IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.944 of 2014

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

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Khusboo Kumari, Daughter of Arun Kumar Baranwal, resident of Mohalla - Naya Godown, Gaya, P.S. Kotwali, in the district of Gaya

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 39 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

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Vikky Singh alias Ravi alias Guddu Singh alias Munna Son of Khokan Singh, Resident of Village - Champa Nagar, Bangali Tola, P.S. - Nath Nagar, District - Bhagalpur. At Presently Residing at Shiv Lal Dangal, P.S. - Ashansole, North, District Bardwan West Bengal.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 74 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

==========

Naresh Burnwal @ Naresh Pd. Burnwal Son of Bitanlal Burnwal, resident of Amlabad Coliary, P.S. - Chandan Garhi, District - Bokaro.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 114 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

==========

Ram Pravesh Singh @ Burbha, Son of Singheshwar Singh, Resident of Village- Bengucha, P.S- Karande, District- Sheikhpura.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 127 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

==========

Basant Singh S/o Krishna Singh, R/o Village- Sirkhari, P.S-Halsi, District-Lakhisarai.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 154 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

==========

Jitu Singh @ Jitendra Singh @ Amarjeet Kumar @ Suraj Singh, S/o Sushil Singh, Resident of Village - Sirkhindi, P.S. - Halsi, District - Lakhisarai.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 166 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

==========

Vinay Singh, son of Sri Sitaram Singh, resident of village Begucha, P.S. Karandey, District Sheikhpura.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 169 of 2015

Arising Out of PS. Case No.-25 Year-2012 Thana- HALSI District- Lakhisarai

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Ranjay Singh @ Debu Singh @ Ganesh Singh, Son of Late Baleshwar Singh, resident of Village- Sirkhandi, P.S.- Halsi, District- Lakhisarai.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
(In CRIMINAL APPEAL (DB) No. 944 of 2014)
For the Appellant : Mr. Pratik Mishra, Advocate
For the Respondent : Mr. Abhimanyu Sharma, APP
(In CRIMINAL APPEAL (DB) No. 39 of 2015)
For the Appellant : Mr. Rajive Ranjan Singh, Advocate
Mr. Rajnish Chandra, Advocate
For the Respondent : Mr. Ajay Mishra, APP
(In CRIMINAL APPEAL (DB) No. 74 of 2015)
For the Appellant : Mr. Pratik Mishra, Advocate
For the Respondent : Mr. D.K. Sinha, APP
(In CRIMINAL APPEAL (DB) No. 114 of 2015)
For the Appellant : Mr. Arun Kumar Arun, Advocate
Mr. Akash Arun, Advocate
For the Respondent : Mr. Sujit Kumar Singh, APP
(In CRIMINAL APPEAL (DB) No. 127 of 2015)
For the Appellant : Mr. Bivutosh Kumar, Advocate
For the Respondent : Mr. Abhimanyu Sharma, APP
(In CRIMINAL APPEAL (DB) No. 154 of 2015)
For the Appellant : Mr. Rajnish Chandra, Advocate
For the Respondent : Mr. Bipin Kumar, APP
(In CRIMINAL APPEAL (DB) No. 166 of 2015)
For the Appellant : Mr. Vinod Kumar, Advocate
Mr. Ashutosh Singh, Advocate
For the Respondent : Mr. Bipin Kumar, APP
(In CRIMINAL APPEAL (DB) No. 169 of 2015)
For the Appellant : Mr. Bivutosh Kumar, Advocate
Mr. Rajnish Chandra, Advocate
For the Respondent : Mr. Sujit Kumar Singh, APP

Amicus Curiae : Mr. Anil Singh (In all the aforesaid appeals)

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 03-10-2023

In this batch of appeal, inadvertently the order dated 15.09.2023 has wrongly been typed as Serial No.6 and the order

dated 19.09.2023 as Serial No.4, which require correction, therefore, the order dated 15.09.2023 be read as Serial No.4 and the order dated 19.09.2023 as Serial No.5.

2. By order dated 15.09.2023 passed in the present batch of appeals, Mr. Anil Singh, learned advocate, was appointed as *Amicus Curiae* to assist the Court.

3. As per the F.I.R., the prosecution case in brief is that on the evening of 25th March 2012, Suman Barnwal, the wife of Naresh Barnwal (informant-cum-appellant) along with her husband and family members was travelling from Rajgir to Jamui, in between 8-9 pm, she was shot dead near Lakhisarai road and thereby, formal first information report (*Exhibit 6*) was registered.

4. The prosecution, in course of trial, contended that the murder was committed by the appellant Naresh Barnwal in conspiracy with the appellants Jitu Singh @ Jitendra Singh @ Amarjeet Singh @ Suraj Singh, Vikky Singh @ Ravi @ Guddu Singh @ Munna, Ram Pravesh Singh @ Burbha, Basant Singh, Vinay Singh, Ranjay Singh @ Debu Singh @ Ganesh Singh and Khusboo Kumari. Sri Krishna Kumar Agrawal, Adhoc Additional District and Sessions Judge-V, Lakhisarai in Sessions Trial No. 535/2012, arising out of Halsi P.S. case No. 25/2012, G.R. No. 317/2012, after the trial, by the judgment of conviction dated

10.12.2014 and order of sentence dated 11.12.2014, all the appellants have been convicted for the offences under Section 302/120B of the Indian Penal Code (for short 'the I.P.C.') and sentenced to undergo rigorous imprisonment for life and a fine of Rs. 1,000/- each. Appellants Vikky Singh @ Ravi @ Guddu Singh @ Munna and Jitu Singh @ Jitendra Singh @ Amarjeet Kumar @ Suraj Singh have been convicted under Section 379 of the I.P.C. and sentenced to undergo rigorous imprisonment for three-three years. Appellants Jitu Singh @ Jitendra Singh @ Amarjeet Kumar @ Suraj Singh, Basant Singh and Ranjay Singh @ Debu Singh @ Ganesh Singh have been convicted for the offence under Section 411 of I.P.C. and sentenced to undergo rigorous imprisonment for three-three years. Appellants Vikky Singh @ Ravi @ Guddu Singh @ Munna and Jitu Singh @ Jitendra Singh @ Amarjeet Singh @ Suraj Singh have also been convicted for the offence under Section 27 of the Arms Act and sentenced to undergo imprisonment for five-five years and a fine of Rs. 500/- each. All the sentences so imposed on the appellants shall run concurrently.

5. Coming to the first information report registered on the statement of appellant Naresh Barnwal, the facts narrated therein in brief were that he along with his wife Suman Devi (deceased), brother-in-law Rajesh Baranwal @ Pappu, Bhabhi of his wife with

her children were going from his Zen Maruti Car bearing No. JH-10A-9329 from Gaya to Jamui via Rajgir, Biharsharif and Sheikhpura and in the night of 25.3.2012 at about 8 p.m., when they reached near Tarhari village within Halsi Police Station of Lakhisarai district, subsequently 8-10 unknown persons by flashing torch directed them to stop the vehicle. As soon as the vehicle came to a halt, two of the unknown individuals brandishing pistols, one in the front seat and the other in the rear, forcibly entered the car. The rest of the assailants warned against raising an alarm. Those who boarded the vehicle instructed Naresh to drive, and after ten steps, they ordered a left turn. Approximately a kilometre later, they forced the vehicle to stop again. They dragged Suman Devi out of the car and threw her onto the road, after which they shot her. The two assailants also looted jewellery, mobile phones, money, and clothes, etc. and fled away. With the assistance of his brother-in-law, Naresh rushed his injured wife to Sikandara Hospital and then to Sadar Hospital in Jamui. Unfortunately, Suman Devi succumbed to her injuries during treatment. The assailants, who had boarded the vehicle, verbally abused and physically assaulted the other occupants, hitting them with the butt of their guns. Naresh claimed that he couldn't identify the culprits as their faces were covered, but he believed he could recognize

them by their voices. He also noted that the place where the incident occurred was marshy. This incident took place near Tarhari village, within the jurisdiction of Halsi Police Station, Lakhisarai district, approximately one kilometre away from the road, on the evening of March 25, 2012, between 8 and 9 p.m.

6. On the basis of fardbeyan of the informant, Halsi P.S. case No. 25 of 2012 was registered under Section 396 of the I.P.C. Later, on the request of the Investigating Officer, statements of some of the witnesses were taken under Section 164 Cr.P.C. and thereafter the informant of the case has been made accused of the case. The police after investigation submitted a charge-sheet under Sections 302, 379, 411, 120B of the I.P.C. and Section 27 of the Arms Act. The cognizance of the offence was taken by the learned jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed under Sections 302, 379, 120B, 411 of the I.P.C. and Section 27 of the Arms Act against all the appellants herein, on which they pleaded not guilty and claimed to be tried.

7. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as 14 witnesses, namely, Raj Kumar Prasad (PW 1), Kumkum Barnwal (PW 2), Lalita Devi (PW 3), Rajesh Kumar (PW 4),

Pawan Kumar Singh (PW 5), Shambhu Sharan Prasad Singh (PW 6), Arvind Kumar Srivastava (PW 7), Rajiv Choudhary (PW 8), Atul Kumar Mishra (PW9), Dr. Vijay Kumar (PW 10), Raj Kumar Tiwari (PW 11), Raj Bansh Singh (PW 12), Ravindra Kumar Roy (PW 13) and Ram Pravesh Singh (PW 14). In support of its case, the prosecution has also produced exhibits as Ext. 1 (signature of witness Raj Kumar Prasad on statement under Section 164 Cr.P.C.), Ext. 1/1 (signature of witness Kumkum Barnwal on statement under Section 164 Cr.P.C.), Ext. ½ (signature of witness Lalita Devi on statement under Section 164 Cr.P.C.), Ext. 2 (seizure list), Ext. 1/3 (signature of witness on statement under Section 164 Cr.P.C.), Ext. 3 (signature of witness on material seized report), Ext. 3/1 (signature of witness on another seized report), Ext. 3/2 (signature of Raj Kumar Barnwal on seized report), Ext. 4 (seizure list), Ext. 5 (confessional statement of accused Vikky Singh), Ext. 6 (fardbeyan), Ext. Mark ‘X’ (photo copy of inquest report), Ext. 7 (confessional statement of accused Basant Singh), Ext. 8 (seizure list), Ext. 9 (seizure list), Ext. 10 (production-cum- seizure list of voter ID card), Ext. 11 (confessional statement of accused Jitu @ Amarjeet Kumar), Ext. 12 (confessional statement of accused Ranjay Singh), Ext. 13 (seizure list), Ext. 14 (carbon copy of seizure list), Ext. 2/1 (seizure list), Ext. 6/1 (formal F.I.R.), Ext. 15

(post-mortem report), Ext. 16 to 16/5 (Tower location charts), Ext. 17, 17/1 to 17/80 (C.D.R. and C.A.F.), Ext. 18 (confessional statement of Naresh Kumar Barnwal), Ext. 19 (confessional statement of Khusboo Kumari), Ext. 20 (confessional statement of accused Binay Singh), Ext. 21 (writing and signature of Rajesh Kumar on 164 Cr.P.C. statement), Ext. 21/1 (writing and signature of Kumkum Barnwal on 164 Cr.P.C. statement), Ext. 21/2 (writing and signature of Raj Kumar Prasad on 164 Cr.P.C. statement), Ext. 21/3 (writing and signature of Lalita Devi on 164 Cr.P.C. statement), Ext. 21/4 (writing and signature of Manoj Mahto on 164 Cr.P.C. statement), Ext. 21/5 (Identification of writing and signature of Subodh Sao on 164 Cr.P.C. statement), Ext. 22 (Identification of writing and signature of Vikky Singh on T.I.P. chart), Ext. 22/1 (Identification of writing and signature of Ranjay Singh on T.I.P. chart), Ext. 22/2 (Identification of writing and signature of Jitu Singh on T.I.P. chart), Ext. 22/3 (Identification of writing and signature of Vinay Singh on T.I.P. chart), Ext. 23 (original inquest report), Ext. 24/1 (charge-sheet of this case in the form of public document). The defence has also produced two witnesses, namely, Mukhtar Ahmad (DW 1) and Sanjeet Rajwar (DW 2) in support of its case. The defence has also produced one exhibit i.e. Ext. A (signature of witness on fardbeyan). Six Court

witnesses were examined by the Trial Court, namely, CW 1 Rajesh Kumar, CW 2 Kumkum Barnwal, CW 3 Raj Kumar Prasad, CW 4 Lalita Devi, CW 5 Manoj Mahto and CW 6 Abodh Sao. Thereafter, the statements of the appellants were recorded under Section 313 of the Cr.P.C and after conclusion of the trial, the learned trial Court convicted the appellants in the manner stated above.

8. The learned counsel for the appellants has submitted that the trial suffers from several infirmities that were overlooked by the learned trial court. Therefore, the impugned judgement is not sustainable in the eyes of the law. It has been argued that the prosecution's case relies entirely on call detail records, which are not admissible under section 65B(4) of the Evidence Act. Additionally, it has been pointed out that there are numerous gaps in the investigation. Furthermore, during investigation the looted articles primarily includes common household products were put for identification, which were identified by PW1 and PW4, while PW3 and PW4 were the only eyewitnesses in the case. It has been emphasised that the seized articles were not properly sealed as required by procedure. Moreover, the prosecution has failed to examine a single witness from the seizure list. The contention is that the appellants have been falsely implicated in this case and had no role to play in the alleged offence. It has been argued that there

are significant deficiencies in the prosecution's case, and the chain of circumstances does not conclusively point towards the guilt of the appellants. Therefore, the findings of the learned trial court are legally flawed, factually incorrect, lacking in legal reasoning, and devoid of merit. The judgement of conviction should be set aside.

9. Learned APP for the State, on the other hand, has submitted that the judgement of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. The learned counsel submitted that the two eyewitnesses have proved the conduct of appellant Naresh Barnawal to be doubtful while driving the car slowly and providing signals to other appellants through the car light and indicator. Furthermore it has been pointed out that, from the evidence on record, it is absolutely clear that there existed an illicit relationship between appellant Naresh Barnwal and appellant Khusboo Kumari which is the root cause for the conspiracy that leads to the commission of the murder of the deceased. As such, there does not remain any hiatus in the chain of circumstances to prove that it was the appellants who conspired to commit the murder of the deceased. Thus, the guilt of the appellants has been satisfactorily proved by the evidence adduced

during the course of trial and there is no infirmity in the judgement of conviction of the learned trial Court.

10. The learned *Amicus Curiae* appointed to assist the Court have submitted that it is mandatory to comply with section 65B(4) of the Evidence Act to admit any electronic evidence. Furthermore, the counsel suggested the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal,* reported *in (2020) 7 SCC 1*, where the Hon'ble Supreme Court decided on the mandate of the certificate to admit electronic records. He further pointed out the procedural formalities that must be followed by the investigating officer while conducting the Test identification parade.

11. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal:

(I) Whether the call detail records produced by the prosecution would be admissible in light of Section 65B(4) of the Indian Evidence Act?

(II) Whether the prosecution's failure to disclose the source of light affected the credibility of the test identification parade for appellants, Vikky Singh, Jitu Singh, Basant Singh and Ranjay Singh?

(III) Whether the identification of the recovered looted

articles by PW4 made during the Test Identification Parade is doubtful in the light of the fact that such articles were not sealed?

(IV) Whether the non production of FSL Report regarding blood seized from the alleged place of occurrence has caused prejudice to the appellants?

(V) Whether mere recovery of weapon i.e. pistols & cartridges, made on the basis of confession of accused appellants, in absence of opinion of a ballistic expert is sufficient to prove the charge under Section 27 of the Arms Act?

12. With reference to issue no. (I), it is found upon thorough examination of the material available on record that CDR (*Exhibit 17* and *Exhibit 17/1* to *17/180*) and tower location chart (*Exhibit 16* and *Exhibit 16/1* to *16/5*) is the main thread that could facilitate the chain of circumstances relating to the conspiracy between the appellants with respect to the alleged offence. At this juncture, this court has taken note that before relying on any electronic evidence, the Court has to scrutinise whether such electronic evidence is admissible in accordance with Section 65A and Section 65B of the Indian Evidence Act, 1872. It is pertinent to note that the Evidence Act does not permit the electronic record evidence if the requirements under Section 65B (4) are not complied with. When an electronic record such as a computer printout, CD, VCD, pen drive, etc. is sought to be offered in evidence, it must be

accompanied by a certificate. Such a certificate is intended to guarantee the authenticity and genuineness of the source of the electronic evidence. In this context, it is relevant to refer the case of ***Anvar P.V. versus P.K. Basheer*** reported in ***(2014) 10 SCC 473***, wherein three judge bench of the Hon'ble Supreme Court has observed that:

> *"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."*

Also, in the case of ***Arjun Panditrao Khotkar versus Kailash Kushanrao Gorantyal*** reported in ***(2020) 7 SCC 1***, wherein three judge bench of the Hon'ble Supreme Court has observed that:

> *"84. But Section 65-B(1) starts with a non obstante clause excluding the application of the other provisions and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65-A and 65-B, if read together, mix up both proof and admissibility, but not talk about relevancy. Section 65-A refers to the procedure prescribed in Section 65-B, for the purpose of proving the contents of electronic records, but Section 65-B speaks entirely about the preconditions for admissibility. As a result, Section 65-B places admissibility as the first or the outermost checkpost, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stest identification paradeulated therein are not fulfilled."*

Additionally, in the case of ***Ravinder Singh versus State of Punjab*** reported in ***(2022) 7 SCC 581,*** the Hon'ble Supreme Court has observed that:

"21. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under Sections 65-A and 65-B of the Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether Anvar P.V. v. P.K. Basheer [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473] occupies the field in this area of law or whether Shafhi Mohammad v. State of H.P. [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801] lays down the correct law in this regard has now been conclusively settled by this Court by a judgment dated 14-7-2020 in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal [Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587] wherein the Court has held that : (Arjun Panditrao Khotkar [Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587] , SCC pp. 56 & 62, paras 61 & 73)

> *"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 lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

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 Mohammad v. State of H.P. [Shafhi Mohammad 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).

22. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such a certificate, as is the case in the present matter, cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law."

Therefore, the intent behind the provisions contained in Section 65B is to sanctify secondary evidence in electronic form as these are more susceptible to tampering. So, in order to ensure the source and authenticity of the electronic record produced before a court, Section 65B (4) mandates a certificate from the person responsible for the operation of the relevant device because failure to do so could result in a miscarriage of justice. Thus, in light of the above discussions and upon thorough application of the above-settled law on the facts of the present case, we hold that the call details of the appellants cannot be admitted in evidence as the same has not been accompanied by the certificate in terms of Section 65B (4) of the Indian Evidence Act.

Accordingly, issue no. (I) is decided in ***negative***.

13. With reference to issue No. II, upon a thorough examination of the case record, it is evident from the case records that the offence occurred between 8 to 9 pm, when the appellant stopped the car by flashing torchlights on the car. It is relevant to note that in situations when someone flashes a torchlight then it is difficult to identify them. Similar situation exists in our case, where PW4 claims to have identified the appellant Ram Pravesh Singh, Basant Singh, Vinay Singh and Ranjay Singh when they were holding torchlight and flashing it towards them. In this regard, it is

pertinent to take note of the decision of the Hon'ble Supreme Court, passed in the case of ***Tamilselvan versus State*****,** reported in ***(2008) 7 SCC 755***, where in para no. 9 the following has been observed:

> *"9. Since it was the accused who allegedly carried torches, we find it difficult to believe how the prosecution witnesses could have identified the assailants. The position would have been different if the forest guards had been carrying torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to the torches of the assailants the prosecution witnesses would have been partially blinded by the light of the torchlight, and would not have been able to identify anybody."*

In light of the discussions made above, we are of the considered opinion that the eyewitnesses in the present case cannot have been reasonably able to see or identify the appellants when the appellants approached them by flashing a light on their car. Furthermore, the Investigating Officers in the present case produced no evidence regarding the source of identification or any source of light near the place of occurrence.

Additionally, PW4 deposed for the first time in the court that the light inside the car was switched on as, PW12 in para 31 of his deposition has stated that PW 4 didn't say that the light of the car was on. Furthermore, PW 4 in the para 9 says that he identified

appellant Ram Pravesh Singh, Basant Singh and Ranjay Singh while taking the deceased to the hospital, but the alleged fact that the appellants who stopped the car remained near the same place even after the occurrence is doubtful. Furthermore, the claim of identification of these appellants by PW 4 has been reinforced in the light of the Fardbeyan, of which PW4 is a signatory and which has been marked as *Exhibit A*, wherein it is mentioned that the appellant persons who entered the car had covered their faces. It would be relevant to take note of the decision of Hon'ble Supreme Court in the case of ***State of Madhya Pradesh versus Ghudan*** reported in ***(2003) 12 SCC 485*** wherein it was observed that if any source of light was present at the place of occurrence, then the investigating agency would have mentioned or shown the existence of such source and the benefit of such omission should be given to the accused. Therefore, in the light of the above referred decision of the Hon'ble Supreme Court, in the facts of the present case we find that the prosecution has failed to establish and prove the source of identification under which the appellants have been identified.

Moreover, it is imperative to acknowledge that the test identification parade is not a substantive piece of evidence; rather, its role lies in corroborating or contradicting the testimonies provided by witnesses in court. However, the test identification

parade constitutes a crucial aspect of a comprehensive investigation. Therefore, in the present case the claim of identification of the appellants by PW 4 in case where the source of light becomes doubtful makes the Test Identification Parade questionable. Therefore, the test identification parade exhibits flaws arising from the breach of established guidelines, it raises doubt regarding the integrity of the entire test identification parade and the prosecution case.

Accordingly, issue No. II is decided in ***affirmative***.

14. With reference to issue No. III, it has been found that PW8 in the para 6 and para 8 of his deposition that he recovered and made seizure list of the articles of ring, watch, bindi, blue saree, mangalsutra from appellant Ranjay & Jitu, which have been marked as *Exhibit 8*. The PW 5 recovered two mobile phones which had been marked as *Exhibit 4* from appellant Ranjay & Jitu. It is relevant to emphasis upon the material seized that most of the recovered articles are common household products. It is relevant to mention that the seizure list witnesses in this case, regarding the seized articles, were not even examined by the prosecution. Moreover, it is noteworthy that PW4, in paragraph 12 of his deposition, mentions that the articles presented to him during the test identification parade were not sealed. At this juncture, it is

imperative to consider the decision of the Hon'ble Supreme Court passed in the case of ***Surinder versus State of Haryana***, reported in ***(1994) 4 SCC 365***, wherein para no. 4, it has been held that in cases where the articles are not sealed then it will cast serious doubt on the prosecution. In light of the discussions made above, we are of the considered opinion that the seizure made for the articles, in the absence of the sealing of these materials, casts serious doubt on the prosecution. It is noteworthy that the Investigating Officers in the present case did not mention anything about the sealing of the articles seized. Moreover, PW4, who appears to be the most competent witness as the articles were placed before him during the test identification parade, has himself deposed in para no. 12 that the materials produced were not sealed. Furthermore, these articles were put in the test identification parade, which was identified by PW1 and PW4. However, PW1 nowhere in his deposition mentioned anything about the test identification parade. Additionally, the signature of PW1 is also identified by PW4. Hence, the identification of these articles made in the test identification parade is doubtful, as the materials seized were not sealed.

Accordingly, issue No. III is decided in ***affirmative***.

15. With reference to issue no. IV, it is relevant to note that the PW 9 has deposed in para no. 2 of his examination-in-chief that he had seized blood from the alleged place of occurrence and a seizure list (*Exhibit 2/1*) had been prepared. However, upon minute examination of the entire material available on the record, it is found that the prosecution has not brought on record any FSL report in relation to the seized blood so as to prove the missing causative link. In the case of ***A. Shankar versus State of Karnataka*** reported in ***(2011) 6 SCC 279*** wherein it has been held that the non-production of the FSL report by the prosecution is fatal, as in the absence of such report, it was difficult for the court to reach to a definite conclusion.

Thus, non-production of the FSL report in the present case by the prosecution is fatal as in the absence thereof it is not possible to ascertain as to whether the blood found was human blood and that too of the blood group of the deceased.

Accordingly, issue no. (IV) is decided in ***affirmative.***

16. With reference to issue no. (V), it is pertinent to take note of the fact that the present case is primarily based on circumstantial evidence as the identification of the appellants by the prosecution witnesses is doubtful, as discussed in the aforementioned issues. Upon the perusal of the deposition of PW8

and PW12, it is found that two country made pistols and two 315 bore live cartridges have been recovered upon the confession of appellant Jeetu Singh and Ranjay Singh. It would be relevant to take note of the decision of the Hon'ble Supreme Court in the case of ***Dudh Nath Pandey versus State of U.P.*** reported in ***(1981) 2 SCC 166***, wherein it has been observed that:

> *".. Evidence of recovery of the pistol at the instance of the appellant cannot by itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery is woefully vague to identify the authorship of concealment, with the result that the pointing out of the weapon may at best prove the appellant's knowledge as to where the weapon was kept. The evidence of the ballistic expert carries the proof of the charge a significant step ahead, but not near enough, because at the highest, it shows that the shot which killed Pappoo was fired from the pistol which was pointed out by the appellant. .."*

In light of the discussions made above, we are of the considered opinion that the recovery of two country made pistols and two 315 bore live cartridges is not sufficient to prove the guilt of the appellants regarding the commission of the alleged offence. Moreover, there was no attempt made by the prosecution to obtain the opinion of a ballistic expert to ascertain whether the bullet could

have been fired from the recovered weapon. It would be relevant to take note of the case of ***Gurucharan Singh versus State of Punjab*** reported in ***1962 SCC OnLine SC 42***, wherein three judge bench of the Hon'ble Supreme Court has observed:

> *"...Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case."*

Also, in this context, it becomes imperative to refer to the Hon'ble Supreme Court decision in the case of ***Pritinder Singh versus State of Punjab*** reported in ***(2023) 7 SCC 727***, wherein it has been observed that in view of the circumstances, non-examination by ballistic expert has created a significant doubt to the case of the prosecution. Thus, in light of the above discussions and in view of the serious doubt with regard to the identification of the appellants upon thorough application of the above-settled law on the facts of the present case, we hold that it is difficult for the court to ascertain whether the recovered weapon has been used by the appellant in the commission of the present offence and thereby,

failure to examine the recovered weapon has caused serious infirmity to the prosecution case.

Accordingly, the issue No. (V) is decided in ***negative***.

17. In view of the findings arrived at on the issues formulated above, we are of the considered opinion that the prosecution has failed to prove the charges against the appellants and, therefore, the judgement of conviction is not tenable.

18. In the result, these criminal appeals stand allowed and the judgment of conviction dated 10.12.2014 and the order of sentence dated 11.12.2014 passed by Sri Krishna Kumar Agrawal, Adhoc Additional District and Sessions Judge-V, Lakhisarai in Sessions Trial No. 535/2012, arising out of Halsi P.S. case No. 25/2012, G.R. No. 317/2012, are set aside.

19. Since the appellant Vikky Singh @ Ravi @ Guddu Singh @ Munna of Criminal Appeal (DB) No.39 of 2015, appellant Basant Singh of Criminal Appeal (DB) No.127 of 2015, appellant Jitu Singh @ Jitendra Singh @ Amarjeet Singh @ Suraj Singh of Criminal Appeal (DB) No.154 of 2015 and appellant Vinay Singh of Criminal Appeal (DB) No.166 of 2015, are in jail custody, they are directed to be released from custody forthwith, if not wanted in any other case.

20. The appellant Khusboo Kumari of Criminal Appeal (DB) No.944 of 2014, appellant Naresh Burnwal @ Naresh Pd. Burnwal of Criminal Appeal (DB) No.74 of 2015, appellant Ram Pravesh Singh @ Burbha of Criminal Appeal (DB) No.114 of 2015 and appellant Ranjay Singh @ Debu Singh @ Ganesh Singh of Criminal Appeal (DB) No.169 of 2015, are on bail, they are discharged from the liabilities of their respective bail bonds.

21. Before parting away with these appeals, we record our appreciation for the sincere efforts put by Mr. Anil Singh, learned *Amicus Curiae*, who has assisted this Court in these appeals. Therefore, as a gesture of appreciation we direct the Patna High Court Legal Services Committee to pay a sum of Rs. 12,000/- to Mr. Anil Kumar Singh, learned advocate, appointed as *Amicus Curiae* by this Court by order dated 15.09.2023.

22. Pending application (s), if any, stand disposed of.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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