

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 108 of 2018

Bechuram Bag

-Vs-

The State of West Bengal

For the Appellant	:	Mr. Subir Ganguly, Adv. Mr. Sumanta Ganguly, Adv. Mr. D. Sardar, Adv.
For the State	:	Mr. Sudip Ghosh, Adv. Mr. Apurba Kumar Datta, Adv. Mr. Bitasok Banerjee, Adv.
Heard on	:	04.04.2022, 08.04.2022, 12.04.2022, 20.04.2022, 17.05.2022, 06.01.2023, & 19.01.2023.
Judgment on	:	22.02.2023

Joymalya Bagchi, J.:-

1. This appeal is directed against the judgment and order dated 20.12.2017 and 21.12.2017 passed by learned Additional Sessions Judge, Fast Track Court, Serampore, in Sessions Trial No. 05 of 2013 arising out of Sessions Case no. 205 of 2012 convicting the appellant for commission of offences punishable under sections 302/376/201 of the Indian Penal Code and sentencing him to suffer rigorous

imprisonment for life and also to pay a fine of Rs.10,000/, in default, to suffer simple imprisonment for a further period of two years for the offence punishable under section 302 IPC and to suffer rigorous imprisonment for seven years and also to pay a fine of Rs. 5000/, in default, to suffer simple imprisonment for a further period of two years for the offence punishable under section 376 IPC and to suffer rigorous imprisonment for a period of five years and also to pay a fine of Rs. 2,000/-, in default, to suffer simple imprisonment for a further period of one year for the offence punishable under section 201 IPC. All the sentences to run concurrently.

Prosecution case:-

2. The victim Keya was a 22-year old girl. On 03.01.2012 around 3:30 PM she left her residence. She told her mother she is going to Teliamore. Till 7:00 PM she did not return home. This disturbed her parents and other relations. They started searching for Keya. Around 7:00 PM her paternal aunt Ashima Patra (P.W. 17) received a phone call. A male voice told her he had married Mana (Keya's nickname) and they were residing at Santipur. On the next day i.e. 04.01.2012, father of Keya (P.W. 13) lodged missing diary.

3. On 05.01.2012 around 4/4:30 PM one Kesto Malick (P.W. 1), a resident of Baidyabati Chawk went to wash himself at a big pond situated beside Bank Colony. He found the dead body of an unknown girl floating in the pond. She was wearing only a *kameez* and a panty.

He noticed a deep wound on her neck. He lodged written complaint at Serampore Police Station which was scribed by one Soumen Ghosh (P.W. 3). This resulted in registration of Serampore Police Station case no. 07/12 dated 05.01.2012 under sections 302/201/34 IPC against unknown person.

4. On 07.01.2012 Haladhar Patra (P.W. 13) read a news item regarding recovery of dead body of an unknown female. He along with others went to Sheoraphuli Phari. On seeing the photograph he identified the body as that of his daughter. Thereafter, he identified the body of his daughter at the morgue. Post mortem was conducted over the body by P.W. 25, Dr. Debaprasad Ghosh. In addition to the cut injury on her throat, post mortem doctor noted injuries in the private parts. He opined victim had been subjected to forcible sexual assault/rape and was murdered.

5. In the course of investigation, Debanjan Bhattacharjee, the investigating officer (P.W. 26) interrogated the relations as well as one Rimpa Patra (P.W. 6), friend of the deceased. It transpired that appellant was working as a mason in the house of Haladhar and his relations. Keya, the deceased, fell in love with the appellant. Appellant had suppressed that he was a married man and had a daughter.

6. On suspicion, appellant was arrested in the case on 10.01.2012. On 12.01.2012 he made a disclosure statement (Exhibit 20). Pursuant to the disclosure statement, the certificate of the

deceased, her purse, handkerchief and a plastic packet were recovered. On 13.01.2012, appellant made another disclosure statement (Exhibit 21). Pursuant thereto, the weapon of offence *katari* and cardigan of the deceased were also recovered. FSL report (Exhibit 22) showed there was blood on the *katari* but its origin could not be detected. Call Detail Records (CDRs) of mobile Nos. 8017481635 (standing in the name of Nilima Patra, mother of the deceased) and 9051738821 (standing in the name of the appellant) were collected. Subscriber Detail Records (SDRs) Exhibits 19, 19/1 show there were a number of telephonic conversations between the aforesaid numbers. On 03.01.2012 two phone calls were made from the mobile phone of Nilima Patra to that of the appellant around 16:03 hours and 16:08 hours and a phone call was made from the mobile number of the appellant to that of Nilima Patra at 17:14 hours. No further phone call was made or received on the number of Nilima Patra. Base Transceiver Station (BTS) of both the mobile phones were same when the aforesaid phone calls were made.

7. Charge-sheet was filed against the appellant and charges were framed under sections 302/201/376 IPC. Appellant pleaded not guilty and claimed to be tried.

8. In the course of trial, prosecution examined 26 witnesses. Number of documents including the SDRs and CDRs of the aforesaid mobile numbers were exhibited.

9. In the course of arguments, appellant raised objection to the admissibility of the SDRs i.e. electronic records without proof of certificate under section 65(4) of the Evidence Act. Overruling such objection, the trial Judge upon considering the entire evidence on record including the electronic records came to a finding of guilt against the appellant. Hence, the present appeal.

Prosecution evidence:-

10. To prove its case the prosecution has led the following evidence:-

(i) Relations:-

11. P.W. 5, Kamalesh Patra is the brother of the victim. On 03.01.2012, he was not at his residence when Keya left. He returned around 7:30 PM and heard about the incident from his mother. He rang his sister's mobile number which was found switched off. He stated that the mobile number used by his sister stood in the name of his mother. He further deposed he heard that his Jathaima i.e. Ashima Patra (P.W. 17) had received a phone call where a person in a male voice stated he had married Mana i.e. Keya and were residing at Santipur. On the next day, he lodged missing diary. A police officer from Chanditala Police Station made enquiry into the matter. Upon enquiry the officer told them that the phone call had come from a public telephone booth at Baidyabati station area.

12. He further deposed one Satyam Chowdhury @ Jhantu (P.W. 7) a mason used to reside at Baidyabati and had done marble flooring in their house three years ago. Appellant was a labour employed under Jhantu. He had worked at their house. Keya used to talk with the appellant regularly over phone. He suspected Keya and the appellant had developed a relationship. He informed the police officer of Chanditala Police Station about such fact. Rimpa, a friend of Keya told him that Keya had developed affection for the appellant who was a married man with a daughter. Appellant knew the nickname of Keya as Mana. He also knew the telephone number of his Jathaima, Ashima Patra. On 07.01.2012, they read a news item that an unidentified dead body of a female was recovered from Baidyabati area. They went to Sheoraphuli Police Station and identified the body.

13. Haladhar and Nilima, parents of the deceased, were examined as P.Ws. 13 and 18 respectively. P.W. 18 was present in the house on 03.01.2012 when Keya went out. She was wearing a Ghee coloured Churidar and a red-orange and black coloured sweater. She told her mother she was going to Teliamore. She did not return. They searched for her in vain. Around 9:00 PM her sister-in-law, Ashima Patra (P.W. 17) disclosed about the phone call. On the next morning her husband lodged general diary. She further deposed appellant worked in their house for three months. He used to call her daughter over mobile. She suspected that he had killed her daughter.

14. Haladhar Patra (P.W. 13) corroborated his son Kamalesh (P.W. 5) and his wife Nilima Patra (P.W. 18). He also suspected appellant had murdered his daughter.

15. P.W. 16, Biswajit Chalki is the maternal uncle. He also deposed that Keya was missing from 03.01.2012. In the night they searched for Keya. Ashima Patra told them she received a phone call wherein a male voice claimed he had married Keya and was staying at Santipur. He tried to ring back but the phone was switched off.

16. P.W. 17, Ashima Patra stated on 03.01.2012 she saw Keya going out. She was wearing ghee coloured churidar and an orange white coloured sweater. She stated she was going to Teliamore. She did not return. At 9:30 PM she received a phone call in a male voice stating "*Ami Mana ke biye korechi. Amra bhalo achi bole deben*". (*I have married Mana. We are happy. Please convey this news*). Appellant used to work in the house of her *devar* Haladhar and also in her house for six months as a mason. She informed Haladhar about the phone call.

17. P.W. 14, Shyam Sundar Patra is a cousin of Keya. He stated he saw Keya at Teliamore around 4:30/5:00 PM. He stated she had come to eat *fuchka* (snacks).

(ii) Friends and neighbour:-

18. P.W. 6, Rimpa Patra is a friend of Keya. She deposed Keya was missing. Subsequently, reading the newspaper she came to know Keya had died. She further deposed she had told the investigating officer that

she came to know from Keya that a love affair had developed between Keya and the appellant. She also disclosed such fact to police. She had not divulged such fact to the parents of Keya earlier.

19. P.W. 15, Bibhas Sur a neighbour has corroborated P.W. 14, Shyam Sundar Patra, cousin of Keya that she saw her eating *fuchka* (snacks) at Teliamore around 4:30/5:00 PM on 03.01.2012.

(iii) Employer and co-workers of appellant:-

20. P.W. 7, Satyam Chowdhury @ Jhantu was the employer of the appellant. He deposed he worked at the house of Haladhar for setting marble. He provided masons. Appellant was one of them. The work went on for one and half months. They became familiar with the family members of Haladhar. He also worked at the house of Haladhar's elder brother. On 02.01.2012, there was celebration in his house in relation to his son's birthday. All the workers were invited. On the next day i.e. 03.01.2012 appellant and other workers also came to his house to attend a feast. They left around 2:00 PM. Appellant again returned to his house at 9/9:15 PM and left after 15 minutes. On the next day, appellant went to work at Janai. Janai is situated at a distance of 4-5 kilometers from the village of Haladhar. On that day, he received news from Haladhar that his daughter was missing and he suspected that she had left with the appellant. He went to Janai and found appellant was working there. He informed Haladhar accordingly.

21. P.W. 12, Chandranath Hazra is a co-worker. He corroborated P.W. 7 that appellant worked under him. On 03.01.2012, they had gone to P.W. 7's residence for a feast and left his residence around 2:30 PM.

(iv) Witnesses to recovery of dead body and registration of F.I.R.:-

22. P.W. 1, Kesto Malick deposed on 05.01.2012 at around 4/4:30 PM he had gone to wash his hands and feet at a big pond situated beside the Bank Colony. He saw the dead body of an unknown female in the pond. He found she was wearing only a *kameez* and a panty. There was a cut mark on her throat. He lodged written complaint (Exhibit – 1) which was scribed by Soumen Ghosh. He was a signatory to the inquest prepared by police.

23. P.W. 3, Soumen Ghosh is the scribe though he is declared hostile. He proved the written complaint (Exhibit – 1).

24. P.W. 8, Amit Ghosh is the owner of the pond from where the body was recovered.

25. P.W. 20, Tathagata Pandey was posted as I.C., Serampore Police Station. He received written complaint from P.W. 1.

(v) Medical witness:-

26. P.W. 25, Debaprasad Ghosh is the post mortem doctor. He examined the body of the deceased on 06.01.2012. He held post mortem examination on 06.01.2012. He found the following injuries:-

- (1) *“Two separate incised wounds in left shoulder No. (a) 3” X 2” X 1” (b) 2” X 1” X 1”;*
- (2) *Another incised wound in right palm 4” X 1” X 1”;*

- (3) *One Big cut throat wound in neck below the laryngeal prominence – 14” X 4” X extending upto deeper structure. The wound extends from one sterno – cleido mastoid to another. Internal Jugular vein, carotid artery and vagus nerve of both sides injured. Tracheal rings cut. Injury to larynx and thyroid cartilage;*
- (4) *Bruise in abdomen, medial part of thigh;*
- (5) *Crescentic shape nail mark abrasion in thigh, abdomen and inguinal area and injury No. - 1 and 2 are suggestive of defence wound. Brain, lungs, heart, kidney, liver-pale, stomach – empty. Genital findings – blood in vagina, injury to cervix of uterus, injury to vaginal wall and fourchette. These features are suggestive of sexual assault.”*

He deposed the time of death was within 36 hours of autopsy. He opined cause of death was shock due to haemorrhage arising from cut throat injury, ante mortem and homicidal in nature. He opined injury No. 3 in the report was caused by a sharp cutting weapon.

(vi) Police and other witnesses:-

27. P.W. 26, Debanjan Bhattacharjee is the investigating officer. He deposed after receiving F.I.R. he went to Baidyabati Bank Colony. He held inquest and took photograph of the deceased. He sent the body for post mortem examination. He proved the inquest report (Exhibit – 2/2). He prepared rough sketch map with index. He examined the owner of the pond. P.W. 4, Constable Dibeyendu Chaklanabish collected the wearing apparels and other body parts of the deceased from post mortem doctor. P.W. 2, A.S.I. Debashis Banerjee seized the said articles. On 07.01.2012 Kamalesh, brother of the deceased came to the police station. He stated he had made general diary at Chanditala Police

Station being G.D. Entry No. 198 dated 04.01.2012. He identified the wearing apparels. Thereafter, body of the deceased was handed over to her brother.

28. In the course of investigation, he arrested the appellant on 10.01.2012. On 12.01.2012, appellant made a disclosure statement (Exhibit – 20) leading to the recovery of certificates, purse and handkerchief of the deceased. Recovery was made in the presence of local witnesses, namely, P.Ws. 9, 10 and 11 and a police officer, P.W. 19. On the next day, appellant made another disclosure statement (Exhibit – 21) resulting in the recovery of a *katari* and cardigan of the deceased. Recovery was made in presence of a police officer, P.W. 21 and independent witnesses, P.Ws. 22 and 23.

29. P.W. 24, Mohan Karmakar deposed police had brought the appellant to his shop. Appellant stated he had sharpened the *katari* in his shop.

30. P.W. 26, investigating officer also obtained CDRs and SDRs with regard to mobile Nos. 8017481635 and 9051738821. CDRs of the mobile phones were exhibited as Exhibits – 19, 19/1. He opined from the CDRs it appears that the cell tower location of the two phones were the same. Hence, appellant and the deceased were at the same place. He collected FSL report and submitted charge-sheet.

Principles governing cases based on circumstantial evidence:-

31. The prosecution case is based on circumstantial evidence. In ***Sharad Birdhichand Sarda vs. State of Maharashtra***¹ the Apex Court enunciated five golden principles governing proof in cases involving circumstantial evidence as follows:-

“153. ... (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

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

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

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

32. Let me examine whether the prosecution has been able to discharge the onus as per the parameters laid down in ***Sarda*** (supra).

a) Last seen together:-

33. The main plank of the prosecution case is that around 5:00 PM on 03.01.2012 the appellant met Keya. Thereafter, she had been murdered. To prove this circumstance, the prosecution case has essentially relied on electronic records i.e. CDRs of the mobile Nos. 8017481635 and 9051738821, SDRs of the said mobile numbers were also placed on record. In addition thereto, prosecution also relied on the

¹ (1984) 4 SCC 116

oral evidence of P.W. 5, brother of Keya that mobile No. 8017481635 which stood in the name of her mother was used by Keya.

34. P.W. 26 investigating officer deposed upon obtaining permission from Superintendent of Police, he had obtained the SDRs and CDRs of the said mobile numbers. Referring to the CDRs he deposed on three occasions conversation took place between the appellant and Keya. From the tower location, it reveals they were at the same place. Admittedly, no certificate under section 65(4) of the Evidence Act was placed before the Court. During trial, this issue was raised on behalf of the defence. Trial Judge negated the argument with reference to the responses made by the appellant during his examination under section 313 Cr.P.C. He also held as defence did not put any objection when CDRs and SDRs were exhibited the appellant has “virtually admitted”, he had made conversations with the user of the other phone.

35. I have gone through the answers given by the appellant in his examination under section 313 Cr.P.C. Relevant questions and his responses are as follows:-

“Q. This witness further deposed that her sister had a Vodafone number which was issued in the name of his mother, Nilima Patra and that they obtained call details of last five months and on seeing the said call details they found that except three numbers to which calls were made from said mobile used by his sister was the number of your mobile phone. What would you say?”

A. As I worked in the house of Haladhar Patra I used to talk to the owner of that house concerning worked or information relating to new work. But, I never called Keya Patra over telephone at any point of time.

Q. He further deposed that on 14.01.2012 he collected S.D.R. and C.D.R. of mobile phone No. 8017481365 & 9051738821 and came to learn that the first number belongs to one Nilima Patra, jathaima of Keya Patra and the second number belongs to you and that on three occasions conversations were made between you and Keya Patra and when the last call is made the tower location of both the cell phones were same which means both the persons were at the same place. Will you say anything on this?

A. I have got nothing to say.”

36. Responses of the appellant to the aforesaid questions by no stretch of imagination can be said to be an admission that he had telephonic conversations with the victim earlier on the fateful day. He merely stated he had worked at the house of Haladhar and used to talk to the owner of the house concerning work or information regarding new work. With regard to the questions put to him regarding the SDR and CDR, he replied he had nothing to say.

37. Admission of a fact particularly in a criminal trial must be clear and unequivocal. An evasive reply during examination under section 313 Cr.P.C. cannot be construed to be an admission of an incriminating fact which tends to implicate the appellant. In fact, an accused does not render himself vulnerable by refusing or evading to answer a question during examination under section 313 Cr.P.C. Only when the onus shifts on the accused to explain circumstances within his “special knowledge” and if he fails to discharge such onus or gives a false explanation during such examination, his conduct may be treated as an additional circumstance supporting the prosecution case. No

such situation arises in the present case. The burden wholly lay with the prosecution to establish that the appellant and the deceased were together on the fateful day. If the prosecutor is unable to prove such circumstance beyond doubt, the onus does not shift on the accused. In such a situation, the Court cannot put the cart before the horse and rely on an evasive response of the accused to the so-called circumstance to come to a finding of guilt.

38. This brings us to the more important question:- Have the electronic records, i.e., Exhibits – 19, 19/1 been proved in accordance with law?

39. Section 65A of the Evidence Act, inter alia, states the contents of electronic records may be proved in accordance with the provisions of 65-B of the Evidence Act. In **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal And Others**² a three-Judge Bench of the Apex Court reiterated the ratio in **Anvar P.V. vs. P.K. Basheer**³ and held that section 65-A and 65-B of the Evidence Act are a complete code in itself. Proof of a written certificate under section 65-B (4) is a condition precedent for admission of a copy of the electronic evidence.

40. The Bench held **Tomaso Bruno vs. State of U.P.**⁴ and **Shafhi Mohammad vs. State of Himachal Pradesh**⁵ did not lay down the law

² (2020) 7 SCC 1

³ (2014) 10 SCC 473

⁴ (2015) 7 SCC 178

⁵ (2018) 2 SCC 801

correctly. The Bench, however, carved out two exceptions to the aforesaid rule. Firstly, when the original electronic records stored in the computer device is produced in Court. Secondly, when the party who is not in possession of the certificate takes all efforts within its powers to obtain the certificate and even on an application before the Court the party in possession of the certificate does not produce the same. Then secondary evidence of such electronic records may be adduced without the certificate.

41. In **Arjun Panditrao Khotkar** (supra) the stage at which objection is required to be raised for admitting secondary electronic evidence did not fall for consideration. Though the Court reiterated that proof of a certificate is a condition precedent to adduce a copy of the electronic evidence, the ratio cannot be stretched to mean that copy of electronic evidence once admitted without objection during trial can be put into question at a subsequent stage. *Ramasubramanian, J.* referred to the 1st proviso of section 136 of the Evidence Act and held proof of certificate is a condition precedent for admissibility of copy of electronic evidence. Proof of certificate, therefore, is a mode of admitting secondary electronic evidence. It has nothing to do with the inherent admissibility of such evidence. For example, copy of a video recording of a confession before a police officer would be inherently inadmissible even if a certificate under section 65-A(4) is proved. On the other hand, absence of a certificate would not make the copy of the video recording of a

judicial confession inherently inadmissible but would affect the mode of its proof envisaged in section 136 of the Evidence Act rendering it inadmissible on such score.

42. No doubt onus to prove the preliminary fact to adduce secondary electronic evidence i.e. certificate under section 65-A(4) of Evidence Act is on the prosecution. But when a copy of electronic evidence without the certificate is tendered and admitted in evidence without objection from the defence it would mean the defence does not dispute the preliminary fact and the mode of proof of the secondary electronic evidence.

43. This issue was addressed by the Apex Court in **Sonu vs. State of Haryana**⁶. In the said report the Apex Court held production of a certificate under section 65-A(4) of the Evidence Act relates to the method and mode of proof of secondary electronic records. The Court held objection to the admissibility of secondary electronic records must be raised at the time when the secondary electronic evidence is tendered and proved and not thereafter. It held as follows:-

“32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an

⁶ (2017) 8 SCC 570

opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies.”

44. It may not be out of place that the Bench in **Arjun Panditrao Khotkar** (supra) at paragraph 45 noted the aforesaid observation in **Sonu** (Supra) but did not express any opinion on this score:-

“45. Thus, it is clear that the major premise of Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.”

45. In the present case, no objections were raised when the copies of CDRs/SDRs were tendered and admitted into evidence. Once the CDRs/SDRs were admitted into evidence without objection it would lead to the irresistible conclusion that defence had waived its objection to the method of proof of the secondary electronic evidence. Having done so it cannot do a volte face at a later stage of the proceedings. If the defence is permitted to do so, it would cause prejudice to the prosecution for the following reason. Had the objection been raised at the time of tendering the evidence, prosecution would have had the opportunity to rectify the defect and produce the certificate. Having not done so, it would be

unfair to permit the defence to rake up the issue at a subsequent stage and spring a surprise on the prosecution.

46. For the aforesaid reasons, I hold CDRs/SDRs were lawfully read into evidence in the absence of objection by the defence at the time they were tendered and proved.

47. This leads us to a more serious question – what conclusions may be drawn from the entries in the aforesaid CDRs/SDRs. The moot question for consideration is the competence of the investigating officer to draw a conclusion on the basis the entries in the CDRs that the appellant and the victim were at the same places as the cell IDs noted in the CDRs of the two mobile phones were same when telephone calls were made between 4:00 p.m. and 5:00 p.m.

48. A cellular network is based on four basic components:-

- “(i) Base Transceiver Stations (BTSs), known as “cell towers” and “cell sites”;*
- (ii) Mobile Stations (MS), known as “cell phones” and “mobile phones”;*
- (iii) Mobile Switching Centre (MSC);*
- (iv) Public Switched Telephone Network (PSTN), for connection to wired telephones.”⁷*

49. The mobile phone is essentially a wireless telephone which transmits to and receives from cell tower audio, text and data. In order to communicate with the service provider’s cell tower, the cell phone is

⁷ Thomas A. O’Malley, ‘Using Historical Cell Sites Analysis Evidence in Criminal Trials’ (2011) 59 US Att’ys Bull 16 [see page 19]

programmed with various channel-access technologies e.g., Code Division Multiple Access (CDMA) or Global System for Mobile Communication (GSM).

50. CDRs are the service provider's business records of a particular mobile phone's location and communication activity over time within the provider's network. It contains date, time and location information of the cell phone. Cell tower and cell sector information are coded in the CDRs as cell ID. Cell ID in the CDRs denotes a unique number used to identify a BTS or a sector of a BTS from which the mobile phone receives or sends signals. It contains a code and not recognisable geographic coordinates. Service providers maintain records containing the geographical location and orientation of all cell towers that is BTS in their network. To interpret the cell IDs and identify the actual geographic coordinates of the cell tower, examination of a competent person from the end of the service provider is necessary to identify precise geographical coordinates of the tower.

51. It may not be out of place to note that the range of a cell tower is dependent on number of variables as follows⁸:-

- “(i) How high the antenna is over the surrounding landscape;*
- (ii) The frequency of the signal in use;*
- (iii) The rated power of the transmitter;*

⁸ Millman National Land Services, 'What is a Cell Tower and How Does a Cell Tower Work?' (12th May, 2020), < <https://millmanland.com/company-news/what-is-a-cell-tower-and-how-does-a-cell-tower-work/> > accessed 10th February, 2023

- (iv) The directional characteristic of the antenna array on the site;*
- (v) Nearby buildings and vegetation absorbing and reflecting radio energy;*
- (vi) The local geographical or regulatory factors and weather conditions.”*

52. Analysis of the CDRs/SDRs show telephone calls were made between the two mobile numbers as follows:-

- i. Calls were made from 8017481635 (belonging to the mother of the victim) to 9051738821 (belonging to the appellant) at 16:03 hours and 16:08 hours respectively;
- ii. One call was made from 9051738821 (belonging to the appellant) to 8017481635 (belonging to the mother of the victim) at 17:14 hours and
- iii. Identical cell IDs were noted in the CDRs with regard to each set of phone calls.

53. The data in (iii) leads to the inference that both mobile phones received signals from the same cell tower i.e. Base Transceiver Station (BTS) when the phone calls were made. Would this lead to the inference that the users of both the phones were at the same place? Investigating officer by no stretch of imagination can be treated to be an expert on this issue who had specialized knowledge with regard to the range and other operational factors of the cell towers to opine both the users were at the same place. It would be extremely dangerous and wholly

unwarranted to rely on his evidence in this regard. Only a competent person from the service provider could have enlightened the Court about the range and geographical location on the cell tower which corresponded to the cell IDs noted in the CDRs and opine whether it would be reasonable to conclude on such date that the appellant and the victim were at the same place. In ***Wilder vs. Maryland***⁹ the Appellate Court of Maryland labelled detective's testimony regarding location of cell phone records as lay evidence and not expert testimony. Hence, Investigating Officer's opinion that the appellant and the victim were at the same place as the cell IDs in the CDRs matched is mere speculation of a lay person. In the absence of expert opinion of a competent witness from the service provider regarding the range, topography and geographic coordinates of the cell tower/ BTS corresponding to the cell IDs, no reasonable conclusion that the appellant and the victim were together could be arrived at. Trial Court relied on mere speculation of a lay witness to come to the inference that the appellant and the victim were at the same place in the evening of 03.01.2012.

(b) Call received by Ashima Patra P.W. 17:-

54. Another circumstance relied by the prosecution to connect the appellant to the rape and murder of the deceased is that Ashima Patra (P.W. 17), aunt of the deceased received a phone call around 9:30 PM on the day of the latter's disappearance. A male voice told P.W. 17 he had

⁹ 191 Md. App. 319, 368-69 (Md. Ct. Spec. App. 2010)

married Mana and they were living happily at Santipur. Apart from the oral evidence of the relations of the deceased no other corroborative material is placed on record to prove this fact.

55. On the next day, a missing diary came to be lodged at Chanditala Police Station. The said missing diary has not been produced in Court. But P.W. 13, father of the deceased, admitted the aforesaid vital fact was not disclosed in the missing diary.

56. A police officer of Chanditala Police Station is said to have made enquiries about the phone call. The said officer was neither interrogated during investigation nor examined in trial. Mobile phone of P.W. 17 was not seized during investigation to verify such fact. Failure to examine the enquiry officer or to verify the call list in the mobile phone of P.W. 17 amounts to withholding of best evidence which casts a doubt on the credibility of the aforesaid circumstance.

57. That apart, source of phone call is shrouded in mystery. While P.W. 5 claimed the enquiry officer told him that the phone call came from a phone booth near Baidyabati Railway Station, P.W. 16 claimed that the call had come from a mobile phone and he found the phone switched off.

58. Even identity of the voice has not been established as that of the appellant, though it is the prosecution case that he was known to the relations of the deceased including Ashima and had even worked at her house.

59. Prosecution argued appellant had worked at the residence of Ashima (P.W. 17) and Haladhar (P.W. 13), father of the deceased. He knew the nickname of the deceased as Mana. Hence, it may be inferred he made the call. This inference is farfetched. Evidence has come on record that Keya used to go out and work in a jewellery store. She had many friends and it would be incorrect to presume that her nickname was known only to the appellant.

60. For the aforesaid reasons I hold prosecution has failed to prove that it was the appellant who had made a phone call to P.W. 17 at 9:30 PM on 03.01.2012 and claimed that he had married Mana.

(c) Recoveries pursuant to the disclosure statements of appellant whether reliable?

61. Prosecution has relied on two sets of recoveries:- one on 12.01.12 and the other on 13.01.12. It is contended appellant was arrested on 10.01.2012 from his residence. He was taken into police custody. On 12.01.12 he made a disclosure statement that he had thrown the purse and certificates wrapped in a plastic pouch in a bush beside the railway track between Sheoraphuli and Baidyabati. To work out the statement he was taken to a spot on NCM Road opposite the house of Shyamal Chatterjee P.W. 10. It is claimed on his showing a red purse, certificates and handkerchief along with plastic pouch were recovered. Recoveries were witnessed by P.W. 21, Soumitra Ta, a police officer attached to Sheoraphuli TOP and local witnesses namely, P.Ws. 9, 10 and 11.

62. Prosecution case regarding the recovery suffers from various incongruities. As per prosecution incident occurred on 03.01.2012. Recovery was made after 9 days from an open place accessible to all which does not rule out the possibility of planting.

63. Evidence of the independent witnesses are also not consistent. PW9 was not present at the time of recovery. Police told her they had recovered the purse and certificates and, on their statement, she signed the seizure list.

64. P.W. 10 was unable to identify any of the articles in Court. Though P.W. 11 identified the articles, he admitted in cross-examination that the purse did not bear any label. The said purse has not been identified by any of the relations including the mother and aunt of Keya. It would be argued that the certificates allegedly recovered stood in the name of Keya. None of the witnesses, particularly, the mother (P.W. 18) and aunt (P.W. 17) who saw Keya leave the house claimed that she was carrying her certificates. The shape and size of the certificates (Exhibit – 12 series) are such that they could not have been stuffed into the purse unless folded. I have examined Exhibit – 12 series. The documents do not bear any mark of folding. Keya claimed to her mother and aunt she was going out to Teliamore. Had she carried the certificates in her hand the said witnesses would have naturally noted and enquired about the same. This improbabilises the fact that Keya had carried the certificates with her when she went out of her

residence. There is another incongruity in the alleged recovery. Police witnesses claimed that the certificates and purse were kept inside a plastic bag and thrown into the drain. None of the independent witnesses corroborate such fact. On the other hand, P.W. 11 claimed that he had supplied a plastic bag to the police officers though he could not say whether the said bag was present in Court. This demolishes the prosecution case that the certificates and purse kept inside a plastic bag were recovered on the showing of the appellant.

65. The other recovery is equally unconvincing. It is claimed on 13.01.2012 the appellant made further a disclosure statement leading to recovery of weapon of offence, i.e., *katari* and a cardigan of the deceased from a spot near the pond where the body was found. As discussed earlier, body was recovered on 05.01.2012. Police had immediately swung into action. P.W. 26 had visited the place of occurrence. He inspected the site and drew up rough sketch map of the place of occurrence. He interrogated the owner (P.W. 8). Strangely, inspite of such efforts he did not notice the *katari* or cardigan which is said to have been recovered from a spot beside the place of occurrence after a week. P.Ws. 22 and 23 were examined as independent witnesses. During cross-examination, it revealed they are not local people and pocket witnesses of the police. They had deposed in other police cases too. One of them (P.W. 22) could not even identify the seized *katari* and

cardigan in Court. Recovery of the said articles appears to be highly artificial and do not inspire confidence.

66. Even the deposition of P.W. 24, Mohan Karmakar, a dealer in scissors, knives etc. is very vague. He deposed police brought appellant who stated he had sharpened the *katari* in his shop. He did not identify the appellant in Court. In fact, it would be most improbable for the said witness to have identified the appellant as was not a regular customer. Even his identification of the *katari* is suspicious. In cross-examination, he admitted there was no special identification mark by which he could have identified the instrument. Purchase of the *katari* and its recovery along with the cardigan has not been proved beyond doubt.

67. Under such circumstances, presence of blood on the *katari* in question as per FSL report would not implicate the appellant as the perpetrator of the crime.

Conclusion:-

68. In the light of the aforesaid discussion, I am of the opinion most of the incriminating circumstances relied upon by the prosecution are either based on inadmissible evidence or vague surmises which cannot be the substitute of proof. It is trite that suspicion howsoever high cannot take the place of proof. One cannot lose sight of the fact that the incident was a heinous one but graver the crime stricter should be the proof which the prosecution has failed to discharge.

69. Hence, I am constrained to extend the benefit of doubt to the appellant. Conviction and sentence of the appellant are set aside.

70. The appeal is accordingly, allowed.

71. The appellant, Bechuram Bag, shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

72. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

73. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)