2022:CHC-AS:55233

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:
THE HON'BLE JUSTICE UDAY KUMAR

CRR 1781 OF 2022

DILWAR HOSSAIN & ANR.
-VS-
STATE OF WEST BENGAL & ANR.

For the Petitioners : Mr. Satadru Lahiri,
Mr. Malay Bhattacharyy

For the State : Mr. Subir Ganguly
Mr. Sayan Mukherjee

Reserved on : 13.10.2026

Pronounced on : 12.11.2026

UDAY KUMAR, J.: –

1. This criminal revisional application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, is directed against the legality, propriety, and correctness of the judgment and order dated March 15, 2022, passed by the 5th Court of the learned Additional Sessions Judge, Malda, in Criminal Appeal No. 04 of 2021, thereby affirming the judgment of conviction and sentence passed by the learned Chief Judicial Magistrate, Malda, convicting the petitioners under Sections 419/120B and 420/120B of the Indian Penal Code.

2. The prosecution's case briefly stated that, on October 01, 2019, Karuna Bala Adhikary (PW-1), visited the Axis ATM counter at Bulbulchandi to

withdraw cash but due to technical glitches she failed to withdraw the same. The unknown persons who were present inside the booth at that time suggested her to try a nearby SBI ATM. When she inserted her card into the second SBI ATM, one person intercepted her under the pretext of urgent necessity, requesting permission to execute a transaction first. It is the case of the prosecution that during this brief interval, the petitioners-accused surreptitiously swapped her original SBI debit card (ending in 1042) with a card bearing the name of one Raju Sarkar. This deception came to the knowledge of the complainant on the following day (October 02, 2019), when she received mobile alerts indicating unauthorized cash withdrawals and a gold purchase using her SBI debit Card amounting to a total of ₹65,300/-. Thereafter she searched for her card but failed to find it, subsequently blocked the said debit card. Despite that she lodged the formal written complaint (Ext. 1) only on October 16, 2019, i.e., after sixteen days of denture/incident, upon which Cyber Crime P.S. Case No. 05 of 2019 has been registered under Sections 419/420/120B of the Indian Penal Code, 1860, against the present petitioners, Dilwar Hossain and Mehebub Alam, alongside one Nabi Sk.

3. During investigation, the Investigating Officer, ASI Jhumpa Mandal (PW-12), apprehended Petitioner No. 1 on October 16, 2019, from a jewellery shop (Goswami Guinea House) owned by PW-4**,** where the complainant's original ATM card was purportedly recovered from his physical person, and seized tax invoices (Ext. 4 and 4/1) and jewellery boxes from G.D. Guinea House on October 19, 2019, under a proper

seizure list but without seals and gala impressions, and without entering these articles in the Malkhana Register. The I.O. also failed to produce all the 26 ATM cards recovered from the petitioners. The prosecution could only produce 9 cards in court during the trial.

4. To prove its case, the prosecution adduced ocular testimony of seizure witnesses (PW-3, PW-7), trade witnesses (PW-2, PW-4), and other documents, including complainant's bank passbook (Ext. 2), unverified photocopies of tax invoices and merchant slips (Ext. 4 and 4/1), digital debits and bank ledgers, and T.I.P. records (CW-2) claiming a witness identified the suspects. In their examination under Section 313 of the Code of Criminal Procedure, the accused failed to bring any adverse inferences to prove innocence, while the trial court heavily leaned on unverified past criminal histories of the petitioners and pending cases against them as substantive proof of criminal propensity.

5. The petitioners focused strongly on a complete collapse of the chain of custody, total inadmissibility of secondary and electronic documents, a vitiated Test Identification Parade wherein the contemporaneous parade document proved a complete failure of identification, where PW-1 herself admitted that the accused were shown to her at the police station prior to the parade, and Magistrate CW-2's oral testimony contradicted official T.I.P. records (Ext. 14), and a flagrant violation of the principle of parity.

6. Concluding the trial, the learned Chief Judicial Magistrate, Malda, vide judgment dated November 16, 2021, convicted the petitioners under

Sections 419/120B and 420/120B IPC, sentencing them to imprisonment extending up to four years with a fine of ₹20,000/- each.

7. Being aggrieved by the said judgment of conviction, the petitioners preferred Criminal Appeal No. 04 of 2021 before the Sessions Court, challenging the trial court's findings on the grounds that the conviction rested on a broken chain of custody, unsealed and fabricated seizures, dead secondary and electronic documents lacking statutory certification under Section 65B of the Indian Evidence Act, 1872 or under Section 2A of the Bankers' Books Evidence Act, 2026, pre-trial police station exposure destroying the T.I.P., and a direct violation of the doctrine of parity. The petitioners took the stand that in doing so, the trial court manifested a glaring judicial double standard—i.e., while evaluating identical house-search recovery evidence of third-party ATM cards, the Magistrate chose to discard the recoveries and honourably acquit co-accused Nabi Sk., while turning around to weaponize the exact same quality of flawed recovery evidence to convict the present petitioners, violating the foundational parity principle.

8. However, the 5th Court of the learned Additional Sessions Judge, Malda, vide judgment dated March 15, 2022, mechanically affirmed the conviction and sentence passed by the learned Trial Court. The first appellate court dismissed the monumental foundational illegalities, sealing defects, missing Malkhana entries, and electronic admissibility bars as mere "defective investigation," endorsing the trial court's reliance on direct recovery and ocular testimony without independently

addressing the mandatory statutory prerequisites governing secondary and electronic records.

9. Left with no other efficacious remedy against concurrent findings perceived as a classic instance of perversity, the petitioners invoked the revisional jurisdiction of this Court under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, through the instant revisional application i.e., C.R.R. No. 1781 of 2022. The revisional challenge is firmly grounded on the premise that the concurrent judgments of conviction and sentence are founded on suspicion, inadmissible secondary and electronic materials, unsealed and fabricated recoveries with broken chains of custody, pre-trial police station exposure vitiating the T.I.P., a blatant violation of the doctrine of parity vis-à-vis the acquitted co-accused, and the unlawful use of unverified past criminal histories to shift the burden of proof to the defence. The petitioners contend that these cumulative foundational gaps meet the highest judicial threshold of a perverse judgment, wherein total non-appreciation of evidence and gross manifest errors of law warrant immediate revisional interposition to prevent a gross miscarriage of justice.

10. Mr. Satadru Lahiri, the learned counsel appearing on behalf of the petitioners, Dilwar Hossain and Mehebub Alam, emphasized that the concurrent findings of conviction and sentence rendered by the trial court and the first appellate court are vitiated by fundamental illegality, misreading of evidence, and complete perversity, as the prosecution case from its inception in Cyber Crime P.S. Case No. 05 of 2019 up to

the first appellate court's affirmation dated March 15, 2022 rested on a fragile and broken foundation of unproved circumstances.

11. Mr. Lahiri further submitted that the prosecution case suffers from a fatal and unexplained delay right at the threshold. Although the alleged card swap and discovery occurred on October 01 & 02, 2019, the formal written complaint (Ext. 1) was belatedly lodged only on October 16, 2019, after a hiatus of nearly fourteen days coinciding precisely with the date of arrest of the petitioner no. 1-accused and initial police raids, without any Station Diary entry or justification offered to account for the interregnum.

12. Mr. Lahiri strongly contended that the core circumstance of alleged recovery of ATM cards and gold items was completely *non est* in the eye of law for want of identity, safe custody, and mandatory statutory safeguards. He pointed out that the I.O. (PW-12) admitted on oath that no Malkhana register was maintained or produced, all seized articles remained in her personal and unsupervised custody and the independent seizure witnesses (PW-3 and PW-7) deposed that items lacked proper seals or gala impressions. Furthermore, the total absence of a Malkhana register and an unexplained quantity mismatch, where an initial recovery of 26 ATM cards dwindled down to 9 produced in court, completely shatters the chain of custody. To substantiate this limb, the defence relied upon authoritative pronouncements including *Mohd. Aman & Anr. v. State of Rajasthan*, [(1997) 10 SCC 44]; *State of Rajasthan v. Daulat Ram*, [(1980) 3 SCC 303]; *State of Rajasthan v. Gurmail Singh*, [(2005) 3 SCC 59]; *Sk. Bhalu & Anr. v. State of West*

Bengal, (2019 SCC OnLine Cal 8007); *Mool Chandra v. State of Uttarakhand*, (2026 SCC OnLine Utt 726); and *Ramkrushna Prahllad Dongardive v. State of Maharashtra*, (2026 SCC OnLine SC 2091), submitting that unsealed seizures and compromised tamper-proofing render recoveries legally dead.

13. The learned counsel for the petitioners further contended that the prosecution's attempt to prove financial siphoning relied on unverified photocopies of tax invoices (Ext. 4 and 4/1) and uncertified computer-generated bank passbooks (Ext. 2), which are legally dead documents violating the provisions of the Indian Evidence Act and the Bankers' Books Evidence Act. Relying on the decisions of the Hon'ble Supreme Court in *Tharammel Peethambaran & Anr. v. T. Ushakrishnan & Anr.*, (2026 SCC OnLine SC 169); *Pooranmal v. State of Rajasthan & Anr.*, (2026 SCC OnLine SC 344); *Anvar P.V. v. P.K. Basheer & Ors.*, [(2014) 10 SCC 473]; and *LIC of India & Anr. v. Ram Pal Singh Bisen*, [(2010) 4 SCC 491], the defence argued that secondary evidence is strictly inadmissible unless the pre-conditions under Section 65 of the Indian Evidence Act are fulfilled, computer outputs require mandatory Section 65B (of the Indian Evidence Act) certification, and the mere marking of a document as an exhibit does not dispense with the requirement of proving its contents.

14. It was also urged that identification evidence was fatally flawed due to pre-trial police station exposure and judicial contradictions, citing *Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra*, [(1998) 5 SCC 103]; *Habal Shaikh & Anr. v. State of West Bengal*, (1990 SCC

OnLine Cal 98); and *Sujit Biswas v. State of Assam*, [(2013) 12 SCC 406]. Furthermore, a formidable argument was advanced on the principle of parity, highlighting that the trial court disbelieved identical house-search recoveries to acquit co-accused Nabi Sk., yet adopted a diametrically opposite standard to convict the petitioners on identical recovery materials, violating the ratio laid down in *Javed Shaukat Ali Qureshi v. State of Gujarat*, [(2023) 9 SCC 164], and *Manjur Sk. @ Manjur Shaikh v. State of West Bengal & Anr.*, (2026 SCC OnLine Cal 4500). Finally, invoking the ratio laid down in *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke & Ors.*, [(2015) 3 SCC 123] and in, *Manjir Chatterjee v. Sushanta Dutta*, (2022 SCC OnLine Cal 3352), the petitioners submitted that concurrent findings suffering from total non-appreciation of evidence and reliance on inadmissible documents warrant revisional intervention of this Court under Sections 397 read with 401 Cr.P.C.

15. Finally, Mr. Lahiri submitted that the first appellate court mechanically dismissed these monumental foundational illegalities, sealing defects, and electronic admissibility bars as mere "defective investigation," failing to apply an independent judicial mind to the total lack of statutory certification and the blatant violation of the principle of parity by the learned Trial Court.

16. Conversely, Mr. Subir Ganguly, the learned counsel appearing on behalf of the State of West Bengal stoutly defended the concurrent findings of conviction and sentence rendered by the learned trial Court and first appellate Court, contending that the impugned judgments suffered from

no perversity, illegality, or miscarriage of justice. He argued that the primary circumstance of recovery, specifically the seizure of the victim's exact, personalized SBI ATM card (ending in 1042) was effected directly and exclusively from the physical person of Petitioner No. 1, Dilwar Hossain, upon his red-handed apprehension at Goswami Guinea House on October 16, 2019, as proved by independent witnesses PW-4, PW-7, and the Investigating Officer (PW-12).

17. Mr. Ganguly further submitted that the acquittal of co-accused Nabi Sk. by the trial court was entirely justified because no direct or circumstantial material connected Nabi Sk. to this specific victim's card, whereas the present petitioners were caught red-handed with the stolen property. To substantiate this position, the State relied upon the decisions of the Hon'ble Supreme Court in *State of Uttar Pradesh v. Naresh & Ors.*, [(2011) 4 SCC 324], and *Bhagwan Jagannath Markad v. State of Maharashtra*, [(2016) 10 SCC 537], submitting that minor discrepancies, procedural oversights, or ordinary remissness by an investigating officer do not erode the core credibility of truthful ocular testimony and direct recovery evidence.

18. The learned counsel for the State further contended that the evidentiary chain was fully fortified by contemporaneous commercial records, including original Tax invoice marked as Exhibit 5, merchant slips marked as Exhibit 4/1 from G.D. Guinea House, and branded packaging recovered from the residences of the petitioners-accused, which tied the siphoned funds directly to gold purchases made by them under aliases. Addressing criticisms regarding minor investigative

lapses, such as the lack of formal Malkhana entries or sealing defects, the State placed heavy reliance upon the decisions of the Hon'ble Supreme Court in *State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand*, [(2004) 7 SCC 659], and *Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra*, [(2000) 8 SCC 457], arguing that courts must distinguish between vital defects that strike at the root of the prosecution case and minor ministerial flaws that cause no prejudice or miscarriage of justice.

19. Finally, the State urged that the identification matrix was completely watertight, pointing out that the de facto complainant (PW-1) positively identified both petitioners during judicially conducted Test Identification Parades held on November 01, 2019 and November 27, 2019, while CW-1, the salesman at G.D. Guinea House, positively identified Petitioner No. 2, Mehebub Alam, in open court as the individual who used the alias Mosaraf Hossain to buy gold, concluding that concurrent findings supported by stellar ocular and recovery evidence should not be disturbed in revisional restraint.

20. Upon consideration of the rival contentions of the parties and the materials-on-record, the following core questions are formulated for judicial determination:

(i) Whether the alleged recoveries of ATM cards and articles suffered from a fatal, incurable breakdown in the chain of custody due to the non-production of the Malkhana register, absence of independent seals, and glaring chronological

anomalies, or whether such lapses were curable procedural irregularities.

(ii) Whether the Trial Court and the first Appellate Court committed a grave illegality by relying upon unverified photocopies of tax invoices (Ext. 4 and 4/1) and uncertified computer-generated bank passbooks (Ext. 2) without fulfilling the mandatory pre-conditions of Section 65 of the Evidence Act and Section 65B certification requirements.

(iii) Whether the evidentiary value of the T.I.P. was completely vitiated and destroyed by pre-trial police station exposure and contradictory judicial testimony.

(iv) Whether the trial court committed a gross judicial impropriety and violation of the doctrine of parity by picking and choosing identical house-search recovery evidence to acquit co-accused Nabi Sk., while weaponizing it to convict the petitioners.

(v) Whether unverified past criminal histories or pending cases against the petitioners-accused were illegally utilized as substantive proof of guilt and whether the burden of proof was improperly shifted.

(vi) Whether the concurrent findings of the Trial Court and the first Appellate Court meet the judicial threshold of a "perverse judgment" warranting intervention of this Court under Sections 397/401 Cr.P.C.

21. Now, adverting to the first question concerning the legality, sanctity, and integrity of the alleged recoveries and the foundational chain of

custody, I must examine the specific and unvarnished admissions elicited from the prosecution witnesses during the trial. The Investigating Officer, PW-12 (ASI Jhumpa Mandal), categorically admitted on oath that no Malkhana register was ever maintained, seized, or produced before the trial court, and that all purported incriminating articles remained continuously in her personal, unsupervised custody. It is an elementary canon of criminal jurisprudence that the production of the Malkhana register and proper entries therein form the essential link to prove that seized articles were kept in safe custody. The absence of such records leaves a wide, unbridgeable chasm in the prosecution's narrative, exposing the seized property to the gravest risks of tampering, substitution, and contamination.

22. This foundational vulnerability is further compounded by the testimony of independent seizure witnesses, notably PW-3 (Md. Renaul Hoque) and PW-7 (Soumoyajit Pal). Both witnesses explicitly deposed that the seized articles, ATM cards, and containers lacked proper seals, gala impressions, or witness signatures at the time of seizure, thereby undermining their evidentiary authenticity and failing to satisfy the mandatory safeguards required under criminal law. Most egregiously, the prosecution introduced a seizure container, specifically an Amul Dairy Creamer box, allegedly containing material exhibits, yet the said box bore a manufacturing and packaging date of November 17, 2019, which is a full month after the date of the purported seizure on October

19, 2019. The trial record is completely devoid of any explanation for this glaring chronological impossibility.

23. Furthermore, a severe quantity mismatch is writ large on the face of the deposition of PW-4 (Ripon Goswami), who deposed that police official searched the body of the accused and recovered approximately twenty-six ATM cards, yet only nine cards were ultimately produced and marked as exhibits in court, with the remaining seventeen ATM cards entirely unaccounted for.

24. The legal consequence of such structural infirmities in criminal trials is well-settled. An examination of the authorities cited by both parties clarifies their precise applicability to the facts of the present case. The learned counsel for the petitioners placed heavy reliance upon the classic rulings in *Mohd. Aman (supra)*, and *Daulat Ram (supra)*, wherein the Hon'ble Supreme Court authoritatively held that when the chain of custody is broken, and seized articles are kept unsealed or exposed to tampering without proper safe-keeping records, such recoveries cease to have any evidentiary value. This principle was reinforced in the decision of *Gurmail Singh (supra)*, emphasizing that the non-production of the Malkhana register is a fatal omission that breaks the essential chain of custody. These principles find direct application here, given the total absence of Malkhana entries and the admitted lack of seals.

25. Furthermore, the defence/petitioners appropriately cited recent pronouncements including *Mool Chandra (supra)*, and the landmark ruling of the Supreme Court in *Pooranmal (supra)*, wherein the Apex Court reiterated that where structural illegalities, missing

contemporaneous records, and tampering possibilities (such as unsealed packaging and glaring chronological container discrepancies) are writ large across the seizure procedure, the recovery is rendered entirely inadmissible, making it impossible for a conviction to rest upon such vitiated foundations.

26. On the contrary, the learned counsel for the State strenuously argued, relying upon dictums of the Hon'ble Apex Court in *Jagmohan Singh Kuldip Singh Anand (supra)*; *Narayan Chetanram Chaudhary (supra)*; and *Naresh (supra)*, that minor procedural oversights, ministerial flaws, or ordinary remissness by an investigating officer do not erode the core credibility of truthful ocular testimony and direct recovery evidence, and should not be exploited to vitiate a trial. However, upon a careful distinguishing of facts, the ratio of the decisions cited by the State applies exclusively to minor, inconsequential omissions such as minor delays in dispatching samples or typographical errors in paperwork where the tamper-proof seal and the Malkhana register remain intact and unimpeached. That general principle can never be stretched to cover a fatal structural collapse of the magnitude seen in the present case, where the seizure container itself bears a future manufacturing date (a full month after the raid), the Malkhana register is completely missing, and an unexplained shortfall of seventeen ATM cards exists. These are not minor ministerial flaws; they strike at the very root and substratum of the prosecution's recovery matrix.

27. Therefore, upon a strict appraisal of the evidence and the correct application of legal precedents, I have no hesitation in holding that the

alleged recoveries are completely vitiated, *non est* in the eye of law, and cannot form the foundation of a criminal conviction. Both the Trial Magistrate and the First Appellate Court committed a grave perversity in law by dismissing these monumental failures as mere "defective investigation."

28. I now take up the second question for discussion concerning the legality, admissibility, and evidentiary value of the documentary and electronic outputs relied upon by the prosecution to establish financial siphoning, bank account details, and commercial gold purchases, specifically the bank passbook printout (Ext. 2), the tax invoice (Ext. 4), and the merchant copy/POS slip (Ext. 4/1).

29. A careful examination of the trial records and the depositions of key witnesses reveal profound infirmities in how these documents were brought on record. Regarding the de facto complainant's bank passbook (Ext. 2), the Investigating Officer, PW-12, explicitly admitted during cross-examination that she failed to produce any formal seizure list, requisition, or contemporaneous record to show how or when the passbook was seized during the investigation. Despite this total absence of foundational link evidence, the passbook which is fundamentally a computer-generated ledger printout maintained by a bank was marked as an exhibit merely through oral testimony. Similarly, the tax invoice (Ext. 4) and merchant copy (Ext. 4/1) were tendered through trade witnesses such as PW-2 (Abdur Rouf, seizure witness of G.D. Guinea House). During cross-examination, PW-2 candidly admitted that these

documents were mere photocopies and that the original invoice and merchant copy were never found, traced, or produced before the court.

30. To assess the legal sustainability of admitting such documentation, this Court must measure these exhibits against the absolute strictures of the law governing secondary and electronic evidence, while carefully examining the judicial precedents relied upon by the rival parties. Under Sections 61 and 64 of the Indian Evidence Act, the contents of documents must, as a primary rule, be proved by primary evidence (the original document itself), unless a proper foundational case for leading secondary evidence is established under the strict parameters of Section 65. The learned counsel for the petitioners rightly referred the recent authoritative pronouncements of the Hon'ble Supreme Court in *Tharammel Peethambaran (supra)*, and *Pooranmal (supra).* In these decisions, the Hon'ble Apex Court reiterated that secondary evidence of a document is strictly inadmissible unless the statutory pre-conditions proving the existence of the original and accounting for its loss or non-production under the specific clauses of Section 65 of the Evidence Act are rigorously fulfilled. In the instant case, the prosecution neither laid any foundation under Section 65 nor accounted for the missing originals of the tax invoices, rendering photocopies like Exhibits 4 and 4/1 entirely dead in the eye of law.

31. Furthermore, because these documents particularly the bank passbook ledger (Ext. 2) and transaction merchant slips, represent information stored or generated electronically, they are squarely governed by the special and mandatory provisions of Sections 65A and 65B of the

Indian Evidence Act. As consecrated by the landmark Constitution Bench ruling of the Hon'ble Supreme Court in *Anvar P.V. v. P.K. Basheer (supra)* which has been consistently reaffirmed, a certificate under Section 65B(4) of the Indian Evidence Act is a mandatory condition precedent to the admissibility of any electronic record or computer-generated output. Oral testimony or mere exhibit-marking cannot cure this inherent statutory defect. In the case at hand, not a single Section 65B certificate was produced at any stage of the trial with respect to the bank ledger or electronic transaction logs.

32. To compound this fatal omission, the prosecution also ignored the mandatory requirements of the Bankers' Books Evidence Act, 1891, which dictates that bank account entries can only be proved by producing original books or certified copies accompanied by the statutory certificate under Section 2A of the said Act. As emphasized by the Hon'ble Supreme Court in *Ram Pal Singh Bisen (supra)* at Paragraphs 25-27, the mere marking of a document as an exhibit by the court is merely for identification purposes and does not dispense with the mandatory requirement of proving its contents through primary or legally admissible evidence.

33. *Per contra,* the learned counsel for the State attempted to salvage these exhibits by relying on general propositions that formal defects in document introduction should not override substantial justice. However, upon distinguishing the facts, the general authorities cited by the State pertain to situations where primary documents were duly accounted for or where secondary foundations under Section 65 of the

Indian Evidence Act were substantially laid during trial. Those principles have no application here, where unverified photocopies of invoices and uncertified computer bank printouts are introduced without a shred of compliance under Section 65 of the Evidence Act or without Section 65B certification.

34. Despite these binding statutory mandates and judicial dictums, both the Trial Magistrate and the First Appellate Court committed a patent and manifest error of law. They utilized these unverified photocopies (Ext. 4 and 4/1) and uncertified bank passbook entries (Ext. 2) as substantive pillars of guilt, treating them as proved documents merely because they bore exhibit numbers. The Appellate Court, while acknowledging certain investigative flaws, completely glossed over the absolute inadmissibility of these electronic and secondary outputs, without independent application of judicial mind.

35. Accordingly, upon a rigorous analysis of the statutory provisions, the settled propositions of law, and the proper distinguishing of cited precedents laying down evidentiary principles laid down by the Hon'ble Supreme Court, I hold that Exhibits 2, 4, and 4/1 are legally inadmissible in evidence, having been brought on record in patent violation of Sections 63, 65, and 65B of the Indian Evidence Act, Section 2A of the Bankers' Books Evidence Act. The concurrent findings of the learned Trial and First Appellate Courts, resting upon these dead documents are perverse and legally unsustainable.

36. Now this court takes up the evidentiary value of the Test Identification Parade (T.I.P.) and the subsequent dock identification. A scrutiny of the

deposition reveals a deeply compromised identification process. The *de facto* complainant, Karuna Bala Adhikary (PW-1), made a devastating and fatal admission during her cross-examination when she candidly stated: "The accused persons were shown to me at the police station by the police officer." It is an elementary and foundational canon of criminal jurisprudence that a Test Identification Parade is conducted during investigation primarily to test the initial version of the witness and to ensure that the investigating agency is moving against the right individuals. However, the foundational premise of a T.I.P. is completely destroyed if the suspect is exhibited/exposed to the identifying witness at a police station prior to the parade. Once pre-trial police station exposure occurs, any subsequent identification in a T.I.P. or in court ceases to be an independent recollection of the witness and becomes merely a reflection of police-induced familiarity.

37. This grave infirmity is further compounded by an irreconcilable and startling contradiction between the official court record and the oral testimony of the Judicial Magistrate who conducted the parade (CW-2). The Magistrate deposed during trial that a witness (PW-3) had successfully identified the petitioners during the T.I.P., whereas the contemporaneous, official T.I.P. records (Ext. 14) explicitly establish that PW-3 had completely failed to identify them. When the oral testimony of a judicial officer flatly contradicts contemporaneous official court documents, the sanctity of the entire identification exercise collapses. Furthermore, PW-3 made the damaging admission that he was never interrogated by the police during investigation and was

making statements for the first time in court, rendering his testimony entirely unsafe.

38. To evaluate the legal consequences of such fatal flaws, this Court is guided by the authoritative pronouncements of the Hon'ble Supreme Court and this High Court, while carefully distinguishing the authorities cited by the contesting parties. The learned counsel for the petitioners rightly placed heavy reliance upon the landmark ruling of the Supreme Court in *Shaikh Umar Ahmed Shaikh (supra)*, wherein at Paragraph 8, the Hon'ble Apex Court held that if accused persons are shown to the witnesses before the identification parade is held, the very purpose of holding the identification parade is lost and the evidence of identification of the accused at the trial becomes valueless. This principle was echoed by the Hon'ble Division Bench of this Court in *Habal Shaikh (supra)*, wherein it was authoritatively ruled that pre-trial police station exposure and vague, uncorroborated dock identifications destroy the evidentiary value of identification, making it wholly impermissible to base a conviction thereon.

39. Furthermore, the identification evidence suffers from another fatal structural defect: vagueness in court. The record demonstrates that multiple prosecution witnesses spoke generically of "two or three unknown persons" without naming, describing, or specifically pointing out which petitioner corresponded to which role. Since co-accused Nabi Sk. was acquitted, and no specific attribution was recorded by the trial court or prosecutor during dock identification, a generic pointing to an undifferentiated group fails to legally fix culpability upon Petitioner No.

1 (Dilwar Hossain) or Petitioner No. 2 (Mehebub Alam). The Hon'ble Supreme Court, in *Sujit Biswas (supra),* at Paragraphs 13–19 of the said report propounded that, suspicion, however grave, can never take the place of legal proof, and in the absence of a reliable, unblemished identification chain, the prosecution cannot bring home the charge.

40. *Per contra*, the learned counsel for the State attempted to defend the identification matrix by relying on general rulings such as *Naresh (supra)*, and *Bhagwan Jagannath Markad (supra)*, arguing that minor discrepancies in identification or minor lapses by witnesses should not be magnified to throw out a genuine prosecution case. However, upon distinguishing facts, those rulings apply where identification is supported by independent, untainted circumstances and unimpeached dock testimony. In the present case, where the principal identifying witness (PW-1) admits to pre-trial police station show-ups, where the Magistrate's oral testimony directly contradicts official T.I.P. records (Ext. 14), and where witnesses like PW-3 were never interrogated during investigation, the State's reliance on generalities must fail.

41. The learned counsel for the petitioners has rightly contended that pre-trial police station exposure and dock identification following improper parade procedures render the identification evidence legally worthless. Both the Trial Court and the First Appellate Court completely failed to appreciate this glaring vitiating circumstance, brushing aside the pre-trial exposure as a minor irregularity. Such an approach is patently perverse. Consequently, I hold that the identification of the petitioners

through the T.I.P. stands vitiated and cannot be relied upon to connect the petitioners with the alleged crime.

42. I now proceed to the fourth question for determination namely, whether the trial court committed a gross judicial impropriety and a flagrant violation of the doctrine of parity.

43. The doctrine of parity in criminal sentencing and evaluation of evidence is a facet of Article 14 of the Constitution of India. It dictates that where two or more co-accused stand trial on identical or indistinguishable allegations, supported by the exact same quality of evidence, a court cannot adopt a dual standard acquitting one while convicting another. To do so manifests clear judicial arbitrariness and perversity.

44. A meticulous perusal of the trial court's judgment reveals a glaring judicial double standard. The prosecution levelled identical allegations of house-search recoveries of third-party ATM cards against co-accused Nabi Sk. as well as the present petitioners namely, Dilwar Hossain and Mehebub Alam. While evaluating this identical house-search recovery evidence, the learned Chief Judicial Magistrate, Malda chose to disbelieve the recoveries and honourably *acquitted* co-accused Nabi Sk. Yet, in the very same breath and upon the exact same quality of flawed, unsealed, and uncorroborated recovery evidence, the trial court turned around and convicted the present petitioners.

45. The first Appellate Court mechanically glossed over this blatant anomaly, failing to realize that once identical recovery evidence is discarded as untrustworthy for one co-accused, it cannot legally form

the sole basis of conviction for another co-accused standing on the same footing.

46. The learned counsel for the petitioners has rightly drawn support from the landmark rulings of the Hon'ble Supreme Court in *Javed Shaukat Ali Qureshi (supra)*, and the recent Hon'ble Division Bench judgment of this Court in *Manjur Sk. @ Manjur Shaikh (supra)*, wherein it has been authoritatively held that selective appreciation of identical evidence to convict one accused while acquitting another violates the foundational doctrine of parity and vitiates the judgment.

47. In view of this glaring double standard, the conviction of the present petitioners cannot be sustained on any known principle of judicial consistency.

48. I shall now take up the fifth question for determination: whether unverified past criminal histories or pending cases against the petitioners were illegally utilized as substantive proof of guilt and whether the burden of proof was improperly shifted.

49. It is a cardinal and sacrosanct principle of criminal jurisprudence in India that an accused is presumed innocent until proven guilty beyond reasonable doubt, and the burden of establishing guilt rests squarely and unshiftingly on the prosecution from inception to end. Furthermore, past criminal antecedents or pending criminal cases against an accused are strictly inadmissible as substantive proof of commission of the crime for which he is currently on trial; they can, at best, be considered only at the stage of sentencing if a conviction is independently secured on legally admissible evidence.

50. In the case at hand, a disturbing feature emerges from the judgments of the learned Trial Magistrate and the First Appellate Court. The trial court heavily leaned upon unverified past criminal histories and pending cases attributed to the petitioners, weaponizing them as substantive proof of criminal propensity to bridge the gaping holes in the prosecution's evidence. Furthermore, in examining the accused under Section 313 of the Code of Criminal Procedure, the learned Trial Magistrate drew adverse inferences against the petitioners for failing to prove their innocence, thereby committing a grave illegality by shifting the onus of proof onto the defence.

51. It is axiomatic that no matter how weak the defence may be, the prosecution must stand on its own legs and prove its case beyond a shadow of doubt. The shifting of the burden of proof and the use of unverified past histories to establish current guilt strikes at the very root of a fair trial. The concurrent findings resting on such extraneous and impermissible considerations are wholly perverse and unsustainable in law.

52. Having meticulously analyzed all the formulated points of determination namely, the total breakdown of the chain of custody, the absolute inadmissibility of secondary and electronic documents under Sections 65, 65B, and the Bankers' Books Evidence Act, the vitiation of the T.I.P. through pre-trial police exposure, the blatant violation of the doctrine of parity vis-à-vis the acquitted co-accused, and the illegal utilization of unverified criminal histories to shift the burden of proof, I find that the concurrent judgments of conviction and sentence rendered by both the

courts below suffer from monumental perversity, total non-appreciation of evidence, and gross manifest errors of law.

53. While this Court is fully conscious of the self-imposed limitations under revisional jurisdiction pursuant to Sections 397 read with Section 401 of the Code of Criminal Procedure, wherein re-appreciation of evidence is generally discouraged, it is equally well-settled that when concurrent findings are founded on no evidence, inadmissible materials, and a complete disregard for settled canons of criminal jurisprudence, such findings cross the threshold of a "perverse judgment," warranting immediate revisional intervention to prevent a gross miscarriage of justice, as illuminated in *Sanjaysinh Ramrao Chavan (supra)*, and *Manjir Chatterjee (supra)*.

54. Accordingly, the revisional application being **C.R.R. No. 1781 of 2022** is hereby **allowed**.

55. The judgment and order dated March 15, 2022, passed by the 5th Court of the learned Additional Sessions Judge, Malda, in Criminal Appeal No. 04 of 2021, affirming the judgment of conviction and sentence dated November 16, 2021, passed by the learned Chief Judicial Magistrate, Malda, in Cyber Crime P.S. Case No. 05 of 2019, are hereby **set aside**.

56. The petitioners, **Dilwar Hossain** and **Mehebub Alam**, are hereby **acquitted** of the charges levelled against them in the said proceeding under Sections 419/120B and 420/120B of the Indian Penal Code, 1860, on the ground of benefit of doubt.

57. The petitioners be set at liberty forthwith, if not wanted in connection with any other case. Fine, if paid, shall be refunded to them.

58. Pending Connected application(s), if any, are also disposed of accordingly.

59. Interim orders, if any, stand vacated.

60. There shall be no order as to costs.

61. Let a copy of this judgment along with the Trial Court Records (T.C.R.) be transmitted to the learned Trial Court forthwith for necessary information and compliance.

62. Case diary, be returned to the Learned Counsel for the State.

63. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Uday Kumar, J.)