phonetic characteristics and belongs to the same person. Fard Mamoora Telephone dated 11.03.2005(Exhibit P-2) putting caller ID and voice recording system on land line of Suborto Mukharjee(P.W. 3), father of the deceased, clearly proves that such device was carefully installed and was indicating time of recording. Alok Bhargava(PW.6) was assigned the job of receiving telephone calls on the land line of father of the deceased, during the period when the deceased was kidnapped and kept in captivity. Exhibit P-2 also proves this fact. Telephone instrument and voice recording system were validly seized on 15.03.2005.
2. **9 .** Learned Public Prosecutor relied upon judgment of the Supreme Court in Yusufalli Esmail Nagree v. The State of Maharashtra, MANU/SC/0092/1967 : AIR 1968 SC 147 and argued that therein the Supreme Court laid down conditions subject to which tape recorded conversation can be admitted into evidence. Reliance is also placed upon the judgment of the Supreme Court in Ram Singh & others v. Col. Ram Singh, MANU/SC/0176/1985 : AIR 1986 SC 3 and (1) N. Sri Rama Reddy & others
3. Sri Abdul Ghani Dar & others v. Shri V.V. Giri; MANU/SC/0333/1970 : AIR 1971 SC 1162. It is argued that Subir Kumar(P.W. 2); Subroto Mukherjee (P.W. 3); Alok Bhargava (P.W. 6); Bal Krishan Mishra (P.W. 18); Harji Lal Yadav (P.W. 22) and Rajendra Kumar Ojha(RW.24) have proved all the aforesaid circumstances against the accused-appellants. Chain of circumstances against the accused-appellants is so complete which rules out every possibility of their innocence. It is, therefore, prayed

that the appeals filed by the accused-appellants may be dismissed and judgment and order passed by the trial court may be affirmed.

1. We have given our anxious considerations to rival submissions and perused the material on record. We have also carefully studied the judgments cited by learned counsel for the parties.
2. **.** Analysis of the evidence on record shows that number of circumstances were individually proved against the accused-appellants, which when joined together, form a chain of circumstances so complete as to point to their guilt and none else. We shall in the light of arguments of the defence presently deal with the evidence of prosecution with reference to each of such circumstances on the basis of which the trial court has recorded the finding of guilt against the accused-appellants.
3. **.** First circumstance which has been found proved by the trial court is that the deceased was lastly seen talking to two young persons and thereafter he went missing. Devi Singh (P.W. 1) has stated that he was domestic servant in the house of Subroto Mukherjee (P.W. 3), father of the deceased. While he was leaving his house at about 7.00 p.m. on 10.03.2005, he saw two boys sitting on stationary motorcycle talking to Akash. Their back was towards him, but face of Akash was visible to him. Thereafter, Akash sat between both of them on the motorcycle and went away. Age of these two young persons was stated to be about 20-22 years. Akash at that time was wearing red shirt, brown pant and white shoes. On the following morning when he reached back there around 9 O' clock, a crowd was assembled outside the house of Subroto Mukherjee and when he learnt that Akash was missing, he immediately informed them about the fact that he saw Akash talking to two young persons sitting on stationary motorcycle the previous evening. This witness has been subjected to extensive cross-examination and was confronted with his police statement recorded under Section 161, Cr.P.C. (Exhibit D-1), but there was not much deviation from what he stated to the police. Mere fact that this witness did not mention that when Akash accompanied two young persons, he was carrying a cricket bat with him cannot be a reason to completely discard his testimony at least to the extent it proves that the deceased went with two young persons on motorcycle, who were aged about 20-22 years. Subroto Mukherjee(P.W. 3) father of the deceased has also stated that he returned the house from his factory around 6.45 p.m. on 10.03.2015. His son Abhishek was not there at home. Around 7.00 p.m., his wife told her that Abhishek had gone to play cricket and has not yet returned back. When Abhishek did not come back by 7.15 p.m., he went to the park where Abhishek used to play and made enquiries from his friends, who were residing nearby. One of the boys, who recently started residing there, told him that Abhishek was playing with them till some time ago and he saw him talking to two young persons, who had come on motorcycle. A cumulative reading of statements of these two witnesses would clearly prove the circumstance of two young persons, who had come on motorcycle, being seen talking to the deceased Abhishek and then Abhishek accompanying them on their motorcycle and thereafter he went missing. Mere fact that in the first information report which was not lodged either by Devi Singh(P.W. 1) or Subroto Mukherjee(P.W. 3) and was lodged at the instance of Harji Lal Yadav (P.W. 22), this fact was not mentioned, does not in any manner diminish evidentiary value of their statements.
4. Another significant circumstance proved against the accused-appellants was that when the accused-appellants made phone call from Sainik Telecom, STD/PCO booth owned by Bhoop Singh(P.W. 12), the police immediately discovered location of STD booth and talked to STD/PCO booth owner, Bhoop Singh(P.W. 12) and enquired

about physiognomy of the accused. Bhoop Singh(P.W. 12), owner of STD/PCO booth categorically stated that two boys had come to his shop around 2.00-3.00 p.m. One of them entered the cabin to make the telephone call and another boy stood outside the cabin. First boy talked hardly for ten seconds and the boy, who stood outside the cabin, gave him a currency note of Rs. 10/-. He deducted Rs. 2/- and returned Rs. 8/- to them. First boy made a call on telephone No. 2429199. Soon after this telephone call, two police personnel came there in civil uniform and demanded from him copy of bill/STD slip, whereupon he generated duplicate copy thereof and handed over the same to them, which was Exhibit P-23. The police personnel, then and there, made seizure memo of that slip (Exhibit P-21). The police personnel also seized telephone instrument vide seizure memo (Exhibit P-22). He was signatory to both these memos. This witness further stated that Exhibit P-23 was generated from his STD/PCO booth because number of telephone of his PCO, i.e. 2481660 was printed on the same which was allotted to him by telephone department for the use as STD. Said slip was sealed in an envelop (Exhibit P-24), which also contain his signature.

1. **.** Evidence show that the accused were smart enough to use different STD/PCO booths. The police was already on vigil, which is evident from the fact that Bhoop Singh(P.W. 12) further stated that two days prior to the date on which the aforesaid call was made by the accused from his STD/PCO booth, two police personnel in civil dress had come to his STD/PCO booth and told his father to note telephone No. 2429199 and asked that if anyone makes call to this number, the police should be informed immediately. Though, this witness did not inform the police immediately about the said telephone call because shortly thereafter, the police personnel reached there. This witness has also stated that two police personnel came to his STD/PCO from Udyog Nagar Police Station. One of them was named Satveer, after about half an hour. Rakesh Pal, Circle Inspector was also accompanying them. They enquired about the physiognomy of the accused and he told that one of the boy was fatty and another was slim. Thereafter, the police brought two boys to his shop after about half-one hour. Rakesh Pal, Circle Inspector was also with them. This witness has identified accused-appellants in the Court as those two boys who made the phone call from his STD/PCO on the aforesaid number. This is therefore yet another significant circumstance against the accused-appellants is that the police had traced the STD/PCO booth and immediately reached there and knew about the physiognomy of the accused and soon thereafter they nabbed the accused and brought them back to STD/PCO and then arrested them. At the time of arrest, police recovered from right side pocket of pant of accused Sunil Panchal a STD/PCO slip (Exhibit P-54), which was original bill generated from the STD machine and given to the accused by Bhoop Singh(P.W. 12) and matched exactly with the duplicate copy thereof(Exhibit P-23), which was generated and handed over by him to the police.
2. Contention of learned counsel for the accused-appellants that dock identification of the accused for the first time in the court, in the facts of the present case, should not be relied to link them with the crime is noted to be rejected. Even in Suresh Chandra Bahri (MANU/SC/0500/1994 : AIR 1994 SC 2420) (supra) case, relied by learned counsel for the appellants, it has been held by the Supreme Court that identification of accused by the witness in court is substantial piece of evidence. Where accused is not previously known to the witness, test identification parade must be held at the earliest possible opportunity with necessary safeguards and precautions. However, when accused had been seen by the witness for a quite number of times at different point of time and places, test identification parade is not necessary. In the present case, the evidence clearly show that the accused were seen

by Bhoop Singh(P.W. 12) not only when they came to his STD/PCO booth for making telephone call, but thereafter again when they were brought back to his STD/PCO booth by the police personnel, who wanted to ascertain whether it were these very accused, who made the phone call from his STD/PCO booth. Hence, aforesaid contention of learned counsel for the appellant is hereby rejected.

1. **.** Next significant circumstance against appellant is that pursuant to information given by accused Arif under Section 27 of the Evidence Act with regard to dead body (Exhibit P-65) and similar information given by accused Sunil Panchal (Exhibit P-66), the police immediately reached the place where from they recovered dead body of Abhishek vide Exhibit P-17 at 8.00 p.m. on 14.03.2005 itself which either to remained untraceable. We are not inclined to countenance the argument that since recovery of dead body was made from open place, no new fact can be held to have been discovered at the instance of the accused. Rajendra Ojha (P.W. 24), the investigating officer has made it clear that it was a deserted multi storied building, which normally no one visits. Such unfurnished multi storied deserted building can by no stretch of reasoning be described as an open place. Moreover, as per the post- mortem report, duration of death was 72 to 120 hours. The fact that no one could notice the dead body lying there even for so long, only reinforces the conclusion that the dead body could be recovered only on the basis of information furnished by the accused under Section 27 of the Evidence Act. Solely because information memos, arrest memos and information memo and seizure memo of motorcycle and STD slip mentioned offence under Section 302, IPC, which were prepared an hour or so prior to preparation of recovery memo of dead body at 8.00 p.m. on 14.03.2005 could not render this significant stage of investigation as doubtful. On the information given by the accused immediately after their arrest, if the police had come to know about murder of abducted boy and mentioned offence under Section 302, IPC in the aforesaid memos, the same was quite natural and there was nothing unnatural in what the police did at that time.
2. **7 .** The Supreme Court in State of Maharashtra v. Damu Gopinath Shinde, MANU/SC/0299/2000 : AIR 2000 SC 1691 (supra) has observed that the basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in search made on the strength of any information obtained from the accused, such a discovery is guarantee that the information supplied by the accused is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact, it become reliable information. Therefore, the law permits such information to be used as evidence by restricting the admissible portion to the minimum. Relying on the judgment of Privy Council in Pulukuri Kottayya v. Emperor, MANU/PR/0049/1946 : AIR 1947 PC 67, the Supreme Court held that "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to the effect.

**28.** Minor discrepancies in the investigation cannot be a reason to discard the entire prosecution case. The Supreme Court in State Govt. of NCT of Delhi v. Sunil & another MANU/SC/0735/2000 : (2001) 1 SCC 652 : (2000 AIR SCW 4398) held tha mere absence of independent witness when investigating officer recorded the statement of the accused and the article was recovered pursuant thereto is not sufficient ground to discard the evidence. Evidence of police officer regarding the recovery at the instance of the accused should ordinarily be believed. Official acts of police should be presumed to be regularly performed. Archaic notion to approach

actions of police with initial distrust should be discarded. Even if, for the present we do not believe the factum of recovery of silver chain and silver amulet at the instance of the accused-appellant Sunil Panchal, because as per Niranjan Gautam (P.W. 13), police photographer, he saw them lying on the floor near the dead body on 14.03.2005 and took pictures of the same which are Exhibits P-28, P-32 and P-33, there is otherwise enough evidence on record which points to the guilt of the accused-appellants and none else. Since discovery of the place where the dead body was found was made pursuant to information given by the accused under Section 27 of the Evidence Act, which eventually led to recovery of dead body of the abducted boy, recovery of silver chain and silver amulet from that place then even, as per testimony of Niranjan Gautam (P.W. 13) relied by the defence, could also be read against the accused-appellants. Moreover, cricket bat was also recovered at the instance of accused Arif vide Exhibit P-59. Mere non-mention of these articles in the missing person report and first information report may not be a reason to hold that they did not belong to the deceased, particularly when they have been identified by his father, Subroto Mukherjee (P.W. 3) in the proceedings conducted by Hari Mohan Gupta (P.W. 15). The fact that in the recovery memo, chain is shown to be broken into pieces would not be a reason to disbelieve the fact that this belongs to the deceased. Similarly, the fact that Hari Mohan Gupta (P.W. 15) has stated that articles similar to silver chain and amulet and cricket bat were procured by his Reader whereas Investigating Officer, Rajendra Ojha(P.W. 24) has stated that they were procured by Harji Lal Yadav (P.W. 22), the Sub Inspector of Police is also not so serious contradiction, as to disbelieve that the aforesaid articles did not belong to the deceased. It is common knowledge that when a Judicial Magistrate is entrusted with the task of test identification parade of persons or articles, his Reader invariably accompany him to the place where such identification proceedings are conducted. In the case of identification of articles, proceedings are mostly conducted in the court premise itself where availability of Reader is natural. Therefore, if similar articles were procured by Hari Mohan Gupta(P.W. 15) with the help of his Reader, who in turn relied on police personnel, there was nothing unusual in such a practice.

1. **9 .** The most important and significant circumstance in the present case is the factum of recording of voice sample of accused-appellant Sunil Panchal, obtained by Hari Mohan Gupta(P.W. 15), which according to FSL Report(Exhibit P-72) matched with his voice recorded on the device attached to the residence land line phone of Subroto Mukherjee(P.W. 3), father of the deceased. Hari Mohan Gupta(P.W. 15), the Judicial Magistrate, has stated that an application was filed before Chief Judicial Magistrate by S.H.O., Police Station Vigyan Nagar, Kota seeking permission to record voice sample of accused Sunil Panchal. As per the order of Chief Judicial Magistrate, he was to sit at the place where call was to be received and Bal Krishna Mishra(P.W.

18) Additional Chief Judicial Magistrate, Kota(South) was to remain present at the place where from the call was to be generated. S.H.O., Police Station Vigyan Nagar, Kota produced before him a tape recorder and two blank cassettes, which were checked by Hari Mohan Gupta(P.W. 15) in the presence of B.K. Mishra(P.W. 18) and they were found empty. Investigating officer gave him a written transcription of pre- recorded conversation which was Exhibit P-41. Voice of Sunil Panchal was recorded directly on one cassette and his voice through phone call was recorded in another cassette. An application in this connection was submitted to Chief Judicial Magistrate(Exhibit P-42) seeking his permission to make use of his official telephone in the chamber for making an outgoing call and also use telephone installed in the chamber of Additional Chief Judicial Magistrate No. 4, Kota for the purpose of incoming call. Permission was granted by Chief Judicial Magistrate, Kota, which is contained in Exhibit P-42. For this purpose, they had to get the telephone instrument

installed in the chamber of Additional Chief Judicial Magistrate No. 4, Kota replaced as the earlier one was not compatible with the tape recorder. Thereafter, phone call was made from the chamber of Chief Judicial Magistrate, Kota in which accused Sunil Panchal was made to speak and his recording was made in the chamber of Additional Chief Judicial Magistrate, No. 4, Kota. Complete proceedings of this were prepared vide Exhibit P-43 and the cassettes were sealed. Similarly, Bal Krishna Mishra(P.W.

18) also stated that he obtained permission of Chief Judicial Magistrate, Kota to make use of his telephone No. 2326956 for making call to official telephone of Additional Chief Judicial Magistrate No. 4, Kota from his chamber and the accused was made to speak from the chamber of the Chief Judicial Magistrate, which was recorded. Proceedings were prepared vide Exhibit P-48 and the voice recorded was transcribed as Exhibit P-47, both of which contained signatures of the accused. Hari Mohan Gupta(P.W. 15) made endorsement of his permission vide Exhibit P-43. The cassette with the help of which voice of accused Sunil Panchal was recorded was Article-5, which was handed over to Hari Mohan Gupta(P.W. 15).

1. We are not inclined to uphold the contention of learned counsel for the appellant that tape recorder attached to land line telephone of Subroto Mukherjee(P.W. 3), father of the deceased should be deemed to be a computer or computer system and the voice recorded on the cassettes should be treated an electronic record, as defined in various provisions of the Information and Technology Act, 2000 and in the absence of certificate under Section 65-B of the Evidence Act, such evidence should be held inadmissible. Although, learned counsel, in support of his contention, has relied upon the judgment of the Supreme Court in Anvar P.V. (MANU/SC/0834/2014 : AIR 2015 SC 180) (supra), but we are not inclined to sustain the aforesaid argument for the reasons to be stated hereinafter, but before that we would like to briefly address the law that has developed in our country in relation to admissibility of voice recording.
2. The phenomenon of tendering tape recorded conversation before law courts as evidence, particularly in cases arising under the Prevention of Corruption Act, where such conversation is recorded by sending the complainant with a recording device to the person demanding or offering bribe has almost become a common practice now. In civil cases also, parties may rely upon tape records of relevant conversation to support their version. In such cases, the court has to face various questions regarding admissibility, nature and evidentiary value of such a tape recorded conversation. The Indian Evidence Act, prior to its being amended by the Information Technology Act, 2000, mainly dealt with evidence, which was in oral or documentary form. Nothing was there to point out about the admissibility, nature and evidentiary value of a conversation or statement recorded in an electro-magnetic device. Being confronted with the question of this nature and called upon to decide the same, the law courts in India as well as in England devised and developed principles so that such evidence, may be received in law courts and acted upon. Relationship between law and technology has not always been an easy one. However, the law has always yielded in favour of technology whenever it was found necessary.
3. The concern of the law courts regarding utility and admissibility of tape recorded conversation, from time to time, found its manifestation in various pronouncements. In India, the earliest case in which the issue of admissibility of tape recorded conversation arose for consideration was Rup Chand v. Mahabir Parshad & another, AIR 1956 Punjab 173. The Court in that case though declined to treat tape recorded conversation as writing within the meaning of Section 3(65) of the General Clauses Act, but allowed the same to be used under Section 155(3) of the Evidence Act as previous statement to shake the credit of witness. The Court held that there is no rule

of evidence, which prevents a party, who is endeavouring to shake the credit of a witness by use of former inconsistent statement, from deposing that while he was engaged in conversation with the witness, a tape recorder was in operation, or from producing the said tape recorder in support of the assertion that a certain statement was made in his presence. In S. Pratap Singh v. State of Punjab, MANU/SC/0272/1963 : AIR 1964 SC 72, a Constitution Bench of the Supreme Cour considered this issue and propounded the law that tape recorded talks are admissible in evidence and simple fact that such type of evidence can be easily tampered, certainly could not be a ground to reject such evidence as inadmissible or refuse to consider it, because there are few documents and possibly, no piece of evidence, which could not be tampered with. In this case the tape record of the conversation was admitted in evidence to corroborate the evidence of witnesses, who had stated that such a conversation has taken place.

1. The Supreme Court in Yusufalli Esmail Nagree (MANU/SC/0092/1967 : AIR 196 SC 147) (supra) considered various aspects of the issue relating to admissibility of tape recorded conversation. This was a case relating to an offence under Section 165-A, IPC. The conversation between accused, who wanted bribe and complainant was tape recorded at the instance of the Investigating Agency. The prosecution wanted to use this tape recorded conversation as evidence against accused and it was argued that the same is hit by Section 162, Cr.P.C. as well as Article 20(3) of the Constitution. In this landmark decision, the Supreme Court authoritatively laid down in unequivocal terms that the process of tape recording offers an accurate method of storing and later reproducing sounds. If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. The imprint on the magnetic tape is direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Evidence Act. The Supreme Court after examining the entire issue in the light of various previous pronouncements laid down the following principles:

"a) The contemporaneous dialogue, which was tape recorded, formed part of res gestae and is relevant and admissible under Section 8 of the Indian Evidence Act.

* 1. The contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act.
  2. Such a statement was not in fact a statement made to police during investigation and, therefore, cannot be held to be inadmissible under Section 162, Cr.P.C.
  3. Such a recorded conversation though procured without the knowledge of the accused but the same is not elicited by duress, coercion or compulsion nor extracted in an oppressive manner or by force or against the wishes of the accused. Therefore, the protection of the Article 20(3) was not available.
  4. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Therefore, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with."

1. **4 .** The point whether tape recorded conversation would be primary and direct

evidence, was dealt with by the Supreme Court in N. Sri. Rama Reddy & others v. Shri. V.V. Giri, MANU/SC/0333/1970 : AIR 1971 SC 1162 wherein the Court held that like any document, the tape record itself was primary and direct evidence admissible of what has been said and picked up by the receiver. This view was reiterated by the Supreme Court in R.K. Malkani v. State of Maharashtra, MANU/SC/0204/1972 : AIR 1973 SC 157 wherein the Court ordained that when a Court permits a tape recording to be played over, it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. A three-Judge Bench of the Supreme Court in Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehta & others, MANU/SC/0277/1975 : AIR 1975 SC 1788 upheld the conclusion of the High Court in holding that tape records of speeches were "documents" as defined under Section 3 of the Evidence Act, which stood on no different footing than photographs and that they were admissible in evidence on satisfying the condition of voice being identified and accuracy of what was actually recorded, being proved by maker of the record or by others, who know it, by satisfactory evidence, direct or circumstantial, to rule out possibilities of tampering with the record and further that subject-matter recorded was relevant as per rules of relevancy found in the Evidence Act. The Supreme Court further held that tape records were the primary evidence of what was recorded. Transcripts could be used to show what the transcriber has found recorded there at the time of transcription. It has been further held that the use of tape recorded conversation was not confined to purpose of corroboration and contradiction only. Giving an example, the Court pointed out that when it was disputed whether a person's speech on a particular occasion, contained a particular statement, there could be no more direct or better evidence of it than its tape recording, assuming its authenticity to be duly established.

1. In the case of Ram Singh & others v. Col. Ram Singh, MANU/SC/0176/1985 : AIR 1986 SC 3, the Supreme Court following the law laid down in Yusufalli Esmail Nagree (MANU/SC/0092/1967 : AIR 1968 SC 147) (supra) and various othe judgments culled out following as the conditions for admissibility of tape recorded conversation:

"(1) The voice of the speaker must be duly identified by the maker of the record or by other who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

* 1. The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence, direct or circumstantial.
  2. Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
  3. The statement must be relevant according to the rules of Evidence Act.
  4. The recorded cassette must be carefully sealed and kept in a safe or official custody.
  5. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

1. In the case of R.K. Anand (MANU/SC/1310/2009 : 2009 AIR SCW 6876) (supra) those very conditions, which were laid down in Ram Singh (MANU/SC/0176/1985 : AIR 1986 SC 3) (supra) by the Apex Court for admissibility of tape recorded conversation, were reiterated.
2. **.** The Supreme Court in Anvar P.V. (MANU/SC/0834/2014 : AIR 2015 SC 180) (supra) has settled the law with respect to the admissibility of evidence under Section 65B of the Indian Evidence Act. The Court held that an electronic record by way of secondary evidence is only admissible in a court of law if the requirements under Section 65B are complied with. A certificate in terms of Section 65B of the Evidence Act is mandatory for secondary evidence pertaining to an electronic record such as a CD or a chip to be admissible. The factual matrix of that case involved CDs being used for announcements and songs. If these CDs had been adduced as primary evidence, the same would not have been hit by the requirements of Section 65B of the Evidence Act. The announcements and songs were recorded using other instruments and were then fed into a computer, from which CDs were made, which can be classified as secondary evidence. The Supreme Court held that CDs could not be admitted as evidence without due certification and compliance with the requirements under Section 65B of the Evidence Act. The Court clarified and made it amply clear that Section 65B of the Evidence Act seeks to bring within its ambit only secondary evidence on electronic record and the same does not bar the admissibility of electronic records being used as primary evidence.

**3 8 .** It is thus clear that provision of Section 65B of the Act itself negates the requirement of the production of the primary evidence in the form of the original media on which data or information was stored and makes secondary evidence admissible in the form of computer output, subject to the production of a certificate. The purpose behind Section 65B of the Act is to obviate the difficulty attached to the production of primary evidence, which can lead to a denial of justice in many cases. This provision through its requirements brings secondary evidence to the level of primary evidence in order to make it admissible in accordance with law. Evidently, Section 65B is attracted in cases where an electronic record is printed, copied etc. and is produced by a computer(computer output), thus making it a provision dealing with secondary evidence. It is, therefore, significant to note that the difference between primary evidence and secondary evidence is of utmost importance. A tape recorded cassette, seen in the light of this analysis of law, is clearly a primary and direct evidence of what has been said and recorded.

1. The Supreme Court in R.M. Malkani (MANU/SC/0204/1972 : AIR 1973 SC 157 (supra), in such circumstances held that tape recorded conversation is admissible provided; first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The importance of Section 65B of the Evidence Act is that it does away with the requirement to produce the original computer or the original media on which data or information was stored and allows the secondary evidence in the form of computer output to be produced and admitted in evidence, subject to the condition that when evidence of computer output is produced and tendered, certificate of a person occupying a responsible official position in relation to operation of the relevant device or

management of the relevant activities as prescribed by Section 65B of the Evidence Act is produced.

1. **.** Since in the present case voice of accused Sunil Panchal recorded at the time when ransom call was made by him has matched with his voice recorded in another cassette and it has been proved by FSL Report(Exhibit P-72) that voice recorded in two cassettes were of the same person, it is an important link connecting the accused with the crime.
2. All afore discussed individual circumstances, when joined together, thus form a complete chain which lead to an inescapable conclusion that it were the accused- appellants and none else, who abducted Abhishek alias Aakash, demanded ransom and eventually murdered him. We, therefore, do not find any error in impugned judgment and order passed by the trial court and uphold the conviction and sentence awarded to them by the trial court.
3. In the result, both the appeals fail and are, hereby, dismissed. Office is directed to place a copy of this judgment on record of connected appeal.