2025 INSC 116

**REPORTABLE**

# IN THE SUPREME COURT OF INDIA
# CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPEAL NO. 879 OF 2019

CHANDRABHAN SUDAM SANAP APPELLANT(s)

VERSUS

THE STATE OF MAHARASHTRA RESPONDENT(s)

## J U D G M E N T

**K.V. Viswanathan, J.**

**1.** The present appeal calls in question the correctness of the judgment of the High Court of Judicature at Bombay dated 20.12.2018 in Confirmation Case no. 3 of 2015 with Criminal Appeal No. 1111 of 2015. By the said judgment, the High Court upheld the conviction and the sentence of death imposed on the appellant by the Court of Sessions for Greater Bombay (hereinafter referred to as the 'Trial Court') in Sessions Case No. 388 of 2014 and consequently dismissed the criminal appeal filed by the

appellant. The Trial Court convicted the appellant for the offences punishable under Sections 302, 364, 366, 376(2)(m), 376A, 392 read with Section 397 and 201 of the Indian Penal Code (for short 'IPC'). For the offences punishable; under Section 302 IPC, the appellant was sentenced to death; under Section 364 IPC, rigorous imprisonment for 10 years and to pay a fine of Rs. 10,000/-, in default to undergo rigorous imprisonment of one year; under Section 366 IPC, a sentence of ten years RI and to pay a fine of Rs. 10,000/-, in default RI for one year; under Section 376(2)(m) IPC, a sentence of RI for ten years; under Section 376A IPC, RI for life which was to mean imprisonment for remainder of his natural life; under Section 392 read with 397 IPC, a sentence of RI for seven years and under Section 201 IPC, he was sentenced to RI of seven years. All the sentences were to run concurrently. The appellant was directed to pay a sum of Rs. 50,000/- as compensation to be payable to the parents of the deceased.

**The case of the Prosecution :-**

**2.** The deceased is a 23 year old young woman (hereinafter referred to as 'EA' in the judgment). PW-26 Singavarapa Jonathan Surendra Prasad is the father of the deceased EA. According to the prosecution, the deceased, who was working in Mumbai and staying at the YWCA Hostel for Women in Andheri, visted her parents at Machilipatnam in Andhra Pradesh between 22.12.2013 and 04.01.2014. On 04.01.2014, PW-26 dropped her at the Vijayawada Railway Station at about 05:00 AM. The deceased EA boarded Visakhapatnam LTT Express which was to reach Mumbai early morning on 05.01.2014. The deceased EA called her father at 09:00 PM on 04.01.2014 when the train was crossing Solapur Station. According to PW-26, after reaching Mumbai, EA did not contact him. He, however, constantly made attempts to contact her mobile number but there was no response. PW-26 contacted the YWCA Hostel where she was staying, and he was informed that EA had not turned up. According to PW-26, on 05.01.2014 itself, he lodged a missing complaint with the Railway Police Station at

Vijayawada. Thereafter, he took the missing complaint and went to Mumbai. He along with his relatives went to LTT Railway Station where the Railway Police told PW-26 that the case did not come under their jurisdiction and directed him to go to Kurla Police Station.

**3.** Thereafter, PW-26 states that with the help of police they started searching for his daughter and the last signal of the tower location of her mobile was found at Bhandup. The anxious father continued his search along with his relatives. Ultimately, on 16.01.2014, they found the body of EA in the bushes near the Express Highway. PW-26 states that the condition of the body was burnt and beyond recognition. Based on a ring in her finger, he identified the body as that of his daughter. According to PW-26, as the case came under Kanjur Marg Police Station, he lodged a complaint therein for the offence of murder and an F.I.R. (Exh.134) was registered.

**4.** PW-30 Dattatray Tukaram Naikodi is the Police Inspector who was then attached to Kanjur Marg Police Station. He recorded the F.I.R. and registered the crime bearing No. 6 of 2014 for the offences punishable under Section 302 and 201 of IPC at about 08:15 PM (information received at 5.45 PM) on 16.01.2014. He proceeded to the spot and found a decomposed body of a female. He arranged for dog squad and for persons from the Forensic Science Laboratory (FSL). He made arrangements for lighting and conducted the inquest Panchnama which is marked as Exh.84 and seized the ring of yellow metal (Article 27) and thereafter he sent the body for post-mortem. A spot Panchnama was also drawn in the presence of two panchas. While PW-2 Bapu Mahadev Adsul deposed with regard to spot Panchnama (Exh.38), PW-6 Nirmala Vilas Kadu testified for the inquest Panchnama (Exh. 84). PW-30 further testified that on the spot a mobile phone of Samsung company with two sim cards, one grey colour scarf, red colour T-shirt, bunch of hair, one knicker and one wrist-watch having a broken belt were found and seized. He collected the blood samples,

the grass and the mud from the spot with the help of FSL persons. He deposed that the back portion of the body and chest were decomposed and that the chest was looking like half burnt. He deposed further that the leg was half burnt.

**5.** PW-25 Dr. Gajanan Shirserao Chavan, Assistant Professor, Forensic Medicine Department, J.J. Hospital conducted the post-mortem between 11:00 AM and 12:30 PM on 17.01.2014. The dead body was received at 05:45 AM. According to the doctor, the dead body showed a black colour brassier avulsed with metallic hook and a pink colour hair band. Rigor Mortis was absent and variable mixed pattern of decomposition was seen. Facial skin was burnt, there was blackish adherent to skull bone; no maggots were seen, the genitals were distorted due to decomposition and the vaginal wall showed blackish, reddish discolouration. Limbs, hand and feet were absent. He noticed the following:-

| | | |
|---|---|---|
| 12. | Extent, and signs of decomposition, presence, post-mortem lividity of buttocks, loins, back and | Variable mixed pattern of decomposition was seen. Fascial skin burnt, blackish adherent to skull |

| | | |
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| | thighs or any other part whether bullae present and the nature of their contained fluid. Condition of the cuticle. | bone. Skin absent at some places of extremities and abdomen exposing bones and abdominal viscera at places. Ends of long bones are nibbled and exposed. |
| 13. | Features – whether natural or swollen, state of eyes, position of tongue, nature of fluid (if any) oozing from mouth, nostrils or ears | Natural separations seen at most of the joints without evidence of ante mortem fractures. No maggots and no foul smell. Features distorted due to decomposition. Tongue absent, Eyes sunken. No oozing of fluid from eyes, mouth and nose. |
| 14. | Condition of skin – marks of blood etc. in suspected drowning the presence or absence of cutes anserina to be notes. | Skin destroyed due to decomposition. |
| 15. | Injuries to external genitals. Indication of purging. | Genitals distorted due to decomposition. Vaginal wall shows blackish, reddish discolouration at posterior wall, confirmed by cut section. Swabs |

| | | |
|---|---|---|
| | | taken for CA. |
| 16. | Position of limbs – Especially of arms and of fingers in suspected drowning the presence or absence of sand or earth within the nails or on the skin of hands and feet. | Limbs, hand & feet absent. Nibbling seen as mentioned in column No. 12 right middle ring, little finger present. Nails of this finger showing bluish black discolouration. |
| 17. | Surface wounds and injuries- Their nature, position, dimensions (measured) and directions to be accurately stated – their probable age and causes to be noted<br><br>If bruises be present what is the condition of the subcutaneous tissues?<br><br>(N.B.- when injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed) | 1) Contusion over LT-Left fronto temporal area 4 x 5 cm, blackish red colour<br><br>2) Contusion over lower lip right side against canines - blackish red in colour 2 x 2 cm. Both contusions confirmed by cut section. |
| 18. | Other injuries discovered by external examination or perlustration as fractures | No ante mortem fracture. |

| | | |
|---|---|---|
| | etc. | |
| 22. | Opinion as to the cause probable cause of death | Evidence of blunt injuries over body and genital injuries seen. However, final opinion reserved pending for C.A. of samples. |

**6.** The provisional cause of death was given as evidence of blunt injuries over the body and genital injuries were noticed. However, final opinion was reserved pending chemical analysis of samples. After receipt of the chemical analysis report, final cause of death was given as death due to head injury with smothering associated with genital injuries.

**7.** Most importantly, the time of death was estimated to be 8-10 days before the post-mortem date as no maggots or pupa were seen on the body. The post-mortem date was 17.01.2014. The defence has a case based on this that death would have occurred anytime between 07.01.2014 and 09.01.2014. The appellant also raised an issue about the failure to draw Panchnama when the brassier of the

deceased was purportedly handed over in the hospital to PW-7 Bhausaheb Suresh Mistry. It was only in the police station, according to the prosecution, as spoken to by PW-14 Satyavan Shridhar Gawade, that the Panchnama for the brassier was prepared. The stand was that between the hospital and the police station, the brassier was not in a sealed condition. It has also been the case of the defence that PW-30 Dattatray Tukaram Naikodi admits to have not made the handing over Panchnama of the brassier from the hospital and also that the brassier was not seen mentioned in the spot Panchnama Exh.38 or inquest Panchnama Exh.84.

**8.** The defence has also raised a grievance with regard to the final conclusion in the death certificate (Exh.128) about the cause of death being "head injury with smothering associated with genital injuries", contending that this was without any medical or scientific basis since PW-25 admitted in evidence that there was nothing found in the chemical analysis report which he was awaiting. The defence also stated that there was no mention in the Post-mortem

Report (Exh.127) of forceful penetration and that a belated query letter of 28.07.2014 (Exh.129) was sent, in response to which three doctors including PW-25 stated that injury in column 15 mentioned hereinabove could be due to forcible entry of some article in the vagina and subsequently due to decomposition, vide Exh.130, dated 14.08.2014.

**9.** Exh.130, which sets out the queries and the answers are extracted hereinbelow:

> "Sir,
>
> The opinion on the following points with regard to the facts mentioned in column No. 15 of the post-mortem Report, as asked by you vide letter under reference are given as under:
>
> 1) What could cause the condition of the organ, as mentioned in the column No. 15?
>
> Answer:- Such condition can be caused due to said private part (organ) sustaining injuries before death and subsequently due to decomposition (of its surface)
>
> 2) Whether forcible entry of some article in the vagina could cause the condition of the organ as mentioned in column No. 15?
>
> Answer:- Yes, on the basis of the entry made in respect of

the private part such condition can be caused due to forcible entry of some article in the vagina.

3) Whether the condition of the organ as mentioned in column No. 15 could be caused due to decomposition?

Answer:- peruse the answer given at Sr. No. 1.

| | | |
|---|---|---|
| Sd/- (Illegible)<br>(Dr. M.M. Jawle)<br>Assistant Professor<br>Deptt. Of Forensic Medicine Grant Medical College, Mumbai-08 | Sd/- (Illegible)<br>(Dr. G.D. Nithurkar)<br>Assistant Professor<br>Deptt. Of Forensic Medicine Grant Medical College, Mumbai-08 | Sd/- (Illegible)<br>(Dr.G.S. Chavan)<br>Deptt. Of Forensic Medicine Grant Medical College, Mumbai-08” |

**10.** The defence also states that no semen was found on any articles received from the spot or the biological samples of the deceased since the chemical analysis Reports (Exh. 17 to Exh.34) indicates that on the scarf, T-shirt, knicker with cotton pad, burnt cloth pieces and in the partly burnt cloth pieces and grass, no semen was detected.

**11.** Having carefully perused the evidence of PW-25 and the Exh.127 to Exh.130, we have no reason to dislodge the findings of the courts below that the death is homicidal in nature. The doctors have clearly opined that the final cause of death was due to head injury with smothering associated with genital injuries and clarified that injuries to the genitals are possible by forcible entry of some article in the vagina.

**12.** After the post-mortem, the body was handed over to PW-26 on 17.01.2014 for performance of last rites which were duly performed. The Appellant has a grievance that when he was arrested, there were parallel investigations being conducted by Kanjur Marg Police Station and Unit V, VI, VII and other Units of Crime Branch between 16.01.2014 and 02.03.2014. According to the defence, all reporting within the Crime Branch was oral and there was no legal basis for investigation by the Crime Branch till 02.03.2014, when formal orders transferring the investigation were made. Accordingly they contend that, as a result of this, the appellant was in a state of forced ignorance about events from

16.01.2014 to 02.03.2014, including possible exculpatory material found during the parallel investigation by the Crime Branch. The appellant was arrested on 02.03.2014. PW-8 Salim Mustaq Shaikh was the panch witness in the arrest panchnama (Exh.90). He deposed that during the physical search of the accused, one xerox copy of the letter in the back pocket of his jeans pant was found and when enquired by the police, the appellant told them that it was a Kundli (horoscope) (Article 28) prepared by PW-17 Rajabhau Baburao Aher. We have discussed this aspect in detail later in the judgment. The Crime Branch ultimately filed the charge-sheet for the offences mentioned above. PW-38 Vyanket Bhanudas Patil stated that investigation in serious offences parallel investigation is often conducted along with the police station having jurisdiction. The prosecution has submitted that parallel investigation was about detection and not collection of evidence. It was further submitted that no prejudice has been caused to the appellant. Keeping in mind the ultimate conclusion that we have arrived at, we do not deem it necessary to delve into this aspect in great detail. It is also not

disputed that ultimately, on 02.03.2014, formal orders of transfer were made to the Crime Branch. PW-38 further admitted that he called for the opinion of three doctors marked as Exh.130, after framing of charges and that at the time of addition of Section 376(2)(m) the said opinion was not there. He expressly denied the suggestion that the report was planted since there was no prima facie material for the charges. We are satisfied that prejudice has been caused to the accused on this score. All the witnesses have been examined only after all the charges were in position.

**13.** Between 16.01.2014 and 02.03.2014, investigation was carried on and the prosecution claims that the pen drive of the CCTV footage for the date 05.01.2014 between 4:00 AM and 07:00 AM were taken on 18.01.2014 from the Lokmanya Tilak Terminus; then the father of the deceased was contacted with the pen drive for identification of deceased EA and statements of witnesses were recorded. Chargesheet was filed after obtaining the FSL report for offences mentioned above. At the trial, the prosecution examined 39 witnesses and marked approximately 200 exhibits. The defence

examined four witnesses. DW-1 to DW-3 reporters and editors who are associated with newspapers and DW-4 the official from the mobile company who spoke of CDR details and marked approximately eight exhibits. The appellant was examined under Section 313 and in answer to the last question as to whether he wanted to say anything more, the appellant stated that he was falsely implicated in the case and added that in February 2014, the Kurla Police detained him for 15 days.

**14.** We have heard Mr. Shri Singh, learned counsel appearing pro bono, for the appellant who presented the case comprehensively and was ably assisted by M/s Pritha Srikumar Iyer, Pratiksha Basarkar, Sakshi Jain and Surabhi Vaya. The prosecution has been effectively represented by Mr. Raja Thakare, learned Additional Solicitor General ably assisted by M/s Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Aditya Krishna, Preet S. Phanse, Adarsh Dubey and Ms. Yamini Singh. Both sides have submitted detailed written submissions. We have also considered the submissions and perused the records including the Trial Court

records.

**15.** The case rests on circumstantial evidence. We are conscious of the five golden principles enunciated in long line of cases including ***Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116***, wherein it was held as under:-

> **"153**. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> "(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made:
>
> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

**16.** Keeping in mind the above principles, we have approached the case at hand. The High Court has tabulated the following circumstances to sustain the conviction in Para 40 of the Judgment:-

"(i) The deceased EA who was working with TCS Andheri, Mumbai and a resident of Vijaywada, Andhra Pradesh has boarded the train from Vijaywada to LTT, Kurla on 4th January2014.

(ii) Phone calls made by her father to EA on 5th January were not answered and she did not reach her hostel located in Andheri.

(iii) A partly burnt decomposed body was found on 16th January2014 near the service road of Eastern Express Highway near Kanjur Marg which came to be identified by PW no.26 as to be of his missing daughter EA.

(iv) The post mortem report establish that the death of the deceased was homicidal and there was injury to her private parts, thereby establishing that she was raped.

(v) The Inquest Panchnama and Post Mortem report establish that the body was partly burnt and attempt was made to destroy the evidence by burning the body.

(vi) The accused consumed liquor at the residence of PW no.12 in the company of PW no. 9 and then left his residence by a motorcycle belonging to PW No.9.

(vii) The CCIV footage collected from the LTT Railway station disclosed that the accused was loitering on the platform at 4:50 am.

(viii) In the CCIV footage it is seen that the deceased had accompanied the accused while leaving LTT and she was last seen in the company of the accused in the footage.

(ix) The accused was seen near the spot on the Eastern Express Highway with the trolley bag and a bag pack belonging to the deceased.

(x) The circumstance of the accused seen along with the trolley bag in the morning on the date of incident by PW 13 leaving the building.

(xi) The subsequent conduct of the accused i.e. going to the Astrologer and performing a puja in order to wash off the sin committed on a woman and the entry in the register of PW 17 establishing that he has paid an amount of Rs.3,000/- for performing the said puja.

(xii) Articles 22, 23 and 24 belonging to the deceased were identified by PW No.26 came to be recovered at the instance of the accused along with her articles i.e. identity card, spectacles, her eye-liner, pencil and the DNA Test confirm that it belonged to the deceased.

(xiii) The accused in his extra-judicial confession to PW9 had disclosed that he had poured petrol on the dead body of EA and set it on fire after committing rape and on killing her.

(xiv) The medical examination of the accused about his potency test and mental health."

We have, while marshalling the evidence below, kept each of the above circumstances in mind. Few circumstances relied upon by the High Court, do not figure in the tabulation. They have also been discussed hereinbelow.

**17.** Insofar as the circumstances elucidated hereinabove, circumstance no. 1 to 4 pertains to the homicidal nature of the death of the deceased after her travel from Vijayawada in the morning of 4th January, 2014. We have already found that the death was homicidal in nature relying on the evidence of PW-25 and the post-mortem documents (Exh.127 to Exh.130).

**18.** PW- 26, father of the deceased EA, identified her based on the ring in her finger. We have no reason to doubt his deposition. Notwithstanding the challenge mounted by the defence, we are

fully convinced that PW-26 was the father of the deceased and, as such, we are not inclined to disturb the finding that PW-26 was indeed the father of the deceased EA; that deceased EA was dropped at the station in Vijayawada on 04.01.2014 by PW-26; that deceased called PW-26 when the train was crossing Solapur Station on 04.01.2014 at 09:00 PM and that the deceased died due to the injuries mentioned by the experts in the report.

**19.** PW-28 Shrikant Hanumant Lade also testified about the DNA profile of PW-26 – the father matching with the paternal alleles in the source, DNA of the deceased. His report is marked as Exh. 22. He compared the DNA profiles from the blood sample of PW-26 and the DNA extracted from the sweat detected on Exh.1 - ID card with belt, Exh.2-spectacles and the bone sample of the deceased. Notwithstanding our finding recorded later on on the alleged recovery aspect of the ID card from the sister, as far as this DNA matching is concerned, considering that the DNA has matched with the blood sample of PW-26 with that of the DNA profiles of the deceased, we have no reason to doubt that PW-26 is the father of

the deceased EA.

**20.** The defence feebly questioned the chain of custody with regard to the blood samples of PW-26 and about the lack of underlying scientific basis in the report and testimony of PW-28, the Assistant Director of FSL. We are not impressed with the said submission and hence, we reject the same, as we find no merits in the said submissions.

**21.** Insofar as circumstance no. 5, that an attempt was made to destroy the evidence by burning the body is concerned, herein again the prosecution must demonstrate that there was evidence circumstantial or otherwise pointing to the involvement of the appellant.

**22.** That leaves us with circumstance no. 6, 7, 8, 9, 10, 11, 12 and 13. Insofar as circumstance no. 14 is concerned about the potency and mental health of the accused, that by itself again will not point to the involvement unless other circumstances are made out. Hence, what is really to be addressed is circumstance no. 6 to 13 pointed out above.

**23.** For convenience, the arguments of counsel have been dealt with while marshalling the evidence adduced by the prosecution in an effort to prove the circumstances. The circumstances alleged had been specified under the following order for providing a logical sequence:

i) The evidence of PW-1, PW-30, PW-31, PW-33 and PW-34 with regard to CCTV footage collected from the LTT Railway Station and its admissibility thereof.

ii) The evidence of PW-18, PW-19, PW-20 and PW-21 as advanced to establish the sighting of the accused at the LTT Terminus and also to establish last seen theory (PW-20 and PW-21).

iii) The evidence of PW-9, PW-12 and PW-22 with regard to the events that allegedly transpired on the night of 04.01.2014 and the morning of 05.01.2014.

iv) The evidence of PW-23 and PW-13 on the issue of alleged presence of the appellant near the scene of crime and his purported exit from the society building.

v) The evidence of PW-15, PW-16 and PW-17 with regard to the subsequent conduct of the accused in going to the astrologer and performing the *puja* at Nasik.

vi) Recovery of articles 22, 23 and 24 along with recovery of identity card, spectacles, eye liner pencil from the sister (not examined) of the accused and the alleged recovery of the Trolley bag from PW-24.

vii) Alleged extra judicial confession to PW-9 and the alleged recovery of the motorcycle bearing no.MH-03-AY-0241.

**CCTV footage and its admissibility thereof:-**

**24.** The prosecution has relied on the CCTV footage which, according to them, was taken from the camera installed at the Lokmanya Tilak Terminus to establish the fact that the appellant was last seen with the deceased at around 05:00 AM in the morning of 05.01.2014. To establish this fact, the prosecution has examined PW-1 Girish Rajeshwar Mishra, PW-31 Chandramani Sitaram Pandey, PW-33 Vishal Bhaskar Patil and PW-34 Nishikant

Vishwanath Tungare, the Police Inspector.

**25.** According to PW-1, the data for 05.01.2014 between 04:00 AM to 07:00 AM consisting of the CCTV footage for that time was copied in two pen drives on 18.01.2014. He has deposed that PW-31 Chandramani Sitaram Pandey searched for the particular date and copied the footage to the pen drives and in this way the footage was copied from the computer in two pen drives. In all 425 files were copied, according to the witness. The witness states that he signed the Panchnama and thereafter PW-34 Nishikant Vishwanath Tungare sealed the articles and stamped it. Mr. Tungare told PW-1 that one pen drive was for the court and one was for operational purpose. The Panchnama was marked as Exh.36. In Exh.36 Panchnama the following description of digital video recorder 1 and digital video recorder 2 is given:

> "Shri Chandramani Pande, acceding to the request made by the Senior Police Inspector, Shri Tungare, gave brief information in respect of the machinery installed in the said CCTV Control Room. He said that there are 36 cameras in Kurla Terminus area and the recording done by the said cameras is seen on two screens, installed in the control room.

> Now two screens are seen in the control room, one of the said screens is of LG Company, the recording by 16 cameras, seen on the said screen is stored in HP Company computer CPU, attached thereto. They call the said CPU as Digital Video Recorder-1 (DVR-I). Further, the recording by 20 cameras, seen on the another Samsung Company screen is stored in the i-ball Company computer CPU, attached thereto. They Call the said CPU as Digital Video Recorder-2 (DVR-2). The technician, Shri Pande showed both the said computer CPU. The said CPU are seen to have electric supply from the electric connection in the said room and both the said CPUs are seen to be connected with wires to two separate screens and to the camera installed on platform."

**26.** PW-31 Chandramani Sitaram Pandey is a CCTV operator doing the job in the Central Railway in CCTV department since 2013. According to his deposition, in one monitor, there are 20 cameras and in the other there are 16 cameras and the cameras are fixed on all the platforms and rooms and the servers are kept in the control room. He states that there was automatic recording system in the camera and the recording is saved in the server. According to PW-31, in one server there is recording of 12 days and in another server there is recording of one month. After 12 days and one month respectively, the recordings in the servers get automatically deleted

and the footage cannot be saved after the said period unless the footage is saved in the hard disc. According to him, the footage of 05.01.2014 was available in the CCTV camera and it was copied to the pen drive and given to the police. In cross-examination, he admitted that he was an employee of contract company Sonal Enterprises. The witness further deposed in the cross-examination as under:-

> "12. ...The limitation for saving the period is for 12 days is in DVR - II. It is correct to say that under DVR II, the recording of 16 cameras is done. I have not stated in my statement that there is recording of 20 cameras in DVR-II. I cannot say why it is mentioned in the statement. The portion marked 'B' in my statement is not stated by me.
>
> 13. Sixteen cameras are from platform Nos. 1 to 5 in DVR – II. It is correct to say that the cameras of DVR I is located in outer side of the platform. It is correct to say that 16 cameras which are mentioned in DVR- II covers the half platform and the bridge. It is correct to say that the limitation for saving the data in these 16 cameras are 12 days. I cannot say the date whether the police came to L.T.T. railway station on 18/01/2014. It is correct to say that the date of 5th March will be deleted on 17th March at night automatically....
>
> 15. ... Before 18th the police from Kurla police station never contacted me. RPF also did not call me during the period of 05/01/14 to 18/01/14. It is correct to say that any video can

be edited at any stage but not from the server. One can edit the recording from the Pen Drive."

He further admitted that he gave the recording in the pen drive from the server. What is of significance is that the recording on platform nos. 1 to 5 is in DVR-II where the life span is 12 days and also that the DVR-I cameras are located in the outer side of the platform.

**27.** PW-33 Vishal Bhaskar Patil, is Police Constable attached to Lokmanya Tilak Terminus who was on duty in Railway Protection Force. He speaks of CCTV footage being taken after the Senior Police Officer met the officers of Railway Protection Force and obtained oral permission. On a specific question whether there was any fault in the CCTV server during the period 01.01.2014 to 08.01.2014, he answered that on 18.01.2014, there was a fault and the server was not working and therefore Mr. Pandey was called. He further stated that after repair, the servers were fine. He further stated that on 18.01.2014, there was no fault in the cameras of DVR-II.

**28.** Mr. Shri Singh, learned counsel relying on Section 65-B of the Indian Evidence Act, 1872 has raised objection regarding admissibility of CCTV evidence. Before we deal with the admissibility, we would briefly discuss the evidence based on the CCTV to see if even assuming the CCTV evidence was admissible as to where it takes the prosecution case? The CCTV footage was marked through the evidence of PW-1 as Article 1 and 1-A being the pen drive and Exh.36 being the Panchnama for collection of CCTV. The CCTV was first played before PW-26, the father of the deceased EA who testified to the effect that it was his daughter in the footage who was entering the platform along with a trolley bag and a sack on the back. PW-26 further stated that in one footage his daughter was holding the mobile and one man was driving her trolley.

**29.** PW-27 Hemant Dharma Kohli claims to be a neighbour in the building where the appellant resided. He deposes that, on 26.03.2014, the police asked him to come to the police station and he states that the police showed him two CCTV footages and in one

footage he saw that the appellant was walking on the platform with one bottle of cold drink in his hand and in another footage he was driving the trolley bag. He also stated that the said person was the appellant in both the footages.

**30.** PW-34 Mr. Nishikant Tungare is a Senior Police Inspector attached to Kanjur Marg Police Station. He speaks of visiting the CCTV control room and asking for the footage of 05.01.2014 between 04:00 AM and 07:00 AM. He speaks of calling for two pen drives from PC Jadhav and about the drawing of Panchnama and completing the same by 07:15 PM. Thereafter, he deposed to the following effect:

> "8. During the investigation, it was found that one person who is working in salt office which is near the spot is having some important information with him. Therefore, I asked the team to call him in the police station. I called him and I recorded his statement. His name is Prahlad Yadav. On 05/01/14 Prahlad Yadav saw that one person was trying to start his motorcycle near the spot. I recorded his statement on 19/01/14.
>
> 9. I have recorded the statement of the ASI who has taken the samples to the forensic lab. When I was watching the CCTV footage in pen drive, I found that one person was talking with somebody therefore I gave the instructions to

inquire said person. Said person was seen in said CCTV footage for many times and he was having a bottle of soft drink in his hand. After inquiry, I came to know that said person was talking with the person who was the A.C. mechanic of the railway and his name is Nair. I called him in the police station, inquired him and I recorded his statement on 22/01/14.

10. During inquiry, the investigating team found that said soft drink bottle was purchased by him from one of the stalls in railway staff therefore I called said person in the police station and I recorded his statement. I inquired him how he remembered said person, he gave the statement and accordingly I recorded it.

11. During the inquiry with auto and taxi drivers, the investigating team found that two drivers have seen the girl whose photo was shown to them therefore I called said taxi drivers and recorded the statements of two taxi drivers."

**31.** PW-34 deposed that he went to Kurla Terminus for the first time on 18.01.2014 at 10:00 AM and he further stated that he did not enquire with the persons from the Railway Station about the incident. He however, stated that when he was in the CCTV control room, other staff members were enquiring about the crime. PW-34 deposes that he gave the copies of the photographs of the deceased EA to all the investigating team members and that was a coloured photograph. He however added that neither did he collect the

photograph of the accused after watching the CCTV footage nor asked for the sketch of the accused. PW-34 deposed that he did not show the CCTV footage to PW-18 Shivkaran Chotelal Patel.

**32.** Mr. Shri Singh, learned counsel vehemently contended that the CCTV footage in no way advances the case of the prosecution. According to the learned counsel, if the footage was admittedly from DVR-II, the life span of the footage would have been only till 17.01.2014 and since admittedly the Panchnama was drawn on 18.01.2014 and the pen drives were taken on 18.01.2014, the CCTV footage is not reliable. CCTV footage, if available from 18.01.2014, was inexplicably not used for identification by chance witnesses, raising doubts on its seizure and veracity. According to the learned counsel, if the CCTV footage had been obtained from 18.01.2014, there was no reason why it was not shown to PW-18 Shivkaran Chotelal Patel (statement recorded on 08.02.2014), PW-19 Surendra P.P. Nayar (statement recorded on 22.01.2014) and PW-23 Prahlad Kumar Yadav (statement recorded on 19.01.2014) to confirm that the individual person that they saw on 05.01.2014

was in fact the same person seen in the CCTV footage. In any case, according to the learned counsel, PW-18, PW-19 and PW-23 only claim to have seen the appellant and not the appellant and the deceased together. Equally, according to the learned counsel, a serious doubt arises since PW-20 Ramesh Sonu Rathod and PW-21 Ganesh Krishna Shetty were also not shown the CCTV footage since they claim to have seen the appellant with the deceased. No sketch or photograph of the person in the CCTV footage was also prepared and the footage was also not sent for forensic analysis.

**33.** According to the learned counsel, the CCTV footage will not tantamount to "last seen together evidence" as identification of the appellant and the deceased in the same footage has not been proved. Learned counsel submits that no witness identified both the deceased and the appellant in the CCTV footage and the two witnesses to whom the CCTV footage was shown Singavarapa Jonathan Surendra Prasad PW-26 (who identified his daughter) and PW-27 who identified the appellant have not established the fact that the identifications were in the same footage. PW-26 identified

only his daughter coming out with her bag and with an unknown person on platform no. 4 of LTT Station and PW-27 saw the footage and identified the appellant, in one footage with the cold drink bottle and in another with the trolley bag but did not mention presence of any girl, contends the learned counsel. Learned counsel contends that PW-27's identification did not inspire confidence as it was as late as on 26.03.2014; that the police brought him into the picture and nothing was there to establish that PW-27 knew the appellant as a person who roams in the area. Learned counsel further contends that PW-38 Vyanket Bhanudas Patil admitted that he did not collect the address proof of PW-27. According to the learned counsel, it is unclear as to how the police knew that the persons PW-18 and PW-19 were speaking to the same person who was seen in the footage.

**34.** We find that the infirmities referred to by the defence namely, about the life span of the CCTV footage in DVR-II being 12 days; the absence of identification of both the appellant and deceased in the same footage by the witnesses; the absence of explanation as to

how the Police knew that the person PW-18 and 19 were speaking to was the same person in the footage and other infirmities raised have not been adequately answered by the prosecution in its evidence. Learned Additional Solicitor General Mr. Raja Thakare painstakingly took us through the available evidence and objectively placed the matter before us. However, from the material available on record, these lingering doubts in our mind have not been adequately addressed.

**35.** However, what resolves this issue against the prosecution completely is the failure of prosecution to follow the mandate under Section 65-B of the Indian Evidence Act, and the failure to produce the Section 65-B(4) certificate. Section 65-B reads as under:-

> "Section 65-B - Admissibility of electronic records. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without

further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:--

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, --

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any

matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment; --

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. -- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process."

**36.** Mr. Shri Singh learned counsel for the appellant fairly submits that when the CCTV footage was introduced as evidence through PW-1 on 28.08.2014, the judgment of this Court in ***State (N.C.T.***

***of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600*** was holding the field. In ***Navjot Sandhu (supra)***, this Court held as follows:

> "150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

**37.** However, on 18.09.2014, in the case of ***Anvar P.V. v. P.K. Basheer & Ors., (2014) 10 SCC 473, Navjot Sandhu (supra)*** was overruled. In ***Anvar P.V. (supra),*** it was held as under:

> "22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

**38.** According to the learned counsel, since the exhibits were

marked before 18.09.2014, the appellant did not have the benefit of the decision of the ***Anvar P.V. (supra)*** when the footages were marked.

**39.** In ***Shafhi Mohammad v. The State of Himachal Pradesh (2018) 2 SCC 801*** (delivered on 30.01.2018), a two Judge Bench of this Court after noticing ***Anvar P.V. (supra)*** held that a party who is not in possession of device from which the document is produced cannot be required to produce the certificate under Section 65-B(4) of the Indian Evidence Act. It also held that applicability of requirement of certificate being procedural can be relaxed by the Court wherever interest of justice so justifies.

**40.** In ***Sonu @ Amar vs State of Haryana (2017) 8 SCC 570,*** (delivered on 18.07.2017) the following paragraphs being crucial are extracted hereinbelow:-

> "30. In R.V.E. Venkatachala Gounder [R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752] , this Court held as follows: (SCC p. 764, para 20)

"20. … Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is [Ed.: The matter between two asterisks has been emphasised in original.] itself inadmissible [Ed.: The matter between two asterisks has been emphasised in original.] in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the [Ed.: The matter between two asterisks has been emphasised in original.] mode of proof [Ed.: The matter between two asterisks has been emphasised in original.] alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party

tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior court.

31. It would be relevant to refer to another case decided by this Court in P.C. Purushothama Reddiar v. S. Perumal [P.C. Purushothama Reddiar v. S. Perumal, (1972) 1 SCC 9] . The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that: (SCC p. 15, para 19)

"19. Before leaving this case it is necessary to refer to one of the contentions taken by Mr Ramamurthi, learned counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to

object to their admissibility."

32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

As rightly pointed out by Mr. Raja Thakare, learned Additional Solicitor General, it was held in ***Sonu (supra)*** that objection about Section 65-B(4) of the Indian Evidence Act, not being complied, cannot be taken at the appellate stage since that will deny an opportunity for the prosecution or the opposite party to rectify the defect. It was also held that the documents were not inherently inadmissible in evidence.

**41.** In this case, learned counsel Mr. Shri Singh contends that even though there was no objection when PW-1 marked the exhibits; question was put to PW-38 Vyanket Bhanudas Patil about the need for Section 65-B certificate and its absence in the case of CCTV footage particularly when Section 65-B certificate was furnished for CDR report by the police. Relevant part of the deposition of PW-38 reads as under:

> "It is correct to say that while calling the CDR reports, I called the certificates u/s. 65-B of Evidence Act. It is correct to say that I was aware that while collecting the electronic evidence, the certificate is required. It is correct to say that I have not collected the certificate for CCTV footage. It is correct to say that I have not taken any authority letter from

> railway or said company to show that Chandramani Pandey has authority to handle the CCTV server. It is correct to say that the papers which were received from the Kanjur Marg police station, no such certificate was received."

**42.** The deposition of PW-38, when this question was put, was recorded on 18.06.2015 when the judgment in ***Anvar P.V. (supra)*** was holding the field. The prosecution ought to have taken a cue and attempted to remedy the situation. They have not done so.

**43.** We are dealing with a criminal case where the accused is being tried for the offences which involve capital punishment. A court of law in this scenario cannot be technical about the manner of objections that are raised. Even though objection has not been raised specifically when the CCTV footage was exhibited by PW-1, when PW-38 was in the witness box a specific question was put to him and subsequent to evidence, he deposed that he was aware of the necessity of furnishing 65-B certificate while collecting electronic evidence. On the facts of the present case, we are inclined to treat it as an objection taken at the earliest point in time. Thus, when the prosecution was aware of the need for the 65-B (4)

certificate and they themselves collected it for the CDRs there was no reason as to why they did not collect the same for the CCTV footage.

**44.** The resort to Section 465(2) Cr.P.C. by the learned A.S.G. does not impress us because according to us, objection has been taken at the earliest available instance.

**45.** The Trial Court judgment in this case came on 31.10.2015, when ***Anvar P.V. (supra)*** was holding the field and the High Court judgment came when ***Sonu (supra)*** had been further reinforced by the judgment in ***Shafhi Mohammad (supra)*** (delivered on 30.01.2018).

**46.** The High Court pronounced its verdict on 20.12.2018. What is important is that the High Court which also viewed the CCTV footage had the following crucial finding to make:

> "The CCTV footage obtained by the Investigating Agency during the course of investigation and which was put before the trial Court through Prosecution Witness No.31 is the axis of the whole chain of circumstances relied upon by the

prosecution."

**47.** A two-Judge Bench in a referral order reported in ***Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors., (2020) 3 SCC 216*** referred the following question to a larger bench:

> "3. We are of the considered opinion that in view of Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , the pronouncement of this Court in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC (Civ) 346 : (2018) 1 SCC (Cri) 860] needs reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless to say that there is an element of urgency in the matter."

**48.** The reference came to be answered in the judgment reported in ***(2020) 7 SCC 1*** by a three-Judge bench in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.*** The relevant portions of which are as under:-

> "45. Thus, it is clear that the major premise of Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 :

(2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

46. Resultantly, the judgment dated 3-4-2018 of a Division Bench of this Court reported as Shafhi Mohd. v. State of H.P. [Shafhi Mohd. v. State of H.P., (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704] , in following the law incorrectly laid down in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] , must also be, and is hereby, overruled.

47. However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by

a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate.….
52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the

trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , and incorrectly "clarified" in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] . Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426] , which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner

stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

73. The reference is thus answered by stating that:

73.1.Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno [Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54] , being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] and the judgment dated 3-4-2018 reported as Shafhi Mohd. v. State of H.P. [Shafhi Mohd. v. State of H.P., (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704] , do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).

> The last sentence in para 24 in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] which reads as "… if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act …" is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,…". With this clarification, the law stated in para 24 of Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] does not need to be revisited."
>
> (Emphasis supplied)

**49.** This judgment has put the matter beyond controversy. In view of the above, there is no manner of doubt that certificate under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record and further it is clear that the Court has also held ***Anvar P.V. (supra)*** to be the correct position of law.

**50.** There is one more difficulty in the way of prosecution in this case. In ***Sundar @ Sundarrajan vs. State by Inspector of Police, (2023) SCC OnLine SC 310*** this Court reiterated the holding in ***Mohd. Arif @ Ashfaq v. State (NCT of Delhi), (2023) 3 SCC 654***

and held that in matters pertaining to award of death sentence, the case must be considered in the light of the decisions in ***Anvar P.V. (supra)*** and ***Arjun Panditrao Khotkar (supra).*** So holding, the Court in both ***Sundar (supra)*** and ***Mohd. Arif (supra),*** after noticing the holding in ***Sonu (supra)*** eschewed the electronic evidence for want of certificate under Section 65-B(4) of Indian Evidence Act and considered the matter. Paragraphs 44 to 46 from ***Sundar (supra)*** are extracted hereinbelow:-

> "44. Therefore, we are inclined to agree with the ratio in Sonu by not allowing the objection which is raised at a belated stage that the CDRS are inadmissible in the absence of a Section 658 certificate, especially in cases, where the trial has been completed before 18 September 2014, i.e. before the pronouncement of the decision in Anvar P.V.. However, we are also mindful of the fact that the instant matter involves the death sentence having been awarded.
>
> 45. Most recently, in Mohd. Arif v. State (NCT) of Delhi, a three judge Bench of this Court while deciding a review petition in a case involving the review of a death penalty faced a similar fact situation where the decisions of the trial court and appellate courts were rendered during the period when Navjot Sandhu was the prevailing law. In that case as well, the Court took note of it being a matter involving a death sentence and held that:

"24. Navjot Sandhu was decided on 4.8.2005 i.e., before the judgment was rendered by the Trial Court in the instant matter. The subsequent judgments of the High Court and this Court were passed on 13.9.2007 and 10.8.2011 respectively affirming the award of death sentence. These two judgments were delivered prior to the decision of this Court in Anvar P.V. which was given on 18.9.2014. The judgments by the trial Court, High Court and this Court were thus well before the decision in Anvar P.V. and were essentially in the backdrop of law laid down in Navjot Sandhu. **If we go by the principle accepted in paragraph 32 of the decision in Sonu alias Amar, the matter may stand on a completely different footing. It is for this reason that stand on has been placed on certain decisions of this Court to submit that the matter need not be reopened on issues which were dealt with in accordance with the law then prevailing. However, since the instant matter pertains to award of death sentence, this review petition must be considered in light of the decisions made by this Court in Anvar P.V. and Arjun Panditrao.**

**25. Consequently, we must eschew, for the present purposes, the electronic evidence in the form of CDRs which was without any appropriate certificate under Section 65-B(4) of the Evidence Act."**

46. Accordingly, we too deem it appropriate to consider this review petition by eschewing the electronic evidence in the form of CDRS as they are without the appropriate certificate under Section 658 even if the law, as it was during the time the trial in the present case was conducted, allowed for such electronic evidence to be admitted."

(Emphasis supplied)

**51.** In view of the above, we are not able to place any reliance on the CCTV footage, insofar as an attempt is made by the prosecution to attribute that the appellant and the deceased EA were last seen together based on the CCTV footage. We eschew the same from consideration.

**Evidence of PW-20 and PW-21 for the last seen together as well as evidence of PW-18 and PW-19 for sighting the appellant:**

**52.** Anticipating the problem that he might encounter due to the absence of 65-B(4) certificate, Mr. Raja Thakare, learned Additional Solicitor General tried to sustain the conviction by relying on the evidence of PW-20 and PW-21 for having last seen the appellant and deceased EA together and also on the evidence of PW-18 and PW-19 for having sighted the appellant on the morning of 05.01.2014.

**53.** PW-20 Ramesh Sonu Rathod is a witness doing the job in taxi pre-paid booth at Kurla Terminus for the last three years as of

11.02.2015, the day he deposed. His statement was recorded on 20.03.2014, a good two months and 15 days after the incident. He also participated in the identification parade on 25.03.2014 and identified the accused. He admits that on 07.01.2014 persons from Crime Branch came and met him but could not identify as to who they were. He denies the suggestion that he had disclosed whatever he knew about the incident to them. He admits that thereafter he met the police only on 20.03.2014.

**54.** According to PW-20, his job as supervisor involved the work of looking after the workers and going to RTO for office purposes. He deposed that in January there was a Sai Bhandara and therefore he was collecting the donation from rickshaw drivers for Sai Bhandara on 05.01.2014, while on duty from 09:00 PM on 04.01.2014 to 09:00 AM on 05.01.2014. He claims that on that day Visakhapatnam Train came on the platform at about 05:00 AM to 05:15 AM, and he saw one lady going with one man who was having trolley bag in his hand. The witness deposes that he enquired whether the man required a taxi and the said man told that he was

having vehicle. He described the man as having a broad moustache and was bald from front side, about 5’5’’ tall and wearing T-shirt and blue jeans pant. He was about 35 years of age. He deposes that police came to enquire regularly and used to pressurize the taxi drivers. He states that his friend Ganesh Shetty (PW-21) came to him and told him that he visited the police station and gave statement to the police about the said lady. At that time, PW-20 said that he also saw that girl and was ready to give his statement. Thereafter, he went with his friend to Crime Branch on 20.03.2014 and gave his statement that he saw the girl going with one person. On 25.03.2014, he speaks of the TI parade held to identify the appellant. He deposes in cross-examination that the drivers of pre-paid taxi never called passengers like normal taxi driver and also that about 500-600 persons would get down from the train and leave in a hurry. He further deposed that many people were having thick moustache.

**55.** PW-20 claimed that he was watching them for two minutes from a distance. He claimed that the girl was wearing T-shirt, jeans

and Dupatta though he could not say about the colour of the Dupatta and T-Shirt. He stated that the girl was of 4’5’’ in height. He admits that he came to know about the murder of the said girl on 05.01.2014 and was aware that the police was enquiring about the murder. He admits that he did not mention in his statement that he was on duty from 09:00 PM on 04.01.2014 to 09:00 AM on 05.01.2014. He stated that the person showed on VC screen was the person that he saw on the night of 04.01.2014 to 05.01.2014.

**56.** PW-21 Ganesh Krishna Shetty works in the pay and park place at Lokmanya Tilak Terminus for the last five years. His statement was recorded on 04.03.2014 nearly two months after the date of the incident. He claims that police from Crime Branch came near the parking and they were having one photograph of one girl and the police asked whether he was on duty on 05.01.2014. When he told the police that he saw the girl, they asked him to come to the Crime Branch Office unit VII, in the evening. When he was asked as to how he knew the girl, he said he saw the girl with one man. He further added that the said man parked his motorcycle near

RPF Chowki at about 04:00 AM to 04:15 AM and when he went to stop him, the man went inside and thereafter when he followed him and asked him to take receipt, the man abused him and told him that he was a staff member and after abusing him in a filthy manner asked him whether he did not know him as an RPF staff? Thereafter, the man again abused him and went to platform no. 1. The witness adds that he saw the person at 05:15 AM having trolley bag in his hand and one girl was with him. He further adds that there was conversation between the man and the girl for one minute; that the man took the bike from the stand, put the said trolley bag in front of the motorcycle and the girl was having sack on her back and she sat on the backside of the motorcycle and he saw the girl since she passed from the gate where he was standing and that she was wearing jeans and top and having shawl like odhani (stole).

**57.** Thereafter, he deposed about going to Arthur Road Jail on 20.03.2014 and speaks of identifying the appellant in the identification parade. He admits that the police met him for the first time on 01.03.2014 and showed a passport size photograph of the

girl. Again on 04.03.2014, the girl's photograph was shown to him. He admits that the police asked him to give the list of vehicles which were parked in the parking area on the night of 04.01.2014 to 05.01.2014. He further deposed that he used to put the number when the vehicle entered the parking place. He however deposed that since the receipt of the vehicle of the accused was not prepared, he did not mention the number on any receipt. He admits that no action or complaint was lodged against the appellant for not paying parking charges and did not try to catch him.

**58.** He however states that when he met PW-20 Ramesh Rathod, he did not tell him that he went to the police and did not talk with Ramesh about the recording of his statement. He states that the passage of exit was 2.5 feet and passage was always crowded after the arrival of train and further added that if two persons pass together, it is not necessary that they have arrived together.

**59.** Mr. Shri Singh, learned counsel for appellant mounts a scathing attack on the evidence of PW-20 and PW-21 labelling

them as unreliable witnesses. Learned counsel submits that PW-21's statement was recorded on 04.03.2014 and PW-20's statement was recorded on 20.03.2014 about two to two and a half months after the incident. In the meantime, the appellant had been arrested on 02.03.2014. According to the learned counsel, the delay was inexplicable since the police had been patrolling the station and making enquiry since 16.01.2014. Learned Counsel submits that both PW-20 and PW-21 admit to being approached by the police earlier prior to the appellant's arrest. While the Crime Branch enquired with PW-20 for half an hour on 07.01.2014, it enquired from PW-21 on 01.03.2014. Nothing was disclosed about seeing the deceased or the appellant at that time by these two witnesses.

**60.** Learned counsel draws pointed attention to the deposition of PW-20 about the pressure exerted by the police on taxi drivers and further about PW-20 giving the statement only after PW-21 told him and PW-21 contradicting this fact. The remarkable similarity in the descriptions of the appellant by PW-20 and PW-21 even though they were speaking of it after a considerable lapse of time,

came in for some pointed criticism by the learned counsel for the appellant. Learned counsel submits that the identification parade holds no value as the photo of the appellant was widely circulated in the media by 04.03.2014 including grainy stills from the alleged CCTV footage.

**61.** According to the learned counsel, DW-1 Abhijeet D. Sathye who was then working with the Mumbai Mirror as a Senior Assistant Editor Exhibited Article 40 'the extract of the Mumbai Mirror newspaper dated 04.03.2014' which published the photograph of the appellant. Equally, DW-2 Shiva S. Devnath, the reporter of Mid Day Newspaper admitted to have published the photograph of the accused on the 04.03.2014 edition. The witnesses claimed that they received the photographs from secret sources. In view of this, the learned counsel for the appellant contended that the identification parade on 25.03.2014 was not only belated but wholly unreliable. Further, learned counsel submits that PW-20 and PW-21 did not identify the deceased via any photo in the Court. While PW-20 was not shown the photograph of the deceased, PW-

21 though stated that he was shown the photograph, the same was not proved and no memo of identification was drawn up. We will revert to these witnesses after discussing the evidence of PW-18 Shivkaran Chotelal Patel and PW-19 Surendra Nayar for a comprehensive analysis.

**62.** PW-18 Shivkaran Chotelal Patel works in the canteen at Kurla Terminus since 24.12.2013. According to him, the stall where he was working was at platform no. 4 and 5 facing towards Kalyan Railway Station. He deposes that on 08.02.2014, the Kanjur Marg Police came to him. The police asked him whether any person came to him for purchasing cold drink or water on 05.01.2014. He deposes that he told that thousands of people come to him and as to how could he tell them as to who came. He states thereafter that he remembered that on 05.01.2014 one person came to him after opening the stall and he purchased thums-up for Rs. 34/-; that the said person gave him currency note of Rs. 100/-; that he asked him to give change of Rs. 4/-; that he was not having change of Rs. 4/- therefore he gave chocolate. The witness deposes that at that time

the person started abusing him and for 10-15 minutes he was debating with him and thereafter he gave a change of Rs. 4/- to him. Ordinarily, if a person in this scenario asked for a change of four, one would have assumed that he wanted to return a round figure of Rs. 70/- and if the change Rs. 4/- was not given he ought to return a figure of Rs. 6/- and it is unclear as to how after the exchange of argument, he claims to have returned Rs. 4/-. An explanation, however, has indeed been attempted in the cross-examination.

**63.** He further describes that the man was having moustache and his forehead was broad and that he was wearing T-shirt and blue colour pant and one key was hanging from his pocket; the man was of 5'5'' in height with a well built body and was 28 to 29 years of age. The witness states that the statement was recorded on 08.02.2014 and he participated in the TI parade on 25.03.2014 and identified the appellant in the jail. In the cross-examination, he adds that he gave the person two chocolates and Rs. 4/- change. He admits that he was having change but did not give him change. He states that nobody came to him to enquire before 08.02.2014.

**64.** PW-19 Surendra PP Nayar, an AC mechanic who was on duty at Kurla Terminus on 04.01.2014 between 08:00 PM and 06:00 AM. He deposes that on 05.01.2014 Tulsi Express arrived at platform no. 5 at 04:30 AM and that he would enter the AC compartment one hour before the departure and put on the AC and keep the door open. He deposes that he was standing near the train along with two attendants as people were going in and coming out. The witness states that on that day one person came to him and told him that he is from Railway staff and he wanted to go by that train. The person further stated that he was a coolie and now his service is confirmed as gangman. The witness replied to him that the TC was yet to come and advised him to enter the train after the TC's arrival. The witness also advised him to go to the general coach. According to witness, the person went and came back and told him that there was no place in the general bogie and at which point, the witness advised him to go in sleeper coach upto Manmad as there is quota of Nashik to Manmad. The witness claims that the person went away and was having thums-up bottle in his hand, had no

luggage and was wearing white coloured T-shirt and jeans pant and the person was well built and was not having hairs from the front side. The police recorded his statement on 22.01.2014 and thereafter he was called to the jail for the TI parade on 25.03.2014 and he identified the appellant. The witness denied that the police came along with photograph captured from CCTV footage.

**65.** Mr. Shri Singh, the learned Counsel for the appellant seriously questioned the reliability of PW-18 and PW-19. At the outset, learned counsel states that the witnesses cannot be classified as persons who have last seen the deceased with the appellant since they merely claim to have sighted the appellant alone at the LTT Railway Station on 05.01.2014. Learned Counsel submits that while PW-18's statement was recorded, nearly after a month from 05.01.2014 (the statement was recorded on 08.02.2014) and PW-19's statement was recorded on 22.01.2014. Learned Counsel claims that it is unnatural for either of them to remember the appellant based on any brief, chance encounter and canvassed that

it was surprising that identical detailed descriptions of height, clothes worn were provided by the witnesses.

**66.** Admittedly, according to the learned counsel, CCTV footage was not shown to the witnesses and as such it was unclear as to on what basis the Police knew that the person they were speaking of, was the same man in the footage. Learned counsel further questions that TI Parade was of no value since as was submitted earlier, the photographs were widely circulated in the Media from as early as 04.03.2014.

**67.** Learned counsel contends that circumstances of last seen can be taken into consideration only when the prosecution establishes that the time gap between the point where the accused and deceased were last seen together and the time when deceased was found dead was so small that the possibility of any other person being with the deceased could be completely ruled out. Learned counsel draws our attention to the judgments in ***State of Goa Vs. Sanjay Thakran &***

***Anr. (2007) 3 SCC 755***, and ***Anjan Kumar Sarma & Ors. Vs. State of Assam (2017) 14 SCC 359***.

**68.** According to the learned counsel, the deceased who alighted from the Train on 05.01.2014 was found dead on 16.01.2014. As per Dr. Chauhan, PW-25, the death was traced back 8-10 days before the post-mortem, which was held on 17.10.2014. Going by this, the deceased could have been killed at any point between 07.01.2014 and 09.01.2014 even as per the version of the prosecution. Learned counsel further claims that the place where the body was found, was not under the exclusive possession of the appellant and submits that without the prosecution discharging its burden that no third person could have intervened, the burden under Section 106 of the Evidence Act would not shift to the appellant.

**69.** We have carefully considered the evidence of PW-20 and 21 on the one hand, and PW-18 and 19 on the other. While PW-20 and

21 claim to have last seen the appellant and the deceased EA. PW-18 and 19 only claim to have seen the appellant.

**70.** Analysing the evidence, we must record that the witnesses fail to inspire the necessary confidence that a Court of Law looks for, to clinchingly establish the circumstances of last seen. To start, the statement of PW-20 was recorded on 20th March, 2014 a good two and a half months after 05.01.2014. Statement of PW-21was recorded on 04.03.2014 a good two months later. The police has not explained as to why this delay happened, particularly when they have been inquiring at the Station since 16.01.2014.

**71.** PW-20 was approached on 07.01.2014 and was interacted with for thirty minutes and PW-21 was approached on 01.03.2014. Neither of them disclosed anything about seeing the appellant and the deceased together.

**72.** PW-20, on top of it, admits to Police pressurising the taxi drivers. There is also contradiction between PW-20 and PW-21. PW-20 states that he gave the statement only after PW-21 told him

about his statement. PW-21 denies any such happening. The way his physical features are remembered also does not inspire confidence. It should not be forgotten that they are referring to a time when the Station would have been bustling with hectic activity, when the train would have arrived and people would be departing in hordes in a hurried manner. To recollect something that happened two and a half months back in this situation would be a tall order. The Identification Parade conducted by PW-39 Vishnu Janu Kanhekar also lacks steam since the photographs of the appellant were admittedly published earlier in the newspapers as deposed by DWs 1, 2 and 3.

**73.** In ***Suryamoorthi and Another v. Govindaswamy and Others, (1989) 3 SCC 24,*** this Court in Para 10 held as under:-

> **"10.** Two identification parades were held in the course of investigation. At the first identification parade PW 1 identified all the seven accused persons whereas PW 2 identified three of them, namely, Accused 2, 6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before

the identification parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether…"

**74.** In ***Gireesan Nair & Ors. v. State of Kerala, (2023) 1 SCC 180,*** this Court in Para 31 held as under:-

> **"31.** In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form i.e. physically, through photographs or via media (newspapers, television, etc.), the evidence of the TIP is not admissible as a valid piece of evidence (*Lal Singh* v. *State of U.P.* [*Lal Singh* v. *State of U.P.*, (2003) 12 SCC 554 : 2004 SCC (Cri) Supp 489] and Suryamoorthi vs. Govindaswamy [suryamoorthi v. *Govindaswamy*, (1989) 3 SCC 24 : 1989 SCC (Cri) 472] )."

**75.** However, evidence of PW-20 and PW-21 does not point towards the guilt of accused even if we discount all these infirmities. The law on circumstantial evidence mandates that any other hypothesis must be ruled out. This is not a case where any conviction could be sustained even if we believe PW-20 and PW

21 on the basis of their evidence, in view of our holding with regard to the other circumstances, some of which have been recorded hereinabove and some of which are to follow hereinbelow. In view of the same, even we have to assume that the evidence of PW-20 and 21 are to be taken at their face value (which is difficult) we still do not find the evidence clinching to record the conviction.

**76.** This Court in the case of ***Sanjay Thakran (supra)***, held as under:-

> "34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can

be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

**77.** PW-18 and PW-19 had not last seen the accused appellant and the deceased together. The statement of PW-18 was recorded on 08.02.2014 and the other of PW-19 on 22.01.2014. They have not been shown the CCTV footage admittedly. How they remembered as to what happened on 05.01.2014 when the Police recorded their

statement on 22.01.2014 and 08.02.2014 is anybody's guess. In any event, taking the evidence at its highest will only mean that the appellant was at the station and coupled with the other evidence some of which we have analysed hereinabove and the rest of which we have done hereinbelow it does not satisfy the five golden principles of circumstantial evidence. That TI Parade held on 25.03.2014 leaves much to be desired as the photograph of the appellant was all over the place in the Media, as early as on 04.03.2014.

With regard to PW-18 and PW-19 claiming to recollect incidents on the railway platform, we only want to draw attention to the judgment of this Court in ***Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra, (2008) 3 SCC 210***, wherein this Court answered as under:-

> "27. The overzealous efforts made by the prosecution to link the handkerchief allegedly found near the body of the deceased to the appellant lends support to the argument of the learned counsel for the appellant that the police had fabricated the case to implicate the appellant. In his statement, PW 7 Mohd. Farid Abdul Gani, who is said to

> have sold the handkerchief to the appellant, admitted that he was not selling branded handkerchiefs and that there were no particular marks on the goods sold by him. He, however, recognised the handkerchief by saying that the accused made a lot of bargaining and he was amused by the latter's statement that he will soon become an actor.
>
> 29. In our opinion it is extremely difficult to believe that a person engaged in the business of hawking would remember what was sold to a customer almost two months after the transaction and that too without identity of the goods sold having been established."

**Evidence of the Dog Walker PW-23 to establish presence of the appellant in the vicinity of the crime and evidence of PW-13:-**

**78.** PW-23 Prahlad Kumar Yadav claims that he works in the Salt Office between Kanjur Marg and Bhandup. One of his jobs is to wake up in the morning at 5:30 and take the five dogs for a stroll. According to this witness, on 19.01.2014, one constable came to him and took him to the Police Station and inquired whether he saw any person near the service road on 05.01.2014. He replied stating that he saw one person 100 meters away from the service road. The Police further inquired whether he saw any person starting the Bike

near the service road and he replied that he saw one person starting the bike.

**79.** PW-23 further states that he asked the person who was starting the bike whether he had a problem in starting the bike and the person nodded his head in agreement. The witness adds that when he saw him he found that there was mud on his shoulder and when he asked the person whether he fell down, the person said he did not fall down. When the witness further asked the person whether he could help him start the bike, the person told him that there was no petrol. The witness claims that he saw one bag on his back and one bag was kept on the petrol tank of the bike. The witness adds that the person parked the bike there and was going towards Vikhroli by pulling the trolley bag. The witness says he went towards in with the dogs and saw him wearing white colour T-shirt and blue colour jeans pant and he was 5’5” in height and was of wheatish complexion. The witness claims that he identified the person who he saw on 05.01.2014 at the Identification Parade

on 25.03.2014. The witness states that the person shown in Court on the VC screen is the same person.

**80.** Mr. Shri Singh the learned counsel assailing the evidence of PW-23 contends that the statement was belatedly taken on 19.01.2014 and it was unnatural to remember the details after a chance meeting which happened two weeks back particularly when the witness could not recall other past information. Learned counsel contends that the Police asked as to whether he saw someone starting a Motorcycle even though the role of the Motorcycle was known only on 03.03.2014 after the arrest of the appellant on 02.03.2014. Further learned counsel contends that there was no explanation as to how the investigator chanced upon the PW-23 and as to how they were aware that the Motorcycle was being used as early as on 19.01.2024 and as to why no steps were taken to recover the Motorcycle then. No site plan was prepared and according to learned counsel, PW-23 did not depose the exact time of the encounter and the exact place where he saw the man except stating that it was 100 meters away from the service road.

According to learned counsel, the proximity of the place where allegedly PW-23 saw the appellant to the spot where the body was found has not been established. Challenging the TI Parade, learned counsel reiterates about the Photos being widely circulated. He further contends that even though the Mobile Phone of the appellant was seized after his arrest on 03.02.2023, no steps to ascertain the location on 05.01.2014 were ever undertaken.

**81.** We find the evidence of PW-23 unnatural. As to how on 19.01.2024 he remembered about what happened on 05.01.2024, when he does not remember other past information is surprising. Here again, PW-23 is not the witness in the last seen category. He only claims to have seen the appellant under circumstances which are doubtful and to sustain a conviction on the basis of his evidence will be very unsafe. Hence, we discard the evidence of PW-23. As stated earlier, the TI Parade also is vitiated because admittedly the Photographs were all over the place from 04.03.2014. The other infirmities pointed out by the appellant have also not been met by the prosecution. That on 19.01.2024, PW-23 remembers that on

05.01.2014 he met a person in the early morning who had mud on the shoulders is too big of a pill to swallow. We need to say nothing more on this witness.

**82.** So far as PW-13 Mohammad Usman Lalmiyan Khan is concerned, a main portion of his examination in chief is as follows:-

> "I saw the accused for many times. I saw him coming to society for many times. On 05/01/14 at 9.00 a.m. I saw the accused going with his mother when I was standing with Chairman with other persons near the water room. (The witness started the statement saying that something published in paper). After 05.01.14 I have not seen the accused. The accused was having one bag on back and one trolley bag. The police inquired with me and recorded my statement on 12/03/14."

We really see no basis on which this can be considered as a link in the chain of circumstances to prove the offence of which the appellant is charged. We need to say nothing more.

**83.** Before we deal with the aspect of the evidence of PWs - 9, 12, 22 and the recoveries allegedly effected, we would first deal with the evidence of PWs -15, 16 and 17.

**Evidence of PWs-15, 16, 17:-**

**84.** PW-16 is Prasad Sharadchandra Shukla, a Priest in Trimbakeshwar Temple. He deposes that he does Puja for Kalsarpayog. He states that on 05.01.2014 the appellant came to him on reference of PW-17 Rajabhau Aher (the astrologer) for performing Puja of Kalsarpayog and Atigand Yog. He deposes that the appellant came with his horoscope and paid him Rs. 3000/-. That the Puja was performed at 7:30 AM on 06.01.2014 when the appellant was accompanied by his mother. He deposes that when his mother went out, the appellant told him that he had committed sin towards one lady and asked whether it would be cleared by performing the Puja. He told him that there is no relation between his act and the Puja and with this Puja the problems could be solved.

**85.** More importantly, he deposes that he used to maintain the register and mentioned the name of the person, date and amount given by him. In the register the name of the appellant is

mentioned. According to the witness, Police from Crime Branch came on 10.03.2014 and he produced the register; that the police took the register for taking Xerox copy and returned it to him and in the register on 06.01.2014 the appellant's name is mentioned on 4th number of the said page. He deposes that the entries in the register were in his handwriting and on the register the Panch witness PW-15 signed in his presence. The extract of the register verified from the original was marked as Exhibit 112. He stated that his statement was recorded on 10.03.2014 and also stated that the accused shown on Video Conference was the same. In the cross-examination he deposes that he starts writing diary by "Om or Swastik" and used to perform Puja on copies or notebooks on Diwali.

**86.** PW-16, stated that neither was his name mentioned, nor was there any stamp of his on the register. He submitted that he had not brought the register maintained before and after this register. He also admitted that there is no entry in the register after 09.03.2014. He further stated that the names of the persons who came to him

on 07.01.2014 are not mentioned in the register. Further the names of persons who came from 13.01.2014 to 14.01.2014 for performing Puja are also not mentioned. He stated that he is not able to say who came on 07.01.2014. He admitted that there are different hand writings of six to seven persons in the register and there is no signature of any person under the entry and that he cannot say that which entry is made by whom. He also stated that there are several strikings in Exhibit 112. He says that except the signature on Exhibit 112 there is no signature on any page of the register. He stated that he cannot say how many persons have performed Puja on 06.01.2014. He admitted that he had not stated in his statement that after mother left the house, the appellant asked him about anything.

**87.** PW-15 Ashok Kumar Harivilas Pandey is a resident of Mumbai. According to his evidence, on 10.03.2014, Police constable Sanjay Jadhav called him to the Police Station. Police Officer Mr. Mane was present there. The Police told him that he had to go to Nasik, Panchvati, Makhmalabad for conducting

Panchnama. He along with another Panch witness and Mr. Mane went to Nasik by white colour Scorpio Vehicle. He was told that one house search in one murder case at Nasik had to be done. They reached Makhmalabad at 12:00 noon. During the search, nothing was found in the house. Post lunch they went to Trimbakeshwar and Mr. Mane sent one constable to call PW-16 Shri Prasad Shukla. The Police asked him whether the appellant came for performing Puja at which point PW-16 took one register from his bag and after going through the same, told him that appellant came there to perform Puja on 06.01.2014 and received Rs. 3000/- from him. He stated that the Police took the Xerox copy of the extract of register and the original was returned. The Xerox copy was marked as Article 30. The extract bears the signature of PW-15 at serial no. 2. The Panchnama was marked as Exhibit 110 which was counter signed by PW-37 Santosh Dattaram Sawant - SPI attached to DCB CID Unit-VII. He admitted that there was no signature of PW-16 on the Panchnama and that there were no other persons from Trimbakeshwar when the Panchnama was prepared.

**88.** PW-17 is Rajabhau Baburao Aher, an Astrologer in Nasik. According to this witness, on 05.01.2014 at about 2 PM, the appellant came with one elderly lady. The appellant was under pressure and he told him that his stars are not good and therefore he consulted him to see his horoscope. On reading his horoscope, he told him that his horoscope had Kalsarpadosh and Atigand Dosh and that a shanti Puja had to be performed at Trimbakeshwar. PW-17 gave him the visiting card of PW-16 and asked him to go to him. He stated that when the appellant and the lady were about to leave, the appellant asked him if any sin has been committed by him against any woman and whether the said Puja could rectify it. His reply was that answer, would be given by Guruji. He submitted that the original of the horoscope is with the appellant and he identified the Xerox copy. The Xerox copy was marked as Exhibit 114. On VC, he identified the appellant. In the cross-examination, he admitted that there was no signature of his on the horoscope and no date was mentioned and even the signature of appellant was not there. He admitted that 5 to 10 persons come daily and 25 persons

would come in a week and he cannot say the description and names of the said persons since he did not maintain any register.

**89.** Mr. Shri Singh, learned counsel for the appellant submits that the statements attributed to the appellant are vague and generic and did not link the appellant to the crime. Learned counsel submits that on 02.03.2014, when the appellant was arrested the Police claim that the horoscope was in his back pocket and the Police took eight days to investigate the horoscope, particularly, when the Police travelled to Nasik on 03.03.2014 to allegedly recover the trolley bag. The appellant's visit to PW-16 has also not been proved.

**90.** We are really at a loss to understand as to what the prosecution seeks to establish. The priest has no systematic account of maintaining registers and on summoning of the Police, he seems to appear before the Police and produced the register out of the bag. It is also intriguing why the appellant would carry the horoscope as late as on 02.03.2014. In any case, the evidence given by PWs -15,

16 and 17 do not constitute circumstantial evidence having any nexus with the commission of the crime in question. We totally discard this from the chain of circumstances.

**Evidence of PWs - 9, 10, 12 and 22 and the alleged extra judicial confession to PW-9:-**

**91.** The role of the Motorcycle in this case has several twists and turns. PW-10 Sureshchandra Ramdhiraj Mishra, is a driver of Auto Rickshaw and is a resident of Vikroli, Mumbai. He is acquainted with PW-9 Nandkishore Sahu since 2010. The acquaintance, according to him, was only to the extent of Hi, Hello. He states that he gave a Discover Motor Bike of Bajaj Company bearing no. MH03AY0241 to Nandkishore Sahu.

**92.** PW-10 states that his Pan Card, Voting Card and Ration Card were given for purchasing the said Motor Bike while the payment was being made by PW-9 also known as Nandkishore Sahu. He states that PW-9 was using the said Motor Bike and he gave the documents since such documents were not with Sahu. His case is

that he gave the documents and Sahu (PW-9) made the payment and that the police recorded his statement. He is not able to say the date and month when the Motor Bike was purchased and there was nothing with him to show that it was purchased in his name and was used by Sahu. He states that the Police called him in connection with the case on 05.03.2014 and told him that the vehicle was seized in the said murder case.

**93.** The significance of the Motor Bike emerges in the evidence of PW-9 Nandkishore Sahu who claims to be the resident of Shri Bhalchandra Building in Kanjurmarg and claims to be a hawker. He claims that he has Motorcycle bearing No. MH03AY0241 and he purchased the same in year 2010. He is aware about the appellant since, according to him, the appellant stays behind his building. PW-9 states that he and the appellant used to play cards and the appellant was staying at Kanjurmarg before 2-3 years and was staying at Nasik also. He states that the mother and the sister of the appellant were staying at Kanjurmarg. While the appellant's mother sold fruits, he did not know about the sister of the appellant,

Sunita. According to him, the appellant came to Mumbai and he met him for the last time in Mumbai on 31.12.2013 on which day he met for 2-4 times. He states that he is aware of PW-12 Rajashri Raju Shetty who does the business of selling liquor in the Chawl. He claims that on 04.01.2014, he took some wine and parcel of meals and was with Rajashri (PW-12) consuming liquor from 10:30 to 11:30 PM. He states that at about 11:32 PM, the appellant nick named Chokya came there and was having a parcel with him and also sat there for consuming liquor. He states that till 1:30AM they were sitting there. Thereafter, according to him, the appellant told him that he was hungry and asked for some eatables. Since, they were not having anything to eat, the appellant asked for the key of his Motorcycle and he gave the key of his Motorcycle.

**94.** According to him, the appellant took the key and went at 01:30 AM. He states that he waited for 40-45 Minutes but since the appellant did not return back, he went to his house and went to sleep. He states that next day morning at 7:30 AM, he received a phone call from the room of the appellant; that he went to the house

of the appellant; that the mother and the sister of the appellant were present in the house; that one hand bag and one trolley bag were there and he found that the clothes were there in the said bag; that one white colour T-shirt which was stained with mud was lying there. He states that the appellant came with him after wearing the clothes and when PW-9 asked him for the key, the appellant told him that as there was no petrol he had to park it at the highway and the appellant asked PW-9 to come with him by taking somebody's vehicle. PW-9 states that he went to PW-22 Kadir Murgeewala and on his asking, PW-22 gave his splendor bike and the appellant sat on the Motorcycle behind him stating that he would show where the Motorcycle was parked. Thereafter, the appellant showed the bike and asked him to take the service road where PW-9 saw his bike parked on the service road. PW-9 states that he tried to start the Motorcycle but there was no petrol. Thereafter, PW-9 states that the appellant went 100 ft. away from him inside the bushes and when he went behind him he saw the appellant searching something in the bushes and when asked the appellant told him that

he was searching something. PW-9 states that at the place where he was searching, one girl was lying there and she was no more and she was 23-24 years of age. PW-9 states that he was scared and came back. The appellant came running behind him and when he asked him he told him everything.

**95.** PW-9 states that the appellant told him that he went to Kurla Terminus for taking PW-9's bike. One girl got down from the Train and when he asked her where she wanted to go the girl told him that she wanted to go to Andheri. The appellant told her that he was also going to Andheri and he had taken her on the Motorcycle and brought her on the spot. Thereafter, he took her in the bushes and raped her. When the girl started shouting he had pressed her mouth and strangulated her by scarf and killed her. The PW-9 states that the appellant gave him threats stating that if he mentions it to anybody he would not spare him. On a question by PW-9 as to why the petrol was not in the Motorcycle, the appellant said he did not know but thereafter told him that he poured the petrol on the body and tried to burn it. PW-9 further added that the appellant was

searching the Mobile Phone of the said girl as he was having apprehension that she might have taken his photograph or photograph of the Motorcycle number. Thereafter, PW-9 states that he put petrol in his Motorcycle from the other Motorcycle and thereafter the accused rode his Motorcycle while he took another Motorcycle and both reached home. Thereafter, the PW-9 states that on 06.01.2014 accused called him and told him not to disclose it to anybody at which point PW-9 told him, that he could not disclose to anybody and disconnected the phone. PW-9 states that again on 07.01.2014 he called him on his Mobile and gave threats that he would kill his family members. Thereafter, PW-9 states that he did not receive call and he was threatened and since he knew that he is of quarrelsome nature and 2 to 3 crimes were registered against him hence, he did not disclose it to anybody.

**96.** PW-9 states that on 15.01.2014 he again called him but he did not receive his call. Thereafter, since PW-9's mother's health was not good he went to Nasik and after taking Rs. 2500/- from his brother-in-law he went to his native place. PW-9 states that on

11.02.2014 and 13.02.2014 he went to Nasik. He states that on 04.03.2014 he came to know that Police from crime branch called him and therefore, on 06.03.2014 he went to crime branch and gave his statement. In cross-examination PW-9 deposed that Police from crime branch office had called his wife and that Police met him for the first time and disclosed to him about the case on 04.03.2014.

**97.** PW-9 admitted in cross-examination that in his statement he had not stated that when he asked about the key to the appellant, the appellant told him that there was no petrol and it was parked in the highway. He also admitted that he had not mentioned in the statement that appellant came with him after wearing clothes. PW-9 further states that he was not at home when the Police came to his house and took the Motorcycle. He further stated that near Kanjur Marg bridge there was a petrol pump and the bridge was about 5 minutes distance from his house and the petrol pump was also on the way from the spot to his house.

**98.** PW-9 further submitted that though it will be incorrect to say that the appellant was not his close friend he also said that he was not having close friendship with him. PW-9 admitted that he had a quarrel with him three years before. PW-9 admitted that it was correct to say that he was annoyed with him because of the said quarrel and from that day he came to know that appellant was of quarrelsome nature. He further stated that he decided to keep distance from him from that day and that after the quarrel he did not meet him for 3 years.

**99.** PW-12 Rajashri Raju Shetty is a resident of MHADA Building, Kanjur Marg, Mumbai. She claims to know both PW-9 Nandkishore and the appellant. She stated that the appellant and PW-9 are staying in the same area and both PW-9 and the appellant would come to her house. She states that the appellant came at 10:30 PM on 04.01.2014 with a bottle of liquor and asked for some snacks. She states that as there was no food the appellant took the key of Motorcycle of Nandkishore and went and that PW-9

Nandkishore waited for sometime and went to his house at about 11:00 PM.

**100.** At this stage, it is also relevant to discuss the evidence of PW-22 Abdul Kadir Shah, the owner of the chicken shop. He deposed that he knows PW-9 whom he calls Kishore. He deposed that, on 05.01.2014, PW-9 came to his shop about 7:00 AM and asked for key of the Motorcycle. At that time, he asked him why he was asking for Motorcycle and PW-9 told him that his Bike was taken by his friend at night and it is parked on the highway and therefore, he wanted my bike to be brought back. He deposed that he gave the key of his Motor Bike and after half an hour PW-9 returned the key to him. He also deposes that he is aware that PW-9 was taken into custody by the Police in this case. PW-22 does not speak of the presence of the appellant with PW-9, when PW-9 arrested him.

**101.** It is also relevant to deal with the evidence of PW-3 Boga Rama More who was the Panch witness for the recovery of the Motorcycle, as also PW-36 Pravin Sarjerao Patil (API DCB CID)

who also speaks of the recovery of the Motorcycle. PW-36 Pravin Sarjerao Patil who was API attached to the crime branch unit 7, states that he was present when the accused was arrested on 02.03.2014 and he interrogated the accused on 03.03.2014 till 6:30 PM. According to him, the accused showed his willingness to make voluntary statement. PW-36 asked constable Shetty to bring Panch witnesses and recorded the statement under Exhibit 42. He states that thereafter, they went in the Police Vehicle along with accused, appellant, API Sawant, two constables and the Panch witnesses. The accused asked the vehicle to be stopped at Karve Nagar at Kanjur Marg. On his instruction, the vehicle was stopped in front of one library the accused by walk took them in front of Rose Beauty Parlour. In front of the Beauty Parlour one Motorcycle was parked bearing No. MH03-AY-0241. He recorded the engine no. and chassis no. When asked about the key, the appellant told that his friend is having the key who is staying on the second floor of the said building and his name was Nandkishore Sahu (PW-9). PW-36 states that he sent constable shetty (not examined) along

with Panch witness no. 2 Moh. Rehan Shafi Sheikh (not examined) – (Panch witness no. 1 was PW-3 Boga Rama More) to bring the key. They had brought the key and Exhibit-42A Panchnama was prepared for the seizure of the Motorcycle.

**102.** Admittedly, as is clear, no Panchnama of handing over of the key by the person on the second floor was made. The person who went to collect the key is not examined. PW-3 Boga Rama More who narrates the same sequence is not the Panch witness who went to collect the key. DW-4 Vikas Narayan Palekar, Nodal Officer in Vodafone who produced the CDR of Mobile No. 7775853547 speaks of in the cross-examination that there was no phone call or SMS from the said mobile from 11.02.2014 to 02.03.2014. However, in the Chief, he did mention about the calls on 05.01.2014, 06.01.2014 and 08.01.2014. Admittedly, the phone bearing No. 7775853547 belongs to Sagar Kakker, as spoken to by PW-38, Vyanket Bhanudas Patil, the Senior Police Inspector attached to DCB CID Unit – VII, Ghatkopar. The claim of the prosecution is that Sagar Kakkar is the appellant's brother-in-law.

PW-38 also admitted that no statement of Sagar Kakkar was recorded and he was also not examined. A suggestion was put to him that he was deposed falsely about Sagar Kakkar being the brother-in-law of the appellant. However, nothing was produced to establish the said fact or that the appellant had access to the said phone bearing No. 777585347. In view of that it will be too much to assume that the calls from the said no. to PW-9 were made by the appellant and to further assume that the calls were threatening calls so as to deter PW-9 from reporting to the Police about the alleged extra judicial confession.

**103.** Mr. Shri Singh, the learned counsel for the appellant while assailing the extra judicial confession purported to be given to PW-9 by the appellant contends that PW-9 is an unreliable witness and the circumstances around the alleged confession raised questions on his credibility; that PW-9 statement was recorded on 06.03.2014 after a delay of about 2 months after the incident; that the justification for the delay being the threats is an embellishment since the number (7775853547) allegedly used by the appellant to

make these threats admittedly belong to one Sagar Kakkar; and the claim of the Police that Sagar Kakkar is the appellant's brother-in-law is not supported with any proof nor was any investigation done to relate the number to the appellant; that the version of the prosecution as to how PW-9 joined the investigation is contradicted by the record inasmuch as while prosecution's case is that the Police met PW-9 for the first time on 06.03.2014, the real fact is that PW-9 is taken into custody by Police in January, 2014, as spoken by the PW-22; further that the newspaper reporting (Article 41 Exhibited by DW-2 Shiva Sukhranyam Davnath) of 04.03.2014 mentioned his name thereby indicating that the Police were aware of him atleast 2 days before they claim to have first spoken with him.

**104.** In view of all these, it was contended that PW-9's testimony regarding the extra judicial confession which is inherently a weak piece of evidence is completely unreliable particularly when prosecution's own witness speaks of his being taken into custody and, in any event, 2 days before the recording of the statement it

being publicly announced that Nandkishore (PW-9) was already in contact with the Police. According to Shri Singh, no new information was brought on record and PW-9's deposition merely brings together the disparate pieces of evidence already available with the Police. According to the learned counsel no importance should be attached to the extra judicial confession, since it served merely to bolster the circumstantial evidence on which the case depends.

**105.** According to the learned counsel, PW-9's testimony was not corroborated on any material particulars and his evidence primarily consisted of material improvements which were put to the investigating officer. A part of the evidence of PW-38 Vyanket Bhanudas Patil, Senior Police Inspector, DCB CID unit VII, is extracted hereinbelow:

> "44. I have recorded the statement of Nandkumar Sahu (PW 9). PW 9 has not stated in his statement that he was using motorcycle No. MH- 02-AY-0241. He has not stated in his statement that Sanap was staying at the backside of his building. He has not stated in his statement that Rajashree Shetty was doing the business of selling the liquor. He has

not stated in his statement that Chandrabhan asked him whether there was any eatable in the house. He has stated that there was nothing to eat. He has not stated in his statement that there was handbag in the house of Chandrabhan and the colour of T-shirt was white. He has not stated in his statement that when he asked about the key of motorcycle, the accused told him that as there was no petrol in it, it was parked at Highway. He has not stated in his statement that he asked Channdrabhan what he was doing and he told that he was searching something. He has not stated in his statement that when he saw the body, he was scared and came back. He has not stated in his statement that he asked the accused what he had done. He has not stated in his statement that accused told him that one girl got down from the train. He has not stated in his statement that the accused told him that when the girl started shouting, he had closed her mouth. The PW 9 has not stated in his statement that accused told him that he is afraid that she had taken the photograph of number of vehicle. only the number is not mentioned by him He has not stated in his statement that on 07/01/14 again accused called him and gave him threats and he had given threats that accused would kill his family members.

45. PW 9 has not stated in his statement that thereafter he has not received phone calls from the accused as he was frightened and having quarrelsome nature. He has not stated in his statement that he did not receive the phone call. He has not stated in his statement that he went to Nasik on 13/01/14.5."

**106.** Learned counsel, further contended that the evidence of PW-9 and PW-22 contradicted each other. While PW-9 states he did

not tell PW-22 anything, PW-22 depose that PW-9 told him that he needed the Motorcycle since his friend's Motorcycle was parked on the highway; further PW-22 admitted to not disclosing to the Police this fact when they first inquired from him on 05.01.2014.

**107.** The learned counsel for the appellant further contended that the Motorcycle theory appears to have been introduced to create a role for PW-9 and it was unnatural for the appellant to call PW-9 and take PW-22's Motorcycle for transferring petrol when PW-9 admitted that their house was 20 to 25 minutes away by walking from the spot and there was a petrol pump near the bridge 5 minutes away from his house.

**108.** We have carefully considered the efficacy of the extra judicial confession of PW-9. Extra judicial confession, by its very nature, has been held to be a weak piece of evidence. Normally it is given to persons who enjoyed the confidence and trust of the accused. From the evidence mentioned above, we are not able to find that PW-9 enjoyed the confidence of the accused so as to safely infer

that the accused would have made a clean breast of things to PW-9. Further disturbing feature in this case is that PW-22 does speak of Police taking PW-9 into custody in connection with this case. There is no re-examination of PW-22 at this stage.

**109.** In the case of ***Nikhil Chandra Mondal v. State of W.B., (2023) 6 SCC 605***, one of us (B.R. Gavai, J.) speaking for the Court, felicitously set out the Statement of law thus:

> "16. It is a settled principle of law that extra-judicial confession is a weak piece of evidence. It has been held that where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It has further been held that it is well-settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession. It has been held that there is no doubt that conviction can be based on extra-judicial confession, but in the very nature of things, it is a weak piece of evidence.
>
> 17. Reliance in this respect could be placed on the judgment of this Court in Sahadevan v. State of T.N. [Sahadevan v. State of T.N., (2012) 6 SCC 403 : (2012) 3 SCC (Cri) 146] This Court, in the said case, after referring to various earlier judgments on the point, observed thus : (SCC pp. 412-13, para 16)

"16. Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

**110.** Further, from DW-2 read with Article 41, it is clear there are reasonable grounds to believe that PW-9 was in interaction with Police in some capacity. In any event, discounting all that, from the

cross-examination portion extracted above of PW-38 with so many omissions in the statement of PW-9, we do not feel it prudent to sustain the conviction based on the purported extra judicial confession given to PW-9. Moreover, there is no corroboration in material particulars and hence we are inclined to reject the extra judicial confession purportedly given to PW-9.

**111.** In the case of ***Laxmi Raj Shetty*** vs. ***State of T.N.,*** (1988) 3 SCC 319, this Court held as under: -

> "26. It is now well settled that a statement of fact contained in a newspaper is merely hearsay that therefore inadmissible in evidence in absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. The accused should have therefore produced the persons in whose presence the seizure of the stolen money from Appellant 2's house at Mangalore was effected or examined the press correspondents in proof of the truth of the contents of the news item…"

**112.** Moreover, the recovery of the Bike leaves much to be desired. The ownership of the Bike is in the name of PW-10 Sureshchandra Ramdhiraj Mishra. He claims that money was paid by PW-9; the recovery was from an open place and most importantly neither the

constable Shetty who went to collect the key nor the Panch witness no. 2 Mohammed Rehan Shafi Shaikh have been examined in this case. No Panchnama was made to the delivery of the key from the second floor.

**113.** That leaves for consideration, the recovery of the trolley bag from Nasik on 03.03.2014 from PW-24 Kamlabai Kisan Sanap, who is a resident of Mhasoba Patangan, Panchvati, Nashik, and the recovery of the plastic carry bag from the mess of the appellant's sister including items like ID cards and Spectacles.

**114.** Insofar as the recovery of the trolley bag is concerned, the evidence of PW-24 should be read with evidence of PW-4 Abdul Sattar Sayyed Ali Shaikh-the Panch witness. PW-24 Kamlabai Kisan Sanap stated that on a particular date which she does not remember, she was sitting near the public toilet; that the appellant on VC (video conference) came to see her; that she asked her why she was sitting there and asked her whether she could take the bag; that when she asked why she is giving the bag he told her that his

sister is no more and is giving the bag which is of black colour and having two wheels; that there were some clothes inside the bag which she threw since they were dirty and 2 other clothes she sold for Rs. 20; that she has kept the bag at Misrawada in a room and that she handed over to Police and they left the house after taking thumb impression on paper.

**115.** The black coloured bag was produced as Article 22. In cross-examination, PW-24 stated that because of old age she cannot recollect the persons who gave her articles; that she cannot say on what date the accused came to her; that the face of the accused was covered with black cloth that she gave the thumb impression as per the say of the Police; that many times Panchvati Police came there and used to drive them out. Most importantly, PW-24 stated that the Police came to her and told her to show the bag otherwise they would arrest her; that the Police told her to depose and that Police told her to identify the person shown on the screen of VC.

**116.** PW-4 Abdul Sattar Sayyed Ali Shaikh is a resident of

Ghatkopar, Mumbai and he was the Panch witness for the recovery of the bag from the elderly lady. No effort was made to associate a local Panch witness and PW-4 was taken all the way from Mumbai. The learned counsel for the appellant argued that the prosecution case is that ACP Bhonsle came to know during the investigation that the appellant was found in Kharve Nagar, Kanjur Marg West. So he along with Senior Police Inspector Patil and Officer Sawant reached Kharve Marg and arrested the accused at 23.05 hours on 02.03.2014; that the appellant in his disclosure statement Exh.44 stated that he gave a trolley bag to one poor lady in Nasik and that he would show the said 'lady'; however, PW-4 and PW-35 depose that the appellant stated his readiness to produce the trolley bag and contended that the exact information given by the accused in the disclosure statement ought to be proved; that no description of PW-24 or the place in Nasik was given in the disclosure statement; that PW-24 admitted that she was threatened with arrest; that she was unaware of what was written on the paper she was putting the thumb impression on and also did not identify the appellant in the

TIP; that no local Panch was associated and that trolley was admittedly a generic and easily available material.

**117.** We are not impressed with the evidence of the recovery and, in any event, merely based on the recovery no conviction for the offence charged could be sustained against the appellant in this case. Similarly, the prosecution claims that PW-5 was a Panch witness for the recovery of the bags which were with the victim. PW-5 deposes that the appellant accompanied them in a Police vehicle to room no. 12 in Sai Building; that one lady was there in the room; that it was a sister's room and she was running a Mess; that the accused went inside the room and brought one plastic bag and on search of the plastic bag, one I-card of University College of Engineering JNU, Karkinada with the name of deceased written on it, her photograph, Mobile number and hall ticket number were also written on it was seized. One lady's spectacles which were broken was also seized. One lady's jeans pant labelled as DIES was also seized along with one ladies T-shirt and one ladies Top and one ¾ pant and one legging of blue colour and one Kajal Pencil in

all totalling 8 articles found in the plastic bag were seized.

**118.** PW-38 deposes that after the arrest of the accused he came to know about his relatives including sister and wife and also about the address of the accused. He also deposed that he was aware on 4th March that the sister was staying in the house but, was not aware that she was doing the business of Mess. PW-38 admitted that the sister was having a mess in the ground floor but on 4th March he was not aware about the business, he however, stated that on 4th March no search was conducted on the ground floor.

**119.** Learned counsel for the appellant submits that appellant's sister was in the same society and she has not been examined. That the disclosure statement lacked material details like the description of articles or the place where they were allegedly kept; that the theory that the appellant retain the ID card of her college for over 2 months was unnatural since according to prosecution he went as far as Nasik to get rid of the trolley bag. According to the learned counsel, PW-5 was an unreliable witness who had acted as a Panch

witness before and knew PW-38. That none of the items were linked to the appellant, argues learned counsel.

**120.** We are not able to sustain the conviction based on this recovery for the same reason as we are not impressed by the mere purported recovery of the trolley bag from PW-24. The prosecution has not answered the infirmities pointed out by the learned counsel for the appellant. As to why the college identity card of the deceased EA would be preserved by the accused and kept in custody of the sister nearly two months after the incident, is something we find very intriguing.

**121.** All these facts cumulatively constrain us to conclude that there are gaping holes in the prosecution story leading to the irresistible conclusion that there is something more than what meets the eye in this case. While the old adage, *witness may lie but not the circumstances*, may be correct, however, the circumstances adduced, as held by this Court, should be fully established. There is a legal distinction between 'may be proved' and 'must be or

should be proved' as held by this Court. The circumstances relied upon when stitched together do not lead to the sole hypothesis of the guilt of the accused and we do not find that the chain is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused.

**122.** Not only, is the test of ***Sharad Birdhichand Sarda (Supra)*** not satisfied, sustaining a conviction based on this sketchy and disjointed evidence would be disregarding the warning of Judge Barron Alderson in ***Reg*** **vs.** ***Hodge*** [1838] 2 Lew 227 as reiterated in ***Hanumant*** **Vs.** ***State of Madhya Pradesh, AIR (1952) SC 343,*** about the caution to be exercised in cases based on circumstantial evidence:-

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

**123.** On the available evidence, we are of the opinion that it will be extremely unsafe to sustain a conviction against the appellant.

The prosecution has not established its case beyond reasonable doubt. Hence, we are constrained to come to the sole irresistible conclusion that the appellant is not guilty of the offences for which he has been charged.

**124.** In view of what has been stated hereinabove, we allow the appeal and set aside the judgment of High Court of Judicature at Bombay dated 20.12.2018 in Confirmation Case no. 3 of 2015 with Criminal Appeal No. 1111 of 2015 and acquit the appellant with regard to the offences for which he was charged in this case. The appellant shall be set at liberty forthwith, if not required in any other case.

……J.
[**B.R. GAVAI**]

……J.
[**PRASHANT KUMAR MISHRA**]

……J.
[**K. V. VISWANATHAN**]

New Delhi;
28th January, 2025.