

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.368 of 2014

Arising Out of PS. Case No.-118 Year-2010 Thana- KHAGARIA District- Khagaria

=====

Mala Devi wife of Late Arbind Sah Resident of Village P.O. Ramganj,
Police Station - Muffasil, District - Khagaria

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 297 of 2014

Arising Out of PS. Case No.-118 Year-2010 Thana- KHAGARIA District- Khagaria

=====

Rajesh Kumar Gupta Son of Late Ram Sharan Sah Resident of village
Ramganj, Police Station Khagaria Mufassil, District- Khagaria.

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

=====

Acts/Sections/Rules:

- Section-302 read with 149 and 120B and 201 of I.P.C.
- Section-27, 65B(4) of the Evidence Act

Cases referred:

- Aghnoo Nagesia Vs. State of Bihar, reported in AIR 1966 SC 119
- Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh., reported in AIR 2022 SC 5273
- Subramanya Vs. State of Karnataka, reported in AIR 2022 SC 5110

- Ravinder Singh @ Kaku Vs. State of Punjab, reported in 2022 LiveLaw (SC) 461
- Sujit Biswas Vs. State of Assam, reported in AIR 2013 SC 3817

Appeal - filed challenging the judgment of conviction by which the appellants have been convicted for the offences under Section-302 read with 149 and 120B and 201 of I.P.C.

Held - I.O. has admitted that he is not having the original copy of the C.D.R. Further, as per his deposition, one Sanjay Kumar has provided copy of the C.D.R. to him. However, the said Sanjay Kumar has not been examined by the prosecution. - None of the witnesses from the mobile company has been examined by the prosecution nor the certificate issued under Section-65B(4) of the Evidence Act has been produced before the Court. (Para 28)

Trial Court has wrongly placed reliance upon the C.D.R. and the prosecution has failed to complete the chain of circumstances against the appellants. (Para 29)

Prosecution has not proved the motive on the part of the appellants to kill the deceased by leading cogent evidence. (Para 29)

Circumstances not put to the accused while recording statement under Section-313 of the Code cannot be used against the accused. (Para 31)

Appeal is allowed. (Para 34)

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Rajesh Kumar Gupta Son of Late Ram Sharan Sah Resident of village
Ramganj, Police Station Khagaria Mufassil, District- Khagaria.

... .. Appellant/s

Versus

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... .. Respondent/s

Appearance :
(In CRIMINAL APPEAL (DB) No. 368 of 2014)
For the Appellant/s : Mr.Amrendra Kumar, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP
For the Informant : Mr. Praveen Kr. Agrawal, Advocate
Mr. Santosh Kr. Singh, Advocate
(In CRIMINAL APPEAL (DB) No. 297 of 2014)
For the Appellant/s : Mr.Pratik Mishra, Advocate
Mr. Birendra Kumar Singh, Advocate
Mr. Vatsal Vishal, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, Advocate
For the Informant : Mr. Praveen Kr. Agrawal, Advocate
Mr. Santosh Kr. Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 08-05-2024

The present appeals have been filed under Section-
372 of Code of Criminal Procedure, 1973 (hereinafter referred



to as the Code) by the appellants challenging the judgment of conviction dated 28.02.2014 and order of sentence dated 05.03.2014, passed by *Ad hoc* Additional District & Sessions Judge-II, Khagaria, in connection with Sessions Trial No. 395 of 2010 (arising out of Khagaria Muffasil P.S. Case No. 118 of 2010) by which the appellants/convicts have been convicted for the offences under Section-302 read with 149 and 120B and 201 of I.P.C. and have been sentenced to undergo life imprisonment with a fine of Rs. 10,000/- (ten thousand) each for the offence under Sections- 302 read with 149 and 12B and 201 of I.P.C. and rigorous imprisonment for three years each for the offence under Section-201 of I.P.C. In the event of default in payment of fine, they will have to further undergo 6 months simple imprisonment each. All the sentences have been directed to run concurrently and the period of custody shall be treated as period undergone.

2. The brief facts leading to the filing of the present appeal are as under:

“On 16.04.2010 at about 12:00 at night, a call was received on the mobile phone of Prashant Kumar, brother of the informant, but thereafter when he left the house could not be noticed by the family members and he has not return. At that



time Prashant Kumar was sleeping on the platform (Chabutara) of Kishore Sah among so many children. The family members are in hectic search of his whereabouts since early morning. The mobile phone on which call was received is switched off. The informant along with his family members and acquaintances made hectic search of his brother Prashant Kumar, but to no avail. The informant apprehends that Prashant Kumar has been abducted by unknown miscreants.”

3. After filing of the F.I.R., the investigating agency carried out the investigation and, during the course of investigation, the Investigating Officer recorded the statement of the witnesses and collected the relevant documents and thereafter filed the charge-sheet against the accused. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions where it was registered as Sessions Trial No. 395 of 2010.

4. Learned counsel Shri Amrendra Kumar submits that, initially, he had filed Vakalatnama on behalf of the appellant Mala Devi. However, thereafter her relatives have taken back the papers from him and he has given no objection. However, till today nobody has filed appearance on behalf of the present appellant. It is pertinent to note that the present



appeal is pending since 2014 and the appellant lady convict is in custody since 29th of April, 2010 and, therefore, we have requested learned counsel Shri Amrendra Kumar to assist in the matter. As in past he had filed appearance on behalf of the present appellant, he has readily accepted the said request of the Court and has assisted the Court in the matter.

5. Heard learned counsels Mr. Amrendra Kumar and Mr. Pratik Mishra assisted by Mr. Birendra Kumar Singh and Mr. Vatsal Vishal for the appellants, Mr. Sujit Kumar Singh, learned APP on behalf of the respondent State and Mr. Praveen Kr. Agrawal and Santosh Kumar Singh, learned counsels for the informant.

6. Learned advocates appearing for the appellants mainly contended that in the present case, there is no eye-witness to the occurrence in question and the case of the prosecution rests on circumstantial evidence. It is further submitted that the prosecution has failed to completed the chain of circumstances from which it can be said that the appellants have killed the deceased.

6.1. At this stage, learned counsels further submit that from the case of the prosecution, on 16.04.2010, at about 12:00 O'clock in the night, brother of the informant received a



call on his mobile phone and thereafter he left the house and did not return. When the brother of the informant received phone call, he went out assuring that he is going to the platform (Chabutara) of Kishore Sah and will return after 2-3 hours, but did not return. Family member have searched the brother of the informant. However, he was not traceable and, therefore, written application was given by the informant to the police. It is submitted that thereafter it is alleged that the dead body of the deceased was found in the septic tank of one of the accused.

6.2. At this stage, it is pointed out that, as per the case of the prosecution, the dead body was discovered at the instance of the accused after the confessional statement of the accused were recorded. It is pointed out from the record that the said story is not correct. It is contended that the dead body was recovered on 27.04.2010 whereas both the accused appellants were arrested on 29.04.2010.

6.3. Learned counsels would submit that on the basis of C.D.R. collected by the Investigating Officer, the police reached to the house of the appellant/accused Mala Devi. When she was in Uttar Pradesh, for bringing her from Uttar Pradesh to Ramganj, one police constable Ramakant Singh was sent by the Investigating Officer and it is alleged that when she was being



brought in the train by the said police constable, the confession was made by Mala Devi that she, in connivance with the other two accused, has killed the deceased and his dead body is kept in the septic tank of Arvind Sah.

6.4. It is further submitted that thereafter confessional statement of co-accused Rajesh Kumar Gupta was recorded by the Investigating Officer on 24.04.2010. However, prior to that the dead body of the deceased was already recovered from the place of occurrence. Learned advocates have referred para-19 of the deposition given by P.W. 3. In the said paragraph, the said witness has admitted that the dead body was recovered and thereafter police came at the said place. Learned counsels have also referred to the deposition given by P.W. 4 Archana Devi, more particularly para-22, wherein the said witness has admitted that after the dead body was recovered, names of the accused were disclosed.

6.5. It is further submitted that even while recording confessional statement of the appellants on 27.04.2010, they were not in police custody and they were not an accused on the said date and, therefore also, the so called discovery of the dead body is not admissible in evidence as per Section-27 of the Evidence Act. Learned counsels have placed



reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Aghnoo Nagesia Vs. State of Bihar**, reported in **AIR 1966 SC 119**. It is submitted that the Investigating Officer has not prepared the Panchnama and did not follow the procedure before the discovery was made. At this stage, learned counsels have placed reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh.**, reported in **AIR 2022 SC 5273**. Learned counsels have also placed reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Subramanya Vs. State of Karnataka**, reported in **AIR 2022 SC 5110**.

6.6. Learned counsels for the appellants thereafter submitted that the original copy of the C.D.R. was also not produced before the Court. Only relevant portion of the case diary was referred by the Investigating Officer and the same is, surprisingly, exhibited. It is also contended that certificate under Section-65B(4) of the Evidence Act was also not produced by the prosecution and, therefore also, the C.D.R. is not duly proved. At this stage, it is also pointed out that as per the deposition given by the Investigating Officer, he got the said C.D.R. from one Sanjay Kumar. However, the said Sanjay



Kumar is also not examined by the prosecution. Reliance is placed upon the decision rendered by Hon'ble Supreme Court in the case of **Ravinder Singh @ Kaku Vs. State of Punjab**, reported in **2022 LiveLaw (SC) 461**.

6.7. Thereafter, learned advocates have contended that even the incriminating circumstances which are against the appellants were also not put to them at the time of recording their statement under Section-313 of the Code. Learned counsels, therefore, urged that such circumstances cannot be used against the accused/appellants in view of the decision rendered by Hon'ble Supreme Court in the case of **Sujit Biswas Vs. State of Assam**, reported in **AIR 2013 SC 3817**.

6.8. Learned counsels for the appellants, therefore, contended that though the prosecution has failed to prove the accusations against the appellants/convicts beyond reasonable doubt, the Trial Court has passed the impugned judgment and order and, therefore, the same be quashed and set aside and the appeals be allowed.

7. On the other hand, learned counsel for the informant and learned A.P.P. have opposed the present appeals. It is mainly contended that, though it is a case of circumstantial evidence, the prosecution has completed the chain of



circumstances from which it is established that the appellants have committed the alleged offences. Learned counsels for the respondents have placed reliance upon the C.D.R. of mobile phone of the deceased and the present appellants. It is also contended that on the basis of the confessional statement of the appellants, the dead body of the deceased was discovered from the septic tank of Arvind Sah. Such discovery is admissible in evidence in view of Section-27 of the Evidence Act. Learned counsel, therefore, urged that no error is committed by the Trial Court while passing the impugned judgment and order and, therefore, both these appeals be dismissed.

8. In all, prosecution has examined 20 witnesses. At this stage, we would like to appreciate the relevant evidence led by the prosecution before the Trial Court.

9. P.W. 1 Laxman Kumar is a co-villager. He has stated that Prashant has been Killed about a year ago, but he does not know how. His statement was not recorded by the Police.

10. P.W. 2 Fakir Kumar has also deposed that he knew Prashant who has been killed, but he does not know how.

11. P.W. 3 Urmila Devi is the mother of deceased Prashant. She has stated that the incident took place about 15



months ago. At 9:00 p.m., her son Prashant, after taking dinner had left saying that he will come soon, but he did not return. Thereafter she slept. He did not return even in the morning. Then the family members started to search him. They searched the place indicated, but could not find him. When Prashant could not be traced, her elder son Manoj Kumar filed a case at the Police Station. After 11-12 days, the dead-body of her son was recovered by the police from the septic tank of Arvind Sah. She had gone to that place and had seen the dead body of her son bearing stab wounds made by knife and a Sari tied around the neck. She has stated that accused Arvind Sah, his wife Mala Devi, father Rajesh have killed her son whom she identifies with the help of articles available on the scene. She has claimed to identify Arvind, Raghunath, Rajesh and Mala Devi.

11.1. In her cross-examination she has stated that as her statement was recorded before recovery of the dead body of her son, she had not mentioned about the same in her statement. She has denied that Arvind Sah stays in Uttar Pradesh with his wife. She has stated that Arvind and his father stays in Delhi in connection with profession. She denies the suggestion that Mala Devi lives at another place with her husband. She has further stated that her son Prashant used to run a hotel and sometimes



used to stay there. She has also stated that she had no enmity with Arvind, his father and Mala. Foul smell was coming out from the dead body. The dead body was in a condition to be identified and had swollen. She claims that as the dead body of Prashant was recovered from the septic tank of Arvind. Therefore, it is only he and his family members who have killed Prashant. She had not seen with whom her son had gone. She has denied the suggestion that the tank from which dead body was recovered does not belong to Arvind.

11.2. In her cross-examination, she has further stated that out of her three sons, namely, Manoj, Satish and Prashant, Satish has also been killed. Police had arrived after the message spread all over the village. When she reached near the dead body with the wife of Prashant, hundreds of people had assembled there. The dead body of Prashant was not brought home rather police had taken it. The names of accused persons had not come out at that time. She never met any policeman after recovery of the dead body of Prashant. She has denied the suggestion that due to village politics, name of Rajesh had been taken as the accused. She has denied to have given false deposition.

12. P.W.-4, Archna Devi is the wife of deceased



Prashant. She has deposed that her husband, after returning from the shop, had gone to the *pucca* (paved rectangular platform) of Kishore Sah to take rest and had assured her to come after 2-3 hours but her husband did not return. On the next day of occurrence, slippers of her husband were recovered from one septic tank of Arvind Sah and the dead body from the other. The dead body was nude, a *sari* tied around the neck and bearing knife wound. She claims that accused Arvind Sah, Mala Devi, Raghunath Sah and Rajesh Sah killed her husband and hid the dead body. She claims to identify each one present in Court. In her cross-examination, she has stated that police had interrogated her before lodging of the case. She cannot say whether police recorded the statement as stated by her or not. It is further deposed by this witness that she cannot tell the date of recovery of the dead body of her husband. In para-22, she has stated that she had stated before the police that slippers of her husband were recovered from one septic tank of Arvind Sah and the dead body of her husband from the other. She had stated before the police that a *sari* was tied around the neck of the dead body, the dead body was nude and accused Arvind Sah, Mala Devi, Raghunath Sah and Rajesh had together killed him and pushed the body into the tank. The names of accused persons



were disclosed after recovery of the dead body. She has denied that the dead body was fully decomposed and was not identifiable. She cannot point out the portions of body having wounds. She does not know whether any limb of the dead body was separated or not. She has stated that her husband had no enmity with anybody in village. She has also denied that she has deposed as tutored to her. She has denied the suggestion that the conduct of her husband was not blemished due to which he has been killed.

13. P.W.-5, Pankaj Kumar is a hearsay witness who has deposed in his examination-in-chief that on 16.04.2010 at 09:30 p.m., Prashant Kumar was sitting on the *Chabutara* of Kishore Sah. This witness also reached there walking. He talked with Prashant Kumar for sometime and left the place at about 10:00-10:15 p.m. In the morning, he came to know that Prashant is traceless for which occurrence Manoj Kumar has lodged a case. On 27.04.2010 between 04:00-05:00 p.m. police came to the house of Arvind Sah and Raghunath. Dead body of Prashant was recovered from the inoperational septic tank of the newly constructed house of Arvind Sah. The slippers of deceased Prashant Kumar were recovered from the first tank of Arvind Sah. From the house of Arvind and Mala Devi, one T-shirt, shirt,



½ portion of sari were recovered. Half of the sari was blood stained and the other half was tied around the neck of Prashant Kumar. He has claimed that the dead body was nude and Arvind Sah, Mala Devi and Raghunath Sah had killed Prashant Kumar. He identifies Arvind Sah, Mala Devi, Rajesh Gupta, Raghunath Sah and Kishore Sah who are present in the dock.

13.1. In his cross-examination, this witness has stated that Prashant Kumar was his friend. He identifies Arvind Sah, Mala Devi, Raghunath Sah, Kishore Sah and Rajesh Gupta as they were villagers. He has stated that he had seen the dead body outside the waterless tank. The tap attached with the tank had been uprooted to recover the dead body. Since the tank belonged to Arvind Sah, he suspects that Arvind Sah, Mala Devi and Raghunath Sah were behind the crime. He cannot produce any evidence to show that the tank belonged to Arvind Sah. He has further stated that the dead body was worthy of identification. It is incorrect to state that the dead body was decomposed and in course of dragging it out, its limbs were separated. In para-13 of his cross-examination, he has denied his statements given in para-1 of his examination-in-chief and in para-14 of his cross-examination he has supported his statements given in para-2 of his examination-in-chief. He has



denied to have met Manoj Kumar in Court. He has also denied the suggestion that he has falsely deposed on the instruction of Manoj Kumar who wanted to conceal the actual cause of occurrence.

14. P.W.-6, Subodh Kumar Sah has stated that on 17.04.2010 the incident took place. He was at his house. It was 07:00 a.m. Arvind Sah came to his house and informed that he had received injury. Arvind Sah had received injury on his left cheek and one of his teeth was broken. He dressed the wound applied Dettol and gave him two pills to take. After that the witness went to his in-laws' place (*Sasural*) and, on his return, he came to know that Prashant was no more.

14.1. In his cross-examination, he has denied the suggestion that he is a quack (*Jhola chhal doctor*). He has admitted to have given pills to Arvind which he keeps at home. He has further stated that police had not recorded his statement. He has denied the suggestion that he had given false statement to have treated Arvind. He admits that he has no degree of qualification.

15. P.W.-7, Dr. Jagdev Mandal has stated that on 27.04.2010 while he was posted at Sadar Hospital, Khagaria as Deputy Superintendent. On 27.04.2010, a medical board was



constituted by order of D.M., Khagaria vide letter No. 722 dt. 27.04.2010 consisting of following members namely Dr. Ravindra Narain, Dr. K.N. Prasad and myself Jagdev Mandal for examination of dead body of Prashant Kumar, Hindu male, 35 years, s/o Ramji Sah of village Ramganj Muffasil, Khagaria. The Board constituted conducted the *post mortem* of the dead body on 27.04.2010 at 09:00 P.M. which found the following injuries:

1. On external examination, face and whole body was swollen and disfigured, decomposed and foul smelling. Tongue was protruded between, swollen lips and magot was present over the whole body. There was peeling of the skin at different parts of the body. A broad ligature was present around the neck, about 3" in breadth, horizontal and continuous with knot of right side of neck. And on removal ligature marks till (illegible).

2. A stab wound 1"x1/2"x1/4" on the back of left upper arm.

3. A stab wound 3"x1/2"x cavity deep on lateral side of right of upper part of abdomen through which a loop of small intestine profuding.

4. Stab wound 1"x1/2"x cavity deep on lateral side of right lower chest.

5. Stab wound lateral side of left side of chest on the axillary line about 10" below oxilla 1"x1/2"x1" in size.

6. Stab wound 1/2"x1/2"x1/2" on lateral side of chest in the mid axillary line about 2" below injury No. 5.

The *post mortem* report is not written by him and it is torn (Hole) at some places. So he is unable to read



it. He has admitted to have signed on post mortem report as a member (Ext-1).

16. P.W. 16 Dr. Rabindra Narain has also supported the said version of P.W. 7.

17. P.W.-8 Manoj Kumar has *inter alia* stated that he is the informant of the case. He was at home in the night of 16.04.2010. At about 9:00-10:00 at night, his brother Prashant Kumar giving assurance to his mother and wife to return, went to the *Chabutara* of Kishore Sah to take rest. When the witness got up in the morning, his mother Urmila Devi told him that Prashant did not return. He tried to contact him on Mobile Nos. 9472076386 and 9308592424, but the same were switched off. He went to the *Chabutara* of Kishore Sah and asked the persons sleeping at the *Chabutara*, namely Fakir Kumar, Lalan Kumar, Rishi Kumar, Ritu Kumar who told him that at 12:00 O'clock at night a call was received from a lady and Prashant went out, but they cannot tell the exact time. When despite hectic search, Prashant could not be traced out, he submitted a written application at the police station in his pen and signature (Ext-2). He has further stated that on 27.04.2010, Police went to the house of Arvind Sah with Rajesh Kumar Gupta. He and the wife of Prashant also reached there. On the clue given by Rajesh



Kumar, a pair of white slippers was recovered from the septic tank of Arvind Sah which belonged to his brother Prashant. A gunny bag was also recovered from the courtyard from which a cotton mattress, a blood stained red colour half Sari, a blood stained half pant and a blood stained green colour Blouse were recovered. The dead body of Prashant was recovered from the inoperational tank of Arvind Sah in nude condition. Left side of the chest was swollen with injury and half of *Sari* was recovered with which the neck was tied and another half of Sari was recovered from the gunny bag. The witness has, therefore, strong apprehension that Rajesh Gupta, Arvind Sah, Mala Devi and Raghunath Sah, sharing common intention, had killed his brother. He identifies all the four present in Court. He also submits that Kishore Sah has been falsely implicated.

17.1. In his cross-examination, he has denied the suggestion that Arvind and Mala Devi were not at Khagaria on 16.04.2010. He has further stated that he had no clue about Prashant before the recovery of his dead body. Police called him at the place of recovery of the dead body after recovery. Police did not hand over the dead body to him, rather sent it for *post mortem*. He has stated that it is not a fact that the dead body was not worthy of identification. He has stated that he had gone to



Hospital with the dead body. The dead body was taken to Hospital at about 6-7 hours and not to the police station. He stayed with the dead body for about 1-2 hours. He has denied the suggestion that when the police suspected him to be instrumental in the killing of Prashant, he diverted the suspicion towards the accused persons.

18. P.W. 9 Sanjeev Kumar, P.W. 10 Bechan Sah, P.W. 11 Vijay Kumar and P.W. 12 Subodh Kumar Sah have not supported the prosecution-case and have been declared hostile.

19. P.W. 13 Sanjay Kumar Rai is the Investigating Officer of the present case. He has stated that on 21.04.2010 he was posted as the S.H.O. of Khagaria (Muffasil) Police Station. Manoj Kumar submitted a written application on 21.04.2010 at 14:30 hours. He wrote the forwarding letter in his pen and signature which he identifies. The same is marked as Ext-3. He himself took the charge of investigation of the case. At the police station itself, he recorded the re-statement of informant Manoj Kumar and proceeded with him for the place of occurrence. In para-3 he has given the detailed description of the place of occurrence. Thereafter he recorded the statements of Fakir Kumar, Lakshman Kumar, Archana Devi and Urmila Devi. On 22.04.2010 he made an application to the computer



operator, S.P. Office, namely Sanjay Kumar and also to the Mobile Company to get the call detail of Mobile Nos. 9308592424 and 9472076386. On 23.04.2010, the call details of the mobile numbers were obtained. He examined the call detail of Mobile No. 9472076386 and found that 7-8 times calls were made from this number to Mob. No. 9279189126. He has detailed the contents of the calls in para-28 of the case diary which is in his handwriting and he identifies the same (Ext-5). Contents of the calls from the other mobile of Prashant on Mob. No. 9279189126, which belonged to Surendra Kumar of North Hajipur Khagaria has been detailed in para-29 of the case diary (Exh-6). He has detailed the talks on mobile phone made on 16.04.2010 and 17.04.2010 in para-36 of the case diary (Ext-7).

19.1. In his further statement on 03.11.2012, he has stated that there are repeated calls in the night of incident on both the mobile numbers of Prashant Kumar from the mobile number of Surendra Kumar. On 17.04.2010 after 17:46 hours there is no incoming or outgoing call on the mobile phone of Prashant Kumar. Mobile phone of Surendra Kumar is also switched off. The call detail is from 15.04.2010 to 24.04.2010. Prashant Kumar is also missing after talking on mobile phone on 16.04.2010 at 12:00 O'clock at night and his mobile phone is



switched off. He has detailed the calls between Prashant and Surendra Kumar in para-40 of the case diary (Ext-9). Upon enquiry, Surendra Kumar stated that he had purchased the Mobile bearing No. 9279189126 and had gifted it to the elder sister of his wife, namely Mala Devi, w/o- Arvind Sah. Ever since its purchase the said mobile is in exclusive use of Mala Devi. She is in Uttar Pradesh with her husband. She had gone to Uttar Pradesh on 20.04.2010.

19.2. The witness further states that when he interrogated Raghunath Sah, he stated that Arvind Sah was his son. He (Arvind Sah) came on 16.04.2010 and took his wife and children on 20.04.2010 with him. He has further stated that he recorded the statement of Subodh Kumar, P.W. 11, who is the driver of Prashant Kumar's vehicle NO. BR-340893. He has stated that Prashant Kumar used to bring Mala Devi to his hotel. Mala Devi had contact with several others also. P.W. 9 Sanjeev Kumar also deposed on the same line as P.W. 11.

19.3. He has further stated that after permission from the senior officers, A.S.I. Ramakant Singh and Choukidar 9/12 Mahesh Sah were sent to Shahjahanpur. It was revealed that Mobile No. 970978415 belonged to Rajesh Kumar. Upon further interrogation, he gave his confessional statement which



is in his pen and signature (Ext-10). Based on the confessional statement of Rajesh Kumar Gupta, he raided the place of occurrence and recovered the slippers from the septic tank of Arvind Sah, seized the same and prepared the seizure list. The wife of Prashant Kumar certified that the same belonged to Prashant Kumar (Ext-11).

19.4. He has further stated that A.S.I. Ramakant Singh informed on mobile phone that while bringing Mala Devi to Khagaria, on the way, she has confessed her guilt and has stated that the dead body of Prashant is lying by the side of inoperational septic tank of her house and the clothes of Prashant are kept in a gunny bag in the courtyard beneath the heap of leaves used as fuel. The same day at 16:30 hours, based on the confessional statements of Rajesh Kumar Gupta and Mala Devi the covering of the tank was lifted and foul smell started coming out and later the dead body was recovered, which was identified by the family members of the deceased. He has identified the attested copy of the inquest report prepared by Ravindra Kumar and Munna Kumar (Ext-12).

19.5. He has further stated in para-49 that none of the materials described in para-72 is with him. He has not stated as to whose Sari and whose Pant was recovered. He had not got



the said articles examined from Forensic Expert. In para-50 he has specifically stated that he did not find any eye-witness to the occurrence during investigation. He has admitted to have stated that Ramakant Singh came by train with Choukidar Mahesh Sah, Mala Devi and Arvind Sah.

19.6. In his cross-examination on behalf of accused Kishore Sah, he has stated that he does not have the original copy of the call detail. He has deposed about the C.D.R. on the basis of entries in case diary. He is unable to supply copy of the call detail mentioned in the case diary. He has denied to have recorded the statement of computer operator Sanjay Kumar. Sanjay Kumar had not told him the name of the owner of Mobile No. 9279189126. He has stated that the time of arrest of Rajesh Kumar Gupta is not mentioned in the case diary. He has stated about the Rajesh Gupta coming home in para-71 of the case diary. Before that he had sent the dead body of the deceased for *post mortem*. He had reached the house of Rajesh Kumar Gupta at 07:30 p.m. on 27.04.2010. He has also stated that he had visited the 2nd place of occurrence on 27.04.2010 at 05:00 p.m. Before that he had already talked with A.S.I. Ramakant Singh on mobile phone (para-64 of the case diary).

19.7. In para-59, he has stated that he did not



contact any of the family members of Rajesh Kumar Gupta. He did not prepare arrest memo. of Rajesh Kumar Gupta. He is aware that accused has to be produced in Court within 24 hours of arrest. He sent Rajesh Kumar Gupta to Court on 29.04.2010. There is no forwarding letter available in the case diary.

19.8. In para-62, he has stated that 2:30 hours after visiting the 2nd place of occurrence, he had reached the house of Rajesh Kumar Gupta. He had not recorded any statement of A.S.I. Ramakant Singh. He denies the suggestion that Rajesh Kumar Gupta had not given any confessional statement before him. He also denies the suggestion that the confessional statement of Rajesh Kumar Gupta is fraudulent and the investigation is faulty.

20. Depositions of P.W's. 14 to 20 need not be gone into in detail as they are formal witnesses who have proved different documents, signatures and exhibits and have not stated anything about the complicity of the accused/appellants in the crime.

21. We have re-appreciated the relevant evidence led by the prosecution before the Trial Court. We have also considered the submissions canvassed by learned counsels for the parties and materials placed on record.



22. It would emerge from the record that in the present case, there is no eye-witness to the occurrence in question and, therefore, the case of the prosecution rests on the circumstantial evidence. It transpires from the record that after recording of the F.I.R., which was filed by the informant, the Investigating Officer collected the details of the mobile phone of the missing Prashant Kumar and thereafter came to know that Prashant Kumar received a phone call from a particular mobile phone number. Therefore, it is the case of the prosecution that the Investigating Officer collected the C.D.R. of mobile phone number of the missing person i.e. Prashant Kumar as well as appellant Mala Devi. It was revealed that she was in touch with other co-accused. Therefore, the Investigating Officer sent one Ramakant Singh, Police Constable, at the place of appellant Mala Devi at Uttar Pradesh. It is alleged that while returning from Uttar Pradesh, with Ramakant Singh, in train, the said Mala Devi made confessional statement before the said police constable that she had killed Prashant Kumar with the help of the other two accused. Thus, it is the case of the prosecution that the confessional statement was made by Mala Devi before the police constable Ramakant Singh. It is further revealed from the record that Ramakant Singh, therefore, informed the



Investigating Officer about the said confessional statement and, therefore, on the very same date i.e. on 27.04.2010, other co-accused Rajesh Kumar Gupta was called by the police and, it is alleged, the said accused made confessional statement before the Investigating Officer. However, it is revealed from the record that Ramakant Singh, before whom the confession was made by Mala Devi, has not been examined by the prosecution. Therefore, what was the confession made by Mala Devi before the said Constable is not produced or proved before the Court. It is further revealed that both these persons were not an accused on 27.04.2010. Admittedly, they were arrested on 29.04.2010. Prior to that, the dead body was already discovered. P.W. 3 in paragraph-19 has specifically stated that the police came at the place of occurrence after the message of recovery of the dead body had spread all over the village and that there was no disclosure of the names of the assailants in the village. Similarly, P.W. 4 has stated in paragraph-22 that the names of the assailants became public only after the recovery of the dead body.

23. Thus, from the aforesaid evidence, it would emerge that before the police came at the place of occurrence, the dead body was already recovered and when the police came



at the place, names of the accused persons were not known.

24. At this stage, we would like to refer **Section-27 of the Evidence Act** which reads as under:

“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.”

25. At this stage, we would like to refer the decision rendered by Hon’ble Supreme Court in the case of **Ramanand @ Nand Lal (supra)**, wherein the Hon’ble Supreme Court has observed in paragraph Nos. 52 to 55 as under:-

“52. Section 27 of the Evidence Act, 1872 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.”

53. 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 along with his blood stained clothes 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 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. 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.

54. The reason why we are not ready or rather reluctant to



accept the evidence of discovery is that the investigating officer in his oral evidence has not said about the exact words uttered by the accused at the police station. The second reason to discard the evidence of discovery is that the investigating officer has failed to prove the contents of the discovery panchnama. The third reason to discard the evidence is that even if the entire oral evidence of the investigating officer is accepted as it is, what is lacking is the authorship of concealment. The fourth reason to discard the evidence of the discovery is that although one of the panch witnesses PW-2, Chhatarpal Raidas was examined by the prosecution in the course of the trial, yet has not said a word that he had also acted as a panch witness for the purpose of discovery of the weapon of offence and the blood stained clothes. The second panch witness namely Pratap though available was not examined by the prosecution for some reason. Therefore, we are now left with the evidence of the investigating officer so far as the discovery of the weapon of offence and the blood stained clothes as one of the incriminating pieces of circumstances is concerned. We are conscious of the position of law that even if the independent witnesses to the discovery panchnama are not examined or if no witness was present at the time of discovery or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the discovery evidence unreliable. In such circumstances, the Court has to consider the evidence of the investigating officer who deposed to the fact of discovery based on the statement elicited from the accused on its own worth.

55. Applying the aforesaid principle of law, we find the evidence of the investigating officer not only unreliable but we can go to the extent to saying that the same does not constitute legal evidence.”



26. In the case of **Subramanya (supra)**, the Hon'ble Supreme Court has observed in paragraph Nos. 76 to 78 as under:-

76. 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.”

77. 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.

78. 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.”

27. Keeping in view the aforesaid provision of law



and the decisions rendered by the Hon'ble Supreme Court, if the evidence led by the prosecution is carefully examined, it is revealed that the procedure prescribed in the aforesaid decision has not been followed by the investigating agency. The I.O. or any other witness of the prosecution did not depose before the Court about the exact word used by the appellant Rajesh Kumar Gupta, at the time of recording of his confessional statement. As such, we are of the view that the prosecution has failed to prove the discovery of the dead body of the deceased at the instance of the accused and, therefore, such discovery is not admissible in evidence.

28. It is also relevant to note that the prosecution has heavily placed reliance upon the C.D.R. of the deceased as well as the appellants/accused. However, it is pertinent to note that the I.O. has admitted that he is not having the original copy of the C.D.R. Further, as per his deposition, one Sanjay Kumar has provided copy of the C.D.R. to him. However, the said Sanjay Kumar has not been examined by the prosecution. Certain paragraphs of the case diary containing entries with regard to C.D.R. have been, surprisingly, exhibited by the Court. It is also not in dispute that none of the witnesses from the mobile company has been examined by the prosecution nor the



certificate issued under Section-65B(4) of the Evidence Act has been produced before the Court.

29. Thus, we are of the view that the Trial Court has wrongly placed reliance upon the C.D.R. and the prosecution has failed to complete the chain of circumstances against the appellants/convicts. It is also relevant to note that the prosecution has not proved the motive on the part of the appellants to kill the deceased by leading cogent evidence. It is well settled that in a case of circumstantial evidence, the motive plays an important role. In the case of **Ravindra Singh @ Kaku** (supra) the Hon'ble Supreme Court has observed in paragraph Nos. 20 and 21 as under:

“20. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under section 65A and 65 B of the Indian Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether *Anvar P.V. vs P.K. Basheer & Ors*; [(2014) 10 SCC 473] occupies the filed in this area of law or whether *Shafhi Mohammad v. State of Himachal Pradesh* (2018) 2 SCC 801 lays down the correct law in this regard has now been conclusively settled by this court by a judgement dated 14/07/2020 in *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal* [(2020) 7 SCC 1] wherein the court has held that:

“We may reiterate, therefore, that the certificate required



*under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly “clarified” in Shafhi Mohammed (supra). **Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law.** Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.*

Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

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



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

30. It is the specific case of the defence that the prosecution did not examine Sanjay Kumar, nodal officer, Rama Kant, Police Constable, the witnesses who have signed the inquest report and thereby, because of non-examination of the said witnesses, great prejudice has been caused to the accused.

31. In view of the judgment rendered by Hon’ble Supreme Court in the case of **Sujit Biswas (supra)**, it is well settled that the circumstances not put to the accused while recording statement under Section-313 of the Code cannot be used against the accused. Para-12 of the aforesaid judgment reads as under:

“12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Code of Criminal Procedure, is to meet the requirement of the principles of natural justice, i.e. *audi alteram partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial



evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination Under Section 313 Code of Criminal Procedure, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.”

32. In view of the above discussion, we are of the view that the prosecution has failed to complete the chain of circumstances by leading cogent evidence to prove the guilt against the appellants, despite which the Trial Court has passed the impugned judgment and order. Therefore, the same deserve to be quashed and set aside.

33. Accordingly, the impugned judgment of conviction dated 28.02.2014 and order of sentence dated 05.03.2014, passed by *Ad hoc* Additional District & Sessions Judge-II, Khagaria, in connection with Sessions Trial No. 395 of 2010 (arising out of Khagaria Muffasil P.S. Case No. 118 of 2010) are quashed and set aside. The appellants are acquitted of the charges levelled against them by the learned Trial Court.

33.1. The appellant, namely Mala Devi, (in



Criminal Appeal (DB) No. 368 of 2014), is in custody. She is directed to be released from custody forthwith, if her custody is not required in any other case.

33.2. The appellant, namely Rajesh Kumar Gupta, (in Criminal Appeal (DB) No.297 of 2014) is on bail. He is discharged from the liabilities of his bail-bonds.

34. The appeals stand allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
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