GAHC010250882018

2026:GAU-AS:1073

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Death Sentence Ref./5/2018

NATIONAL INVESTIGATION AGENCY (NIA)
REPRESENTED BY SC, NIA

VERSUS

BISHNU NARZARY ANR
ASSAM

2:AJOY BASUMATARY
ASSAM

Advocate for the Petitioner : SC, NIA,

Advocate for the Respondent : MR N DUTTA (R2), MR. N N B CHOUDHURY (R2),MR. N SARKAR (R2)

Linked Case : Crl.A./342/2018

SRI NITUL DAIMARY @ NAIHAB
S/O JOGESHWAR DAIMARY
VILL. HIRIMBAPUR NO. 2
P.S. DHEKIAJULI
DIST. SONITPUR
ASSAM
PIN 782124

VERSUS

THE NATIONAL INVESTIGATION AGENCY (NIA)
REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for : MR. M SARANIA
Advocate for : SC
NIA appearing for THE NATIONAL INVESTIGATION AGENCY (NIA)

Linked Case : Crl.A./93/2019

BISHNU NARZARY @ N. BERAMA
S/O- SUNIL NARZARY

VILL- BATASHIPUR
P.S.-DHEKIAJULI
DIST- SONITPUR
ASSAM. PIN-784110.

VERSUS

THE NATIONAL INVESTIGATING AGENCY (NIA)
REPRESENTED BY THE STANDING COUNSEL

Advocate for : MR. M SARANIA
Advocate for : SC
NIA appearing for THE NATIONAL INVESTIGATING AGENCY (NIA)

Linked Case : Crl.A./358/2018

SRI AJOY BASUMATARY @ B. BUHUM
S/O SR BOLENDRO BASUMATARY
PERMANENT R/O VILL. DULIGAON
P.S. BISWANATH CHARIALI
DIST. BISWANATH CHARIALI
ASSAM.

VERSUS

NATIONAL INVESTIGATION AGENCY AND ANR
REPRESENTED BY SPECIAL PP
NIA

2:THE STATE OF ASSAM

REPRESENTED BY PP
ASSSAM.

Advocate for : MR N DUTTA
Advocate for : SC
NIA appearing for NATIONAL INVESTIGATION AGENCY AND ANR

Linked Case : Crl.A./171/2019

SRI SANJU BORDOLOI
S/O- LATE DIMBESWAR BORDOLOI

R/O- VILLAGE- KULAJARI
DIMORIA
P.S.- KHETRI
DIST- KAMRUP
PIN-782403
ASSAM.

VERSUS

THE NATIONAL INVESTIGATION AGENCY
REPRESENTED BY STANDING COUNSEL
NIA

Advocate for : MR K K KALITA
Advocate for : SC
NIA appearing for THE NATIONAL INVESTIGATION AGENCY

BEFORE

HON'BLE THE CHIEF JUSTICE ASHUTOSH KUMAR

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants : Mr. K. Gogoi, Public Prosecutor, Assam assisted by Mr. R. R. Kaushik, Additional Public Prosecutor, Assam, for the State in Death Sentence Ref. No. 5/2018.

Mr. A. K. Bhattacharyya, Senior Advocate assisted by Mr. D. K. Bhattacharyya for the appellants in Crl. A. No. 342/2018, Crl. A. No. 358/2018, Crl. A. No. 93/2019 and Crl. A. No. 171/2019.

For the Respondents : Mr. A.K. Bhattacharyya, Senior Advocate assisted by Mr. D. K. Bhattacharyya for the respondents in Death Sentence Ref. No. 5/2018.

Mr. K. Gogoi, Public Prosecutor, Assam.

Mr. R. R. Kaushik, Additional Public Prosecutor, Assam.

Amicus Curiae : Mr. K. Agarwal, Senior Advocate/Amicus Curiae in Death Sentence Ref. No. 5/2018.

Date on which Judgment is Reserved : **08.12.2025**

Date of pronouncement of Judgment : **30.01.2026**

Whether the pronouncement is of the operative part of the Judgement : NA.

Whether the full Judgment has
been pronounced : Yes.

JUDGMENT & ORDER (CAV)

(A.D.Choudhury, J)

1. The Death Sentence Ref. No. 5/2018, Crl. A. No. 342/2018, Crl. A. No. 358/2018, Crl. A. No. 93/2019 and Crl. A. No. 171/2019, have been heard together and are being disposed of by this Common Judgment and Order.

2. We have heard Mr K. Gogoi, learned Public Prosecutor, Assam, assisted by Mr. R. R. Kaushik, learned Additional Public Prosecutor, Assam, for the State in Death Sentence Ref. No. 5/2018 and Mr. A. K. Bhattacharyya, learned Senior Advocate, assisted by Mr D. K. Bhattacharya, learned Advocate for the appellants in Crl. A. No. 342/2018, Crl. A. No. 358/2018, Crl. A. No. 93/2019 and Crl. A. No. 171/2019. We have also heard Mr K. Agrawal, Learned Amicus Curiae.

3. By the impugned judgment dated 29.08.2018 and Order of sentence dated 15.09.2018 passed by the learned Special Judge, NIA, Assam, Guwahati in Special NIA Case No. 04/2015, the accused/appellants were convicted and sentence in the following manner:-

Sl. No.	Accused/Appellants	Conviction	Sentenced
1.	Sanju Bordoloi	I. U/S 121 IPC	Imprisonment for life and fine of Rs. 10,000/- i.d. SI for 1 year.

		II. U/S 16(1)/18/20 of UA(P) Act.	Imprisonment for life and fine of Rs. 10,000/- i/d SI for 1 year.
2.	Bishnu Narzary	I. U/S 302/34 IPC. II. U/S 25(1A) of Arms Act. III. U/S 5 of Explosive Substance Act. IV. U/S 121 IPC. V. U/S 307 IPC	Death Sentence. R.I. for 7 years and fine of Rs. 5000/- i/d to suffer SI for another period of 6 months. R.I. for 7 years and fine of Rs. 5000/- i/d to suffer SI for another period of 6 months. Imprisonment for life and fine of Rs. 10,000/- i/d to suffer SI for 1 year. RI for 10 years and fine of Rs. 10,000/- i/d to suffer SI for 1 year. Imprisonment for life and fine of Rs.

			10,000/- i/d to suffer SI for 1 year.
		VI. U/S 16(1)(a)/18/20 of UA(P) Act.	
3.	Ajoy Basumatary	I. U/S 302/34 IPC.	Death.
		II. U/S 121 IPC.	Imprisonment for life and fine of Rs. 10,000/- i/d to suffer SI for 1 year.
		III. U/S 307 IPC.	RI for 10 years and fine of Rs. 10,000/- i/d to suffer SI for 1 year.
			Imprisonment for life and fine of Rs. 10,000/- i/d to suffer SI for 1 year.
		IV. U/S 16(1)a/18/20 of UA(P) Act.	

4.	Nitul Daimary	I. U/S 121 IPC. II. U/S 16(1)(a)/18/20 of UA(P) Act.	Imprisonment for life and fine of Rs. 10,000/- i/d to suffer SI for 1 year. Imprisonment for life and fine of Rs. 10,000/- i/d to suffer SI for 1 year.

4. The prosecution case in a nutshell is that on 23.12.2014, the villagers of Santipur and Hatijuli area under Dhekiajuli Police Station were attacked by the cadre of the extremist group of NDFB(S). The incident of firing took place between 04:00 PM and 05:00 PM. In the aforesaid incident, six people died, and two were injured. Accordingly, a GD entry was made, and Assam Police started an investigation. The dead bodies were sent for post-mortem, and the injured were sent for medical examination and treatment in the Kanaklata Civil Hospital, Tezpur.

5. PW-1, Lakheswar Mirdha, lodged the FIR. Accordingly, Dhekiajuli PS Case No. 738/2014 was registered. The Assam Police continued the investigation until 06-01-2015, when it was handed over to the National Investigating Authority (in short, NIA). Thereafter, the National Investigating Authority continued with the investigation and filed a charge sheet against the four appellants before the Special Judge, NIA, Assam.

6. The learned Special Judge framed charges under Sections 120B, 121, 121A, read with Sections 302, 307, and 34 of IPC, Sections 7, 25(1-A) Arms Act, Section 5 of Explosive Substance Act and Sections 16(1)(a), 18 and 20 of

Unlawful Activities (Prevention) Act, 1967, and read over to the accused, to which the accused pleaded not guilty, and accordingly, the trial proceeded.

7. During the Trial, to bring home the charges, the prosecution examined as many as 63 witnesses and exhibited 130 numbers of documents and material exhibits. The accused were examined under Section 313 CrPC. The defence did not lead any evidence in their defence.

8. Thereafter, the impugned judgment and sentence was passed by the learned Special Judge, Assam, convicting and sentencing the accused as detailed hereinabove.

9. Assailing the impugned judgment, Mr. A. K. Bhattacharya, learned Senior Counsel for the Appellants, first challenges the validity of the sanction, contending that a competent authority did not accord it in accordance with law. Though Exhibit 27 refers to a recommendation for sanction, such a recommendation neither forms part of the sanction order nor was proved before the trial court, thereby depriving the appellants of an opportunity of cross-examination. It is further urged that the timelines prescribed under the UA(P)A Sanction Rules 2008 were not adhered to.

10. Learned Counsel next assails the reliability of eyewitnesses. PW4, a child witness aged about 13 years at the time of the occurrence, identified the accused Ajay for the first time in court without any prior test identification parade, despite admitting to having only a fleeting glance at the assailants. Such dock identification, it is argued, is inherently weak.

11. PW53, aged about 9 years at the relevant time, allegedly identified the accused Bishnu through photographs; however, the source and authenticity of the photographs were not proved. PW49, not a cited witness in the charge sheet, was later made to identify the accused Bishnu, rendering such identification doubtful.

12. Reference is also made to Exhibit 101, a photo identification memorandum of one Rajen Hemron, a minor, who was never examined, nor does the

memorandum bear the signature of the investigating officer. PW40, though claiming to have witnessed the shooting, neither named nor identified any accused, rendering his testimony of no evidentiary value.

13. With regard to the linkage of the appellants with NDFB, reliance placed by the prosecution on later pads and cadre lists, Exhibits 77, 95 and 99, is assailed on the grounds that their authenticity and evidentiary value were not duly proved.

14. Similarly, intercepted phone transcripts are challenged as PW19 failed to disclose who prepared the transcript. The certificate issued under Section 65B does not reveal the identity of the translator, the computer system used, or the exact process adopted and contains ambiguous opinions, thereby failing to meet the mandatory requirement of Section 65B of the Evidence Act. Reliance is placed on **Anwar P V versus PK Basir, 2014, 10 SCC 473**, **Arjun Panditrao Kotkar versus Kailash Kusandrao Grantial, 2020, 7 SCC 1** and **Sundar @ Sundarajan versus Inspector of Police, 2023, 2 SCC 671**.

15. Similar infirmities are pointed out in Exhibits 92 and 85, including a lack of endorsement by PW44 that the contents were true to his knowledge and belief. The seizure of the NDFB's cash register is also questioned as it was seized from one Durga Boro, who is neither an accused nor shown to be an NDFB cadre or conspirator. Regarding disclosure and recovery, it is argued that arms and exclusives were seized by the Assam Police prior to the transfer of the investigation to the NIA. In contrast, the disclosure memo, Exhibit 109, was recorded later by the NIA.

16. It is argued that the contradiction regarding the place of arrest, prior custody of arms, and inconsistencies in handing over memos raise serious doubt about the alleged recoveries under Section 27 of the Evidence Act. The prosecution has also failed to clearly establish the number of grenades allegedly recovered, thereby undermining the entire recovery narrative, argues the learned senior counsel.

17. On the discovery of fact under Section 27, reliance is placed on **Muhammad Inayatullah versus State of Maharashtra, 1976, 1 SCC-828**, contending that only the admissible portion of the statement can be relied upon. It is further urged that recovery alone cannot sustain conviction without corroboration, relying on **Waqar versus State of UP, 2011, 3 SCC-306** and **Bijoy Kumar versus State of Rajasthan, 2014, 3 SCC-412.**

18. Summing up, learned Senior counsel submits that serious investigation lapses entitle the appellants to the benefit of doubt, relying on **Rampal Pithwa versus State of Maharashtra, 1994, supplementary to SCC-73** and **State of UP versus Wasif Haider, 2019, to SCC-303**

19. On sentencing, it is argued that the mandatory requirement of assessing the possibility of reformation before imposing the penalty, as enunciated in Basant Singh, was not complied with.

20. Accordingly, acquittal is prayed for.

21. Par Contra, Mr. K. Gogoi, learned Public Prosecutor, submits that the validity of the sanction must be challenged at the earliest stage, and no justification has been offered for raising it belatedly in appeal. According to him, the sanction was duly granted and proved by a competent authority.

22. Relying on Dhanaj Adab alias Zahu, it is argued that the absence of a test identification parade does not render dock identification inadmissible if found trustworthy.

23. On photo identification, reliance is placed on **Lakshmira Shetty versus Tamil Nadu, 1988, 3 SCC-319**, to contend that photographic identification is a recognised mode of identification.

24. The disclosure statement and recoveries are asserted to be duly proved, and the non-examination of independent witnesses is not fatal. Reliance is placed on **Rizwan Khan versus State of Chhattisgarh, 2020, 9 SCC-627**.

25. As regards electronic evidence, it is contended that the certificate under

Section 65B is not necessary where the original electronic record is produced.

26. We have given anxious consideration to the submissions advanced by the learned counsel for the parties. Also, perused the material available on record.

27. The vital prosecution witnesses are PW-1 the informant; PW-39, PW-40, PW-53, PW-57, PW-58 and PW-59, the villagers; PW-4 and PW-53 the two eyewitnesses; PW-15 a witness to photo identification parade; PW-17, who collects different photographs of terrorist from various sources; PW-49 witness to photo identification; The witness relating to the seizure of the arms and ammunition such as PW-37, PW-38, PW-9, PW-51 and PW-63; The witness relating to interception of mobile phones conversation i.e. PW-20 and PW-19; the witness recording of voice sample i.e. PW-21; PW-63, PW-32, PW-44 and PW-45.

28. For the sake of completeness, the evidence of the aforesaid witnesses is summarised below:

I. **PW-1, Shri Lakheswar Mirdha**, President of the Assam Tea Tribes Students Association, is the informant who lodged the FIR on 24.12.2014. He proved Exhibit-1, FIR and his signature therein.

In cross-examination, he stated that he received information about the incident over the phone from the members of the Association at about 6:00 pm on 23.12.2014 and lodged the FIR on 24.12.2014.

II. **PW-39, Shri Deepak Urang,** a villager deposed that on 23.12.2014, at around 4/4:30 pm, he along with other friends were confronted by 7/8 cadres of NDFB(S) with arms and informed that they had killed villagers and that when this witness reached the village, saw the dead bodies of mother and elder brother of his friend Rajen Hemron who were killed by the NDFB cadres. According to him, six villagers were killed by the NDFB(S) cadres, and two villagers received bullet injuries.

In cross-examination, he testified that NIA had recorded his statement, but the police had not questioned him.

III. **PW40, Smt. Bimala Kurmi** deposed that on 23.12.2014 at around 4.30/5.00 p.m., she, her sister-in-law, father Mahabir Kurmi and her children were sitting in their courtyard. Suddenly, they saw some NDFB cadres killed Karna Hemrom by firing bullets from firearms in front of his house, which is situated just opposite their house. Witnessing the incident, her father asked them to run away. PW40 further deposed that she could not run away because of her ill health and she entered into her dwelling house. Her father and sister-in-law ran away, and her 3-year-old minor daughter was with her father. The NDFB cadres chased her father, Mahabir Kurmi and shot him dead in the paddy field in front of their house. Her minor daughter escaped unhurt and started crying, and then she came out to take her back. The said NDFB cadres took away the mobile handset of her father. On earlier occasions, the NDFB cadres with arms visited their village, and on the day of the incident, they could not anticipate that the NDFB cadres would kill them.

In cross-examination, PW40 stated that NIA had recorded her statement. She denied the fact that she had not stated before the NIA that she could not run away because of her ill health, and entered into her dwelling house and also denied the fact that she had not stated before the NIA that the NDFB cadres chased her father, Mahabir Kurmi and shot him dead in the paddy field in front of their house. She also denied that she had not stated before NIA that on earlier occasions, the NDFB cadres with arms visited their village. PW40 further admitted that she had not stated before the NIA that NDFB cadres were involved in the incident.

IV. **PW53, Sh. Suresh Bhengra**, another eyewitness, deposed that about 3 years back, his mother Bhingni Bhengra was killed by a terrorist in their village residence on 23rd December at around 4 P.M. He can identify the terrorist who fired and killed his mother. PW53 was shown several photographs where he identified two photographs of the terrorist,

who killed his mother and put his signature on the back side of the photographs in the presence of Officials. Material Ext. 9 and 10 are two photographs of the said terrorist, who killed his mother.

In cross-examination, PW53 deposed that NIA did not examine and record his statement. The Assam police examined him and recorded his statement in the presence of his father. During the cross-examination, he admitted that some persons were wearing black cloths covering their faces. PW53 further deposed that their house consists of four connected rooms, with no electrical connection. There were two doors in two rooms, and the other two rooms had only frames without doors. The room where he was hiding had a wooden frame with hanging curtains. He further deposed that he did not know the contents of the Ext. 101, having two pages, as it was written in English because he could not read or write in English language. He further admitted that the signatures of the witnesses and others in Ext. 101/1,101/2,101/3 and 101/4 were not put in his presence.

PW53 admitted that before identifying the accused in the photograph, he had not explained the physical features of the said accused to any official.

V. **PW-57, Smt. Joba Hemron**, a villager of Hatijuli deposed that on 23.12.2014, after returning from market, she found her dauther Bela Hemrom was lying on the bed with a pool of blood spread all over her body. When she asked her daughter, Bella stated that 3 NDFB militants entered the house and fired bullets at her, due to which she sustained bullet injuries and later on, Bella died.

In cross-examination, she testified that she did not file any written Ezahar and that the police came to her village and recorded her statement. NIA also recorded her statement. She denied mentioning the word NDFB in her statement to the NIA.

VI. **PW-58, Smt. Salomi Hajda**, a villager of Hatijuli village, stated that after returning from the market, on 23.12.2014, at about 3 PM, she found her husband Budrai Hajda in a pool of blood, as he sustained bullet injuries and when she asked her husband about his condition, he replied that NDFB cadres fired upon him, due to which he sustained bullet injuries in his stomach.

In cross-examination, she testified that police interrogated her after the incident. Still, she cannot say if the police recorded her statement, and she admitted that she was not present at the time of the incident.

VII. **PW-59, Smt. Archumoni Hemrom**, a farmer, deposed that on 23.12.2014, while she reached home after returning from the paddy field, suddenly, Bodo militants started firing on her along with the family members, and they ran away from the spot. But her husband, Karna Hemrom, sustained bullet injuries and died on the spot.

In cross-examination, she testified that her village organisation submitted a written ezahar. Police did not meet her, nor did she make any statement before the police.

VIII. **PW4, Sh. Kati Hemron**, an eyewitness, deposed that on 23.12.2014, two Bodo persons entered their house with guns and asked for drinking water, but before they could fetch the drinking water, one of them shot his elder brother, who subsequently died on the spot. When his mother tried to escape, she was also shot dead. PW4 further deposed that he also received a bullet injury on the right side of his chest, but he was treated at Tezpur Medical College. PW4 had seen the assailants, whom he could now identify in court. PW4 looked at the accused persons and other persons present in the court and identified Ajay Basumatary.

PW4 was interrogated in Tezpur Police Station, and the Police recorded his statement. PW4 did not give any facial description of the assailants to

the police. PW4 denied the fact that while the assailants were firing at his mother and brother, he did not see their faces. PW4 also denied falsely identifying the person in court as one of the assailants.

IX. **PW15, Sh. Jayanta Sarkar**, an Executive Magistrate, deposed that he was officially deputed to conduct inquest over the dead bodies pertaining to the mass killings in Hatijuli village. Accordingly, PW15 conducted inquest over the bodies and prepared inquest reports mentioning the visible injuries. He proved the inquest reports as Ext. 7, Ext.10, Ext.13, Ext. 18, Ext.21 and Ext. 24.

In cross-examination, PW 15 stated that in Ext. 7, 10, 21, and 24, there are corrections with whitener, without an initial, in respect of the case numbers. In Ext 13 and 18, the GDE entry number and date of the concerned Police Station were not entered by him, and he could not say who had entered the same. In Ext. 7, 10, 13, 18, 21, 24, there is no official seal. In the aforesaid Inquest reports, namely Ext. 7, 10, 13, 18, 21, the time of receipt of the dead bodies was not mentioned, and the date mentioned therein also had overwriting without his initial. In Ext 24, the date of receipt of the dead body mentioned as 23.12.2014 was not in his handwriting. In the aforesaid Inquest reports, there were two witnesses in each Inquest; however, the details of only one such witness were mentioned. In Ext. 10, Inquest report, there was no entry in the column of description of Injury mark. He denied that, in preparing the Inquest report, he did not apply his mind and also that he had prepared the Inquest report mechanically.

X. **PW-17 Shri Prafulla Kumar Bora**, DSP Headquarters Tezpur, testified that they usually collect different photographs of terrorists from different sources. On 11.06.2015, he handed over 11 photographs of members of NDFB(S) cadres to NIA, which were seized by R.S. Tyagi, DSP NIA, Guwahati vide Exhibit-35 (production-cum-seizure memo). He

proved Material Exhibits-9 & 10 to be two photographs among the 11 photographs provided under Exhibit 35.

During cross-examination, this witness admitted that NIA did not record his statement; the source of Exhibit-35 is not mentioned; while handing over the photographs to NIA, no witness was there; and that the source did not supply any memory stick/negatives, etc. of the 11 photographs, including that of Material Exhibits 9 & 10.

XI. **PW49, Smt. Liza Talukdar**, Circle Officer, Thelamara, deposed that on requisition received from NIA, she and her Senior Mr. Jayanta Sarkar, Circle Officer, Dhekiajuli, took part in a photo identification process as witnesses. On 12.6.15 at about 12.30 hours, a photo Identification parade was conducted at the Dhekiajuli Circle Office in their presence. At the chamber of Mr. Jayanta Sarkar, a total of 11 photographs, bearing Sl No. 1 to 11, were laid down. A witness, namely Suresh Bhengra, aged 8 years, accompanied by his father Sri Chemmel Bhengra of Hatijuli Village under Dhekiajuli PS, Dist-Sontipur, was called inside the room, to identify the photographs of any assailant seen in the 11 photographs who were present or involved in the Killing of Adivasi people at village Hatijuli and Shantipur on 23.12.2014. After carefully analysing the said 11 photographs, the witness, Suresh Bhenggra, identified two photographs bearing Sl. No. 6 & 10 as the person/assailant who was involved in the killing of Adivasis on 23.12.2014 at Hatijuli and Shantipur village. Sh. Jayanta Sarkar reshuffled the said photographs and asked the witness Suresh Bhenggra to re-identify them. PW49 re-identified the two photographs in question bearing Sl. No. 6 & 10, and as a token of correctness of his identification to the said photographs, the said witness put his signature on the back side of the identified photographs. She proved Ext. 101 as the memorandum prepared in connection with said photo identification process after the witness identified the said two photographs out of 11 photographs. The witness Suresh Bhenggra had

put his signature in their presence. The witness Suresh Bhenggra was produced before them by the NIA on 12.6.2015 to participate in the said proceeding. The proceeding was completed at about 13.00 hours.

In cross-examination, PW 49 stated that she was not given any written order to attend the photo identification process at the Circle Office, Dhekiajuli. PW 49 further stated that she was not shown the negatives of the said 11 photographs at the Circle Office, Dhekiajuli and in the Court. She further stated that she does not know whether the said photographs were manipulated and that she never saw them before the identification. PW49 denied that Ext. 101 was prepared without following the due procedure of law.

XII. **PW-37, Shri Keshab Ranjan Choudhury**, is a Sub-Inspector of Assam Police and Investigating Officer of BNC PS Case No. 15/2015. According to this witness, during the investigation of the said case, he arrested accused Bishnu. On interrogation, Bishnu disclosed voluntarily about the arms and ammunition kept by him and on 12.01.2015, he led the police to the place where arms and ammunition were kept, and this witness recovered the arms and seized under Exhibit-68. According to him, the seized articles were handed over to the NIA later on.

According to this witness, he also conducted the investigation of BNC PS Case No. 23/2015 and arrested accused Nitul, accused Runilius and accused Sokson Basumatary. On interrogation, the accused persons disclosed voluntarily about the arms and ammunition kept by them and led them to the place where the same were kept. He seized an AK-56 Rifle bearing No. 29830652 with one magazine and handed over the same to NIA. He also handed over the material Exhibits 11 to 16 to NIA in connection with RC-04/2014/NIA-GUW.

In cross-examination, he testified that NIA did not record his statement. He does not know whether the seizure list, which he exhibited as Exhibits

68 & 71, had any relation to the present NIA Spl. Case No. 4/2015. In Exhibits-68 & 71, there is no independent witness except the police officials. He denied that the accused Bishnu Narzary had not put his signature on Exhibit 68. In Exhibit 71, he did not mention specifically from whose conscious possession the seized arms were recovered.

XIII. **PW-38, Shri Krishna Kanta Doley**, Sub-Inspector of Assam Police, on instructions Sr. Officer, Addl. S.P. (HQ), investigated the BNC P.S. Case No. 23/2015, and during the investigation, accused Nitul Daimary was arrested. On interrogation, the accused voluntarily disclosed the arms and ammunition kept by him. On 30.01.2015, he led to the place where the arms and ammunition were kept and seized the same vide Seizure List Ext. 72. He seized two M-22 Rifle bearing Nos. 0898348 & 00320001 with Magazines (Material Ext. 12 & 13). Again, on 03.02.2015, he seized one HK 33 Rifle with Magazine, one M-22 Rifle bearing No. 0898776 with Magazine loaded with 3 rounds, and one M-81 Rifle bearing No. A0.2905 with Magazine (Material Ext. 14, 15 & 16 respectively). Material Exts. 12/1,13/1,14/1, 15/1 & 16/1 are the Magazines recovered and seized along with the aforesaid arms.

In cross-examination, he testified that he does not know whether the seizure list, which he exhibited as Ext. 72 & 73 have any relation to the present NIA Spl. Case No. 4/2015 and that he had not seen the extract copy of GD entries in connection with Sootea P.S. to Biswanath Chariali PS and recovery of arms and ammunition of Biswanath Chariali P.S. Case No. 23/2015. He denied that he did not seal and pack the seized arms vide Seizure List Ext. 72 & 73. He admitted that he did not see the photographs/sketch map of the location and condition before the recovery and securing of the articles mentioned in Ext. 72 & 73.

XIV. **PW-9, Sh. Chayaram Doimary**, one NDFB cadre stated that in 1998, he surrendered before the then Chief Minister of Assam and on the

day of surrender he fled from the NDFB camp, so he could not carry his arms with him and no arm was deposited. PW9 further stated the family member of Nitul Doimary @ Naihab requested him to see that Nitul Doimary @ Naihab is rescued from the cadre of NDFB, who was working as Deputy Commander of NDFB and accordingly, he led accused Nitul Doimary @ Naihab to Bishwanath Chariali Police Station where he was arrested. PW9 further stated that at the time of arrest accused Nitul Doimary handed over a black coloured mobile to him to hand over the same to his family member but NIA confronted him and took the mobile set from PW19.

In cross-examination, PW9 testified that he was arrested and put to jail. PW9 further testified that around 1997-98 he abandoned NDFB and after his abandonment, he was not related to any recruitment for NDFB.

XV. **PW-51, Shri Dinesh Basumatary**, presently a businessman, was a member of NDFB cadre. He deposed that he brought Nitul Daimary @ Naihab to Biswanath Chariali P.S. for surrendering before the authority just after the killings of Advasi. He was arrested, and at the time of arrest, he handed over one mobile to this witness. Thereafter, NIA official rang him up and enquired about the mobile and asked him to produce it before the NIA and on production, the same was seized by NIA. Ext. 104 is the said production cum-seizure memo, and Material Ext-26 is the said mobile handset. This witness testified that he knew the different cadres of NDFB. On 23.12.2014, an incident of killing of Adivasi people took place at Dhekiajuli, which was carried out by NDFB(S) and in the said incident, Ajoy Basumatary Buhum and Bishnu were directly involved under the instruction of Nitul Daimary, Deputy Commanding Officer of NDFB in Sonitpur District.

In cross-examination, he stated that NIA did not record his statement. He denied that Naihab never handed over any mobile handset to him to

hand over the same to the family members, and that Naihab, Ajoy Basumatary & Bishnu were not NDFB cadres and were not involved in the incident of killing of Adivasi.

XVI. **PW-63, Sri Ranveer Singh Tyagi**, Deputy S.P., NIA HQ, New Delhi, deposed that he was entrusted to investigate the cases as CIO, with the assistance of AIOs under the NIA Guwahati Branch. On 27.12.2014, Dhekiajuli P.S. Case No. 738/2014 was handed over to NIA along with other cases of killings committed by NDFB(S). He started the investigation and took over the documents, materials, arms and ammunition from the Assam Police vide handing and taking over memo dated 06.01.2015. The handing over and taking over procedure started from the evening of 06.01.2015 and was completed on the morning of the next day, i.e., 07.01.2015. Ext. 53 is the said handing/taking over memo. On 02.01.2015, he visited the place of occurrence along with the investigation team. He recovered four empty cases likely to be of AK 47 Rifle and two fired bullet heads likely to be of AK 47 Rifle in the presence of witnesses, namely, Anut Orang and Badka Hembrom. Ext. 114 is the said search and seizure dated 02.01.2015. He again visited the place of occurrence and recovered two empty cases likely to be of 5.56 rifle, 1 missed fire of potential to be of AK 47 Rifle, one empty case likely to be of AK 47 Rifle, one bullet head of AK 47 rifle ,one bullet head of .22 Rilfe and one sample of burnt wooden pieces of ashes and seized the same from the place of occurrence. Ext. 47 is the said search and seizure list and Ext. 47/1 is the signature of Narayan Kurmi and Ext. 47/2 is the signature of Junus Bhenggra as witness.

During interrogation of the arrested accused persons, he found that one of the main accused, Sanju Bordoloi, was hiding in Bangalore and immediately informed the same to the DCP Bangalore and finally arrested the said accused at Bangalore. During personal search, one

PAN card (Mat. Ext. 34) in the name of the said accused, one back colour mobile handset (Mat. Ext.23), one Vodafone SIM (Mat. Ext. 24) and one memory card of 2 GB were found (Mat. Ext.25). He produced the arrested accused person before the Court at Bangalore and obtained transit remand.

XVII. **PW20, Sh. Bhaba Kumar Bora**, Inspector, SOU, Special Branch (SB), Assam Police, Guwahati, deposed that he has been looking after the IT Section since 2010, and they used to do lawful interceptions of mobile phone conversations of terrorists/extremists. PW20 further deposed that as directed by their Controlling S.P., PW19, he retrieved the data from database and recorded in sterile Moserbaer CD Pro which was marked as CD-II (Sonitpur) along with required certification U/S 65(B) of Indian Evidence Act which was forwarded to the NIA, Guwahati by S.P. These Intercepted conversations were in Bodo language which was subsequently translated into English language by his colleagues who were conversant with Bodo and English language. He exhibited Mat. Ext. 1 as the said Moserbaer CD Pro marked as CD-II (Sonitpur), which contained the intercepted conversations of NDFB(S) cadres copied and recorded by him.

In cross-examination, he stated that he did not physically intercept the mobile phone conversations. PW 20 further said that in Ext.42, he had not mentioned in which period he was in charge of the office computer where the aforesaid conversations were stored. PW 20 denied that while storing the enclosed sterile CD of Moserbaer CD Pro from mobile phone conversations is tempered and manipulated. PW20 further stated that he did not see the order issued by PW19, under which he retrieved the data from the database and recorded it in a sterile Moserbaer CD Pro, which was marked as CD-II (Sonitpur). PW 20 also denied that Ext.42 interception of mobile phone conversations was not lawfully done.

XVIII. **PW19, Smt. Banya Gogoi**, S.P., SOU, Assam, under Special Branch, Assam Police, Kahilipara, Guwahati testified that since 2007, has been looking after mainly the collection of extremist Intelligence Inputs using both human resources and scientific techniques and devices. They usually collect conversations intercepted under lawful interception on mobile phones by various terrorists/extremists involved in various unlawful activities. They mainly collect those interceptions of telephonic conversations made by cadres of different active terrorist/extremist organisations of Assam. They also intercepted telephonic conversations of NDFB(S) cadres and stored them in their database system, which is a secret matter. In order to maintain a law and order situation, they share these interceptions and intelligence inputs with other law-enforcing agencies of both the central and state governments. On 15.6.2015, PW19 received a requisition from NIA, Guwahati vide letter No.RST/CIO/RC-04/2014/3150 dtd 15.6.2015 signed by one Ranbir Singh, DSP, NIA, Guwahati for providing further copies of lawful interceptions of mobile phone conversations of NDFB(S) cadres through mobile phones (Ext.37). For lawful interception of conversations through mobile phones, permission from the competent authority is necessary under Indian Telegraph Act, 1885. They were issued such orders from the competent authority for lawful Interception of conversations.

She proved Ext.38, Ext.39 & Ext.40, all are in two sheets each, as those orders under the Indian Telegraph Act, 1885, issued by the Principal Secretary to the Govt. of Assam, Home & Political Deptt, who is the competent authority. These lawful interceptions are done by competent and experienced police personnel under her supervision. The conversations through phones, which are made in local languages, are translated into English. Trained personnel under the department know different local languages of Assam. The conversations made by NDFB(S) cadres on phones are in the local Bodo language and are intercepted

by personnel conversant with the Bodo language. The NDFB(S) cadres also use code language, which is known to them. They decipher the code languages and act accordingly. They provided the translated transcript of the lawful interceptions of mobile phone conversations to NIA, Guwahati. Ext 41 is the forwarding letter, by which PW19 forwarded 20 sheets of translation of the transcript of legal interceptions of mobile phones Nos. 8752882490 along with one CD containing those intercepted conversations used by NDFB(S) extremists NAIHAB and other NDFB(S) cadres for the period from 23.12.2014 to 24.12.2014. These intercepted conversations pertained to the killing of Adivasis by NDFB(S) cadres.

For the purpose of identifying these 20 sheets, they are marked as "Mark-I to Mark-XX". The transcript materials were retrieved from the Database by her competent staff, Inspector, Bhaba Kumar Bora (PW20), which was subsequently translated into English by other skilled staff who are conversant with the Bodo language as well as the English language.

XIX. **PW-21, Shri Partha P D Sarma**, Sr. Scientific Officer (Physics), testified that on instruction and authorisation of the Director of Forensic Science, Assam, he recorded the voice samples of the accused in Central Jail along with the NIA team and two officers of Assam Civil Service, who attended the proceeding as witnesses. He recorded the voice samples of the accused Nitul and three others using scientific methods and devices. He recorded the same in a sterile CD (Material Exhibit-2), and NIA prepared Exhibit-36 voice recording Memo. He also recorded the voice samples on three other sterile CDs, i.e., Material Exhibits 3, 4 & 5. He identified the signatures of other witnesses in the aforesaid exhibits. According to him, the accused persons voluntarily and willingly provided their voice samples.

During cross-examination, he admitted that he recorded the voice

samples as per the direction of the concerned Director, and he was not shown the Court's order for the collection of voice samples of the accused. He further admitted that he has not issued any certificate under Section 65(B) of the Evidence Act, 1872, as regards the CDs. He denied the suggestion that the accused did not give their voice sample voluntarily and willingly, and he admitted that the machine by which the voice was recorded was neither shown in the Court nor had he brought the same.

XX. **PW-32, Pronob Bora**, a Scientific Asstt., Digital Forensic Unit, FSL, Guwahati stated that on 19.06.2015, he was assigned task of recording voice samples of some detainees of Central Jail, Guwahati and accordingly recorded the voice sample of accused Bishnu Narzary @ N. Berama, Sanju Bordoloi @ Sibigiri & Ajay Basumatary @ Buhum by using linear PCM Voice Recorder, Model No. DDR 5300 by adopting scientific methods in presence of witness. PW32 proved the willingness memo of Bishnu Narzary @ N Berama as Ext. 60 and his signature as 60/1 and signature of accused Bishnu Narzary @ N. Berama as Ext. 60/2. He also proved the willingness memo of Sanju Bordoloi @ Sibigiri as Ext. 61, his signature as 61/1 and signature of accused Sanju Bordoloi @ Sibigiri as Ext. 61/2. He also proved the willingness memo of accused Ajay Basumatary @ Buhum as Ext. 62, his signature as Ext. 62/1 and signature of accused Ajay Basumatary @ Buhum as Ext. 62/2.

In cross-examination, PW32 testified that NIA recorded his statement and he has not issued any certificate under Section 65(B) of the Indian Evidence Act. PW32 further testified that he did not know the accused persons personally who were identified to him by NIA. He also denied that the signatures of all accused persons were obtained in a blank paper.

XXI. **PW44, Sh. Ramdhan Choudhury**, Alternate Nodal Officer,

Reliance Communications Ltd. at Guwahati. In 2015, PW44 received a requisition from NIA vide letter NO.RST CIO/RC-04/2014 to provide call details of mobile No.6822591184 for the period 23.12.2014 to 24.12.2014 and the original copy of the customer application form of the said mobile Number. Accordingly, by letter dated 10.06.2015, he had provided the said request.

In cross-examination, PW44 stated that he did not mention the specific words, "to the best of my knowledge and belief in Ext.85." PW44 admitted that he followed the conditions mentioned in Ext.85 as provided by their Corporate office and that he personally had not gone through the prescribed provisions of Sec 65B of Indian Evidence Act while preparing Ext.85. PW44 also admitted that the call data information received by a designated company server/hard disc, is situated at Mumbai. As per DOT Rule, CDRs are stored for 1 year. PW44 also admitted that during the investigation, NIA seized only the original CAF. There is no record in their office to show that the computer or server/hard disc, from which the CDR was extracted, was in good condition, and it is true that there is no mention at Ext.61, on which date the CDRs were extracted from the system.

XXII. **PW45, Sh. Pankaj Kumar Borah**, Nodal Officer for Aircel Dishnet Wireless Ltd., testified that the CDRs he had forwarded are from the period 19.12.2014 to 25.12.2014, as per the available electronic records. Along with the said CDRS, he had also annexed a certificate U/S 65 B of the Indian Evidence Act. On perusal of Ext.87, PW45 could say that there were several columns in the CDR and that, on closely examining the CDR, PW45 can say that on different dates there were phone calls between the phones mentioned therein.

In cross-examination, PW45 stated that before issuing a certificate U/S 65 B of the Indian Evidence Act, he had not gone through the entire

provisions of Section 65 B of the Indian Evidence Act; however, he knew the stipulated provisions of Section 65 B of the Indian Evidence Act for providing CDR. PW 45 admitted that he followed the conditions mentioned in Ext.92, 93 & 94, provided by their Corporate office. Format provided by the corporate office U/S 65 B of the Indian Evidence Act at Ext.92, 93 & 94 did not mention the specific word "best of my belief. PW 45 also admitted that he did not mention in Ex.92, 93 & 94, the period during which the computer was used regularly to store or process information for mobile communication. PW45 also admitted that the server or CDR module from which the call details are extracted is located at their Delhi Corporate office.

In further cross-examination, PW45 admitted that in Ext.86 & 88 there is no mention of case Numbers under investigation. Further, it stated that he had not seen the NIA request letter for providing CDR and CAF covering the period of 19.12.2014 to 25.12.2014 about Mobile Nos.98548-17353, 95776-97355 & 87528-82490. On further cross-examination, PW45 stated that the concerned agency did not ask him to examine the CDRs of the Mobile Nos. 98548-17353, 95776-97355 & 87528-82490, and he did not submit any analysis of CDR report about the aforesaid Mobile Nos and also admitted that vide Ext.87 shown in the column 14, the visited location mentioned is "nil".

29. In the backdrop of the evidence above led by prosecution, what is gathered is that the prosecution seeks to establish the culpability of the accused primarily through four interlinked circumstances, namely: (i) eye witness and identification evidence; (ii) recoveries of arms and ammunitions allegedly pursuant to disclosure statements; (iii) electronic evidence comprising intercepted telephone conversations, voice sample and call details records; (iv) recovery of writing pad, cadre lists, etc, of NDFB(S) and (v) overarching allegation of criminal conspiracy.

30. In our opinion, each of these circumstances must independently satisfy the test of legal admissibility and probative value, and cumulatively form an unbroken chain pointing only to the guilt of the accused.

31. In the aforesaid backdrop, this Court now proceeds to scrutinize the evidence led by the prosecution and determine whether the prosecution has succeeded in establishing the charges brought against the accused persons beyond a reasonable doubt.

32. Let us first scrutinize the eyewitness testimony and other villagers' testimony, together with the evidence relating to photo and dock identification of the accused persons.

33. PW-3, PW-4, PW-39, PW-40, PW-53, PW-57, PW-58 and PW-59 uniformly support the occurrence of the brutal killing of six innocent Adivasi villagers of Hatijuli village and causing injuries to two others on the fateful day, i.e. on 23.12.2014, between 04:00 PM and 05:00 PM.

34. Admittedly, none of the eyewitnesses, except PW-4 and PW-53, identified the assailants.

35. PW-4, who was about 13 years of age at the time of the incident, deposed that he had seen one assailant and could identify him. He identified the accused, Ajay Basumutary, in the dock. During his cross-examination, he stated that he was seated on the last bench in the courtroom, where several other persons were also present. He further admitted that he had not furnished any physical description of the assailant to the police during the investigation.

36. PW-53, the other eyewitness who was about 10 years old at the time of the incident, testified that he could identify the terrorist, who had fired and killed his mother. He further deposed that upon being summoned, he appeared before the Investigating agency and identified two photographs of terrorists (allegedly of accused Bishnu) who had killed his mother, and also identified his signature on those photographs (M. Ext. 9 and M. Ext. 10). He also identified accused Bishnu Narzary in the dock. However, during cross-examination, PW-53 stated

that some of them were wearing black clothes and had covered their faces. He further admitted that at the time of the occurrence, the sunlight was fading. Significantly, he acknowledged that he did not know the contents of Ext. 101 (the memorandum of photo identification parade) and that the witnesses to Ext. 101 had not signed the same in his presence. He further stated that before identifying the accused in the photographs, he had not disclosed the accused's physical features to any authority.

37. Thus, though these two eye witnesses claimed the ability to identify the assailants, none of the witnesses had furnished any physical description to the police before identification in the Dock/in photographs, inasmuch as these two witnesses were minors at the time of the occurrence under fading daylight. It is significant that the identification was made on a distant date from the date of the incident. The occurrence took place on 23.12.2014, accused Bishnu Narzary and Ajay Basumatary were arrested on 13.02.2015, 20.02.2015 respectively and the photo identification and dock identification was done on 12.06.2015 and 19.08.2017, respectively. Such a delay becomes significant when both the eyewitnesses were minors.

38. It is also important to note that no test identification parade was conducted, even though all the accused persons had been arrested and were in police custody. No explanation had been offered by the prosecution for the failure to hold an identification parade, particularly when the materials on record clearly establish that the assailants were not previously known to the eyewitnesses.

39. Another significant aspect is that PW-53 was not even cited as a prosecution witness on the charge sheet, despite his alleged participation in the photo identification process.

40. In the opinion of this Court, where the assailants were not previously known to the witnesses, the failure to conduct a test identification parade assumes critical significance. It renders the subsequent dock identification inherently weak and unsafe to rely upon as substantive evidence.

41. Turning to the photo identification conducted on 12.06.2015, PW-17 deposed that he usually collects photographs of terrorists from various sources and that he had handed over 11 photographs of NDFB cadres to PW-63 vide Exhibit-35. According to him, out of those 11 photographs, M.Ext. 9 and M.Ext. 10 were photographs of the accused persons. However, in his Cross-examination, this witness admitted that his statement was not recorded by NIA during the investigation, that Ext. 35 does not disclose the source of the photographs, that no witness was present at the time of handing over the photographs to NIA and that the source from which the photos were collected had not supplied any negatives, memory cards or other primary materials relating to the photographs.

42. PW-49, who participated in the photo identification process as a witness, stated that 11 photographs were laid out and PW-53 identified Ext. 9 and Ext. 10, and that she put her signature on the memorandum of photo identification. In her cross-examination, she admitted that no negatives of the photographs were shown to her. She stated that she did not know whether the photographs were manipulated prior to the identification process.

43. The law has been consistently expounded by the Hon'ble Apex Court so far as identification evidence is concerned, whether by way of a test identification parade, photo identification, identification in Court, or even dog-tracking evidence. Identification for the first time in court, without a prior test identification parade, is a weak piece of evidence, particularly where the accused was not previously known to the witness. Photo identification, though not per se inadmissible, is merely an investigative aid and cannot ordinarily substitute a properly conducted test identification parade. The evidentiary value of such identification must be assessed in the backdrop of the facts of each case. In this context, we can gainfully place reliance on **George and others -Vs- State of Kerala, (1998) 4 SCC 605; State (NCT of Delhi) -Vs- Navjot Sandhu @ Afshan Guru, (2005) 11 SCC 600; Siddharth Vashisht @ Manu Sharma -Vs- State (NCT of Delhi), (2010) 6 SCC 1; Ravinder Kumar Pal @ Dara Singh -Vs-**

Republic of India, (2011) 2 SCC 490; and Raja -Vs- State by the Inspector of Police, (2020) 15 SCC 562.

44. In the backdrop of the aforesaid evidence and settled propositions of law, in the opinion of this Court, the photo identification process conducted on 12.06.2015 is fraught with infirmities. The sources of the photo were not brought on record; no primary materials, such as negatives or digital originals, were produced; no contemporaneous independent corroboration exists; and the witnesses to the process admitted a lack of knowledge regarding possible manipulation.

45. Therefore, the evidentiary value of such photo identification, in the absence of a prior identification parade, is minimal and cannot form the foundation of a conviction.

46. To summarise, when it comes to the crucial question of the identity of assailants, the evidence assumes a distinctly fragile character. The absence of a test identification parade also assumes critical significance in the present case, since the identification of the accused was for the first time in the Court after a long gap by a child witness, particularly where the witness had no prior acquaintance. Such evidence constitutes weak form of evidence and cannot, by itself, sustain a conviction. The photo identification test process relied upon by the prosecution also fails to inspire confidence. As recorded hereinabove, the process lacked the minimum safeguards to rule out the possibility of suggestion or manipulation. Although photo identification is not, per se, inadmissible, in the absence of corroboration, it cannot be treated as substantive evidence of identity.

47. The Court now turns to the next link sought to be established by the prosecution, namely, the seizure of arms and ammunition, allegedly led by the accused Ajay and Bishnu and Nitul.

48. The prosecution relies heavily upon multiple seizure lists and alleged recoveries of arms and ammunition to connect the accused with the crime.

49. There are four seizure lists on record. The first is Exhibit 68, dated 12.01.2015, prepared by PW-37 in connection with BNC Police Station Case No. 15/2015 at about 11:30 PM from the Library centre under Dhekiajuli Police Station.

50. Although three constables were listed as seizure witnesses, none were examined by the prosecution. The Seizure lists records indicate that recovery was made while being led by accused Bishnu; however, there is no disclosure statement or recovery memo in this regard, as required under law.

51. It is relevant to note that the accused, Bishnu, was apprehended in a joint operation on 11.01.2015. As per Material ext. 17, one M-22 rifle bearing No. N0032008, without a magazine, was recovered and said Mat. Exhibit was handed over to NIA vide Exhibit-75 on 25.03.2015. Although two witnesses were shown to have been present at the time of the handover, they were not examined. PW-37, in his cross-examination, admitted that he had not seen any disclosure statement in Court as referred to in Exhibit-68 (Seizure list) and further admitted that he had neither sealed nor packed the seized arms.

52. The second seizure list is Exhibit 71, dated 28.01.2015, prepared by PW-37 in connection with BNC PS Case No. 23/2015, which was allegedly recovered from Hugrajuli Pathar. Three constables were shown as seizure witnesses; however, none were examined. The seizure list indicates recovery of arms from the arrested accused person, but does not specify from whose conscious possession the recovery was made. Although the names of three accused persons, including accused Nitul, are mentioned, the seizure lacks clarity as to the possession. The seizure so made, under M. Ext. 11 to M.Ext. 11/7, was handed over to NIA by Exhibit 46. Two independent witnesses were shown to be present during the handing over of such arms and ammunition; they were not examined. PW-37 admitted in his cross-examination that there was voluntary disclosure by the accused regarding the arms and ammunition that he had not seen any disclosure statement referred to in Exhibit-71, that the seizure list did not specify conscious possession, and that the arms were neither

sealed nor packed.

53. The third seizure list is Exhibit 72, dated 30.01.2015, prepared by PW-38 at Adabari Library Centre in connection with BNC PS Case No. 23/2015. Two independent seizure witnesses were there as per Exhibit 72; however, none were examined. The seizure list states that the recovery was made after accused Nitul led and shown the arms and ammunition. Still, again, there is no disclosure statement or recovery memo in this regard as required under Section 27 of the Evidence Act. Beyond that, PW-38 admitted in cross-examination that he had not seen any disclosure statement in Court and that he had not mentioned the brand, year of manufacture or country of origin of the seized arms.

54. The fourth seizure list is Exhibit 73, dated 03.02.2015, also prepared by PW-38 at the same location. Although two independent witnesses were shown to be present, none were examined. The seizure was again stated to have been made on being led and shown by accused Nitul, but without a disclosure statement and a recovery memo, as required under Section 27 of the Evidence Act. PW-38 admitted that he had not seen the disclosure statement referred to in Exhibit 73 in the Court.

55. With regard to seizure of mobile phones, SIM cards and memory cards from accused Nitul, as well as his arrest, PW-9 and PW-51 gave differing versions.

56. PW-9 stated that accused Nitul was brought to the Police Station by him on the request of family members of accused Nitul and that accused Nitul handed over the mobile phone to him, to be given to his family member, which was later taken by NIA.

57. PW-51 stated that he brought Nitul to the Police Station for surrender, and Nitul handed over a mobile phone to him, which was later seized by NIA vide Exhibit 104 dated 17.03.2015; however, as recorded hereinabove, in BNC PS Case No. 23/2015, it is shown that Nitul was apprehended in a joint operation on 27.01.2015. Thus, three conflicting versions emerges as regards arrest and

seizure of mobile phone, SIM Cards etc., from Nitul. The prosecution cannot at the same time, through their witnesses project that Nitul was arrested in a joint operation and that he surrendered before Police. Either of one is possible and not both together.

58. The Court now considers the disclosure statement attributed to accused Bishnu. He was apprehended on 11.01.2015 in connection with BNC PS Case No. 15/2015 during a joint operation by the 18th Maratha Light Infantry Division and Dhemaji Police. The FIR, Exhibit-67, records that he was apprehended without any weapon. The FIR does not mention any disclosure regarding the killing of Adivasi villagers on 23.12.2014 (Dhekiajuli PS Case No. 738/2014). However, Exhibit-68 indicates a seizure on 12.01.2015 at 11:30 PM, allegedly on being led by accused Bishnu. Subsequently, a disclosure statement dated 16.02.2015 (Exhibit-109), recovery memo dated 16.02.2015 (Exhibit 110) and seizure list dated 07.02.2015 were prepared. Although two independent witnesses were shown to have signed these documents, none were examined. PW-41, who allegedly recorded the disclosure statement and prepared the recovery and seizure memos, did not depose about these exhibits.

59. PW-62 claimed to be present during disclosure and recovery, yet his signature does not appear on Exhibit 109 or Exhibit 110. Even the documents do not bear the signature or seal of NIA officials. The witnesses to the seizures, though, put their signatures on the seizure memo on 19.05.2015, though such seizures were carried out on 17.02.2015.

60. Thus, the non-examination or withdrawal of these witnesses has critical significance and bearing. A careful scrutiny of Exhibits 68, 71, 72 and Exhibit 73 reveals a consistent pattern of procedural non-compliance. In none of the recoveries are there legally proved disclosure statements satisfying the requirement of Section 27 of the Evidence Act. The alleged disclosures were not proved through the examination of witnesses.

61. The alleged disclosure recovery and seizure pertaining to accused Bishnu

suffers from an even graver deficiency. The subsequent disclosure memo, recovery memo, and seizure list were prepared while he was in custody and are unsupported by examined witnesses. Vital witnesses present were not even examined. Exhibits bear inconsistent dates and timings and lack the signatures of responsible officers. PW-41, who allegedly recorded this document, did not testify regarding the same. Therefore, such recoveries cannot be held to be voluntary, reliable or legally admissible.

62. In totality, the recovery projected by the prosecution failed to meet the statutory threshold of Section 27 of the Evidence Act and remains under a cloud of serious doubt.

63. The arrest of the accused occurred in a staggered manner between January and March 2015, mostly during joint Army operations in different PS station jurisdictions, resulting in multiple local police cases. Arms, ammunition and explosives were seized in these independence cases and later handed over to the NIA. This aspect is important to the noted. The prosecution has attempted to treat this seizure as incriminating discoveries in the present case. However, the evidence shows that many of these arms and explosives were seized prior to, or independent of, any disclosure made in connection with the present offence

64. The principle underlying Section 27 of the Evidence Act is that "the fact discovered" is not synonymous with the "object produced". This position has been authoritatively laid down in **Pulukuri Kattaya and others -Vs- Emperor, AIR 1947 PC 67; Mohd. Inayatullah -Vs- State of Maharashtra (1976) 1 SCC 828, Bobby -Vs- State of Kerala, (2023) 15 SCC 760; and Subramanya -Vs- State of Karnataka (2023) 11 SCC 255**.

65. The scope of admissibility of Recoveries under Section 27 of the Indian Evidence Act, 1872, is limited strictly to that portion of the information given by the accused which distinctly relates to the fact thereby discovered. What is admissible is the information leading to discovery, and not any opinion or

inference drawn by the investigating agency. Mere recovery of an object does not *ipso facto* establish the guilt of the accused, unless the recovery is proved to be a direct consequence of voluntary disclosure and is corroborated by other reliable evidence, which is lacking in the present case as discussed and recorded hereinabove.

66. The prosecution has further sought to establish involvement of the accused through intercepted telephone conversations, call detail records, voice samples and recovery of the cadre list of the NDFB (S) militants and their cash receipt records.

67. Now, let us scrutinize such projection of the prosecution.

68. PW-19 deposed regarding lawful interceptions under the Telegraph Act and the production of a transcript and a stored compact disk. However, she admitted that she did not intercept the call herself; that original CDs were not shown to her in the Court; and that she was not acquainted with the Bodo language.

69. PW-20, who retrieved the data from the database, admitted that he did not perform the interception, and he retrieved the data under the direction of PW-19.

70. The person who actually intercepted and stored the conversations was not examined nor was any appropriate certificate under Section 65B produced to authenticate the database/CD.

71. The person who transcribed the intercepted conversations was also not examined.

72. The NDBF (S) cadre list and the cash register were seized from an Army official who earlier recovered those in connection with some other operations carried out by the Army against NDFB(S) extremists. The authenticity of such documents was neither proved, nor was the said Army official, from whom such seizure was made, examined.

73. Thus, though the prosecution relied on these materials to establish conspiracy and to prove that accused are members of NDFB(S), the authenticity of the compact disk, translated transcript and cadre list, etc., have not been duly proved, as neither the translators, nor the person who made such interception, nor the person from whom such cadre list, etc., was recovered were examined. The certificate under section 65B was also defective in the absence of a declaration of the same being "true to the knowledge and belief" of the issuing authority.

74. Coming to the call details record, Exhibits 84 and 87 are CDRs produced by Reliance Telecom Limited and Aircel Distant Wireless Limited, respectively. Exhibits 83, 89, 90, and 91 are customer application forms. These Exhibits go to show that the mobile phones were in the names of three different persons but not of the accused. However, the owners of mobile phones were not examined. The certificates issued vide Exhibits 85 and 87 are also defective, inasmuch as the requirement that they be based on the knowledge and belief of the person who proved them was not disclosed.

75. Thus, the call details record and customer application forms suffer from defective certifications and the absence of examination of registered subscribers or retailers. The chain of custody and the ownership of the mobile connections remain unproven.

76. Voice samples of the accused were recorded pursuant to judicial orders; however, voice compilation presupposes admissible primary electronic evidence. Where the intercepted conversations themselves are inadmissible, voice sample evidence becomes inconsequential. The superstructure cannot survive the collapse of the foundation.

77. The prosecution further seeks to establish conspiracy and extremist membership by recovering letter pads, cadre lists, and organisational documents. The law is well settled that mere possession of a document or association is insufficient. What is required is proof of active involvement and

meeting of the minds. The documents relied upon were not proved to have been authored by the accused, nor seized from their possession, nor linked to planning the execution of the present offence; instead, they were recovered in other cases from other persons, who are not accused in the present case. The person who recovered such material was not even examined. The prosecution's evidence in this regard, even when taken at its highest, establishes suspicion but not proof.

78. Thus, to summarise the evidence relating to intercepted conversions/call records suffers from foundational defects. The person who actually intercepted and stored the conversations was not examined. The database from which the conversations were retrieved was not authenticated. The person who prepared the translated transcripts was not examined as a witness. PW-19 herself admitted unfamiliarity with the language of the conversation and the absence of original media during her testimony. Above that, no proper certificate under Section 65B of the Evidence Act was produced to authenticate the database.

79. It is important to record here that Section 10 of the Evidence Act, and its interplay with conspiracy related offences, is well settled that acts, statements, or writings, of a conspirator are admissible against co-conspirator, however, as recorded hereinabove, in the case in hand, when the intercepted telephone conversations/ translated transcript suffers from foundational defect, such materials cannot be used as evidence against the accused appellants.

80. Thus, although the prosecution has sought to establish conspiracy through intercepted telephone conversations, call detail records, and voice samples, the electronic evidence placed on record is replete with legal infirmities, as set forth hereinabove.

81. The voice samples were without proper certification, and the expert opinion merely states that the voices are “possible”, which is far from conclusive. These lapses strike at the root of the admissibility and reliability of the electronic evidence.

82. When these evidentiary shortcomings are examined in the backdrop of the law relating to criminal conspiracy, the prosecution case falls substantially short of the required standards.

83. Undoubtedly, a conspiracy is rarely proved by direct evidence and may be inferred from circumstances. However, the circumstances must be firmly established and must form a complete chain pointing unerringly to the guilt of the accused. Suspicion, however strong, cannot replace place proof.

84. In the present case, the evidence on record, far from establishing a meeting of minds, is fragmented, procedurally fraught and incapable of sustaining the interference of a criminal conspiracy beyond a reasonable doubt.

85. The earliest link relied upon is the intelligence input received on 2.10.2013 by PW34, leading to Jagirod PS case No. 223/2013. That information pertains to the presence of NDFB cadre allegedly taking shelter in the house of one Rinku Patar. These are prior to the incident on 23.12.2014 by more than a year, and the prosecution has failed to bring on record any direct nexus between the said episode and the offence in question. Intelligence inputs, by their very nature, are not substantive evidence and can only trigger and aid the investigation. They do not establish culpability without independent corroboration. In the present case, the prosecution must bridge this temporal and evidentiary gap.

86. Applying the settled principle governing child witness, identification evidence, recoveries under Section 27 of the Evidence Act, electronic evidence under Section 65 B and the law of conspiracy under Section 120B IPC read with Section 10 of Evidence Act, we are constrained to hold that the prosecution has failed to prove the involvement of the appellants in the commission of the crime in the manner required by law.

87. The foundational evidence necessary to link the appellants to the commission of the offence is conspicuously absent, and vital links in the chain of circumstances remain unproven..

88. So far as the charges under the Arms Act are concerned, the prosecution was required to prove conscious and exclusive possession of arms by the appellants, duly recovered in accordance with law, and further to establish a nexus between such recovery and the commission of the offence. In the present case, the recoveries relied upon are vitiated by serious procedural and evidentiary lapses. Independent seizure witnesses were not examined; the seized arms were not sealed or packed at the place of recovery; the seizure list does not consistently disclose from whom they were recovered. In several instances, the witnesses themselves admitted that no voluntary disclosure preceded the alleged recovery. In the absence of reliable proof of conscious possession and lawful recovery, the foundational requirement for sustaining a conviction under the Arms Act remains unfulfilled.

89. Turning into the charges under the UA(P)A, the prosecution was required to establish either that the appellants were active members of a banned terrorist organisation or that they had participated in, abetted, or facilitated terrorist acts. Mere possession of arms or documents or alleged ideological affiliation is insufficient. The Hon'ble Supreme Court, on many occasions, held that passive and nominal association does not attract penal liability under the UA(P)A unless accompanied by proven active involvement or incitement of violence. In the present case, the alleged recovery of letter pads, cadre lists, and documents has not been proved in accordance with the law; their authorship, authenticity, and conscious possession remain un-established.

90. The voice sample, even if assumed to have been properly recorded, is merely corroborative and cannot substitute for substantive proof in the absence of admissible electronic evidence, reliable recoveries, or credible identification. The essential ingredients of offences of conspiracy and under the UA(P)A are not established.

91. The prosecution has thus failed to prove beyond a reasonable doubt the culpability of the appellant under the Arms Act or the UA(P)A. Therefore, the

benefit of doubt must necessarily follow.

92. In the ultimate analysis, while the occurrence of a heinous crime stands established, the evidence on record does not meet the threshold to prove beyond a reasonable doubt that the appellants are the perpetrators of the crime and thereby, to sustain the conviction of the appellants.

93. The appellants are, therefore, entitled to the benefit of doubt.

94. Accordingly, for the reasons recorded hereinabove, the judgment dated 29.08.2018 and Order of sentence dated 15.09.2018 passed by the learned Special Judge, NIA, Assam, Guwahati in Special NIA Case No. 04/2015, stands set aside and the appellants are acquitted of the charges leveled against them.

95. Because we have acquitted the accused, we need not go into the aggravating and mitigating circumstances noted by the Trial Court for the appellant. i.e. accused No. 2, Bishnu Narzary, and accused No. 3, Ajoy Basumatary, while imposing the Death Sentence.

96. Accordingly, the Death Sentence Reference is also dismissed.

97. The accused are directed to be set at liberty forthwith, unless detained in any other case.

98. The TCR to be returned to the Trial Court forthwith.

99. Registry to forward a copy of this judgment and order to the concerned Superintendent of District Jail, for compliance and record.

JUDGE **CHIEF JUSTICE**

Comparing Assistant