BOBY

v.

STATE OF KERALA

(Criminal Appeal No. 1439 of 2009)

JANUARY 12, 2023

[B. R. GAVAI* AND M. M. SUNDRESH, JJ.]

Evidence Act, 1872 – s.27 – Discovery of Fact – Criminal trial – Three accused – Disclosure statement allegedly made by accused no.3-appellant – Recovery of dead body of complainant's husband – Appreciation of evidence – Held: s.27 requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact – The information as to past user, or the past history, of the object produced is not related to its discovery – If a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence – The law expects the investigating Officer to draw the discovery panchnama u/s.27 – In the present case, the recovery panchnama is not in accordance with the said requirement, and also there is no statement of accused no.3-appellant recorded u/s.27 – Consequently, prosecution failed to prove the circumstance that dead body of the deceased was recovered at the instance of accused No. 3-appellant – IPC – ss. 395, 364, 365, 380, 201, 302 and 302 r/w s.34.

Evidence Act, 1872 – s.27 – Application of – Held: Provisions of s.27 are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence.

Evidence – Last seen theory – Discussed – Held: Last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible – If the gap between the time of last seen and the deceased found dead is long, then the possibility of other person coming in between cannot be ruled out.

* Author

Criminal Trial – Murder case – Case resting entirely on circumstantial evidence – Appreciation of circumstantial evidence – On facts, the only circumstance against the accused was that he was last seen in the company of deceased on the basis of the evidence of PW-1 – However, solely on the basis of last seen theory, conviction cannot be upheld – Prosecution failed to prove the chain of incriminating circumstances which leads to no other conclusion than the guilt of the accused – Judgment passed by trial Court, thereby convicting appellant and impugned judgment passed by High Court affirming the same, accordingly, set aside – Appellant acquitted – IPC – ss. 395, 364, 365, 380, 201, 302 and 302 r/w s.34.

Evidence – Circumstantial evidence – Appreciation of – Golden principles with regard to conviction in a case which rests entirely on circumstantial evidence – Discussed – Criminal Trial.

Allowing the appeal, the Court

HELD:

1. **It is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. It is a primary principle that the accused 'must be' and not merely 'may be' guilty before a court can convict the accused. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved". The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be such that they exclude every possible hypothesis except the one to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused. [Para 10]**

2. **Section 27 of the Evidence Act requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact. The information as to past user, or the past history, of the object produced is not related to its discovery. The law expects the IO to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. In the present case, leave aside the recovery panchnama being in accordance with the aforesaid requirement, there is no statement of accused No. 3/appellant recorded under Section 27 of the Evidence Act. Therefore, the prosecution has failed to**

prove the circumstance that the dead body of the deceased was recovered at the instance of accused No. 3/appellant. [Paras 21, 26]

3. **Insofar as accused No.1 is concerned, the additional circumstance sought to be relied on by the trial court and the High Court is the alleged recovery of the spade. It is to be noted that the spade was also recovered from the same place from where the dead body of the deceased was alleged to have been recovered at the instance of accused No. 3/appellant. The trial court again held that the place from where the spade was recovered was already known from the disclosure statement of accused No. 3/ appellant; however, it still held the recovery of the said spade to be admissible in evidence. It is thus clear that the said recovery was from a place which was already known and not exclusively within the knowledge of accused No. 1. Hence, the trial court has again committed perversity in arriving at such a finding. [Para 28]**

4. **It is clear that the only circumstance that now remains is the circumstance of the accused last seen in the company of the deceased on the basis of the evidence of PW1. However, solely on the basis of last seen theory, the conviction could not have been recorded. The prosecution has utterly failed to prove that the recovery of the dead body of the deceased was at the instance of accused No. 3/appellant. The recovery of the articles from the house of accused No. 3/appellant, even according to the trial court, is farce and fabricated. The recovery of the spade at the instance of accused No. 1 is from a place which, even according to the trial court, was also known on account of the disclosure statement made by accused No. 3/appellant. Therefore, the prosecution has utterly failed to prove the chain of incriminating circumstances which leads to no other conclusion than the guilt of the accused. [Para 29, 30]**

Sharad Birdhichand Sarda v. State of Maharashtra **(1984) 4 SCC 116 : [1985] 1 SCR 88;** *State of U.P. v. Satish* **(2005) 3 SCC 114 : [2005] 1 SCR 1132;** *Chandran v. The State of Tamil Nadu* **(1978) 4 SCC 90 : [1979] 1 SCR 176;** *State of Karnataka v. David Rozario and Another* **(2002) 7 SCC 728:[2002] 2 Suppl. SCR 419** and *Subramanya v. State of Karnataka* **2022 SCC OnLine SC 1400 – relied on.**

Suresh Chandra Bahri v. State of Bihar **1995 Supp. (1) SCC 80 : [1994] 1 Suppl. SCR 483 – referred to.**

Pulukuri Kotayya and Others v. King-Emperor **1946 SCC OnLine PC 47 – referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1439 of 2009.

From the Judgment and Order dated 25.08.2008 of the High Court of Kerala at Ernakulam in CRLA No.326 of 2005.

R. Basant, Sr. Adv., Abdulla Naseeh V. T., Meena K. Poulose, Akshay, Ashok Basoya, Ms. Shruti Jose, P. S. Sudheer, Advs. for the Appellant.

K. N. Balgopal, Sr. Adv., Harshad V. Hameed, Dileep Poolakkot, Ms. Ashly Harshad, Advs. for the Respondent.

The Judgment of the Court was delivered by

B. R. GAVAI, J.

1. This appeal challenges the judgement and order dated 25th August 2008, passed by the learned Division Bench of the High Court of Kerala at Ernakulam (hereinafter referred to as "the High Court") in Criminal Appeal Nos. 326, 230 and 847 of 2005 thereby dismissing the appeals filed by Shibu @ Shibu Singh (accused No. 1) and Boby (accused No. 3/appellant herein), thereby upholding the judgment of conviction and sentence dated 18th December 2004, passed by the Additional Sessions Judge, Fast Track Court–II (Ad-hoc Court), Thrissur (hereinafter referred to as "the trial court") in Sessions Case No. 208 of 2003 in respect of the said accused persons. Vide the same impugned judgment, the High Court, however, allowed the appeal filed by Biju @ Babi (accused No. 2) and acquitted him from all the offences charged with.

2. Shorn of details, the facts leading to the present appeal are as under:

   2.1 On 21st November, 2000, Leela w/o Vishwanathan (Complainant/PW-1) made a statement before the Police Station, Anthikkadu, Dist. Thrissur, wherein she alleged that Shibu @ Shibu Singh (accused No. 1), the younger brother of her husband, Vishwanathan (deceased), was a convict who was then undergoing imprisonment as he was involved in many theft cases wherein stolen articles from the said thefts were disposed of by her husband.

   2.2 It is the case of the complainant that Shibu @ Shibu Singh (accused No. 1) had escaped from the prison and was

absconding. Due to the fear that Vishwanathan (deceased) would disclose to the police about his escape from jail, Shibu @ Shibu Singh (accused No. 1) along with other accused persons, namely, accused No. 2 to accused No. 7 came in a jeep to the house of Vishwanathan (deceased) on 20.11.2000 at 08.00 p.m. The accused persons then held Vishwanathan (deceased) at knife point, forcefully poured liquor into his mouth and compelled him to drink till he was left unconscious. When Leela (Complainant/PW-1) tried to interfere, she sustained injuries on her palm due to the knife carried by the accused persons with which they attempted to inflict blows on her. Thereafter, Leela (Complainant/PW-1) along with her husband were blindfolded and taken in a jeep. After covering a distance of about 30 kms., the Complainant/ PW-1 was dropped at Poomala, which was her native place. When she managed to reach her house with the help of a local named Baiju from the said village, she informed her brother Babu (P.W.6) about the aforesaid incident, who attempted to search for Vishwanathan (deceased) during the said night. Next day, i.e., on 21st November 2000, Leela (Complainant/PW-1) along with Babu (PW-6) lodged her statement (Ext. P-1) at the Police Station Anthikkadu, Dist. Thrissur. Based on the contents of the aforesaid complaint, a First Information Report (Ext. P-19) (for short, "FIR") came to be registered against the aforementioned accused persons along with other unknown persons for offences punishable under Section 395 and 365 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2.3 Boby (accused No. 3/appellant herein) was arrested by the Police on 25th November 2000. Based on his disclosure statement (Ext. P-23), the dead body of Vishwanathan, which was buried at Pattithara on the banks of river Bharathapuzha, was recovered. Additionally, stolen goods were also recovered from the house of accused No. 3 and were marked as Ext. P-14. Shibu @ Shibu Singh (accused No. 1) and Biju @ Babu (accused No. 2) were arrested on 28th November 2000 from a lodge at Guruvayoor by the Guruvayoor Police. Subsequently, they were handed over to the Anthikkadu Police on 2nd December 2000. Based on the disclosure statement

of Shibu @ Shibu Singh (accused No. 1), the spade with which the deceased's burial spot was dug was recovered near the site where the body was exhumed from, concealed in a plastic bag.

2.4 At the conclusion of investigation, a charge-sheet came to be filed before the Judicial Magistrate First Class, Court–II, Thrissur, who committed the case to the Sessions Court, Thrissur for trial.

2.5 Charges came to be framed by the trial court for the offences punishable under Sections 395, 364, 365, 380 and 302 read with Section 34 of the IPC.

2.6 All the accused persons pleaded not guilty and claimed to be tried. The prosecution examined 33 witnesses to bring home the guilt of the accused persons. The prosecution also placed on record 14 Material Objects which were marked as M.O. 1 to M.O. 14. During the cross-examination from the defence side, Sekharan (DW-1), father of the deceased was examined. The accused persons were questioned under Section 313 of the Criminal Procedure Code, 1973 (for short, "the Cr.P.C.") wherein they denied the circumstances that appeared against them in evidence which were put to them. At the conclusion of trial, the learned trial court found Shibu @ Shibu Singh (accused No. 1), Biju @ Babu (accused No. 2) and Boby (accused No. 3/appellant herein) guilty of the offences charged with and accordingly sentenced them to undergo life imprisonment for the offence punishable under Section 302 read with Section 34 IPC. It further directed them to undergo rigorous imprisonment for different periods for the offences punishable under Sections 364, 395, and 201 read with Section 34 of the IPC. The sentences were directed to run concurrently.

2.7 Being aggrieved thereby, accused Nos. 1 to 3 preferred their respective appeals before the High Court. The High Court, by the impugned judgement, dismissed the appeals preferred by Shibu @ Shibu Singh (accused No. 1) and Boby (accused No. 3/appellant herein), but was pleased to allow the appeal preferred by Biju @ Babu (accused No. 2), thereby setting aside the judgment of conviction and sentence of the trial court insofar as Biju @ Babu (accused No. 2) was concerned.

3. Being aggrieved thereby, the present appeal.

4. We have heard Shri R. Basant, learned Senior Counsel appearing on behalf of the appellant–Boby and Shri K.N. Balgopal, learned Senior Counsel appearing on behalf of the respondent–State of Kerala.

5. Shri Basant, learned Senior Counsel would submit that both the trial court and the High Court have erred in convicting and sentencing the appellant–Boby for the offences punishable under Sections 395, 365, 364, 201, 380, 302 and 302 read with Section 34 of the IPC. He submitted that the prosecution has failed to prove its case against the appellant–Boby beyond reasonable doubt and that there are glaring lacunae in the case of the prosecution. It is submitted that even the High Court found that there were discrepancies in the statements of the prosecution witnesses who were examined during the trial. It is further submitted that the High Court also observed the glaring discrepancies in the statement of the Complainant/PW-1 with regard to Biju @ Babu (accused No. 2) on the basis of which, the High Court acquitted the said accused Biju @ Babu (accused No. 2) of all the charges levelled against him.

6. Shri Basant submitted that a Memorandum under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") is required in cases of recovery initiated at the instance of an accused person, based on the statements made before the Police. It is submitted that, on perusal of evidence on record in the instant matter, neither such Memorandum under Section 27 of the Evidence Act was prepared at the time of the recovery of the body of deceased Vishwanathan, nor were signatures of independent or panch witnesses taken at the time of said recovery. It is further submitted that it was the duty of the Investigating Officer (for short, 'IO') to have prepared the said Memorandum while acting on the information obtained from Boby (appellant herein) and that such inaction on part of the IO would vitiate the prosecution case, at least insofar as proving the recovery of the dead body of the deceased is concerned.

7. Shri Basant submitted that the trial court solely relied on the last seen theory and held that the prosecution had proved the same with regard to the chain of circumstances in this case. It is further

submitted that conviction of an accused person cannot be sustained only on the basis of proving the last seen theory as the same was required to be corroborated with the statements of the witnesses that are examined during trial along with other evidence placed on record. While pointing out the discrepancies in the statements of prosecution witnesses, which were relied upon by the courts below, it was submitted that the conviction of the appellant herein could not be sustained on the said ground alone.

8. Shri Balgopal, on the contrary, submits that the courts below have concurrently found the accused persons guilty of the offences charged with. The prosecution has proved the incriminating circumstances beyond reasonable doubt. It has also proved the chain of circumstances which leads to no other conclusion than the guilt of the accused. He relies on the judgment of this Court in the case of ***Suresh Chandra Bahri v. State of Bihar***[1].

9. Undisputedly, the present case rests entirely on circumstantial evidence. A three-Judges Bench of this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[2], has laid down the golden principles with regard to conviction in a case which rests entirely on circumstantial evidence. We may gainfully refer to the following observations of this Court in the said case:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> *(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

1 1995 Supp. (1) SCC 80
2 (1984) 4 SCC 116

> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

10. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused 'must be' and not merely 'may be' guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved". It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused.

11. In the light of these guiding principles, we have to examine the present case.

12. The trial court has relied on the following circumstances:

(i) Last seen together with the deceased;

(ii) Recovery of the stolen material including jewellery from accused No.3-Boby;

(iii) Recovery of spade from accused No. 1-Shibu @ Shibu Singh;

(iv) Recovery of the dead body at the instance of accused No. 3-Boby;

13. The trial court had convicted accused Nos. 1 to 3 upon finding that the prosecution had proved the aforesaid circumstances against them. In appeal, the High Court found that the prosecution had failed to prove the case against Biju @ Babi (accused No. 2) and accordingly acquitted him.

14. The learned Division Bench of the High Court, though found that the prosecution had failed to prove the case beyond reasonable doubt insofar as accused No.2 was concerned, held that, insofar as accused Nos. 1 and 3 were concerned, the prosecution had proved the case beyond reasonable doubt.

15. It could thus be seen that the trial court as well as the High Court found the circumstance of the accused persons having been last seen in the company of the deceased on the basis of the evidence of PW-1, as the main incriminating circumstance. The High Court further found that, insofar as Boby (accused No.3/appellant herein) was concerned, there was an additional evidence with regard to the recovery of the dead body and ornaments. Insofar as Shibu @ Shibu Singh (accused No. 1) was concerned, the High Court found that the recovery of spade which was used to dig the burial site where the dead body was concealed, was an additional circumstance which proved the guilt of Shibu @ Shibu Singh (accused No. 1).

16. Insofar as last seen theory is concerned, it will be relevant to refer to the following observations of this Court in the case of ***State of U.P. v. Satish***[3]:

"22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so

3 (2005) 3 SCC 114

small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2."

17. It could thus clearly be seen that the last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. If the gap between the time of last seen and the deceased found dead is long, then the possibility of other person coming in between cannot be ruled out.

18. In the present case, according to the complainant/PW-1, the deceased was taken away by the accused persons on the night of 20th November 2000 at 08.00 p.m. Though, it is the contention of the appellant that he was taken into illegal custody on 21st November, 2000 and his arrest was shown on 25th November, 2000, we do not find it necessary to go into that aspect of the matter. A perusal of the evidence of the IO would reveal that, on 25th November, 2000, on the basis of secret information that Boby (accused No.3/ appellant herein) was standing at Manaloor Kadavu, he proceeded to that place and arrested him at 02.00 p.m. He stated that, on the basis of his confession, various articles were seized from his house. He further stated that thereafter on the same day, the accused led them towards the place in Bharathapuzha where the deceased was buried. He stated that, after seeing the loose soil, the scene was guarded as it was an odd time. He further stated that, on 26th November 2000, as led by accused No. 3, they reached the place and the Tahasildar, Ottapalam prepared the inquest report.

19. It can thus clearly be seen that firstly, there is a gap of at least five days from the date on which, according to PW-1, the

deceased was taken away by the accused persons and the dead body was recovered. However, the crucial question would be as to whether it can be held that the prosecution had established beyond reasonable doubt that the recovery of dead body was at the instance of Boby (accused No. 3/appellant herein). Only in the event the prosecution establishes that the recovery of the body was at the instance of Boby (accused No. 3/appellant herein), the relevancy of the gap of five days would come.

20. As early as 1946, the Privy Council had considered the provisions of Section 27 of the Evidence Act in the case of ***Pulukuri Kotayya and Others v. King-Emperor***[4]. It will be relevant to refer to the following observations of the Privy Council in the said case:

"The second question, which involves the construction of s. 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms. [His Lordship read ss. 25, 26 and 27 of the Evidence Act and continued :] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw for the Crown, has

4 1946 SCC OnLine PC 47

argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. On this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity, would all be admissible. If this be the effect of s. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislaturethat a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. ***On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.*** Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A.", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

[*Emphasis supplied*]

21. It could thus be seen that Section 27 of the Evidence Act requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact. The information as to past user, or the past history, of the object produced is not related to its discovery. The said view has been consistently followed by this Court in a catena of cases.

22. This Court, in the case of ***Chandran v. The State of Tamil Nadu***[5], had an occasion to consider the evidence of recovery of incriminating articles in the absence of record of the statement of accused No. 1. In the said case also, no statement of accused No. 1 was recorded under Section 27 of the Evidence Act leading to the recovery of jewels. The Court found that the Sessions Judge as well as the High Court had erred in holding that the jewels were recovered at the instance of accused No. 1 therein in pursuance to the confessional statement (Ex. P-27) recorded before PW-34 therein. It will be relevant to refer to the following observations of this Court in the said case:

> **"36.** ……Thus the fact remains that no confessional statement of A-1 causing the recovery of these jewels was proved under Section 27, Evidence Act….."

23. It is thus clear that this Court refused to rely on the recovery of jewels since no confessional statement of the accused was proved under Section 27 of the Evidence Act.

24. It will also be relevant to refer to the following observations of this Court in the case of ***State of Karnataka v. David Rozario and Another***[6]:

> **"5.** ……This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by

5 (1978) 4 SCC 90
6 (2002) 7 SCC 728

the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. ***It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence.*** The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. ***The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information.*** It is now well settled that recovery of an object is not discovery of a fact envisaged in the section. Decision of the Privy Council in *Pulukuri Kottaya v. Emperor* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (*See State of Maharashtra v. Damu* [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301] ....."

[*Emphasis supplied*]

25. A three-Judges Bench of this Court recently in the case of ***Subramanya v. State of Karnataka***[7], has observed thus:

"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

"27. How much of information received from accused may be proved.—

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much

7 2022 SCC OnLine SC 1400

of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then

that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

26. This Court has elaborately considered as to how the law expects the IO to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. In the present case, leave aside the recovery panchnama being in accordance with the aforesaid requirement, there is no statement of Boby (accused No. 3/ appellant herein) recorded under Section 27 of the Evidence Act. We are, therefore, of the considered view that the prosecution has failed to prove the circumstance that the dead body of the deceased was recovered at the instance of Boby (accused No. 3/appellant herein).

27. Another circumstance on which the High Court relied was that the recovery of ornaments was at the instance of Boby (accused No. 3/appellant herein). We find that both the trial court and the High Court have patently erred in relying on such recovery. The trial court found that there was enough material to show that the alleged recovery memo was a fabricated document and the alleged recovery as per Ext. P-14 is farce. However, the trial court still relied on the said recovery to convict the accused. In our view, the finding of the trial court in this regard is totally perverse which has been confirmed by the High Court.

28. Insofar as Shibu @ Shibu Singh (accused No. 1) is concerned, the additional circumstance sought to be relied on by the trial court and the High Court is the alleged recovery of the spade. It is to be noted that the spade was also recovered from the same place from where the dead body of the deceased was alleged to have been recovered at the instance of Boby (accused No. 3/ appellant herein). The trial court again held that the place from where the spade was recovered was already known from the disclosure statement of Boby (accused No. 3/appellant herein);

however, it still held the recovery of the said spade to be admissible in evidence. It is thus clear that the said recovery was from a place which was already known and not exclusively within the knowledge of Shibu @ Shibu Singh (accused No. 1). We find that the trial court has again committed perversity in arriving at such a finding.

29. It is thus clear that the only circumstance that now remains is the circumstance of the accused last seen in the company of the deceased on the basis of the evidence of PW-1. In that view of the matter, we find that, solely on the basis of last seen theory, the conviction could not have been recorded. The prosecution has utterly failed to prove that the recovery of the dead body of the deceased was at the instance of Boby (accused No. 3/ appellant herein). The recovery of the articles from the house of Boby (accused No. 3/appellant herein), even according to the trial court, is farce and fabricated. The recovery of the spade at the instance of Shibu @ Shibu Singh (accused No. 1) is from a place which, even according to the trial court, was also known on account of the disclosure statement made by Boby (accused No. 3/appellant herein).

30. In that view of the matter, we find that the prosecution has utterly failed to prove the chain of incriminating circumstances which leads to no other conclusion than the guilt of the accused.

31. Insofar as the reliance placed by Shri Balgopal, learned Senior Counsel on the case of ***Suresh Chandra Bahri*** (supra) is concerned, it is totally misplaced inasmuch as in paragraph 40, this Court has observed thus:

> **"40.** .....Before we discuss the merits or demerits of the aforesaid submissions we would like to state that the law relating to conviction based on circumstantial evidence is well settled and it hardly requires a detailed discussion on this aspect. Suffice to say that in a case of murder in which the evidence that is available is only circumstantial in nature then in that event the facts and circumstances from which the conclusion of guilt is required to be drawn by the prosecution must be fully established

beyond all reasonable doubt and the facts and circumstances so established should not only be consistent with the guilt of the accused but they also must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence."

32. It will further be relevant to refer to the following observations of this Court in the said case:

> **"71.** .....The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false....."

33. A perusal of paragraph 71 of the said judgment would reveal that the Court has reiterated that the two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence and (2) he must also be in police custody. The Court held that the provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence.

34. In the facts of the said case, the Court found that there was, in fact, a confessional statement of the disclosure made by the appellant Gurbachan Singh which was confirmed by the recovery of the incriminating articles. As such, the Court believed the disclosure statement and the evidence led in that behalf. As already stated hereinabove, in the present case, there is no confessional statement of Boby (accused No.3/appellant herein) recorded with regard to recovery of the dead body of the deceased.

35. In the result, the appeal is allowed.

36. The judgment dated 18th December 2004 passed by the trial Court, thereby convicting the appellant under Sections 395, 365, 364, 201, 380, 302 read with Section 34 of the IPC and the impugned judgment dated 25th August 2008, passed by the High Court affirming the same are set aside. The appellant is acquitted of all the charges charged with. The bail bonds of the accused shall stand discharged.

37. Pending application(s), if any, shall stand disposed of.

Headnote prepared by: Bibhuti Bhushan Bose (*Assisted by:* Shevali Monga, LCRA)

Result of the case: Appeal allowed.