

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.543 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Nikesh Dubey Son of Vijay Dubey resident of Village - Koigama, Police Station - Chakiya, District - East Champaran at Motihari.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 455 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Munni Devi Wife of Sanjay Lal Dev, Resident of Village- Shivram, P.S.- Baheri, District- Darbhanga.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 523 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Mukesh Pathak @ Chutul Pathak @ Aditya Kumar S/o Late Lalan Pathak, R/o Vill.- Maruabad, P.S.- Mehsi, District- East Champaran at Motihari.



... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 567 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Vikash Jha @ Kalia Son of Subodh Jha, Resident of Village- Bathnaha, Police Station- Bathnaha, District- Sitamarhi.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 577 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Pintu Lal Dev @ Ajay Kumar Son of Late Mahesh Lal Dev, Resident of Village Shivram, P.S. Baheri, District- Darbhanga.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s



with

CRIMINAL APPEAL (DB) No. 579 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Sanjay Lal Dev Son of Dinesh Lal Dev @ Parmod Kumar, Resident of
Village- Shivram, P.S. Baheri, District- Darbhanga.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 605 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Pintu Jha @ Pintu Kumar Jha S/o Pawan Jha, R/o Vill.- Belwa, P.S.- Piprahi,
District- Sheohar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 789 of 2018

Arising Out of PS. Case No.-270 Year-2015 Thana- BAHERI District- Darbhanga

Pintu Tiwari @ Pintu Tiwary S/o Sri Ashok Tiwari, R/o Vill.- Rashidpur, P.S.-
Sheohar, District- Sheohar.



... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 543 of 2018)

For the Appellant/s : Mr. Sunil Kumar Pathak, Adv.

For the State : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 455 of 2018)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.

Ms. Kiran Kumari, Adv.

Mr. Md. Imteyaz Ahmad, Adv.

Mr. Anisur Rahman, Adv.

Mr. Ritwik Thakur, Adv.

Ms. Vaishnavi Singh, Adv.

For the State : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 523 of 2018)

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

Mr. Sunil Kumar Pathak, Adv.

For the State : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 567 of 2018)

For the Appellant/s : Mr. Ashhar Mustafa, Adv.

Mr. Vikash Kumar Jha, Adv.

Mr. Ashish Kumar Ranjan, Adv.

For the State : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 577 of 2018)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.

Ms. Kiran Kumari, Adv.

Mr. Md. Imteyaz Ahmad, Adv.

Mr. Anisur Rahman, Adv.

Mr. Ritwik Thakur, Adv.

Ms. Vaishnavi Singh, Adv.

For the State : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 579 of 2018)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.

Ms. Kiran Kumari, Adv.

Mr. Md. Imteyaz Ahmad, Adv.

Mr. Anisur Rahman, Adv.

Mr. Ritwik Thakur, Adv.

Ms. Vaishnavi Singh, Adv.

For the State : Mr. Satya Narayan Prasad, APP

(In CRIMINAL APPEAL (DB) No. 605 of 2018)

For the Appellant/s : Mr. Pratik Mishra, Adv.

Mr. Vatsal Vishal, Adv.



Ms. Anita Kumari, Adv.
For the State : Mr. Mayanand Jha, APP
(In CRIMINAL APPEAL (DB) No. 789 of 2018)
For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Ms. Kiran Kumari, Adv.
Mr. Md. Imteyaz Ahmad, Adv.
Mr. Anisur Rahman, Adv.
Mr. Ritwik Thakur, Adv.
Ms. Vaishnavi Singh, Adv.
For the State : Mr. Ajay Mishra, APP

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 11-12-2024

The afore-captioned eight appeals have been heard together and are being disposed of by this common judgment.

2. We have heard Mr. Surendra Singh, Senior Advocate and Mr. Ajay Kumar Thakur; Mr. Sunil Kumar Pathak; Mr. Ashhar Mustafa and Mr. Pratik Mishra, Advocates for the appellants. The State is represented by Mr. Abhimanyu Sharma, Mr. Dilip Kumar Sinha, Mr. Satya Narayan Prasad, Mr. Mayanand Jha and Mr. Ajay Mishra, the learned APPs.

3. The appellants/Nikesh Dubey, Mukesh Pathak and Vikash Jha have been convicted under Sections 302,



387/109, 386/116 and 120B of the IPC and Section 27(2) of the Arms Act *vide* judgment dated 26.02.2018 passed by the learned Additional Sessions Judge-V, Darbhanga, in connection with Sessions Trial No. 146 of 2016, arising out of Baheri P.S. Case No. 270 of 2015. By the same judgment, appellants/Munni Devi, Pintu Lal Dev, Sanjay Lal Dev, Pintu Jha and Pintu Tiwari have been convicted under Sections 302/109, 387/109, 386/116 and 120B of the IPC. By order dated 07.03.2018, they have been sentenced to undergo R.I. for life for the offence under Section 302 of the IPC. The appellants have also been sentenced for rest of the offences. They have been saddled with different amounts of fine with respect to all the offences including for the offence of murder.

4. The sentences have been ordered to run concurrently.

5. Along with the appellants, six other accused persons were also tried but co-accused Subodh Dubey @



Ajay Kumar Dwivedi, Rishi Jha, Anchal Jha and Tuna Jha were acquitted for the paucity of evidence against them. Out of ten accused persons including the appellants who have been convicted, Abhishek Jha and Santosh Jha died during the pendency of their respective appeals preferred before this Court.

6. As such, the appeals of Abhishek Jha and Santosh Jha stood abated.

7. The appellants have been charged for conspiring and killing the two engineers of BSC C&C JV company, a construction company which was awarded the contract for constructing the road between Baheri and Bahera, falling under the territorial jurisdiction of Baheri police station. The two engineers viz. Mukesh Kumar and Brajesh Kumar were killed on 26.12.2015 at 01:00 P.M. at the construction site.

8. The FIR was lodged by Dhiraj Singh (P.W. 15), the nephew of one of the deceased/Mukesh Kumar. He has alleged that on 26.12.2015 at about 01:00 P.M.,



while the deceased engineers were at the construction site, four unknown persons came on motorcycles and started firing indiscriminately, injuring and killing both the engineers. The marauders thereafter left the scene. The two injured were brought by the company officials to Darbhanga Medical College & Hospital (DMCH) but on way, they succumbed to the injuries. While the miscreants left the place of occurrence, they threw pamphlets, hailing appellants/Mukesh Pathak and Vikash Jha.

9. On the basis of the aforementioned fardbeyan of P.W. 15, Baheri P.S. Case No. 270 of 2015 was registered for investigation under various Sections of the IPC and the Arms Act against unknown persons.

10. It appears from the records that the news regarding this incident was conveyed to one Mritunjay Pandey (P.W. 2), a Project Manager of the company, who was present at a different site but only 12 to 15 kms. away. He brought the injured/Mukesh and Brajesh to



DMCH, where they were declared dead.

11. The fardbeyan was countersigned by Rupesh Kumar (P.W. 3) who though claims to be an eye witness but has been declared hostile and Ramesh Kumar as well as Anil Chandra Suman, both of whom have not been examined at the Trial. The fardbeyan had been recorded by ASI/Brahmdeo Prasad, who has also not been examined. The fardbeyan was recorded in the Emergency Ward of DMCH.

12. Shortly after the occurrence and the registration of the FIR, one Sachchidanand Yadav (P.W. 8), a Sub-Inspector posted in Baheri Police Station visited the P.O. and seized the pamphlets referred to above (Material Ext. 2) and 12 fired cartridge cases of rifle and one fired cartridge case of a pistol. It further appears that on suspicion, because of the proclamation in the pamphlets, investigation proceeded on the assumption that Mukesh Pathak and Vikash Jha are behind the occurrence. They were arrested. The names of the other



appellants surfaced during the course of investigation. The investigation had proceeded on the premise that the murders were committed at the behest of one Santosh Jha, who had set up a kind of private militia called Bihar Peoples Liberation Army. The appellants are in some way or the other alleged to be associated with Bihar Peoples Liberation Army.

13. The investigations revealed that the private army, referred to above, thrived on the extortion money from the Road Construction companies. The protection/extortion money was demanded from the officials of the company viz. the Project Manager S.B. Singh who has not been examined at the Trial; Senior Manager, Devesh Rathore (P.W. 16) and Chief Project Manager, B.K. Jha (P.W. 6).

14. It further came to light that appellants/Sanjay Lal Dev, Munni Devi and Ajay Kumar @ Pintu Lal Dev are residents of the area where the occurrence took place; whereas the other appellants and



accused persons are residents of districts Sitamarhi, Sheohar, Motihari and Muzaffarpur. Appellants/Sanjay Lal Dev, Pintu Lal Dev and Munni Devi are alleged to have procured mobile telephone numbers of the officials of the company on the asking of Santosh Jha, Mukesh Pathak and Vikash Jha. Later, the three officials of the company, named above, were told to pay up the extortion money.

15. The prosecution version is that amongst the miscreants who had come to the spot, Pintu Lal Dev and Sanjay Lal Dev pointed at the engineers (deceased), whereafter Vikash Jha, Abhishek Jha, Nikesh Dubey and Mukesh Pathak fired from their weapons, killing the two deceased. Appellants/Munni Devi, Pintu Lal Dev and Sanjay Lal Dev had arranged for accommodation of Vikash Jha, Karan Jha, Pintu Jha and Mukesh Pathak. They had stayed in a lodge owned by one Sanjeev Mishra. The miscreants kept on changing their location and after sometime, they shifted to the house of one Durga Nand Jha, situated within the territorial jurisdiction of



Laheriasarai Police Station in the district of Darbhanga. On the disclosure of Munni Devi, a raid was conducted in the house of Durga Nand Jha from where a paper with mobile number 7549355779 written on it, was recovered. It was later found out that the said mobile number was registered in the name of one Kesho Devi, mother of Pintu Lal Dev, who had been using the number. Two other telephone numbers which were put on surveillance, reflected that Santosh Jha, Munni Devi and Sanjay Lal Dev were in constant touch with each other. Appellant/Munni Devi is said to be the sister of Santosh Jha. She is the wife of Sanjay Lal Dev. Ajay Kumar @ Pintu Lal Dev is the cousin of Sanjay Lal Dev. Thus, Santosh Jha, Munni Devi, Sanjay Lal Dev and Ajay Kumar @ Pintu Lal Dev are closely related to each other.

16. Post-mortem examination was done on the two deceased by Dr. Ravi (P.W. 5), who found that both the deceased had suffered several gun-shot wounds.

17. Before the Trial Court, twenty witnesses



were examined and several Exhibits/Material Exhibits were produced. The Trial Court found 10 out of 14 persons put on Trial to be guilty. Appellant/Mukesh Pathak had absconded for a while, as a result of which his trial was separated but was later amalgamated with the main trial *viz.* Sessions Trial No. 146 of 2016.

18. In sum and substance, the case of the prosecution is that Santosh Jha (since dead) was the linchpin who had set up Bihar Peoples Liberation Army and along with his associates had demanded protection money from the construction company, which money was never paid. The murders were executed for instilling fear in the minds of company officials as also for their not having paid the extortion money.

19. The appellants, however, have argued that the prosecution has relied upon absolute guess-work and all persons who are in some way or the other associated or related with Santosh Jha have been made the scapegoat. Before the Trial Court, a weird defence was



taken that the management of the company itself got their engineers killed as otherwise they would have had to pay a penalty of Rs. 6.76 Crores because of delayed completion of the project. There was a clause in the agreement which stipulated a penalty of 10%, if the project were not completed within the timeline. Penalty would not be payable in the event of any natural calamity or law and order problem.

20. The other defence taken by the appellants before the Trial Court was that (i) the informant (P.W. 15) was not present at the P.O. and, therefore his claim of being an eye witness to the occurrence is false; (ii) there is an interpolation in the FIR and a day's delay in the FIR being placed before the Magistrate; (iii) the certificate regarding CDR of various telephone numbers on surveillance was not in accordance with the provisions contained in Section 65(B) of the Indian Evidence Act; (iv) credible witnesses were not examined; (v) the decoding of CDR reflected a patent mistake; (vi) the



scribe of the FIR had not been examined; (vii) and the investigator (P.W. 19) had reasons to falsely implicate the appellants.

21. It was urged before us that Mukesh Pathak, one of the killers, was arrested on 12.07.2016 who was taken on police remand and interrogated by the investigator (P.W. 19). Based on his confession (Ext. 53), there were recoveries of firearms but that was of no value as it did not reflect the authorship of concealment. It only reflected his knowledge as to where the firearms were kept. In that connection, it has been argued that based on his confession, one pistol (Material Exhibit No. 8) was recovered from one Vijay Kumar, who, later disclosed about another weapon *viz.* AK-56 rifle (Material Exhibit 6) which was seized from one Sanjay Jha. Neither Vijay Kumar nor Sanjay Jha were arraigned as accused persons in the Trial. They, in fact, were prosecuted separately for the offence under Section 25 of the Arms Act.

22. The two weapons which were seized along



with the fired empty cartridge cases were dispatched to the RFSL, Patna. It was opined by the laboratory that with those weapons only, the shots were fired and the 12 fired cartridge cases were the ammunition.

23. It was summed up on behalf of the appellants that the Trial Court convicted them only on the basis of the conclusions drawn by the I.O. (P.W. 19) that they were the members of Bihar Peoples Liberation Army. During the course of investigation, the I.O. had learnt through secret sources about the formation of Bihar Peoples Liberation Army and the association of the appellants with the organization. The information about such private militia seeking extortion money from construction companies was based on hearsay reports. The Trial Court wrongly but heavily relied upon the dock identification of four of the appellants by Dhiraj Singh (P.W. 15) as also on the recovery of AK-56 rifle and a pistol on the so-called confession of Mukesh Pathak and the reports of the RFSL, Patna opining that the crime



cartridges found at the P.O. were fired by the seized weapons.

24. The Trial Court had also, according to the appellants, erroneously relied upon the call detail records which were certified by S.I./Dilip Kumar Pathak (P.W. 18) and not by any official of the telephone company. There was no way, the appellants have argued, that the seizure of pamphlets from the P.O. and the claim of some of the P.Ws. that slogans were raised at the time of occurrence, could have been relied upon by the Trial Court to conclude that the appellants are guilty.

25. With respect to the case of Munni Devi, Sanjay Lal Dev, Pintu Lal Dev and Pintu Tiwari in particular, it was argued that none of them were either named in the FIR nor during the Trial, any witness had spoken about their complicity in the crime or their having conspired with the other assailants. It was further argued that the I.O. (P.W. 19) in his examination-in-chief has admitted that on 26.12.2015 *i.e.*, the day of the



occurrence, he had conducted raids in the houses of Sanjay Lal Dev and Pintu Lal Dev but he did not at all speak about the smoking gun for him to do so. He admitted of knowing Sanjay Lal Dev and Munni Devi even prior to the occurrence.

26. There is absolutely no evidence, the appellants have contended, of any conspiracy which was hatched for committing the occurrence.

27. It was also seriously criticized by the appellants that the confession of the accused persons before the police was exhibited before the Trial Court, notwithstanding the deprecation of such practice by the Supreme Court in the case of ***Venkaresh @ Chandra and Anr. v. State of Karnataka (2022) 16 SCC 797.***

28. Before, we discuss the evidence, we stand reminded of a pithy observation of the Supreme Court in ***Paramjeet Singh @ Pamma v. State of Uttarakhand AIR (2011) SC 200,*** that a Court must



bear in mind that “*human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicion.*” The Courts have been cautioned that even though an offence may be gruesome and revolting to the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjectures. The fact that the offence is committed in a very cruel and revolting manner may in itself be a reason for scrutinizing the evidence more closely, lest the shocking nature of the crime may induce an instinctive reaction against dispassionate judicial scrutiny of facts and law.

29. The substratum of the prosecution version is thus based on the inference of the I.O. (P.W. 19) about the activities of Bihar Peoples Liberation Army. The information gathered was through sources which have not been disclosed. No witness appears to have been examined to prove those facts *viz.* of Santosh Jha (since dead) having set up Bihar Peoples Liberation Army and the appellants being active members of the militia.



30. While going through the evidence, we found that Dhiraj Singh (P.W. 15) had lodged the fardbeyan (Ext. 17) and on the same day, his further statement was recorded. He did not give any description of the miscreants nor claimed to identify them.

31. Om Prakash Paswan (P.W. 1) though claims to have been present at the time of occurrence at the P.O., but he did not identify anyone of the four assailants. He had come to the Court to depose for the first time. However, he was declared hostile.

32. Mritunjay Pandey (P.W. 2) who had brought the two injured/deceased to DMCH also does not claim to have identified anyone of the assailants. In fact, he has clearly stated that he had received information that two of the engineers of the company were shot at and injured at about 12:30 P.M. in the day. At that time, he was camping somewhere else but nearby. Hearing this, he went to the P.O. and carried the two injured/deceased to DMCH, where they were declared dead.



33. Rupesh Kumar (P.W. 3) was also present at the P.O. but because he did not claim to identify anyone, he was also declared hostile.

34. The only other person who claims to have been present at the site is one Darsaniya Devi (P.W. 13) who has, in a truthful manner, stated before the Trial Court that hearing the sound of gun-shot, she became unconscious and did not see anything. She was brought to her home by local people. She regained her consciousness only after two hours.

35. Thus, the only person who identified appellants/Nikesh, Mukesh, Vikash and Santosh (since dead) is Dhiraj (P.W. 15).

36. A serious objection has been raised with respect to the credibility of the assertion of P.W. 15. It has been argued that he never claimed, either in his fardbeyan or further statement, that he could identify the assailants if shown to him. The incident occurred in a sudden manner and if the prosecution version is to be



accepted, it would not have lasted for more than few minutes. Under such circumstances, single dock identification, it has been argued, would not warrant conviction of the appellants. The evidence of P.W. 15 was recorded on 24.11.2016 *i.e.* after a year when he identified the four above named appellants in the dock as assailants of the deceased.

37. No Test Identification Parade was held during the course of investigation.

38. In ***Malkhan Singh & Ors. v. State of M.P. (2003) 5 SCC 746***, a question was raised whether the conviction of appellants could be sustained on the basis of identification of the appellants by the prosecutrix in Court without holding a Test Identification Parade in the course of investigation. It was contended that the identification in Court not proceeded by a TIP is of no evidentiary value. On behalf of the prosecution in that case, it was argued that the substantive evidence is the evidence of identification in Court and therefore, the



value to be attached to such identification must depend on facts and circumstances of each case. No general rule could be laid that such identification in the Court is of no value. It was held by the Supreme Court that there could be no doubt about the substantive evidence being the evidence of identification in Court.

39. Apart from the clear provision contained in Section 9 of the Evidence Act, the position under law is well settled: the facts which establish the identity of the accused are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused at the Trial for the first time, is from its very nature, inherently of a weak character.

40. The purpose of a prior Test Identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimonies of the witnesses in Court as to the identity of



the accused who are strangers to them, in the form of earlier identification proceedings. The Supreme Court elaborated that this rule of prudence is subject to exceptions. If a Court is impressed by a particular witness on whose testimony it can safely rely, there would be no need of a prior Test Identification Parade.

41. The Identification Parades belong to the stage of investigation and there is no provision in the Cr.P.C. which obliges the investigating agency to hold, or confer a right upon the accused to claim a Test Identification Parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of Cr.P.C. The failure to hold TIP would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be left to the Courts of facts. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

42. True it is that there is no hard and fast rule



of a Test Identification Parade preceding an identification in dock, but in the present case, we find that nobody was named in the FIR or in the further statement. The lead to investigation was based on the names of two of the appellants in the pamphlets. There is no evidence of who printed those pamphlets and for whom.

43. P.W. 15 was examined in Court after a year of the occurrence. There also appears to be a doubt regarding his presence at the site. He is not an employee of the company. The first person to receive the information about the incident is P.W. 2, the Project Manager in the company, who was camping nearby. In his statement also, there is nothing to indicate that P.W. 15 was present at the P.O. from before and he witnessed the occurrence.

44. That apart, it has been argued that P.W. 15 had ample opportunity to see the appellants prior to his identifying the appellants in Court. The evidence at the Trial commenced on 02.08.2016, when P.W. 1 was



examined. Before P.W. 15, fourteen other witnesses had already been examined. On each date of hearing, the appellants were brought to the Court. There is no evidence of their being brought to the Court 'Ba-Parda'.

45. With such doubts in our minds, it is difficult for us to believe the identification of four of the appellants by P.W. 15.

46. The Supreme Court in **Wakil Singh & Ors. v. State of Bihar AIR (1981) SC 1392**, has held that: “*in the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits, whom they have alleged to have identified in the dacoity nor did the witnesses give any identification marks viz. stature of the accused or whether they were fat or thin or of a fair colour or of a black colour. In the absence of any such description, it will be impossible for us to convict an accused on the basis of single identification, in which case the reasonable possibility of mistaken identification*



*cannot be excluded” [also refer to **Subash and Shiv Shankar v. State of U.P. AIR 1987 SC 1222; N.J. Suraj v. State (2004) 11 SCC 346; Laxmipat Choraria v. State of Maharashtra AIR (1968) SC 938; Dana Yadav @ Dahu v. State of Bihar (2002) 7 SCC 295; Vijayan v. State of Kerala (1999) 3 SCC 54 and Shaikh Umar Ahmed Shaikh v. State of Maharashtra (1998) 5 SCC 103].***

47. Thus we are of the considered view that in the event of no Test Identification Parade having been conducted during the investigation and the incident being sudden and unexpected, lasting for a few minutes, which would have caused pandemonium all around, failure to hold Test Identification Parade was fatal. There is also doubt about P.W. 15 being present at the time of the occurrence. The doubt is further exacerbated when P.W. 15 identified the four appellants after a year of the occurrence when on each and every date when other witnesses were examined, the appellants were brought to



the Court in custody without concealing their faces.

48. The next evidence relied upon by the Trial Court is the discovery of the weapons of assault under Section 27 of the Evidence Act.

49. Mukesh Pathak had given a memorandum (Ext. 53) in which he had disclosed that he had knowledge regarding the weapons. This *per se* does not incriminate Mukesh Pathak. Recovery becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime, which actually lies in the authorship of concealment. What would be admissible as a criminating circumstance would be an accused giving information leading to the discovery, being the person who concealed the weapon. As observed in ***Pullukuri Kotaya's*** case (***AIR 1947) PC, 67***, it can seldom happen that information leading to discovery of a fact forms the foundation of prosecution case; it is just one link in the chain of proof and the other links must be



forged in a manner allowed by law [also refer to ***K. Chinnaswamy Reddy v. State of A.P. AIR (1962) SC 1788*** and ***Anter Singh v. State of Rajasthan (2004) 10 SCC 657***].

50. In the case at hand, there is no evidence that Mukesh Pathak was at any point of time in possession of any weapon or that he had handed over the weapons either to Vijay Kumar or to Sanjay Jha. Rather, the evidence of the I.O. is that Vijay Kumar and Sanjay Jha informed him that weapons had been kept with them by some other named persons but not the appellant [also refer to ***Ramanand @ Nandlal Bharti v. State of U.P. (2022) SCC online SC 1396***].

51. It is really surprising that the Trial Court has accepted such discovery of weapons, not from anyone of the appellants or at their instance, to be admissible under Section 27 of the Arms Act.

52. This alone leaves us with great doubt with respect to the same weapons having been used in the



occurrence. Even if it were, whether it was at the instance of appellants is rendered very doubtful.

53. Nonetheless, we would examine the forensic evidence on record.

54. The RFSL report though confirms that the empty cartridge cases were fired by the two weapons seized but how such an impression was arrived at by the experts remain undeciphered to us.

55. Section 45 of the Evidence Act speaks of expert evidence. It reads as follows:

45. Opinions of experts.--*When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting ²[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, ³[or in questions as to identity of handwriting] ²[or finger impressions] are relevant facts.*

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at



the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

56. The importance of the provision has been explained in the case of ***State of H.P. vs. Jai Lal and Ors. (1999) 7 SCC 280***. In order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein, or in other words, he is skilled and has adequate knowledge of the subject.

57. Way back in ***Titli vs Alfred Robert Jones***



AIR (1934) ALL 273, it was held that the real function of an expert is to put before the Court all the materials, together with the reasons which induce him to come to the conclusion so that the Court, although not an expert, may form its own judgment by its own observation of the materials.

58. An expert's opinion has to be demonstrative and should be supported by convincing reasons.

59. *“A Court cannot be expected to surrender its own judgment and delegate its authority to a third person, however great”.*

60. Though the report talks about the microscopic examination of the breech face marks, firing pin marks and ejector marks on the percussion caps of the cartridges, but no material has been brought before the Trial Court for him to have cross-checked the opinion of the experts to verify its correctness or to come to his own conclusion and satisfaction that the seized weapons were used to fire the crime cartridges. This could have



been done provided the experts had taken the photographs during the examination under the comparative microscope so as to enable the Court to cross-check and verify the breech face markings, the firing pin impressions and the ejector marks [refer to ***Ramesh Chandra Agrawal v. State of Regency Hospital Ltd. & Ors. AIR (2010) SC 806***].

61. The connecting link between the appellants is sought to be established by the analysis of the CDRs. They could not constitute legal evidence as the certificate required under Section 65B of the Indian Evidence Act has not been filed by the prosecution. The certificate was required to be signed by the nodal officer of the service provider. There also does not appear to be any proof of the appellants being in possession of such mobile telephones which was put under surveillance.

62. Section 109 of the Indian Evidence Act reads as hereunder:

109. Burden of proof as to relationship in the cases of partners,



landlord and tenant, principal and agent.

-- When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

63. The wordings of the Section are absolutely clear.

64. It is the initial burden of the prosecution to prove that the appellants were *particeps criminis*. If that were proved, then perhaps the onus would have shifted to the appellants to confirm that they were not partners in crime. Merely because accommodation was arranged for some of the appellants by the others, though related to each other, it cannot be said with certainty that it was part of the post-occurrence efforts to save the culprits. The CDR is the only basis for the prosecution to assert so and as we have noted, those have been rendered meaningless with no proper certification under Section 65B of the Indian Evidence Act in this case.

65. True it is that for the offence of criminal



conspiracy, it is very difficult and rare to find direct proof of it because of the very fact that it is hatched in conspiracy. Unlike other offences therefore, criminal conspiracy in most of the cases is proved by circumstantial evidence only; but then, relying on circumstantial evidence has its own limitations. It has to cross through the litmus test of *Panchsheel* principle that unless it is shown that the offence was committed by the appellants only and by no one else, it could not be pressed into use for convicting the appellants.

66. The investigation appears to have been carried forward in the direction of finding out who Mukesh Pathak and Vikash Jha were, because of their names inscribed on the seized pamphlets.

67. Could that have been taken as an evidence?

68. Not a single witness has deposed about the authorship of the document. It had to be proved in accordance with Sections 62 to 67 of the Evidence Act for it to have been relied upon.



69. The allegation of slogan raising by the assailants also do not constitute substantive evidence.

70. The slogans do not prove the truth of what is being uttered.

71. Sloganeering has a purpose which need not necessarily be linked with the truth of the matter. The raising of slogans or names inscribed in the pamphlets do not prove the presence of the named persons at the spot. These could only be the starting point of investigation and not the end result.

72. The appellants may have been associated amongst themselves and there could be a strong possibility of the appellants being behind the occurrence, but such an inference is only in the realm of possibilities. The law does not permit the Courts to punish the accused on the basis of any moral conviction or suspicion alone. The burden of proof in a criminal Trial never shifts and it is always the burden of the prosecution to prove its case beyond all reasonable doubts on the basis of acceptable



evidence.

73. For the aforementioned discrepancies in the prosecution case and the version of P.W. 15 as an eyewitness to the occurrence being in great doubt, we have no option but to give benefit of doubt to the appellants.

74. The appellants are acquitted of all the charges levelled against them.

75. All the appeals are allowed.

76. Appellants/Nikesh Dubey, Mukesh Pathak @ Chutul Pathak@ Aditya Kumar, Vikash Jha @ Kalia, Pintu Jha @ Pintu Kumar Jha and Pintu Tiwari @ Pintu Tiwary are in jail.

77. They are directed to be released forthwith, if not wanted or required in any other case.

78. So far as appellants/Munni Devi, Pintu Lal Dev @ Ajay Kumar and Sanjay Lal Dev are concerned, they are on bail.

79. They are discharged of their liabilities under



the bail-bonds.

80. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

81. The records of these cases be returned to the Trial Court forthwith.

82. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Rajesh Kumar Verma, J)

krishna/-

AFR/NAFR	AFR
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