

Crl.Appeal No.652 of 2023

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**CR**

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR.JUSTICE P. V. BALAKRISHNAN

MONDAY, THE 24<sup>TH</sup> DAY OF MARCH 2025 / 3RD CHAITHRA, 1947

CRL.A NO. 652 OF 2023

CRIME NO.2124/2019 OF Perumbavoor Police Station, Ernakulam

(AGAINST THE ORDER/JUDGMENT DATED 23.12.2022 IN SC NO.182 OF  
2020 OF DISTRICT COURT & SESSIONS COURT, ERNAKULAM)

APPELLANT/ACCUSED (IN CUSTODY):

UMER ALI

AGED 23 YEARS

S/O ABDUL HUSSAIN, MASJID STREET, NEAR HAIBERGAON  
POLICE AID POST, ISLAMPATHI BHAGOM (SADAR POLICE  
STATION LIMITS), NAGON DISTRICT, ASSAM, PIN -  
782002

BY ADVS.

P.MOHAMED SABAH

LIBIN STANLEY

SAIPOOJA

SADIK ISMAYIL

R.GAYATHRI

Crl.Appeal No.652 of 2023

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M.MAHIN HAMZA  
ALWIN JOSEPH

RESPONDENT/COMPLAINANT:

STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF  
KERALA, ERNAKULAM, PIN - 682031

BY PUBLIC PROSECUTOR NEEMA T.V.

OTHER PRESENT:

PP- ADV. NEEMA T.V

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
18.03.2025, THE COURT ON 24/3/2025 DELIVERED THE  
FOLLOWING:



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**RAJA VIJAYARAGHAVAN V,  
&  
P.V.BALAKRISHNAN,JJ.**

**CR**

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**Crl.Appeal No.652 of 2023**  
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Dated this the 24<sup>th</sup> day of March 2025

**JUDGMENT****P.V.BALAKRISHNAN,J**

This appeal is filed by the sole accused in SC No.182/2020 on the files of the Special Court of Sessions, Ernakulam Division, challenging his conviction and sentence imposed under Sections 302, 376(A) and 201 IPC by that court.

**Prosecution Case**

2. On 27/11/2019 at about 1.08 am, the accused, a vagabond, with an intention to commit rape and murder of deceased Deepa dragged her to the courtyard of 'Indraprastha hotel' situated in Perumbavoor. Thereafter, when the deceased



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resisted the attempts of the accused, he took a hoe and hacked on her face causing injuries. Then, the accused laid the victim on the ground, disrobed her and committed rape upon her. Thereafter, the accused again inflicted injuries on the head, face and other parts of the body of the victim using the very same hoe, resulting in inflicting further injuries and the deceased succumbing to her injuries. Later, the accused also damaged a CCTV camera placed in the place of occurrence, which had captured the events. Hence, the prosecution alleged that the accused has committed the offences punishable under Sections 302, 376 (A) and 201 IPC.

Proceedings before the trial court

3. On appearance of the accused, charges were framed against him under the afore sections, to which he pleaded not guilty. Thereafter, from the side of the prosecution PW1 to PW28 were examined and Exts.P1 to P45 and MO1 to MO11 were marked. Ext.D1 contradiction was also marked from the side of the



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accused through the prosecution witnesses. When examined under Section 313 Cr.P.C, the accused denied all the incriminating circumstances appearing against him in evidence and contended that he is innocent. He stated that on 26/11/2019 at about 3 pm, the deceased approached him seeking money and he did not oblige to the request. He told the deceased that he will handover the money, if she is ready to have sex with him. The deceased consented and they indulged in sexual intercourse and thereafter, he paid Rs.300/-. Later, at 4.30 pm he was taken to the police station and was informed that a crime is going to be registered against him for usage of drugs. He was arrested on 27/11/2019 at about 10 pm and he came to know that the arrest was made in connection with the murder of a lady. He further stated that he was below 18 years of age at that time. Even though an opportunity was granted to the accused to adduce evidence, no evidence was adduced. The trial court, on an appreciation of the



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evidence on record, found the accused guilty and convicted him under Sections 302, 3769(A) and 201 IPC. The accused was sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- under Section 302 IPC. In case of default, the accused was ordered to undergo rigorous imprisonment for a period of four months. The accused was also sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- under Section 376(A) IPC. In case of default, he was ordered to undergo rigorous imprisonment for a further period of four months. The accused was further sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.10,000/- under Section 201 IPC. In case of default, the accused was ordered to undergo rigorous imprisonment for a further period of two months.

Contentions of the appellant/accused

4. The learned counsel for the appellant Adv. Sai Pooja contended that the prosecution case entirely rests upon



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circumstantial evidence and the prosecution has failed to prove each of the circumstances relied on by it. She argued that the entire case of the prosecution hinges upon the alleged CCTV visuals recovered from the scene by the investigating officer, but the same has not been proved as required by law. She contended that the DVD's including Exbt.P25, which allegedly contains the mirror image of the visuals in MO-4 DVR and which has been relied on by the trial court, was not accompanied with an obligatory certificate under Section 65B and hence, is not at all admissible in evidence. She relied on the decisions in **Anwar v. Basheer(2014 KHC 4602)** and **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020 4 KHC 101)** in support of her contentions. She argued that the evidence of PW5 identifying the accused is not believable and no Test Identification parade has been conducted to corroborate his evidence. She relied on the decisions in **Rameshwar Singh v. State of J & K (1971 KHC**



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**604) & Sasikumar v. State (AIR 2024 SC 5507)** and contended that the non-conduct of the Test Identification parade of PW5 is fatal. She also argued that there is no link evidence to connect Exts.P26 & P27 reports of the expert with the accused since there is no evidence to show that the samples allegedly taken have reached the lab in a tamper-proof condition. She relied on the decision in **Prakash Nishad v. State of Maharashtra (AIR 2023 SC 2938)** and contended that in such circumstances, no value can be attached to them. She also added that Ext.P27 cannot be relied upon, since it does not reveal the method of examination and the recovery of the articles from the place of occurrence cannot be relied upon, in the absence of independent witnesses. She further contended that the prosecution has not proved the identity of the accused and that the DVD, which has been played in the court initially before the introduction of Ext.P25 DVD and which has been relied on by many of the witnesses to identify the accused, is not





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seen produced and marked. Hence, she prayed that this appeal may be allowed.

#### Contentions of the Public Prosecutor

5. The learned Public Prosecutor Adv.Neema T.V. argued that, the prosecution has proved the contents of Ext.P25 which unerringly shows that it is the accused who has committed the crime. She argued that the evidence of PW25 would categorically show that Ext.P25 is a mirror image of the original hard disk seized by the police and which has been produced and marked as MO4. According to the learned prosecutor, since the original hard disk itself has been produced before the trial court, there is no need for Section 65B certification for Ext.P25. She further submitted that all the material witnesses have identified the accused in the dock as the person, who is seen in the CCTV visuals, committing the crime. She argued that the scientific evidence adduced by the prosecution also supports the afore evidence and shows that it is the accused



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who has committed the crime. Hence, she prayed that this appeal may be dismissed.

A conspectus of the prosecution evidence

6. PW1 is the son of the owner of the hotel by name 'Indraprastha'. He deposed that on 27/11/2019 at about 5.30 am, PW3 called him and informed him that a lady was seen lying dead in front of their hotel. He, along with his father, went there and saw a lady lying in a pool of blood, with cut injuries on her hand, face and head. Nearby, a black shawl and a hoe smeared with blood was lying. The CCTV camera was found broken. He went inside the shop and opened the CCTV monitor and saw that at about 1.08 am, a person was seen dragging a lady to the front of his shop and hitting her using a hoe. Thereafter, the person committed rape upon the lady and damaged the CCTV. He identified the person, whom he saw in the visuals, as the accused in the dock. Thereafter, he along with his father went to the police



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station and gave Ext.P1 FIS. He also identified the weapon as MO1, shawl as MO2, CCTV camera as MO3, the DVR and charger as MO4 series. He also signed in Ext.P2 mahazar prepared by the police while seizing MO4 series.

7. PW3 is the employee in Indraprastha Hotel, who had first seen the dead body of the victim. He deposed that at about 5.30 am, when he went to the hotel, he saw the dead body and informed PW1. He also found MO1 and MO3 (in a broken condition) lying nearby. During cross examination, he denied giving a statement to the police that he knew Malayalam very well and the said portion was marked as Ext.D1.

8. PW4 deposed that in the evening of 26th November, he had gone to Indraprastha hotel to have food and had kept his hoe at that place. On the next morning, when he went to pick his hoe, he saw the dead body lying there and he returned. He identified his hoe as MO1.



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9. PW5 is working as a security guard in 'K.P.Chacko Jewellery', which is located near Indraprastha hotel. He deposed that at about 12.45-1.00 am, he had witnessed the accused walking through the front of the jewellery store and that the police had shown that person to him five to six days after the incident. In his cross examination, he stated that he had seen the photos of the accused in the newspaper.

10. PW8 was the manager of Indraprastha Hotel. He deposed that when he reached the spot he saw the dead body of the victim and MO1 and MO3 lying there. He witnessed the police seizing MO2 shawl, MO5 series dresses worn by the deceased and MO1 and MO3, and had signed in Ext.P5 mahazar.

11. PW13 is the scientific officer, who inspected the scene of crime on 27/11/2019 and collected samples. She thus collected eight items, packed, labeled and sealed them and handed them over to the investigating officer along with Ext.P12 certificate.



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12. PW15 deposed that he is running a computer firm by name 'Bits and Bytes' in Ernakulam. He had installed the CCTV in Indraprastha hotel and he identified the camera as MO3. In his cross examination, he stated that the CCTV system includes a camera, control recorder, DVR, Hard disk, Monitor and power supply cable. He also stated that what was saved in the hard disk is in MP 4 format and the CCTV was installed two months ago. He further stated that in the DVD played before the court, the content was in K-Lite -Codec format and the same was converted to this format from MP 4 format by using a converter.

13. PW17 is the doctor, who conducted the postmortem examination on the body of the deceased Deepa and issued Ext.14 certificate. He noticed 32 ante mortem injuries on the body. The blood group was determined as 'O Rh positive' and he collected blood samples from the body, vaginal swab and smears, nail clippings and handed over the same to the place. He opined that



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the cause of death was due to head injury. Injury Nos. 1 to 5, 10 & 11 are fatal injuries and are sufficient in the ordinary course of nature to cause death. He also stated that these injuries can be caused by using MO1. He added that injury No.24 could be caused as a result of forceful separation of the victim's thighs and this could have happened following an attempt for a sexual assault. He further stated that the whitish mucoid fluid seen inside the vaginal orifice could have a mixture of female as well as male secretions. In his cross examination, he stated that the congested margins in vaginal orifice could be evidence of vaginal penetration.

14. PW19 is the senior CPO attached to the Perumbavoor Police station. He deposed that on 27/11/2019 at about 1.00 pm, the investigating officer arrested the accused and had seized the articles worn by him as per Ext.P16 mahazar. He signed in the mahazar as a witness and identified the dresses and other articles worn by the accused as MO6 series to MO11.



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15. PW 23 is a witness to Exts.P5, P22 and Ext.P23 mahazars. He also identified MO1, MO2, MO3 & MO5 series as the articles seized as per Ext.P5 mahazar. He also saw the visuals along with the Investigating Officer while preparing Ext.P23 mahazar.

16. PW 24 is the police officer, who recorded Ext.P1 FIS and registered Ext.P1(a) FIR. He also saw the CCTV visuals along with the investigating officer and understood the details of the accused. Thereafter, he brought the accused to the police station. In his cross examination he stated that 7.35 am which is recorded in the FIR, is the time when the information received was recorded and completed.

17. PW25, the Assistant Director of Regional Forensic Science Laboratory, Cochin, deposed that on 18/12/2009 she examined the hard disk marked as Q1 and recovered the video footage for the period 1.08 am to 1.20 am on 27/11/2019 . She stated that she



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copied it into Annexure -1 DVD. She also prepared and handed over Ext.P24 report at that time. The DVD was identified and marked as Ext.P25. She stated that on examining the video footage, she could identify the man shown in the standard photograph assaulting and sexually abusing a woman. She identified the said person as the accused in the dock. She also identified MO1 as the weapon used by him and MO4 series as the DVR and charger examined by her. In her cross examination, she stated that Ext.P24 does not contain the hash value and that Folder No.1 of Ext.P25 contains the original visuals as retrieved from Q1.

18. PW26, the Scientific Officer attached to FSL, Trivandrum, deposed that he had received 26 sealed packets along with a forwarding note and that he had examined items Nos. 1 to 5, 8,9 and 13 to 19 and issued Ext.P26 report. On examination, he found human blood in item Nos. 1,2,4,5,8,9,14,15,17 & 19 and blood in





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item Nos. 3 and 18. He identified the articles examined as MO5 series, MO6, MO7, MO8, MO9, MO10, MO11, MO1 & MO2.

19. PW 27 was the Scientific Officer (Biology) attached to the FSL, Thiruvananthapuram. She deposed that she had examined 26 items received from the Scientific Officer of Zerology Division and has issued Ext.P27 certificate. On examination, she found that the blood stains in item Nos. 1,2,4,5,8,9,14,17 & 19 belong to the deceased and seminal stains in item No.4 belong to the accused. The stains in item No.15 belong to both the accused and the deceased and the nail clippings of the accused in item No.20 contained cells and tissues of both the accused and the deceased.

20. PW28 is the Investigating Officer in this case. He deposed that he took over the investigation on 27/11/2019 and prepared Ext.P3 inquest report and seized MO1, MO2, MO3, & MO5 as per Ext.P5 mahazar. He produced these articles before the court as per Ext.P28 property list. Later, he collected the samples taken by the



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Scientific Officer as per Ext.P15 Mahazar and produced them before the Court as per Ext.P29 property list. He also prepared Ext.P4 scene mahazar and arrested the accused by preparing Ext.P30 series documents. Thereafter, he seized the dresses and articles worn by the accused as per Ext.P16 mahazar and produced them before the court as per Ext.P31 property list. He also collected biological evidence of the accused along with Ext.P7 certificate as per Ext.P21 mahazar and produced them before the court as per Ext.P32 document. Later, he collected the samples taken by the doctor who conducted the postmortem as per Ext.P22 mahazar and produced it before the court as per Ext.P33. On 28/11/2019, he prepared Ext.P23 observation mahazar after seeing the CCTV visuals, seized DVR and charger as per Ext.P2 mahazar and produced them in the court as per Ext.P35 property list. He also produced all the documents collected during investigation and prepared and sent Ext.P44 series forwarding



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notes to the court and obtained Exts.P26, P27 reports.

### Evaluation of evidence

21. The first and foremost question that arises for consideration is whether the cause of death of Deepa is homicidal or not. The evidence of PW17 coupled with Ext.P14 shows that the victim had suffered 32 ante mortem injuries and amongst them, injury Nos. 1 to 5, 10 and 11 are fatal injuries, sufficient in the ordinary course of nature to cause death. PW17 categorically opined that the cause of death was due to the head injuries, which are injury Nos. 1 to 5, 10 and 11 as referred above. His evidence also reveals that these injuries can be caused using MO1. In the light of the afore evidence, we have no hesitation to find that the death of Deepa is by homicide.

22. The next question to be considered is whether it is the accused who has committed the rape and murder of deceased Deepa. Admittedly, in the present case there are no eye witnesses



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to the incident. The prosecution is heavily relying upon the visuals collected from the CCTV, which is located near the place of the occurrence, to inculcate the accused in this crime. The DVR of the CCTV, which was kept in the premises, in which the events were recorded, were seized by the investigating officer and produced before the court and marked as MO4. It is also to be seen that the mirror image allegedly copied to a DVD from the hard disk in the DVR, have been played before the trial court to enable the witnesses to identify the accused. The original document/primary evidence which is available (the DVR containing the hard disk), has not been brought into evidence during trial for reasons best known to the trial court and the prosecution. Instead, it appears that DVR has been forwarded to the Forensic Science Laboratory and a copy of the relevant portion from it has been copied to a DVD and has been adduced as evidence. The proceedings also reveal that the DVD, which was played in the trial court and used



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for identifying the accused by the witnesses till PW25 was examined, is not the DVD which was played and marked as Ext.P25 through PW25. It appears that the DVD in which the video clipping was copied from the DVR, and which was played in the trial court till the examination of PW25, did not 'work' when the same was attempted to be played when PW25 was in the box. An application was then filed by the prosecution to direct the expert to make another copy from the data retained in the office which was allowed by the Trial Court. The expert then went back and came with a new DVD and the same was marked as Ext.P25 through the witness. Anyway, it is very pertinent to note that there is no Section 65B certification for both the DVDs and there is nothing available on record to show as to what happened to the DVD which was initially produced and the same was run in the presence of the witnesses.

23. Matter being thus, as stated earlier, the prime contention



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of the appellant is that in the absence of Section 65B certification, the DVDs played and relied upon by the trial court are not at all admissible in evidence and, therefore, the entire edifice, on which the prosecution case is built up, is shaken. In order to appreciate the afore contention, it would only be apt to discuss the settled principles of law laid down by the Apex Court regarding the admissibility and appreciation of electronic records/evidence. In the decision in Anwar's case (cited supra), the Hon'ble Apex Court has held thus:

“13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of S.59 and S.65A, can be proved only in accordance with the procedure prescribed under S.65B. S.65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything



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contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under S.65B(2). Following are the specified conditions under S.65B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the



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said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under S.65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions





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mentioned under S.65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of S.65B of the Evidence Act, the question would arise as to the



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genuineness thereof and in that situation, resort can be made to S.45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under S.65B of the Evidence Act are not complied with, as the law now stands in India.

18. xxxx

19.xxxx

20.xxxx

21.xxxx

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under S.63 read with S.65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the Court omitted to take note of S.59 and S.65A dealing with the admissibility of electronic record. S.63 and S.65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by S.65A and S.65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to



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electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under S.65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of S.65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23 xxxxx

24.The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in Court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded



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using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in Court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of S.65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to S.59, S.65A and S.65B of the Evidence Act, if an electronic record as such is used as primary evidence under S.62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in S.65B of the Evidence Act.”

24. Subsequently, in the decision in Arjun Panditrao Khotkar case(cited supra), the Hon'ble Apex Court again considered the very same question and held thus:

“30. Coming back to S.65B of the Indian Evidence Act, sub-section (1) needs to be analysed. The sub-section begins with a *non obstante clause*, and then goes on to



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mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "*...without further proof or production of the original...*" make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

31. The *non obstante clause* in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of S.65B, which is a special provision in this



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behalf - S.62 to 65 being irrelevant for this purpose. However, S.65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that S.65B differentiates between the original information contained in the "computer" itself and copies made therefrom - the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a 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. In cases where



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"the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with S.65B(1), together with the requisite certificate under S.65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of *Anvar P. V. (supra)* which reads as "*... if an electronic record as such is used as primary evidence under S.62 of the Evidence Act...*". This may more appropriately be read without the words "*under S.62 of the Evidence Act,...*". With this minor clarification, the law stated in paragraph 24 of *Anvar P. V. (supra)* does not need to be revisited."

25. In the light of the afore dictums, it can unambiguously be stated that the DVDs, in which the electronic record (video clipping) was extracted from the DVR (MO4) and which have been



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played in the court and relied on, being secondary evidence of the electronic record, requires certification under Section 65B in order to admit the document in evidence. In other words, we may say that without Section 65B certification, there is no question of the DVDs including Ext.P25 being admitted in evidence and relied upon. There is no exemption granted in law to any authority including the Forensic Science Laboratories from not complying with the requirement of certification under Section 65B, while making copies from the original electronic record. The afore conclusion also gets full support from the observation made by the Apex Court in para 16 of Anwar's case (cited supra), which is extracted above. Further, an expert's report cannot be considered as a formal substitute for Section 65B(4) certificate in the eyes of law since, they serve two different purposes. A Section 65B certificate is a specific statutory requirement to make a secondary electronic record admissible as evidence, while Section 293 Cr.P.C.





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report is evidentiary material in its own right, typically presenting the results of forensic analysis. A Section 293 Cr.PC report being admissible, simply means that the report can be read as evidence of what it states and it does not automatically validate any attached electronic media. For instance, if the FSL report says "I retrieved video file ZYZ from the DVR onto a DVD", the report is proof that the analyst made such retrieval. But the video recording(the DVD) still has to be independently admissible to be viewed and relied upon as evidence of the facts depicted. The expert's statement, however authoritative, is not the same as the statutory certificate that permits the court to treat the DVD as evidence of the video's contents. The situation would have been different if in the present case, the prosecution has adduced primary evidence by exhibiting and proving the contents of the original electronic record itself, which is the DVR marked as MO4. At the sake of repetition, we may say that we are at a loss to



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understand why the prosecution and the trial court had forgone the primary evidence available and have made attempts to rely upon secondary evidence and that too, without proper certification. In the light of the afore discussions, the only conclusion we can reach is that no reliance can be placed upon the secondary evidence in the form of DVDs, the contents of which have been relied upon by the trial court for convicting the accused.

26. The afore facts and circumstances discussed reflects a grave truth, which is not at all easy to comprehend, i.e., both the prosecution and the trial court have appallingly failed in their duties to meet the demand of justice. The original electronic record, which is the primary evidence and which was very much available before the court, has been omitted to be adduced as evidence and a copy of the electronic record extracted from the original DVR was adduced without proper certification to make it admissible. The prosecution, for reasons which we are not able to



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decipher or on a misconception, has failed in leading and tendering material evidence to substantiate the charge, resulting in failure of justice. It can also be stated that there was no fair trial conducted in this case, thereby causing prejudice to both the victim and the accused. It has been held by the Apex Court in **Mohd.Hussain @ Julfikar Ali v. State (Govt. of NCT) [2012 KHC 4473]** that an appellate court hearing a criminal appeal from a judgment of conviction has power to order retrial of the accused, though such power should not be exercised in a routine manner. It was also held that retrial should be ordered in exceptional and rare cases and only when in the opinion of the court such a course becomes indispensable to avert failure of justice. The guiding factor must always be demand of justice. The appellate court must closely keep in view that while protecting the right of an accused for fair trial and due processes, the people who seek protection of law do not lose hope in the legal system and the interest of the society are



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not altogether overlooked.

27. In the decision in **Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (dead) Thr. L.Rs. [2012 KHC 4181]**, the Hon'ble Apex Court held that truth is the guiding star in a judicial process and truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth and judges at all levels should seriously engage themselves in the journey of discovering the truth and that is their mandate, obligation and bounden duty. It was also held that the justice dispensation system will acquire credibility only when people get convinced that the justice will be based on the foundation of truth.

28. It is true that if a case is ordered to be retried, ordinarily it will be considered as a *de novo* trial. But, it is a settled law that even in such cases, the appellate court is not debarred from directing to use the evidence already recorded and to proceed to



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record additional evidence and dispose of the case. The Hon'ble Apex Court in the decision in **Satyajit Banerjee v.State of West Bengal [(2005) 1 SCC 115]** has held that even in cases where retrial is directed, the evidence already recorded and the initial trial need not be erased or wiped out from the records of the case and the trial court can decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial. This Court also has, in the decision in **Jimmy George v. Sreekumar (2023 6 KLT 603)**, followed the afore dictum.

29. If so, keeping in mind the afore principles and the facts and circumstances of this case, including the fact that proper evidence which was very much available before the trial court was not adduced, the fact that no prejudice will be caused to the accused since he has already been served with a copy of the DVD and, in the interest of justice, we are of the view that this is a fit



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case where after setting aside the conviction and sentence passed against the appellant/accused, the matter can be remanded back for adducing further evidence relating to the electronic records in a proper format, in the light of the discussions made afore. It need not be mentioned that it will be open to the trial court to recall any witnesses or summon documents for this purpose and the accused will also be entitled to adduce evidence in his favour at the appropriate stage. It is made clear that the trial court has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded hereinafter.

In the result, this appeal is allowed in part as follows:

- i) The conviction and sentence passed against the appellant/accused under Sections 302, 376(A) and 201 IPC in SC No.182/2020 by the Special Court of Sessions, Ernakulam are set aside.
- ii) SC No.182/2020 is remanded back to the trial court for the



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purpose of bringing in evidence the electronic records available in this case, as per law.

iii) The trial court shall, if required, recall any witnesses, summon any documents, take additional Section 313 statement and grant an opportunity to the accused to adduce further evidence.

iv) Thereafter, the trial court shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner being inhibited by anything stated in this judgment.

v) Considering the fact that the accused is still undergoing incarceration, the Session Judge shall make every endeavour to dispose of the case as expeditiously as possible.

**Sd/-**

**RAJA VIJAYARAGHAVAN V**

**Judge**

**Sd/-**

**P.V.BALAKRISHNAN**

**Judge**

dpk