

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1319 of 2017

Arising Out of PS. Case No.-130 Year-2016 Thana- RAMPUR District- Gaya

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Teni Yadav @ Rajiv Kumar, Son of Suresh Yadav @ Suresh Prasad, Resident of House No. 275, A.P. Colony, P.S.- Rampur, District- Gaya, Bihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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With
CRIMINAL APPEAL (DB) No. 1310 of 2017

Arising Out of PS. Case No.-130 Year-2016 Thana- RAMPUR District- Gaya

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Rajesh Kumar, Son of Ram Lakhan Prasad, Resident of Village-Balwapur, P.S. Warsaliganj, District Nawada, Bihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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With
CRIMINAL APPEAL (DB) No. 1321 of 2017

Arising Out of PS. Case No.-130 Year-2016 Thana- RAMPUR District- Gaya

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Rakesh Ranjan Yadav @ Rocky, Son of Bindi Yadav @ Bindeshwari Prasad Yadav, Resident of House No. 51, A.P. Colony, P.S. Rampur, District Gaya, Bihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 1319 of 2017)

For the Appellant/s : Mr. Vikram Deo Singh, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 1310 of 2017)

For the Appellant/s : Mr. Ashish Giri, Advocate

Mr. Sumit Kumar Jha, Advocate

Ms. Riya Giri, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 1321 of 2017)

For the Appellant/s : Mr. Surendra Singh, Sr. Advocate



For the Respondent/s : Mr. Rajiv Kumar Singh, Advocate
Mr. Sajal Kumar Sinha, Advocate
Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)
Date : 19-07-2023

All these appeals are of the year 2017 but they are specially assigned to this Court because of these happenings. On 15.02.2023, the Division Bench headed by Hon'ble Mr. Justice Arvind Srivastava had passed an order in one of these appeals that they are required to be heard on priority basis. Accordingly, the Criminal Appeal (DB) No. 1319 of 2017 was placed before the Hon'ble Acting Chief Justice on 17.03.2023 for assignment of the Bench. Under orders of the Hon'ble Acting Chief Justice, these appeals were placed before the Bench presided by the Hon'ble Acting Chief Justice. Thereafter, as per order dated 07.04.2023 passed by the Bench presided by the Hon'ble Acting Chief Justice hearing of these appeals was fixed at 2.15 P.M. on 08th May, 2023. However, on 08th May, 2023, the Division Bench headed by the Hon'ble Acting Chief Justice had passed an order - 'not to list these appeals before the Division Bench of which Hon'ble Mr. Justice Chakradhari Sharan Singh is a member'. On recusal by



the Hon'ble Acting Chief Justice, the Registry of this Court placed submission before Hon'ble the Chief Justice for modalities to be followed in the event of recusal and that is how under order dated 20.06.2023 of the Hon'ble Chief Justice, these connected appeals arising out of the same Judgment and order were placed before this Court for final hearing.

2. Appellant/convicted accused no.1 Rakesh Ranjan Yadav alias Rocky, appellant/convicted accused no.3 Teni Yadav alias Rajiv Kumar and appellant/convicted accused no.4 Rajesh Kumar son of Ram Lakhan Prasad, by these appeals, are challenging the Judgment and Order dated 31.08.2017 and 06.09.2017 passed in the Sessions Trial No. 292/2016(SJ) by the learned Additional Sessions Judge-I, Gaya, thereby convicting them of offences punishable under Section 302 read with 34, 323 read with 34 and 427 of the Indian Penal Code as well as under Sections 27 and 30 of the Arms Act. In addition, appellant/ convicted accused no.4 Rajesh Kumar is also convicted of the offence punishable under Section 217 of the Indian Penal Code. Appellant/convicted accused no.1 Rakesh Ranjan Yadav alias Rocky is sentenced to suffer imprisonment for life apart from



imposition of fine of Rs.1,00,000/- for the offence punishable under Section 302 read with 34 of the Indian Penal Code. Other appellants, on this count, are sentenced to suffer imprisonment for life apart from imposition of fine of Rs.50,000/- on each of them. In default of payment of fine, appellant Rakesh Ranjan Yadav @ Rockey is directed to undergo rigorous imprisonment for two years. Rest of the appellants are directed to undergo similar sentence but for one year. They all are sentenced to undergo rigorous imprisonment for one year apart from a direction to pay fine of Rs.5000/- by each of them for the offence punishable under Section 323 read with 34 of the Indian Penal Code and in default of payment of fine, to undergo rigorous imprisonment for one month. Similarly, the appellants are directed to undergo rigorous imprisonment for one year apart from a direction to pay fine of Rs.5000/- by each of them for the offence punishable under Section 427 of the Indian Penal Code and in default of payment of fine, they are directed to undergo rigorous imprisonment for one month by each of them. For the offence punishable under Section 27 of the Arms Act, they all are directed to undergo rigorous imprisonment for five years apart from direction to pay fine of



Rs.5000/- by each of them and in default of payment of fine, they are directed to undergo imprisonment for two months. For the offence punishable under Section 30 of the Arms Act, the appellants/convicted are directed to undergo rigorous imprisonment for six months apart from a direction to pay fine of Rs.5000/- and in default of payment of fine, to undergo further rigorous imprisonment for one month. For the offence punishable under Section 217 of the Indian Penal Code, the appellant/convicted accused no.4 Rajesh Kumar is directed to undergo rigorous imprisonment for two years apart from a direction to pay fine of Rs.10,000/- and in default of payment of fine to undergo rigorous imprisonment for two months. It needs to point out here that original convicted accused no.2 Bindi Yadav alias Bindeshwari Prasad died during the pendency of his appeal and, therefore, his appeal stood abated. For the sake of convenience, the appellants shall be referred to in their original capacity as 'an accused'.

3. The facts leading to the prosecution of the accused persons projected from the police report can be summarized thus:

(a). Aditya Kumar Sachdeva (since deceased) was a young boy aged about 18 years. P.W.1 Nasir Hussain, P.W.2



Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi were his friends. They all used to reside at Gaya. The incident in question of road rage leading to murder of Aditya Kumar Sachdeva took place soon after 07.45 P.M. of 07.05.2016 on a road leading to the police lines while their return journey from Bodh Gaya to Gaya.

(b). On 07.05.2016, there was birthday party to celebrate birthday of one Abhishek at Bodh Gaya. In the evening hours of 07.05.2016, by a four wheeler vehicle bearing Registration No.BR02AC-2699 of Maruti Swift make driven by P.W.1 Nasir Hussain, Aditya Kumar (since deceased), P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi, went to Bodh Gaya from Gaya for attending that birthday celebration. They all started their return journey from Bodh Gaya to Gaya at about 07.30 P.M. of 07.05.2016. P.W.4 Md. Kaifi Azmi was sitting by the side of P.W.1 Nasir Hussan, who was driving the Maruti Swift Car. Aditya Kumar (since deceased) was sitting on the middle of the rear seat while P.W.2 Ayush Agarwal and P.W.3 Ankit Kumar were sitting beside him on the rear seat. During the course of this return journey , their Maruti Swift Car took over another four wheeler vehicle bearing Registration No.



DL01TempAU 7063 of Land Rover make allegedly driven by accused no.1 Rakesh Ranjan Yadav alias Rocky near Maharani Petrol Pump. Thereafter, as alleged by the prosecution, accused no.1 Rakesh Ranjan Yadav alias Rocky started attempting to overtake the Maruti Swift Car by chasing. Because of heavy vehicular traffic from the opposite direction, P.W.1 Nasir Hussain could not give him the side. The hot chase continued and, therefore, P.W.1 Nasir Hussain had turned the Maruti Swift Car towards the police lines. The Land Rover Car allegedly driven by accused no.1 Rakesh Ranjan Yadav alias Rocky followed the Swift Car in the Police Line and during the course of following that Maruti Swift Car, a bullet came to be fired from the Land Rover car to warn inmates of the Maruti Car. Hearing the sound of gunshot, out of fear, P.W.1 Nasir Hussain took the Maruti Swift Car to the side of the road and stopped it. The Land Rover Car allegedly driven by accused no.1 Rakesh Ranjan Yadav @ Rockey also stopped near the Maruti Swift Car.

(c). As alleged by the prosecution, then accused no.1 Rakesh Ranjan Yadav alighted from his Land Rover Car while holding a sliver coloured pistol in his hand and started beating P.W.1 Nasir Hussain, who was still sitting in his Maruti Swift



Car, with the butt of that pistol causing injury to the face. Accused no.4 Rajesh Kumar, a police personnel, who was bodyguard of mother of accused no.1 Rakesh Ranjan also alighted from the Land Rover Car holding a carbine in his hand. He was wearing a Jungle dress with a name plate on his chest. He then started beating P.W.4 Md. Kaifi Azmi, who was sitting beside P.W.1 Nasir Hussain, by means of fists and slaps. Accused No.4 Rajesh Kumar then made an unsuccessful attempt of opening the door of the Maruti Swift Car. Accused No.1 Rakesh Ranjan @ Rockey challenged the inmates of the Swift Car by uttering that they are taking confrontation with son of Bindi Yadav alias Bindeshwari Yadav (deceased convict). Accused No.1 Rakesh Ranjan then started dragging P.W.1 Nasir Hussain out of the Maruti Swift Car by holding his collar. Apprehending imminent bashing at the hands of the accused persons, P.W.1 Nasir Hussain immediately started the Maruti Swift Car and when that car traded a short distance, as alleged by the prosecution, accused no.1 Rakesh Ranjan @ Rockey fired a bullet which penetrated rear windshield of the Maruti Swift Car and hit head of Aditya Sachdeva causing a bleeding injury. The injured was then immediately taken to the Anugrah Narayan Medical College



and Hospital, Gaya (Magadh Medical College and Hospital) by his friends - P.W. 1 to P.W. 4 where he was declared dead.

(d). From the cell phone of deceased Aditya Sachdeva, his friends gave information of the incident to the father of deceased Aditya Sachdeva and that is how, his family members including his brother. i.e., First Informant P.W.26 Akash Sachdeva rushed to the Anugrah Narayan Magadh Medical College and Hospital (Magadh Medical College and Hospital) and noticed dead body of Aditya Sachdeva with the head covered by bandage, lying on the stretcher thereat.

(e). Upon getting information of this incident, police personnel reached Anugrah Narayan Magadh Medical College and Hospital (Magadh Medical College and Hospital). P.W.27, Gauri Shankar Gupta, Police Inspector of Rampur Police Station recorded the First Information Report (Ext.16) lodged by P.W.26 Akash Sachdeva at the said hospital. P.W.1 Nasir Hussain, P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi, who were present at the Hospital also put their signatures, obviously, as witnesses on the F.I.R. lodged by P.W.26 Akash Sachdeva. That is how, Crime/P.S. Case No.130 of 2016 came to be registered under Sections 341, 323, 307, 302, 427 and 374 of the Indian Penal Code as well



as under Section 27 of the Arms Act at Police Station-Rampur.
The wheels of investigation were then set in motion.

(f). Dead body of Aditya Sachdeva was dispatched for post-mortem examination. P.W.12 Dr. Purnendu Shekhar then conducted post-mortem examination on dead body of Aditya Sachdeva on 08.05.2016. His report is at Ext.9. The spot of the incident which was at the Police Line Road behind the Central Jail came to be inspected by the police as well as the team of Forensic Expert. Statements of the witnesses came to be recorded.

(g). Search of the house of deceased accused no.2 Bindi Yadav came to be conducted and statement of police personnel posted as bodyguard of his wife Mrs. Manorma Devi MLC came to be recorded. Land Rover vehicle bearing Registration No.DL01TempAU 7063 was found parked in the garage of that house. It came to be seized by preparing seizure memo (Ext.21). Official carbine with bullets assigned to accused no. 4, Rajesh Kumar was also seized vide Ext.21/A. Maruti Swift Car bearing Registration No. BR02AC-2699 with the firing hole in the rear windshield was also seized. Both those vehicles came to be inspected by the experts of the Forensic team for collecting necessary evidence. Mobile numbers of



the accused persons came to be obtained and call detailed records showing their tower location etc. came to be collected. The analysis thereof was conducted by P.W. 9 Chandra Bhanu, Police Officer working in the Technical Branch of the office of the Senior Superintendent of Police. Statement of witnesses came to be recorded under Section 164 of the Code of Criminal Procedure (Exts. 2, 3, 5 and 6). Finger prints were collected. Visual sight map (Ext.22) of the scene of the occurrence was prepared by the Investigating Officer. Injury report (Ext. 12) of injured P.W.1 Nasir Hussain came to be collected.

(h). At about 02.30 A.M. of 10.05.2016, on the basis of the confidential information, search was conducted at the Hot Mixed Plant, Janpur, Bodh Gaya and accused no.1 Rakesh Ranjan alias Rocky came to be arrested. His licensed pistol came to be seized by preparing a seizure memo (Ext.21B) along with few bullets, magazines and the fire arm license issued in his name.

(i). Blood stained clothes of deceased Aditya Sachdeva and injured P.W.1 Nasir Hussain were collected and seized by preparing a seizure memo.

(j). Two parts of the bullets found in the head of dead



body of Aditya Sachdeva were also collected during the course of investigation from autopsy surgeon P.W. 12 Dr. Purnendu Singh.

(k). Seized articles were presented to the court of the Additional Chief Judicial Magistrate along with a request letter and, accordingly, those were sent to the Forensic Science Laboratory, Patna, by following the due process. Report of the Forensic Expert regarding the seized articles came to be collected – (Exts. 14, 18 and 24 etc.).

(l). On completion of routine investigation, the accused persons came to be chargesheeted. After committal of the case, the learned trial court framed the charge. All accused persons abjured their guilt and claimed trial.

(m). In order to bring home the guilt to the accused, the prosecution had examined as many as 30 witnesses. Alleged eye witnesses Nasir Hussain, Ayush Agarwal, Ankit Kumar and Md. Kaifi Azmi were examined as P.W.1 to P.W.4 respectively. Constables Sunil Kumar and Tej Narain Singh Yadav, who were bodyguards of mother of accused no.1 Rakesh Ranjan Yadav were examined as P.W.5 and P.W.6. They both had turned hostile to the prosecution. Shyam Sundar Sachdeva-father of deceased Aditya Sachdeva was



examined as P.W.7. Chand Sachdeva-mother of the deceased was examined as P.W.8. Chandra Bhanu, Police Officer of the Technical Cell of the office of the Superintendent of Police was examined as P.W.9 to prove the CDR and tower location of the cell phones and other documents. Md. Yunush, Sargent Major, was examined as P.W.10 for proving issuance of arms and ammunition to accused no.4 Rajesh Kumar, police constable. Amit Kumar, Sub Inspector, who had participated in the investigation was examined as P.W.11. Autopsy Surgeon Dr. Purnendu Singh of A.N.M.M.C. Hospital (Magadh Medical College and Hospital), Gaya, was examined as P.W.12 to prove the report of the post-mortem examination (Ext.9). Sagar Sachdeva, cousin of the deceased was examined as P.W.13. Rajendra Prasad posted at A.N.M.M.C. Hospital, who inspected the dead body was examined as P.W.14. He had prepared the inquest Panchnama (Ext.10). Dr. V.K. Jain, who had examined P.W.1 Nasir Hussain was examined as P.W.15 to prove the injury report at Ext.12. Alok Kumar Roy, Police Officer, working with the Technical Cell of the office of the Superintendent of Police was examined as P.W.16 to prove that the accused No. 1 was at his hometown at the time of incident. Naushad Alam working with the office



of the Superintendent of Police was examined as P.W.17. Binod Kumar Pal, the Scientific Assistant working with the Forensic Science Laboratory was examined as P.W.18. He along with his team had inspected the site, vehicles and weapons involved in the incident and had submitted his report at Ext.14. Ram Prapan Ojha, the Senior Scientific Assistant of the Forensic Science Laboratory was examined as P.W.19 to prove the report (Ext.15). Niranjan Kumar Pandit, who interrogated accused no.1 Rakesh Ranjan Yadav alias Rocky and had video-graphed his confessional statement, is examined as P.W.20. Mundrika Paswan, the Police official posted at Confidential Technical Cell of the office of the Senior Superintendent of Police was examined as P.W.21 to prove seizure memo (Ext.17). Uttam Kumar Sinha, Sub Inspector of Police Station Rampur, who brought the articles in the court was examined as P.W.22. Dilip Kumar, the Senior Scientist was examined as P.W. 23 to prove the Forensic Report. Rakesh Ranjan Singh, the Judicial Magistrate who recorded the statements of P.W.1 to P.W.4 was examined as P.W.24 to prove those statements (Ext. 2, 3, 5, 6 and Ext.16/1 to 16/3). Das Ashok Kumar, the Assistant Director of Forensic Science Laboratory was examined as P.W.25 to prove



the Forensic Science Report (Ext.18). Akash Sachdeva-the First Informant and elder brother of the deceased was examined as P.W.26. The FIR lodged by him is at Ext. 19. Gauri Shankar Gupta, the Investigating Officer, was examined as P.W.27. Dilip Kumar S/O Mahesh Prasad, Inspector of the R.T.O. was examined as P.W.28 to prove his report (Ext.23) Himanjay Kumar was examined as P.W.29 to prove the Forensic Science Laboratory Report (Ext.24). Lokesh Shankar, Police Officer, who was one of the members of the team constituted for visiting the site was examined as P.W.30 to prove preliminary report (Ext.14).

(n). In addition to oral evidence, the prosecution has relied on the voluminous documentary evidence in the form of the F.I.R., statements of the witnesses recorded under Section 164 of the Code of Criminal Procedure, Call Detailed Records, reports of the Forensic Science Laboratory, Seizure Memos etc.

(o). On closure of evidence of the prosecution, statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. Defence of the accused was that of total denial. Accused no.1 Rakesh Ranjan has stated that he was not present in Gaya on the day of the incident but



he was busy in attending the meeting at Patna. Accused no.3 Teni Yadav had stated that he was not present at Gaya on the day of the occurrence but was at his native place Ganesh Chak falling under the jurisdiction of Police Station Mohanpur. Accused no.4 Rajesh Kumar, the police constable, had stated that on the day of the occurrence, he was with Manorma Devi, M.L.C. being her bodyguard. The accused, however, did not enter in defence.

(p). After hearing the parties, by the impugned Judgment and Order, the learned trial court was pleased to convict the appellants/accused as indicated in the opening paragraphs of this Judgement and they were sentenced accordingly. Feeling aggrieved by the said Judgment and Order, this appeal.

4. It will be most appropriate to note the material relied upon by the learned Trial Court and reasoning given for convicting the accused persons and sentencing them accordingly. Paragraph 9 of the impugned judgment is giving reasons and findings on which conviction is based. The learned Trial Court has held that P.W.1 to P.W.4 - Nasir Hussain, Ayush, Ankit and Md. Kaifi respectively, have supported the prosecution case on the point of motive, time of



occurrence, place of occurrence and as to number of persons involved in the crime but they were declared hostile on the point of identification of the accused persons, arms as well as vehicle used in the crime. Then the learned Trial Court proceeded to hold that relatives of the deceased, namely, P.W. 7 Shyam Sundar, P.W. 8 Chand Sachdeva, P.W. 13 Sagar Sachdeva and P.W. 26 Akash Sachdeva are hearsay witnesses but eyewitnesses – P.W.1 to P.W.4 had disclosed the incident to them to the effect that accused Rocky @ Rakesh Ranjan came in the Land Rover vehicle with a pistol and assaulted P.W.1 Nasir Hussain. The learned Trial Court further held that this fact of assault on P.W. 1 Nasir Hussain is corroborated by P.W.15 Dr. V.K. Jain who had proved injury report of P.W.1 Nasir Hussain. Relying on hearsay evidence regarding hearing of the incident from P.W.1 to P.W.4, the learned Trial Court accepted evidence of P.W. 7 Shyam Sundar, P.W. 8 Chand Sachdeva, P.W. 13 Sagar Sachdeva and P.W. 26 Akash Sachdeva – relatives of the deceased and concluded that accused No.1 Rocky @ Rakesh Ranjan had committed murder of Aditya Sachdeva by causing firearm injury to him by means of pistol of Beretta make. The learned Trial Court then placed reliance on evidence of P.W.9 Chandra Bhanu, a



technical expert employed in the office of the Superintendent of Police, Gaya and held that through his evidence, the prosecution has proved the call detail records, tower location and customer application form provided by the cellphone company and held that at the time of the incident, location of the accused persons including Rocky @ Rakesh Ranjan was on the same track on which P.W.1 to P.W.4 accompanied by the deceased were travelling. Call detail records, photocopies of the other documents such as a bill of electricity, authorization letter etc. submitted in a bunch with the charge sheet were held to be proved by P.W.9 Chandra Banu – a staff member of the office of the Superintendent of Police, Gaya. Photocopy of confirmation letter from the Refree as well as photocopy of the bill issued by BSES Rajdhani Power Limited Company for consumption of electricity were collectively marked as Exhibit-7 with call detail record and these photocopies were held to be proved though, evidence of P.W.9 Chandra Bhanu – an employee of the office of the Superintendent of Police. With this exercise, it is held that these two photocopies are containing mobile phone number of accused No.1 Rocky @ Rakesh Ranjan and this fact demonstrate that the said mobile number was used by him at



the time of the incident and its tower location was identical with that of tower locations of mobile phones of P.W.1 to P.W.4 – the alleged eyewitnesses. Thereafter, ballistic report Exhibit-13 proved by P.W.23 Dilip Kumar was pressed in service by the learned Trial Court to hold that the licensed pistol of accused No.1 Rocky @ Rakesh Ranjan was used in the incident of murder of deceased Aditya Sachdeva. Pendrive of videographed confessional statements of accused persons including that of accused No.1 Rocky @ Rakesh Ranjan were held to be proved and those confessional statements made to the police was pressed in service to record conviction. Statements of P.W.1 to P.W.4 recorded by Judicial Magistrate under Section 164 Cr.P.C. were used as substantial evidence in proof of incident in question. By considering all these materials as legal evidence, conviction came to be recorded by the learned Trial Court.

5. We heard Shri Surendra Singh the learned Senior Counsel, Shri Vikramdev Singh, Shri Rajeev Kumar Singh as well as Shri Ashish Giri, the learned counsel appearing for the appellants at sufficient length of time. It is argued on behalf of the appellants that evidence of P.W.1 Nasir Hussain, P.W.2 Ayush Agrawal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi



is wholly insufficient to infer guilt of the appellants in the crime in question. They all have turned hostile to the prosecution and, as such, identity of the appellants as perpetrator of the crime in question is not established by evidence of these four alleged eyewitnesses. The impugned judgment is criticized on behalf of the appellants by contending that the learned Trial Court has failed to understand the law on the aspect of admissibility of evidence and by considering statement of witnesses recorded under Section 161 as well as Section 164 of the Cr.P.C. as substantive evidence, finding of the guilt is recorded in the case in hand. Such type of statements cannot be considered as substantive evidence. It is further argued that if evidence of P.W.1 to P.W.4 is ignored, as they had turned hostile to the prosecution, there remains no direct evidence to connect the appellants to the crime in question. It is further argued that evidence of close relatives of the deceased, namely, P.W.7 Shyam Sundar Sachdeva (father), P.W.8 Chand Sachdeva (mother), P.W.13 Sagar Sachdeva (cousin) and P.W.26 Akash Sachdeva (elder brother and the First Informant) is completely hearsay in nature and the learned Trial Court ought not to have accepted that evidence to record a finding that the appellants have committed the offence punishable under Section 302 read



with Section 34 of the Indian Penal Code. It is also argued that if evidence of all these witnesses is ignored then their remains only circumstantial evidence in the form of the call detail record and forensic reports. Evidence regarding the call detail record is not admissible in absence of the certificate as required by Section 65B of the Evidence Act. No such certificate is produced nor the relevant witness was examined. So far as forensic evidence is concerned, it is argued that the FSL report is not mentioning taking of micro photographs and though P.W.23 Dilip Kumar Singh, Senior Scientist has deposed about taking of micro photographs, those were not produced on record. This renders opinion of the forensic expert hearsay and cannot be accepted. The data for cross checking the accuracy of the forensic evidence is not provided by the prosecution and, therefore, report of the forensic expert at Exhibit 13 as well as evidence of said witness P.W.23 Dilip Kumar Singh is wholly insufficient to conclude that the bullet fired from seized pistol had hit the deceased causing his death. Even identity of the seized articles including the vehicles was not established by the prosecution by adducing necessary evidence. Reliance is placed on several judgments of the Hon'ble Supreme Court for buttressing the contentions and we proposes to deal with those



judgments at the appropriate place.

6. As against this, the learned Additional Public Prosecutor vehemently argued that the defence has accepted the entire evidence adduced by the prosecution which is only lacking the material regarding identity of the assailants. However, identity of the accused is established by the sequence of events which connects them with the crime in question. The learned Additional Public Prosecutor submitted that appellant / convicted accused No.1 Rocky @ Rakesh Ranjan was owner of the Land Rover as well as the pistol which he had handed over to police. These articles were proved to have been used in commission of crime on the basis of forensic evidence. The mobile phones used by the accused persons were at the location of the crime at the time of commission of crime and, therefore, according to the learned Additional Public Prosecutor, the impugned judgment needs no interference at the hands of this Court.

7. We have carefully perused the records and proceedings. We have also perused the case law cited by the parties and have considered the submissions advanced by them.

8. As the accused persons were charged for the offence punishable under Section 302 read with 34 of the Indian



Penal Code, at the outset, the prosecution will have to prove that Aditya Sachdeva died homicidal death on 07.05.2016. The prosecution, for this purpose had examined his near and dear ones including his father-P.W.7 Shyam Sundar Sachdeva, his mother-P.W.8 Chand Sachdeva, his cousin-P.W.13 Sagar Sachdeva, his elder brother-P.W.26 Akash Sachdeva-the First Informant. They all had categorically deposed that after getting information regarding death of Aditya Sachdeva, they all had been to the A.N.M.M.C. Hospital (Magadh Medical College and Hospital) and had seen dead body of Aditya lying on the stretcher with bandage applied to the head. In a similar manner, P.W.1 Nasir Hussain, P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi have spoken about the death of Aditya Sachdeva because of firing a bullet which pierced his head. Though all these four alleged eye witnesses have turned hostile to the prosecution, this part of their evidence, which is consistent with the prosecution case, needs to be accepted. Moreover, factum of death of Aditya Sachdeva occurring on 07.05.2016 because of a bullet wound to his head is not disputed by the defence as evidence of these witnesses on this aspect has remained unchallenged in their cross examination.

9. Dead body of Aditya Sachdeva, as seen from the



evidence of P.W.27 Gauri Shankar Gupta, the Investigating Officer, was sent for post-mortem examination after taking inquest notes. P.W.12 Dr. Purnendu Singh who working as the Medical Officer at A.N.M.M.C. Hospital, Gaya, had conducted post-mortem examination on the dead body of Aditya Sachdeva after inspecting the same. As per version of this Medical Officer, during the course of post-mortem examination, on 08.05.2016, he noticed the following injuries on the dead body:-

(I). One entry wound of firearm in the mid line on the back of upper part of neck (1.1 cm x 1 cm) with interverted contused margins having abraded collar.

The Autopsy Surgeon had not noticed evidence of burning and blackening or tatting near the wound. He deposed that after dissection, he found that the bullet which had entered into the body through the entry wound had pierced skin and muscles. After fracturing I and II cervical vertebra into multiple pieces, it entered into the canal cavity through foramen magnum of the skull lacerating the brain stem and cerebellum. As testified by this Autopsy Surgeon, two broken pieces of bullets of size of 1.3 cm x 1 cm as well as 1 cm x 1



cm were found enlodged thereat. P.W.12 Dr. Purnendu Singh further deposed that those two broken pieces of bullets were retrieved and preserved in a duly sealed and labelled glass container which was subsequently handed over to the police with his report. The Autopsy Surgeon opined that the death of Aditya Sachdeva was due to injuries noted by him caused to the brain and brain stem as a result of firearm fired from a distance of more than 3 feet. This Medical Officer proved contemporaneous injury report (Ext.9) prepared by him. There is nothing in the cross-examination of this Medical Witness to disbelieve his version regarding death of Aditya because of bullet wound to the head caused by a headshot occurring on 07.05.2016. With this overwhelming evidence on record, we conclude that the prosecution has established a fact that Aditya Sachdeva died homicidal death on 07.05.2016.

10. Now, let us examine whether it is proved by the prosecution that the accused persons or any of them have caused death of Aditya Sachdeva with requisite intention and knowledge for making out the offence punishable under Section 302 of the Indian Penal Code. It is a settled principle of criminal jurisprudence that greater the felony the stricter the degree of proof. The burden is always on the prosecution to



prove its case beyond reasonable doubt on the basis of legally admissible evidence and when the offence charged is gruesome or diabolic, much higher, degree of assurance is required to infer the guilt of the accused. This principle is succinctly explained by the Hon'ble Supreme Court in **Mousam Singha Roy and Others -Vs- State of W.B.** reported in **(2003) 12 Supreme Court Cases 377**, paragraphs 27 and 28 of which reads as under:-

"27. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In the similar circumstance this



Court in the case of Sarwan Singh Rattan Singh v. State of Punjab (AIR 1957 SC 637) stated thus (AIR p.645, para 12)

“It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

28. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."



Similar is the observation of the Hon'ble Supreme Court in **Shivaji Sahebrao Bobde -vs.-State of Maharashtra (AIR 1973 SC 2622)** whether it is held that certainly it is a primary principle that the accused 'must be' and not merely 'may be' guilty before a court to convict and the mental distance between 'may be' and 'must be' is long and divides vague conjunctures from sure conclusions.

11. The prosecution has based its case on oral as well as documentary evidence. The prosecution case is based on eye witness account of P.W.1 Nasir Hussain, P.W.2 Ayush Agarwal, P.W. Ankit Kumar and P.W.4 Md. Kaifi Azmi, who were accompanying deceased Aditya Sachdeva at the time of the incident and were travelling with him in the four wheeler vehicle bearing Registration No.BR02AC-2699 of Maruti Swift make. However, on material aspect of identity of the accused the weapon and vehicles, all these four eye witnesses have turned hostile to the prosecution. None of them had identified the accused persons while in the dock. Rather they had deposed that the accused sitting in the dock are not involved in the crime in question and none of them were present on the spot of the incident at the time of the incident. The weapon of offence was also not got identified from them



by the prosecution. Prior to adverting evidence of these four alleged eye witnesses, let us put on record the duty of the appellate court while dealing with the appeal challenging the Judgment of conviction or acquittal of the accused in criminal trial. It is settled that there is no embargo on the appellate court reviewing the evidence upon which the impugned order of conviction or acquittal is based. The appellate court is empowered to re-appreciate the entire evidence adduced by the parties for the purpose of ascertaining as to whether the accused persons or any of them had committed any offence or not and if the impugned Judgment and Order is ultimately found to be clearly unreasonable and perverse then such Judgment and Order can be set aside by the appellate court. Similarly, let us put on record the law regarding appreciation of evidence of hostile witnesses in the light of the fact that all four eye witnesses who were accompanying the deceased have turned hostile to the prosecution on material aspect of identification of the perpetrator of the crime as well as the weapon of the offence and the vehicle in which the accused arrived at the spot of the incident.

12. The Hon'ble Supreme Court in **C. Muniappan v. State of T.N.**, reported in **(2010) 9 SCC 567** has dealt with the



issue of appreciation of evidence of hostile witnesses as has held thus in paras 81 to 83:-

“81. It is settled legal proposition that:

“6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

(Vide Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233, Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 and Khujji v. State of M.P., (1991) 3 SCC 627, SCC p. 635, para 6.)

82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC



543: 2003 SCC (Cri) 112], [Gagan Kanojia v. State of Punjab](#) [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], [Radha Mohan Singh v. State of U.P.](#) [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], [Sarvesh Narain Shukla v. Daroga Singh](#) [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and [Subbu Singh v. State](#) [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106].

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

While deciding criminal appeal Nos. 339-340 of 2014 **Rajesh Yadav and Another etc. – vs. - State of U.P.** on 4th February 2022, the Hon’ble Supreme Court has quoted this law with approval. Keeping in mind the settle position of law that evidence of hostile witness should not be rejected totally but that part of his evidence which is consistent with the case of the prosecution or the defence and which is truthful can be used, let us scrutinized evidence of alleged eye witnesses examined by the prosecution.

13. So far as the mode and manner of happening of the incident is concerned, evidence of all four prosecution witnesses namely P.W. 1 Nasir Hussain, P.W. 2 Ayush



Agrawal, P.W. 3 Ankit Kumar and P.W. 4 Md. Kaifi Azmi by and large is quite consistent with the prosecution case. Their version to a large extent is congruous. These four eye witnesses have unanimously stated that for attending birthday party of one Abhishekh, in a four-wheeler vehicle bearing Registration No. BR02AC-2699 driven by P.W.1 Nasir Hussain. They had gone to Bodh Gaya from Gaya Town. They had started return journey to Gaya at about 7.45 P.M. of 07.05.2016. As testified by these witnesses, at about Maharani Petrol Pump, the four-wheeler vehicle in which they were travelling had overtook another four-wheeler vehicle. As per their version thereafter that four-wheeler started chasing and following them. It was attempting to overtake the vehicle in which they all were travelling. All of them have stated that deceased Aditya Kumar Sachdeva was sitting in middle at the rear seat of the four-wheeler in which they were undertaking the return journey from Bodh Gaya to Gaya. P.W. 1 Nasir Hussain who was driving the Maruti Swift vehicle then deposed that when they reached near the Police Line road, he turned his vehicle on that road leading to the Police Line. The other eye witnesses have also deposed this fact in unison. They all testified that the another four-wheeler then again



started chasing them even on that road leading to the Police Line. They thereafter heard a sound of firing a bullet. As stated by all these four witnesses then P.W. 1 Nasir Hussain stopped the Maruti Swift Car by the side of the road and that another vehicle which was chasing them come from behind and stopped near their car.

14. So far as the actual incident is concerned, P.W. 1 Nasir Hussain had deposed that one person holding a pistol in his hand got down from that another vehicle and had beaten him causing injury to his nose. He further stated that one another person also got down from that another vehicle and had slapped P.W. 4 Md. Kaifi Azmi. He testified that he do not know the registration number of that another vehicle of the assailants. By declaring him hostile, the learned Prosecutor had cross-examined this witness at length. While being cross-examined, P.W. 1 Nasir Hussain had stated that the person who had beaten him at the time of the incident is not present in the court and all the accused persons sitting in the dock were not seen by him on the day of the incident while proceeding from Bodh Gaya to Gaya. Without drawing attention of this witness to his police statement several questions were put to his witness with reference to his police



statement and he had denied of having stated those facts to police while recording his statement. Thus contradictions from his police statement were not brought on record by the prosecution by drawing attention of P.W. 1 Nasir Hussain to his police statement. On the contrary, the learned Persecutor was merely satisfied by generally cross-examining this witness with reference to his police statement. During cross-examination, P.W. 1 Md. Nasir had admitted his signature on the FIR lodged by P.W. 26 and has also stated that he had given his statement before the Magistrate. But during cross-examination by the defence, this witness has stated that as tutored by Police, he gave the statement to the learned Magistrate. P.W. 1 Nasir Hussain has stated while being cross-examined by the defence that because of the darkness at the time of the incident he could not identify any of the assailants. Seized pistol was not showing to this witness for the purpose of identifying it. He had not described or identified the vehicle which chased them.

15. In a similar way by turning hostile to the prosecution, P.W. 2 Ayush Agrawal has stated that after their car took a turn towards Police Line that another vehicle continued chasing them and he heard a sound of firing a



bullet. Their car was then stopped and a person having something in his hand got down from the another vehicle. He further deposed that one another person also alighted from that another vehicle. However, this witness has not deposed as to who had assaulted P.W. 1 Nasir Hussain. He had not spoken about anybody assaulting P.W. 4 Md. Kaifi Azmi. In cross-examination by the learned Prosecutor, he admitted that when the vehicle in which they were travelling had proceeded ahead, suddenly he heard a sound of firing a bullet and that bullet hit the head of deceased Aditya Sachdeva. P.W. 2 Ayush Agrawal refused to identify the accused persons and had stated that because of darkness at the spot of the incident the assailants could not be identified by him. This witness has further stated that the accused persons who are sitting in the dock are not involved in the incident. The suspected weapon of offence was not shown to him for the purpose of identification. In stead of bringing contradictions from the police of statement on record, the learned Prosecutor without drawing attention to this witness to his police statement had generally cross-examined him with reference to his police statement. This witness has not described or identified the vehicle which had allegedly chased them.



16. Towing the line of P.W. 1 and P.W. 2, P.W. 3 Ankit Kumar has also turned hostile to the prosecution on the point of mode and manner of happening of the incident. As per his version a vehicle in which some people were sitting started chasing them and some people got down from that vehicle. However because of darkness he could not see that another vehicle. P.W. 3 Ankit Kumar further deposed that two people got down from that another vehicle. Out of them one had beaten P.W. 1 Nasir Hussain whereas the another had beaten P.W. 4 Md. Kaifi. As per version of P.W. 3 Ankit, nothing was in the hands of that person who was beating P.W. 1 Nasir. Despite searching cross-examination by the learned Prosecutor nothing could be brought on record even from evidence of this witness to support the prosecution case. This witness has denied his version in the police statement upon being question on those aspects by the learned Prosecutor. This witness has also failed to give any details of the vehicle which was chasing their vehicle. However in cross-examination, he accepted that when their car started onward journey, immediately a sound of firing a bullet was heard and that bullet hit head of deceased Aditya Sachideva. P.W. 3 Ankit Kumar had also refused to identify the accused persons



sitting in the dock and has stated that vehicle in which he was travelling was not chased by anyone at the time of the incident. In cross-examination by the defence, this witness has stated that his statement before the learned Magistrate is an outcome of tutoring him by the police and his police statement is also result of whatever was told to him by the Police.

17. P.W. 4 Md. Kaifi Azmi in a similar manner while in the witness box refused to identify the accused persons and has stated that none of the accused persons were on the spot at the time of the incident. As per his version, he had not seen the colour of the vehicle chasing them and because of the darkness he could not see the person who had beaten him. He stated that the person who had beaten P.W. 1 Nasir Hussain was not having any weapon in his hands. This witness has not even stated that the assailants were travelling in the another car which was chasing their car. P.W. 4 Md. Kaifi was generally cross-examined with reference to his police statement by the learned Prosecutor without drawing his attention to the police statement and bringing contradictions from his police statement on record. This witness has stated that he had just put his signature on the statement recorded under Section 164 of the Cr.P.C. and police had tortured them



as to what statement should be made by them. He however accepted the fact that when their car traded some distance, Aditya Sachdeva was found to be hit by a bullet. The suspect weapon was not shown to this witness for the purpose of identification.

18. It is thus seen from evidence of all these four witnesses that they have not spoken about the details and descriptions of the another car which had allegedly chased them. They had not identified the vehicle which had chased their car. They had not spoken about the fact that accused no.1 Rakesh Ranjan Yadav alias Rocky, accused no. 3 Teni Yadav alias Rajiv Kumar and accused no.4 Rajesh Kumar were travelling in that another car or that any of them had assaulted the inmates of their car. None of these four witnesses have stated that accused no. 1 Rakesh Ranjan Yadav alias Rocky was found to be holding a pistol in his hand at the time of the incident and thereafter he fired a bullet from that pistol which hit the deceased Aditya Sachdeva. All these prosecution witnesses have categorically stated in their evidence that none of the accused person was present on the scene of the occurrence at the time of the incident of firing a bullet at the head of deceased Aditya Sachdeva. They had



stated that because of darkness on the spot, they could not see the assailants so as to identify them. Thus evidence of none of these witnesses is of any help to ascertain guilt of the appellant/convicted accused in the crime in question, as they have refused to identify the accused persons or to vouch about their presence with a firearm at the spot of the occurrence.

19. We have noted a very strange aspect in evidence of investigator P.W. 27 Gauri Shankar Gupta recorded by the learned Trial Court, which permitted the learned Prosecutor to reiterate the police statements of P.W. 1 Nasir Hussain, P.W. 2 Ayush Agrawal, P.W.4 Md. Kaifi etc. while in the dock. This was certainly done in order to read their police statements in evidence through deposition of P.W. 27 Gauri Shankar Gupta because all these four eye witnesses have turned hostile to the prosecution. Similarly, as noted in forgoing paragraphs, all these four eye witnesses are generally cross-examined by the learned Prosecutor to bring on record their denial or ignorance in respect of averments in their statements recorded under Section 161 by the Investigating Officer without drawing their attention to their police statement and without questioning them about the truthfulness of contents of these relevant portions from their police statement. It seems that by adopting



this method the learned Prosecutor wanted the Trial Court to draw its attention to the police statement of these witnesses and to use it as evidence against the accused. By perusal of paragraph 9 of the impugned judgment, we are satisfied that the learned Prosecutor became successful in this attempt of persuading the learned trial court to read and treat statements under Section 161 Cr.P.C. as evidence. This mode as seems to be suggested by the learned Prosecutor is impermissible in law. As all these four prosecution witnesses have stated in their evidence that their statements recorded under Section 164 Cr.P.C. are result of tutoring them by Police, the prosecution has examined P.W. 24 Rakesh Ranjan Singh, the Judicial Magistrate Ist Class who had recorded the statements under Section 164 of the Cr.P.C. He proved those statements which are at Exts. 16, 16/1, 16/2 and 16/3. The use of such statements can only be for corroborating or contradicting the testimony of such witness. As P.W. 1 to P.W. 4 have turned hostile and have not supported the prosecution case, these statements loses their value as corroborative material. It seems that the learned trial court has considered these statements recorded under Section 164 Cr.P.C. as substantive evidence to base conviction. Therefore, there is no alternative but to put



on record, settled position of law on this aspect for reiterating that all these evidences are of no consequence to infer guilt of the accused persons in the subject crime.

20. Statements recorded under Section 161 of the Cr.P.C. are inadmissible in evidence and its use is limited for the purpose as provided under proviso Clause of Sub-Section (1) of Section 162 of the Cr.P.C. r/w Sections 145 and 157 of the Evidence Act, 1872. A note of caution needs to be added here that the statement recorded under Section 161 of the Cr.P.C. and duly proved portions of such statement recorded under Section 161 Cr.P.C. cannot be used to corroborate substantive evidence of the maker thereof. Similarly, a statement recorded under Section 164 Cr.P.C. can be used only for the purpose of corroboration or contradiction. Such statement can be used only as a previous statement of a witness and nothing more. When a maker of such statement under Section 164 of the Cr.P.C., while in the dock resiles from such statement, then such statement loses its relevance. It cannot be used for basing conviction but such contingency do indicates that the maker thereof is not a witness of truth and is changing his stand to suit his convenience. **(See State of Maharashtra and another -vs- Dr. Maroti Pimpalkar**



**(2023) 4 SCC 298, Ram Kishan Singh - vs. - Harmit Kaur
- AIR 1972 SC 468 and the State of Karnataka - vs.- P
Ravi Kumar @ Ravi - (2018) 9 SCC 614).**

21. Even if the contradictions from the former statement of a witness is proved through the Investigating Officer, that does not translate such duly proved contradiction into substantive evidence and it can at the most impeach the credit of witness by throwing doubt on his deposition before the court. Statements recorded under Section 161 of the Cr.P.C. is not and cannot be treated as substantive evidence. If the party to the trial brings on record contradictions from such former statement by following the due process of law, then such duly proved contradictions only makes substantive evidence of such witness doubtful and discrepant.

22. At this juncture, upon perusal of evidence of prosecution witnesses, we feel that we should reiterate as to how and which part of statement recorded under Section 161 of the Cr.P.C. can be looked into by the court. Duly proved contradictions from the police statement of the witnesses can only be looked into by the court and the court cannot directly look into such police statement recorded under Section 161 Cr.P.C. by perusing evidence of the concerned witness as well as



that of the Investigating Officer to find out what are the omissions or what are the contradictions which could be gathered from such statement. As indicated in the forgoing para, this exercise is required to be done strictly by following proviso clause of Sub-Section (1) of Section 162 of the Cr.P.C. r/w provisions of Section 145 of the Evidence Act. Similar is the process that needs to be followed in respect of statement recorded under Section 164 Cr.P.C. if it is required to be used for contradicting the witness. Even if the witnesses resiles from his statement recorded by the Judicial Magistrate under Section 164 of the Cr.P.C. then also as per mandate of Section 145 of the Evidence Act, the prosecution is obliged to draw attention of the concerned witness to such previous statement made by him and recorded by the Magistrate under Section 164 of the Cr.P.C. The prosecution cannot take any benefit of such statement made under Section 164 of the Cr.P.C. for contradicting such witness without drawing attention of such witness to the statement. When the maker of such statement resiles from such statement recorded under Section 164 of the Cr.P.C. and fails to support the prosecution, there is no question of using such statement recorded under Section 164 of the Cr.P.C. for corroborating the version of the witness. At this juncture, it is apposite to quote



provisions of Section 162 of the Cr.P.C. as well as Sections 145 and 157 of the Evidence Act which read thus;

162. Statements to police not to be signed:

Use of statements in evidence;

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.



(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Sections 145 and 157 of the Indian Evidence Act, 1872

145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

23. How contradictions from the previous statement of the witness recorded under Section 161(1) of the Cr.P.C. are



required to be proved is succinctly elaborated by the Hon'ble Supreme Court in the matter of **V. K. Mishra and Another - vs. - State of Uttarakhand and Another** reported in **(2015) 9 Supreme Court Cases 588**, paragraphs 16 to 19 of which reads thus;

16. Section 162 Cr.P.C. bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) Cr.P.C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162 (1) Cr.P.C. The statements under Section 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose:- (i) of contradicting such witness by an accused under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.

17. The court cannot suo moto make use of statements to police not proved and ask questions with reference to them which are



inconsistent with the testimony of the witness in the court. The words in Section 162 Cr.P.C. “if duly proved” clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction.

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and



this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.



24. We are at pains to note that the trial Courts in the entire State of Bihar are not following this prescribed process for bringing on record the contradictions and omissions. The instant case is one of such example. It would not be out of place to quote paragraphs 26 to 29 from the Judgment of the Supreme Court in **R. Shaji vs. State of Kerala** reported in **(2013) 14 SCC 266** which clinches the issue. Those reads thus:

26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded



under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: Jogendra Nahak v. State of Orissa and CCE v. Duncan Agro Industries Ltd).

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 Cr.P.C. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (Vide: Mamand v. Emperor, Bhuboni Sahu v. R., Ram



Charan v. The State of U.P., and Dhanabal v. State of Tamil Nadu).

25. In the instant case, all four eye witnesses have turned hostile to the prosecution and their evidence is of no use to the prosecution. However, it needs to be kept in mind that for proving a crime, it is not necessary that it must be seen to have been committed or must be proved by a direct ocular evidence. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans. The law relating to circumstantial evidence no longer remains *res integra* and it has been held by catena of decisions of the Supreme Court that the circumstances proved should lead to no other inference except that of guilt of the accused and proof of such circumstances must be based upon unimpeachable evidence. Following is the ratio of Judgment of the Hon'ble Supreme Court in **Padala Vera Reddy Vs. State of Andhra Pradesh and others** reported in **1989 Supp (2) SCC 706**.

- (a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (b) those circumstances should be of a definite



tendency unerringly pointing towards guilt of the accused;

(c) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(d) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

26. Now, let us examine whether the prosecution has firmly established various circumstances which linked together forges a chain so complete that it leads to sole hypothesis of guilt of the accused beyond all reasonable doubt.

27. The prosecution has pressed in service oral evidence of relatives of the deceased and these witnesses are P.W.7 Shyam Sundar-Father, P.W.8 Chand-Mother, P.W.13 Sagar-Cousin and P.W.26 Akash-the elder brother and the First Informant. All of them congruously deposed that on getting telephonic information from P.W.1 Nasir Hussain about the incident, they had rushed to the hospital where P.W.1 Nasir



Hussain, P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi were present. These relatives have also spoken about narrations of the incident made to them by these four friends of deceased Aditya and as to how he was done to death by accused No.1 Rakesh Ranjan by firing a bullet from the pistol. We have already noted that these four friends of the deceased, while in the witness box have refused to identify the accused persons. From their evidence, the weapon and the vehicle of the accused were also not got identified. Let us now see effect of evidence of these witnesses.

Section 60 of the Cr.P.C. dealing with oral evidence in the Evidence Act reads thus:

“60. Oral evidence must be direct.- Oral evidence must, in all cases whatever, be direct; that is to say-

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such



opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

28. It is thus clear that if oral evidence refers to a fact which could be seen, then on that fact evidence of such witnesses who says that they had seen such fact is required to be adduced. In the case in hand, chasing the car in which deceased Aditya Kumar was travelling, then after stopping that car assaulting two of its inmates (P.W.1 Nasir Hussain and P.W.4 Md. Kaifi Azmi), thereafter firing a bullet at the car in which the deceased was travelling and that bullet hitting head of deceased Aditya are all facts which could be seen. Therefore, P.W.1 Nasir Hussain, P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi who were inmates of Maruti Swift Car in which the deceased was travelling in that fateful day were only legally competent to testify about these facts leading to homicidal death of Aditya Kumar. As such statements of witness such as P.W.7 Shyam Sundar, P.W.8 Chand, P.W.13 Sagar and P.W.26 Akash that they were told



about all these facts by P.W.1 to P.W.4 would not be admissible being 'hearsay'. As P.W.1 to P.W.4 turned hostile to the prosecution and have failed to vouch about involvement of accused persons in this incident, evidence of these related witnesses (P.Ws. 7, 8, 13 and 26) who claims to have heard about the incident from alleged eye witnesses (P.W.1 to P.W. 4) loses importance as well as relevance and their naming of the accused as perpetrator of the crime in question cannot invite any penal liability against the accused persons. This evidence of P.Ws. 7, 8, 13 and 26 is totally inadmissible.

29. One of the circumstance pressed in service by the prosecution and accepted by the learned Trial Court to convict the accused is evidence regarding the call detail records and photocopies of other documents for establishing identity of the accused persons as well as the fact that they were on the scene of occurrence at the time of the incident of commission of murder of Aditya Sachdeva. Let us, therefore, advert to the evidence adduced on these aspects in order to ascertain whether this circumstance is firmly established by the prosecution with clear, cogent and admissible evidence. It is seen from the impugned judgment and as noted by us in foregoing paras that the learned Trial Court has relied on the



document which is collectively marked as Exhibit 7 which comprises of the photocopies of the call detail records, photocopies of the customer application forms as well as photocopies of the confirmation letter from Refree and the photocopy of the electricity bill of BSES Rajdhani Power Limited. These documents were used for coming to the conclusion that appellants / accused No.1 Rocky @ Rakesh Ranjan was using the mobile phone bearing No.9818744447 and that mobile phone was found in the same track at the time of the occurrence and it was at the place of occurrence at the time of the incident.

30. The question which falls for consideration is in respect of proof of documents, when this evidence relied by learned Trial Court is in the form of the documentary evidence. The call detail records, customer application form, a bill of consumption of electricity and some Refree form which were all photocopies prepared by photocopying machine and placed on record by the prosecution were considered to be proved by the learned Trial Court by marking those documents collectively as Exhibit 7 through evidence of P.W.9 Chandra Bhanu who was working as a technical expert in the office of the Superintendent of Police, Gaya. He was not the author or custodian of those



documents or the system of computer from which the CDR was generated. As the learned Trial Court has adopted this novel method of holding that photocopies of these documents are proved through evidence of P.W.9 Chandra Bhanu, a police personnel, let us put on record as to what should be the criteria which needs to be satisfied for holding a document as proved. The very first stage is to prove execution of the concerned document and it can be done by adopting the modes prescribed by Section 67 to Section 73 of the Evidence Act, 1872, e.g., the handwriting or signature on the document is required to be proved as that of the concerned witness who may be the author of such document. When attestation of the document is compulsory requirement of law then at least one attesting witness is required to be examined for the purpose of proving execution of such a document. The next stage is to prove the contents of the document either by primary or by secondary evidence and for this purpose provisions of Section 61 to 66 of the Evidence Act are required to be kept in mind. A document is essentially required to be proved by adducing primary evidence but secondary evidence (barring that of an electronic record) can also be given in respect of existence, condition or contents of the document by adhering to the provisions of Section 65 of the



Evidence Act. If electronic record is required to be proved then as mandated by Section 65A of the Evidence Act, provisions of Section 65B of the said Act are required to be followed and no other mode of proving such record is permissible. Section 66 of the Evidence Act requires that for proving the contents of the document referred to in Section 65 of the Evidence Act, the party proposing to prove such documents by secondary evidence is required to give a notice to produce such documents to the party in possession or power over such document. The process of proving the signature or handwriting in a document goes to the genuineness of the document and the party which seeks to prove a particular document has to get the handwriting or signature of the author of such document identified either by the author himself as per provisions of Section 67 of the Evidence Act or this can also be got done through any third person acquainted with such handwriting or signature by taking recourse to the provisions of Section 47 of the Evidence Act. The execution of a document can also be proved through a person in whose presence the document was signed or executed as per provisions of Section 67 and 68 of the Evidence Act or by an expert witness as per provisions of Section 45 of the Evidence Act. If the signatory of the document admits having



signed or executed the document, then proof of such document is dispensed with as per provisions of Section 58 of the Evidence Act. Even the Court itself is empowered to compare the handwriting and signature on the document in question with an admitted or proved documents as prescribed by Section 73 of the Evidence Act. Under certain circumstances enumerated in Section 79 to 90A of the Evidence Act, the Court is entitle to presume that the signature on a document and that the document itself is genuine. Use of presumptive provisions can be seen in these provisions of the Evidence Act. As stated by us, when it is not possible to produce the primary evidence in respect of document, the party is at liberty to produce secondary evidence to prove contents of such documents. It needs to be kept in mind that the proof of contents of a document is totally different from the truth of the contents of the document. The contents of the document must mean only what the document states and not the truth of what the document states. The truthfulness of the contents of the document has to be proved by the personal knowledge only. The witness should be the author of the document sought to be proved and this mode of proof by way of oral evidence is stipulated under Section 59 of the Evidence Act. Keeping in mind these provisions regarding proof of the



document and truthfulness of the contents of the document, let us advert to the evidence adduced by the prosecution on this aspect in the case in hand.

31. The prosecution has pressed in service photo copies of the call detail record, customer application form and other photocopies of certain documents which the learned trial Court presumed to be proved through evidence of a police personnel P.W.9 Chandra Bhanu. Thus, contents of electronic record in the form of the call detail record is thus assumed to be proved by the learned trial Court through evidence of P.W.9 Chandra Bhanu - a police personnel.

32. As envisaged by Section 65B of the Evidence Act, an information contained in an electronic record either printed on a paper or stored, recorded or copied in optical or magnetic media produced by the computers, is a document. However, before treating this printed material or computer output to be a document, conditions prescribed by Section 65B are required to be satisfied. On such conditions being fulfilled, production of the original i.e., the computer or relevant device is not warranted. The conditions prescribed by Section 65A for making the electronic record admissible are condition precedent for accepting the electronic record as evidence before the Court.



Section 65A of the Evidence Act itself lays down such condition. Section 59 of the Evidence Act makes it clear that contents of electronic records cannot be proved by oral evidence. Use of the concerned computers regularly to store or process information for regularly carrying out activities by a person having lawful control over the use of computer, regular feeding of information to the computer in the ordinary course of activities, proper operation of the computer during the relevant period, computer output being in respect of such information which was regularly fed into the computer are some of such conditions prescribed by Section 65B of the Evidence Act. Such electronic evidence is admissible before the Court only and only if a certificate mandated by Sub-section (4) of Section 65B of the Evidence Act is accompanied with such evidence.

33. The learned counsel for the appellants has rightly relied on the judgment of the Hon'ble Supreme Court in **Anvar P.V. Vs. P.K. Basheer and Others** reported in **(2014) 10 SCC 473**, paragraphs 8 to 23 thereof clinches the issue which reads thus:-

“8. 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.”

9. 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.

10. 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.”

11. 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.”



12. 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 subsection 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.”

These are the provisions under the Evidence Act relevant to the issue under discussion.

13. In the Statement of Objects and Reasons to the IT Act, it is stated thus:

“New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business.”

In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The



purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence 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 shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived



was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act;



and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. 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.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A —opinion of Examiner of Electronic



Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to



electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] 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 computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows : (SCC p. 714)

“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 [**Ed.** : Reference is to State v.



Mohd. Afzal, (2003) 71 DRJ 178] 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.”

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 65-B of the Evidence Act. However, it was held that



irrespective of the compliance with the requirements of Section 65-B, 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.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements



under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.”

Keeping in mind this law regarding procedure for admitting electronic record as evidence, let us deal with such evidence in the case in hand.

34. At the outset itself, we must put on record that evidence given by the prosecution in respect of electronic record is far from satisfactory and totally inadmissible. No evidence has been adduced by the prosecution to prove what were the phone numbers of alleged eye witnesses P.W.1 Nasir Hussain, P.W.2 Ayush Agrawal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi as well as those of accused No.1 Rokey @ Rakesh Ranjan



Yadav, accused No.3 Teni Yadav @ Rajiv Kumar and accused No.4 Rajesh Kumar. No efforts were taken by the prosecution to search cellphone numbers of these witnesses as well as those of the accused either from investigating on this aspect or by collecting them from the Telecom Service Providers. No evidence on this point is addressed by the prosecution. P.W. 27 Gauri Shankar Gupta, the Investigating Officer, on this aspect has stated that he had constituted a team to collect the phone numbers. Apart from this, he had also stated that he had interrogated accused No.2 Bindi Yadav @ Bindeshwari Prasad Yadav (deceased accused) and his wife Manorama Devi and had obtained their mobile phone numbers as well as mobile phone numbers of accused No.1 Rokey @ Rakesh Ranjan, accused No.3 Teni Yadav @ Rajiv Kumar and accused No.4 Rajesh Kumar. However, P.W.27 Gauri Shankar Gupta had not clarified which were those mobile phone numbers which he obtained during the course of investigation. He has not stated as to whether he had counter checked correctness of those phone numbers by collecting evidence on this aspect and by confirming those numbers from the Service Provider Company. Statement of deceased accused Bindi Yadav, if any, in that regard during the course of investigation being in the nature of



confession was even otherwise inadmissible. This Investigating Officer has not even deposed that he issued request letter to the service provider telecom company for getting call detail records and tower locations of alleged mobile phones of P.W.1 to P.W.4 as well as those of the accused persons. On the contrary, he merely stated that he had forwarded those documents to the technical branch of the office of the Superintendent of Police. How he had procured this electronic record is not clarified by this witness. Evidence of P.W.27 Gauri Shankar Gupta is conspicuously silent as to who had collected the call detail record, photocopies of customer application form etc. and from which service provider telecom company. Thereafter, he proceeded to depose in respect of this electronic record by stating that all the alleged mobile phones of the prosecution witnesses and the accused persons were on the same road till the incident. This statement of P.W.27 Gauri Shankar Gupta is completely inadmissible as contents of the electronic record are required to be proved in accordance with the provisions of Section 65B of the Evidence Act. P.W. 27 Gauri Shankar Gupta's evidence on this aspect is completely inadmissible and his opinion expressed presumably on the basis of call detail record while in the dock carries no weight. Ultimately, he was a



witness of fact.

35. The learned Trial Court held that the electronic record and other photo copies of some documents are proved by the prosecution through evidence of P.W.9 Chandra Bhanu, a police personal working in the office of the Superintendent of Police. This witness has stated that on 08.05.2016, he received requisition from the Police Station, Rampur, where the crime in question was registered. The original requisition was not produced on record of the learned Trial Court by the prosecution but the learned Trial Court had marked the photocopy thereof as Exhibit-X. This is an unproved document of the prosecution. Though P.W.9 Chandra Bhanu, a police personal was not competent to prove the electronic record in the form of call detail records, tower location and photocopies of other documents, while he was in the witness box the learned Trial Court had exhibited all those photocopies collectively as Exhibit-7. The learned Trial Court proceeded to record statement of this witness about location of mobile phone numbers as per the call detail records. In our considered opinion, this evidence of P.W.9 Chandra Bhanu is not legally admissible. P.W.9 Chandra Bhanu is not an official from the service provider telecom company which maintains a system of



computer wherein the call detail records is stored in huge servers. Printouts of call detail records and other documents taken from computers, servers or from other documents by mechanical process which are at Exhibit-7 collectively are not even certified to be true by the responsible official of the service provider telecom company. The Nodal Officer or other competent officer of the service provider telecom company had not even certified the documents at Exhibit-7 as true copies taken out from the computers/servers etc. Certificate as envisaged by Section 65B of the Evidence Act was not produced with those documents by the prosecution leave apart the further task of summoning the competent officer from the service provider telecom company to adduce evidence for proving such certificate and the contents of such electronic record. Thus, the documents at Exhibit-7 in the form of call detail records and tower locations cannot be looked into as legal evidence and it remained an unproved document. The learned trial court which assumed the CDR as proved has not even cared to undertake scrutiny thereof to record the finding about the accused and the prosecution witnesses being on the place of the incident at the time of the incident. Thus, it cannot be said that the prosecution has proved a fact that mobile phones which were used by the



accused persons as well as mobile phones used by the prosecution witnesses P.W.1 Nasir Hussain, P.W.2 Ayush Agrawal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi were under the same tower covering the spot of the incident at the time of the incident. This circumstance is not established by the prosecution by adducing legal evidence.

36. Similarly, the learned Trial Court had committed serious error of law in reading in evidence photocopies of 'confirmation letter from Refree' as well as an electricity bill issued by BSES Rajdhani Power Limited when these photocopies of the documents were not got proved through the concerned witness after following the mandatory provisions of Section 65 of the Evidence Act regarding adducing secondary evidence of such documents. The procedure adopted by the learned Trial Court in marking these documents as Exhibit-7 collectively with the call detail records through evidence of P.W.9 Chandra Bhanu, an employee of the police department is not in consonance with the relevant provisions of law as discussed in foregoing paras. This witness had no concerned with these documents nor he was author of those documents. Therefore, these documents cannot be read in evidence to infer as to what was the mobile phone number of appellant / accused



No.1 Rokey @ Rakesh Ranjan.

37. The next circumstance relied by the learned trial Court for convicting the appellants is videographed confession of accused No.1 Rocky @ Rakesh Ranjan Yadav as well as appellant-accused No.3 Teni Yadav @ Rajiv Kumar preserved in pen drives. Leave apart the fact that this electronic record i.e., videographed confessions are not proved by following the provisions of Section 65B of the Evidence Act, the learned trial Court had completely lost sight of the provisions of Sections 25 and 26 of the Evidence Act which bars proof of confession made to a police officer by an accused. The learned trial Court ought not to have permitted the prosecution to adduce such legally inadmissible evidence. In this view of the matter, even evidence of P.W.20 Niranjana Kumar Pandit, a police personnel working in the office of the Senior Superintendent of Police who spoken about the recording of the confession of these accused persons is of no use to the prosecution. It needs to mention here that it is not a case of the prosecution that confessional statement of these two accused persons has resulted in any recovery of fact. The learned Trial Court committed error of law by basing conviction on confessions of the accused.



38. Now, let us examine whether the prosecution has established that a license pistol came to be seized from the appellant-accused No.1 Rocky @ Rakesh Ranjan Yadav and that the said pistol is proved to have used in commission of murder of Aditya Sachdeva.

39. In the case in hand, the spot of the incident came to be inspected soon after the incident by a team of Forensic Expert as well as by the Investigator - P.W. 27 Gauri Shankar Gupta. P.W.18 Binod Kumar Pal and P.W. 19 Ram Parpan Ojha, Senior Scientific Assistants, as deposed by them, had inspected the spot of occurrence on 08.05.2016. Their evidence shows that the spot was at the Southern wall of Jail and Sarju Tank near the Guard Post on Police Line Road. As deposed by P.W. 18 Binod Kumar, both vehicles involved in the incident were also inspected by them at the premises of Rampur Police Station. Their evidence shows that they had collected sample of blood from Maruti Swift Car but no significant forensic evidence was found by them on inspecting another car. These two witnesses had also inspected the fire arm. They had given their preliminary report Ext. 14, which is in tune with evidence of these witnesses. Similarly P.W.27 Gauri Shankar Gupta, Investigating Officer has deposed that at 1.15 am of 08.05.2016,



he had visited the spot firstly and thereafter he again visited and inspected the spot of the incident at 6.10 am of 08.05.2016 and prepared sketch map of the spot Ext. 22. Carefully scrutiny of evidence of all these witnesses goes to show that they could not seize fired cartridge cases though according to the prosecution case, at least two shots were fired from the firearm used in the occurrence, one while driving the another car and second when the Maruti Swift Car attempted to escape from the spot. Immediate visit to the spot of the incident and inspection thereat so also prompt inspection of vehicles allegedly involved in the incident has not yielded in recovery of two fired cartridge cases. If those cases would have been recovered by the Investigator or the team of Scientific Expert, then job of the prosecution to match the weapon of offence with the pieces of bullet recovered from the body of the deceased would have been easy. However this evidence is not forthcoming.

40. Importance of a fired cartridge case for marrying the crime bullet with the suspected weapon of offence is of prime importance. It has been taken note of by the Hon'ble Supreme Court in **Kalua - vs- State of U.P.** reported in **AIR 1958 SC 180**. The Supreme Court relied on the work of noted another Kirk and has observed thus in para 8 of the said



Judgment:-

" Kirk in his book "Crime Investigation" at page 346 states: "Fired cases are less often encountered in criminal investigation than are bullets, but when found they are usually of greater significance because they receive at least as clear markings as do bullets, have a greater variety of such markings, and are not ordinarily damaged in firing..... The questions which may be asked as a result of finding such materials are similar to those that require answers when only bullets are located. In the ordinary case, quite definite answers can be given. This is true both of shotgun shells and of cartridge cases from pistols, revolvers, and rifles In general, it is possible to identify a certain firearm as having fired a particular shell or cartridge. It is often possible to identify the type or make of gun which fired it, though in many instances this must be tentative or probable identification only."

After dealing with the marks left by breech-block, firing pin impressions, marks from extractors and ejectors, marks due to expansion, magazine marks and loading mechanism marks, he states.

"Summarizing, the cartridge or shell case usually



carried markings which are quite distinctive of the gun in which the charge is fired, and can be used for positive identification of the latter. These marks arise from a variety of contracts which various parts of the gun, an analysis of which is useful in determining the type of weapon in case no suspected gun is available

Thus, the recovered shell or cartridge case is one of the most useful types of physical evidence which can be found in shooting cases." Soderman and O'Connell in their book "Modern Criminal Investigation" also deal with the subject and they refer to the marks from the fire pin, the extractor, the ejector and the breech-block. After referring to comparison being made of the cartridge or shell fired from a fire-arm for the purpose of test, they state at page 200,

"If they are in the same position in relation to one another and their general appearance is the same, one may conclude that they have been fired from a pistol of the same make. An absolute conclusion about the origin of the shells, however, can be reached only after a photo-micrographic examination of the markings from the breech-block on the rear of the shell....."

"Identification, with the aid of the enlargement, should not prove difficult. The characteristic scratches can be easily seen. A photograph of the



incriminating shell and one of a comparison shell should be pasted side by side on cardboard, and the characteristic marks should be recorded with lines and ciphers, following the same method as that used in the' identification of fingerprints”."

41. Now we will have to see whether the prosecution has proved beyond all reasonable doubt that two pieces of bullet extracted from body of the deceased Aditya were fired from the weapon allegedly seized from accused No. 1 Rakesh Ranjan @ Rockey. P.W. 27 Gauri Shankar Gupta, Investigating Officer has deposed that at 2.30 am of 10.05.2016, he raided one Hot Mix Plant at Bodh Gaya and arrested accused no. 1 Rakesh Ranjan @ Rockey. He further deposed that from this accused, he seized a pistol along with magazines and bullets. This Investigator has proved the seizure memo of these articles Ext. 21B while in the witness box. However when we compare this ocular evidence of P.W. 25 Gupta with contemporaneous Seizure Memo Ext. 21B, then element of doubt creeps in the mind regarding the truthfulness of version of the Investigator. The seizure memo Ext. 21 B prepared by the Investigator is a detailed one. It is mentioning the time and date of seizure as 2.45 am of 10.05.2016. It is mentioned therein that it was prepared in presence of two Panch witnesses who are named



there with their addresses. All details of seized articles including the firearm and its number, details of the Fire Arm License etc. are written therein. Place of seizure is also mentioned in that seizure memo as area of the Hot Mix Plant located under jurisdiction of Village Janpur falling under Police Station Bodh Gaya. However what prevented this Investigator to write the name of person from whom those articles including the firearm were seized is difficult to fathom. In normal course, in such a heinous crime if really the firearm used in the offence was seized from the accused then contemporaneous document in the form of seizure memo written by the Investigator would certainly reflected the name of the accused as a person from whom such seizure was effected. This did not happen. As such it cannot be said with certainty that .380 Pietzo Baretta Pistol was seized by the Investigating Officer on 08.05.2016 while it was in possession of the accused no. 1 Rakesh Ranjan @ Rockey. Evidence of this aspect adduced by the prosecution is weak and infirm. This weakness in evidence assumes importance because all four alleged eye witnesses P.W. 1 Nasir Hussain, P.W. 2 Ayush Agarwal, P.W. 3 Ankit Kumar and P.W. 4 Md. Kaifi have not identified this seized pistol as a firearm used in the subject crime. On the contrary, their evidence that because



of darkness on the spot of the incident they could not identify and recognize the accused seems to be consistent with the defence of the accused because the incident took place sometime after 7.45 pm of that date, even as per prosecution case. There is no evidence regarding availability of the light on the spot for enabling these witnesses to identify the accused and the weapon.

42. As fired cartridge cases were not recovered by the Prosecution, it was the duty of the Investigator to collect and seized the bullet extracted from body of the deceased by taking all precautions to rule out possibility of tampering of this evidence. Ultimately recovered fragmented pieces of bullets were the only piece of available evidence which could establish a fact that the bullet which caused death of Aditya came to be fired from the licenced pistol of accused no. 1 Rakesh Ranjan. However evidence of the Investigator of P.W. 27 Gupta on this aspect is far from satisfactory. Autopsy Surgeon P.W. 12 Dr. Purnendu Singh has stated in his evidence that he found two broken pieces of bullet of size 1.3 cm X 1 cm and 1 cm X 1 cm respectively in the head of deceased Aditya. As per his version, he retrieved those pieces and preserved them in a duly sealed glass containers. As stated by him, that container was then



handed over to the Police. It seems that no documentation of this taking over and handing over took place as there is no such evidence on record. Evidence of P.W. 27 Gupta, Investigating Officer shows that on 09.05.2016 he obtained the Postmortem Report and two pieces of the bullet in sealed condition. He has not spoken about those pieces being kept in the container nor he had spoken about seizing those pieces of bullets by effecting a seizure memo. He has not spoken about resealing the container if any, containing broken pieces of bullets and then keeping it in safe custody of Malkhana of the Police Station. We have noted that the Pistol is shown to have been seized from the Hot Mix Plant of Bodh Gaya on 10.05.2016 vide seizure memo Ext. 21B, by P.W.27 Gupta Investigating Officer. He has not deposed about sealing the pistol by applying the wax seal on the container in which it was kept. Panch witnesses to this recovery are not examined by the Prosecution. In the light of this discrepant evidence it is not possible to rule out tampering of evidence concerning these material object by using the pistol subsequently. The question is not whether there is tampering but what matters is possibility of tampering the evidence and that possibility is not ruled out by the prosecution. Moreover, these objects are shown to have been



delivered to the Forensic Science Laboratory much subsequently, i.e., on 14.05.2016 as deposed by P.W. 23 Dilip Kumar, Senior Scientist, Fire Arms with the Forensic Science Laboratory, Patna. There is no positive evidence to show that right from their seizure till handing them to the FSL these material objects such as pistol and pieces of bullets were in sealed condition and were kept at the safe custody of Malkhana of the Police Station. Thus evidence adduced by the prosecution on this aspect is also laconic and discrepant.

43. Let us now examine whether the prosecution has proved that fragmented pieces of the 'Crime' bullet recovered from the body of the deceased was fired from the seized pistol. On behalf of the appellants, reliance is placed on two celebrated books on Ballistic Science, namely, 'The Identification of Firearms And Forensic Ballistics' by Major Sir Gerald Burrard and 'Firearms, Investigation, Identification And Evidence' authored by J. S. Hatcher. Both these authors are authorities in the field of Ballistic Science. We have examined their work. Chapter VII from the book authored by Major Sir Gerald Burrard deals with identification of firearms by means of fired bullets. It points out that no two barrels are microscopically identical and surfaces of each bore possesses individual and



characteristic markings. When a bullet is fired from the rifled barrel, it becomes engraved by the rifling and this engraving will vary in its minutes details with every identical barrel. As such engraving on a bullet fired from one barrel will be different from that on a similar bullet fired from the another barrel. Conversely the engraving on bullets fired from the same barrel will be the same. The task of identification depends on matching the engraving on two or more fired bullets in exactly same way. Perusal of this Chapter further makes it clear that there are various types of rifling i.e. internal spiral grooves inside the barrel for the purpose of spin stabilizing the bullet. Most common is six grooves, right hand twist, narrow lands and broad grooves. If two fired bullets are to be examined with a view to ascertaining whether both have been fired from the some weapon, firstly general type of engraving is required to be examined and the next step is to examine the character of engraving- heavy or light. Chapter VII further cautions the reader that microscope is essential for comparing striations which are finer. There is astonishing differences seen on the bullets fired from the same barrel which can be due to the sliding imprint.

44. Keeping in mind the work of celebrity author, as



noted above, let us examine whether in tune with the opinion of the ballistic expert, the prosecution is successful in proving a fact that two deformed pieces of bullets found in the body of the victim were fired from seized 0.380 beretta pistol. Seized articles including the pistol, bullets and pieces of bullets retrieved from the body of the victim were sent for ballistic report to the Forensic Science Laboratory. P.W.23 Dilip Kumar, Senior Scientist, Firearm, of the Forensic Science Laboratory, Patna, had examined those articles with the help of Senior Scientific Assistants, Vinay Kumar, Nayan Ojha and Ms. Kiran Bala Sinha. Accordingly, a ballistic report at Ext.13 was produced before the court which is proved by P.W.23 Dilip Kumar by referring it in his evidence as the report which was prepared by them. Perusal of evidence of this witness makes it clear that he has deposed before the court and the learned trial court has recorded his evidence in a most casual manner. After introductory para in his deposition regarding receipt of the seized articles, formation of the team for examination of those articles, arrangement of the photographer named Narad Prasad, this witness straightway stated that on 27.05.2016, he prepared final report which is counter signed by Umesh Kumar Sinha, Director of the Forensic Science Laboratory. The learned trial



court then marked that report as Ext.13 and, thereafter, as seen from the deposition of this witness, the learned trial court had written the entire F.S.L. report (Ext.13) as if it is as a part of the deposition of P.W.23 Dilip Kumar. In other words, the F.S.L. report was reproduced ad verbatim as deposition of this witness including all the irrelevant parts thereof. In a very mechanical manner, the entire F.S.L. reports at Ext.13 is shown as a deposition of this witness before the court by writing it down as oral evidence of P.W. 23 Dilip Kumar. The reproduction of this report is without application of mind to the extent that in chief examination of this witness, formal part of the F.S.L. report such as 'read and found correct', 'opinion on other points are being furnished separately', 'endorsement of S.H.O., M.M.C., Gaya on an envelope marked 'B' ' etc. is written as the chief examination of this expert witness. This casual manner in which evidence is shown to have been adduced by the witness and recorded by the learned trial court puts a question mark on sanctity of the version of this Ballistic Expert and casual attitude shown by the witness reflects on trustworthiness of his evidence.

45. P.W.23 Dilip Kumar further deposed that two bullets from 19 seized bullets came to be test fired from the



seized 0.380 Beretta pistol and shells and fired bullets were marked separately as SC1(A), SC2 (A) and BC1(A) and BC2 (A). If the F.S.L. report which is reproduced in evidence of this witness is ignored then it will reveal that this witness has not made any statement while in the witness box, during the course of his chief examination as to what examination was conducted by him to marry the extracted deformed parts of bullets from the dead body with the seized suspect weapon, i.e., 0.380 Baretta pistol. Chief examination of P.W.23 Dilip Kumar is not containing any material together with the reasons which induced him to come to a conclusion that retrieved two deformed pieces of bullets were fired from the pistol of Beretta make allegedly sized from the area of Hot Mixed Plant of Bodh Gaya vide seizure memo Ext. 21B. This witness, in his entire chief examination, if the reproduced F.S.L. report in his deposition, is ignored, has not tendered any data or material nor explained about any method adopted by him by which he formed his conclusion that two pieces of bullets forwarded to the F.S.L. are of the same bullets which was fired at the fateful night from 0.380 Berreta pistol leading to death of Aditya Sachdeva.

46. Be that as it may, let us revert to the material elicited from the cross examination of this Ballistic Expert



P.W.23 Dilip Kumar. In order to ascertain whether he is really an expert in the field of ballistics, he was questioned as to whether he has read the books authored by celebrity authors Major Sir Gerald Burrard titled as “The Identification of firearms and Forensic Ballistics as well as by J.S. Hatcher titled as “Firearms, Investigation, Identification and Evidence”. This witness answered in negative. He was not in a position to tell as to how many pistols were examined by him till the date of giving evidence before the court. In his chief examination also he has not given any material to demonstrate that he is an expert in the Ballistic Science. He has not even stated his professional qualification which makes him Ballistic Expert. P.W.23 Dilip Kumar has stated in his cross examination that he is unable to tell width and depth of grooves. He was unable to tell the length of grooves and lands. He accepted the fact that he had not measured width of lands and is unable to tell at what distance lands and grooves were placed in the barrel of the pistol. Having accepted all these facts, we are unable to endorse the opinion of this expert witness reflected in the ballistic report to the effect that the exhibits marked D-1 and D-2 are parts of same bullets that was fired from the firearm marked ‘A’ i.e., seized 0.380 Beretta pistol, as correct and can be accepted to



hold this fact 'proved'. At this juncture, we reiterate that, as noted by us from Chapter-VII of the book 'The Identification of Firearms and Forensic Ballistics', by Major Sir Gerald Burrard, a pistol with six grooves and right hand twist are most common. Similar observation can be found from the book 'Firearms, Investigation, Identification and Evidence' authored by J.S. Hatcher, wherein in Appendix-2, the author has observed that pistols of right hand twist and six grooves are most popular of all and are manufactured by so many manufacturers including Berreta. In this view of the matter, unless and until the Ballistic Expert comes up with details of grooves and lands, the width and depth of grooves, no opinion can be given as to the fact that the test fired bullets and two deformed pieces of a single bullet were fired from the same pistol i.e., Article- 'A'-0.380 Berreta pistol.

47. P.W.23 Dilip Kumar has rightly stated that striation marks inside the barrel of firearm are produced at the time when the barrel is grounded. It needs to mention here that striations are tiny grooves, scratch or channel inside the barrel of a firearm caused by grounding. Comparison of striations on the test fired bullets as well as the bullet involved in the crime is one of the mode by which identity of a firearm can be



established as a firearm involved in the crime. P.W.23 Dilip Kumar while in his cross examination has stated that he had taken photographs of microscopic examination of the weapon and those photographs are available in his office. He has admitted that those microscopic photographs are not produced by him before the court. Perusal of the F.S.L. report makes it clear that, the fact that while examining the barrel of the seized Pistol – Article ‘A’, microscopic photographs thereof were taken is not mentioned therein. The prosecution ought to have placed on record those microscopic photographs, if any, taken during the course of examination of the weapon and two deformed parts of bullets in order to enable the court to compare striation marks thereon for fixing identity of seized 0.380 Beretta pistol (Article A) as weapon of the crime. This was not done by the prosecution for the reasons known to it.

48. In a similar way, while in cross examination P.W.23 Dilip Kumar has deposed that weight of lead core of the bullet was 4.0125 grams whereas weight of deformed copper jacket of the bullet retrieved from the body of the deceased was 1.276 grams. In the next breath, this Ballistic Expert has stated that he himself had not actually weighed the two deformed pieces of bullets. The prosecution has not examined the



Scientist who had weighed those parts of bullets.

49. It is well settled that opinion of an expert does not amount to substantive evidence. The expert is required to place the data before the court and it is for the court to come to the final conclusion as to whether such opinion is correct or not. As noted by us in foregoing paragraphs, no data has been furnished by P.W.23 Dilip Kumar before the court to verify whether his opinion to the effect that the seized firearms Article 'A' is the firearm from which deformed parts of bullets were fired at the deceased causing his death. At this juncture, it would not be out of place to mention the observations of the Hon'ble Supreme Court found in paragraphs 14, 15 and 17 of the Judgment in **Ramesh Chandra Agrawal V. Regency Hospital Ltd. and others** reported in **AIR 2010 Supreme Court 806**. Those read thus:

“14. It is not the province of the expert to act as Judge or Jury. It is stated in *Titli v. Jones* (AIR 1934 All 237) that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

15. An expert is not a witness of fact and his



evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and others) [Criminal Appeal Nos. 1191-1194 of 2005 along with Civil Appeal No. 1727 of 2007, decided on 7.8.2009].

17. In the Article “Relevancy of Expert’s Opinion” it has been opined that the value of expert opinion rest on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross-checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The



same is clear from following inference: “Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.”

50. Similar are the observations of the Division Bench of this Court in **State of Bihar Versus Shamshe Alam @ Md. Shamse Alam** reported in **2016(1) PLJR 590**. Paragraph 60 thereof reads thus:

“60. Opinion of the Expert is relevant under Section 45 of the Evidence Act. Expert is not a witness of fact. His evidence is really of an advisory character. The duty of expert witness is to furnish to the Court the necessary scientific criteria, all the materials together with reasons which induce him to come to the conclusion so as to enable the Judge to form his independent judgment by the application of the criteria to the facts found so as to test the conclusion arrived by the Expert. The scientific opinion if intelligible, convincing and tested becomes a factor and often an important factor for considering the other evidence of the case. The credibility of the expert witness depends on the scientific data, materials and the reasons which he has furnished in support of the conclusion. Reference in this



connection may be made to the judgment of the Supreme Court in the case of State of H.P. Vs. Jai Lal and others (Supra) and Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. & Ors. (Supra).

51. In the matter of **the State of Gujarat Vs. Adam Fateh Mohmed Umatiya and others** reported in **1971 SCC (Cri) 381**, the Supreme Court has observed that the evidence of identification unsupported by photograph is nothing more than an expression of opinion. Such evidence does not establish that test cartridges and empty cartridges were fired from the same weapon or that the misfired cartridge was fired from the same weapon. The bulj marks on test cartridges and bulj marks on the empty cartridges were similar but not the same, cannot establish that the empty cartridges were fired from the same weapon. The bulj marks on the empty cartridges were of the shape of of an eye. The expert witness did not take composite photograph of the empty cartridges superimposed by the test cartridges. The photographs taken were not in the same condition of light. If identification marks were different at the face of the cartridge that would show that they were not fired from the same weapon, the evidence of the Expert in absence of the photograph cannot be



relied upon. These observations of the Supreme Court applies with full force to the case in hand.

52. We reiterate that for want of supply of data and reasons in support of the conclusion recorded by P.W.23 Dilip Kumar in the F.S.L. report at Ext.13, we are unable to endorse the said opinion so reflected in the F.S.L. as correct. Needless to mention again that this expert has not spoken about the process by which he had reached the conclusion expressed in the F.S.L. report while adducing evidence before the learned trial court. Evidence of this Officer from the F.S.L. is not reliable or trustworthy. Thus, we are of the considered opinion that the prosecution has failed to establish that retrieved parts of bullets from the body of the deceased were of the bullet which was fired from 0.380 Pietro Beretta pistol (Article A) which was seized during the course of investigation vide seizure memo Ext.21B from the Hot Mixed Plant area of Bodh Gaya. Thus, this circumstance is also not established by the prosecution by adducing clinching evidence.

53. One more factor casts a shadow of doubt in the prosecution case. P.W.26 Akash Sachdeva, elder brother of the deceased, had lodged the FIR Ext. 16 of the subject crime which has resulted in registration of the Crime No. 130/2016



at the Police Station Rampur. However, perusal of evidence of P.W.26 Akash Sachdeva creates a reasonable doubt in the case of prosecution as to whether the FIR at Exhibit-16 proved by him is really the first version of the prosecution case in respect of commission of cognizable offence. P.W.26 Akash Sachdeva in his evidence before the Court has stated that in pursuant to the telephonic information of the incident, he and his relatives had been to the Anugrah Medical College and Hospital, Gaya, where all four friends of deceased Aditya viz. P.W.1 to P.W.4 were present. P.W.26 Akash Sachdeva testified that they all disclosed the mode and manner of happening of the incident to him and his relatives. He further stated that at the time when he along with his other relatives reached the Anugrah Medical College and Hospital, Gaya, police were already present thereat. As per his evidence appearing in chief examination itself, after hearing from P.W.1 to P.W.4 about the incident, police recorded his statement and he had disclosed all what he had heard from P.W.1 to P.W.4 to the police while recording his statement to the police. As deposed by P.W.26 Akash Sachdeva thereafter Gauri Shankar Gupta (P.W.27) had also recorded his statement and that statement was read over to him and as he found the contents thereof as correct, he



signed that statement. He further stated that thereafter all four friends of deceased Aditya, namely, P.W.1 Nasir Hussain, P.W.2 Ayush Agarwal, P.W.3 Ankit Kumar and P.W.4 Md. Kaifi Azmi had also signed that statement. While in the witness box, P.W.26 Akash Sachdeva identified that second statement given to him to police as his FIR containing his signature as well as signatures of P.W.1 to P.W.4 and that is how the FIR (Exhibit-16) was considered as proved by the learned Trial Court. However, evidence of P.W.26 Akash Sachdeva is clear on the aspect of his reporting of commission of cognizable offence to the police first in the point of time and even prior to his FIR at Ext. 16. That statement of P.W.26 Akash Sachdeva recorded by police initially first in point of time at the hospital itself is suppressed by the prosecution and it is never brought on record. In fact, that statement of P.W.26 Akash Sachdeva communicating commission of cognizable offence to the police was first in point of time and ought to have been considered and treated as the FIR of the subject crime. The defence had cross-examined P.W.27 Gauri Shankar Gupta on this aspect but he has shown ignorance on his aspect. He stated in his cross-examination that he is not knowing as to whether any police officer from the police



station located at the said hospital had recorded the FIR lodged by P.W.26 Akash Sachdeva or not. He further stated that during the course of investigation of this crime by him, he had not received any FIR of this crime recorded by the police station attached to the said hospital. It is worthwhile to note that this Investigator is not denying recording of such statement of P.W.26 Akash Sachdeva at the hospital but is feigning ignorance about it. It hardly needs to mention that the whole unwarnish truth is required to be placed before the Court by the prosecution and in the case in hand the first statement of P.W.26 Akash Sachdeva recorded by the police at the Anugrah Medical College and Hospital, Gaya, is not forthcoming. This fact coupled with the fact that all alleged eyewitnesses are refusing to identify the accused persons with a reason that at the time of the incident, there was darkness on the spot of the incident and as such, they could not see the assailant; assumes over bearing importance. A lurking doubt creeps in the judicial mind that the first statement of P.W.26 Akash might have been suppressed as it might not be containing names of the assailants. This aspect casts a serious shadow of doubt on the prosecution case and the possibility of bolstering of it subsequently by recording another statement



as the FIR is not ruled out by the prosecution.

54. Apart from this evidence, there is no evidence worth mentioning adduced by the prosecution in the instant case to connect the accused to the crime in question. Clothes of deceased Aditya and injured P.W.1 Nasir Hussain were found to be stained with blood but evidence on this aspect in no way incriminates the accused in the crime in question. Inspection of motor vehicles involved in the accident by P.W.23 Dilip Kumar, son of Mahesh Prasad cannot in any manner constitute an incriminating evidence against the accused persons. Even if it is considered that the seized pistol (Article A) was the licensed pistol of accused No.1 Rocky @ Rakesh Ranjan then also the prosecution has failed to establish a fact that the killer bullet was fired from the said pistol and more particularly by appellant/accused No.1 Rocky @ Rakesh Ranjan. There is nothing on record to infer use of pistol – Exhibit A by the said accused, in the subject incident. In a similar way, other accused persons are also not identified to be perpetrator of the crime in question. Their role in the murder of the deceased or any overt act played by them during the course of that transaction is not established by the prosecution by adducing clear, cogent and trustworthy



evidence in that regard.

55. Applying the yardstick of a prudent man and considering the entire materials from the records and proceedings, it is not possible to conclude that those were the appellants/convicted accused before this Court who had committed the subject crime and none else. Materials on record, through the logical inference does not probablize the contingency that except the accused none else had committed the crime in question.

56. In the light of this discussion, the appellants/convicted accused are certainly entitled for benefit of doubt as the prosecution has failed to establish their guilt by adducing clear, cogent, trustworthy and clinching evidence. In the result, all these appeals deserve to be allowed and are allowed with the following orders:

I. The appeals are allowed.

II. The impugned judgment and order dated 31.08.2017 and 06.09.2017 respectively passed in the Sessions Trial No.292 of 2016 (SJ) /57 of 2017 between the parties by the learned Additional Sessions Judge-I, Gaya, thereby convicting the appellants/convicted accused and sentencing them accordingly, is quashed and set aside.



III. All the appellants are acquitted of the charges leveled against them and held to be proved against them by the learned trial Court. They be set at liberty forthwith if not required in any other case.

IV. The fine amount, if any, paid by them should be refunded to them.

(A. M. Badar, J)

(Harish Kumar, J)

P.S./Mkr./Bhardwaj

AFR/NAFR	AFR
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