Neutral Citation No. - 2024:AHC:171384-DB

<u>Court No. - 43</u>

Case :- CRIMINAL APPEAL No. - 3675 of 2013

Appellant :- Daya Prasad @ Vyas Ji
Respondent :- State of U.P.
Counsel for Appellant :- Gunjan Sharma
Counsel for Respondent :- Govt. Advocate

<u>Hon'ble Ashwani Kumar Mishra,J.</u>
<u>Hon'ble Dr. Gautam Chowdhary,J.</u>

(Per: Hon'ble Ashwani Kumar Mishra,J.)

1. This appeal is directed against the judgment and order of conviction and sentence dated 30.5.2013, passed by the Special Judge (SC/ST Act), Banda, in Special Criminal Case No. 43 of 2009 (State Vs. Daya Prasad @ Vyas Ji), arising out of Case Crime No.378 of 2008, Police Station Girvan, District Banda, whereby the accused appellant Daya Prasad @ Vyas Ji has been convicted and sentenced to rigorous life imprisonment alongwith fine of Rs.25,000/-, each, under Section 302 I.P.C. read with Section 3(2)(v) SC/ST Act; ten years rigorous imprisonment under Section 377 I.P.C. alongwith fine of Rs. 10,000/- and five years rigorous imprisonment alongwith fine of Rs. 5,000/-, each, under Section 201 IPC and on failure to deposit fine to undergo one year, six months and three months, respectively, additional rigorous imprisonment have been given. All the sentences are directed to run concurrently.

2. The informant is the father of the deceased who has made a written report stating that his 13 year old son Ram Babu had gone out of the house at about 2.00 pm on 13.10.2008. Despite efforts made, he could not be found. On 16.10.2008 at about 12.00 in the afternoon a telephone call was received on the mobile of his nephew (sister’s son) No. 9005274183 that the

missing boy has been found cut in pieces on the railway track. On receiving such information the informant (P.W.-1) tried to contact the informant on his phone number. The person concerned identified himself as Narayan Babu Shivhare of Village Arjunah. The informant alongwith his son Ram Gulam came to the concerned village and inquired about his missing son. The caller i.e. Narayan Babu Shivhare intimated the informant that Daya Prasad Tiwari @ Vyas Ji (the accused) had actually made the phone call from his number and had given information that the deceased has died in a train accident. The informant was also intimated that the caller Daya Prasad Tiwari @ Vyas Ji (hereinafter referred to as the accused) was living in a rented room at Khurand. The informant alongwith his son came to Khurand and met the accused, who took them to a tea shop. On the pretext of urination the accused left the shop and fled. The informant alongwith his son ultimately apprehended the accused in the forest at a distance of about two kilometres and inquired about his son. The accused confessed that on 14.10.2008 the brother-in-law of the deceased, namely, Shyam Sundar had met him at the station and asked him to return the deceased to his house. The accused, thereafter, took the deceased Ram Babu to his village Pataura in the intervening night of 15/16.10.2008 and committed unnatural offence on him and thereafter has murdered him. He also disclosed that the dead body is buried in his house. On this disclosure the informant alongwith his son brought the accused to police station. A written report (Exhibit Ka-1), dated 17.10.2008 was made to the Police which forms the basis of the first information report in Case Crime No. 378 of 2008, under Sections 377/302/201 IPC and 3(2)(v) SC/ST Act, Police Station Girvan, District Banda.

3. The police came to the village Pataura and recovered

bloodstained mattress, langot of the accused, spade, stick and sickle from the house of the accused appellant. The clothes worn by the deceased allegedly were burnt and the ashes were collected by the Investigating Officer. Recovery memo in that regard has been prepared which are duly exhibited as Exhibit Ka-6 to Ka-11. The accused was then taken in custody at the police station vide Exhibit Ka-2. The inquest was conducted between 4.00 pm to 5.30 pm on 17.10.2008 at the place where the dead body was recovered in the presence of inquest witnesses. The inquest witnesses were told that the buried dead body was exhumed from the courtyard of the house of accused. The inquest witnesses found the death to have occurred on account of injuries caused and for ascertaining correct cause of death postmortem be conducted. It is thereafter that the postmortem has been conducted on 18.10.2008 at 3.30 pm. The likely time of death is stated to be 4 to 5 days. Following injuries have been shown on the deceased and the cause of death is shock and haemorrhage:-

> *"1. Anti mortem ligature mark over neck 32 x 3 c.m. with gap 7 c.m. ligature mark started from below angle of mandible. Left side two posterior and below right ear. On cut section echymosis 6 c.m. below left ear 5 c.m. below right ear.*
>
> *2. Anti mortem lacerated wound over left anterior shoulder joint 5 x 2 c.m. shoulder joint tear axillary vessels 6 c.m. deep.*
>
> *3. Anti mortem lacerated wound over abdomen 15x 2 c.m. protruded stomach small and large intestine 14 c.m. below lower part of sternum 6 c.m. above pubic symphysis.*
>
> *4. Lacerated wound over anterior side of anus 0.5 c.m. x 0.5 c.m. mucous deep and posterior side 0.5 c.m. x 0.5 c.m. mucosal deep two finger dilated."*

4. The recovered articles were also sent for forensic examination and on the recovered mattress human blood and semen was found. The FSL Report has been duly exhibited as Exhibit as Ka-21 to Ka-23. On the basis of investigation held in the matter a charge-sheet was submitted against the accused under Sections 377/302/201 IPC and 3(2)(v) SC/ST Act on 20.11.2008.

5. Cognizance on the chargesheet was taken and the case was committed to the Sessions Judge, Banda, where it got registered as Session Trial No.43 of 2009. Charges were framed by the Sessions Judge against the accused, under Sections 377/302/201 IPC and 3(2)(v) SC/ST Act. The contents of the chargesheet were explained to the accused who denied the charges and demanded trial.

6. The prosecution in order to prove its case has produced following documents:-

> *"i. F.I.R., Ex.Ka.13/14, dt. 17.10.2008.*
> *ii. Written Report, Ex.Ka.1, dt. 17.10.2008.*
> *iii. Recovery Memo of 'gadda', Ex.Ka.6, dt. 17.10.2008.*
> *iv. Recovery Memo of 'lagota', Ex.Ka.7, dt. 17.10.2008.*
> *v. Recovery Memo spade, Ex.Ka.8, dt. 17.10.2008.*
> *vi. Recovery Memo of stick, Ex.Ka.9, dt. 17.10.2008.*
> *vii. Recovery Memo of 'hasiya', Ex.Ka.10, dt. 17.10.2008.*
> *viii. Recovery Memo of ashes, Ex.Ka.11, dt. 17.10.2008.*
> *ix. 'Supurdginama' & search memo, Ex.Ka.2, dt. 17.10.2008.*
> *x. Injury report, dt. 18.10.2008.*
> *xi. P.M. Report, Ex.Ka.4, dt. 18.10.2008.*
> *xii. Forensic Science laboratory report, Ex.Ka.21, dt. 12.12.2008.*
> *xiii. Forensic Science laboratory report, dt. 12.12.2008.*
> *xiv. Forensic Science laboratory report, Ex.Ka.22, dt. 09.01.2009.*
> *xv. Forensic Science laboratory report, dt. 09.01.2009.*
> *xvi. Forensic Science laboratory report, Ex.Ka.23, dt. 03.01.2009.*
> *xvii. Forensic Science laboratory report, dt. 03.01.2009.*
> *xviii. 'Panchayatnama', Ex.Ka.5, dt. 17.10.2008.*
> *xix. Charge-sheet, Ex.Ka.12, dt. 20.11.2008.*
> *xx. Charge framed by Spl. Judge, dt. 06.04.2009.*
> *xxi. Note framed by Spl. Judge, dt. 06.04.2009."*

7. In addition to the above, informant has been produced as P.W.-1 during trial, who has supported the prosecution case. He has clearly stated that a phone call was received by his nephew (Bhanja), whereafter he himself made a telephone call on the number from which call was received informing that his son Ram Babu has met with an accident. He tried to contact the

caller who identified himself as Ram Naryan Shivhare.

8. On contacting Ram Naryan Shivhare, the witness was informed that the phone call was made by the accused who is a resident of village Pataura. The witness made inquiries at village Pataura and found that the accused was living at a rented house at Khurand. It is thereafter that he came to the room of the accused appellant. He met the accused who took him to a tea shop and on the pretext of going for urination he tried to flee, but ultimately the accused was apprehended in the fields at a distance of about two kilometres. The accused thereafter confessed that he had taken the deceased Ram Babu with him to village Pataura and committed unnatural offence on him. Since the deceased tried to resist, the accused assaulted him with a stick and he fainted. It was thereafter that the accused admitted to have killed the deceased and buried the dead body in his courtyard. The accused was then taken to the police station and was given in the custody of the police. P.W.-1 has proved the written report as well as the custody certificate of the accused i.e. Exhibit Ka-2.

9. In the cross-examination, P.W.-1 has stated that Khurand Station and Khurand Village are adjoining each other. There is a police chowki at Khurand where the report could be lodged. He had apprehended the accused at a distance of two kilometres from Khurand Station. In his further cross-examination, the date of disappearance of deceased has been specified as 13.10.2008; whereas the telephone call was received by him on 16.10.2008. P.W.-1 has alleged that he had lodged a missing report on 14.10.2008. He has further stated that his son was not known to the accused, nor was even he knowing the accused from before. He has further proved the receiving of phone call on the basis of which the accused could be traced/located. He has further stated that though he had gone

to the house of the accused but he is not aware as to how many rooms exists in the house. He has further stated that dead body was found at some distance from the room. The recovered articles were brought out by the accused himself and was given to the police in the presence of P.W.-1. The circle officer was already there and he had asked the items uses in committing the offence to be taken out by the accused, which the accused did. All recovered items were given by the accused to the police before the dead body was recovered. He was only called by the Circle Officer for identifying the dead body. He had identified the dead body.

10. P.W.-1 has denied the suggestion that the dead body was not recovered from the house of the accused, nor the recovery was made on the pointing out of the accused.

11. P.W.-2 is Shyam Sunder, who happens to be brother-in-law of the deceased. He has stated that in connection with work he was living at Punjab and three days prior to the incident he had met the accused who was known to him from before as the accused used to work in Ramlila as Vyas Ji. The deceased had also come with P.W.-2 for going to Punjab but as he started having dysentery, the deceased refused to come with him. He had left the deceased with the accused. Accused had assured that he would safely return the deceased. It was only later that he came to know that the deceased has been done to death.

12. In the cross-examination, P.W.-2 has stated that he had left by Mahakaushal Express at about 1.00 in the night for Delhi after leaving the deceased in the company of accused, since the deceased could not join him on account of his illness i.e. dysentery.

13. P.W.-3 is the alleged independent witness of recovery who has not supported the prosecution case and has stated that no

recovery memo etc., was prepared in his presence. Similarly, P.W.-4 is also witness of recovery who has turned hostile stating that no recovery was made in his presence. P.W.-5 is Dr. Shekhar, who has conducted the postmortem and has proved the postmortem report. As per him, the death of the deceased occurred on 13.10.2008 or 14.10.2008. He has also proved the injuries on the body of the deceased and has stated that on account of excessive loss of blood the deceased died.

14. P.W.-6 is the pathologist, who examined the smear and found no semen on it. He has also proved his report exhibited as Ex.Ka-3. P.W.-6 is the autopsy surgeon, who has proved the postmortem report. At the time when the postmortem was conducted nuggets were found in it. There were injuries near the anus of the deceased and ligature mark also existed. Hyoid bone was found fractured. Cause of death was antimortem injuries which are already extracted above.

15. P.W.-7 is a Police personnel, who has conducted the inquest and proved the inquest report. He has also proved various recoveries which have been dully exhibited as Ex.Ka-6 to Ex.Ka-11. In the cross examination, P.W.-7 has stated that when he arrived at the place of occurrence the door was found closed. Various other persons had already arrived. Dead body was found lying on the ground in the courtyard. The dead body had no clothes on it and was in a debilitated condition. He had arrived at Village Pataura at about 3.30 in the afternoon. The inquest was prepared on the dictation made by the Naib Tehsildar. He has also proved the challan-nash. However, there are no signatures on the challan-nash. He has stated that recoveries were made after inquest was done. This witness has denied the suggestion that all papers were prepared while sitting in the Police Station and that none of the documents were prepared at the place of occurrence. P.W.-8 is the

Investigating Officer of the present case. He has stated that, the site plan was prepared on the instructions of the informant. In his cross-examination, this witness has stated that after making G.D. entry, he had recorded the statement of the informant whereafter the statement of accused was taken and the dead body was recovered from inside his house. He has proved the entry parcha No.1 in the case diary, which is to such effect. This witness, however, has clearly stated that he made no investigation with regard to ownership of the house from where the dead body was recovered. He has also admitted that no memo of recovery was prepared in respect of the dead body allegedly recovered from the house of accused. He has, however, stated that recovery memo in respect of Ex.Ka-5 to Ex.Ka-10 were prepared on his instructions. He has not recorded statement of any person of village Pataura. P.W.-10 is the Naib Tehsildar, who claims that on the instructions of the Sub Divisional Magistrate, Naraini, he had conducted the inquest between 2.30 p.m. to 4.00 p.m. He has also stated that the inquest papers were prepared in his presence and the name of inquest witnesses were recorded. In the cross-examination, this witness has not been able to explain the direction of the house or any other features specific to the house in question. He has, however, stated that boundary existed on two sides of the house about 3 to 4 feet high. He has stated that inquest was prepared at the site, where the dead body was recovered.

16. The above evidence led by the prosecution during trial has been confronted to the accused appellant, who has categorically stated that the prosecution case is false and that the evidence itself is not reliable. In reply to the question no.16, the accused appellant has stated that his family members wanted to grab his property. He was unmarried and was facing threat to his life and property on account of which he started to reside at

Khurhand Station on rent. He has stated that in a conspiracy, he has been falsely implicated.

17. On the basis of above evidence led by the prosecution, the court of Session has convicted the accused appellant and sentenced him, as per above.

18. Learned counsel for the appellant argues that this is a case of false implication in which none of the prosecution evidence is reliable and the conviction and sentence of the accused appellant is in teeth of the weight of evidence on record. Learned counsel further submits that neither there is any disclosure statement of the accused nor any recovery memo or *panchayatnama* has been drawn in respect of the dead body allegedly recovered on the pointing out of the accused appellant from his house. He further argued that recovery exhibited vide Ex.Ka-6 to Ex.Ka-11 are inadmissible as the two independent witnesses to it namely, P.W.-3 and P.W.-4 have turned hostile and have not supported the prosecution case of recovery. He further urged that no evidence was otherwise brought on record to prove that the dead body had been exhumed from the house belonging to the accused appellant and, therefore, except for the confession, there is no other evidence on record to implicate the accused appellant. Learned counsel further submits that the accused appellant has no criminal history and is languishing in jail since 2008 and, therefore, the actual period of incarceration undergone by him is more than 16 years and with remission the period of incarceration would be much more. He also urged that the role of P.W.-2 has not been examined in correct perspective.

19. Sri Vikas Goswami, learned A.G.A., on the other hand, argues that this is a case of brutal murder of 13 year old child, who was subjected to unnatural offence and, therefore, the

judgment of conviction and sentence warrant no interference.

20. We have heard Mrs. Gunjan Sharma, learned panel lawyer of the High Court Legal Services Committee on behalf of the appellant and Sri Vikas Goswami, learned A.G.A. for the State. During the course of argument, the appellant's counsel has been assisted by Sri Saghir Ahmad, learned Senior Counsel along with Shri Rajarshi Gupta, learned counsels, who have appeared as amicus curiae. Various aspects relating to the case have been highlighted by the learned counsels which shall be dealt with hereinafter.

21. Admittedly, this is a case in which 13 year old boy was subjected to unnatural offence and has been done to death. The postmortem report is on record which clearly shows existence of injures around anus of the deceased and the death is otherwise found to be homicidal. Four injuries on the body of the deceased have been noticed in the postmortem report which are duly proved by the testimony of autopsy surgeon, namely P.W.-6. The inquest also shows existence of injuries on the body of the deceased and from such evidence on record it is clear that the death of the deceased was homicidal.

22. Prosecution case emanates on the written report of the father of the deceased, who claims that his son had gone missing on 13.10.2008. No missing report in that regard has however been brought on record. The case of the prosecution is that a phone call was received from Mobile No.9005274183 that the missing boy has died in a train accident. This information was received on the mobile phone of the informant's bhanja (sister's son). Informant's bhanja, however, has not been produced in evidence. The prosecution case however is that the informant alongwith his son contacted Narayan Babu Shivhare from whose mobile phone information was received and they

were informed that it was accused who had called using his mobile to give the false information that the deceased met with a train accident and had died. The evidence of P.W.-1 in that regard is specific. However, from the testimony of P.W.-2, we find a different reason for disappearance of the deceased. P.W.-2 is the son-in-law of the informant. He was working for wages at Punjab. This witness has stated that he had come to visit the family members and three days prior to the incident he was to return to Punjab. He has clearly stated that the deceased had left with him since he wanted to join him for work at Punjab. This witness has clearly stated that the deceased had left with the knowledge of the family members and has denied the suggestion that the deceased was taken secretly by him for going to Punjab. This witness has, further, stated that the deceased became sick as he was having dysentery and consequently he stayed back. Assertion of P.W.-2 is that he knew the accused and, therefore, he had left the deceased in the company of the accused with the hope that the deceased would be sent back to the village.

23. On the aspect of disappearance of the deceased, there are two separate and distinct versions of prosecution case which are mutually incompatible. No reasons have been assigned as to why the version of P.W.-2 was not known to the informant, particularly when P.W.-2 has clearly stated that the deceased had left within the knowledge of the family members. The prosecution evidence is, therefore, not very specific about the manner in which the deceased left his house. The evidence of P.W.-2 would reveal that the deceased was left in the company of the accused, whereas the version of P.W.-1 is that the death of deceased was reported by the accused. The effect of this contradictory stand of the witnesses would be analysed a little later.

24. The prosecution case heavily relies upon the confession of the accused, as per which having taken the deceased to his village the accused committed unnatural offence upon him and as the deceased resisted, he caused the assault by a stick due to which he fainted and ultimately he was done to death by the accused appellant. But for this confessional statement there is no other corroborative evidence on record to implicate the accused appellant. This confessional statement is allegedly made at two stages. The confession is made firstly before the informant and his son, while the second disclosure was made by the accused appellant before the Police. So far as making of the confessional statement before the Police is concerned, it is well settled that such confession would not be admissible in view of the Section 25 and 26 of the Evidence Act. (See: Aghnoo Nagesia v. State of Bihar, 1965 SCC OnLine SC 109). We otherwise find that no disclosure statement exists on record of the accused appellant, nor any independent person has been associated while recording the confessional statement of the accused.

25. So far as extrajudicial confession by the accused before the informant is concerned, we do not attach much importance to it for the simple reason that extrajudicial confession by its very nature is a weak piece of evidence and unless there are strong evidence to corroborate it, not much reliance can be placed upon it. (See: Kalinga @Kushal v. State of Karnataka By Police Inspector Hubli 2024 INSC 124). We are otherwise not persuaded to accord importance to the statement of P.W.-1 about the accused confessing his guilt before him, inasmuch as, his version with regard to disappearance of the deceased is otherwise contradicted by the testimony of P.W.-2, who had given an entirely different reason for the disappearance of the deceased. If the deceased had left for Punjab along with P.W.-2

on 13th October, 2008, as is the specific testimony of P.W.-2, it is difficult to believe the version of P.W.-1 that the deceased had left the house and had gone missing. On account of contradictions found in the version of P.W.-1 and P.W.-2, the extrajudicial confession recorded before P.W.-1 cannot be given much weight. The son of PW-1 who is the other witness of extrajudicial confession has not been produced in evidence.

26. The prosecution case then takes us to the recovery of dead body from the house of the accused appellant. According to the prosecution, the accused took the Police personnels to his native village Pataura, where the accused unlocked the house by using keys and thereafter informed the Police personnels that in the courtyard he had buried the body of the deceased. Though, it is the prosecution case that the dead body was taken out by the accused from the courtyard, enclosed by a boundary, but it is admitted on record that no memo of recovery of dead body has been prepared or is brought on record during the course of trial.

27. We have meticulously examined the evidence on record and we find that there is no other reliable evidence to show that the dead body was recovered from the house of the accused appellant. In fact the evidence is clearly lacking on the aspect relating to recovery being made from the house of the appellant itself. The prosecution has not brought any evidence to show that the specific place from where the body was recovered was the house of the accused appellant. In this regard, the testimony of I.O. (P.W.-9) would be relevant. In his cross-examination P.W.-9 has clearly stated that he had collected no evidence in respect of ownership of the house from which the dead body was recovered.

28. Learned A.G.A. has not been able to invite our attention

to any evidence on record which may show that the house from which the dead body was taken out belonged to the accused appellant. Only the oral statement of the I.O. and the Tehsildar, who had prepared the inquest, exists, according to which the house from which the dead body was taken out, belong to the accused appellant.

29. So far as other recoveries allegedly made from the house of the accused i.e. Exhibit Ka-6 to Ka-11 are concerned, they too cannot be relied upon in evidence against the accused appellant. The two independent witnesses of such recovery have turned hostile. There is no disclosure statement of the accused on record pursuant to which such recoveries are made. Even the FSL report does not connect the accused with the offence inasmuch as the bloodstains or the semen found on the recovered articles are not proved to be of the accused.

30. So far as the testimony of the Tehsildar regarding recovery of dead body allegedly from the house of the accused is concerned, learned counsel for the appellant urged that his testimony cannot be believed, inasmuch as, P.W.-10 has stated that the inquest was conducted between 2.30 p.m. to 4.00 p.m. This statement of P.W.-10 is clearly contradicted by the inquest itself, wherein it is clearly mentioned that the inquest started at 4.00 p.m. and concluded at 5.30 p.m. The inquest, therefore, creates a doubt on the testimony of P.W.-10 that he had conducted inquest between 2.30 p.m. to 4.00 p.m., whereas the inquest itself had commenced later.

31. We also find force in the argument advanced by Sri Saghir Ahmad, learned Senior Counsel and Shri Rajrshi Gupta, learned counsel that the inquest has limited purpose to subserve i.e. to ascertain the cause of death. Section 174 of Cr.P.C. mandates that the Executive Magistrate shall hold inquest in the manner

specified in law so as to ascertain the cause of death. The statement of P.W.-10, therefore, will have to be read in the context of the statutory scheme as per which his statement would be confined to the purpose for which the inquest itself is prepared. The statement of P.W.-10 that the dead body was recovered from the house of the appellant, therefore, cannot be given much weight when there is no evidence to show that the house belonged to the accused. It is otherwise admitted that by the time P.W.-10 arrived at the place of occurrence the dead body had already been exhumed and was lying on the ground. The testimony of P.W.-10, therefore, cannot be relied upon in support of the plea that the dead body was recovered from the house of the accused appellant. We also find from the testimony of the Investigating Officer that though he prepared recovery memos in respect of other items allegedly recovered from the house but surprisingly no recovery memo was made in respect of the dead body which too was recovered from the house itself. There is absolutely no earthly reason explained by the prosecution as to why no recovery memo was prepared when it was otherwise known to the Investigating Officer that such procedure had to be followed if the recovery was to be relied upon.

32. We are also impressed by the argument advanced on behalf of the appellant that recovery pursuant to confession by the accused can be read in evidence only if it is in accordance with the provisions of Section 27 of the Indian Evidence Act and the procedure laid down in Pulukuri Kotayya vs. King-Emperor, 1946 SCC OnLine PC 47 is relied upon. At this juncture, we may refer to a recent judgment of the Supreme Court in the Boby vs. State of Kerala, 2023 SCC OnLine SC 50, wherein following procedure is held to be mandatorily followed for any recovery to be read in evidence under Section 27 of the Evidence Act.

Relevant paras thereof are reproduced hereinafter :

> *"27. As early as 1946, the Privy Council had considered the provisions of Section 27 of the Evidence Act in the case of Pulukuri Kotayya v. King-Emperor. 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 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 legislature that 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]*

28. 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.

29. This Court, in the case of Chandran v. State of Tamil Nadu, 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 P.W.-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….."*

30.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.

31. It will also be relevant to refer to the following observations of this Court in the case of State of Karnataka v. David Rozario:

> *"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 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 : (1946-47) 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]

32. A three-Judges Bench of this Court recently in the case of Subramanya v. State of Karnataka 2022 SCC OnLine SC 1400, 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 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."*
>
> *33. 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. …"*

33. The evidence on record of the present case clearly goes to show that none of the procedural safeguards emphasised by the court have been adhered to, inasmuch as, neither any disclosure statement had been recorded in the presence of the two independent persons, nor any *panchayatnama* has been drawn in respect of the recovery of the dead body. The manner in which recovery of the dead body is sought to be proved from the house of the accused appellant, therefore, leaves much to be desired. In the absence of there being any recording of disclosure statement in the manner specified in the law, as well as absence of any memo of recovery of dead body, duly exhibited and proved, we are not persuaded to accept the prosecution case that recovery of the dead body of the deceased was on the basis of any disclosure statement made by the accused leading to recovery of the dead body of the deceased.

34. We have also examined the prosecution case from another angle i.e. the recovery of the dead body from the house of the accused appellant, *per se*, even if it is not in furtherance of any

disclosure statement of the accused. In order to prove that the recovery of the dead body was from the house of the appellant it was imperative for the prosecution to prove that the house from where the dead body was recovered belonged to accused appellant. In this regard the evidence of the Investigating Officer is categorical that he made no effort to collect evidence with regard to ownership of the house from where the dead body was recovered.

35. Learned A.G.A. on the above aspect states that P.W.-8 is the Investigating Officer of the present case to whom no question was put doubting the ownership of the house from where the dead body was recovered. Sri Goswami submits that P.W.-9, who stated that no evidence was collected with regard to ownership of the house from where the dead body was recovered, is the person who had prepared the topography and that he was not the I.O. The statement of P.W.-9, therefore, would not be determinative of the fact that ownership of the house from where the dead body was recovered did not belong to the accused appellant.

36. Submission of Sri Goswami does not appear to be convincing for the simple reason that the onus to prove that the dead body was recovered from the house of the accused appellant was upon the prosecution and in that regard no evidence has been adduced to discharge such onus. P.W.-9, moreover, is the Circle Officer and had acted as the first Investigation Officer in this case. The prosecution case is that the Circle Officer arrived at the place of occurrence and most of the investigation was done under his supervision and guidance. The later Investigating Officer also acted on the directions of the Circle Officer as is clearly admitted by the Investigating Officer himself. Once that be so, the statement of P.W.-9 i.e. the Circle Officer that no evidence was collected with regard to

ownership of house from which the dead body was recovered would clearly weaken the prosecution case. Moreover, the testimony of I.O. at page no. 73 of the paper book clearly reveals that P.W.-9 K.K. Bhalla was the first Investigating Officer of the present case. When the dead body was recovered, it was P.W.-9, who was acting as the first Investigating Officer. His testimony that no evidence was collected to ascertain the ownership of the house from where the dead body was recovered would thus be a fatal blow to the prosecution case with regard to recovery of the dead body from the house of the accused appellant.

37. On the evaluation of the evidence placed on record, we find that the prosecution has not been able to connect the accused appellant to the commissioning of the offence once the confessional statement and recovery are disbelieved for the reasons recorded above. P.W.-9 has, moreover, emphatically stated at page no.79 that he had not prepared any memo of recovery in respect of the dead body also. The fact that memo of recovery was prepared in respect of the recoveries vide Ex.Ka.-6 to Ex.Ka.-11, yet no recovery was made in respect of the recovery of the dead body is a serious lapse on part of the investigation which otherwise remains unexplained. In such circumstances, the prosecution has failed to prove beyond reasonable doubt that the dead body was recovered from the house of the accused appellant. The trial court, therefore, erred in placing burden of Section 106 of Evidence Act upon the accused in respect of recovery of the dead body. We also find that trial court has neither examined the testimony of witnesses in respect of recovery of dead body in correct perspective nor has applied the provisions of law, correctly.

38. In the facts of the present case and for the reasons noticed above, the conclusions drawn by the court of Session

that the prosecution has established its case in the charged sections against the accused appellant beyond reasonable doubt cannot be sustained. The accused appellant otherwise has no criminal history and has remained incarcerated for well over 16 years. In the facts of the case, we are, therefore, of the considered opinion that the prosecution has failed to establish its case beyond reasonable doubt against the accused appellant and the findings of the trial court are, consequently, reversed. The accused appellant is entitled to benefit of doubt.

39. Before parting, we are constrained to make some observations with regard to working of the investigating agencies/Police personnels, who are entrusted with the task of investigating serious offences involving recoveries made under Section 27 of the Evidence Act.

40. The first I.O. in the present case is an officer of the rank of Circle Officer and, therefore, expected to be aware of the procedural safeguards to be followed in the matter of recovery under Section 27 of the Indian Evidence Act, 1872. He was expected to be aware of the need to prepare a recovery memo of the dead body allegedly recovered from the house of the accused appellant. The first I.O. (PW-9) was otherwise aware of this requirement and that is why recovery memo in respect of other articles recovered vide Exhibit Ka-6 to Ka-11 was duly drawn and exhibited during trial. However, no reasons are disclosed as to why the recovery memo in respect of the recovered dead body was not prepared. We also find that the requirement of recording of confessional statement by the accused, leading to recovery, for it to be relied upon as evidence under Section 27 of the Evidence Act has also not been adhered to. Neither any *panchayatnama* was drawn, nor the recovery memo was prepared and proved in the presence of two independent persons as was required in law. The Hon'ble

Supreme Court in a series of judgments has consistently emphasised the need to follow procedure to effect recovery as was settled way back in 1946 in the case of Pulukuri Kotayya. In Subramanya (supra) and Boby (supra) the law is emphatically reiterated. Law in this regard is again reiterated by the Supreme Court in Babu Sahebagouda Rudragoudar and others Vs. State of Karnataka, 2024 INSC 320 as well as in Ravishankar Tandon Vs. State of Chhattisgarh 2024 SCC OnLine SC 526. Despite the law having been settled in this regard, in the above judgments, we find that the investigation/prosecution is routinely flouting compliance of such provisions.

41. The provision relating to recovery under Section 27 of the Evidence Act, 1872 remains intact even in Section 23 of the Bhartiya Sakhsya Adhiniyam, 2023, which is reproduced hereinafter:-

> *"23.* ***Confession to police officer.***
>
> *(1) No confession made to a police officer shall be proved as against a person accused of any offence.*
>
> *(2) No confession made by any person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate shall be proved against him:*
>
> ***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 of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered, may be proved.***"

42. The compliance of the above procedure for effecting recovery under Section 27 of the Evidence Act is eminently required to rule out false implication of accused. It is often the tendency of Police is to implicate an accused by extracting his confession and by showing recovery, etc., at the instance of the accused. It is to safeguard the accused from such procured confession/recovery that the higher Constitutional Courts have evolved the safeguards for effecting recovery under Section 27 of the Evidence Act if they are to be read in evidence.

43. We are repeatedly coming across cases in which this Court is compelled to discard the prosecution case only because safeguards in respect of recovery, for it to be read in evidence under Section 27 of Evidence Act, are not adhered to. This is high time that the Investigating Agencies be made alive to the requirement of law in the matter of effecting recovery under Section 27 of the Evidence Act, as is settled by the Supreme Court in case of Pulukuri Kotayya (supra) and referred to and reiterated in Subramanya (supra), Boby (supra), Babu Sahebagouda Rudragoudar (supra) and Ravishankar Tandon (supra). The Investigating agencies be instructed to ensure appropriate compliance of the procedure established in law for effecting recovery under Section 27 of the Evidence Act or else material evidence may loose its evidentiary value in the court of law. The failure to adhere to the procedural safeguards cannot be brushed aside as mere flaw in the investigation when the consequence is that the evidence relating to recovery is itself held inadmissible in law. Accordingly, we direct the Registry to forward a copy of this judgment to Additional Chief Secretary (Home), Principal Secretary (Law) and Director General of Police for its necessary circulation to all concerned so that henceforth the Investigating authorities ensure compliance of the mandatory safeguards relating to recovery to be read in evidence under Section 27 of the Evidence Act.

44. For the detailed reasons and deliberations made above, we reverse the finding of the Sessions Judge contained in judgment and order dated 30.05.2013 and hold that prosecution has failed to establish its case beyond reasonable doubts. Upon evaluation of the evidence led on record by the prosecution the accused appellant - Daya Prasad @ Vyas Ji is clearly entitled to get the benefit of doubt.

45. Consequently, this appeal succeeds and is allowed. The

judgment and order dated 30.05.2013, passed by the Sessions Judge, Banda in Special Criminal Case No. 43 of 2009 (State Vs. Daya Prasad @ Vyas Ji), arising out of Case Crime No.378 of 2008, Police Station Girvan, District Banda against the accused appellant is hereby set aside.

46. The accused-appellant, namely, Daya Prasad @ Vyas Ji would be released, forthwith, unless he is wanted in any other case, subject to compliance of Section 437-A Cr.P.C./481 BNSS-2023.

Order Date :- 24.10.2024
Ranjeet Sahu/Anurag/-

(Dr. Gautam Chowdhary,J.) (Ashwani Kumar Mishra,J.)

Digitally signed by :-
RANJEET SAHU
High Court of Judicature at Allahabad