

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.A. No.1005/2008**

% **Date of Decision: 06.04. 2011**

Bhupender Singh Appellant

Through Mr.Ajay Verma and Mr.Gaurav
Bhattacharya, Advocates

Versus

The State (Govt. of NCT of Delhi) Respondent

Through Mr.Lovkesh Sawhney, APP

AND

Crl.A. No.408/2007

Drojan Singh Appellant

Through Mr.C.M.Sharma, Advocate

Versus

The State (Govt. of NCT of Delhi) Respondent

Through Mr.Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE S.L.BHAYANA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

ANIL KUMAR, J.

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1. The appellants have challenged the judgment dated 21st March, 2007 in the Sessions Case No.38 of 2006, titled as 'State v. Bhupender

Singh and Others' arising from FIR No.164 of 1999, under Sections 302/399/34 of the Indian Penal Code, PS Mukherjee Nagar, sentencing Bhupender Singh and Drojan Singh for offences punishable under Sections 302/34 of the Indian Penal Code and Sections 399/34 of the Indian Penal Code and sentencing them to life imprisonment with fine of Rs.5,000/- each for the offences u/s 302/34 of IPC, and in default of payment of fine to further undergo rigorous imprisonment for 1 year and for rigorous imprisonment of 10 years along with fine of Rs.5,000/- for offences under Sections 392/34 of the Indian Penal Code and in default to further undergo rigorous imprisonment for 1 year.

2. The case of the prosecution is that on 16th June, 1999, one Jaswant Singh, S/o Sh.Mansa Ram, R/o 339, Bhai Parmanand Colony, Delhi complained that when he came back home on 16th June, 1999 at about 9:30 p.m., he found his wife lying in the bathroom and the households articles were lying scattered. The door of the house was open and cash, jewellery, silver utensils and coins were found missing from two bedrooms. The complainant had stated that he would furnish the list of articles missing from his house. On the complaint of Sh.Jaswant Singh, a rukka was prepared and a case was registered under Section 459/380 of the Indian Penal Code. The wife of the complainant was removed to the hospital, however, she was declared brought dead and thus, Section 460 of the Indian Penal Code was also

added. The post mortem was conducted on 17th June, 1999 and on 18th June, 1999 after consulting with the higher officials, the case was converted under Section 302/392/34 of the Indian Penal Code. On 22nd June, 1999, the complainant handed over a list of missing articles to the police, Ex. PW-4/C. He had found that the cash amount of Rs 2,25,000/-, gold jewellery, silver coins including one which the words “Happy Birthday, Gursift Kaur, 08.03.1999, with best compliments from Jaswant Singh Juneja” were engraved, and two silver rings on which the initials of HBK were engraved were found to be missing from his house.

3. During the investigation, the help of the crime team, dog squad and photographers were taken. The complainant on 5th September, 1999 had expressed his suspicion on his earlier servant Bhupender Singh @ Babu S/o Yadu Nath Singh as he had seen his house and was aware of the movements of the family members of the house as well as the fact that his wife used to remain alone in the house. Sh.Bhupender Singh had left the services of the complainant due to some annoyance about one and half months before the date of incident. Therefore, the notice under Section 160 of the Criminal Procedure Code was given to Sh.Bhoopender Singh to join the investigation and during the investigation, he allegedly confessed that on 16th June, 1999 at about 2:00 pm, he along with his accomplices, namely Sh.Drojan Singh @

Verma S/o Sh.Bare Lal and Sh.Dinesh S/o Sh. Jawahar after planning the robbery went to the house of complainant where they met his wife Smt.Harbhajan Kaur. They asked her for water and as she turned to go to fetch water for them, Sh.Dinesh put his hands on her mouth and caught hold of her hands and Sh.Drojan Singh caught hold of her feet. The deceased, Smt.Harbhajan Kaur resisted for sometime, however, thereafter she became calm and they dragged her and put her in the bathroom. They removed Rs.2,25,000/- in cash and silver coins and rings from the bed room and distributed the loot amount equally amongst themselves.

4. Pursuant to the disclosure statement by Sh.Bhupender Singh, accused Sh.Drojan Singh was also apprehended and recoveries were also made. On the basis of the disclosure statement of the Sh.Drojan Singh, Rs.10,000/- and one ring on which the letters 'HBK' were inscribed were recovered from the room which was rented by Sh.Drojan Singh. On 27th September, 1999 on the basis of the disclosure statement of Sh.Bhupender Singh, cash of Rs.15,000/- and one silver coin on which the words 'HAPPY BIRTHDAY GURSIFT KAUR 08.03.1999 WITH BEST COMPLIMENTS FROM JASWANT SINGH JUNEJA' were inscribed, were also recovered.

5. The crime team also lifted chance prints marked as Q1 and Q2 from a tape recorder RX-FS 400 lying in the lobby of the complainant's house. Chance print Q3 was lifted from the double bed and chance print Q4 was lifted from the Polythene guarantee card. The chance prints were photographed and samples finger prints were also taken, which were sent by letter dated 23rd August, 1999 to the Finger Prints Bureau, Delhi police along with the sample finger prints of the accused and 11 other suspects. The police had further seized a foot-mat lying under the head of the deceased in the bathroom, an iron safe with brass handle, 10 keys of different types lying near the safe and some torn papers were seized by the police vide seizure memo Ex PW3/B. The police had also seized the tape recorder, one steel chain (the two ends of which were closed with a safety pin) and paper guarantee card vide seizure memo Ex 3/A.

6. The third accused, Sh.Dinesh remained untraceable. After the investigation, the charge sheet was filed against the appellants under Sections 302/392/34 of the Indian Penal Code and the appellants pleaded not guilty and claimed trial. During the trial, the prosecution examined 18 witnesses including complainant Sh.Jaswant Singh and the appellant Sh.Bhupender Singh also examined. DW-1, Smt.Beena, landlady of the house in which the appellant, Sh.Bhupender Singh, had

taken a room on rent, and from where the recoveries were made at his instance.

7. After considering the evidence on record and the statement of the appellants under Section 313 of the Criminal Procedure Code and the defence evidence. The trial Court on noticing the facts that the appellant Sh.Bhupender Singh was refused an advance of Rs.50,000/- by the complainant and that he was in need of money in connection with the marriage of his sister, therefore, he had a motive to kill Smt.Harbhajan Kaur and to rob the money from the house of Sh.Jaswant Singh, his employer; also that for robbing, the appellant, Sh.Bhupender Singh colluded with Sh.Dinesh Singh and Sh.Drojan Singh and on being apprehended, the appellants, Sh.Bhupender Singh and Sh.Drojan Singh made disclosure statements, and in furtherance of their disclosure statements, some of the articles robbed were recovered and one chance print on the tape recorder which was found lying at the spot, also matched with the middle finger print of the appellant, Sh.Bhupender Singh; that the chance print which was lifted from the tape recorder was found to be fresh, though he had left the service of Sh.Jaswant Singh one and half months before the incident and in the circumstances, the prosecution had established the chain of links pointing without any doubt, the complicity of both the appellants, convicted them under Sections 302/392/34 of the Indian Penal Code.

8. The learned counsel for the appellant, Sh.Bhupender Singh, Mr.Ajay Verma, has contended that there are materials contradictions in the depositions made by the prosecution witnesses, which rendered the credibility and reliability on them doubtful and suspicious. According to him, the complainant, Sh.Jaswant Singh PW-4 had expressed his suspicion on 5th September, 1999, however, the notice under Section 160 of the Criminal Procedure Code was issued on 22nd September, 1999 and this delay regarding issuing of notice to the appellant Sh.Bhupender Singh has not been explained which has caused a doubt about the credibility of the complainant and thus his deposition cannot be relied on.

9. According to the learned counsel, there is no independent/eye witness regarding murder of the deceased and no weapon of offence had been recovered which had caused the death of the deceased. He further asserts that, the recoveries are also doubtful and not in consonance with the procedure contemplated under Section 100 of the Criminal Procedure Code and consequently, such recoveries could not be relied on for convicting the appellants.

10. The learned counsel also submitted forcefully that since Sh.Bhupender Singh was an employee of the complainant and this has not been disputed that he had also been visiting the house of the

complainant, there could be chance prints of the appellant on the household articles. From the evidence, according to him, it has not been established that chance prints were not old and this creates a doubt regarding their genuineness and consequently, the appellant Sh.Bhupender Singh is entitled for the benefit of the doubt and therefore, his conviction cannot be sustained.

11. Referring to the disclosure statement of Sh.Bhupender Singh, which was exhibited as Ex.PW-11/A, he asserted that perusal of the same reflects that it is not in the language of the appellant Sh.Bhupender Singh. The alleged recovery of Rs.15,000/- comprising of 10 notes of Rs.5,00/-, 80 notes of Rs.100/- and 40 notes of Rs.50/- and one silver coin inscribed with the word "HAPPY BIRTHDAY GURSIFT KAUR 08.03.1999 WITH BEST COMPLIMENTS FROM JASWANT SINGH JUNEJA could not be relied on as the alleged recoveries were not made in the presence of any independent witness, though this has not been denied that the alleged recoveries were made from a house which is in a populated area. According to him, the investigating officer, SI Anil Kumar PW-18 had deposed that no efforts were made to get independent witness, and therefore, the recoveries made pursuant to the alleged disclosure statement of the appellant Sh.Bhupender Singh exhibited as Ex.PW-4/A are in contravention of

the procedure laid down under Section 100 of the Criminal Procedure Code and hence cannot be relied on.

12. The learned counsel also emphasized that the report of the Finger Print Bureau matching the finger print lifted from the tape recorder with the sample finger print of the left middle finger of the appellant, cannot be relied on as the sample finger prints were taken without the permission of the Magistrate in contravention of the provision of the Identification of the Prisoners Act, 1920 and therefore such sample prints are not admissible.

13. The learned counsel relied on 'Thavarj Pandian v. State' CrI.A.No.810, decided on 16th December, 2002 (Division Bench of Madras High Court) holding in Para 41 that if no rules are framed for taking finger print under Section 4 of the said Act, then the procedure prescribed under Section 5 ought to have been followed. Learned counsel also relied on Manu/RH/0520/2006, 'Ganpat Singh and Narpat Singh v. State of Rajasthan' to contend that the sample finger prints taken are inadmissible and consequently, the report based on the sample finger prints would also be inadmissible. It is contended that in the absence of finger prints of the accused which are inadmissible there isn't sufficient evidence to inculcate the appellant, Bhupender Singh.

14. The learned counsel has also contended that no cogent explanation has been given by the prosecution as to why the recoveries from the appellants, namely Sh.Bhupender Singh and Sh.Drojan Singh pursuant to their disclosure statement made on 22nd September, 1999 could not be made from the same house on the same day and were instead made on 24th September, 1999 from Drojan Singh and on 27th September, 1999 from Bhupender Singh. According to him, it is admitted that pursuant to the disclosure statement of Sh.Drojan Singh, the recoveries were made on 24th September, 1999 whereas from the same house, the alleged recoveries on the basis of the alleged disclosure statement of Sh.Bhupender Singh were made on 27th September, 1999. The recoveries are also not in presence of the independent witnesses and during this gap the alleged articles which were allegedly recovered could have easily been planted, and therefore, according to him, the recoveries cannot be relied on and the conviction of the appellant, Sh.Bhupender Singh could not be based on such recoveries and hence is liable to be set aside.

15. The learned counsel has also doubted the lifting of finger prints from the tape recorder, bed and polythene guarantee card on the ground that even according to prosecution, the iron safe with the brass handle was found open and 10 keys were found lying on the floor, however, finger prints were not found on any one of them. The learned

counsel further contended that the articles seized on 16th September, 1999 and thereafter, were also not sealed by the prosecution and thus a doubt is created about the authenticity of lifting the alleged chance print from these articles. He submitted that it is highly improbable that the iron safe with the brass handle which found to be opened would not have any chance prints.

16. The learned counsel for the appellant, Drojan Singh has challenged the conviction of the appellant on the ground that though the said appellant was arrested on 22nd September, 1999 and had also given a disclosure statement at the time of his arrest, however, no recoveries were made pursuant to his disclosure statement on the same day. Rather the alleged recoveries were made on 24th September, 1999 and no cogent explanation has been furnished by the prosecution for this delay. The learned counsel contended that the recoveries were not made pursuant to the alleged disclosure statement in the presence of independent witnesses though the area is thickly populated and even according to the allegations of the prosecution the landlady of the house was available. This is also urged that according to the disclosure statement from the amount allegedly robbed by the said appellant, an amount of Rs.25,000/- was given to the landlady Smt.Beena, however, the prosecution had not examined her.

17. Alleged recoveries pursuant to the disclosure statement are further challenged on the ground that various witnesses associated and connected with the recoveries have not given the correct particulars of the property and the description of the area, casting a doubt about their deposition. Referring to the testimony of PW-11 it was contended that the said witness Ct. Lal Chand, PW-11 did not know as to how many rooms were in the house from where Drojan Singh was arrested and later on recoveries were made. He also could not give the number of the houses situated near the house of the appellant Drojan Singh. PW-11, Ct. Lal Chand had deposed that though the people were residing in the houses near the house of appellant Drojan Singh and the investigating officer had asked the public persons to join but no one had agreed and he did not know about the initiation of any legal action against the persons who had refused to join. The said version about asking persons living nearby to become independent witnesses for the recovery of articles is not supported by the IO PW-18 in his deposition. The learned counsel emphasized that the recoveries were in violation of the procedure laid down under Section 100 of the Criminal Procedure Code and on the basis of the said recoveries the appellant Drojan Singh could not be convicted. The learned counsel also referred to the testimony of PW-18 recorded on 8th April, 2004 where in the cross examination by the counsel for the other accused he admitted that he did not call any persons from the neighborhood to become the independent witnesses in the case. The deposition of the said witness is as under:-

“It is correct that the house of accused Bhupinder is located in the crowded place and is also surrounded by many houses. I did not call any person from the neighborhood to become the witness in this case.”

18. In the circumstances according to the appellant in the case set up by prosecution there is nothing to inculcate the appellant except the alleged recoveries made which in itself are also doubtful. The recoveries of the currency notes could not be linked to the appellant. Even the silver ring is a common article which could have been easily planted by the police officials and in the circumstances the appellant cannot be convicted for the offence with which he has been charged.

19. The learned Additional Public Prosecutor, Mr.Sawhney has vehemently opposed the contention of the learned counsel for the accused/appellant that the sample finger prints taken by the investigating officials in exercise of the power under Section 4 of the Identification of Prisoners Act, 1920 could not be considered. According to him even if the rules and the prescribed procedure has not been framed under Section 4 of the said Act, the power to take the sample finger prints voluntarily given by an accused could not be denied. According to him the forensic science laboratory has rules, as to how the finger prints are to be taken and in taking the sample finger prints of the accused/appellants the procedure prescribed in the manual was employed and professionally trained person had taken the sample

prints in accordance with the rules. Relying on the testimony of PW-9 ASI Narender Singh it is contended that he was posted as a finger print expert in the crime branch on the date of the incident on 16th June, 1999. He also deposed that he had passed the examination of finger print expert course conducted by the Central Finger Print Bureau, Ministry of Home Affairs. The learned counsel contended that the appellants had not disputed about giving their sample prints to the investigating officers. The only objection which had been taken is that the sample finger prints and palm prints were taken on 22nd September, 1999 and not on 23rd August, 1999 or before that. He submitted that while taking the sample prints from the appellants reasonable guidelines were adopted and in any case no objection was ever raised by any of the appellants about taking the finger prints forcibly or under compulsion either at the time of framing of the charge or during trial in the statements made by the appellants under Section 313 of the Criminal Procedure Code nor was any such suggestion given to the witnesses of the prosecution.

20. The learned counsel contended that even if the evidence is collected illegally by the investigating agency, the evidence cannot be discarded unless the statute provides that in case of non compliance of any of the Statute, the evidence so collected shall not be considered. He submitted that the consequence of not following the prescribed

procedure as contemplated under Section 4 of the Identification of Prisoners Act, 1922 is not provided under the said Act and, therefore, the sample finger prints taken from the appellants could not be discarded nor can the same be held to be inadmissible.

21. The learned prosecutor contended that the charge sheet filed by the prosecution duly reflects that chance prints were lifted and the specimen finger prints which were taken from the appellant which were forwarded on 23rd August, 1999 along with the finger prints of other suspects to the FSL, Malviya Nagar for comparison. Sample prints taken from the accused are also established from the statement of Sh.Jaswant Singh PW-4, complainant who deposed that the sample finger prints were taken twice. Sh.Jaswant Singh, PW-4 had also categorically deposed that even the chance prints were lifted in his presence which fact has not been disputed by the appellants, as in the cross examination it was not even been suggested to him that sample prints were not taken in his presence or that the chance prints were not lifted in his presence.

22. Relying on the opinion of the finger print expert, it is contended that same is admissible under Section 293 of the Criminal Procedure Code. The learned counsel has also relied on (1978) 3 SCC 435, Shankaria v. State of Rajasthan, where a plea was raised that in view of

Section 5 of the Identification of Prisoners Act it was incumbent upon the police to obtain the specimen thumb impression pursuant to an order from a Magistrate and since that was not done, the opinion rendered by the finger print expert could not be considered in evidence and was inadmissible. This contention was repelled by the Supreme Court holding that it was not necessary for the police to obtain an order from Magistrate for obtaining such specimen finger prints under Section 4 of the Identification of Prisoners Act, 1920. Para 84 of the judgment is as under:-

84:- The contention appears to be misconceived because in the State of Rajasthan, the Police were competent under Section 4 of the Identification of Prisoners Act, to take the specimen finger-prints of the accused, and this they did, in the instant case, before the Superintendent of Police, Shri K.P.Srivastava. **It was not necessary for them to obtain an order from the Magistrate for obtaining such specimen finger-prints."**

23. The learned counsel has contended that the sample prints which were taken cannot be held to be inadmissible in the facts and circumstances and that the judgment relied on by the appellant cannot be followed as they have not considered some of the precedents of the Supreme Court where it has been held that if the finger prints are given voluntarily and taken under section 4 of the Identification of Prisoners Act, 1920 then they are not be excluded and cannot be held to be inadmissible in evidence.

24. This Court has heard the learned counsel for the parties in detail and has also perused the record of the trial Court including the testimonies of the witnesses and the documents established on record. This is a settled law that in reversing the finding of conviction, the High Court has to keep in view the fact that the presumption of innocence is still available in favor of the accused. If on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, the Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favors the accused should be adopted. However the view taken by the Trial Court which had an advantage of looking at the demeanor of the witnesses and observing their conduct in the Court is not to be substituted ordinarily by another view, unless another view if substantially and reasonably is possible in the opinion of the High Court. Reliance for this can be placed on AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors v. State of Madhya Pradesh, 2002 (2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat, (1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the

view which is favorable to the accused should be adopted because the paramount consideration of the Court is to ensure that miscarriage of justice is not done. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent person. The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the findings are against the evidence on record or unsustainable or perverse. However, before reversing the finding of acquittal the High Court must consider each ground on which the order of conviction is based and should also record its own reasons for accepting those grounds.

25. In the instant case the evidence produced by the prosecution is purely circumstantial. The principles on which the circumstantial evidence is to be evaluated have been stated and reiterated by the Supreme Court in numerous judgments. We may notice here the observations made by the Apex Court, in the case of Hanumant Govind Nargundkar v. State of M.P.: 1952 SCR 1091 on the manner in which circumstantial evidence needs to be evaluated. In the aforesaid judgment, Mahajan, J. speaking for the Court stated the principle which reads thus:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so

established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

The aforesaid proposition of law was restated in the case of *Naseem Ahmed v. Delhi Admn* : (1974) 3 SCC 668, by Chandrachud J. as follows:

This is a case of circumstantial evidence and it is therefore necessary to find whether the circumstances on which prosecution relies are capable of supporting the sole inference that the Appellant is guilty of the crime of which he is charged. The circumstances, in the first place, have to be established by the prosecution by clear and cogent evidence and those circumstances must not be consistent with the innocence of the accused. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the over-all picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect.

26. In a case in which the evidence is of a circumstantial nature, the facts and circumstances from which conclusion of guilt is sought to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and circumstances so established should not only be consistent with the guilt of the accused, but they must be entirely incompatible with the innocence of the accused and

must exclude every reasonable hypothesis consistent with his innocence. It has been observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete, pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favor of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however farfetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise. It has also been held that onus is on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defense or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they

should not be explainable on any other hypothesis except that the accused is guilty;

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

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

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

27. One of the strong links in proving the guilt of the appellant Bhupender Singh is the chance print on the tape recorder which was found lying at the spot, matched with the middle finger print of the appellant. According to the learned counsel for the appellant sample finger print which was taken from the appellant is not admissible on account of non compliance of the provisions of Identification of Prisoners Act, 1920, whereas according to the Learned Public Prosecutor the sample finger prints taken are admissible and cannot be ignored. Both the counsels have relied on various judgments which are as under:

28. The judgments relied on by the learned counsel for the appellants in the tabular form are as under which include the judgments of co-ordinate benches of this Court:

S.No.	Title	Matter in Issue	Judgments Relied On
1.	Harpal Singh v. State : Crl. Appeal No. 362/2008	Specimen Handwriting	1. Crl. Appeal No. 682/2008 'Santosh @ Bhure v. State' 2. Crl. Appeal No. 316.2008 'Neeraj v. State' Wherein the following Supreme Court Judgments were relied upon: (a) State of Bombay v. Kathi Kalu Oghad and Ors: 1961CriLJ856 (b) State of U.P. v. Rambabu Mishra: [1980]2SCR1067 (c) Sukhwinder Singh and Ors. v. State of Punjab: [1994]3SCR1061
2.	Raj Kumar @ Raju Vs. The State (G.N.C.T. of Delhi): Crl. A. No. 979/2005	Sample Fingerprints	Supreme Court Judgments relied on: (1) State of U.P. v. Ram Babu Mishra, AIR 1980 SC 791 (2) Sukhvinder Singh v. State of Punjab, 1994 (5) SCC 152
3.	Mehmood Ali Vs. State: Crl. Appeal No. 326/2007	Sample Fingerprints	Supreme Court's Judgments relied on: (1) State of U.P. v. Ram Babu Mishra, AIR 80 SC 791 (2) Sukhvinder Singh and Ors. v. State of Punjab, 1994 (5) SCC 152 and (3) State of Haryana v. Jagbir Singh, AIR 2003 SC 4377
4.	Ashok Kumar @ Govind Vs. State [Alongwith Crl.A. Nos. 275, 397, 398, 410 and 601/2007]: 2010CriLJ2329, 159(2009)DLT383	Sample Fingerprint	Judgment relied on: (1) Crl. Appeal No. 682/2008 'Santosh @Bhure v. State' Wherein the following Supreme Court Judgments were relied upon: (a) State of Bombay v. Kathi Kalu Oghad and Ors: 1961Cri. L.J. 856

			(b) State of U.P. v. Rambabu Mishra: [1980] 2 SCR 1067 (c) Sukhwinder Singh and Ors. v. State of Punjab; [1994] 3 SCR 1061
5.	Ganpat Singh and Narpat Singh v. State of Rajasthan : RLW 2007 (1) Raj 523 (Rajasthan High Court)	Sample Finger prints	Supreme Court's Judgement relied on: (1) Mohd. Aman v. State of Rajasthan: 1997 Cri.L.J. 3567
6.	M.S. Syed Anwar and Etc. v. Commissioner of Police, Bangalore City and Another: 1992 CriLJ 1606	Sample Finger Print, Foot prints and Photographs	No Supreme Court Judgment relied on: Just a reference made to the provisions of Identification of Prisoners Act

29. In Harpal Singh Vs State; Crl. Appeal No. 362/2008 one of the matters in issue was about specimen handwriting and that since no permission was taken from the Court of Competent Jurisdiction and Section 5 of the Identification of Prisoners Act 1920 was not complied with, whether the FSL report comparing the specimen handwriting of the accused taken by the Inspector during custody and the suicide note recovered from the spot of occurrence, allegedly authored by the appellant could be relied upon by the learned Trial Judge. The Trial Judge in this case was of the opinion that even though no permission was taken by the Inspector from the Court before obtaining the specimen handwriting of the appellant the same in no way dented the opinion contained in the FSL report, which stated that the suicide note

Ex.P1 to Ex.P4 is in the handwriting of the appellant in view of the dictum of law laid down by Supreme Court in the decision reported as State of Haryana vs. Jagbir Singh AIR 2003 SC 4377 that pendency of some proceedings in the court is a sine qua non before a court can give direction to an accused to give his specimen handwriting under Section 73 of the Evidence Act and that such a direction can be given by the court only for enabling the court to compare the handwriting of the accused and not for the purpose of the investigating or any other agency to compare the same and the fact that the appellant did not raise any dispute in the trial that the suicide note was not in his handwriting or that the police did not obtain his specimen handwriting and the fact that the suicide note Ex.P1 to Ex.P4 was written by the appellant established beyond any doubt that the appellant had murdered his wife and son. Another Bench of this Court, however, took a different view relying on the decision dated 5.3.2009 disposing of CrI. Appeal No. 682/2008 'Santosh @ Bhure v. State' and CrI. Appeal No. 316.2008 'Neeraj v. State', noting the decision of the Constitution Bench of Supreme Court reported as 1961 Cri.L.J. 856, State of Bombay v. Kathi Kalu Oghad and Ors. as also the decisions of Supreme Court reported as [1980] 2 SCR 1067, State of U.P. v. Rambabu Mishra and [1994] 3 SCR 1061, Sukhwinder Singh and Ors. v. State of Punjab; holding that the FSL report Ex.PW-24/A has to be excluded from the arena of admissible evidence in the present case, for the reason that no orders were obtained by the competent court to obtain the specimen

writings of the appellants nor were the provisions of the Identification of Prisoner's Act 1920 complied with.

30. In *Raj Kumar @ Raju Vs The State* (G.N.C.T. of Delhi): CrI. A. No. 979/2005, another bench of this Court, also relying on *Ram Babu Misra* (supra) and *Sukhvinder Singh* (supra) had held that where the provisions of the Identification of Prisoners Act, 1920 are violated, specimen samples pertaining to the fingerprints, handwriting etc. of an accused and the incriminating evidence stipulated in the reports relatable thereto will be inadmissible in evidence and hence has to be excluded while considering the circumstantial evidence against the appellant. Similarly in *Mehmood Ali Vs State*; CrI. Appeal No. 326/2007 relying on *Ram Babu Misra* (supra), *Sukhvinder Singh* (supra) and *Jagbir Singh* (supra) it was held by a Division Bench of this Court that the chance finger prints have to be compared with the sample finger prints after obtaining permission from the Court of competent jurisdiction and after the proper identification of the prisoner as per the requirement of Section 5 of the Identification of Prisoners Act 1920. If this has not been done, then the incriminating evidence of the chance finger print lifted from the scene of crime cannot be admissible. Yet another bench of this Court in *Ashok Kumar @ Govind Vs State*; 2010 Cri L. J. 2329 relying on *Kathi Kalu Oghad* (supra) *Ram Babu Misra* (supra) and *Sukhvinder Singh* (supra) had held that since no permission was obtained from the Court as required by the

Identification of Prisoners Act, 1920, it has to be excluded while considering the incriminating evidence.

31. A bench of Rajasthan High Court in Ganpat Singh Vs State of Rajasthan; RLW 2007 (1) Raj 523 relying on Mohd Aman Vs State of Rajasthan 1997 CrL.L.J 3567 had also held that since finger prints were not taken before or under the order of the Magistrate, it was unsafe to accept the evidence led on this regard.

32. The judgments relied on by the Learned Additional Public Prosecutor in the tabular form holding that the finger prints taken under section 4 of the Identification of Prisoners Act, 1920 would be admissible are as under:

S.No.	Title	Matter in Issue	Judgments Relied On
1.	State of Madhya Pradesh v. Devender: (2009) 14 SCC 80	Photographs	No Judgments relied on
2.	Manikam v. State: (2009) 5 CTC 316	Sample Finger Prints	Supreme Court Judgments relied on: (1) Ravanan v. State, (1994) 1 LW (CrL.) 58 (2) State of T.N. v. T. Thulasingham, 1994 Supp (2) SCC 405
3.	Mohd. Aman, Babu Khan and Another v. State of Rajasthan: AIR 1997 SC 2960	Sample Finger print and Foot print	No judgments relied on

33. In *State of Madhya Pradesh Vs Devender*, (2009) 14 SCC 80 a bench of three judges of Supreme Court had held that on perusing the Sections 3, 4, and 5 of the Identification of Prisoners Act, the Court is of view that Section 4 deals with taking of measurements, etc. of non-convicted persons and that it is taken if the police officer so requires it and it has to be done in the prescribed manner. So far as Section 5 is concerned, it deals with the power of the Magistrate to direct any person for measurement or photographs to be taken if he is satisfied that for the purpose of any investigation or proceedings under the Code the same is necessary. It was further held that in case of conflict of directions given by the Court and the provisions of an Act, the Regulations and the Code, the statute itself prevails. In *Mohd Aman, Babu Khan & Anr. Vs. State of Rajasthan* AIR 1997 SC 2960, a bench of two judges of Supreme Court had held that under Section 4 of the Identification of Prisoners Act, 1940 police is competent to take finger prints of the accused and such evidence will not be inadmissible. In *Manikam Vs State*, (2009) 5 CTC 316 it was also held that there is no law which prohibits the investigating officer from lifting the fingerprint of the accused for comparison during the course of investigation of the case. In fact, the provisions found under S. 5 of the Identification of Prisoners Act, 1920 and S. 311-A Cr. P.C. speak only about the powers of the Judicial Magistrate, when he is approached by the investigating officer concerned for a suitable direction to the accused to co-operate by giving his finger-print or signature or sample handwriting as the case

may be. It is to be noted that those provisions do not put an embargo on the investigating officers from acting on their own for lifting the fingerprint, signature or handwriting of the accused during the course of investigation. The Supreme Court has not specifically laid down that the investigating officer should mandatorily invoke the provisions under section 5 of the Identification of Prisoners Act, 1920

34. While appreciating circumstantial evidence, the Court has to adopt a very cautious approach and should record a conviction only if all the links in the chain are complete and pointing to the guilt of the accused. In the present facts and circumstances one of the important links is the chance fingerprints which were lifted from the tape recorder and which have matched with the sample fingerprints of the appellant Bhupender Singh. The Sample fingerprints which were taken under section 4 of Identification of Prisoners Act, 1920 will be admissible or not is an important question in this case. In case the Sample fingerprints are not admissible as has been contended by the counsel for the appellant, a very pertinent link will be snapped as the other evidence is only regarding recoveries of articles pursuant to the disclosure statements of both the appellants.

35. The learned counsel for the appellant has relied mainly, on the judgments of other branches of this Court who had further relied on Kathi Kalu Oghad (supra) Ram Babu Misra (supra), Sukhvinder Singh (supra) and Jagbir Singh (supra). In State of Uttar Pradesh v. Ram

Babu Misra, AIR 1980 SC 791 the Supreme Court had held that Section 73 of the Evidence Act does not enable the Magistrate to give directions to the accused to give his specimen writings when the case is still under investigation because Section 73 contemplates pendency of some proceedings before a Court. It does not permit the Court, whether civil or criminal to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Relying on Barindra Kumar Ghose v. Emperor, ILR (1910) 37 Cal.467 the Supreme Court in Pushpadevi M.Jetia v. M.L.Wadhawan, (1987) 3 SCC 367 in paragraph 20 at page 388 had held that if evidence is relevant, the Court is not concerned with the method by which it was obtained. In Barindra Kumar Ghose (Supra) the contention that the Court must exclude relevant evidence on the ground that it was obtained by illegal search or seizure was repelled. Referring to page 500 of the report it was noticed:-

“Mr.Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded.”

36. Perusal of State of Bombay v. Kathi Kali Ughad, AIR 1961 SC 1808 reveals that the Supreme Court had held that by giving specimen writing, the accused person does not furnish evidence against himself and, therefore, when an accused person is compelled to give a specimen writing or impression of his finger, palm or foot, it may be such that he has been compelled to be a witness, however, it cannot be held that he had been compelled to be a witness against himself. In the circumstances, the Supreme Court has held that merely taking a specimen writing does not mean to be giving a statement so as to be hit by Section 162 of the Criminal Procedure Code. Ram Babu Misra (supra) and Kathi Kali Ughad (supra) did not hold that if the finger prints are taken under section 4 of the Identification of Prisoners' Act, 1920 without the specific permission of the Magistrate, then sample finger prints will not be admissible in evidence.

37. What also emerges from the perusal of Sukhvinder case (supra) is that it is also distinguishable and does not hold that if the sample finger prints are taken under section 4 of the Identification of Prisoners Act, 1920 without the permission of the Magistrate which is contemplated under section 5 of the said act and not under section 4 of the Act, then the sample finger prints would be inadmissible. The specimen writings in the instant case of appellant Sukhdev Paul were taken under the directions of Shri. Garg, Tehsildar –Executive Magistrate, PW13. No enquiry and trial in this case were pending in the Court of the

Tehsildar-Executive Magistrate. Rather the enquiry and trial in this case were pending under TADA before the Designated Court only. In these circumstances the Court was of the view that the direction given by the Tehsildar –Executive Magistrate to the accused to give his specimen writings was clearly unwarranted and not contemplated or envisaged by Section 73 of the Evidence Act despite admission by the accused in his statement under section 313 of the Cr.P.C. In this case there was also inherent ambiguity as to the matter of the letters reaching the hands of the police officials, as the prosecution's explanation for the same was diametrically opposite to the explanation of the mother of the deceased.

38. A division Bench of this Court in *Satyawan Vs State* MANU/DE/1044/2009 had ignored the part of the report of handwriting expert wherein he had opined that the specimen writings S-1 to S-8 of an accused Satish matched the writing on the ransom note on the ground that the investigation officer had taken specimen writing in violation of the provisions of the Identification of Prisoners Act, 1920 and also on the ground of being contrary to the law that specimen writing for purposes of expert opinion can be directed to be taken under orders of the Court, where the trial is pending, relying on *State of UP. Vs Ram Babu Misra*, (supra) and *Sukhwinder Singh & ors Vs State of Punjab*, (supra). In this case the investigating officer took the specimen sample of the accused while he was in custody.

39. In Harpal Singh vs State, MANU/DE/1091/2010, the IO had obtained the specimen handwriting Ex.PX-1 to Ex.PX-4 of the accused and sent the same along with Ex.P-1 to Ex.P-4 recovered from the house of the accused to the Forensic Science Laboratory for comparison of the handwriting. Before taking the specimen sample of handwriting he had not taken permission of the Court. Vide FSL report Ex.PW-24/A it was opined that the writing Ex.P-1 to Ex.P-4 is in the same hand of the person who had written Ex.PX-1 to Ex. PX-4. During trial no suggestion was given to the witnesses in the cross examination that the specimen handwritings were not the handwritings of the accused. The Court however, excluded the opinion of the handwriting expert pertaining to the letter recovered by the police. While excluding the opinion of handwriting expert, the Court had relied on para 7 of the Kathi Kalu Oghad's (supra) and paras 3 to 6 and para 8 of Ram Babu Misra (supra). Paras 18 to 23 of Harpal Singh (supra) are as under:

18. Unfortunately, for the prosecution, the charge against Neeraj has to fail for the simple reason Neeraj's specimen handwriting was obtained by the police when he was in their custody. No permission was taken from the Court concerned to obtain his specimen handwriting.

19. Learned Counsel for the State urges that a Constitution Bench of 11 Judges of the Supreme Court, in the decision reported as 1961 Cri.L.J. 856 State of Bombay v. Kathi Kalu Oghad and Ors. has upheld the constitutional validity of compelling an accused to give specimen handwritings. It has been held that the same does not contravene Article 20(3) of the Constitution of India and thus the fact that the police obtained the specimen handwriting of Neeraj when he was in their custody

does not invalidate the said act. Learned Counsel was at pains to point out that the Constitution Bench of the Supreme Court was considering three references pertaining to three views taken by the High Court of Bombay, Punjab and West Bengal pertaining to compelling an accused to give his specimen handwriting, fingerprints and specimen signatures respectively and that in the latter two cases the palm and finger print impressions as also the specimen signatures were obtained with the permission of the magistrate concerned but in the first case pertaining to the Bombay High Court the specimen handwritings were taken when the accused was in police custody. Thus, learned Counsel urged that the Constitution Bench upheld the action of taking specimen handwriting by the police when the accused was in police custody.

20. It may be noted that the Constitution Bench of the Supreme Court was dealing with the issue whether to compel an accused to give his blood sample, palm and fingerprints impressions, signatures and handwriting etc. would or would not be violative of Article 20(3) of the Constitution of India which made it unconstitutional for a person to be a witness against himself. The Constitution Bench held that to be a witness means to give evidence. It was held that giving handwriting samples or fingerprints or palm impressions did not tantamount to giving evidence and that when a handwriting sample or a fingerprint or a palm impression was obtained by the police it did not amount to compelling an accused to be a witness against himself.

21. In the decision reported reference to the decision of the Constitution Bench in *Kathi Kalu Oghad's case* (supra) in para 7 it was observed as under:

7. Section 73 of the Evidence Act was considered by us in *State (Delhi Administration) v. Pali Ram* 1979 Cri.L.J. 17 where we held that a Court holding an enquiry under the Criminal Procedure Code was entitled under Section 73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the Court by which he may be tried to compare it with disputed writings. The present question whether such a direction, under Section 73 of the Evidence Act, can be given when the matter is still under investigation and there is no

proceeding before the Court was expressly left open. The question was also not considered in *State of Bombay v. Kathi Kalu Oghad* 1961 Cri.L.J. 856, where the question which was actually decided was that no testimonial compulsion under Article 20(3) of the Constitution was involved in a direction to give specimen signature and handwriting for the purpose of comparison.

22. In para 3 to 6 and para 8 of the decision in *Rambabu Mishra's case* (supra) it was observed as under:

3. Section 73 of the Evidence Act is as follows:

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications to finger-impressions.

4. The second paragraph of Section 73 enables the Court to direct any person present in Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency

'to compare'. If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further Section 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court. Would it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under Section 73 of the Evidence Act on the plea that it would help him to decide whether to institute a civil suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should it make any difference if the investigating agency seeks the assistance of the Court under Section 73 of the Evidence Act on the plea that a case might be instituted before the Court where it would be necessary to compare the writings?

5. We may also refer here to Section 5 of the Identification of Prisoners Act, 1920, which provides:

5. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Cr.PC, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

Provided further, that no order shall be made under this section unless the person has at some time been

arrested in connection with such investigation or proceeding.

Section 2(a) of the Act defines "measurements" as including "finger impressions and foot print impressions.

6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such provision, signature and writings were deliberately excluded. As we said, this is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act.

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8. The view expressed by us in the earlier paragraphs, on the construction of Section 73, Evidence Act was the view taken by the Madras High Court in *T. Subbiah v. S.K.D. Ramaswamy Nadar* AIR 1970 Mad. 85, the Calcutta High Court in *Farid Ahmed v. the State* AIR1960Cal32 (Mitter J., at page 32). and *Priti Ranjan Ghosh and Ors. v. The State* (1973) 77 CWN 865, the High Court of Punjab and Haryana in *Dharamvir Singh v. State*, the High Court of Madhya Pradesh in *Brij Bhushan Raghunandan Prasad v. The State* MANU/MP/0050/1957 : AIR 1957 MP 106, the Orissa High Court in *Srikant Rout v. State of Orissa* 1972 (2) CWR 1332 and the Allahabad High Court in the judgment under appeal. A contrary view was taken by the Patna High Court in *Gulzar Khan and Ors. v. State* MANU/BH/0069/1962 : AIR 1962 Pat 255 and the High Court of Andhra Pradesh in *B. Rami Reddy and Ors. v. State of Andhra Pradesh*. We do not agree with the latter view. We accordingly dismiss the appeal and while doing so we would suggest that suitable

legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act and provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings.

23. In the decision reported as MANU/SC/0783/1994 : [1994] 3 SCR 1061 Sukhvinder Singh and Ors. v. State of Punjab, noting that the specimen writing of Sukhvinder Singh was obtained by the police when he was in police custody, notwithstanding the fact that Sukhvinder Singh had admitted in his statement under Section 313 Cr.P.C. that he gave the specimen handwriting it was held that the opinion of the handwriting expert had to be excluded while considering the evidence against Sukhvinder Singh. We note that the said evidence brought on record inculpatory evidence against Sukhvinder Singh in respect of ransom letters Ex.P-A and Ex.P-C alleged by the prosecution to be in the handwriting of Sukhvinder Singh.

40. Though the Division Bench had relied on Ram Babu Mishra (supra) for excluding the specimen writings, however, in Ram Babu Mishra it was rather held that section 73 does not permit the Court, whether Civil or Criminal to give direction to the accused to give specimen writing for anticipated necessity for comparison in a proceedings which may later be instituted. But in Satyawan (supra) the investigating officer took specimen writings samples while in custody. Similarly in Sukhvinder Singh (supra) relied on by the Division Bench the Apex Court was of the view that under Section 73 of Evidence Act it is the court which has to make comparison and it may either confirm opinion by comparing the disputed and admitted writings or seek the

assistance of an expert to put before the court all the material together with reasons which induce the expert to come to the conclusion that the disputed and the admitted writings are that of one and the same, and so that the court may confirm its own opinion on its own assessment of the report of the expert based on the data furnished by the expert. It was further held that since directions under Section 73 of the Evidence Act can be given for the purpose of enabling the court to compare and not for the purpose of enabling the investigating or prosecuting agency to obtain and produce as evidence in the case the specimen writings for their comparison with the disputed writings, the accused could be compelled to give his specimen signatures during the course of investigation. The Court was of the view that recourse to Section 73 of Evidence Act can be had only when the inquiry or trial is pending before the Court and the Court wanted the writing for the purpose of enabling it to compare the same. It was also held that the court, which can issue such a direction, would either be the court holding inquiry under the Code of Criminal Procedure or the court trying the accused. This judgment of the Division Bench in Satyavan (supra) and Sukhvinder Singh (supra) will have no application to the present case in the facts and circumstances as the sample handwritings were taken by the IO directly under Section 4 of the Identity of Prisoners Act, 1920.

41. Rather in State represented by Inspector Police and ors v. N.M.T.Joy Immaculate, (2004) 5 SCC 729 it was held that the admissibility of evidence or a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure. In the circumstances, the directions of the High Court that the confession and alleged recovery have no evidentiary value was held to be clearly illegal and had been set aside. The Supreme Court had held that the effect of the confession and also the recovery of the incriminating articles at the instance of the accused have to be examined strictly in accordance with the provisions of the Evidence Act.

42. In (1997) 10 SCC 44, Mohd.Aman and Anr v. State of Rajasthan, the Supreme Court had held that under Section 4 of Identification of Prisoners Act, 1920 the police was competent to take specimen finger prints of the accused. It was further held that, however, to dispel any suspicion or to eliminate the possibility of fabrication of evidence such specimen finger prints should have been taken before or under the order of a Magistrate. In para 8 of the judgment the Supreme Court had held as under:-

“..... it is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bonafides or to eliminate the

possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The other related infirmity from which the prosecution case suffers is that the brass jug, production of which would have been the best evidence in proof of the claim of its seizure and subsequent examination by the Bureau, was not produced and exhibited during trial-for reasons best known to the prosecution and unknown to the Court. For the foregoing discussion we are unable to sustain the convictions of Mohd.Aman.”

43. The Supreme Court again in *Pooran Mal v. The Director of Inspection (Investigation), New Delhi and Ors.*, (1974) 1 SCC 345 had held that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights it can be held that the evidence obtained on an illegal search can be excluded. It was further held that so far as India is concerned its law of evidence is modeled on the rule of evidence which prevail in English law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.

44. In *Shankaria v. State of Rajasthan*, (1978) 3 SCC 435 construing the provisions of Section 4 & 5 of Identification of Prisoners Act, 1920 it was held by the Supreme Court that police is competent under Section 4 of the said Act to take specimen fingerprints of the accused. In this case the fingerprints of the accused were taken before the Superintendent of Police Sh.K.P.Srivastava and it was held that it was

not necessary for them to obtain an order from the Magistrate for obtaining such fingerprints. The relevant para 84 at page 458 is as under:-

“84: The contention appears to be misconceived because in the State of Rajasthan, the police were competent under Section 4 of the Identification of Prisoners Act, to take the specimen finger-prints of the accused, and this they did, in the instant case, before the Superintendent of Police, Sh.K.P.Srivastava. It was not necessary for them to obtain an order from the Magistrate for obtaining such specimen finger-prints.”

45. In State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 a plea was raised on behalf of the accused that the tape recorded conversation obtained by interception could not be utilized by the prosecution to incriminate them. The plea was opposed by the prosecution contending that the illegality or irregularity does not affect its admissibility in evidence as there was no specific embargo against the admissibility in the Telegraph Act or in the rules. The Supreme Court had held at page 717 in paragraph 154 that the non compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility. The Supreme Court had placed reliance on R.M.Malkani v. State of Maharashtra, (1973) 1 SCC 471 where it was clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as *res gestae* under Section 7 of the Evidence Act. Reliance was also placed on Karuma v.

Reginam, (1955) 1 All. ER 239 where the judicial committee had held that if evidence is admissible it matters not how it was obtained. It was, however, further held that the judge has the discretion to disallow evidence in a criminal case, if the strict rules of admissibility would operate unfairly against the accused.

46. A single Judge of this Court in Sunil Kumar @ Sonu Vs State of NCT of Delhi in CrI.A.446 of 2005 decided on 25.3.2010 despite the ratio of Harpal (supra) and other decisions of other Division Benches had held that powers conferred on the police Officer under Section 4 of the Identification of Prisoners Act is independent and it was not obligatory for him to approach the Magistrate, had the accused not refused to give specimen finger print. In para 26 of the said judgment it was held so:

26. It is true that the specimen finger print impressions of the appellants were taken by the IO directly and not through the Magistrate as provided in Section 5 of Identification of Prisoners Act. But, that, to my mind was not necessary because Section 4 of Identification Prisoners Act specifically provides that any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurement to be taken in the prescribed manner. In view of the independent powers conferred upon a police officer under Section 4 of the Act, it was not obligatory for him to approach the Magistrate under Section 5 of the Act. He would have approached the Magistrate, had the appellants refused to give Specimen Finger Print Impressions to him. Therefore, no illegality attaches to the specimen finger print impressions taken by the Investigating Officer. The court

needs to appreciate that the very nature and characteristic of material such as finger prints renders it intrinsically and inherently impossible for anyone to fabricate them. If there is an attempt to fabricate finger prints, that can certainly be exposed by the accused by offering to allow his finger prints to be taken so that the same could be compared through the process of the court. None of the appellants has come forward to the court with a request to take his finger print impressions in the court and get them compared with the chance finger prints lifted by PW-1 from Car No. DL 2C A 4116 on 21st December, 2000.

47. From the above discussion it is apparent that the Division Bench in Harpal (supra) and other matters did not take into consideration the ratio laid down by the Supreme Court in Mohd. Aman & Anr. Vs State of Rajasthan(supra) categorically holding that under section 4 of the Identification of Prisoners Act, 1920, the police is competent to take specimen finger prints of the accused and similarly in Shankaria Vs State of Rajasthan, (1978) 3 SCC 435 the provision of section 4 & 5 of the Identification of Prisoners act, 1920 were considered and it was held that the police is competent under section 4 of the said act to take specimen fingerprints of the accused. In Ram Babu Misra (supra) the finger prints and signatures were treated at par and it was rather observed that the specimen signatures and writing are excluded from the range of section 5 of the Identity of Prisoners Act, 1920. It was further observed that section 73 of the Evidence Act would not apply in the stage of investigation and so section 5 of the Identification of Prisoners Act, 1920 has made special provisions for that stage and even

while making such provision, signatures and handwriting were deliberately excluded. Sukhvinder Singh (supra) referred to in Harpal Singh (supra) has also not considered the ramification of section 4 of the Identification of Prisoners' Act, 1920 nor has taken into consideration Mohd Aman (supra) and Shankaria (supra) categorically dealing with the scope of section 4 of the Identification of Prisoners Act, 1920.

48. What emerges from the above discussion is that section 73 of the Indian Evidence Act 1872 enables the Court to direct the taking of specimen handwritings, in matters pending before it. The direction is therefore, given by the Court for the purpose of enabling the Court to compare and not for the purpose of enabling the investigating or a prosecuting agency to obtain and produce as evidence in the case, the finger prints for their ultimate comparison with the chance prints. Thus it certainly does not bar the police officials to take finger prints for the purposes of investigation. As noted by the Constitution Bench of Supreme Court in Kathi Kalu Oghad (supra) such evidence does not stand barred by Article 20(3) of the Indian Constitution, as it is not deemed as being “a witness against oneself”, and it does not amount to testimonial compulsion. Rambabu Mishra (supra) also clearly lays down that specimen handwritings and signatures, do not come within the purview of the Identification of Prisoners Act.1920. Thus under the said Act, obtaining sample handwriting or signatures is not barred

under any provisions of the said act and any sample handwriting or signatures taken by the police or investigating agency, unless specifically barred under any other legislation, cannot be excluded being not contrary to any provision of the said Act. It was held categorically that police officials are undoubtedly empowered to take measurements, etc under S. 4 of the Identification of Prisoners Act, and S.4 of the Act is independent of Sec. 5, in its application.

49. In the circumstances, it is inevitable to infer that the Supreme Court has not held in *Kathi Kalu Oghad* (supra); *Rambabu Mishra* (supra) and *Sukhvinder* (supra) that the sample handwriting obtained by the police officials under section 4 of the Identification of Prisoners Act, 1920 is not admissible and has to be excluded. Any view to the contrary appears to be based on misreading of these judgments of Supreme Court. If a particular mode of taking measurement included in the Identification of Prisoners Act, 1920 can be resorted to by the Police for taking measurements under section 4 without the permission contemplated under section 5 of the Act, then it does not make the mode of measurement or the measurement in itself inadmissible.

50. Thus this Bench is of the view that the sample finger prints which were taken from the appellant, Bhupender Singh under section 4 of the Identification of Prisoners Act, 1920 will be admissible in evidence and cannot be made inadmissible on the ground that permission under section 5 of the said Act was not taken from the concerned Magistrate.

Since other co-ordinate Benches of this Court has held differently holding that such sample fingerprints will be inadmissible, it will be appropriate to have the decision of a larger Bench of this Issue.

51. The other issues raised in these two appeals, therefore, would be decided after the decision of this issue by a larger Bench, **“Whether the sample finger prints given by the accused during investigation under section 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate under Section 5 of the Act will be admissible or not?”**

52. In the circumstances, list these appeals before the Hon’ble the Chief Justice for constituting a larger Bench for the decision of above stated issue.

ANIL KUMAR, J.

S.L.BHAYANA, J.

APRIL 06, 2011

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