IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
CIRCUIT BENCH AT JALPAIGURI

Present:-

THE HON'BLE JUSTICE SOUMEN SEN
AND
THE HON'BLE JUSTICE PARTHA SARATHI SEN

D.R 3 OF 2023
With
C.R.A. (DB) No.1 of 2024

Krishna Pradhan @ Tanka
-Versus-
The State of West Bengal

For the appellant : Mr. Arjun Chowhdury, Adv.,
Ms. Pratusha Dutta Chowdhury, Adv.
Ms. Riya Aggarwal, Adv.

For the State : Mr. Aditi Shankar Chakraborty, Ld. APP,
Mr. Ujjwal Luksom, Adv.,
Mr. Subhasish Misra, Adv.

Hearing Concluded on : 3rd May, 2024

Judgment on : 2nd July, 2024

PARTHA SARATHI SEN, J.: –

1. This death reference case and the instant Criminal Appeal arise out of the judgement dated September 29, 2023 and order of conviction dated September 30, 2023 as passed by learned Sessions Judge, Kalimpong in Sessions Trial No.31(5)/2022 arising out of Sessions Case No. 12 of 2022 whereby and whereunder the said Court found the present appellant guilty of

the charge under Section 302 for the commission of murder of one Khadka Bahadur Khadka @ Sambhu Chhetri and Bishnu Maya Chhetri and thus sentenced him to suffer capital punishment of death by hanging him by his neck till his death with fine of Rs. 1 lac i.d. to suffer R.I for five years.

2. Since death penalty has been awarded by the trial court, the case record of the proceeding of the aforesaid trial has been submitted before this Court under section 366(1) of the Code of Criminal Procedure (herein after referred to as the 'said Code' in short) for confirmation.

3. The appellant has also felt aggrieved with the said judgement and order sentence and has thus assailed the same by filling a jail appeal through the Superintendent of Jalpaiguri Central Correctional Home.

4. For effective disposal of the instant appeal and death reference, the facts leading to the initiation of the aforesaid Sessions Trial before the Court of Sessions Judge, Kalimpong are required to be dealt with in a nut shell.

5. One Roshan Chhetri of 4th Mile, Lower Tanek, P.S. Kalimpong lodged a written complaint with the I/C Kalimpong P.S stating inter alia that his 'dharampita' Khadka Bahadur Khadka @ Sambhu Chhetri and his 'dharmamata' Bishnu Maya Chhetri were found dead in their own house and he received such information from one Rajan Giri, a resident of 3rd Mile, Tashiding. It is his further version that immediately after receipt of such information he rushed to the house of the said two deceased persons and on reaching there he found that his 'dharampita' and 'dharamata' were lying dead on the floor in blood stained condition. In his written complaint he expressed

his apprehension that the said two deceased persons might have been killed by some miscreants.

6. On the basis of such written complaint Kalimpong P.S case no.318 of 2021 dated 28.12.2021 was started under Section 302 IPC. Investigation was taken up and on completion of the same charge sheet under Section 302 IPC was submitted against the present appellant. After commitment the learned trial court being the Sessions Judge of District Kalimpong considered and framed charge under Section 302 against the present appellant. At the time of consideration of charge the present appellant being the accused denied such charge as framed against him and claimed to be tried and thus the trial proceeded.

7. From the trial court record it reveals that in order to bring home the charges as against the accused, the prosecution had examined 20 witnesses in all and some documents and materials have been exhibited on their behalf. The accused before the learned trial court however, did not adduce any evidence but from the trend of cross examination of the prosecution witnesses and the answers as given by the accused under Section 313 CrPC it appears that the defence case is based on clear denial and false implication.

8. In course of hearing of the instant appeal and the death reference Mr. Chowdhury, learned advocate for the appellant at the very outset draws attention of this Court to the written complaint as lodged by the informant who has been arrayed as PW1 during the trial. Drawing attention to the cross examination of PW1, written complaint (Exhibit no.01) and the formal FIR

(Exhibit 12) conjointly it is submitted that a serious contradiction arose with regard to the actual time of lodging of the FIR which creates a shadow of doubt with regard to the genuineness of the complaint which materially affects the trial. It is further submitted that though in his written complaint the PW1 has stated categorically that he received the information of death of his 'dharamparents' from one Rajan Giri but the said Rajan Giri was not cited as a prosecution witness for the reason best known to the prosecution.

9. Drawing attention of this Court to the evidence of PW 2 i.e. the Judicial Magistrate who recorded the statements of two prosecution witnesses namely; PW8 and PW13 it is submitted by Mr. Chowdhury that since it is the version of the PW2 that he recorded such statements by a Nepali interpreter, the said interpreter was not tendered in the witness box on behalf of the prosecution and thus the evidence of PW2 loses its significance. It is further submitted by Mr. Chowdhury that the evidence of PW2 with regard to the TI Parade of the seized jewelleries also lost its importance since no substantive evidence with regard to the identification of the seized jewelleries has been adduced either by PW8 or by PW13. It is thus submitted by Mr. Chowdhury that the oral evidence of PW2 with regard to the identification of the seized jewellery being a corroborative piece of evidence has got no value in absence of any substantive evidence which ought to have been adduced by PW8 and PW13.

10. It is further argued by Mr. Chowdhury, that though it is the case of the prosecution that the alleged weapon of offence and the alleged jewelleries of

the deceased persons were recovered as per showing of the present appellant while he was in police custody but the same became doubtful in view of the evidence as laid by PW3 and PW12 who in course of their respective examination-in-chief laid contradictory evidence with regard to the alleged seizure of jewelleries and the alleged weapon of offence though according to the prosecution both PW3 and PW12 are seizure witnesses to the aforesaid articles on the relevant day and hour.

11. It is further argued by Mr. Chowdhury, learned advocate for the appellant that on perusal of the evidence of PW8 and PW13 it would reveal that in their respective examination-in-chiefs they remained mum with regard to the identification of the jewelleries which have been allegedly seized from the house of the accused persons as per his showing and therefore in absence of any substantive evidence learned trial court is not justified in holding that the said jewelleries belonged to the deceased persons which have been allegedly looted by the accused during the commission of the crime of murder.

12. In course of his argument Mr., Chowdhury submits before this Court that while passing the impugned judgement learned trial court very much relied on the oral version of PW14 since according to PW14 the accused before the commission of the alleged crime expressed his intention over phone to commit robbery in the house of the deceased persons and immediately after commission of the crime when PW14 phoned him he did not pick up the phone.

13. It is submitted by Mr. Chowdhury further that learned trial court ought to have placed much reliance upon the evidence of PW14 inasmuch as from the cross-examination of PW14 it has been noticed that the said PW14 is not at all a truthful witness which is evident from his cross examination.

14. It is further submitted by Mr. Chowdhury that from the cross examination of PW15 it has again been established that PW 14 is also not a truthful witness. In course of his argument Mr. Chowdhury draws attention of ours to Section 27 of the Evidence Act while arguing on the evidence led by the I.O i.e PW18, it is submitted on behalf of the appellant that on perusal of the Exhibit 14 i.e. the alleged discovery statement made by the accused while he was in police custody, it would reveal that the said statement does not come under the purview of the Section 27 of the Evidence Act inasmuch as in the said statement the accused merely expressed his desire to help the police to recover the weapon of offence and other things. It is further argued that in absence of any specific statement with regard to the place or places where the accused had allegedly kept the said weapon of offence and looted ornaments in a concealed manner, the learned trial court ought not to have marked the said portion of statement as Exhibit 14 and while passing the impugned judgement learned trial court ought not to have considered the said portion of the statement as recorded under Section 161 Evidence Act, as a substantive piece of evidence in order to come to a logical finding that the said weapon of offence and jewelleries were recovered at the instance of the accused while he was in police custody.

15. It is further submitted by Mr. Chowdhury that PW18 being the I.O in his examination-in-chief has failed to state in verbatim what the accused actually stated before him and therefore learned trial court ought not to have placed much reliance upon PW18 while passing the impugned judgement.

16. It is further argued by Mr. Chowdhury that from the trial court record it would reveal that after closure of the evidence of prosecution witnesses and after examination of the accused under Section 313 CrPC, at the stage of argument learned trial court exercised its power under Section 165 of the Evidence Act and in that capacity he had taken deposition of PW19 and PW20 and at the same time the said Court marked the call details reports (CDRs) as Exhibit 20 and a certificate under Section 65B of the Indian Evidence Act as Exhibit 21. Drawing attention to the provision of Section 65B of the Evidence Act it is argued by Mr. Chowdhury that neither Exhibit 20 nor Exhibit 21 are admissible in evidence since those two exhibited documents are not in conformity of the provision of Section 65B of the Evidence Act which the learned trial court had failed to visualize. It is further argued by Mr. Chowdhury that though the learned trial court exercised its power under Section 165 of the Evidence Act and thus recorded the deposition of PW19 and PW20 but no leave was granted to the defence to cross-examine those witnesses causing serious prejudice to the interest of the accused which according to Mr. Chowdhury affects the very root of the trial. It is thus submitted on behalf of the appellant that it is a fit case for allowing the instant

appeal by setting aside the impugned judgement and to answer the death reference in the negative.

17. In course of his argument Mr. Chowdhury , learned counsel for the appellant relied upon the following reported decisions namely:

i. ***Babu Sahebagouda Rudragoudar and Ors. Vs. State of Karnataka*** *reported in* ***2024 INSC 320;***

ii. ***Bijender @ Mandar vs. State of Haryana*** *reported in* ***(2022) 1 SCC 92;***

iii. ***State of Karnataka Vs. David Razario*** *reported in* ***(2002) 7 SCC 728;***

iv. ***Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors.*** *reported in* ***(2020) 7 SCC 1;***

v. ***Anvar P.V Vs. P.K Basheer*** *reported in* ***(2014) 10 SCC 473;***

vi. ***Shailesh Kumar Vs. State of U.P (now State of Uttrakhand)****reported in* ***2024 INSC 143;***

vii. ***Moorthy vs. State of Tamil Nadu*** *reported in* ***2023 INSC 739;***

viii. ***Pawan Kumar Chourasia vs. State of Bihar*** *reported in* ***2023 Livelaw (SC) 197;***

ix. ***Jose @ Pappachan vs. The S.I of Police, Koyilandy and Anr.*** *reported in* ***(2016) 10 SCC 519;***

x. ***Rajesh & Anr. Vs. State of M.P*** *reported in* ***2023 Livelaw (SC) 814;***

xi. ***State of M.P vs. Phoolchand Rathore*** *reported in* ***2023 Livelaw (SC) 408;***

xii. ***Munikrishna @ Krishna Etc. vs. State of Ulsoor P.S*** *reported in* ***2023 Cri LJ 673;***

xiii. ***State of U.P vs. Rahul Singh @ Govind Singh*** *reported in* ***2022 Livelaw (All) 131;***

xiv. ***Hasib vs. State of Bihar*** *reported in* ***(1972) 4 SCC 773: AIR 1972 SC 283.***

18. Per contra, Mr. Luksom, learned advocate for the State duly led by Mr. Aditi Shankar Chakraborty, learned APP and Mr. Subhasis Misra, learned advocate for the State submits before this Court that on conjoint perusal of the evidence of PW14 and PW15 it would reveal that PW14 is a truthful witness and it has been proved beyond reasonable doubt that immediately prior to the commission of crime the accused expressed his intention to commit robbery in the house of the deceased persons which establishes his motive behind the commission of the murder of the two deceased persons. Mr. Luksom further argued that PW2 being the Judicial Magistrate in course of his deposition has also proved that in course of TI Parade the two prosecution witnesses namely; PW8 and PW 13 duly identified the jewelleries as has been seized from the house of the accused person and in absence of any contrary material, the said version of PW2 who is a disinterested witness, ought not to be disbelieved. It is further submitted by Mr. Luksom that before the learned trial court the prosecution is successful in proving the discovery statement as made by the

accused under Section 27 of the Evidence Act and pursuant to such discovery the weapon of offence and looted jewelries were seized from a bush and from the house of the accused person respectively as per his showing and PW3 and PW12 in their respective depositions had duly corroborated the factum of such seizure.

19. Drawing attention to Exhibit 20 and 21 it is submitted by Mr. Luksom that the evidence of PW14 that immediately before the commission of crime the accused made a phone call to him i.e. PW14 expressing his intention to commit crime and subsequent to the commission of crime at the late evening PW14 called the accused person which get due corroboration from the documentary evidence being Exhibit 20 being CDRs between PW14 and the accused and Exhibit 21 *vis-a-vis* the evidence of PW19 and PW20.

20. It is thus submitted on behalf of the State that it is a fit case for dismissal of the instant appeal and answering the death reference in affirmative.

21. On behalf of the State reliance has been placed upon the following reported decisions namely:

i. ***Narayan Chetanram Chaudhary & Anr. Vs State of Maharashtra*** *reported in* ***AIR 2000 SC 3352;***

ii. ***K. Babu Vs .State of Kerala*** *reported in* ***2023 Livelaw (Ker) 600;***

iii. ***Machi Singh vs. The State of Punjab*** *reported in* ***(1983) 3 SCC 470;***

iv. ***Bachan Singh Vs. State of Punjab*** *reported in* ***1980 (2) SCC 684;***

v. ***Dinesh Kumar Vs. State of Haryana*** *reported in* ***2023 Livealw (SC) 395.***

22. For the sake of brevity I propose to categorize the prosecution witnesses under the following heads:-

Private individuals	Government Officials	Police personnels
1. PW1- The informant And a seizure witness to the materials from P.O.	1.PW2- Judicial Magistrate who recorded the statements of the PW8 and PW13 and also performed TI Parade in respect of the seized articles.	1. PW9- ASI of Police
2. PW3- A co-villager of the deceased persons and a seizure witness to the weapon of offence and jewelleries and currency notes.	2. PW6- Autopsy Surgeon who performed Post Mortem examination over the dead bodies of the two deceased persons.	2. PW16- R.O.
3. PW4- A co-villager of the deceased persons and an inquest witness.		3.PW18- I.O.
4. PW5- A co-villager of the deceased persons.		4.PW19- SI of police who tendered and proved CDR.
5. PW7- A co-villager of the deceased persons.		5. PW20- The I.O, examined as PW20 in view of Section 165 of the Evidence Act.

6.PW 8- The step son deceased Khadka Bahadur Khadka, since deceased and son of deceased Bishnu Maya Katwal, since deceased and a seizure witness to the materials from the P.O.		
7.PW10-Cousin brother of Khadka Bahadur Khadka, since deceased.		
8. PW12- A co-villager of the deceased persons and a witness to the alleged seizure of the weapon of offence and jewelleries and currency notes.		
9. PW13- Son of deceased Khadka Bahadur Khadka.		
10. PW 14- A local driver.		
11.PW15- Another local driver.		
12. PW17- A co-villager.		

23. The factual matrix in which the appellant came to be prosecuted has been dealt with in the impugned judgement in detail. Therefore, I do not recapitulate the same all over again except to the extent it is necessary to do so for the purpose of the instant appeal and death reference. Since a charge under Section 302 IPC has been framed as against the present appellant by the trial

court and since the present appellant have been convicted by the trial court under the said Section, I propose to look to the evidence of PW6 who is the Autopsy Surgeon and in that capacity he performed post mortem examination of the dead bodies two deceased persons. While performing post mortem examination over the dead body of Khadka Bahadur Khadka @ Sunil Chhetri the said doctor found the following injuries as is available from his report namely:

> *"1. One chop wound over the nap of neck, obliquely placed measuring 8.7" X 3" X bone deep. The centre of the wound located 7.5" below vault of scalp. The wound cut the skin, fascia, muscle, blood vessels, nerve. Cerebral vertebrae fracture of C3 and C4 was noted. Laryngeal cartilages severing both the carotid arteries. The direction of the force found downward and forward. The margin of the chop wound was almost regular, clean cut and ill defined with base spellate and torn tags of tissues found to bridge the wound margins at the base of the wound.*
>
> *2. One abrasion noticed, measuring 0.5" X 0.3" over the left thumb. On dissection, extravasation of blood found. The abrasion was non-scab and reddish in colour.*
>
> *Concealed area of body was carefully examined. Several areas of the body examined by giving multiple small incision. No other injury was detected even after careful dissection and thorough examination."*

The said doctor while giving his opinion testified the following:-

> *" In my opinion death was due to the effects of injuries, ante-mortem and homicidal in nature."*

24. As discussed above PW6 also conducted post mortem examination over the dead body of Bishnu Maya Chhetri and while doing the said post mortem examination the said doctor found the following injuries:-

"1. Multiple chop wounds over the places of neck measuring 8"X 2.4" X bone deep. The centre of the wound located 9.5" cm from vault of scalp, 55.5" from left foot. On reconstruction of the wound, 6 angles were found making 3 chop wounds measuring-

1.(a) 3"X2.4"X bone deep on right side of the neck cutting the muscles, nerves, blood vessels and leading to fissure fracture of right mandible on the middle portion more towards right lower jaw. The lateral end is located 3" from right mastoid process.

1(b) One chop wound measuring 3.5"X 2.5"X bone deep cutting the muscles, blood vessels, nerves at the corresponding level and severing the right carotid artery.

1(c) One chop wound measuring 3.5"X 2.1" X bone deep on the left side of the neck cutting the skin, fascia , muscle , nerve, blood vessels, left carotid artery and fissure fracture of left jaw.

2. One chop wound over right side of the neck measuring 1"X 0.8"X cavity deep.

3. One chop wound measuring 0.7"X 0.3"X X chest cavity deep over right side of the chest.

4. One chop wound measuring 1.2" X 0.5" X 0.3" on the neck.

5. One chop wound measuring 1.3" X 0.8" X cavity deep on left side of neck.

6. One chop wound on dorsal aspect on right hand just below right little finger.

With regard to the cause of death of deceased Bishnu Maya Chhetri the said doctor testified the following:-

> *"In my opinion the death was due to the effects of injuries, ante-mortem and homicidal in nature."*

25. On perusal of the aforesaid clinching evidence of PW6, I have got no iota of doubt that the death of the two deceased persons are homicidal in nature. It further appears to this Court that in course of his cross- examination PW6 remained very much consistent and nothing could be elicited from his mouth to draw an inference that the cause of death of the two above mentioned deceased persons are otherwise than homicidal.

26. At this juncture I propose to look to the evidence of PW14 who according to the prosecution is a very vital witness. PW14 in course of his examination-in-chief testified that he is a driver by profession and he used to drive his pick up van from Kalimpong to Falakata to carry vegetables. He further testified that on 26.12.2021 at about 8-8:30 p.m the accused phoned him and expressed his intention to rob the two deceased persons who used to reside near his house and the accused had proposed PW14 to join him in committing such crime. PW14 declined to join and in the night he left for Falakata and subsequent thereto he came to learn from TV news that murder of two persons occurred near the vicinity of the accused. He further testified that he immediately called the accused who did not receive his call.

The cross-examination of PW14 seems to be very vital since in his cross-examination he stated that in course of investigation the police did not seize

his mobile phone. He further stated that Falakata Haat (a weekly market) remains open on Friday and Tuesday and when he was given suggestion that 26.12.2021 was a Sunday, he changed his version and stated that on the said night he had to go to Jaigaon and such fact he had not stated to the I.O.

From the cross-examination of PW15 (who is also a driver of the said locality) it reveals that Falakata market remains open on Tuesday and Friday. As rightly pointed out by Mr. Chowdhury, learned advocate for the appellant that on comparative study of the entire evidence of PW14 and PW15 it would reveal that that PW14 though stated that after getting call from the accused in the evening of 26.12.2021 he went to Falakata market but in course of his cross examination as well as in the cross examination of PW15 it reveals that actually he went to some other place except Falakata and therefore admittedly some contradictions have been elicited in the version of PW14 which definitely affects the reliability of PW14.

27. Admittedly, the FIR which has been lodged in this case was an unknown FIR however, in course of investigation especially from the information received from PW14 the accused was apprehended. Since it is the case of the prosecution that during police custody in course of investigation on the basis of discovery statement made by the accused some incriminating materials namely; weapon of offence and looted ornaments and currencies have been seized as per showing of the accused, I propose to look to the relevant statement of the accused which has been marked Exhibit 14. For better

appreciation, the relevant portion of the statement of the accused is reproduced hereunder in verbatim:-

> *".....and I will help police to recover the weapon and other things. I will help you if you give time."*

28. At this juncture I feel it obligatory to look to the relevant portion of the examination-in-chief of PW18 (I.O) who testified in the following manner:-

> *"While he was in police custody I recorded his statement and he stated that he will help police to recover the weapon and other articles, if allowed. Following this statement I took him to his house and as shown and produced by him, I seized the currency notes and jewellery. This is that part of the statement which led to the discovery. (Statement leading to discovery be marked EXT-14). On the basis of this statement I took Krishna Pradhan @ Tanka to the bush below old abandoned School building (Little Flower School) at Lower Tashiding, Kalimpong and there from below the bush he brought out the iron made khukuri with wooden handle with blood stains and I seized it in presence of witnesses. This is that seizure list, prepared, written and signed by me, (marked Ext-11)."*

29. In order to come to a logical conclusion as to whether the aforesaid statement of the accused comes under the purview of Section 27 of the Evidence Act and further the deposition of PW18 , I.O is also sufficient to prove that he seized the aforesaid materials on the basis of such discovery statement, I propose to look to the provision of Section 27 of the Evidence Act which is reproduced hereunder in verbatim:-

"27. How much of information received from accused may be proved.

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

30. At this juncture I also like to look to the reported decision of **Babu Saheb Gouda (supra**) wherein the Hon'ble Apex Court while dealing with the provision of Section 27 held thus:-

"58. We would now discuss about the requirement under law so as to prove a disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872(hereinafter being referred to as 'Evidence Act') and the discoveries made in furtherance thereof.

59. The statement of an accused recorded by a police officer under Section 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the Investigating Officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of State of Uttar Pradesh v. Deoman Upadhyaya AIR 1960 SC 1125

.....

64. Further, in the case of Subramanya v. State of Karnataka: 2022 SCC Online SC 1400, it was held as under: -

"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

"27. How much of information received from accused may be proved.-

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should

be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law."

31. At this juncture if we look to the evidence of PW3 and PW12 it would reveal that both PW3 and PW12 testified that in their presence on 12.01.2022 police seized one khukori (sharp cutting weapon) being the alleged weapon of offence and jewelleries and currency notes from the house of the accused persons as per showing of the said accused person.

32. If the aforesaid portions of the evidence of PW18, PW3 and PW 12 and Exhibit 14 are viewed in the light of the observation of the Hon'ble Apex Court in **Babu Saheb Gouda** (supra) it appears that the I.O prior to the recording of the statement under Section 27 of the Evidence Act (Exhibit 14) did not secure the presence of the PW3 and PW12 in the P.S which is mandatorily to be followed as per the said dictum of the Hon'ble Apex Court.

33. It is pertinent to mention also that on perusal of the relevant portion of the statement of the accused being Exhibit 14 it appears to me that the accused while in police custody merely expressed his desire to recover the weapon and other things in course of investigation but in such statement he had not disclosed the places from where the incriminating materials were kept in concealment i.e to say in such statement the accused had not pointed out the places where he had hidden the weapon of offence and the looted jewelleries and currencies. The omission as noted hereinabove in considered view of this Court is very vital in the light of the observation of ***Babu Saheb Gauda*** *(supra)* and in view of such I am of the view that the learned trial court

is not justified in placing his reliance upon the said portion of the statement as recorded under Section 161 Cr.P.C. namely; Exhibit 14 in coming to a conclusion that the prosecution is successful in proving the recovery of the alleged weapon of offence and jewelleries and the currencies of the deceased persons from the hidden places as per showing of the accused.

34. For the sake of argument even if I consider that Exhibit 14 is a statement under Section 27 of the Evidence Act leading to discovery of the incriminating materials at the instance of the accused person, it is also required to be looked into as to whether the prosecution before the learned trial court is at all successful to prove that the seized jewelleries belonged to the deceased persons and the alleged weapon of offence is at all used in the crime. As discussed above PW2 being the Judicial Magistrate testified that in his presence PW8 and PW13 being the son of deceased Bishnu Maya Chhetri and son of Khadka Bahadur Khadka respectively identified some jewelleries but if we look to the evidence of PW8 and PW13, it appears that they remained totally silent in their respective examination-in-chief with regard to such identification of the jewelleries as claimed to be have been owned by the deceased persons. In absence of any substantive evidence from the versions of PW8 and PW13 with regard to identification of the said jewelleries, the evidence of PW2 in this regard lost its significance inasmuch as the evidence of PW2 can at best be used as a corroborative piece of evidence but not as a substantive piece of evidence as wrongly claimed by the prosecution.

35. In this regard, I may safely place reliance upon the reported decision of **Hasib** *(supra)* wherein the following has been held:

> "6. *As observed by this Court in Vaikuntam Chandrappa vs. State of Andhra Pradesh, AIR 1960 SC 1340 [LQ/SC/1959/144] the substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when PW 10 saw them on January 28, 1963 then the T.I parade as against him cannot be of any assistance to the prosecution.".*

36. It is also pertinent to mention herein that no other materials have been placed before the trial court from the side of the prosecution with regard to the ownership of the said jewelleries.

37. So far as the alleged recovery of weapon of offence is concerned it is found that during the investigation the said weapon of offence was sent to RFSL for chemical analysis and in such chemical analysis human blood (AB group) was detected but the prosecution has not produced the Senior Scientific Officer of RFSL who conducted such test to prove that such blood group matches with the blood group of the deceased persons.

38. In view of such in considered view of me the recovery of the alleged weapon of offence and recovery of the jewelleries from the house of the accused persons as per showing of the accused loose its significance in connection with the trial as has been faced by the appellant in the trial court.

39. As discussed (*supra*) learned trial court while passing the impugned judgement placed reliance upon the evidence of PW14, PW19 and PW20 vis-a-vis Exhibit 20 (CDRs) in between the accused and the PW14 and Exhibit 21 (certification under Section 65B of the Evidence Act). On perusal of the evidence of PW14 it appears to me that even if PW14 is believed with regard to his testimony that on 26.12.2021 at about 8-8:30 p.m. he received call from the present appellant when the appellant stated to him that it was then Christmas time so there was nobody at home in the locality and he asked PW14 to join him in the proposed robbery in the house of the deceased by the appellant. In my considered view the said alleged telephonic communication at best be considered as a motive of the present appellant to commit the crime. However, it appears from his cross- examination that he is not a truthful witness since in his deposition he stated that on the self same night he went to Falakata market but in course of his cross-examination when PW14 was confronted, he admitted that on the relevant night he went to Jaigaon and he further stated that he did not state to the police that he went to the said place which in considered view of this Court is a relevant omission which tantamounts to contradiction within the meaning of Section 162 proviso read with Section 145 of the Evidence Act.

40. From the materials as placed before this Court it further reveals to me that the trial court very rightly invoked its power under Section 165 of the Evidence Act and thus examined PW19 and PW20 and called for the CDRs between PW14 and the accused and the certificate under Section 65B of the

Evidence Act which have been exhibited as Exhibit 20 and 21. Mr. Chowdhury, learned advocate for the appellant in course of his argument raised the point of admissibility of the said two exhibits. It is submitted on behalf of the appellant that in absence of any material that the said CDRs have been produced from the service provider and in view of the fact the certificate under Section 65 B of the Evidence Act has not been issued by the competent officer of the said service provider, the said CDRs and the said certificate cannot be admitted into evidence which is however disputed by Mr. Luksom in course of his argument by stating that on perusal of the evidence of PW19 and 20 it would reveal that due compliance of the provision of Section 65 B of the Evidence Act has been made. In order to arrive at a logical conclusion with regard to the admissibility of the Exhibit 20 and Exhibit 21, I propose to look to the provision of Section 65B of the Evidence Act which is as under:-

> ***"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."

41. At this juncture if I look to the evidence of PW19 and PW20 it appears that the said CDRs (Exhibit 20) are tendered by one S.I Biswajit Orao of Reang P.S which has been certified by the O/C of Special Operation Group, Kalimpong. PW20 being the I.O of the said case in course of his examination under Section 165 of the Evidence Act testified that the purported certificate under Section 65 B of the Evidence Act has been issued by the O/C Special Operation Group , Kalimpong. If the aforesaid version of the two prosecution

witnesses namely; PW19 and PW20 are viewed in the light of the legislative intent as enshrined in Section 65 B of the Evidence Act, it reveals that the said CDRs ought to have tendered by a responsible officer of the service provider since such CDRs have been generated by the said service provider through its computer system activities which are being regularly carried on in providing service to its customers. Section 65 (4) makes it mandatory that such certificate shall have to be issued by a person occupying a official position in person relation to the operation of the relevant device or the management of the relevant activities. In considered view of me by no stretch of imagination it can be argued that the police authorities generate CDRs by virtue of their regular activities and therefore the police authority is the competent person to grant such certificate. The same view was taken by the Hon'ble Supreme Court in the reported decision of ***Arjun Pandit Rao Khotkar*** *(supra)* wherein the Hon'ble Apex Court expressed the following view:-.

> *"26. It is now appropriate to examine the manner in which Section 65-B was interpreted by this Court in Anvar P.V. vs. P.K Basheer ; (2014) 10 SCC 473; a three Judge Bench of this Court after setting out Section 65A and Section 65B of the Evidence Act held: (SCC P.P.483-86 paras 14-18 and 20-24)*
>
> *14.....*
>
> *15.....*
>
> *16.....*

17.....

18.....

19.....

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

****

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 vs Navjot Sandhu, (2005)11SCC 600], 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.

****

60.. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time)."

42. In view of the discussion made hereinabove I hold that the evidence of PW19 and PW20 vis-a-vis Exhibit 20 and 21 are of no use to the prosecution and further Exhibit 20 and 21 ought not to be admitted in evidence by marking Exhibit 20 and 21 by the trial court.

43. Since the case before us is based on circumstantial evidence, the law with regard to the conviction on the basis of the circumstantial evidence has very well been crystallized in the reported decision of ***Sarad Birdhichand Sarda vs. State of Maharashtra*** reported in ***AIR 1984 SC 1622*** where the Apex Court laid five golden principles with reference to which the prosecution case has to be assessed.

> *"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;*
>
> *2. The facts so established should be consistent only the hypotheses of the guilt of the accused, that is to say, they should not be explainable on any other hypotheses except that the accused is guilty;*
>
> *3. The circumstances should be of a conclusive nature and tendency.*
>
> *4. They should be every possible hypothesis except the one to be proved.*
>
> *5. There must be chain of evidence so complete as not be have 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."*

The same view was taken in the reported decision of ***State of Rajasthan vs Rajaram*** *reported in* ***(2023) 8 SCC 180*** and ***State of Haryana vs. Jaglir Singh*** *reported in* ***(2003) 11SCC 261***.

44. It appears to me that if the facts and circumstances as involved in the case are viewed in the light of the observation of the Apex Court in the reported decision of **Sarad *Birdhichand Sarda* (supra**) it appears to this Court that the prosecution before the trial court has miserably failed to establish the circumstances from which an absolute inference of guilt of the present appellant can be drawn. I find so many lacuna as discussed (supra) in the chain of circumstances leading to the alleged guilt of the accused. Since the conclusion of a criminal trial is based on the theory of conclusive proof and not on preponderance of probability, I hold that the learned trial court is not justified in coming to a finding that the charge under Section 302 IPC has been proved as against the present appellant beyond reasonable doubt. Accordingly, the instant appeal is allowed and death reference is answered in negative.

45. Consequently, the impugned judgement dated September 29, 2023 and order of conviction dated September 30, 2023 as passed by learned Sessions Judge, Kalimpong in Sessions Trial No.31(5)/2022 /Sessions Case No. 12 of 2022 is set aside. The present appellant Krishna Pradhan @ Tanka is thus not found guilty under Section 302 IPC for the commission of murder of Khadka Bahadur Khadka and Bishnu Maya Chhetri.

46. The present appellant is thus acquitted in connection with the Sessions Trial No. 31(5)/2022/ Sessions Case No. 12 of 2022. The present appellant Krishna Pradhan @ Tanka be set at liberty at once, if not, wanted in connection with any other case.

47. Department is hereby directed to forward a copy of this judgment to the Secretary, DLSA, Kalimpong and Jalpaiguri who shall on receipt of the same take up the matter with the Superintendent of the Correctional Home where the present appellant is detained now for his immediate release if, he is not wanted in connection with any other case.

(Partha Sarathi Sen, J.)

Soumen Sen, J.:-

48. I have read the judgment authored by brother Justice Partha Sarathi Sen. However, I am unable to persuade myself to agree with the findings for the reasons recorded in my judgment.

49. The appeal is arising out of a judgment dated 29th September, 2023 in Sessions Case No.12 of 2022/Sessions Trial No.31(5) of 2022 arising out of Kalimpong P.S. Case No.318 of 2021 dated 28th December, 2021. The learned Trial Court convicted the accused appellant of double murder of an elderly couple under Section 302 of IPC and sentenced capital punishment subject to the confirmation by the Hon'ble High Court at Calcutta in addition to a fine of Rs.1 lakh.

50. The death reference along with the appeal has come up for consideration.

51. That the helpless couple were murdered brutally by the accused, is the case made out by the prosecution and accepted by the learned Senior Judge. The prosecution in order to prove the charge has examined 20 (twenty)

witnesses. The vital witnesses appeared to be PW2 the then Judicial Magistrate (1st Class) Kalimpong District Court, Som Prasad Pradhan, PW3, Bhopen Pradhan, a Press Driver - PW12, Rabi Chhetri, a driver-PW 14, Biswajit Oraon Sub-Inspector of Police - PW19 and Ongchuk Lepcha PW20. Som and Bhopen are seizure list witnesses. Rabi is the person to whom the accused alleged to have confided his plan to commit robbery and murder. The evidence of PW 8 and PW 13 the grand-children of the deceased victims are also material.

52. Before I assess and re-appreciate the evidence of the aforesaid witnesses let me summarise the argument advanced by the Counsel for the parties.

Submission on behalf of the Appellant:

53. Mr. Arjun Chowdhury learned Advocate representing the appellant convict has submitted that the conviction is based on circumstantial evidence and the entire chain of circumstances cannot lead to an inescapable conclusion that the accused has committed the murder. The prosecution has failed to offer an unbroken chain unerringly pointing to the guilt of the appellant. Mr. Chowdhury was also critical about the reliance being placed on the disclosure statement leading to the alleged recovery of the offending weapon, cash and ornaments as it has not been proved in accordance with law.

54. The learned Counsel has submitted that the CDR produced by the two police officers on behalf of the prosecution are also not admissible as no

certificate under section 65-B of the Evidence Act was produced by the said two officers and proved in accordance with law.

55. Mr. Chowdhury submits that the de-facto complainant Roshan Chettri claimed himself to be the adopted son of the deceased. He was not present at the police station and was informed about the incident by one Narbada Giri wife of Rajen Giri over phone call on 28th December, 2021 at around 9 a.m. In his cross-examination he admitted that he received the information of the murder at 9 a.m. and reached the police station at 10 a.m. He claimed to have lodged the written complaint thereafter. However, surprisingly the written complaint shows that the same was received at the police station at 9.55 hrs. that is even before the PW1 reached the police station. He also did not remember the time of the seizure of blanket, dari, mat, winter wrapper and the mobile phones by the police officer. There was no label pasted on the seized alamats produced before him in the court which were allegedly seized on 28th December, 2021. This casts serious doubt with regard to the presence of the witness in the police station. Narbada Giri was not cited as a prosecution witness. Rajen Giri PW5 in his deposition did not give any information with regard to his wife informing the de facto complainant about the murder. In view of such apparent discrepancies it can be safely concluded that the written complaint was not lodged in the mode and manner as has been portrayed by the prosecution.

56. The Judicial Magistrate, PW2 has recorded the statement of PW14, Rabi Chettri under Section 164 of the Cr.P.C. In his cross-examination PW2

has stated that PW8 Biswadeep Chettri and PW13 Bhakta Kumari Karki the grand-children of the victims came to know about the murder from K-TV News Channel in the morning of 27th December, 2021.

57. The Magistrate recorded the statement of Rabi Chettri on 29th January, 2022, that is, almost 30 days after the lodgement of FIR with the help of interpreter Narendra Chettri. The interpreter was however, not produced as a prosecution witness as a result whereof the defence lost the opportunity to cross-examine him and throw light on the aspect of whether the interpreter was called by the police and whether the interpreter was manipulated by the police. The Magistrate claimed that on 28th January, 2022 he had conducted the Test Identification Parade of the seized articles allegedly seized from the house of the accused. Two witnesses namely PW8 and PW13 were called for TI Parade of the seized articles. PW8 is the step son of the first deceased and the biological son of the second deceased. Vice Versa PW13 is the biological daughter of the first deceased and step daughter of the second deceased. Both the witnesses entered the chamber of the learned Magistrate one after the other but were unsuccessful in identifying all the articles seized from the house of the accused. Furthermore, in the evidence of PW8 and PW13 the prosecution did not bring any evidence on record with respect to the alleged TI Parade conducted on 28th January, 2022 in which they claimed to have participated and as such the same is liable to be discarded. Som Prakash, PW3 one of the seizure list witnesses has stated that the police seized the Khukri, being the offending weapon, which was concealed behind a bush and was produced by

the accused/convict from behind Purano School. He also stated that the police allegedly seized the cash and jewellery stated to be looted from the old couple. He has also stated that the first deceased was a very calm and quite person and had no enemies but recently he married the wife of another man so it is possible that the first husband of that woman was looking for him. On the basis of such evidence it is submitted that PW3 in fact had meant that the erstwhile husband of the second deceased might be involved in the commission of the offence. Moreover, the evidence of the said witness would show that the alleged recovery of the offending weapon, cash and gold ornaments were from the same place which runs contrary to the mode and manner of the seizure based on the disclosure statement of the accused under Section 27 of the Evidence Act. The entire seizure being doubtful deserves to be discarded in its entirety. Mr. Chowdhury has also referred to the deposition of the said witness to show that he had admitted that he could not see any label pasted on the seized article, that is, cash and allegedly recovered on the basis of the disclosure statement of the accused to which he was claimed to be a witness. He also admitted that no document was seized in his presence with respect to the currency notes and the ornaments produced before the court. Mr. Chowdhury has submitted that the autopsy surgeon, PW6 has stated that he conducted the autopsy between 2.58 pm and 4.28 pm on 28th January, 2021 and the probable time of death could be any time between 8 hrs. and 30 hrs. before the post-mortem examination of the body. Mr. Chowdhury relying upon the evidence has submitted that the probable time of death could be any time

between 10.28 pm on 27th December 2021 to 8.28 am on 28th December, 2021. This rules out any possibility of the offence being committed on 26th December, 2021 and confirms the version of the PW8 and PW13 stated before PW2 that the media reporting was on 27th December, 2021.

58. Mr. Chowdhury has referred to the evidence of PW8 to show that the said witness in his evidence has stated that his biological father has landed property and he remained unmarried. He also admitted that the packet of the seized articles did not contain any label of his signature. The learned Counsel wanted to draw an inference from the evidence some quarrel between the biological father of the witness and the second deceased over property matters at the time when the said deceased decided to live with the first deceased. The I.O did not explore the possibility of the involvement of the biological father of the PW 8 in the murder.

59. The learned Counsel referred to the evidence of PW12. It is submitted that according to PW 12 the seizure of cash and jewellery were from the house of the convict and the offending weapon allegedly produced by the accused concealed in a bush behind Purono School. Thereafter the police allegedly seized the cash and jewellery claimed to have been robbed from the old couple. This entire exercise happened between 3.30 pm and 4.30 pm. One envelope was opened in front of him and one certificate allegedly issued by the proprietor 'Singh Jewellers' certifying that one neck chain of 17 grams and two rings were all made of 23 carat gold. Curiously, the investigating agency did not show the origin of the purported certificate nor explained how and under

what circumstances it was prepared and the maker of the purported certificate was not examined. Under such circumstances the purported certificate could not have been admitted in evidence as it has no evidentiary value.

In his cross-examination, he stated that at first, Police took Krishna Pradhan to his house and thereafter to the other place. He further stated there was no money receipt or bill seized by the police along with the money and gold ornaments. He further stated that he could not see any label pasted on the offending weapon/Khukri allegedly recovered on the disclosure statement of the accused to which he was a witness.

60. Mr. Chowdhury has submitted that the evidence of both PW3 and PW12 seizure witnesses are unreliable and required to be discarded. The seizure list, however, shows that the offending weapon was recovered first between 15.50 hrs. to 16.40 hrs. and the gold articles and cash later on between 16.35 hrs. to 17.20 hrs., contrary to the deposition of the aforesaid witness. This strikes at the root of the alleged seizure based on the disclosure statement of the accused under Section 27 of the Indian Evidence Act. The entire seizure is doubtful and no reliance could be placed on the alleged seizure made on the basis of the disclosure statement of the accused.

61. Mr. Chowdhury submits that the evidence of Rabi Chettri PW14 cannot be relied upon. He is untruthful and unreliable as would be evident from the fact that in the cross-examination he admitted that the police did not seize his mobile phone during investigation, in which he received a call from

the accused on 26th December, 2021. During cross examination he has stated that on that night he went to Falakata Haat to buy vegetables. Being confronted with a suggestion that Falakata Haat remain closed on Tuesday and that 26th December, 2021 was a Sunday he resiled from his earlier statement and said that he had gone to Jaigaon to deliver **'Phing'** to Sangita aunty**.** However, he never spoke about going to Jaigaon in his statement recorded under section 164 of the CrPC for delivering Phing to Sangita aunty. 'Sangita aunty' was also not cited as a prosecution witness.

62. In respect of the evidence of PW18, the Investigating Officer, it is submitted that the recovery of the offending weapon, cash and ornaments could not be proved by the IO. He has failed to demonstrate and bring on record the circumstances as to how the alleged disclosure statement was recorded. The RFSL report was not proved although marked as Exbt. 25 as the maker of the said report was not examined. The Trial Court has proceeded in hot haste and without adhering to the legal principles admitted such document as evidence thereby causing serious miscarriage of justice. Furthermore, the samples to the RFSL was sent after 40 days of seizure without any reasonable explanation which further shows that the same was prone to tampering. The IO has admitted that the CDR with respect to the alleged telephonic conversation between appellant and PW14 on 26th December, 2021 was not seized. The IO has confirmed that the PW14 did not say before him that he went to deliver 'Phing' to Sangita aunty. The IO has further stated that in the disclosure statement the accused did not say that he had hidden the Khukri behind the

bush near the **Little Flower School** or that he had hidden the jewellery and cash in his almirah. The IO did not put any specific mark of identification on the body of any of the jewellery and the cash allegedly recovered from the house of the accused.

63. Mr. Chowdhury submits that in such circumstances the recovery of the offending weapon remains not proved and the prosecution cannot take any benefit of the provision of Section 27 of the Indian Evidence Act since evidence would not show that the offending weapon and the stolen articles were discovered in furtherance of a disclosure statement. The circumstances under which such disclosure statement was recorded is not disclosed or proved. The Investing Officer in his evidence has not narrated what the accused has stated to him that led to the alleged discovery of the aforesaid weapon and articles.

64. It is submitted that in order to sustain the guilt of the accused the recovery should be unimpeachable and not shrouded with elements of doubt. The prosecution has failed to prove the exact information given by the accused while in custody which led to recovery of the articles. Hence the mode and manner of recovery of the articles through the evidence of the seizure list witnesses is inadmissible in evidence and cannot be accepted as recovery in terms of the disclosure statement in view of the settled position in law. In this regard Mr. Chowdhury has relied upon the following decisions:

a. ***Babu Sahebagouda Rudragoudar & Ors. v. State of Karnataka***[1]***,*** Paragraphs 58 to 68.

b. ***Bijender @ Mandar v. State of Haryana,***[2] paragraph 19

c. ***State of Karnataka v. David Rozario,***[3] paragraph 5.

65. It is submitted that the evidence of PW19 and PW20 cannot be relied upon as the certificate under Section 65B of the Indian Evidence Act is not proved in accordance with law. It has not been duly certified by the service provider. In view of the fact that the service provider has not issued the said certificate, the device has not been properly identified and from whose possession the data was collected not being proved the *quintessential* requirement of Section 65B of the Indian Evidence Act has not been fulfilled. CDR is not admissible due to want of Certificate under Section 65B of the Indian Evidence Act has been judicially recognised in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.,***[4] paragraphs 20-24, 30-32, 34, 35 and ***Anvar P.V v. P.K. Basheer,***[5] paragraphs 22-24.

66. Mr. Chowdhury has submitted that the evidence of CDR surfaced on the basis of order passed by the learned District and Sessions Judge at the conclusion of the trial and at the stage of argument. The learned Counsel has drawn our attention to order no.37 dated 1st September, 2023 where the learned Sessions Judge after hearing the prosecution at length had adjourned

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[1] **2024 INSC 320**
[2] **2022 (1) SCC 92**
[3] **2002 (7) SCC 519**
[4] **2020 (7) SCC 1**
[5] **2014(10) SCC 473**

the matter on the prayer of the learned Defence Counsel. However, the learned trial court passed an order directing the IO to produce the CDR of Rabi Chettri @ Ramu Chhettri, PW 14 for the period of 25th December, 2012 till 1st January, 2022 and adjourned the matter till 4th September, 2023 for further evidence of IO under Section 165 of the Indian Evidence Act. It is submitted that the said direction is contrary to law in view of the decision of the Hon'ble Supreme Court in ***Sailesh Kumar v. State of UP***[6] paragraph 29. However, Mr. Chowdhury has candidly admitted that no prayer was made before the learned trial court for leave to cross-examine the said witness or PW 20 who produced the certificate with other relevant documents.

67. It is submitted that the learned Trial Court could not have relied upon the evidence of Rabi Chettri PW14 whose credibility has been impeached at the trial. Moreover extra judicial confession is not admissible in evidence in view of the decision of the Hon'ble Supreme Court in ***Moorthy v. State of Tamil Nadu***,[7] paragraph 6 and ***Pawan Kumar Chourasia v. State of Bihar,***[8] paragraph 5.

68. It is submitted that when the court is faced with two possible and plausible views, the one in favour of the accused, should be accepted as has been clearly laid down in several decisions including the decision of the Hon'ble

[6] **2024 INSC 143: 2024 SCC Online SC 203**
[7] **2023 INSC 739**
[8] **2023 LiveLaw (SC) 197**

Supreme Court in ***Jose @ Pappacha v. The sub-Inspector of Police, Koyilandy & Anr.,***[9] paragraph 53.

69. It is submitted that it would be clear from the evidence of different witnesses that the chain of evidence is not complete and it could not be said that it does not leave any reasonable ground for the conclusion consistent with the innocence of the accused. The circumstances are not conclusive in nature and the facts do not establish conclusively, the guilt of the accused. The circumstances disclosed do not lead to any irresistible conclusion that the accused alone is the perpetrator of the crime in question. Moreover, the prosecution has not corroborated the statement of PW2 the Judicial Magistrate with regard to the identification of seized gold ornaments with the evidence of PW8 and PW13. The prosecution has not asked any question with regard to the evidence of PW2 that PW8 and PW13 had in fact, identified the ornaments of their grand-parents alleged to have been seized from the house of the deceased victims on the basis of the disclosure statement.

70. Per contra Mr. Aditi Shankar Chakraborty, learned Addl. Public Prosecutor submits that it is a case of murder of an elderly couple. They were brutally killed in their house by Khukri (sharp cutting weapon) by the accused when the community in the area were celebrating Christmas week. The learned APP has principally relied upon the evidence of PW 2, PW 3, PW 5, PW 6, PW 14, PW 15, PW 19 and PW20 in aid of his submission that the evidence of these witnesses would unerringly establish the commission of the offence by

[9] **2016 (1) SCC 92**

the accused. The learned APP submits that from the evidence of Rajen Giri, PW 5 it would appear that his house is situated at 300 meters away from the house of the victim. He had a water connection from the house of the victim. When on 27th December, 2021 he was not getting water from the said pipeline, he called Kharka Bahadur Kharka one of the victims over phone but he did not respond and accordingly on the following morning, that is, 28th December, 2021 he went to the house of the said victim but he found the door was closed. He tried over phone unsuccessfully. He became afraid and informed PW 3 Som Prakash and other co-villagers about the aforesaid incident and then co-villagers along with PW 3 and PW 5 assembled. When the door was slightly pushed it was seen from outside that two dead bodies were lying in a pool of blood. This incident was accordingly reported to the police. The said statement of PW 5 was corroborated by PW 3 as he has stated in his evidence that the door was locked from outside by latch. PW 5 informed PW 3 that he did not open the latch out of fear. When few villagers gathered, they opened the door and found the body of Kharka Bahadur Kharka and his wife Bishnu Maya Katwal lying on the floor in a pool of blood and an old blanket covering their face. Thereafter he reported the incident to the Kalimpong Police Station over telephone.

71. Roshan Chhetri, PW 1 was informed at around 9.10 am. After he arrived he saw the bodies lying on the floor in a pool of blood and thereafter he lodged a complaint in writing. PW 18 is the Investigating Officer. It would reveal from his evidence that the inquest report was prepared by him and

thereafter he sent the body for Post Mortem. The evidence of the doctor, PW 6 who conducted the autopsy of the body found grievous injuries over their bodies. In the post mortem report he opined that the death was due to the effects of injuries and ante mortem in nature. The doctor deposed that after going through the nature of the wounds sustained by both the deceased, it can be presumed well that same weapon was used as weapon of assault upon them. The weapon is moderately heavy sharp cutting weapon that might have been used and the possibility of Khurki as the weapon used cannot be ruled out.

72. The learned APP submits that the Post Mortem report and the deposition of PW 6 revealed that in the body of Bishnu Maya Chhetri there are several chop wound in the neck as well as other body part which literally shows the inhumane nature of the crime. Rabi Chhetri @ Damu, PW 14 before the Magistrate has stated that he received a phone call from Krishna Pradhan @ Tanka on 26th December, 2021 at around 8-8.30 p.m. and during such conversation the accused informed him that one old couple used to live in 3rd mile, and since it was Christmas time there was a possibility that the village would be more or less empty. They have lots of money. The accused suggested that both of them can commit robbery and murder the couple. PW 14 refused to act on the said suggestion and asked him not to do anything of that kind and blocked his number in his mobile. Thereafter he left for Falakata with Sangita Pradhan for business purpose to bring vegetables. On 28th December, 2021 he came to know of the said murder from K-TV news and then he called

the accused on his mobile phone to enquire if he had committed such crime. The accused however, disconnected the call. In his evidence PW 14 has affirmed such statement being made before PW2 and recorded under Section 164 of Cr.P.C. The Judicial Magistrate conducted the TI Parade on 28th January, 2022 for identification of the jewelleries which were recovered from the accused. The step son of the first deceased and step daughter of the second deceased victims have duly identified the ornaments in presence of PW2 and it is proved by the evidence of PW2. It is submitted that the evidence of PW 14 is also proved by PW 15 Rafal Lepcha. In his deposition he has stated that while he was watching K-TV news on mobile phone on 28th December, 2021 where the incident of the said murder was shown at that time his friend Damu-PW14 came close to him and was surprised to see the said news. Damu informed Rafal that the accused had planned to steal the properties from the house of the old couple and wanted PW 14 to accompany him. After watching the said news Damu called the accused but the accused disconnected the phone. Thereafter the police interrogated the accused and recorded his statement under 161 of the Cr.P.C where he admitted to commit his crime by Khukri and looted cash and jewellery and assured that he would help the police to recover the weapon and other things. On the instruction of the accused the investigating team found iron made Khukri and seized it. The weapon was marked as MAT Exbt.11. Some cash and gold jewellery have also been seized and exhibited as MAT Exbt. 10. The said incriminating weapon Khukri was examined by the serological department where human blood was found and

matched with the blood found on blanket and cotton wool and other apparels connected with the place of occurrence which is certainly acceptable and is admissible evidence under Section 27 of the Indian Evidence Act.

73. It is submitted that PW 19 and PW 20 proved the statement of the PW 14 regarding phone calls between PW 14 Rabi and the accused Krishna Pradhan. The certificate under Section 65 B of Indian Evidence Act issued by OC. SOG Kalingpong contains call received from mobile number 8016900652 by mobile no. 8101150734 which belongs to PW 14 Rabi on 26th December, 2021 having duration of 155 seconds and one call out from 8101150734 to 8016900652 on 28th December, 2021 at about 13.45 hours.

74. During the examination of the accused under Section 313 Cr.P.C on being asked he accepted that Onchuk Lepcha has proved the report of OC. SOG showing that Mobile no. 8016900652 belonged to him during 25th December, 2021 to 1st January, 2022. It is submitted that all witnesses corroborated each and every circumstance leading to the commission of the offence by the accused and has proved the prosecution case. It is submitted that the prosecution witnesses have been consistent in their deposition which implicates the direct involvement of the accused and clearly pointed out the guilt of the accused in the commission of the brutal, heinous and barbaric crime upon the victims. It is submitted that on proper appreciation of the evidence it can be safely inferred that the assault was intentional which resulted in the death of the victims caused by a weapon and this heinous and brutal murder has been single handedly committed by the accused in a

planned manner. It is submitted that although the appellant has tried to point out certain discrepancies in the evidence of some of the witnesses but they are not material to dislodge the impact created by the evidence of all the witnesses and it is trite law that contradictory portion of the prosecution witnesses needs to be discarded if there has been no material discrepancy. Minor contradiction cannot discard the entire evidence on record as minor contradictions are bound to appear in the statement of truthful witnesses as memory sometimes plays false and the sense of observation differs from person to person **as** has been clearly recognised and accepted in ***Rajendra @ Rajappa vs. State of Karnataka***[10] and ***Narayan Chetan Ram Chowdhury & Anr. v. State of Maharashtra;***[11] paragraph 45. It is submitted that the unshaken evidence of PW 14 duly corroborated leaves no room for doubt and dichotomy as to the fact of commission of murder by the present appellant. Moreover the relative of the victims had identified the jewellery robbed and they cannot be considered as an "interested witnesses" as the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or other convicted for some animus or for some other reason as explained in ***Kartik Malhar v. State of Bihar***[12] which is singularly absent in the instant case.

75. It is submitted that the learned Trial Court on proper appreciation of evidence did not accept the submission of the defence Counsel. The defence has failed to establish any reasonable doubt in the chain of circumstances of

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[10] **2021(6) SCC 178**
[11] **2000 (8) SCC 457**
[12] **(1996) 1 SCC 614 (620)**

the prosecution case. Moreover from the evidence of PW 14 it is quite established that the motive of robbery and the intention of the accused to commit murder in case any difficulty arises while committing murder. It was pre-meditated and well planned. The deposition of PW 6 has referred to a sharp cutting weapon as the weapon used during murder and the same has been recovered from the information given by the accused person himself and accordingly entered in the seizure list in his presence. The signature of the accused along with independent witnesses and their evidence on recovery would go to show that the weapon was seized from and/ or was produced by the accused. These facts had remained unshaken as the accused in course of his examination under Section 313 Cr.PC where he was given adequate opportunity to have a direct dialogue with the learned Trial Judge to explain the evidence against him did not make any statement. The learned APP concluded by submitting that considering the propensity of violence, the magnitude of the gruesome crime, the brutality of the murder of the helpless, innocent and old aged couple certainly attracts the principle of "rarest of the rare case" and the quantum of punishment imposed by the learned Sessions Court is adequate, sufficient and demands no lenient view and in this regard the learned APP has relied upon the decision of the Hon'ble Supreme Court in ***State of UP v. Satish***[13] and ***Machi Singh v. The State of Punjab;***[14] and ***Devender Pal Singh vs. State of (NCT of Delhi)***[15]**.**

[13] **2005(1) C.Cr. LR (SC) 366**
[14] **1983 (3) SCC 470**
[15] **2002 (5) SCC 234**

Discussion and Analysis:

76. The appellant is a convict on death row. I need to assess and re-appreciate the evidence of the witnesses and to consider the statement of the accused recorded under Section 313 of the Evidence Act in arriving at my finding.

77. The investigation was initiated primarily on the basis of the complaint lodged by Roshan Chhetri , the de facto complainant. The de facto complainant is the adopted son of Kharka Bahadur Kharma. On 28th December, 2021 at around 9 a.m. in the morning he received a phone call from Narmada Giri wife of Rajen Giri. She initially informed him that Kharka Bahadur is not receiving her phone call. After ten minutes she again called and intimated that both the victims have been murdered and Roshan was asked to visit the place. When he arrived at the place he found police and co villagers. While entering the house and standing at the corner of the door he found both the victims were lying in a pool of blood splashed all around. He is the de facto complainant.

78. The incident was claimed to have occurred on 26th December, 2021 at around 22.00 hours. The accused was arrested on 10th January, 2022. He was produced before the court on 11th January, 2022.

79. The prayer for police custody was allowed for seven days. While he was in police custody the accused made a statement under Section 161 of the Cr.P.C. The statement relevant for the purpose and needs consideration is:

> *"..... I will help Police to recover weapon and other things I will help you if you give time."* (emphasis supplied)

80. However for the purpose of Section 27 of the Indian Evidence Act a portion of the statement namely, "I will help the police to recover the weapon and other things. I will help you if you give time" as recorded on 10th January 2022 is only admissible. This statement was marked as Exhibit 14. It is clear from the aforesaid statement of disclosure that he has stated to help the police to recover the weapon and other things.

81. Apropos to this I need to consider the evidence of PW 3, 12 and 18.

82. PW 3 and PW 12 are seizure list witnesses.

83. PW. 3 is Som Prakash Pradhan. He duly identified the accused on the dock.

84. Som in his evidence has stated as follows:

> *"On 12.01.2022 police seized one iron made 'Khukuri' (sharp cutting weapon) with wooden handle about 18 inches long with blood stains which was concealed by the accused behind a bush and was produced by the accused Krishna Pradhan in my presence and prepared a seizure list on which I signed. This is my signature on the copy of that seizure list. Signature marked Ext-11/2. Accused was brought by police while he was in police custody and he led the police to the place where it was hidden behind the bush, behind 'Purano' school and police seized it. Police seized 22 numbers of Indian currency notes of Rs. 2000, 33 notes of denomination of Rs 500, one golden colour necklace like gold, one golden colour finger ring like gold, one golden colour finger ring like gold with green colour stone and one old and used blue colour small synthetic bag*

with broken zip in my presence on 12.01.2022 and prepared a seizure list on which I signed. This is my that signature on the seizure list. Signature marked Ext-10/2. These are those currency notes and gold necklace, two gold rings and one blue synthetic bag (Identified Mat Ext-IV collectively and Mat.Ext-V collectively). This is that 'Khukuri' that was seized in my presence (Identified Mat. Ext-III). These are those blood stained blanket, winter wrapper, plastic mat and chairs having blood stains that were seized in my presence, marked Mat.Ext-VI. These are those three mobile phones that were seized in my presence, marked Mat.Ext-VII collectively. The accused on whose showing the 'Khukuri' was recovered is present today in court (Identified)"

85. Shri Bhupen Pradhan PW 12 also identified the accused. In his chief he has inter alia, stated as follows:

"On 12.01.2022 I was at home. Police came to 3rd Mile that day with Krishna Pradhan @ Tanka. He took police to his house and we were asked to come along. Another co-villager Som Prasad Pradhan was also accompanying us. Krishna Pradhan's house is at 3rd Mile. On his showing, police and we went to his house. He was caught in connection with the murder of one Shambu and his wife. He opened the steel almirah in his house and from inside the almirah money, 20/22 notes of Rs. 2,000/- denomination and around 32/33 notes of Rs 500 denomination, neck chain which looked like made of gold, two gold rings and a bag with zip were recovered. Police seized all those articles, prepared a seizure list and I signed on that seizure list. This is my signature on that seizure list. Signature marked Ext-10/1. Krishna Pradhan took us to the place of occurrence and narrated how he came to the house and how he murdered the victims. He stated where he had concealed the weapon of offence.

He took us to a place behind Old Little Flower School and brought out the 'Khukuri' (sharp cutting knife like weapon) out of a bush and handed it over to police and police seized it under proper seizure list on which I signed. This is my signature on that seizure list. Signature marked Ext-11/1 (Seized weapon is produced in sealed condition and opened in court with permission and shown to witness). This is that 'Khukuri' that was handed over by the accused to the police and that was seized by police, marked Mat.Ext-III (objected to). This whole process happened approximately between 3:30-4:30 P.M. (Two sealed envelopes are produced and opened in court with permission) The first envelope contains 22 notes of Rs. 2,000/- denomination and 33 notes of Rs. 500 denomination ie, Rs. 60,500 along with a xerox copy of the seizure list. This is my signature and these are those notes that were seized that day. Signature marked Mat.Ext-IV/I and the notes marked Mat.Ext-IV collectively. The second envelope is opened and one certificate issued by the proprietor 'Singh Jewellers' (marked X for identification) certifying that the one neck chain of 17 gms and two rings are all made of 23 carat gold. This is the gold chain and two gold rings that were seized that day in my presence (identified and marked Mat.Ext-V collectively). This is my signature on the copy of the seizure list (Mat.Ext-V collectively that was kept inside the packet)

86. Shri Onchuk Lepcha, I.O. PW 18 in his evidence has inter alia stated as follows:

"On 10.01.2022 I arrested the accused person from Lower Tashiding. I produced him before court on 11.01.2022 and I prayed for police custody and my prayer for custody was allowed for 7 days. While he was in police custody I recorded his statement and

he stated that he will help police to recover the weapon and other articles, if allowed. Following this statement I took him to his house and as shown and produced by him, I seized the currency notes and jewellery. This is that part of the statement which led to the discovery. (Statement leading to discovery be marked Ext-14). On the basis of this statement I took Krishna Pradhan @ Tanka to the bush below old abandoned School building (Little Flower School) at Lower Tashiding, Kalimpong and there from below the bush he brought out the iron made khukuri with wooden handle with blood stains and I seized it in presence of witnesses. This is that seizure list, prepared, written and signed by me, (marked Ext-11). The accused also signed in my presence. These are the currency notes that I seized on 12.01.2022 on showing of accused (Reference Ext-10) (Identified Mat Ext-IV). This is that gold chain, one gold ring, another gold ring with green stone that I seized from the house of accused on his showing (Reference: Ext-10) (Identified Mat Ext-V). I procured a certificate from Singh Jewellers, Kalimpong to ascertain whether these three articles are made of gold or not and the jeweller gave me a certificate that the chain and two rings are made of gold. This is that certificate issued by the proprietor Singh Jewellers and collected by me in original. (Certificate marked Ext-15) (previously marked X for identification)"

87. During cross examination the IO has deposed that the accused did not give details of the place where he had hidden the articles during his statement recorded under Section 161 of the Cr.P.C., rather he has stated that he would help police to recover the weapons and other things if time is given to the accused.

88. In the background of the aforesaid evidence it needs to be seen whether the disclosure statement led to the discovery of the articles robbed and the offending weapon can be considered and admitted in evidence. It is trite law that the entirety of the statement recorded under Section 27 of the Indian Evidence Act is not admissible. The confessional part of the statement as a whole is inadmissible and only the part which distinctly leads to discovery of a fact is admissible in evidence.

89. In the instant case, the question arises as to whether the evidence relating to the discovery of the offending weapon was sufficient to implicate the accused. In arriving at a finding of his guilt on the basis of disclosure statement has to be assessed by reference to Section 27 of the Evidence Act. Section 27 of the Evidence Act is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The restriction as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure.

90. The Hon'ble Supreme Court in ***Geejaganda Somaiah v. State of Karnataka***[16] has observed as under:

> *"25..... It does not, however, mean that any statement made in terms of the aforesaid Section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the Accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act."*

91. The object of the provision *i.e.* Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections be admitted in evidence. Under Section 27 the evidence leading to discovery of any fact is admissible, provided the information must emanate from an accused in the custody of the police. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be disclosed and evidence to that effect has to be adduced. The idea encapsulated in Section 27 of the Evidence Act is the

[16] **2007 (9) SCC 315**

'doctrine of confirmation' by subsequent facts: that is statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This doctrine is founded on the principle that if any fact is discovered as a result of a search made on the strength of any information obtained from an under-trial, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. [see ***Salvi & Ors. v. State of Karnataka***[17] and ***State of Karnataka v. David Rozario***[18].]

92. The scope and ambit of Section 27 have been succinctly with illustration stated in ***Pulukuri Kottaya & Ors. v. Emperor***[19]**,** in the following words:

> *"...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody*

[17] **AIR 2010 SC 1974: 2010 (7) SCC 263**
[18] **2002 (7) SCC 728: AIR 2002 SC 3272**
[19] **AIR 1947 PC 67: 1946 SCC Online PC 47: (1946-47) 74 IA 65**

> *that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."* (emphasis supplied)

93. The said principle was thereafter restated and reiterated in ***Anter Singh v. State of Rajasthan***,[20] and ***Mustakeem @ Sirtajudeen v. State of Rajasthan***[21]***.***

94. It is a settled legal position that the facts need not be self-probatory and the word "fact" as contemplated in Section 27 of the Evidence Act is not limited to "actual physical material object". The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. It includes a discovery of an object, the place from which it is produced and the knowledge of the accused as to its existence. (see ***Asar Mohammad & Ors. v. The State of U.P.***[22] paragraph 21)

95. In a fairly recent decision in ***Babu Sahebagouda Rudragoudar*** *(supra)* the requirement under Section 27 of the Indian Evidence Act, 1872 to

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[20] **2004 (10) SCC 657**
[21] **AIR 2011 SC 2769**
[22] **2019(12) SCC 253**

make the disclosure statement admissible is discerned in the following paragraphs:

> *"59. The statement of an Accused recorded by a police officer Under Section 27 of the Evidence Act is basically a memorandum of confession of the Accused recorded by the Investigating Officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of State of Uttar Pradesh v. Deoman Upadhyaya 1960: INSC: 107: AIR 1960 SC 1125.*
>
> *60. Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the Accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the Accused which has been taken down into writing leading to the discovery of incriminating fact(s).*
>
> *61. As per Section 60 of the Evidence Act, oral evidence in all cases must be direct. The Section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section in case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same.*
>
> *62. The manner of proving the disclosure statement Under Section 27 of the Evidence Act has been the subject matter of consideration by this Court in various judgments, some of which are being referred to below.*
>
> *63. In the case of Mohd. Abdul Hafeez v State of Andhra Pradesh (1983) 1 SCC 143, it was held by this Court as follows:*

> *5. ……If evidence otherwise confessional in character is admissible Under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information, when he is dealing with more than one Accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.*

64. Further, in the case of Subramanya v. State of Karnataka 2022 INSC 1083, it was held as under:

> *82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:*
>
> *27. How much of information received from Accused may be proved. -*
>
> > *Provided that, when any fact is deposed to as discovered in consequence of information received from a person Accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.*
>
> *83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the Appellant herein which ultimately led to the discovery of a fact relevant Under Section 27 of the Evidence Act.*
>
> *84. If, it is say of the investigating officer that the Accused Appellant while in custody on his own free will and volition made*

a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the Accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the Accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the Accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the Accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other Article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the Accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the Accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other Article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated Under Section 27 of the Evidence Act. If we read the entire oral evidence of the

investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

65. Similar view was taken by this Court in the case of Ramanand @ Nandlal Bharti v. State of Uttar Pradesh 2022:INSC: 1075, wherein this Court held that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. <u>While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement</u>.

66. If we peruse the extracted part of the evidence of the Investigating Officer (PW-27) (reproduced supra), in the backdrop of the above exposition of law laid down by this Court, the interrogation memos of the Accused A-2(Exhibit P-15) and A-1 (Exhibit P- 16), it is clear that the Investigating Officer (PW-27) gave no description at all of the conversation which had transpired between himself and the Accused which was recorded in the disclosure statements. Thus, these disclosure statements cannot be read in evidence and the recoveries made in furtherance thereof are non est in the eyes of law." (emphasis supplied)

96. The disclosure made by the appellant while in police custody had led to certain discovery such as the place where the offending weapon was concealed and hidden and the place where the stolen cash and ornaments were hidden is material and relevant for the purpose of Section 27 of the Indian Evidence Act. It is admissible as the disclosure made by the accused to the police while he was in custody led to discovery of the aforesaid facts and hence that discovery is required to be read as evidence against the accused in terms of Section 27 of the Act. Moreover having regard to the fact that the disclosure

lead to the discovery of distinct facts namely, offending weapon and the stolen cash and ornaments, even if, it may amount to confession is admissible in evidence.

97. The law on this aspect is succinctly stated in ***Jaffar Hussain Dastagir v. State of Maharashtra***[23] in the following manner: (SCC p. 875, para 5)

> "5. Under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to

[23] **1969 (2) SCC 872**

the commission of some offence." (emphasis supplied) [see also ***Yedala Subba Rao & Ors. v. Union of India***[24]]

98. The decisions on the aforesaid legal proposition of the Apex court are legion and it is now well settled that no inference can be drawn against the accused under Section 27 of the Evidence Act only on the basis of the discovery of a material object pursuant to the disclosure statement made by him to a police officer. The burden of proof lies on the prosecution to establish a close link between the discovery of the material object and its use in the commission of the offence.

99. The interface between disclosure statement and motive have been lucidly explained in ***Siju Kurian v. State of Karnataka***[25] in the following words:

> *"18. Section 27 permits the derivative use of custodial statement in the ordinary course of events. There is no automatic presumption that the custodial statements have been extracted through compulsion. A fact discovered is an information supplied by the Accused in his disclosure statement is a relevant fact and that is only admissible in evidence if something new is discovered or recovered at the instance of the Accused which was not within the knowledge of the police before recording the disclosure statement of the Accused. The statement of an Accused recorded while being in police custody can be split into its components and can be separated from the admissible portions. Such of those components or portions*

[24] **2023 (6) SCC 65**
[25] **AIR 2023 SC 2239**

which were the immediate cause of the discovery would be the legal evidence and the rest can be rejected vide Mohmed Inayatullah v. State of Maharashtra AIR 1976 SC 483. In this background when we turn our attention to the facts on hand as well as the contention raised by the Accused that the confession statement is to be discarded in its entirety cannot be accepted for reasons more than one. Firstly, the conduct of the Accused would also be a relevant fact as indicated in Section 8. This Court in A.N. Venkatesh & Anr. v. State of Karnataka (2005) 7 SCC 714 has held to the following effect:

> *9. By virtue of Section 8 of the Evidence Act, the conduct of the Accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the Accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct Under Section 8 irrespective of the fact whether the statement made by the Accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.) [(1979) 3 SCC 90: 1979 SCC (Cri) 656 : AIR 1979 SC 400]. Even if we hold that the disclosure statement made by the Accused-Appellants (Exts.P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant Under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW-4 the spot mahazar witness that the Accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the Accused. Presence of A-1 and A-2 at a place where ransom demand was to*

> *be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible Under Section 8 of the Evidence Act.*
>
> *19. It is a trite law that in pursuance to a voluntary statement made by the Accused, a fact must be discovered which was in the exclusive knowledge of the Accused alone. In such circumstances, that part of the voluntary statement which leads to the discovery of a new fact which was only in the knowledge of the Accused would become admissible under Section 27. Such statement should have been voluntarily made and the facts stated therein should not have been in the knowhow of others."* (emphasis supplied)

100. The interface between the two sections has also been followed in ***Asar Mohammad & Ors. v. State of UP***[26] (paragraphs 28 and 29) where the fact that the appellant had led the police officer to find out the spot where the crime was committed and the tap where he washed the clothes were held to have eloquently "speak of his conduct" and conviction was upheld based on circumstantial evidence.

101. The IO is required to narrate what the accused has stated to him during custody that led to the discovery of the offending weapon and other articles. The IO is essentially to testify about the conversation held between him and the accused which is reduced in writing leading to the discovery of incriminating facts. In the instant case it is important to note that the IO who recorded the disclosure statement of the accused under Section 161 and effected the recovery in presence of two independent local witnesses did prove

[26] **2019 (12) SCC 253**

the disclosure memo as required by law. The IO is the person who asserts to have heard the fact(s) namely "I will help the police to recover the weapon and other things. I will help you if you give time". The IO has narrated the said facts. The IO has deposed the exact statement stated to have been made by the accused during custody which ultimately led to the discovery of 'a fact' namely the offending weapon and stolen articles under section 27 of the Evidence Act. The accused while in police custody has produced from the place of concealment firstly the weapon and later cash and jewellery. The weapon and the ornaments said to be connected with the crime of which the informant is the accused is admissible under Section 27 of the Evidence Act. The Judicial Committee in **Pulukuri Kottaya** (*supra*) had in that case in considering how much of the information given by the accused to the police would be admissible under Section 27 in the context of the phrase "so much of such information ..... as relates distinctly to the fact thereby discovered" held that the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It was emphasised that the phrase "the fact discovered" envisaged in the section "embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact". The exact information given by the accused while in custody which led to recovery of the articles has been proved by the IO and his evidence in this regard is fully corroborated by the statements of PW3 and PW 12. The evidence of two independent witnesses clearly establish that on the basis of such

discovery statement the weapon and the other articles were seized on identification by the accused in their presence. The IO has narrated the sequence of events leading to the discovery of all the articles. Moreover the credibility and worthiness of the evidence of PW2, the Judicial Magistrate, cannot be disputed. He is a Judicial officer. He recorded the statement of PW14 and the grand son and grand-daughter of the victims namely PW 8 and 13. During identification parade of the ornaments PW 8 and PW 13 duly identified some of the ornaments belonged to the victims. The said ornaments were recovered from the house of the accused on the basis of the disclosure statement and in presence of the independent witnesses. It is immaterial whether PW 8 and PW 13 have been omitted to be asked independently about their statement made before the judicial Magistrate regarding identification of such ornaments although it would have been better for the prosecution to put such question in chief. However absence of questions being put to such witnesses cannot dilute the evidence of PW 2 read with other evidence. The Judicial Magistrate has confirmed the identification of the ornaments by the grand children of the victims in his presence. This part of the evidence of the judicial magistrate has remained unshaken.

102. One of the vital witnesses of the case is PW 14 Rabi whose statement was recorded under Section 164 of the Cr.P.C. by the Judicial Magistrate. In his statement he has stated that on 26th December, 2021 at about 8.30 p.m he received a phone call in his mobile from the accused Krishna who told him about the old couple residing in the said village and to

rob their house as the village was likely to be desolated during Christmas time. The accused suggested that they can rob the couple and murder them. This scared Rabi and he blocked the number of Krishna and thereafter he went to Falakata for business purpose. On the next morning he came to know from K-TV news regarding the fact of murder of the old couple. He called Krishna on his mobile and asked him whether he had committed such crime but he had disconnected the phone call. This statement recorded under Section 164 is corroborated in his chief. There are minor discrepancies about the opening and closing of the market which however, is not sufficient and material to discard or impeach the credibility of the said witness when I read the said evidence of this witness with the evidence of other witnesses. It is not being alleged by the defence that all these witnesses are interested witnesses and have an axe to grind. The material witnesses have duly identified the accused at the time of trial.

103. The motive of the crime was to commit robbery of cash and ornaments. It is alleged that the appellant knew that the deceased persons were rich and wealthy at the time of offence. In fact, during the telephonic conversation with PW 14, the accused had expressed his intention to commit robbery and if required to murder the couple and selected the Christmas week for that purpose. The accused in his statement recorded under Section 313 of the Evidence Act has admitted that mobile no. 8016900652 belongs to him during 25th December 2021 to 1st January, 2022 and the report of O.C.S.O.G. The accused has also admitted in answer to question No.4, 5 and 6 that mobile

no.8011150734 belongs to Rabi Chhetri and that he received a call from his number on 26th December, 2021 at around 8 p.m and Rabi called him in his mobile phone on 28th December, 2021 at 13.45 hours. In answer to question No.38 recorded earlier to the order passed on 1st September, 2023 the accused did not deny having received a phone call from PW14 to which he did not respond. This evidence establishes the motive of the crime.

104. The Autopsy surgeon in his opinion has clearly stated that the injuries found on the person of both victims cannot be sustained on fall on sharp edged object. In his opinion the same weapon of assault was used for causing injuries to both victims and it was heavy sharp cutting weapon. It is "moderately heavy sharp cutting weapon" that might have been used in the commission of murder of both the persons. The possibility of user of Khukri against both the persons cannot be ruled out. The weapon recovered from the bush on identification of the accused in person in presence of two independent witnesses from the locality and the I.O. aligns with the description of the weapon seized on identification. The autopsy surgeon has given details of injury found on the person of victims and deposed that in his opinion the victims died due to the effect of injuries homicidal in nature and the probable time of death is in between 8 to 8.30 hours prior to the Post Mortem examination which was conducted between 2.58 p.m and 4.20 p.m on 28th December, 2021.

105. The autopsy surgeon corroborated the case of the prosecution that the death is homicidal caused due to assault by Khukri. The report of RFSL

along with serological analysis report (Exbt. 16, Exbt. 17, Exbt.18, Exbt.19) would show that human blood of A, AB and O group was found on the article seized on the basis of the disclosure statement (Exbt. 14). The corresponding seizure and seizure list have been marked as Exbt.10 and Exbt. 11. The report of RFSL thus shows presence of human blood on the seized Khukri that is, weapon of offence seized on the showing of the accused person following his statement recorded during police custody and such report of RFSL depicting presence of human blood on the weapon of offence read with other evidence on record complete the chain of circumstances showing that it was accused and accused only who committed the murder of Kharka Bahadur Kharka @ Shambhu and his wife Bishnu Maya Kotyal. The IO admitted that he did not seize any call details of PW 14 and the accused during investigation. In the aforesaid background the learned District and Sessions Judge on 1st September, 2023 passed a following order:

"Order No. 37, Dated: 01.09.2023

Date is fixed for further hearing of argument.

Ld. P.P. is present.

Ld. defence counsel is present.

Accused is produced from custody.

Taken up further hearing of argument of prosecution.

Heard argument of prosecution at length and in full.

Taken up hearing of argument on behalf of accused.

Heard argument of Ld. defence counsel at length.

After arguing for around 1 hour, Ld. defence counsel submits that he needs time for further argument and undertakes to file an application to that effect.

Heard, perused, considered.

Prayer is allowed.

On hearing prosecution's argument in full and defence's argument in part, it is found that the details of call record of P.W-14 ie, C.S.W. No. 13 Ravi Chhetri @ Ramu Chhetri, S/o Tara Bhir Chhetri of Lolay Dara, P.S. Kalimpong for the period of 25.12.2021 till 01.01.2022 needs to be brought in evidence for proper adjudication of the case and for this purpose power u/s 165 of Indian Evidence Act needs to be invoked.

Section 165 of Indian Evidence Act lays down that, "The judge may, in order to discover or to obtain proper proof of relevant facts..... at any time....may order the production of any document or thing.....".

Accordingly I.O. is directed to produce the C.D.R of witness Ravi Chhetri @ Ramu Chhetri for the period of 25.12.2021 till 01.01.2022 by date positively.

Fixing 04.09.2023 for further evidence of I.O. as u/s 165 of Indian Evidence Act in view of the above order.

Issue summons."

106. The code of criminal procedure in Section 165 has granted extraordinary power to the trial court to "ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant". The circumstances under which such power could be exercised is at the discretion of the trial court and certainly aimed at discovering the truth in order to enable the court to reach a just and fair conclusion.

107. In the introduction to the Evidence Act, Sir James Stephen stated: "A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out

the truth for himself as well as he can, and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before the court, he will be able to look at and enquire into every fact whatever". The above illuminating passage by the author of the Indian Evidence Act encapsulates the vast power wielded by a trial Judge.

108. The trial is a process to find out the truth and not to shield the accused from the consequence of his wrongdoing. (see. ***Mohammed Ajmal Mohammad Amir Kasab and Ors. vs. State of Maharashtra and Ors.,***[27] ***and Hardeep Singh and Ors. vs. State of Punjab and Ors.***,[28]).

109. Section 165 of the Act reads as under:

> "165. Judge's power to put questions or order production. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant, and may order the production of any document or thing, and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness

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[27] **2012(9) SCC 1**
[28] **2014(3) SCC 92**

would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party, nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

110. The duty of the trial court to unearth the truth and not to behave like a mere recording machine has been laid down authoritatively in a judgment authored by Justice O. Chinnappa Reddy, in ***Ram Chander v. State of Haryana.***[29] Justice O. Chinnappa Reddy in the said judgment refers to his earlier judgment in ***Sessions Judge, Nellore v. Intha Ramana Reddy,***[30] authored by him as a judge of the Andhra Pradesh High Court, where it was said:

> "*Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a judge is so wide that he may, ask any question he pleases, in any form, at any time of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial*".

[29] **1981(3) SCC 191**
[30] **ILR 1972 AP 683**

111. On 4th September, 2023 S.I. Biswajit Orang, PW 19 produced the CDR and necessary certificate under Section 65B of the Evidence Act by the officer-in-charge of Special Operating Group. He was examined and the document was marked as Exbt.20. The CDR would show a mobile no. 8016900652 from which a call was received on 26th December, 2021 and to which a call was made on 28th December, 2021 but there is no evidence as regard to whom this mobile number belongs to on stated date. Accordingly, the I.O was directed by the order dated 4th September, 2023 to produce evidence of the persons to whom the aforesaid number belonged on stated date. On 6th September, 2023 S.I. Onchu Lepcha submitted his report. He was examined as PW 20. The documents produced by him were marked as Exbt. 21 and 22 (collectively). On scrutiny of the fresh evidence an opportunity was given to the accused under Section 313 Cr.P.C to explain the further evidence brought on record. The defence Counsel submitted that they would not adduce any evidence. The statement of the accused was recorded on that date in respect of the additional evidence produced and hearing was concluded.

112. The accused appears to have admitted his conversation with PW 14 although he initially denied the correctness and truthfulness of the deposition of PW14 in his answer to question no. 37 and 38 recorded under Section 313 of the Cr.P.C. In his evidence P.W15 has clearly stated that PW14 called the accused on 28th December, 2021 and the accused did not respond. The learned Counsel for the appellant has admitted that no prayer for leave to cross examine of PW 19 and 20 was made when the CDRs was produced

pursuant to the order passed by the learned District and Sessions Judge on 1st September, 2023. The appellant did not object to the marking of Exhibit 20 and 21 and the said documents have been marked as exhibits without objection. The report prepared by the officer-in-charge SOG Kalinpong along with certificate issued under Section 65(B) of the Evidence Act with all annexures like Voter Id, Aadhar Card, Customer Digital KYC showing that mobile number 8101150734 belongs to witness Rabi Chhetri and mobile no. 8016900652 belongs to Krishna Pradhan @ Tunka, i.e. accused were produced by PW 20. The certificate shows that from mobile no. 8016900652 call was made to mobile no. 8101150734 on 26th December, 2021 having durations of 155 seconds and one call from 8101150734 to 8016900652 on 28th December, 2021 at about 13:45 pm.

113. The certificate issued by the officer in charge SOG on 5th September, 2023 was marked as Exbt. 20 and annexure all attached to the said certificate signed by the Officer in charge SOG with Official Seal have been marked as Exbt. 21 (collectively) without objection.

114. The appellant did not raise any objection with regard to the admissibility of the said documents. The service provider has also furnished the required details of the customer which form part of Exbt. 21. The objection is now raised at the appellate stage with regard to the mode and manner of proving the said certificate. This aspect of the matter was considered in ***Sonu @ Amar v. State of Haryana***[31] where a bench of two Hon'ble Judges of the

[31] **2017(8) SCC 570**

Hon'ble Supreme Court in paragraph 32 of the report has considered the effect and implication of not raising any objection when the CDRs are marked as exhibits and taken into consideration at the time of trial without objection. It was stated that the mode and method of proving of CDRs produced at the trial if not objected to at the trial cannot be permitted to be raised at the appellate stage. It was stated:

> *"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 65B(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 Code of*

Criminal Procedure, 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."

115. In the instant case the certificate issued by the SOG is accompanied by the documents issued by the service provider. The service provider was not independently examined. The point now sought to be raised by the appellant at this stage is with regard to the mode and manner of proving the CDRs. The accused at the stage of the statement recorded under Section 313 Cr.P.C admitted the relevant facts recorded in the CDR namely his mobile number and his conversation with PW14 on the stated date. He has a duty to clarify if at all he had made a call or received a call from PW 14. This is within his special knowledge. This is all the more relevant having regard to the fact that PW 14 has in his statement recorded under Section 164 of the Cr.P.C and in his deposition has referred to the conversation that had taken place on 26th December, 2021 and 28th December, 2021. Although it is open for the accused to remain silent but such silence may cause serious and irreparable prejudice to the accused when he is faced with incriminating materials.

116. The fact that what exactly happened during his presence at the place of occurrence are matters pre-eminently or exceptionally within the knowledge of the accused and very lucidly stated by Justice Vivian Bose in

Shambu Nath Mehra v. The State of Ajmer,[32] paragraph 11 which is reproduced below:

> "11. .....*The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the Section were to be interpreted otherwise, it would lead to the vry startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."*

117. The aforesaid decision has been recently relied upon by the Hon'ble Supreme Court in ***Nagendra Sah v. State of Bihar,***[33] in which the Apex Court has observed as under:

> *"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the Accused. When the Accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the Accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the Accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is*

[32] **1956 INSC 15; AIR 1956 SC 404**
[33] **2021:INSC:475: 2021 (10) SCC 725**

not complete, falsity of the defence is no ground to convict the Accused."

118. The principles that emanate from the decided cases of interpretation of Section 106 of the Evidence Act is that the said section is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. The said Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but it would apply to cases where the prosecution had succeeded in proving facts for which the reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such fact failed to offer any explanation which might persuade the court to arrive at a different inference.

119. In ***Tulshiram Sahadu Suryawanshi & Anr. v. State of Maharashtra***,[34] the Apex Court observed as under:

23. It is settled law that presumption of fact is a Rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of

[34] **2012:INSC:401: (2012) 10 SCC 373**

natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this Section is not intended to relieve the prosecution of its burden to prove the guilt of the Accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the Accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar and Ors. 2000:INSC:422 : (2000) 8 SCC 382: 2000 SCC (Cri) 1516]: (SCC p. 393, para 38):

> *38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the Accused. In Shambhu Nath Mehra v. The State of Ajmer: 1956:INSC:15 : AIR 1956 SC 404: 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:*
>
> > *11. This lays down the general Rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the Accused and which he could prove without difficulty or inconvenience.*

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge." (Emphasis supplied)

120. The finding of guilt is based on circumstantial evidence. In the instant case no direct evidence is available and the prosecution rests its case solely on circumstantial evidence. The factors to be taken into consideration and matters to be examined in a case based on circumstantial evidence has been lucidly explained in paragraph 153 in ***Sharad Birdhichand Sarda v. State of Maharashtra***[35]. The said legal principles has been succinctly restated in ***Mulakh Raj v. Satish Kumar***[36] in paragraph 4 as under:

> *"4. Undoubtedly this case hinges upon circumstantial evidence. It is trite to reiterate that in a case founded on circumstantial evidence, the prosecution must prove all the circumstances connecting unbroken chain of links leading to only one inference that the accused committed the crime. If any other reasonable hypothesis of the innocence of the accused can be inferred from the proved circumstances, the accused would be entitled to the benefit. What is required is not the quantitative but qualitative, reliable and probable circumstances to complete the chain connecting the accused with the crime. If the conduct of the accused in relation to the crime comes into question the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant. The court must weigh the evidence of the cumulative effect of the circumstances and if it reaches the conclusion that the accused*

[35] **1984 (4) SCC 116: AIR 1984 SC 1622**
[36] **1992 (3) SCC 43: 1992 SCC (Cri) 482**

committed the crime, the charge must be held proved and the conviction and sentence would follow." (emphasis supplied)

121. The telephonic conversation between PW14 and the accused on 26th December, 2021, the accused admitting the mobile number from which the call was made, the disclosure statement leading to the discovery of the offending weapon, cash and ornaments, the evidence of PW2 stating that PW8 and PW 13 the grand-children of the victims identified the ornaments, the evidence of two seizure list witness who accompanied the IO, PW 18 to the places wherefrom the recovery was made on proper identification by the accused, the evidence of the autopsy surgeon clearly stating that the murder was committed by a moderately heavy weapon which meets the description of the weapon recovered and seized on identification by the accused, RFSL report matching the blood group, the CDRs, the conduct of the appellant and the motive if put together complete the chain of circumstances and events unerringly connected the accused to the offence. It is in this background the statement of the accused under Section 313 needs to the assessed.

122. In view of the evidence of PW6, PW8, PW14, PW15, PW18, PW19 and PW20 directly implicating the accused for the murder, the statement of the accused recorded under Section 313 Cr.P.C becomes relevant. The statement of the accused under Section 313 is assessed to find out that in view of circumstances strongly suggesting the involvement of the accused in the offence his silence or refusal to offer reasonable and proper explanation could be used against the accused. It is to be remembered that Section 313

provides an opportunity to the accused for his defence by making him aware fully of prosecution allegation against him and to answer the same in support of his innocence but equally there cannot be a generalized presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case, there will have to be a cumulative balancing of several factors. The circumstances put together create a complete network from which it is difficult to escape and does not admit of any inference except that of guilt of the accused and the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis except his guilt. While rights of an accused to a fair trial are undoubtedly important, rights of victim and society at large for eviction of deviant behaviour cannot be made subservient to rights of an accused by placing the latter at a pedestal higher than necessary for a fair trial. (See ***Fainul Khan v. State of Jharkhand***[37]).

123. I am not oblivious of the oft quoted line of American Statesman Benjamin Franklin. "It is better that 100 guilty persons should escape than that one innocent persons should suffer" or the doctrine that "ten criminals may go unpunished but one innocent person should not be convicted". [see **Dinubhai Boghabhai Solanki v. State of Gujarat and Ors.,**[38]].

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[37] **2019 (9) SCC 549**

[38] **2018(11) SCC 129**

124. However, it is apposite to refer to the following observations of Sir Carleton Allen quoted on p.157 of the Prof of Guilt by Glanville Williams, 2nd Edition:

> "I dare say some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than that one innocent persons should suffer; but no responsible and practical persons would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos." quoted in Kalyan v. State of UP, 2001(9) SCC 632 and State of Rajasthan v. Ram Niwas; 2010(15) SCC 463; Prem Kumar Sulati v. State of Haryana; 2014 (14) SCC 646

125. In ***Munna Kumar Upadhyay @ Munna Upadhyaya v. State of Andhra Pradesh,***[39] it was reiterated that if the Accused gave incorrect or false answers during the course of his statement under Section 313 Code of Criminal Procedure, the Court can draw an adverse inference against him. In para 76 of the report, the Supreme Court observed as under:

> *"76. If the Accused gave incorrect or false answers during the course of his statement Under Section 313 Code of Criminal Procedure, the court can draw an adverse inference against him. In the present case, we are of the considered opinion that the Accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the*

[39] **2012 INSC 211 : (2012) 6 SCC 174**

present case, the Court not only draws an adverse inference, but such conduct of the Accused would also tilt the case in favour of the prosecution."

126. The Hon'ble Supreme Court recently in ***Indrakunwar v. State of Chhattisgarh,***[40] on consideration of various judgments summarized the principles in paragraph 35 with regard to the evidentiary value of a statement under Section 313 of CrPC as under:

"35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alteram partem.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

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[40] **2023 SCC Online SC 1364**

35.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

35.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision."

127. In ***Ravirala Laxmaiah v. State of A.P.,***[41] the Hon'ble Supreme Court has considered the principles to be remembered and applied in a case based on circumstantial evidence, where no eye witness account is available and the consequence of the silence if maintained by the accused with regard to the incriminatory circumstances in the following words:

[41] ***2013 (9) SCC 283***

"6. ..... when an incriminating circumstance is put to the accused and the said accused either offers no explanation [for the same], or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete." (Vide: State of U.P. v. Dr. Ravindra Prakash Mittal: AIR 1992 SC 2045; Gulab Chand v. State of M.P. : AIR 1995 SC 1598; State of Tamil Nadu v. Rajendran : AIR 1999 SC 3535; State of Maharashtra v. Suresh : (2000) 1 SCC 471;and Ganesh Lal v. State of Rajasthan : (2002) 1 SCC 731).

21. In Neel Kumar @Anil Kumar v. State of Haryana : (2012) 5 SCC 766, this Court observed:

"30. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement Under Section 313 Code of Criminal Procedure. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: Aftab Ahmad Anasari v. State of Uttaranchal : AIR 2010 SC 773)."

128. In a fairly recent decision in ***Wazir Khan vs. State of Uttarakhand***,[42] the Hon'ble Supreme Court has clearly stated that when incriminating circumstances that inculpated him in the crime is put to the accused and the accused either offers no explanation or offers explanation which is found to be untrue then the same becomes an additional link in the chain of circumstances to make it complete.

[42] **2023 (8) SCC 597**

129. When the attention of the convict is drawn to the incriminating circumstances that inculpate him in the crime and he fails to offer appropriate explanation or gives a false answer the same can be counted as providing a missing link for completing a chain of circumstances. In the instant case his failure to offer appropriate explanation has cost him dearly. Differently viewed, such non-explanation and admission culled out from the statement of the accused under Section 313 fortify the conclusion of guilt that can be arrived at on the basis of proven circumstances.

130. It is well settled that the evidence of witnesses have to be read as a whole and the words and sentences cannot be truncated and read in isolation. Minor contradiction and/or inconsistencies regarding the recovery of the offending materials is also immaterial.

131. In view of my findings that the chain of circumstances establishes the guilt of the appellant and there is absolute certainty about his premeditated act. It is equally important to bear in mind that ***Sharad Birdhichand Sarda*** *(supra)* in dispensing criminal justice suspicion however great may be, cannot take the place of legal proof and 'fail…….. the crime higher the proof". [see **Munikrishna @ etc. v. State of Visoor (Ps. Criminal Appeal Nos. 1597-1600 of 2022 arising out of Special Leave Petition (Crl.) Nos. 8792-8795 of 2022 delivered on 30th September, 2022 paragraph 16].**

132. On appreciation of evidence I cannot say that the view of the trial court is not possible and reasonable on the basis of the evidence and materials on record. The findings of fact recorded by the trial court based on evidence does not appear to the perverse. The appeal court can interfere provided the findings outrageously defy logic or irrational or based on irrelevant, extraneous and unreliable and inadmissible materials. I do not find any of the aforesaid ingredients in the impugned judgment for this court to interfere. However, on sentencing I have my reservation.

133. When the murder is committed in an extremely brutal, grotesque, diabolical and dastardly manner the court is faced with the dilemma when it is found that the accused was in a dominating position and the victim was minor, innocent or helpless. The issue before the Judge is whether it should apply the test of "society-centric" or "Judge-centric". The court is required to examine whether conscience of society is shocked or not and whether it abhors such crime. The Court is required to look into various factors like society's abhorrence, extreme indignation and antipathy where it is a case of sexual assault and murder of minors, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women to mention a few.

134. The Hon'ble Supreme Court was faced with such a situation in ***Anil Alias Anthony Arikswamy Joseph v. State of Maharashtra,***[43] and considering the gruesome nature of the murder and that the victim was an innocent boy and such type of crime shocks the moral fiber of society especially

[43] **2014 (4) SCC 69**

when the passive agent is a minor and both Indian and International society abhor pederasty, commuted to the death sentence to a fixed term as the State had failed to discharge its responsibility of proving the impossibility of rehabilitation of the accused who was 42 years old. The court taking into consideration the legislative policy under Sections 235(2) and 354(3) CrP.C. which mandates reasoning for imposing sentences mentioned in Section 354(3) CrP.C. commuted the death sentence to a fixed term of 30 years without remission in addition to imprisonment already undergone by the appellant/accused.

135. In the instant case when we carefully analyse the balance-sheet of "aggravating and mitigating circumstances" and remind ourselves that full weightage has to be given to the mitigating circumstances before a just balance is struck we are unable to pursuade ourselves to hold that in the instant case the possibility of reformation and rehabilitation is not foreclosed. Sentencing in fact is an onerous duty which has to be exercised keeping in mind the settled and binding precedents including doctrine of proportionality for assigning justifiable reasons to award death penalty and also to keep in mind the doctrine of reform and rehabilitation (see ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra[44]).*** The power of the High Court to pass a fixed term sentence has been elaborately discussed as under:

> "45. *Simultaneously, however, a parallel line of thought has strongly advocated that death be imposed to maintain proportionality of sentencing and to further the theories of*

[44] **2009 (6) SCC 498**

deterrence effect and societal retribution. These people contend that sentencing should be society-centric instead of being judge-centric and make use of a cost-benefit analysis to contend that the miniscule possibility of putting to death an innocent man is more than justified in the face of the alternative of endangering the life of many more by setting a convict free after spending 14-20 years in imprisonment. This possibility, they further state, is already well safeguarded against by a 'beyond reasonable doubt' standard at the stage of conviction.

46. Ostensibly to tackle such a conundrum between awarding death or mere 14-20 years of imprisonment, in Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka (2008) 13 SCC 767, a three-Judge Bench of this Court evolved a hybrid special category of sentence and ruled that the Court could commute the death sentence and substitute it with life imprisonment with the direction that the convict would not be released from prison for the rest of his life. After acknowledging that "the truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench", this Court went on to hold as follows:

> *"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having*

regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri.) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

47. The special sentencing theory evolved in Swamy Shraddananda (supra) has got the seal of approval of the Constitution Bench of this Court in Union of India v. Sriharan alias Murugan and Ors. (2016) 7 SCC 1, laying down as follows:

> *105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court.*
>
> *106. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (2) [Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 : (2009) 3 SCC (Cri.) 113] that a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeet v. State of Haryana [Sangeet v. State of Haryana, (2013) 2 SCC 452: (2013) 2 SCC (Cri.) 611] that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.*

48. Regardless of the suggestive middle path this Court has, when the occasion demanded, confirmed death sentences in many

> *horrendous, barberic and superlative crimes especially which involve kidnapping, rape and cold blooded murder of tender age children."*

136. In ***Santosh Kumar Satishbhushan Bariyar*** *(supra)* the Hon'ble Supreme Court considering the nature of evidence and background of accused commuted the death sentence to life imprisonment as there was nothing to show that the appellant/ accused could not be reformed and rehabilitated and the mere manner of the disposal of the body of deceased howsoever abhorrent would not by itself be sufficient to bring the case in the rarest of the rare category thereby giving weightage to the possibility and probability of reformation and rehabilitation. The Hon'ble Supreme Court held that death punishment qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability.

137. In view of its irrevocability exploring the alternative option by way of reformation was emphasized in the following words:

> *"Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution - all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end anything to do with the life. This is the big difference between two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.*

> *The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh (supra) sets the bar very high by introduction of Rarest of rare doctrine."*

138. The imposing of death sentence only on the basis of the gravity of the crime and not the criminal, his state of mind, his socio economic background is not permissible as has been reiterated in ***Lochan Srivas v. State of Chattisgarh***,[45] and ***Bhagchandra v. State of Madhya Pradesh.***[46]

139. In the aforesaid decision the Court has also emphasized the need for collection of mitigation evidence at the time of sentencing. In two cases where materials relating to mitigating circumstances were not placed on record before the trial court, the Hon'ble Supreme Court called for reports from the probation officer, psychological evaluation reports and jail reports regarding

[45] **2022 (15) SCC 401: 2021 SCC Online 1249**
[46] **2021 SCC Online SC 1209: 2021 (18) SCC 274**

conduct (***Manoj v. State of Madhya Pradesh,***[47] ; ***Mohd Firoz v. State of Madhya Pradesh***[48]. Taking this step forward, on one case, the Court also granted permission to mitigation experts to interview the prisoner and submit a mitigation report (***Irfan @ Bhayu Mevati v. State of Madhya Pradesh***, Criminal Appeal No. 1667-1668 of 2021, order dated 29th March, 2022 (SC).

140. It has been reiterated in the aforesaid judgments that the onus is on the State to lead evidence to the effect that the offender is beyond reformation is one of the important factors to be taken into consideration. There should be an attempt to produce materials relating to mitigating circumstances and before the trial court proceeds to pronounce death sentence the court is required to call for the reports from the Probation Officer, Psychological Evaluation Reports and Jail Reports regarding conduct (see ***Manoj v. State of M.P.*** *(supra)*, ***Mohd Firoz v. State of M.P.*** *(supra)*.

141. The Hon'ble Supreme Court granted permission to experts to interview the prisoner and submit a mitigating report. The subject matter has now been converted into a suo motu writ petition. The Apex Court took note of the difference in approach in the interpretation of Section 235(2) of Cr.P.C. and referred the question for consideration by a larger bench. This has been noted in a fairly recent decision of the Hon'ble Supreme Court in **Review Petition (Crl.) Nos. 159-160 of 2013** in **Criminal Appeal Nos. 300-301 of 2011**

[47] **2021 SCC Online SC 3219**
[48] **[2021] SCC Online SC 3221**

Sundar @ Sundarrajan v. State by Inspector of Police [49], presided over by the Hon'ble Chief Justice of India Dr. Dhananjaya Y. Chandrachud.

142. The importance of probability and possibility of reform and rehabilitation of the convicted accused before sentencing has been reiterated in ***Sundar @ Sundarrajan*** *(supra)*. It has emphasized the need for meaningful, real and effective hearing to the accused with the opportunity to adduce material relevant for the question of sentence. The aforesaid decision has taken into consideration the earlier decisions in paragraphs 76 to 80 delineating the duty of the court before an accused is sentenced to death. For brevity and convenience the said paragraphs are reproduced below:

> *"76. In Rajendra Pralhadrao Wasnik v State of Maharashtra (2019) 12 SCC 460, a three judge bench of this Court took note of the line of cases of this Court which underline the importance of considering the probability of reform and rehabilitation of the convicted accused before sentencing him to death. The court observed:*
>
> *43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.*
>
> *[…]*
>
> *45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly*

[49] **2023 INSC 264: 2023 (5) SCR 1016**

considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

46. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the trial court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in Bariyar and in Sangeet v. State of Haryana where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As

observed in Sangeet "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible. (emphasis supplied)

77. The law laid down in Bachan Singh requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme. As noted in Santosh Kumar Satishbhushan Bariyar v State of Maharashtra , this requires looking beyond the crime at the criminal as well: 66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the

court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine. 2009 (6) SCC 498 (emphasis supplied)

78 A similar point was underlined by this Court in Anil v State of Maharashtra where the Court noted that:

33. In Bachan Singh this Court has categorically stated, 'the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society', is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case. (emphasis supplied)

79. No such inquiry has been conducted for enabling a consideration of the factors mentioned above in case of the

petitioner. Neither the trial court, nor the appellate courts have looked into any factors to conclusively state that the petitioner cannot be reformed or rehabilitated. In the present case, the Courts have reiterated the gruesome nature of crime to award the death penalty. In appeal, this Court merely noted that the counsel for the petitioner could not point towards mitigating circumstances and upheld the death penalty. The state must equally place all material and circumstances on the record bearing on the probability of reform. Many such materials and aspects are within the knowledge of the state which has had custody of the accused both before and after the conviction. Moreover, the court cannot be an indifferent by-stander in the process. The process and powers of the court may be utilised to ensure that such material is made available to it to form a just sentencing decision bearing on the probability of reform.

80. In Mofil Khan, a three judge bench of this Court was also dealing with a review petition which was re-opened in view of the decision in Mohd. Arif v Registrar, Supreme Court of India. While commuting the death sentence to life imprisonment, the Court reiterated the importance of looking at the possibility of reformation and rehabilitation. Notably, it pointed out that it was the Court's duty to look into possible mitigating circumstances even if the accused was silent. The Court held that: 9. It would be profitable to refer to a judgment of this Court in Mohd. Mannan v. State of Bihar in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material. The hearing of sentence should

be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors. 10. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating (Anil Vs. State of Maharashtra) 2014 (4) SCC 69 circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners. We have examined the socioeconomic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative.

143. On consideration of the aforesaid decisions in paragraph 81 it has been observed:

"81. *The duty of the court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple*

judgments of this Court. Despite this, in the present case, no such enquiry was conducted and the grievous nature of the crime was the only factor that was considered while awarding the death penalty."

144. It appears that during the hearing of the review petition the Hon'ble Apex Court passed an order directing the Counsel for the State to get instructions from jail authorities on the following aspects: (i) the conduct of the petitioner in jail; (ii) information on petitioner's involvement in any other case; (iii) details of the petitioner acquiring education in jail; (iv) details of petitioner's medical records; and (v) any other relevant information.

145. In the instant case, we have also called for a report from the Superintendent Jalpaiguri Central Correctional Home with regard to the conduct and other necessary details during incarceration. We have also separately called for a report from the psychologist Jalpaiguri, Central Correctional Home. The Ld. APP on 30th April, 2024 submitted two reports upon intimation to Mr. Arjun Chowdhury.

146. The information provided by the Superintendent, Jalpaiguri Central Correctional Home shows that the accused has spent 2 years 3 months 12 days as on 30th April, 2024 on the date of the report. The Superintendent in his report has made the following remarks - "His conduct is good with staff and inmates of this correctional home. He is agile and obedient to administration. No adverse report recorded against him."

147. The report of the psychologist dated April 30, 2024 with recommendation is as under "Krishna Pradhan is a condemned prisoner. On

the basis of Mental Status Examination (MSE) and observation, it is obtained that he is having coherent speech, goal directed behaviour, oriented to time, person and place, manifested by intact cognitive functioning with presence of insight. Therefore, he is psychologically fit at present."

148. His dress is "appropriate", speech "appropriate" and mood "Ethylic".

149. The accused is "critical" in his judgment and possesses "Intellectual Insight."

150. The accused has no criminal antecedent and it cannot be said that he is beyond reformation and rehabilitation. It cannot be said that he would be menace or threat to the society. We also find that sufficient time was not given to the accused between the date of pronouncement of the judgment and sentencing to ponder over the issue.

151. Moreover the mitigating circumstances have not been produced before the learned Trial Court.

152. On consideration of the report of the superintendent of the correctional home, the psychologist, the nature of the crime and keeping in mind that undue leniency in such a brutal case would be likely to adversely affect the public confidence in the efficacy of the legal system and the rights of the victim as well. I set aside the death sentence and commute it to imprisonment for 30 years. The accused shall not be released for 30 years and he shall be released only after he completes 30 years of actual sentence.

153. The appeal is allowed in part.

154. Department is directed to send down the LCR along with a copy of this judgement to the learned trial court forthwith.

155. Urgent photostat certified copy of this Judgement, if applied for, be given to the parties on completion of the usual formalities.

(Soumen Sen, J.)

Later, the Court:

In view of the difference of opinion the matter shall be placed before the Hon'ble the Chief Justice for appropriate direction.

(Partha Sarathi Sen, J.) **(Soumen Sen, J.)**