NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.14 of 2013
{Arising out of judgment dated 11-12-2012 in Special Sessions Trial No.260/2011 of the Special Sessions Judge, Janjgir-Champa}

Bhupendra @ Prakash Bhargav, S/o Kamlesh Bhargav, aged about 22 years, R/o Temar, P.S. Sakti, Distt. Janjgir-Champa (C.G.)

(In Jail)
---- Appellant

Versus

State of Chhattisgarh, through District Magistrate, Janjgir-Champa, Distt. Janjgir-Champa (C.G.)

---- Respondent

For Appellant: Mr. Praveen K. Dhurandhar, Advocate.
For Respondent/State: Mr. Animesh Tiwari, Deputy Advocate General and Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Shri Radhakishan Agrawal, JJ.

Judgment On Board
(21/02/2023)

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374(2) of the CrPC is directed against the impugned judgment of conviction and order of sentence dated 11-12-2012 passed by the Special Sessions Judge, Janjgir-Champa in Special Sessions Trial No.260/2011, by which the appellant herein has been convicted under Sections 302, 364-A & 363 of the IPC and sentenced to undergo imprisonment for life & pay a fine of ₹ 2,000/-, in default of payment of fine to further undergo additional rigorous imprisonment for three months on both counts under Sections 302 & 364-A of the IPC. Both the sentences

were directed to run concurrently. However, no separate sentence has been awarded under Section 363 of the IPC as greater sentence has been awarded under Section 364-A of the IPC.

2. Case of the prosecution, in short, is that the appellant herein has kidnapped Ku. Mitali Thakur, aged about 5-6 years, from the house of Chhotelal Bhargav and demanded ₹ 3 lakhs as ransom for releasing her and thrown her into the running water of Arpa river in Village Darrighat, District Bilaspur, fully knowing that she is a member of Scheduled Tribe and thereby committed the offence. Further case of the prosecution is that on 8-9-2011 at 6:30 p.m., Kumari Devi Halba Thakur (PW-2) – mother of the deceased, took Kum. Mitali Thakur to the house of her neighbour Chhotelal Bhargav where the accused / appellant being the nephew of Chhotelal Bhargav was also present along with other members of the family and she left Kum. Mitali Thakur therein and came back to her house. Subsequently, Premuram Thakur (PW-1) – father of Kum. Mitali Thakur, who was on duty, received a phone call in his mobile No.9752876469 from an unknown number 9685518609 from unknown person at about 9:15 p.m. informing that his daughter is in his custody and he demanded ransom to the tune of ₹ 3 lakhs. Thereafter, Premuram Thakur (PW-1) immediately contacted his wife Kumari Devi Halba Thakur (PW-2) and enquired about his daughter who informed him that Mitali has not returned from the house of Chhotelal Bhargav and immediately thereafter, Premuram Thakur (PW-1) received an SMS from an unknown mobile number 7898886050 (Ex.P-18) regarding kidnapping of

Kum. Mitali Thakur and ransom of ₹ 3 lakhs resulting into lodging of written report Ex.P-1 by Premuram Thakur (PW-1) before Police Station Pamgarh on the basis of which FIR Ex.P-2 was registered on 8-9-2011 at 10:30 p.m. and crime was registered against unknown person. During the course of investigation, memorandum statement of the appellant was recorded vide Ex.P-7 and on that basis, a motorcycle bearing registration No.CG-11/B-3764 and a mobile phone along with SIM of mobile No.7898886050 was seized vide Ex.P-8. In the said memorandum statement, it was disclosed by the appellant herein that he has thrown Kum. Mitali in Arpa river and subsequently, search was made, but body of Kum. Mitali was not found and morgue intimation Ex.P-15 was registered. Spot verification panchnama (Ex.P-10) of the place of incident i.e. Village Darrighat, Arpa River Bridge where Kum. Mitali is said to have been thrown by the appellant in Arpa river, has been prepared on 9-9-2011 and the accused / appellant was arrested by the police vide arrest memo Ex.P-16, on 10-9-2011. Morgue intimation Ex.P-15 was recorded on 27-11-2011 after search of Mitali and when dead body was not found.

3. Statements of the witnesses were recorded under Section 161 of the CrPC.. After completion of investigation, charge-sheet was filed against the appellant before the jurisdictional criminal court for the aforesaid offences and all the documentary evidence was also collected by the prosecution and the case was committed to the Court of Sessions for trial from where the learned Special Sessions Judge, Janjgir-Champa received the case on transfer for trial and

for hearing and disposal in accordance with law.

4. The trial Court has framed charges against the appellant for offences punishable under Sections 302, 364-A & 363 of the IPC and also under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the Act of 1989') and proceeded on trial. The appellant abjured guilt and entered into defence stating that he has not committed the offence and he has been falsely implicated.

5. The prosecution in order to bring home the offence examined as many as 17 witnesses and exhibited 22 documents Exhibits P-1 to P-22. Articles A-1 to A-4 have also been exhibited on behalf of the prosecution. No witness has been examined on behalf of the defence and no document has been exhibited. Statement of the appellant was recorded under Section 313 of the CrPC in which he abjured the guilt and pleaded innocence.

6. The trial Court after completion of trial and after appreciating oral and documentary evidence available on record, while acquitting the appellant under Section 3(2)(v) of the Act of 1989, convicted and sentenced him in the manner mentioned in the opening paragraph of this judgment against which this appeal under Section 374(2) of the CrPC has been preferred by him calling in question the impugned judgment.

7. Mr. Praveen K. Dhurandhar, learned counsel appearing for the appellant, would submit that neither the dead body of Kum. Mitali Thakur was recovered nor any article belonging to her was seized during the course of investigation which is evident from morgue

intimation Ex.P-15 and since the dead body could not be recovered, it was presumed that her body has been eaten by living organisms. He would further submit that since corpus was not found, it cannot be presumed that the deceased died on account of homicidal death and the appellant is the author of the crime. The prosecution has seized call details vide Ex.P-22 which would show name, address and activation date of mobile No.7898886050, which shows that the said mobile number belongs to one Abhinaya Ratiya, who is resident of Madhya Pradesh, and the activation date is 10-2-2011 much prior to the date of offence. It would be apparent from the statement of K.R. Koshle (PW-14) – Sub-Inspector of Police, wherein he has stated in paragraph 13, that mobile was seized from the accused and he cannot say that SIM belongs to the accused or not. Similarly, Satish Kumar Dubey (PW-15) – Deputy Superintendent of Police (Retd.) in paragraph 11 has stated that the person who sold the SIM to the accused did not submit any document regarding sale and further stated in paragraph 12 that no evidence came in investigation to the effect that the phone belongs to the accused. Even the prosecution did not examine the owner of mobile number 7898886050 as shown in Ex.P-22. Even the call details show that there is difference in IMEI number in Ex.P-22 and the seized mobile of the accused in Ex.P-8 from where he has allegedly sent SMS to the complainant from mobile No.7898886050 of which the IMEI number is 355202040351430, whereas in Ex.P-8, the IMEI number is 355202040351432. Furthermore, the extra judicial confession made by the accused to Mukesh Kumar Bhargav

(PW-5) has not been established in accordance with law and the last seen evidence of B.L. Patel (PW-10) is of no use as he has not seen the deceased in the company of the appellant. Therefore, the prosecution has failed to prove the offence against the appellant beyond reasonable doubt and as such, conviction and sentences imposed upon the appellant deserve to be set aside and the appellant be acquitted of the charges alleged against him by allowing the appeal.

8. Mr. Animesh Tiwari, learned State counsel, would support the impugned judgment and would submit that the prosecution has been able to bring home the offence against the appellant beyond reasonable doubt and all the incriminating circumstances have been proved against the appellant by the prosecution and duly catalogued by the learned trial Court in paragraph 21 of the judgment. He would further submit that recovery of dead body is not *sine qua non* for holding the death to be homicidal, it can be proved by other circumstantial evidence and therefore the appeal has no force and deserves to be dismissed.

9. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

10. Admittedly, there is no direct evidence available on record and the case is based on circumstantial evidence. The prosecution was required to establish the five golden principles which constitute the *panchsheel* of a case based on circumstantial evidence as laid down by the Supreme Court in the matter of **Sharad Birdhichand**

Sarda v. State of Maharashtra[1] in which it has been held in paragraph 153 as under: -

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*[2] where the following observations were made:
>
> > Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.
> >
> > (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
> >
> > (3) the circumstances should be of a conclusive nature and tendency,
> >
> > (4) they should exclude every possible hypothesis except the one to be proved, and
> >
> > (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

11. The trial Court after appreciating oral and documentary evidence available on record has found the following incriminating

1 (1984) 4 SCC 116
2 (1973) 2 SCC 793

circumstances established and proceeded to convict the appellant herein: -

1. Article A-4 seized pursuant to the memorandum statement of of the appellant vide Ex.P-7 i.e. mobile seized from the possession of the appellant being mobile No.7898886050 from which he has sent SMS vide Ex.P-18 (Exs.P-18A, P-18B, P-18C & P-18D) to Premuram Thakur (PW-1) on his mobile number 9752876469 and demanded ransom of ₹ 3 lakhs.
2. The appellant had abducted deceased Kum. Mitali Thakur on 8-9-2011 and after demanding ransom by sending SMS, thrown her into the running water of Arpa river and her dead body could not be recovered as shown in vide Ex.P-15.
3. The appellant had given extra judicial confession to Mukesh Kumar Bhargav (PW-5).
4. The appellant had requested Ashish Kashyap (PW-9) to delete his phone number.
5. Evidence of last seen of the appellant.

12. We will deal with all these circumstances one by one to find out whether the trial Court is justified in holding that the prosecution has been able to prove the aforesaid circumstances so as to hold that the appellant is the author of the crime.

Absence of *corpus delicti*: -

13. True it is that the dead body of deceased Kum. Mitali Thakur was not recovered either at the instance of the appellant or otherwise

and the trial Court, however, recorded a finding that the appellant has admitted in his memorandum statement Ex.P-7 that he has thrown Kum. Mitali Thakur into the running water of Arpa river which he has disclosed to Ashish Kashyap (PW-9). Since the appellant has abducted the deceased and he has opportunity to abduct her as she was in his house at the time of offence, spot verification panchnama has already been prepared vide Ex.P-10 and it has also been recorded in Ex.P-15 (morgue intimation) that after search, dead body was not found, therefore, the deceased died homicidal death, whereas, it has been contended by learned counsel for appellant that *corpus delicti* has not been recovered and merely on the basis of non-recovery of dead body, it has been presumed by the learned trial Court that the appellant is the author of the crime.

14. As stated herein-above, it is true that dead body of the deceased has not been recovered till the investigation and even after investigation, and the appellant was charge-sheeted. However, it is well settled law that discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the *corpus delicti* in murder.

15. In the matter of **Rama Nand and others v. State of Himachal Pradesh**[3], their Lordships of the Supreme Court have held in no uncertain terms that discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the *corpus delicti* in murder. Their

3 (1981) 1 SCC 511

Lordships further held that the 'body' doctrine is merely a rule of caution and not of law. It has also been held that where the dead body of the victim in a murder is not found, other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. But where the fact of *corpus delicti* or homicidal death is sought to be established by circumstantial evidence alone, or by both, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Their Lordships observed as under:-

> "28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. "I would never convict," said Sir Mathew Hale, "a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead." This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal

> death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. But where the fact of corpus delicti i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3, Evidence Act, a fact is said to be "proved", if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned. …"

16. The principle of law laid down in **Rama Nand** (supra) has been reiterated and followed by the Supreme Court in the matter of **Ramjee Rai and others v. State of Bihar**[4] and similar proposition has been made in the matter of **Rishi Pal v. State of Uttarakhand**[5] following **Rama Nand** (supra) and it has been held that absence of *corpus delicti* is insignificant if cogent and satisfactory proof of homicidal death of victim is adduced. The decision of the Supreme Court in **Rama Nand** (supra) has further been followed in the matter of **Sanjay Rajak v. State of Bihar**[6].

17. However, in the matter of **S. Kaleeswaran v. State by the Inspector of Police Pollachi Town East Police Station, Coimbatore District, Tamil Nadu**[7], their Lordships of the Supreme

4 (2006) 13 SCC 229
5 2013 Cri.L.J. 1534
6 (2019) 12 SCC 552
7 2022 SCC OnLine SC 1511

Court have made exception to the rule of *corpus delicti* that if the entire chain is duly proved by cogent evidence, the conviction could be recorded even if the corpus is not found, but when as per the case of the prosecution, the dead body of the victim was discovered from the place shown by the accused, it is imperative on the part of the prosecution to prove that the dead body or the skeleton found at the instance of the accused was that of the victim and of none else, and it was held as under: -

> "14. … but when as per the case of the prosecution, the dead body of the victim was discovered from the place shown by the accused, it is imperative on the part of the prosecution to prove that the dead body or the skeleton found at the instance of the accused was that of the victim and of none else."

18. In the matter of **Mani Kumar Thapa v. State of Sikkim**[8], the Supreme Court has clearly held that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti, and observed as under: -

> "4. … It is a well-settled principle in law that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case the accused would manage to see that the dead body is destroyed which would afford the accused complete immunity from being held guilty or from being punished. What is therefore required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed

8 AIR 2002 SC 2920

> and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced. See Sevaka Perumal and another v. State of Tamil Nadu, 1991 (3) SCC 471. Therefore, the argument that in the absence of corpus delicti the prosecution case should be rejected, cannot be accepted. ..."

19. As such, in view of the aforesaid settled legal position, it is quite vivid that absence of corpus delicti is insignificant if cogent and satisfactory proof of homicidal death of victim is adduced on behalf of the prosecution. We hold so accordingly.

SMS / Call details: -

20. The prosecution has relied upon the message vide Exs.P-18 A, B, C & D sent by the appellant through his mobile / phone No.7898886050 to Premuram Thakur (PW-1) on his mobile number 9752876469 demanding ransom of ₹ 3 lakhs which has been found proved by the trial Court relying upon Ex.P-18 and which has been questioned on behalf of the appellant / accused.

21. First of all, mobile phone has been seized from the possession of the appellant pursuant to his memorandum statement Ex.P-7 and the said mobile No.7898886050 has been marked as Article A-4. The prosecution has filed document Ex.P-22 which would show that this mobile number 7898886050 has been activated on 10-2-2011 and it was registered in the name of Abhinaya Ratiya, S/o Aasha Ram Ratiya, resident of Madhya Pradesh, and it has been activated much prior to the date of offence and the same has been proved by Rajendra Shrivastava (PW-17), Steno to Superintendent of Police, Janjgir-Champa. Lachhram Verma (PW-4), who is owner of Anshu Mobile, has been examined by the prosecution and he has stated

before the Court that one day prior to the date of offence, the appellant has purchased SIM No.7898886050 from him assuring him to submit necessary documents next day, but could not submit the same and fulfill the formalities for getting a SIM. However, the statement of this witness would be of no help to the prosecution, as the same is self-serving statement of Lachhram Verma (PW-4) and therefore it cannot be said that the appellant has purchased SIM No.7898886050 from Lachhram Verma (PW-4) as the said SIM was already registered, on the own showing of the prosecution, in the name of Abhinaya Ratiya, S/o Aasha Ram Ratiya, who is resident of Madhya Pradesh. As such, the statement of Lachhram Verma (PW-4) would not help the prosecution, particularly in this case, where it is alleged that the offence is committed after purchasing the SIM that too without fulfilling the formalities to purchase the SIM and the SIM was sold without asking for the formalities. Thus, it would be inappropriate to accept the version of Lachhram Verma (PW-4) that he has sold the said SIM prior to the date of offence, particularly in light of the statement of Rajendra Shrivastava (PW-17) and Ex.P-22 by which it can be inferred that the said SIM was activated much prior to the date of offence on 10-2-2011, whereas the date of offence is 8-9-2011.

22. Similarly, K.R. Koshle (PW-14), who is Sub-Inspector of Police, in paragraph 13 of his statement before the Court has stated that mobile was seized from the possession of the appellant, but he could not say as to whether the SIM used in the said mobile phone was in the name of the appellant or not.

23. Satish Kumar Dubey (PW-15), Retd. Deputy Superintendent of Police, has clearly stated that the appellant had destroyed the SIM which he has purchased and the seized articles Arts.A-1, A-2 & A-3 – mobiles are not in the name of the appellant and the person who has sold SIM to the appellant has not given any documents for sale of SIM in favour of the appellant.

24. The phone which was used by the appellant was investigated upon, however, no facts were disclosed regarding use of said phone by the appellant. Similarly, mobile phones of the appellant were seized from the appellant vide Ex.P-8 (page 72 of the paper book) and marked as Art. A-4 of which IMEI numbers are 355202040351432 & 355202040356580, whereas as per Ex.P-22 (page 111 of the paper book), IMEI number of the mobile phone through which phone call was made by the accused to Premuram Thakur (PW-1) – father of the deceased, was 355202040351430. As such, IMEI number of the phone which was seized pursuant to the memorandum statement of the appellant Art. A-4 is not tallying with the IMEI number from which phone call is said to have been made to the father of the deceased – Premuram Thakur (PW-1). Similarly, mobile phone bearing number 9752876469 of Premuram Thakur (PW-1) was seized of which IMEI number was 355747021631004, whereas, vide Ex.P-22 (page 104 of the paper book), IMEI number of the said phone is 355747021631000 which is also not tallying with the IMEI number of the mobile phone seized from the possession of the complainant – father of the deceased. As such, it is not established from the call details and SMS record

Exs.P-18 & P-22 that SIM No.7898886050 was owned by the appellant and SMS vide Ex.P-18 was sent to Premuram Thakur (PW-1) – father of the deceased through mobile phone Art.A-4 seized vide Ex.P-8 which bears the IMEI number 355202040351430, which is apparent from the statements of Lachhram Verma (PW-4), K.R. Koshle (PW-14) & Satish Kumar Dubey (PW-15).

25. Furthermore, call details of IMEI No.359389005016460 (page 97 of the paper book) which is part of Ex.P-22 were issued by Bharti Airtel Limited. These are the call details of Devendra Bhargav Gadariya (PW-6), complainant Premuram Thakur (PW-1), the accused / appellant herein and Mukesh Kumar Bhargav (PW-5). The above stated call details have been relied upon the trial Court as one of the incriminating circumstances. However, no certificate under Section 65B of the Evidence Act has been brought on record.

26. In order to assail the above-stated finding holding it to be a piece of incriminating circumstance, it has been contended on behalf of the appellant that it is not supported by certificate under Section 65B(4) of the Indian Evidence Act, 1872, therefore, it is inadmissible in evidence and as such, no reliance can be placed upon it, as the trial Court went wrong in accepting it as a piece of incriminating evidence and reliance has been placed upon the judgment of the Supreme Court in the matter of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**[9] in which their Lordships resolving the dispute and the conflict raised in the matters of **Shafhi**

9 (2021) 7 SCC 1

Mohammad v. State of Himachal Pradesh[10] and **Anvar P.V. v. P.K. Basheer**[11] have clearly held that production of certificate under Section 65B of the Evidence Act is mandatory only in case of secondary evidence where primary evidence is not laid or original is not produced. Their Lordships further held that the certificate required under Section 65B(4) of the Evidence Act is a condition precedent to the admissibility of secondary evidence by way of electronic evidence as laid down in **Anvar P.V.** (supra) and incorrectly clarified in **Shafhi Mohammad** (supra). It was held as under: -

> "61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.* (supra), and incorrectly "clarified" in *Shafhi Mohammed* (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor v. Taylor*[12], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose."

Their Lordships also held that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and / or operated by him. The reference

10 (2018) 2 SCC 801
11 (2014) 10 SCC 473
12 (1875) LR 1 Ch D 426

was answered in paragraphs 73.1., 73.2. and 73.3. as under: -

> "73.1. *Anvar P.V.* (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in *Tomaso Bruno*[13], being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad (supra) and the judgment dated 3-4-2018 reported as *Shafhi Mohd. v. State of H.P.*[14], do not lay down the law correctly and are therefore overruled.
>
> 73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.* (supra) which reads as "… *if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act* …" is thus clarified; it is to be read without the words "*under Section 62 of the Evidence Act,* …". With this clarification, the law stated in para 24 of *Anvar P.V.* (supra) does not need to be revisited.
>
> 73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers."

13 Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54
14 (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704

27. In the matter of **Ravinder Singh @ Kaku v. State of Punjab**[15], their Lordships of the Supreme Court while following the decision of **Arjun Panditrao Khotkar** (supra) have held that oral evidence in the place of certificate cannot be possibly suffice as Section 65B(4) is a mandatory requirement of law. Their Lordships held that Section 65B(4) is a mandatory requirement of law and observed as under:-

> "21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law."

28. Returning to the facts of the present case in light of the aforesaid pronouncements of the Supreme Court in **Arjun Panditrao Khotkar** (supra) and **Ravinder Singh @ Kaku** (supra), though call details of the accused / appellant herein, Premuram Thakur (PW-1), Mukesh Kumar Bhargav (PW-5) & Devendra Bhargav Gadariya (PW-6) have been brought on record and sought to be proved by Rajendra Shrivastava (PW-17), Steno to Superintendent of Police, Janjgir-Champa, but in view of the fact that Section 65B(4) of the Evidence Act is a mandatory requirement of law and in absence of certificate under the aforesaid provision, merely on the basis of the statement of Rajendra Shrivastava (PW-17), call details cannot be said to be proved in absence of required certificate. Moreover, various infirmities in the call details and SMS record have already

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been noticed by us in the foregoing paragraphs. As such, the prosecution has failed to produce mandatory certificate under Section 65B(4) of the Evidence Act. Therefore, reliance placed by the trial Court on the call details of the appellant, complainant Premuram Thakur (PW-1), Mukesh Kumar Bhargav (PW-5) & Devendra Bhargav Gadariya (PW-6) is of no use to the prosecution.

29. The next incriminating circumstance that has been brought on record is the evidence of B.L. Patel (PW-10) that he has last seen the appellant.

30. B.L. Patel (PW-10) is also the resident of same colony where Premuram Thakur (PW-1) – father of the deceased & Chhotelal Gadariya (PW-3) used to reside. He has only seen the appellant passing from that place rashly on motorcycle, but he did not say that he has seen the deceased in the company of the appellant at any point of time. Merely because he has seen the appellant passing thereby in the motorcycle though rashly, it would not connect the appellant with the offence in question.

31. The next circumstance that has been pointed out by the prosecution is that the appellant has given extra judicial confession to Mukesh Kumar Bhargav (PW-5). He is Junior Engineer in a private company. He has been examined before the Court and he has stated that on the date of offence, the appellant has called him on his mobile No.9098909815 and sent SMS and asked him to delete the number and he has informed that he has sent SMS to Premuram Thakur (PW-1) that he has kidnapped his daughter and

demanded ransom. Mukesh Kumar Bhargav (PW-5) has further stated that the appellant has called him by his brother's mobile No.9179797993, but the brother of Mukesh Kumar Bhargav (PW-5) namely Devendra Bhargav Gadariya (PW-6) has been examined and he has not stated that the appellant has taken his phone and called his brother Mukesh Kumar Bhargav (PW-5). As such, the theory propounded by Mukesh Kumar Bhargav (PW-5) that the appellant has taken the phone of his brother Devendra Bhargav Gadariya (PW-6) and called him and gave extra-judicial confession of sending SMS to Premuram Thakur (PW-1) – father of the deceased, is not established. Devendra Bhargav Gadariya (PW-6) is the prosecution witness and there is no reason for him not to support the case of the prosecution, particularly when he has not been declared hostile. Even otherwise, extra-judicial confession is a weak piece of evidence and on the basis of extra-judicial confession, though it has not been proved, merely proving of the call made from one phone to another phone, if any, it cannot be held that the appellant has given any kind of extra-judicial confession to Mukesh Kumar Bhargav (PW-5). Furthermore, it is not such a kind of extra judicial confession which is a weak piece of evidence to base the conviction for an offence that too under Section 302 of the IPC.

32. In sum and substance corpus delicti is not established and dead body of the deceased could not be recovered and furthermore, call records and sending of SMS by the appellant to Premuram Thakur (PW-1) – father of the deceased vide Ex.P-18 is not established

and as per the statements of Lachhram Verma (PW-4), K.R. Koshle (PW-14) & Satish Kumar Dubey (PW-15) it is quite established that it has not been proved that SIM No.7898886050 was used by the appellant and even the IMEI number from which the SMS vide Ex.P-18 was sent to Premuram Thakur (PW-1) is not established to be the IMEI number of the phone which was seized from the possession of the appellant. Moreover, SIM No.7898886050 was purchased by one Abhinaya Ratiya on 10-2-2011. In absence of certificate under Section 65(B) of the Evidence Act, call details are even not otherwise proved. Furthermore, extra judicial confession made by the appellant to Mukesh Kumar Bhargav (PW-5) is also not established and last seen theory is also not established.

33. Motive is said to be established on the basis of phone call made to Ashish Kashyap (PW-9) from mobile phone number 9589392683. This witness has only stated that he has given ₹ 200/- to the appellant and the appellant has called him in his phone number. He has further stated that the appellant is his friend and they used to play cricket together. On that basis motive cannot be said to be established.

34. In view of the aforesaid discussion, we are of the opinion that the prosecution has failed to bring home the offence against the appellant. Conviction of the appellant is not well merited and he is entitled for acquittal on the principle of benefit of doubt. Consequently, we are unable to sustain conviction of the appellant under Sections 302, 364-A & 363 of the IPC and sentences imposed upon him under Sections 302 & 364-A of the IPC.

35. Accordingly, we set aside the conviction so recorded and the sentences so awarded by the trial Court to the appellant vide the impugned judgment dated 11-12-2012. The appellant is acquitted of the charges under Sections 302, 364-A & 363 of the IPC. He is in jail. He shall be released forthwith from the jail if he is not required in any case.

36. The appeal stands allowed.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

Soma