

\$~R-25 (Part-A)

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

+ **CRL.A. 711/2014**

Reserved on: 29th July, 2015

% **Date of Decision:** 24th November, 2015

KUNDAN SINGH

..... Appellant

Through: Mr. Ajay Verma, Ms. Neha Singh and
Ms. Ananya Mitra, Advocates.

versus

THE STATE

..... Respondent

Through: Ms. Ashaa Tiwari, APP with ACP
K.P. Kukreti.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J:

1. In this appeal, Kundan Singh challenges judgment dated 18th January, 2014, passed in S.C. No.32/2008 arising out of charge sheet filed in FIR No.592/07, Police Station Mehrauli, convicting him under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for murder of his friend Vipin Kumar. The appellant has also been convicted under Section 201 and 404 IPC.
2. By order on sentence dated 21st January, 2014, the appellant has been sentenced to imprisonment for life, fine of Rs 15,000/- for the offence

under Section 302 IPC with a direction that in default of payment of fine, the appellant shall undergo rigorous imprisonment of one year. For the offence under Section 201 IPC, the appellant has been sentenced to rigorous imprisonment of seven years, fine of Rs.5,000/-, and in default of payment of fine, to undergo rigorous imprisonment of six months. For the offence under Section 404 IPC, the appellant has been sentenced to three years' rigorous imprisonment and a fine of Rs.5,000/-. On failure to pay the fine, the appellant will undergo rigorous imprisonment of six months. Benefit of Section 428 Code of Criminal Procedure, 1973 (Cr.P.C) would be given.

3. Before we elucidate and adjudicate upon the contentions raised by the appellant with reference to the evidence led by the prosecution, it would be appropriate to note the case of the prosecution in brief.
4. On 13th August, 2007, at about 8.45 p.m., one Brahm Singh, who has deposed as PW1, noticed an unknown person throwing a black colour rexine bag in the jungle near Lado Sarai bus stand. Brahm Singh (PW1), who at that time was going in a car, stopped the car, but the said person fled from the spot on a motorcycle parked near the bus stand. Brahm Singh could not note down the exact number of the motorcycle except noticing that the motorcycle had a number with the letters 'KA 9735'. Contemporaneously, Constable Raghubir Singh (PW13) came running to the spot as he had also seen the same incident. Constable Raghubir (PW13) and Brahm Singh (PW1) proceeded to open the said black colour rexine bag upon which parts of a human body in the form

of two hands (chopped), two legs (chopped from the knee) and a head, without the torso, of a male person were found.

5. On the statement of Brahm Singh (PW1) marked Ex.PW1/A, FIR No.592/2007 marked Ex.PW21/A was registered at Police Station Mehrauli. The identity of the person, whose body parts were found in the bag, could not be ascertained. Wireless text messages sent to the SHOs of Delhi and National Capital Region did not help. Inquest papers, under Section 171 Cr.P.C. were prepared and post-mortem, vide report marked Ex.PW-25/A, was conducted at the All India Institute of Medical Sciences (AIIMS) on 21.08.07, after which the remains of the unidentified person were cremated.
6. On 10th September, 2007, one Nirbhay Prashant (PW3), on seeing the photographs/advertisement published for identification of the deceased, came to Police Post IGNOU, Mehrauli and identified the deceased as Vipin Kumar, son of late Kanahiya Singh and husband of his sister. Nirbhay Prashant (PW3) disclosed that the deceased used to work at Hotel Plaza Soliter, Gurgaon and he (PW-3) had lodged a missing report of Vipin Kumar at the Police Station Civil Lines, Gurgaon on 5th September, 2007. Other relevant information that the deceased had a saving bank account number 009901532543 with ICICI Bank at Panchsheel Park branch and had last talked to his wife on 12th August, 2007 from his mobile phone number 9313341707, came to light.
7. On examination of the call detail records (CDRs, for short) and after examining the video footage of the ATM of the ICICI Bank at Saket from where money was withdrawn using the ATM card of the

deceased, the present appellant was arrested. The evidence and materials collected during the police investigation including the recoveries made at the behest of the appellant form the core evidence of the prosecution case.

8. We now proceed to examine the oral evidence of the witnesses, other evidence relied and the contentions of the appellant. The happenings in the late evening on 13th August, 2007, when Brahm Singh (PW1) had seen an unknown person throwing a black colour rexine bag in the bushes at the crossing of Lado Sarai bus stand has been proved and established beyond doubt by Brahm Singh (PW1). PW1 affirms that a person had fled from the spot on a motorcycle after taking a U-turn to proceed towards Khanpur. He was able to partially note the number of the motorcycle as 'KA 9735'. In the black colour rexine bag, Brahm Singh (PW1) and Constable Raghbir Singh (PW13) found parts of a human body including a human head. On the basis of the statement made by Brahm Prakash (PW1) marked Ex.PW1/A, the FIR in question was registered. Evidence and materials were collected and seized from the spot vide seizure memo Ex.PW1/B.
9. The aforesaid narration finds affirmative corroboration from the testimony of Constable Raghbir Singh (PW13), who was on patrolling duty near M.B. Road, when he had seen an unknown person throwing a black colour rexine bag. Thereafter, the said person had fled on a motorcycle after taking a U-turn towards Khanpur. Raghbir Singh (PW13) had then met Brahm Singh (PW1) and they had checked the said bag which was found to be having a male face, two hands chopped

from the shoulder and two legs chopped from the knees. The said facts are corroborated by Insp. Vinod Pal (PW20) of the Crime Team, photographer HC Rampal (PW15), H.C. Virender (PW-19), Ct. Chander Pal (PW-22), Inspector Raj Kumar (PW-28) and Inspector K.P. Kukreti (PW-30) who reached the spot after receiving information about the occurrence.

10. Post-mortem report marked Ex.PW25/A was proved by Dr. Akhilesh Raj (PW25), who had identified the signature and handwriting of Dr. Bharat Verma, who had conducted post-mortem on the aforesaid body parts on 21st August, 2007. The report Ex.PW25/A opines that the cause of death was haemorrhage due to external injury i.e. incised wound present over the ventral aspect of left upper limb just above the wrist, of 5 × 2 cm. and tissue-deep. This injury was ante-mortem in nature and sufficient to cause death in the ordinary course of nature. PW25 has also proved the opinion marked Ex.PW25/B given by Dr. Bharat Verma regarding the weapon of offence i.e. *daab*, to the effect that the said weapon could have been used to chop the body. The sketch of the weapon marked Ex.PW25/C was prepared by Dr. Bharat Verma.
11. The aforesaid facts would establish a homicidal death amounting to murder. The head, hands and legs below the knee of that person were chopped and thrown by an unknown person, who had fled on a motorcycle which had a number plate with the letters 'KA' and numerical '9735'. The victim was unidentified and the perpetrator or the culprit was unknown. This would bring us to the testimonies of

Nirbhay Prashant (PW-3) and the Investigating Officer Inspector K.P. Kukreti (PW-30), SHO, Police Station Mehrauli, who took over the investigation on 24th September, 2007. Their statements have to be read *in seriatim* to understand and appreciate as to how the case was solved and why the trial court has convicted the appellant. Nirbhay Prashant (PW3) has testified that he had identified his brother-in-law Vipin Kumar on 10th September, 2007 on the basis of the photographs shown to him at the Police Post IGNOU, Police Station Mehrauli. His brother-in-law Vipin Kumar was working in a hotel in Section-14, Gurgaon, Haryana and was missing. He knew that Vipin Kumar had last spoken to his wife Jyoti, sister of Nirbhay Prashant (PW3), resident of village Bhagwatipur, on 12th August, 2007 from his mobile number 9313341707. Nirbhay Prashant (PW3) had tried to contact Vipin Kumar on the aforesaid number but no one would respond, despite rings. On 3rd September, 2007 PW-3, in search, had come to Delhi from his village Bhagwatipur, Bihar, but Vipin Kumar could not be traced. On 5th September, 2007, PW3 had lodged a missing complaint at the Police Station Civil Lines, Gurgaon. Nirbhay Prashant (PW-3) from the police station Civil Lines had collected Call Detail Record (CDRs) of telephone number 9313341707 for the period 10th July, 2007 to 1st September, 2007. On thorough examination and studying the record, PW-3, noticed that on 31st August, 2007, at 9:40:70 P.M., an outgoing call of 149.4 seconds was made from the mobile number of the deceased to a landline number 05946266495 located at Haldwani. PW-3 from a PCO booth had made a call on this landline number, 05946266495 and on conversing with the person on the other side,

came to know that the mobile number 9313341707 had been used by one Kundan, who was working at the Madhuban restaurant, PVR Saket. Kundan was residing at Shaidullajab. PW-3 knew and had been told by his brother-in-law Vipin Kumar about two close friends, Sanjay Srivastav and Kundan Kumar (Kundan Singh) i.e. the present appellant. His brother-in-law had earlier worked at Supper Factory, Greater Kailash, near Amar Colony in the year 2006 and had be friended Sanjay Srivastav and Kundan Kumar. He had also learnt from the person, who had answered the call, that Kundan was a resident of Uttranchal and his mobile phone number was 9313363224. In his cross-examination, Nirbhay Prashant (PW3) clarified that the telephone number being used by Vipin Kumar was a prepaid SIM card issued by the operator Reliance. We shall subsequently refer to the other supporting evidence which confirm several important aspects deposed to by PW-3, but at this stage, we would like to refer to the testimony of Inspector K.P. Kukreti (PW30), who had taken over the investigation on 24th September, 2007, though being the SHO of Police Station Mehrauli had been associated with the earlier investigating officer, Inspector Atul Kumar and S.I. Dinesh Kumar. The latter has not deposed as he had expired on October 26th, 2010. PW30 has testified that Nirbhay Prashant (PW-3) had come to Police Post IGNOU on 10th September, 2007 and identified the face and body parts of Vipin Kumar. He had disclosed details like, mobile number of the deceased 9313341707; that the deceased was working in a hotel at Gurgaon and the last call was made by the deceased to his wife on 12th August, 2007. Nirbhay Prashant (PW-3) had managed to procure a copy of the CDR for the

period 10th August, 2007 to 1st September, 2007 from Gurgaon Police and had ascertained that Vipin Kumar had worked in a restaurant called Supper Factory in East of Kailash in the year 2006 and was friendly with one Kundan who used to also work there. On 14th September, 2007, Nirbhay Prashant (PW-3) had informed PW-30, about the call made by him (PW-3) on the landline number 05946266495 and that the deceased's telephone number was used by one Kundan, who had made a telephone call of 149.04 seconds on the aforesaid landline number on 31st August, 2007 at about 9.04 P.M. He also came to know that Vipin Kumar was having a savings bank account number 002901532543 with the ICICI Bank. Vipin Kumar was residing in a rented accommodation somewhere in Shaidullajab and Kundan used to also reside in the same locality.

12. K.P. Kukreti (PW-30) has referred to investigation and information gathered by SI Dinesh Kumar, who on 17th September, 2007, had gone to ICICI Bank, Panchsheel Park and had obtained the statement of account of Vipin Kumar and had also procured Compact Disk of video recorded in the ATM located at PVR Anupam Saket vide seizure memo marked Ex.PW11/B, from Tanuj Khosla, Channel Manager, ICICI Bank.
13. These facts are affirmed and also narrated by H.C. Virender (PW-19), who had along with S.I. Dinesh visited ICICI Bank branch at Panchsheel and had met Tanuj Khosla, the manager, and had procured a CD with ATM video clipping files, which was taken into possession and sealed vide seizure memo Ex.PW-11/B. Puneet Sharma (PW-11),

whose deposition has been discussed below, has testified that the account statement bearing No.002901532543 marked Ex.PW-11/A and a CD of the photographs taken by the ATM machine located at Saket, marked Ex.PW-11/B, were handed over to the police by Tanuj Khosla.

14. On 24th August, 2007, Inspector K.P. Kukreti (PW30) learnt that the person who had used the mobile phone of the deceased Vipin Kumar, would be visiting PVR Anupam complex at about 4 P.M. A raiding team consisting of PW-30 himself, SI Dinesh, Head Constable Virender (PW19), Constable Raj Kumar (PW18) and Constable Raghuvir (PW13) was constituted and they along with the secret informer, proceeded to the said spot. At about 4 P.M., the appellant Kundan Singh was apprehended from the Madhuban Restaurant Complex vide arrest memo Ex.PW19/E and his disclosure statement Ex.PW19/G was recorded. The appellant then led the police team to House No.477, Shaidullajab, where the deceased Vipin Kumar used to reside in a room on the first floor as a tenant. The said room was locked and to open the lock, a key maker named Bobby (sic Babloo, who has deposed as PW-12), was called to make a duplicate key and open the room. Inside the room, they had noticed and seized a blood-stained wooden stool, one mattress, bed sheet and one black suit cover vide seizure memo Ex.PW19/B. At the behest of the appellant, the purported weapon of offence i.e. a *Daab* (a heavy metallic weapon with a wooden handle) was recovered from a plastic crate kept on the slab inside the said room. Sketch of the *Daab* marked Ex.PW19/D was prepared after measuring the same and the *Daab* was taken into possession vide seizure memo

Ex.PW19/E. Other incriminating articles like blood-stained earth etc. were also seized and Naresh Kumar, Senior Scientific Assistant on being asked, had inspected the crime scene and taken four blood samples from the spot. Subsequently, the police team along with Kundan Singh, had proceeded to House No.615, Shaidullajab, where the appellant used to reside with his relative Bahadur Singh. From the said room from a brief case, two share certificates of BHEL and an acknowledgment of India Bull Securities in the name of deceased Vipin Kumar, were recovered. The appellant, from the said brief case, had also taken out one white polythene containing currency notes of Rs.60,000/- in Rs.500/- denomination. The currency notes were seized and taken into possession vide seizure memo marked Ex.PW6/A. The acknowledgment and the share certificates were seized and taken into possession vide seizure memo Ex.PW19/J. Appellant Kundan also took the police team to G.B. Road (Shradhanand Marg) and on his pointing out, a motorcycle bearing registration number KA04EC 9735, Hero Honda model of grey colour was seized from the parking. The assertion is that it was the same motorcycle on which the appellant had fled away after throwing the black colour rexine bag containing the body parts of the deceased Vipin Kumar. The motorcycle was seized vide seizure memo Ex.PW2/A.

15. We shall now refer to the corroborating circumstances which support the prosecution case and have acted as piers and stanchions in the chain of circumstances affirming and proving the case against the appellant. We have noticed that Brahm Singh (PW1) and Constable Raghubir

Singh (PW13) have deposed that the person who had thrown the black colour rexine bag near Lado Sarai had fled on a motorcycle, the number of which could only be partially identified as 'KA 9735'. This number is mentioned and recorded in the FIR, Ex.PW2/A. Inspector K.P. Kukreti (PW30) has proved recovery of the motorcycle bearing registration number KA 04EC 9735 from G.B. Road. The alphabets and numbers of the motorcycle do match with the statement of Brahm Singh (PW1). It is noticeable that PW1 did not know who was the owner of the motorcycle and was not personally known to the appellant. B.M. Mani (PW-8) from Transport Authority, Bangalore, had produced records/ papers regarding registration of Motorcycle KA 04EC 9735 in the name of Bimal Kumar R/o. NZ House, Modi Bagh, Bangalore-32, marked Ex.PW-8/A. The said Bimal Kumar is no one but the deceased, Vimal Kumar S/o. Late Kanhaiya Singh. The said parentage is mentioned on Form No.20. The recovery of the motorcycle substantially corroborates and links the appellant to the offence in question. Recovery of the motorcycle from the G.B. Road is affirmed by Allaudin (PW2), who has testified that the said motorcycle was recovered from his parking and seized vide seizure memo Ex.PW2/A on 24th September, 2007. The appellant i.e. the accused was present and was having a parking slip with him, which was given to PW2 by the police staff. The said parking slip was not produced before the Court and, therefore, we ignore this part of PW2's statement. PW2, in his cross-examination, has stated that the motorcycle was in an unlocked condition but this cannot be a ground to doubt veracity the recovery. Recovery of the motorcycle is asserted by Inspector Praveen

Kumar (PW-16) in-charge Crime Team, who is the author of the report Ex.PW-16/A and the photographs taken at the spot, i.e. the parking lot, by Ct. Dinesh (PW-17) marked Ex.PW-17/14 to 24 and negatives Ex.PW-7/1 to 13. The motorcycle was certainly recovered.

16. Rambir (PW4), owner of House No.477, village Shaidullajab had given a room on rent to the deceased Vipin Kumar. He has testified that there were six rooms on the first floor and in one of the rooms, deceased Vipin Kumar used to live. Vipin Kumar who used to work in Gurgaon, would not daily return to the tenanted room. On 12th August, 2007, in the evening, PW4 had seen the deceased Vipin Kumar with the appellant i.e. Kundan Singh. They had come on a motorcycle bearing registration number KA 04 EC 9735. The said motorcycle was parked outside his house and after that, he had not seen the deceased or the appellant Kundan Singh. On 24th September, 2007, at about 1.30/2.00 p.m., Kundan Singh was brought to PW4's residence by the police. PW4 had then recognised the appellant as the person who had come with the deceased on 12th August, 2007 and had parked a motorcycle outside his house. He had then learnt that Vipin Kumar had been murdered. In his cross-examination, PW4 avers that that one Babloo was called by the police to unlock the room of Vipin Kumar. The said Babloo, who has deposed as PW12 and affirms having been called by the police to open the lock of the room. He has stated that on 24th September, 2007, at about 4:00-4:15 p.m., he had made duplicate key of the room's lock at the behest of the police. Rambir (PW4) affirms that on 24th August, 2007, the said motorcycle was not shown to him.

17. Sukhvir Singh (PW6) has deposed that he had given a room on rent to one Bahadur Singh in his property located at village Shaidullajab. The appellant was residing with Bahadur Singh as they were related; and he had been informed that the appellant would reside in the said room for sometime. On 24th September, 2007, police had come along with the appellant and from the said room, the appellant had from a briefcase taken out 120 currency notes of Rs.500/- each. The currency notes were kept in a polythene bag. Money was seized and taken into possession vide seizure memo Ex.PW6/A. He identified the currency notes amounting to Rs.60,000/-, which were collectively marked Ex.P-6/1. Sukhvir Singh (PW6) has accepted that he had never seen the deceased Vipin Kumar and that he had first seen the appellant Kundan Singh only a month prior to 24th September, 2007 and not before. He had identified the two police officers as Inspector K.P. Kukreti (PW30) and Devender, Incharge Police Post. Sukhvir Singh(PW6) has not deposed on recovery of the share certificates or acknowledgement of India Bulls Securities and we would not rely on the said recovery. Sukhvir Singh(PW-6) is an independent witness and has positively affirmed recovery of Rs.60,000/-.
18. To prove and establish that the deceased Vipin Kumar knew the appellant Kundan Singh and were friends, we have the deposition of Sanjeev Anand (PW5), owner and proprietor of Supper Factory restaurant located at East of Kailash. He has affirmed that the appellant and the deceased Vipin Kumar had worked for him in the year 2007. They were well acquainted and used to come and go together. While

Vipin Kumar had worked for about a year, and the appellant Kundan Singh had worked for only one month before they left the job. Sanjeev Anand (PW5) proved the bio-data or particular of Kundan Singh marked Ex.PW5/D and E and that of Vipin Kumar as Ex.PW-5/A to 5/C. Thus PW5 positively avers that Vipin Kumar and Kundan Singh were well acquainted with each other. Bio-data of Vipin Kumar (son of late Kanhaiya Singh) mentions his telephone number as 9313341707 and Bio data of the appellant, Kundan Singh mentions his telephone number as 9313363224. Bahadur Singh resident of 615, Shaidullajab was recorded as a reference.

19. We accept the prosecution version that Nirbhay Prashant (PW-3) did not know the exact details of residence of the deceased Vipin Kumar and was only aware that Vipin Kumar used to reside somewhere in Shaidullajab. Pertinently, the missing person complaint was made at the police station Civil Lines, Gurgaon and not in Delhi. Nirbhay Prashant (PW-3) neither visited the residence of the deceased nor went inside the room from where after the arrest of the appellant incriminating evidence in the form of blood stains on various articles were recovered. The said factum stands affirmed from the testimony of Ranbir (PW-4), who had given a room on rent to the deceased Vipin Kumar. FSL report, marked Exhibits PW-7/B and PW-7/C, records that human blood of group 'O' was found from stains present on the floor of the room, the table, on the towel handkerchief and on a small piece of cloth taken from the *gadda*.

20. The appellant in his statement under Section 313 Cr.P.C. denied that he had a relative by the name of Bahadur Singh and that he used to reside with him at Shaidullajab. However, he has accepted that he was taken to premises No. 477, Shaidullajab, i.e. residence of the deceased Vipin Kumar, but asserted that he was not aware of the proceedings that took place inside the room as he was made to stand outside. On the question of his arrest, the appellant has stated that his brother Pankaj was picked up from Nainital and taken into custody. The appellant in the month of July, 2007 had left his earlier job and gone to his native place at Kathgodam. On learning that his younger brother Pankaj had been detained, he had proceeded to Police Station Mehrauli where he was arrested and detained. The appellant has also accepted that he had worked in a restaurant called Super Factory where he became acquainted with the deceased. He claimed that he had not met the deceased after he had left the job. In his subsequent statement recorded on 23rd March, 2013, the appellant has accepted his particulars/bio-data, Exhibits PW-5/D and 5/E and that the document Exhibit PW-5/D was in his handwriting. He accepted that the name of Bahadur Singh was mentioned by him as a reference. He added that he did not know any person by the name of Bahadur Singh. With regard to telephone No. 9313363224 mentioned in the document Exhibit PW-5/D, he had stated that this number was not used by him and he must have given a number of an acquaintance.

21. In response to question No. 54, the appellant has stated his father's name is Jagat Singh and his native address was Malla Beura Kathgodam, District Haldwani, Uttarakhand.
22. We now turn to the evidence of Puneet Sharma (PW11) Branch Manager, ICICI Bank, Panchsheel Park. He affirms that SI Dinesh Chand had come to their branch at Panchsheel Park and had collected the copy of statement of accounts of saving bank account number 002901532543, which was handed over to him by Tanuj Khosla, who was then the Channel Manager. Tanuj Khosla had left the bank branch and was possibly working in Singapore. The statement of account marked Ex.PW11/A was of one Bipin Kumar (Vipin Kumar, the deceased). One ATM video clipping CD was also handed over to SI Dinesh Chand by Tanuj Khosla in his presence, which was taken into possession vide seizure memo Ex.PW11/B. Video clippings of ATM at Rudrapur and Bareilly were also demanded by the Investigating Officer but the same were not supplied as the said ATMs did not have a camera. The aforesaid CD was played and it was found to have still photographs. The photographs were identified by Puneet Sharma (PW11) stating that the same were of their ATM at Saket. In his cross-examination, PW11 has deposed that their Information Technology Department looked after the computers and other technical aspects. The said department had not issued a certificate regarding the ATM CCTV footage CD. In his cross-examination, PW11 accepted as correct that as per the Reserve Bank of India Guidelines, every ATM should have one in-built camera for taking picture of the person using

the ATM. However, PW11 immediately corrected himself by stating that he was not aware of such RBI Guidelines and banks could provide cameras for safety and security. PW11 affirms that the CD furnished was having still photographs taken by the in-built camera of their ATM at Saket. The said CD was played in the trial court after being taken out from a plastic box.

23. In his cross-examination, Puneet Sharma (PW-11) has accepted that the said CD and the account statement were never handed over in his presence to the Investigating Officer. In view the aforesaid contradiction, Puneet Sharma (PW11) was re-examined by the Additional Public Prosecutor and thereupon he had stated that he had seen the CD and the account statement being handed over by Tanuj Khosla to the Investigating Officer and the CD was kept in a plastic box. On cross-examination by the counsel for the appellant, PW11 deposed that a CD could not have been prepared without a password for accessing the server on which photographs/data are stored. PW11 accepted the suggestion that he could not state whether the CD was the original version of the data stored on the server or fabricated one. He has also accepted as correct that the account statement Ex.PW11/A was a photocopy and did not have the stamp of ICICI Bank or certificate under the Bankers' Books Evidence Act, 1891.
24. We agree with the learned counsel for the appellant that the said CD would be an electronic record and as per the ratio of the Supreme Court in *Anvar P.V. v. P.K. Basheer and Ors.*; (2014) 10 SCC 473, certificate under Section 65B of the Evidence Act, is required for

admitting secondary evidence. A larger and a different question could arise in some cases where the electronic record has been taken on record and exhibited without objection before the trial court, but the said issue does not arise for consideration in the present case as objection was certainly taken.

25. However, the testimony of Puneet Sharma (PW11) does show that the deceased had a bank account with ICICI Bank, and statement of account was taken by the police on 17th September, 2010 for the purpose of investigation. The police had also obtained the CD containing still photographs of the persons who had withdrawn money from the ATM located at Saket. We accept PW11's version to the extent that the aforesaid materials were collected by the police during the course of investigation and ultimately led the Investigating Officer to the appellant. To this extent, the testimony of Puneet Sharma (PW11) would be relevant under Section 8 of the Evidence Act. This lends credence and assurance to the prosecution version given by Inspector K.P. Kukreti (PW30) on how they were able to identify and apprehend the appellant as the perpetrator. *In Balram Prasad Agrawal versus State of Bihar and Others*; (1997) 9 SCC 338, the Supreme Court referred to the concept of hearsay evidence and observed that even if some information is ruled out as hearsay, it may still remain admissible as evidence of the conduct of the witness. Relying on Section 8 of the Evidence Act, it was observed as under:-

“11. ...This part of the evidence of PW6 would not be hit by the rule of exclusion of hearsay evidence. A decision of this Court deserves to be noted on this

aspect. In the case of *J.D. Jain v. State Bank*¹ of India a Bench of three learned Judges speaking through Baharul Islam, J. in the Report has made the following pertinent observations: (AIR p.676, para 10: SCC p. 148, paras 21 and 22)

“The word ‘hearsay’ is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. (See Stephen on Law of Evidence)

The Privy Council in the case of *Subramaniam v. Public Prosecutor*², observed:

‘Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made.’”

26. However, there will be no such difficulty with regard to the CDRs of mobile phone number 9313341707. We will first begin with the statement of Saurabh Kumar (PW10), who has deposed that the deceased Vipin Kumar was his friend and used to reside in village Shaidullajab as a tenant. As Vipin Kumar wanted a mobile connection, he had provided his address proof for subscribing to the aforesaid

¹ AIR 1982 SC 673

² 1956 WLR 965

number. In his cross-examination, PW10 affirmed that he had known the deceased since 1995. Mobile telephone No. 9313341707 is mentioned in the personal details/bio data of Vipin Kumar marked Exhibit PW-5/A to C. Nirbhay Prashant (PW-3) has also testified that his brother-in-law Vipin Kumar was using mobile telephone No. 9313341707.

27. Puneet Sharma and Anil Kumar Sachdeva have been referred to as PW-11. For clarity we have referred to, Anil Kumar Sachdeva as PW-11A. Anil Kumar Sachdeva was working in Reliance Communication as a Nodal Officer, in his deposition recorded on 9th November, 2009, proved the CDRs of telephone numbers 9313341707 and 9313363224 marked Ex.PW-11/A and Ex.PW-11/B, respectively. He had also proved the cell ID towers marked Ex.PW-11/C. Certificate under Section 65B of the Evidence Act was not produced but during the course of his examination, Anil Kumar Sachdeva (PW-11A) had stated that on 18th December, 2008, the Investigating Officer Inspector K.P. Kukreti (PW30) had visited their office and made a request vide letter marked Ex.PW11/D to provide CDRs of the aforesaid mobile phone numbers. PW11 could not tell the name of the person, who had extracted the CDRs from the computer on 9th November, 2009. The said person at that time had not issued any certificate affirming genuineness of the CDRs.
28. Anil Kumar Sachdeva (PW-11A) was recalled and re-examined on 17th April, 2013. PW-11A had produced certificate under Section 65B of the Evidence Act, dated 16th April, 2013 which was marked Ex.PW-11/E. On the said date, Anil Kumar Sachdeva (PW11A), Nodal

Officer, Reliance Communication affirmed that during the period from August 2007 to 30th September, 2007, the computers were operational and were in safe custody, and no complaint regarding the operation of the computers was received. On receipt of request from a law enforcing agency for the supply of CDRs of a particular mobile phone, they used to forward the request to the Mumbai office, where the data was stored on the main server. Mumbai office used to transfer the CDRs asked for, to their FTP server. The computer department, which was under the supervision of PW11A, used to access the server and handover the data to him. There was no possibility of tampering or manipulation of the data accessed, which was completely protected. Records provided by them were completely authentic and correct. He also testified as to how the cell towers from where the calls were connected were identified on the CDRs. PW-11A has deposed:

“Whenever a mobile call is made, the BTS tower identifies the location of the mobile phone to which the call is to be made and after the connection is made, all the details with respect to the call made is automatically generated in the main server in our Mumbai office. This is true for each and every mobile call made and the main server in our Mumbai office regularly in the ordinary course of its operation automatically generates such reports. An official in our Mumbai office who has the designation of law enforcement agency coordinator has the control over the main server and therefore the main server remains under his custody and control always. For the period that the call detail records have been furnished to this court, there were no complaints whatsoever that the main server or the FTP server at our office was not operating properly or there were any defects. If there is any defect in the main server due to some technical

problem, the mobile call detail records are not got reproduced till the defect is cured. The call detail records which are provided and which have been provided in this case are a reproduction of the automatic data stored in the main server and that is the reason I state that there is no possibility of its tampering or manipulation. Nobody can access our FTP server without the login password. I have therefore certified with respect to the authenticity of the records Ex.PW11/A to PW11/D.”

PW11A, in his cross-examination gave an example, which is as under:-

“.....From the Ex.PW11/A, the term switch ID and term BTS columns show the location of the tower and of the mobile. For example, in entry X in Ex.PW11/A with respect to the call made on 01.08.2007, the term switch ID is mentioned as LWDLHI5 and the term BTS is mentioned as 55. To find out the tower location and the mobile location, we will now go to Ex.PW11/C and the entry 305 therein corresponds to this entry as it gives the ID as 55 and MSC5 Delhi. The numeral 5 in MSC 5 Delhi corresponds to the numeral 5 in LWDLHI5 and therefore as per this entry, this call was made from sector-7, Dwarka. As per entry X1 in Ex.PW11/A and Y1 in PW11/C, on 31.08.2007, the mobile number 9313341707 was used to make a call and at that time, the location of the mobile phone was in Lado Sarai. As per the records, Ex.PW11/B, the mobile phone no. 9313363224, on 31.08.2007, 8 calls were made from this mobile number and the location of the towers for the said 8 calls would be different. For the entries X4 to X9, the location of the mobile and the tower site is PVR cinema, Saket and for the entry X2, the location is Yusuf Sarai and X3 is Chhattarpur, as is apparent from the tower number mentioned in. Ex.PW11/B and the corresponding entries entries (sic) mentioned in Ex. PW11/C. I cannot say at all whether both the aforementioned mobile numbers were used by two different persons.”

29. Thereafter, counsel for the appellant had put and confronted Anil Kumar Sachdeva (PW11A) with the CDRs of mobile telephone number 9313363224 which for the purpose of identification were marked Mark PW11/D1. PW-11A has deposed that the CDR marked PW-11/D1 appeared to be a print out of the record maintained by their company as the parameters mentioned were similar but the CDRs marked PW11/D1 did not have the stamp of their company and, therefore, he was not sure. Referring to the document Mark PW11/D i.e. the request letter written by the Investigating Officer to supply the CDRs, PW11A could not state whether the said document was presently available at their office or not, but the date 17th December, 2008 mentioned on the back side of the said exhibit, could be the date on which they had received the said request letter. PW11A testified that they were bound to furnish a copy of the tower site locations to all the law enforcing agencies on a monthly basis, regardless of a request, whereas CDRs were supplied on specific request. (The cell tower details are different from CDRs, which reflect the calls received and made from a particular number). PW11A affirmed as correct in his cross-examination that he had brought a computerized copy of the records already tendered by him in the Court and he had obtained the same through his archives. In the archives, they maintain record of the CDRs, which have been asked for by a Court or an enforcement agency, and not otherwise. The entire team of the computer department under PW11A maintained the archives. He voluntarily affirmed in the cross-examination as under:-

“.....Vol. I have today brought a copy of the mobile records in question which have been accessed from the archives and the

same is the exact reproduction of the records already submitted in court. It is correct that the records brought by me in court today do not contain any entry to show that they have been accessed from the archives. Whenever there is a defect in our computer operating system, we inform our own IT department via mail or phone and they come and rectify the said problem. Today the records of those phones or mails is not available with respect to any defects in the year 2007. Vol. If there is a defect in the computer, we will not be able to access the call detail records at all. It is wrong to suggest that Ex.PW11/A to PW11/C were not accessed by me from the computer system of our office but was manipulated and manufactured somewhere else.”

30. We would now refer to the legal position and what is admissible and proved by the prosecution. We begin by examining the statutory provisions. Section 3 of the Evidence Act in sub-section (2) stipulates that documentary evidence means and includes all documents including “electronic records” produced for the inspection of the Court. By way of amendment to the Evidence Act, incorporated by Act, No. 21 of 2000, the following was inserted:

“The expression “Certifying Authority”, “Digital Signature”, “Digital Signature Certificate”, “electronic form”, “electronic records”, “information”, “secure electronic records”, “secured digital signature” and “subscriber” shall have the meanings respectively assigned to them in the Information Technology Act, 2000.”

Section 2(c) of the Information Technology Act, 2000 reads-

“electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro record.”

“Section 22-A of the Evidence Act reads as follows:

“22-A. When oral admission as to contents of electronic records are relevant.—Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.”

Section 45-A of the Evidence Act reads as follows:

“45-A. Opinion of Examiner of Electronic Evidence.—When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79-A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.—For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.”

Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

“59. Proof of facts by oral evidence.—All facts, except the contents of documents or electronic records, may be proved by oral evidence.”

Section 65-A reads as follows:

“65-A. Special provisions as to evidence relating to electronic record.—The contents of electronic records may be proved in accordance with the

provisions of Section 65-B.”

Section 65-B reads as follows:

“65-B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as “the computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

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

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

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

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

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

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

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

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

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

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

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

(4) In any proceedings where it is desired to give a

statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section—

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in

the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

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

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

31. Section 22-A of the Evidence Act is the part of fasciculus of Sections from 17 to 31 under the heading ‘Admissions’. It specifically deals with relevancy of oral admissions as to the contents of an electronic document and was inserted w.e.f. 17.10.2000 by the Information Technology Act, 2000. Oral admissions as to the contents of electronic record are relevant when genuineness of the electronic record is in question. The expression “unless the genuineness ... is in question”, elucidates the ambit and relevance of the Section. Use of word “relevant”, viz. “admissibility” is also of significance, though these terms are interlaced and connected. The object of providing said provision recognizes that the evidence relating to genuineness or “reliability” of electronic record is of consequence, in-spite of the certificate under Section 65B of the Evidence Act. Thus, Section 22A

specifically provides that when genuineness of an electronic record is in question, oral admissions are relevant and could be examined. As noticed below, it states and records the obvious.

32. Section 65-B of the Evidence Act, consists of four sub-sections. Sub-section (1) begins with *non-obstante* clause and gives primacy and overriding effect to the said provision. A dissection of that sub-section would reveal that it consists of distinct parts. The first part stipulates that any information contained in the electronic record in the form of paper print output or optical or magnetic media output, i.e. the electronic record copied, stored or recorded on an optical or magnetic media from another source, shall be deemed to be a document. The first part, therefore, deals with the paper printout or optical or magnetic media on which the electronic record has been copied, stored or recorded as distinct from the original media on which the data or information is created, or recorded, stored or copied. Media and paper print outs are tangible articles. Paper print outs can be seen and read. Media can also be seen and read, when viewed with an appropriate equipment and paper printouts taken. Noticeably and pertinently, the paper printout output or the optical or magnetic media output, on satisfaction of the conditions stipulated in Section 65B is treated as a document by itself. The conditions would relate to the information and the computer from which the printout on paper or optical or magnetic media has been produced by copying, recording or storing the files. The following part, states that when the conditions mentioned in the section in relation to (a) information (b) computers are satisfied, the document i.e. the printed paper or the optical or magnetic media on

which the files have been copied, stored and recorded, shall be admissible in evidence, without further proof or production of the original. In such circumstances, production of the original computer or equipment from which the paper print out or media was produced by copying, recording or storing the files is not required to be produced. Once the requirements are satisfied, the printed document or the optical or magnetic media would be evidence of the contents as to what was stored in the computer from which the print out, or media was created by way of copying, recording or storing files. The last part therefore deals with the effect, when the requirements stated in Section 65B are satisfied.

33. The computer output - when provisions of section 65-B are satisfied is treated as evidence of the contents of the original or facts therein of which direct evidence is admissible. The secondary evidence in the form of a paper print out or media output produced by copying, recording or storing files is treated as a document and are admissible and bear the same status as “direct evidence” on the question of admissibility. The provision, therefore, negates and does not require production of the original computer/equipment/media, on which the data was stored and from which computer output be it in the form of printed paper or optical or magnetic media data has been obtained. The expression “direct evidence” as strictly understood in the Evidence Act, has been explained below.
34. Sub-section 2 to Section 65B explains and elucidates the term ‘computer output’ and in a manner expounds and expands what is meant by the original device or computer from which output is

obtained. As per sub-clause (a) to sub-section 2 computer output can consist of information produced by the computer during the period the computer was regularly used to store or process the information for the purpose of any activity regularly carried on over “that period” by a person, having lawful control over the use of the computer. Clause (b) states that information contained in the electronic record or derived from should be regularly fed into the computer in ordinary course of the said activities. Clause (c) postulates that the computer during the relevant period should have operated properly and if it had not operated properly or was out of operation for a part of the period, such failure should not affect the electronic record or the accuracy of its contents. Lastly, sub-clause (d) recognizes that electronic record could consist of data or information collected or fed into the computer. The word “derived” used in Sub-section 2 of Section 65B finds its meaning and exposition in the explanation. The said expression for the purpose of section 65B would mean, derived as a result of calculation, operation or any other process. The word derive, therefore, has been given a specific and affirmative meaning for Section 65B.

35. Sub-section (3) to Section 65B elucidates and explains sub-section (2) and provides that the output produced could be of data stored or information processed by combination of computers operating simultaneously during that period or different computers in succession over the period in question or even multiple computers operating in succession over the period. Sub-section acknowledges and accepts that the computer, i.e., device from which “computer output” is obtained, may be one in the combination of computers used or even one operating

in succession. The provisions recognises that information or data is easily and frequently for convenience, business or technical reasons transferred, copied, recorded or stored in different machines/equipment simultaneously or in succession. The importance and relevancy of information could arise subsequently and long after it is created. Back-up or archives are maintained to store specific and important information. In such cases, all computers used for the purpose during the period in question from the beginning till the period where the output is obtained, are treated and regarded as the single computer for the purpose of the Section.

36. Before we advert to sub-section (4), it may be advisable to first expound sub-section (5) for the said Section is relevant for interpreting sub-sections (1), (2) and (3). As per sub-clause (a) to sub-section (5), information is taken to have been supplied to a computer when it is supplied in any appropriate form and whether it is done directly, i.e. as in the case of call record data which gets recorded in the computer/server without any interference, or with human intervention, as where a data entry operator gives commands or uses a key board to feed the data or when the sales man punches in details of the sales made. Importantly, the information or data could be supplied to the computer from which the computer output is taken, by means of an appropriate equipment. This transfer can be with or without human intervention. For example, data or information stored in one computer can be transferred to another computer as a result of pre-fixed or standard commands after particular period of time or as a result of specific commands given as a result of human interference. Sub-clause

(a) to sub-section (5) recognises that data or information can be created and then transferred, copied and stored to the computer from which output is obtained by different modes and ways. Transfer of information or data in form of files after they are first created are frequent and a common occurrence. The impact of sub-clause (a) to sub-section (5) is to be noticed and given effect to when we interpret and apply sub-sections (2) and (3) of Section 65B to a factual matrix of a given case. Sub-clause (c) to sub-section (5) is clarificatory in nature and states that computer output can be produced directly as it can happen when data or information stored in the computer is printed as a result of pre-existing commands. It can happen also when a command to take print out or to copy, store or record is given with human intervention. The computer output may be a result of appropriate equipment attached to the computer.

37. Sub-clause (b) to sub-section (5) is rather ambiguously uses the expression “any official” without explaining what is meant by the said term. However, when we read sub-section (4) to Section 65B, the meaning to be given to the expression “any official” emerges. Sub-clause (b) applies when information is supplied to “any official” in the course of activities carried on by him, i.e., in the course of “official” activities with a view that the said information shall be stored and processed for the purpose of the activities carried on by that officer or official. It is also elucidated that the information could be beyond or otherwise in the course of the said activities. Even in such cases the information is treated as supplied in the course of the activities of the official. We clarify that the word “official”, as used in clause (b) of

sub-section (5) of Section 65B, is not intended to mean or be restricted to a person holding an office or employed in public capacity. It connotes, as exemplified by the use of the same expression (albeit in its adjective form) in sub-section (4), a person primarily responsible for the management or the use, upkeep or operations of such device. It would, thus, cover a computer device containing electronic records in the hands or control of a private individual or entity.

38. The certificate under sub-section (4) to Section 65B must state the following:

- (a) Identify the electronic record by identifying the statement, i.e., “computer output” in form of paper print out or copied, recorded or stored optical or magnetic media.
- (b) Particulars of the device involved in the production of that electronic record to show that the electronic record was produced by the computer; and
- (c) State that the computer output contains information, which was stored or fed into the computer over the stated period when computer was regularly used to store or process information, and that the computer output consists of information or data or is derived from information regularly fed into the computer in ordinary course of such activities.
- (d) The certificate should also state as required by sub-clause (c) to sub-section (2) that the computer was during the relevant periods was operating properly and if it was not operating properly during

the period or a part of the said period, it had not affected the electronic record or accuracy thereof.

39. Controversy has arisen whether a certificate under sub-section (4) to Section 65B must be issued simultaneously with the production of the computer output or a certificate under Section 65B can be issued and tendered when the computer output itself is tendered to be admitted as evidence in the court or as in the present case by the official when he was recalled to give evidence. In *Anwar P.V. (S) versus P.K. Basheer and Others*, the Supreme Court has held as under:-

“15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.”

(emphasis supplied)

40. The expression used in the said paragraph is when the electronic record is “produced in evidence”. Earlier portion of the same sentence emphasises the importance of certificate under Section 65B and the ratio mandates that the said certificate must accompany the electronic

record when the same is “produced in evidence”. To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65B. This is not so stated in Section 65B or sub-section (4) thereof. Of course, it is necessary that the person giving the certificate under sub-section (4) to Section 65B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which “computer output” was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. The aforesaid legal ratio, in our opinion, gets affirmation from paragraphs 20 and 21 of the judgment in *Anwar P.V.* (supra), which read as under:-

20. In **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru**, a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

“150. According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies”. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in

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

21. It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.”

41. Paragraph 21 quoted above records and notices that in *State (NCT of Delhi) Vs. Navjot Sandhu alias Afzal Guru*, (2005) 11 SCC 600, a

responsible officer had certified the document at the time of production itself and the signatures in the certificate were also identified and, therefore, there was compliance of Section 65B of the Evidence Act. In these circumstances, we do not accept the legal ratio in ***Ankur Chawla versus Central Bureau of Investigation***, (Crl. M.C. No. 2455/12 & Crl. M.A. Nos. 8308 and 8318/2014 and Crl. Rev. P. 385/2012 decided on 20th November, 2014 by the Delhi High Court) wherein it has been held that the certificate under Section 65B must be issued when the computer output was formally filed in the court and certificate under Section 65B cannot be produced when the evidence in form of electronic record is tendered in the court as evidence to be marked as an exhibit. The said certificate can be produced when the electronic record is to be admitted and taken on record, i.e., when the prosecution, defence or a party to the civil litigation wants the electronic record to be marked as an exhibit and read in evidence. As far back as 1931, the Lahore High Court in ***Baldeo Sahai versus Ram Chander and Others***, AIR 1931 Lahore 546 had stated:-

“There are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents proved and formally tendered in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are resumed to the party who produced them with an endorsement thereon to that effect.”

42. The aforesaid judgment was quoted with approval in ***Sudhir Engineering Company versus Nitco Roadways Limited***, 1995 (34) DRJ 86 wherein it was observed as under:-

“Let me now look at the law. Any document filed by either party passes through three stages before it is held proved or disproved. These are: first stage: when the documents are filed by either party in the Court; these documents though on file, do not become part of the judicial record; second stage: when the documents are tendered or produced in evidence by a party and the Court admits the documents in evidence. A document admitted in evidence becomes a part of the judicial record of the case and constitutes evidence. Third stage: the documents which are held ‘proved, not proved or disproved’ when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Usually this stage arrives at the final hearing of the suit or proceeding.”

43. ***Anwar P.V.*** (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in ***Navjot Sandhu*** (supra), holding that Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65B(4) is mandatory. ***Anwar P.V.*** (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 Cr.P.C or, at the appellate stage under Section 391 Cr.P.C. Evidence Act is a procedural law and in view of the pronouncement in ***Anwar P.V.*** (supra) partly overruling ***Navjot Sandhu*** (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of

course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65B.

44. On the questions of importance of electronic evidence in investigation and increasing impact of technology in everyday life, in *Tomaso Bruno versus State of U.P.*, (2015) 7 SCC 178, it has been observed:

“25. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

26. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great

help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra, (2012) 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.”

Emails are downloaded and computer output, in the form of paper prints, are taken every day. These emails may become relevant and important electronic evidence, subsequently. It is difficult to conceive and accept that the emails would be inadmissible, if the official i.e. the person who downloaded them and had taken printouts had failed to, on that occasion or simultaneously record a certificate under Section 65B.

45. Section 65B is a part of Chapter V of the Evidence Act, which relates to documentary evidence. Documentary evidence can be primary as defined in Section 62, which means the document itself, or secondary which refers to certified copies or copies made from original and even oral accounts of the contents of documents by a person, who has seen the same. Section 64 states that documents must be proved by primary evidence, except when secondary evidence is permitted and allowed. Section 65 states that secondary evidence may be given of the existence, condition or contents of a document when any of the sub-clauses (a) to (g) apply. In case of sub-clauses (a), (c) and (d), secondary evidence can be given even of the contents and the same is

admissible. As noticed above, electronic record is by deeming fiction treated as a document for the purpose of Evidence Act.

46. Section 65A states that contents of electronic record may be proved in accordance with the provisions of Section 65B. We have already interpreted and referred to Section 65B. The importance of the said Section is that it does away with the requirement to produce the original computer or the original media on which data or information was stored and allows the secondary evidence in the form of computer output to be produced and admitted in evidence, subject to the condition that when evidence of computer output is produced and tendered, certificate of a person occupying a responsible official position in relation to operation of the relevant device or management of the relevant activities as prescribed by Section 65B of the Evidence Act is produced. In this manner, Section 65B authorises production and admission, in evidence, all computer output without production of the original, i.e., it permits leading of secondary evidence without the original being produced. It is in this context that in *Anwar P.V.* (supra), the Supreme Court in paragraph 24 had stated and held as under:-

“24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments

and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.”

47. The aforesaid paragraph clearly states that when electronic record is produced as primary evidence, i.e., the original recording itself is produced, the requirement or satisfaction of condition of Section 65B is not required.
48. Sub-section (1) to Section 65B states that when electronic record is produced in terms of the said Section, there is no need for further proof or production of the original as evidence of any of the contents of the original or facts stated therein of which “direct evidence” would be admissible. The term “direct evidence” is opposite of second-hand or hearsay evidence. Section 60 of the Evidence Act states that oral evidence must in all cases be direct, that is to say, it refers to a fact which could be seen be the evidence of a witness who has seen the occurrence, or if it refers to the fact which could be heard the witness should have heard the said words, or if it refers to a fact which could be

perceived by any other sense or any other manner it must have been perceived by the witness by that sense or in that manner.

49. The term “hearsay” applies to both spoken or oral evidence and also has reference to what is written. Hearsay evidence is rejected on the principle that the best evidence obtainable should be produced as it is relatively trustworthy, whereas hearsay evidence poses difficulties for it derives value not from the witness himself, but on the veracity and competence of some other person whose version is not tested in the cross-examination.
50. For principle of hearsay to apply and reject an evidence, it must be shown that it was made by some other declarant other than the one testifying at the trial of hearing and the statement is being offered in evidence to prove the truth of the matter asserted. Therefore, even if the evidence is an assertion made by the declarant, it will not be hearsay until it is offered to prove the truth of what is asserted.
51. A statement which is not assertion, i.e., to state the truth declared and maintained, but only a statement of fact is not hearsay. A hearsay declarants non-verbal conduct may qualify as a “statement” for purpose of exclusion under the hearsay rule, if the conduct of the person intended by him as a substitute for oral or written verbal expression.(see, *Matter of Cheryl H.*, 2 Dist. 153 CA 3d 1098). Pertinently, in case of self-generated data or information there is no declarant as such who is asserting a fact.
52. Evidence may be offered for different purposes. The same evidence can be treated as hearsay and non-hearsay depending upon its relevance, i.e., whether it is relevant for a substantive truth or for some

other purpose. For example, when person A meets person B and speaks to him about an occurrence, testimony of person B to the said effect would not be hearsay, but may become hearsay if a party seeks to rely upon facts stated by person A implicating a third person. Thus, we must notice and record the difference between a “factum of statement” and “truth of a statement”. The said distinction has been recognised and accepted in several pronouncements in *J.D. Jain versus State Bank of India*, AIR 1982 SC 673, *Manilal Navavati versus Sushila Mahendra Nanavati*, AIR 1965 SC 364 and *S.R. Ramaraj versus Special Court, Bombay*, (2003) 7 SCC 175. Thus, electronic record produced as a statement as a tangible in form of a CD, print out on paper, etc. as a fact in itself, must be distinguished from electronic record, which is produced to prove truth of the matter it asserts or correctness of contents for the latter postulates adjudication of veracity and credibility of the information by the person who has made a statement offering or producing the document for its truth.

53. In view of the aforesaid discussion, information memorised as business record or records maintained in common course of events are not treated as hearsay even if the maker lacks personal knowledge of the facts or events. The document should be prepared in normal course of business must have been at or near the time of events it records and should have been made in normal course of business activities or events. Sub-section (4) to Section 65B postulates that the certificate should be given by a person occupying a responsible official position in relation to operation of the relevant device or management of the relevant activities. If the said conditions are satisfied, it promotes and

establishes the trustworthiness. In such cases, presumption of fact regarding genuineness and authenticity of the content can be invoked at the discretion of the court under Section 114 of the Evidence Act.

54. In *Anwar P.V.* (supra) in paragraph 1 itself the Supreme Court noticed the difference between relevancy and admissibility, which is examined at the initial stage; and genuineness, veracity and reliability of the evidence, which is seen by the court subsequently. Thus, the ratio and dictum in *Anwar P.V.* (supra) is based and predicated on the difference between admissibility and veracity or evidentiary value. The Supreme Court dealt with the aspect of admissibility in strict legal sense, not to be confused with evidentiary value or correctness of contents. Of course, when the conditions mentioned in Section 65B are satisfied, in terms of Section 114 of the Evidence Act, the court may presume existence of certain facts for the computer output would have data and information collected or derived in common course of human conduct and in public and private business.
55. In terms of sub-section (1) to Section 65B, original evidence need not be produced when conditions of Section 65B are satisfied. The computer output in relation to the information and computer in question are admissible as secondary evidence, when certificate under Section 65B is produced. However, Section 65B nowhere states that the contents of the computer output shall be treated as the truth of the statement. Section 65B deals with admissibility of secondary evidence in the case of “electronic records” and not with the truthfulness or veracity of the contents. However, when a certificate under Section 65B is produced the Court may presume or form a prima facie opinion,

which is rebuttable and may not be accepted.

56. Electronically generated record is entirely a product of functioning of a computer system or computer process, like call record details or a report generated on a fax, which shows the number from and to which the fax were sent, time, etc. is generated electronically. It does not contain any assertion. Therefore, as noticed above it is not hearsay. These are not writings made by a person (see *United States versus Khoroizian*, 333 F. 3d 498, 506). Normally non-assertive conduct is more reliable, provided there has been no fraud and interpolation in the preparation of the record. Computer generated telephone records are not similar to a statement by a human declarant and, therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved. Ergo, in these cases when conditions of Section 65B are satisfied, the probative value or weight can be substantial of course, subject to verification as to the credibility and integrity of the contents.
57. We have already referred to the distinction between factum of a statement and truth of a statement and the concept of presumption of memorandum or records maintained in normal course of business and the credibility or trustworthiness of electronic records. However, it must be understood that mere admission or admissibility of the electronic record would not mean that the contents of the electronic record have been proved beyond doubt and debate and are automatically proved when the document is marked exhibit. Mere marking of a document as exhibit does not dispense with the proof of its contents (see *Sait Tarajee Khimchand versus Yelamarti Satyam*,

AIR 1971 SC 1865, *Narbada Devi Gupta versus Birendra Kumar Jaiswal*, (2003) 8 SCC 745 and *Mohd. Yusuf versus D. and Another*, AIR 1968 Bombay 112). Provisions of Section 65 of Evidence Act are apposite on the said legal principle and reference can also be made to Sections 91 and 92 of the Evidence Act. The latter sections deal with exclusion of oral evidence by documentary evidence in certain cases and in which cases oral evidence can be led even when there are documents recording terms of contract, grant or any other disposition of property or when a matter is required by law to be reduced to a form of a document. The effect of the aforesaid provisions is that when a certificate under Section 65B authenticates the computer output, it will only show and establish that the computer output is the paper print out or media copy, etc. of the computer from which the output is obtained. The court has still to rule out when challenged or otherwise, the possibility of tampering, interpolation or changes from the date the record was first stored or created in the computer till the computer output is obtained. The focus over here is not so much on the creation of the out-put as stipulated under sub-section (2) to Section 65B, but rather on the preservation and sanctity of the record after it was originally created. It extends beyond identification of the particular computer equipment and the process or equipment used for computer output, etc. It would relate to the policies, procedures for use of the equipment that stored the said information since creation and data base and integrity of the same. Questions which would arise and have to be answered is whether data base was protected and had no or limited access, which permits modification/alteration; whether the data base

could be wrongly lodged or created or could be transferred or changed when the data base was transferred and stored in the backup systems. These are questions which are pertinent and have to be examined to ascertain whether or not there was possibility of change, alteration or manipulation in the initial or original data after it was created. The courts must rule out that the records have not been tampered and read the data or information as it originally existed. These are aspects which are not codified as such, for probative value is examined on the case to case basis keeping in mind the relevant facts.

58. In view of the aforesaid discussion, we hold that the trial court had rightly taken the certificate under Section 65B of the Evidence Act marked Exhibit PW-11/E on record and, accordingly, relied on the CDR of telephone No. 9313341707 marked Exhibit PW-11/A. The said CDR would disclose that after the death of Vipin Kumar, his telephone number was used to make a call at Haldwani on number 266495. The CDR would also confirm the deposition of Nirbhay Prashant (PW-3) that he had made a call to the same landline number at Haldwani and thereupon had ascertained details of the appellant.
59. There is some controversy as to whether the landline No 266495 installed at Malla Beura, Kathgodam, District Haldwani was installed at the residence of the appellant Kundan Singh. In response to question No.54 in his statement under Section 313 Cr.P.C., Kundan Singh has accepted that he used to reside at Malla Beura, Kathgodam, Haldwani, district Nainital. The telephone connection was in the name of Saraswat Devi, wife of Jagat Singh as stated and recorded in the customer application form marked Ex.PW-33/A. The appellant in his

statement under Section 313 Cr.P.C. claims that his mother's name is Saroli Devi. Appellant accepts that Jagat Singh is his father.

60. The ocular statement of Nirbhay Prashant (PW-3) on the conversation he had should be accepted.
61. In view of the aforesaid discussion, when we cumulatively examine the facts established and proved, it has to be held that the appellant Kundan Singh has been rightly convicted for murder of his friend Vipin Kumar. In cases of circumstantial evidence, we have to take the impact and consider the full effect of the evidence and material proved/established and not individually read and consider the evidence and material to ascertain whether conviction is justified.
62. We also do not find any reason to interfere with the order on sentence. In view of the aforesaid reasons, the appeal by Kundan Singh has no merit and is dismissed.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

NOVEMBER 24th, 2015 NA