

## ABC 2025 (II) 257 SC

## ACQUITTAL &amp; BAIL CASES

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## SUPREME COURT OF INDIA

(Sandeep Mehta &amp; Joymalya Bagchi, JJ.)

Criminal Appeal No.1856 of 2014

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Decided on 25 June 2025

RAHIL &amp; ANR.

- Appellant(s).

Versus

STATE (GOVT. OF N.C.T. OF DELHI)

- Respondent(s).

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**Law Covered:-**(A) Code of Criminal Procedure, 1973 -- Sections 378 & 386 (Bharatiya Nagarik Suraksha Sanhita, 2023 -- Sections 419&427) -- Indian Penal Code, 1860 -- Section 302/34 (Bharatiya Nyaya Sanhita, 2023 -- Section 103(1)/3(5)) -- Appeal Against Acquittal -- Interference by Appellate Court -- Principles for

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-- Presumption of innocence stands re-enforced by an acquittal -- Appellate court would not interfere unless the trial court's finding is wholly perverse or against the weight of evidence -- If the acquittal is based on reasonable & plausible findings, the appellate court must be slow to interfere -- Principles summarized in *Guru Dutt Pathak v. State of Uttar Pradesh* applied. (Para 16)

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(B) Evidence Act, 1872 -- Section 106 (Bharatiya Sakshya Adhiniyam, 2023 -- Section 109) -- Scope & Applicability of -- Burden of Proof -- Shifting of Onus -- In a criminal case, the initial burden of proof always rests on the prosecution -- Only when the prosecution discharges this initial onus & proves incriminating circumstances within the 'special knowledge' of the accused does the onus shift -- An adverse inference under Section 106 cannot be drawn to bridge gaps in the prosecution's case -- Failure of the prosecution to prove foundational facts cannot be cured by invoking Section 106. (Para 42)

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(C) Evidence Act, 1872 -- Section 65B(Bharatiya Sakshya Adhiniyam, 2023 -- Section 63) -- Electronic Records -- Admissibility of -- Certificate Under Section 65B(4) -- Condition Precedent -- Computer printouts of electronic records (e.g., CDRs) are secondary evidence -- A certificate under Section 65B(4) from the person in charge of the computer resource is a mandatory condition precedent for their admissibility -- This requirement cannot be supplemented by oral evidence -- The law laid down in *Anvar P.V. v. P.K. Basheer* & affirmed in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* governs admissibility -- If an objection to the

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absence of the certificate is raised during trial & not cured, the evidence is inadmissible. (Paras 31-36)

(D) Evidence Act, 1872 -- Section 3 (Bharatiya Sakshya Adhiniyam, 2023 -- Section 2) -- Proof of Facts -- Cell Tower Location Data -- Evidentiary Value of -- Call Detail Records (CDRs) showing a cell tower location merely indicate that a mobile phone was within the operational range of that tower -- The range of a cell tower is variable & can span a significant geographical area -- Evidence based on a single cell tower, without triangulation data or evidence of the specific tower's range, is too tenuous & hazardous to conclusively prove a person's presence at a specific location. (Paras 37-40)

(E) Evidence Act, 1872 -- Section 3 (Bharatiya Sakshya Adhiniyam, 2023 -- Section 2) -- Relevant Fact -- Witness Testimony -- Omission of Material Fact in FIR -- Effect of -- When a witness introduces a material fact for the first time in court, which was significantly absent in the First Information Report (FIR) or previous statements to the police, such an omission amounts to a contradiction -- It casts serious doubt on the credibility of the embellished version, which appears to be an afterthought. (Para 20)

(F) Indian Penal Code, 1860 -- Section 302/34 (Bharatiya Nyaya Sanhita, 2023 -- Section 103(1)/3(5)) -- Circumstantial Evidence -- Inference of Guilt -- Presumption of Presence -- The mere fact that an accused is an inmate of a house from which a deceased person was last known to have visited cannot lead to a presumption of their presence at the time of the incident or their involvement in the crime -- An incriminating fact must be proved to a degree where a prudent man would believe in its existence -- Speculative inferences about the presence of all family members are insufficient to prove guilt, especially in the absence of direct evidence. (Paras 24-28)

**Facts:-** The appellants, Rahil & Noor Ahmed (son & husband of co-accused Suraiya), were acquitted by the trial court for the murder of Shakeel ur Rehman. The prosecution's case was based on circumstantial evidence, alleging that the deceased was called to Suraiya's house over a property dispute & was murdered there. The High Court reversed the acquittal, convicting the appellants under Section 302/34 IPC, primarily on the inferences that (i) they, being family members, must have been present in the house, & (ii) the cell tower location of Rahil's phone showed his presence in the area.

**Law of relief:-** (i) When a witness introduces a material fact for the first time in court, which was significantly absent in the First Information Report (FIR) or previous statements to the police, such an omission amounts to a contradiction.

a (ii) A certificate under Section 65B(4)(Sec 63, BNSS) from the person in charge of the computer resource is a mandatory condition precedent for their admissibility -- This requirement cannot be supplemented by oral evidence.

(iii) Failure of the prosecution to prove foundational facts cannot be cured by invoking Section 106.

b **Counsel:-**

*For Appellants: Mr. Mohd. Irshad Hanif, Adv.*

*For Respondent: Mr. Rajan Kumar Chourasia, Adv.*

**Cases Referred:-**

- c 1. *Guru Dutt Pathak v. State of Uttar Pradesh: (2021) 6 SCC 116 (Para 16)*
2. *Mulak Raj v. State of Haryana: (1996) 7 SCC 308 (Para 27)*
3. *State (NCT of Delhi) v. Naujot Sandhu: (2005) 11 SCC 600 (Para 33)*
- d 4. *Anvar PV v. PK Basheer: (2014) 10 SCC 473 (Para 33)*
5. *Shafhi Mohammad v. State of Himachal Pradesh: (2018) 2 SCC 801 (Para 33)*
6. *Sonu v. State of Haryana: (2017) 8 SCC 570 (Para 33)*
- e 7. *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal: (2020) 7 SCC 1 (Para 33)*
8. *Mohd. Arif @ Ashfaq v. State (NCT of Delhi): [Citation integrated from footnote 12] (Para 35)*
- f 9. *Sundar @ Sundarrajan v. State by Inspector of Police: 2023 SCC Online SC 310 (Para 35)*

## **JUDGMENT**

**Joymalya Bagchi, J.:-**

g 1. By the impugned judgment the High Court had reversed an acquittal passed by the trial court and convicted the appellants for commission of offence under Section 302 of the Indian Penal Code, 1860 and sentenced them to life imprisonment.

h 2. Prosecution case in brief is as follows:- Co-accused Suraiya had entered into a sale agreement with the deceased Shakeel ur Rehman for purchase of property number 15/1 Jaipur Estate, Nizamuddin, New Delhi. Prior to the sale deed being executed, on 6.04.2003 Shakeel ur Rehman started raising a boundary wall in the property. Suraiya and her associates resisted and a quarrel ensued. Suraiya threatened to kill Shakeel ur Rehman. Matter was reported to the police and amicably settled. At 7.30 pm, Suraiya made a phone

call to deceased on the landline and called him to her residence. Thereafter, deceased went missing. Despite efforts deceased could not be traced. a

3. As a consequence, Aniq ur Rehman (PW3) lodged missing DD entry No. 27A (Ex. PW3/B) at 7.15 AM on 7.04.2003 at Police Station, Hazrat Nizamuddin. On the same day at 5:30 pm, a written complaint was filed by Aniq ur Rehman (PW3) which was treated as First Information Report under Section 365/34 IPC against Suraiya, Mohd. Fazal her brother, and the appellants, namely Rahil and Noor Ahmed who are her son and husband, respectively. b

4. During the investigation, Fazal and one Mohan Seth were arrested on 13.04.2003. On their disclosure statements decomposed body of deceased was recovered near Haridwar. Dr. Pradeep Kumar, Postmortem Doctor (PW9) opined that the death was due to asphyxia as a result of strangulation and had occurred 3 to 5 days ago. c

5. In course of trial, charges were framed against Suraiya, Mohd. Fazal, Mohan Seth and the appellants under Sections 120B and 302/34 read with 120B IPC. Mohd. Fazal and Mohan Seth were also charged under sections 201/34 IPC. d

6. During trial, prosecution examined 25 witnesses and exhibited a number of documents. In conclusion of trial, the trial judge while convicting Suraiya and Mohd. Fazal under Section 302/34 IPC acquitted the appellants of the charges levelled against them. Mohd. Fazal and Mohan Seth were also convicted under Section 201/34 IPC. e

7. Suraiya, Mohd. Fazal and Mohan Seth preferred appeals against their conviction while the State challenged the acquittal of appellants before High Court. f

8. By a common order, High Court while upholding the conviction of Suraiya reversed the acquittal of the appellants and held them guilty under Section 302/34 IPC along with Suraiya. Mohd. Fazal was acquitted of the charge of murder but his conviction along with Mohan Seth under Section 201 IPC was upheld. Appellants as well as Suraiya appealed against their conviction. We are informed that Suraiya has died in the meantime and her appeal has abated. Accordingly, the appellants' appeal is taken up for hearing. g h

9. Mr. Mohd. Irshad Hanif, Id. counsel for Appellants argued that High Court erred in reversing a well-reasoned acquittal on the

basis of vague surmises and inferences. He contended mere suspicion howsoever high cannot take the place of proof.

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10. On the other hand, Mr. Rajan Kumar Chourasia, Id. counsel for Respondent-State argued that findings of trial court were wholly perverse and against the weight of evidence on record. PW-3, 4 and 6 unequivocally deposed that appellant had received a phone call and gone to the house of Suraiya. Appellants are son and husband of Suraiya, their presence at the place of occurrence was most natural. No plea of alibi was taken by the appellants to probabilise their absence. CDRs show active phone calls between Rahil and Mohd. Fazal in the night of 6.04.2003. Tower location of Rahil's phone probabilises his presence at Nizamuddin.

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11. Prosecution case is based on circumstantial evidence. The incriminating circumstances proposed by the prosecution are as follows:-

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(i) Suraiya had entered into a sale agreement with the deceased Shakeel ur Rehman. On the fateful day, before sale deed could be executed Shakeel ur Rehman started constructing a boundary wall on the property. This resulted in a skirmish between Shakeel ur Rehman and Suraiya and her associates.

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(ii) The matter was reported to the police and amicably resolved.  
(iii) In the evening of the same day, Shakeel ur Rehman received a phone call from Suraiya and stated to his relations, PW-3,4 and 6 that he was going to Suraiya's residence.

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(iv) Thereafter Shakeel ur Rehman went missing. On 7.04.2003, PW -3 lodged missing diary at 7:15 am being DD No.27A-Ex.PW 3/B and at 5:30 pm he lodged FIR against Suraiya, Fazal and the appellants.

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(v) On the disclosure statements of Mohd. Fazal and Mohan Seth dead body was recovered.

(vi) Postmortem Doctor PW9 opined that the cause of death was asphyxia due to strangulation.

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12. Trial Court analysed the evidence on record and acquitted the appellants holding as follows:

**Noor Ahmed**

*"There was a property transaction between the accused's wife Suraiya and the deceased; litigation in that regard is going on; a quarrel between accused, his wife & other accused on one side and the deceased and his brother on the other side on the issue of construction of boundary wall*

*had taken place on 6.4.03 wife Suraiya had called deceased to their house; deceased had come to Suraiya's house. Besides this, no further evidence except his own disclosure and disclosure statements of co-accused, (which are inadmissible in evidence against the accused) has come on record against the accused; Thus, there is no material on record to establish that the accused had concerted and conspired with other co-accused and had participated in the commission of the crime i.e. murder of the deceased. In view of the above, accused Noor Ahmed is acquitted of charges U/s 302/r/w 120B IPC"*

#### **Rahil**

*"Accused is the son of the accused Noor Ahmed and Suraiya. His concern regarding old property dispute of his mother was there to the extent as would that be of a son; His presence and participation in the quarrel on 6.4.03 is also substantiated. Beyond that, the only other evidence which has been placed on record against the accused is the recovery of deceased's purse from accused's residence, at his instance. The recovery of deceased's purse at the instance of accused has not been proved beyond reasonable doubt. Besides above material, prosecution has placed on record the phone call details of accused Rahil which show that accused Rahil made and received phone calls from accused Suraiya and Fazal. The said calls no doubt reflect that the accused Rahil was associating with accused Suraiya and Fazal. Except that no other evidence has come on record against the accused. Except for his own disclosure and that of his co-accused admitting to his complicity in murdering the deceased, no other evidence has been led by prosecution linking accused Rahil to the commission of murder. The accused Rahil is therefore acquitted of charge u/s 302 r/w 120B IPC."*

13. The High Court reversed the finding of the trial court holding as follows:-

*"As far are Suratya, Noor Ahmed and Rahil are concerned, their presence in the house at 7/7.30 PM when the deceased Shakeel ur Rehman was called and came to their residence, has been proved and should be accepted. Suratya being a lady could not have committed the said offence alone. Presence of her husband and son was axiomatic and normal. We do not find any explanation has been given by Noor Ahmed or Rahil as to their absence from the place of occurrence. In fact, the call details of Rahil (Ex. PW23/B) and Mohd. Fazal (Ex. PW23/A) as noticed above, on 6th April, 2003 starting 7.18 PM show number of calls being exchanged and the presence of Rahil at Nizamuddin as his mobile was connected through tower No. 911 in Nizamuddin. The presence of Noor Ahmed husband of Suratya with them, when the deceased was called for discussion was*

a *natural and normal. (ii) We do not agree with the reasoning given by the trial court that Suratya and Fazal brother and sister had a property dispute and the same has no connection with Noor Ahmed and Rahil, husband and son of Suratya. The said reasoning keeping in view the social and cultural background of the family, merits rejection and has to be discarded. It is not acceptable and ignores practical reality."*

b 14. It may not be out of place to note by the self-same judgment and order High Court acquitted Mohd. Fazal of the charge of murder, inter alia holding:-

c *"his involvement in the offence under Section 302 IPC would be a matter of debate as he was certainly not in the premises where Rahil was present, as both of them were in touch on phone till at least 7.59 PM."*

15. No appeal has been preferred against such acquittal either by State or the victim's family.

d 16. It is trite in an appeal against acquittal, the appellate court would not interfere with the finding of the trial court unless the same finding is wholly perverse or against the weight of evidence on record. In the event acquittal is based on findings which are reasonable and plausible, appellate court would be slow to interfere with the same as the presumption of innocence stands re-enforced by the acquittal. These principles have been summarized by this Court e after referring to a catena of decisions in **Guru Dutt Pathak v. State of Uttar Pradesh: (2021) 6 SCC 116 (paras 15-20).**

f 17. Having examined the conclusions of High Court from this perspective, we are unable to concur with them for the following reasons.

g 18. High Court recorded that presence of appellants in the house at 7-7.30 PM when the deceased Shakeel ur Rehman was called is proved and should be accepted. In arriving at such conclusion High Court had relied on the response of Noor Ahmed to question no.7 in his examination under 313 Cr.PC holding:

h *"In his statement under Section 313 Cr.P.C. while replying to question No. 7, Noor Ahmed had accepted that Shakeel ur Rehman had come to their house after the police officers had advised them to patch up, though this has been denied and not accepted as correct by Suraiya and others"*

19. Such finding of the High Court is incorrect as would appear from the nature of the question and the answer of the appellant therein.

"7g. It is in evidence against you that in PS police officials advised both parties for patch up the matter and thereafter Shakeel

Ur Rehman came to his house. What do you say?  
A: It is correct.”

From the tenor of the question it unequivocally appears that after the amicable settlement at the police station, Shakeel ur Rehman came to his house. The expression would naturally mean Shakeel ur Rehman came back to his own residence and not that of Suraiya/Noor Ahmed. We are further fortified in arriving at such conclusion as the prosecution evidence on record, particularly that of PW-3,4 and 6, also states that after the patch up Shakeel ur Rehman returned to his residence.

20. The other aspect which was overlooked by High Court is that there is no direct evidence that Shakeel ur Rehman had actually gone to Suraiya’s residence on the fateful evening. Prosecution relied on PW-3,4 and 6 to prove this fact. No doubt, these witnesses stated that after receiving a phone call from Suraiya in the evening around 7.30 PM on 6.4.2003 Shakeel ur Rehman left his residence stating he is going to Suraiya’s house. However, the sole evidence that he actually went to Suraiya’s residence is an embellished statement of PW-3 who claims he accompanied the deceased to Suraiya’s residence. Such version is stated by PW-3 for the first time in court and is significantly absent either in the missing diary or in the First Information Report lodged by him. Such omission of a material fact by PW 3 in the FIR or his previous statement to police would amount to a contradiction or even otherwise would cast doubt on the credibility of such embellished version introduced as an afterthought.

21. Conduct of these witnesses and attending circumstances also improbabilise the fact that Shakeel had gone to Suraiya’s house. Evidence has come on record that there was a scuffle between Shakeel ur Rehman and Suraiya in the morning which got settled in the police station. Given such animosity had Shakeel ur Rehman left for Suraiya’s residence in the evening of 06.04.2003, and gone missing, it would be most natural for these witnesses to go to Suraiya's residence and enquire of his whereabouts. None of the witnesses stated that they either visited Suraiya's residence or inquired from her about Shakeel's whereabouts. In these circumstances, possibility of the witnesses implicating Suraiya and other family members in the crime out of mere suspicion cannot be ruled out.

22. Given this situation, it is difficult for us to conclude that there is credible and reliable evidence on record that the deceased actually went to the residence of Suraiya on the fateful evening.

a 23. Even if the prosecution case with regard to the deceased going to Suraiya's residence is accepted, prosecution must prove that appellants were present in the house between 7.30 and 9.00 PM when it is alleged that Shakeel ur Rehman was murdered.

b 24. The High Court reversed the acquittal on the specious logic that appellants being the son and husband of Suraiya and ordinarily residing with her ought to be presumed to be present in the house. It is nobody's case that the incident occurred in the dead hours of the night when all family members are expected to remain in the house.

c 25. An incriminating fact is said to be 'proved' when after considering the matters before it, the court believes it to exist or considers its existence so probable that a man of ordinary prudence would act as if the same existed.

d 26. Admittedly, no direct evidence is forthcoming with regard to presence of the appellants at their residence when the murder is alleged to have occurred. High Court drew an inference with regard to their presence on the ground that being inmates of the house they would be presumed to be present there.

e 27. In **Mulak Raj v. State of Haryana: (1996) 7 SCC 308 (para 22)**, where the dead body was recovered from the house this Court refused to uphold the guilt of the accused merely because they were the inmates of the house.

f 28. In these circumstances, we are of the view High Court erred in relying on a speculative inference that all inmates must invariably be present in the house at all times to reverse the acquittal and convict the appellants.

g 29. Whether Suraiya, a lady could have committed the murder alone had not been posed to the Postmortem doctor. In absence of medical evidence that murder was committed by a single person High Court incorrectly drew its own inference that Suraiya was assisted by others in committing the crime and roped in her family members, that is the appellants.

h 30. Against Rahil another circumstance has been relied upon. High Court referred to call detail records (CDRs) between Rahil and Mohd. Fazal and observed that as the tower location of Rahil's mobile number is Nizamuddin, his presence at the place of occurrence is established. This finding is based on inadmissible evidence and even otherwise such conclusion on the basis of evidence on record is too tenuous.

31. PW23 Nodal Officer Bharti Airtel produced CDRs of the phones of Fazal and Rahil being Ex. PW 23/A and 23/B, respectively. Site details of Airtel in Delhi and NCR were exhibited as Ex. PW23/C. The ownership certificate was also produced as Ex. PW23/D. All the exhibits were secondary evidence being computer printouts of the data said to be preserved in the computers of the service provider concerned. During cross-examination, PW23 admitted he had neither signed the said documents nor were the documents certified.

32. Section 65-B(4) requires issuance of a certificate by a person -in-charge or responsible officer in relation to operations of the relevant computer network in question stating as per his knowledge or belief that during the relevant period:-

(a) computer(s) were carrying out regular activities, and were working properly; and

(b) the relevant information was regularly fed into the computer in ordinary course of business, as proof of the facts stated therein.

33. In **State (NCT of Delhi) v. Naujot Sandhu: (2005) 11 SCC 600**, this Court held computer printouts are secondary evidence and may be admitted on mere production. Production of certificate under section 65-B(4) was not mandatory for admission of such secondary evidence. However, in **Anvar PV v. PK Basheer: (2014) 10 SCC 473**, this Court took a different view and held Section 65-B laid down a special procedure for admissibility of electronic records which mandatorily requires production of certificate under 65-B(4) for admissibility of secondary evidence i.e. computer printouts. This view was doubted in **Shafhi Mohammad v. State of Himachal Pradesh: (2018) 2 SCC 801**. In **Sonu v. State of Haryana: (2017) 8 SCC 570**, another bench of this Court, held the ratio in Anvar PV (supra) shall apply prospectively unless the defence during trial raised objection to admission of computer printouts. Finally, the issue was settled by a three-judge bench in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal: (2020) 7 SCC 1**, wherein the bench overruling Naujot Sandhu (supra) and Shafhi Mohd. (supra) upheld the ratio in Anvar PV (supra) and held issuance of certificate under section 65-B(4) is a condition precedent for admissibility of computer-generated secondary evidence. It cannot be supplemented through oral evidence.

34. It would be argued that Naujot Sandhu (supra) which did not insist on production of certificate for admissibility of computer-generated printouts was prevailing at the time when the case was decided by the Trial Court and the Appellate Court. The judgement in

a Anvar PV (supra) was delivered subsequently and cannot be a ground to render the CDRs inadmissible. It is also brought to our notice that issue of retrospective application of the ratio in PV Anvar (supra) is pending for consideration before this Court.

b 35. Be that as it may, it is relevant to note the larger bench in *Khotkar* (supra) while reiterating *PV Anvar* (supra) did not hold that its ratio shall apply prospectively. Furthermore, in **Mohd. Arif @ Ashfaq v. State (NCT of Delhi)**: this Court while hearing a review petition in a death penalty case retrospectively applied the ratio in *Anvar PV* to cases decided earlier and eschewed secondary electronic evidence dehors certificate under section 65-B(4), holding as follows:-

c *“23. Naujot Sandhu was decided on 4-8-2005 i.e. before the judgment was rendered by the trial court in the instant matter. The subsequent judgments of the High Court and this Court were passed on 13-9-2007 and 10-8-2011 respectively affirming the award of death sentence. These two judgments were delivered prior to the decision of this Court in Anvar P.V. which was given on 18-9-2014. The judgments by the trial court, High Court and this Court were thus well before the decision in Anvar P.V. and were essentially in the backdrop of law laid down in Naujot Sandhu. If we go by the principle accepted in para 32 of the decision in Sonu, the matter may stand on a completely different footing. It is for this reason that reliance has been placed on certain decisions of this Court to submit that the matter need not be reopened on issues which were dealt with in accordance with the law then prevailing. However, since the instant matter pertains to award of death sentence, this review petition must be considered in light of the decisions made by this Court in Anvar P.V. and Arjun Panditrao Khotkar.*

f *24. Consequently, we must eschew, for the present purposes, the electronic evidence in the form of CDRs which was without any appropriate certificate under Section 65-B(4) of the Evidence Act.”*

g Similar view was taken in **Sundar @ Sundarrajan v. State by Inspector of Police: 2023 SCC Online SC 310.**

h 36. Though the present case does not involve death penalty, it is undeniable that appellants were facing a criminal trial and the prosecutor was required to prove a fact beyond reasonable doubt strictly in accordance with law. Appellants during trial raised objections to admissibility of the secondary electronic evidence relating to Rahil which was marked as exhibit PW23/B-D. Thereby the prosecutor was put on due notice and had opportunity to fill the lacuna by producing the requisite certificate under Section 65-B(4) but did not do so. In *Sonu* (supra), this court held if an objection is taken to CDRs

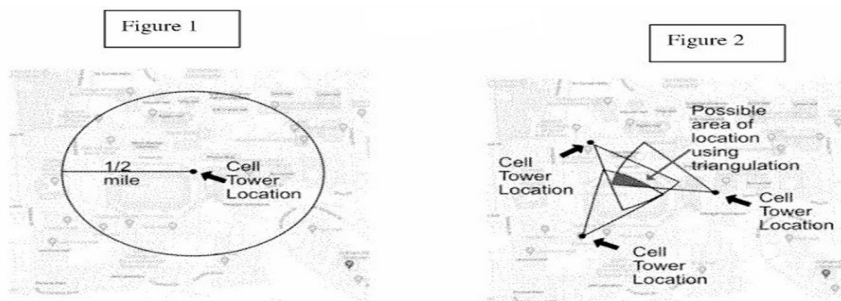
being marked without a certificate and the same was not cured by the prosecutor at relevant stage the document shall be inadmissible in law. In these circumstances we are inclined to apply the ratio in PV Anwar and Khotkar to the case and hold that the exhibits are inadmissible in law being secondary evidence without certification. a

37. Even if the CDRs and other electronic records were admitted in evidence they merely contain the cell tower location information, that is to say, which tower mobile phone was connected to and how long the calls lasted when it was connected to that tower. These data give an approximate area corresponding to the operational area of the cell tower and not the exact site where the phone is located. b

38. In the present case, the CDRs show Rahil's phone was connected to the cell tower at Nizamuddin (Ex. PW/23 C). Cell towers can reach approximately a half mile to two miles in city location. No evidence is led regarding the range of the said tower. It needs to be borne in mind that cell tower ranges widely vary and are dependent on a number of variables such as:- c

- a) how high the antenna is over the surrounding landscape;
- b) frequency of the signal in use;
- c) rated power of the transmitter;
- d) directional characteristic of the antenna array on the site;
- e) nearby buildings and vegetation absorbing and reflecting radio energy;
- f) local geographical or regulatory factors and weather conditions. e

39. Cell triangulation identifies at least three towers to which the cell phone at a particular time is connected and determines the location of the phone by overlapping the ranges of these towers. This is a better and comparatively more precise method than reference to a single tower. The issue may be better elucidated by the diagrams (Figure 1 and Figure 2) set out herein below. f



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a 40. Given these circumstances reference to Nizamuddin cell tower in CDRs would merely show that Rahil's phone was within the operational range of such tower and it is hazardous to rely solely on this evidence to prove his presence at his residence beyond doubt.

b 41. Finally, telephonic exchanges between Rahil and Mohd. Fazal would not lead to an inference of conspiracy to murder as Mohd. Fazal has been acquitted of the charge of murder which has not been appealed against.

c 42. It is settled law in a criminal case whether based on direct or circumstantial evidence, the burden of proof always rests on the prosecution. Only when the prosecution discharges the initial onus, that is, proves the incriminating attending circumstances to establish the cause of death are within the 'special knowledge' of an accused does the onus shift and an adverse inference against such accused d may be drawn if he fails to discharge such onus.

e 43. In the absence of reliable and convincing evidence proving the presence of the appellants at Suraiya's residence when Shakeel ur Rehman is said to have come there, it cannot be said that the prosecution had discharged its initial onus and proved the appellants were present in the house when the murder occurred.

f 44. Such failure of the prosecution cannot be bridged by an inferential conclusion of presence of all inmates in the house to shift the onus on them to explain away the circumstances leading to Shakeel's homicidal death. High Court failed to appreciate this lacuna in the prosecution case and illegally drew adverse inference against the appellants under Section 106 of Indian Evidence Act, 1872.

g 45. Accordingly, we hold that High Court was not justified in reversing the findings of acquittal on the basis of mere surmises and the impugned judgment to the extent that it convicts the appellants liable to be set aside. Consequently, appeal is allowed. Pending application(s), if any, is disposed of.

h **Result:-** Appeal allowed. Impugned judgment of the High Court convicting the appellants set aside. Acquittal of the appellants by the trial court restored.

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