IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA NO.213 OF 2023

In the matter of an Appeal under section 374(2) of the Code of Criminal Procedure and from the judgment of conviction and order of sentence dated 20.01.2023 passed by the learned 2nd Additional Sessions Judge, Baripada, in Sessions Trial Case No.52 of 2019 arising out of G.R. Case No.486 of 2018.

A.F.R

Shiva @ Gurucharan Singh ***Appellant***

….

-versus-

State of Odisha ***….*** ***Respondent***

Appeared in this case by Hybrid Arrangement (Virtual/Physical Mode)

For Appellant - Mr.Dipak Ranjan Mishra
Advocate

For Respondent - Mr.Saubhagya Ketan Nayak,
Additional Government Advocate,

Mr.S.S.Mohapatra,
Additional Standing Counsel.

CORAM:
MR.JUSTICE D.DASH
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING :04.05.2023 : DATE OF JUDGMENT:05.05.2023

D.Dash, J. The Appellant, by filing this Appeal, has called in question the judgment of conviction and the order of sentence dated 20.01.2023 passed by the learned 2nd Additional Sessions Judge, Baripada, in Sessions Trial Case No.52 of 2019 arising out of G.R. Case No.486 of 2018 (T.C. No.1649 /2018) corresponding to Chandua P.S. Case No.20 of 2018 of the

Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Baripada.

The Appellant (accused) faced the Trial with another accused i.e. Duna Singh @ Dinosar and two others namely Beta @ Bibekananda @ Santosh Hansdaah & Dasmat Marndi standing charged for commission of offence under section 302/120(B)/34 of the Indian Penal Code, 1860 (for short 'the IPC'). He as well as accused Duna Singh @ Dinosar have been convicted for commission of offence under section 302/34 of IPC and section 120(B) of IPC. Accordingly, this accused has been sentenced to undergo imprisonment for life and pay fine of Rs.5,000/- in default to undergo rigorous imprisonment for a period of six (06) months for the offence under section 302 of the IPC and imprisonment for life and fine of Rs.5000/- in default to undergo rigorous imprisonment for six months for the offence under section 302/120(B) of IPC with stipulation that the substantive sentences would run concurrently and the realized fine be given to the dependants of deceased (Sonu Singh @ Chhota). The other accused Duna Singh @ Dinosar has also been convicted for the above noted offences and he has been visited with the sentences which have been so imposed upon the present accused. The two others namely Beta @ Bibekananda @ Santosh and Dasmat have however, been acquitted of the charges.

It is stated at the Bar and also reported by the Registry that the convict Duna Singh @ Dinosar has not yet filed any appeal against his conviction and sentence.

2. Prosecution case is that this accused as well as the other accused Duna Singh @ Dinosar are two brothers and they had a step brother namely Sonu Singh @ Chhota (deceased). It is said that this accused with

his brother Duna entertaining the belief in their mind that the deceased by professing sorcery was finishing their family members one after the another, have murdered the deceased. It is further said that this accused with his brother Duna for the purpose engaged the other two accused persons namely Beta @ Bibekananda and Dasmat (since acquitted) by hiring them. Father and another brother of this accused as well as that of the accused Duna having suddenly suffered from diseases when died, this accused and his brother accused Duna Singh @ Dinosar consulted different Ojhas (persons who too profess sorcery) and were told by them that the deceased was responsible for the death of those family members by playing sorcery which he was professing. Having received such information, this accused and his brother accused Duna (non-appellant) are said to have hatched a plan to kill the deceased and for that purpose they took the assistance of two others namely, Dasmat and Beta (since acquitted).

On 11.06.2018 around 8 p.m., accused Duna called the deceased outside to consume liquor and accepting the request, the deceased went with accused Duna to the house of one Nini Singh (P.W.8) and there they consumed handia (local intoxicant as commonly known). The next morning, the dead body of the deceased was found on the west side field of his house. Receiving the news, the son of the deceased namely Mangal Singh (Informant-P.W.1) went to the place where the dead body was lying and found his father lying dead having cut injuries on his throat and different parts of body with profuse bleeding. He then presented a written report with the Officer-in-Charge (OIC) of Chandua Police Station, having got it scribed by one Gande Singh (P.W.16). The OIC receiving

the said report, treated the same as FIR (Ext.1) and immediately registered the case and took up investigation.

3. In course of investigation the Investigating Officer (I.O-P.W.21) examined the Informant and other witnesses and then visited the spot. He also requisitioned the services of the members of the scientific team. He held inquest over the dead body in presence of witnesses and prepared the report (Ext.2). He then arrested this accused and his brother accused Duna. It is said that they confessed to have committed the crime by hatching the conspiracy and by hiring the services of the other two persons who have been acquitted and have intentionally caused the death of the deceased. It is also said that this accused had then led the police and other witnesses to the place where he had kept the iron katuri (M.O.III) concealed, pursuant to the statement given to the police and had given recovery of the same which has been seized. The dead body of the deceased was sent for post mortem examination. The I.O (P.W.21) in course of investigation having seized several incriminating articles under seizure lists had sent those for chemical examination through Court. Finally on completion of investigation, the Final Form was submitted placing this accused, his brother accused Duna Singh @ Dinosar as well as the other two who have been acquitted, to face the Trial for commission of offence under section 302/120(B)/34 of IPC.

4. Learned SDJM, Baripada having received the Final Form as above, took cognizance of the above offences and after observing formalities committed the case to the Court of Sessions. That is how the Trial commenced by framing the charges for the said offences against all the four accused.

5. In the Trial, the prosecution in total examined twenty two (22) witnesses. As already stated P.W.1, who is the son of the deceased is informant and P.W.2, 3 and 4 are the witnesses to the inquest. P.W.7 and P.W.12 are the witnesses to the recovery of the Katuri at the instance of this accused and P.W.8 is the witness in support of the last seen theory. The Doctor who had conducted the autopsy over the dead body of the deceased is P.W.20 and the Investigating Officer is P.W.21. whereas P.W.22 is the Scientific Officer of District Forensic Science Laboratory. The prosecution besides leading the evidence by examining the eye witnesses has proved several documents which have been admitted in evidence and marked Ext.1 to 26/1. Out of those, the FIR is Ext.1, the Inquest Report is Ext.2, the statement of this accused leading the I.O (P.W.21) and witnesses in giving recovery of the Katuri has been marked as Ext.7/2 whereas the Post Mortem Report is Ext.4. Some of the incriminating articles having been produced during Trial, those have been marked as Material Objects (M.O.-I to M.O.-V) and out of those, the important one is that Katuri (M.O.III) which is said to be the weapon used in causing the fatal injury upon the deceased leading to his death.

6. The defence case is that of complete denial and false implication. However, no evidence either oral or documentary has been led from the side of the accused despite the opportunity.

7. The informant-P.W.1 who is the son of the deceased has stated to have gone to the place where the dead body of his father was lying and to have seen his father lying dead with cut injury on his neck as well as the other injuries on other parts of the body causing bleeding. The I.O (P.W.21), who has held inquest over the dead body of the deceased in

presence of the witnesses has also noted such injuries on the person of the deceased which he had reflected in his report (Ext.2).

The Doctor (P.W.20), who had held autopsy over the dead body of the deceased has found six chopped wounds on different parts of the body of the deceased and she has stated so during his examination in the Trial as well as noted all those in her report (Ext.14). She has stated the dimensions of each of the injuries as well as their seats. Besides the above, she has also noticed two cut mark present over the right shoulder and below that. During the internal examination, she has found the fracture of mandible, teeth, cut injury on the neck, vessels, muscles, trachea, osephagus with signs of heavy bleeding and most importantly cervical vertebra to have been bisected and blood inside trachea. As per her version, all these injuries are ante mortem in nature and could have been caused by moderate to heavy sharp cutting weapon. Having stated that the cause of death was due to the shock and hemorrhage resulting from these fatal injuries on the neck, it is her evidence that four such injuries which she noticed are individually fatal and each are sufficient in ordinary course of nature to cause the death and therefore, combinedly the same would inevitably be the result. With all these obtained evidence as discussed, remaining unchallenged by the defence, we are of the view that the prosecution has established that the nature of death of Sonu Singh @ Chhota was homicidal. In fact what we find that this aspect of the case was not under the challenge from the side of the defence before the Trial Court and that is also the situation before us.

Having said so, we are now called upon to examine the evidence piloted by the prosecution in finding out the complicity of this accused in the said homicidal death of the deceased.

But before undertaking that exercise the submission by the learned Counsels for the Appellant as well learned counsel for the State which would stand for being addressed are noted in the following two pars.

8. Learned counsel for the Appellant (accused, Shiva @ Guru Charan Singh) submitted that so far as this accused is concerned, the finding of guilt returned by the Trial court is not the outcome of just and proper appreciation of evidence. He submitted that the conviction in respect of this accused is merely based on conjectures and surmises. He further submitted that when the prosecution is based on circumstantial evidence, except the evidence that this accused had led the police and witnesses to the place in giving recovery of that Katuri M.O.III which too is not believable as having not been proved beyond reasonable doubt by leading clear cogent and acceptable evidence, there is no other evidence to find out his complicity. In this connection he has invited our attention to the depositions of the concerned witnesses which we would discuss later while addressing the issue. He submitted that the evidence on record to whatever extent we may say point the finger of guilt at the accused are not at all believable being wholly concocted. He further submitted that when the prosecution case that this accused with his brother accused Duna having hired the services of two other persons who also faced the Trial had been successful in their mission in finally executing the plan that they had hatched in eliminating the deceased has failed and thus those two persons who had been arraigned as accused persons being the hired criminals for the purpose of committing the offence have been acquitted, the charge under section 120(B) of the IPC as against this accused has no leg to stands as no such evidence at all surfaces that this accused being a party to the conspiracy hatched by arriving at an agreement with others in achieving the goal of committing

the crime by causing the murder of Sonu Singh @ Chhota. He further submitted that even accepting the evidence let in by the prosecution on their face value, this accused cannot be held liable for any of the offences for commission of which he has been convicted and sentenced.

9. Learned counsel for the State submitted that the prosecution having established the motive for this accused as well as the brother accused Duna for elimination of the deceased whom they were suspecting to be the person responsible for causing harm to their father and brother in causing their death by practicing the witchcraft; that coupled with the evidence as to the last seen theory which has been established as well as the factum recovery of the weapon(Katuri-M.O.-III) at the instance of this accused which too has been proved, the finding of conviction of this accused for the offence is not liable to be interfered with.

10. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction passed by the Trial Court. We have also extensively travelled through the depositions of all the witnesses i.e. P.W.1 to P.W.22 and have perused the documents admitted in evidence and marked Exts.1 to Ext.26/1.

11. Indisputably, the prosecution case against this accused is based on the circumstantial evidence and the circumstances projected are:- (a) last seen theory (b) recovery of the weapon (Katuri-M.O.-III), pursuant to the statement of this accused while in police custody by leading the police and other witnesses to the place in giving recovery of the same followed by its seizure and evidence that by the user of this weapon, the injury found with the deceased are possible; and (c) the motive behind the crime.

12. Before going to discuss the evidence let in by the prosecution in establishing the above noted circumstances, one by one, whether those

unerringly point at the guilt of this accused it would be apt and proper to place the principles governing the appreciation of circumstantial evidence.

13. A three judge Bench of the Apex Court in Sharad Bidhichand Sarda v. State of Maharashtra (1984) 4 SCC 116, held as under:

"Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. The State of Madhya Pradesh [AIR 1952 SC 343: 1952 SCR 1091; 1953 Cri LJ 129] This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198: 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625: AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case [AIR 1952 SC 343: 1952 SCR 1091: 1953 Cri LJ 129] it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

14. 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 CRI LJ 1783] where the following observations were made: [SCC Para 19,p.807:SCC(Cri) p. 1047] "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. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

Thus in view of the above, the court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially

inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The court has to drawn an inference with respect to whether the chain of circumstances is complete and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused.

"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."

"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."

15. Bearing the above settled principles in mind, let us proceed in our journey first of all to ascertain as to whether the above noted circumstances have been proved beyond reasonable doubt through clear, cogent and acceptable evidence in so far as the present accused Shiva @ Guru Charan Singh is concerned.

16. The circumstance that the deceased was last seen in the company of the accused persons is sought to be proved through its star witness is P.W.8 namely, Nini Singh. She has stated that accused Duna (non-Appellant) and deceased Chhota had been to her house to consume Handia and as there

was no Handia, she offered them to consume liquor which was available in her house and which they consumed and then left the house. The dead body was recovered on the next day morning with several cut injuries over it and it was then lying in an open place. Now accepting the evidence of this witness, what she has stated does in no way run after this accused Shiva. From above statement of P.W.8 once can neither presume that as accused Duna and this accused Shiva are two full blooded brother and the deceased (Suna) was their step brother, this accused met them on the way when P.W.8 is sating nothing in respect of this accused. Therefore, the circumstance is not against this accused that the deceased was last seen in his company and that is running against the other accused Duna who happens to be the brother of this accused. There cannot be any inference from the fact that since the brother of this accused who was living with this accused under one roof even if we say for a moment that they were having very good relationship and their relationship with the deceased was sour, the presence of this accused that time even in a nearby place cannot be inferred. But then also the time gap being not so short, such a circumstance itself is too fragile in so far as that accused Duna is concerned and that certainly requires corroboration that after leaving the house, they too had been seen together for sometime as this P.W.8 is stating. The Trial Court in fact has noted the evidence of P.W.8 in extentio that it is her evidence that deceased and accused Duna were seen together and they had been to her house, took liquor and left. This P.W.8 is not stating to have seen them proceeding together after leaving the house. Thus that in no way comes to the aid of the prosecution in so far as the complicity of this accused as well as accused Duna (non-Appellant) are concerned. Therefore, even without going to critically examine the evidence of P.W.8 as to the reliability and

trustworthiness and refraining ourselves from making any comment on either way, we find that what she has stated, we simply put it in this way that her evidence has no implication in respect of the present accused as also the other accused Duna (non-Appellant). Therefore, both this accused as well as accused Duna (non-Appellant) were under no obligation to offer any explanation as to how and where the company of the deceased was parted with in view of the shifting of burden of proof when the time gap between the last seen and the time of death is not that short. In so far as this accused Shiva @ Gurucharan as also the accused Duna (non-Appellant) are concerned, the foundational facts which the prosecution was under the obligation to prove beyond reasonable doubt by leading clear, cogent and acceptable evidence in order to prove the initial burden of proof for shifting the same upon the shoulder of the accused has not been proved.

17. The motive playing the role and becoming the compelling force for this accused as also accused Duna (non-Appellant) in committing the crime, we find that there is no such acceptable evidence on record and the prosecution has not examined any witness in proving any such instance to have occurred in the village concerning the deceased so as to infer that this accused as also accused Duna (non-Appellant) had decided and declared to eliminate the deceased for that reason of entertainment of the belief in their mind that the deceased by playing sorcery which has been instrumental in putting an end to the life of their family members i.e. their father and a brother. Reading being given to the judgment of the Trial Court, we too find that in clear terms it has not been held that the prosecution has established the motive beyond reasonable doubt by leading clear cogent and acceptable evidence.

18. The Trial Court having said at one point of time at para 35 of its judgment that the motive of the accused persons to commit the crime is not known to anybody, has however turned around in again stating that due to their belief that the deceased might have been professing sorcery relating to the death of the family members, they have been prompted to conspire to take the life of the deceased to end their fear of losing their family members for all times to come. This has been said by placing implicit reliance upon the disclosure statement of this accused recorded by the I.O (P.W.21) under Ext.7/2 which we would discuss hereinafter.

19. This now takes us to examine the evidence as to the recovery of the Katuri (M.O-III) said to have been made at the instance of this accused.

20. The relevant section 27 of the Evidence Act is under the heading as to how much of information received from the accused may be proved then. It reads:-

> "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 provided."

21. In case of Sampath Kumar v.Inspector of Police, Krishnagiri, (2012) 4 SCC 124, decided on 02.03.2012, the Apex Court held as under:-

"In N.J.Suaj V. State [(2004)11 SCC 346: 2004 SCC (Cri) 85] the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well-settled that the chain of

circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.

To the same effect is the decision of the Apex Court in Santosh Kumar Singh v. State [(2010) 9 SCC 747: (2010) 3 SCC (Cri) 1469) and Rukia Begum v.State of Karnataka [(2011) 4 SCC 779: (2011) 2 SCC (Cri) 488: AIR 2011 SC 1585] where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of the Court in Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh (AIR 2011 SC 2545). The Apex Court explained the legal position as follows :

"In any event, motive alone can hardly be a ground for conviction. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof."

“Suffice it to say although, according to the appellants the question of the appellant-Velu having the motive to harm the deceased-Senthil for falling in love with his sister, Usha did not survive once the family had decided to offer Usha in matrimony to the deceased-Senthil. Yet even assuming that the appellant- Velu had not reconciled to the idea of Usha getting married to the deceased-Senthil, all that can be said was that the appellant-Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt.”

Thus, even if it is believed that the accused appellant had a motive to commit the crime, the same may be an important circumstance in a case based on circumstantial evidence but cannot take the place as conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the accused appellant but suspicion, howsoever strong, cannot be a substitute for proof of the guilt of the accused beyond reasonable doubt. The Trial Court rightly disbelieved motive to commit the crime as the evidence in this regard is absolutely hearsay in nature.

Thus the Trial Court's view as aforesaid is outcome of erroneous appreciation of the legal position.

22. The conditions necessary for the applicability of section 27 of the Act are broadly as under:-

i. Discovery of fact inconsequence of an information received from accused;

ii. Discovery of such fact to be deposed to;

iii. The accused must be in police custody when he gave information; and

iv. So much of information as relates distinctly to the fact thereby discovered is admissible-Mohmed Inayatullah V. The State of Maharashtra: AIR (1976) SC 483**.**

Two conditions for application:-

i. Information must be such as has caused discovery of the fact; and

ii. Information must relate distinctly to the fact discovered Earabhadrappa v. State of Karnataka: AIR (1983) SC 446.

23. We may refer to and rely upon a Constitution Bench decision of the Apex Court in the case of State of Uttar Pradesh V. Deoman Upadhyaya reported in AIR (1960) SC 1125, wherein page 71 explains the positions of law as regards the section 27 of the Evidence Act.

"The law has thus made a classification of accused persons into two: (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the second category the law has ruled that their statements are not admissible, and in the case of the first category, only that portion of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says ; "I pushed him down such and such mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft."

24. The scope and ambit of section 27 of the evidence act were illuminatingly stated in Pulukuri Kottaya and Others V. Emperor, AIR 1947 PC 67, which have become locus classicus, in the following words.

" 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."

25. In Dudh Nath Pandey V. State of U.P., AIR (1981) SC 911, the Apex Court observed that the evidence of discovery of pistol at the instance of the appellant cannot, by itself, prove that he who pointed out the weapon wielded it in the offence. The statement accompanying the discovery was found to be vague to identify the authorship of concealment and it was held that pointing out of the weapon may, at the best, prove the appellant's knowledge as to where the weapon was kept.

26. In the aforesaid context, we may also refer to a decision of the Apex Court in the case of Bodhraj @ Bodha and Others v. State of Jammu and Kashmir reported in (2002) 8 SCC 45, as under:

"It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken in to custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information

which is otherwise admissible becomes inadmissible under Section 27 if the information did 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 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 reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in Palukuri Kotayya 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 Gopinath Shinde & others (2000) 6 SCC 269: 2000 SCC (Cri) 1088: 2000 Cri LJ 2301); (2000) Crl.L.J 2301]. No doubt, the information permitted to be admitted in evidence is

confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."

27. Bearing the aforesaid legal position in mind in adverting to the given case, we find that the prosecution for the purpose has relied upon the evidence of P.W.7 who is a co-villager of the deceased. It is his evidence that when he was sleeping in his house in the night, local Gram Rakhi told him and then he called one Sudhir Hembram and both went with the Gram Rakhi and police Officer near the canal of their village where the police vehicle was there and this accused was inside the said vehicle. His further evidence on the score is that the accused came and went near the culvert and he brought out the katuri under the culvert and produced before the police which he was seized. He is not stating as to what was the statement of the accused. His evidence is that when this witness joined being called by the local Gramrakhi, already the police vehicle carrying the accused was near the culvert. This witness is not stating that in his presence the accused gave any statement before the police and pursuant to that statement, he went near the culvert and from under the culvert brought the katuri and produced before the police which was seized. It is not stated by this witness as to how the police in the vehicle carrying this accused had come near the culvert and what was then the purpose for the same and how could that very place was selected. He has also stated that being present nearby, he was not able to know the conversation between police and this accused

which in other way cannot be definitely said to be not the usual coercive words being hurdled at this accused explaining the fatal consequences thereof. According to his evidence, police vehicle was near their house at a distance of 400 to 500 meters away from the culvert and then, there was no water under the culvert and people use to go under the said culvert.

28. Even accepting P.W.7's evidence in toto, we find that it falls far short of the legal requirements as to the admissibility of that part of the statement of the accused as to the discovery of the fact that the Katuri being kept concealed by him at the place which was within his special knowledge, he had given recovery of the same to the police by leading the police and other witnesses to that place of concealment. The witness having not deposed as to what this accused said before the police, he has simply admitted his signature on that statement as Ext.7. He has also stated to have not asked anything to this accused who too had not told him anything.

29. The above being the evidence of the independent witness, next remains the evidence of the I.O.(P.W.21). Let us now see what his version is. As per his statement, he arrested all the accused persons including this accused on 15.06.2018 at 5.30 p.m. He has stated that having arrested the accused persons, he recorded the confessional statement of this accused. We are unable to understand that this P.W.21 who was then the OIC of the Police Station and proceeded to investigate a case of murder is not aware of the rudimentary position of law that confession before the police is not admissible in the eye of law. It does not at all appeal to us that the accused being arrested, why his statement was recorded immediately. Then this witness has gone to say and also the Trial Court has come to record that this accused confessed to have committed the murder of the deceased along with the other accused persons; he disclosed that his

family members were suffering from fever for few years and his father died due to such fever and that his wife and younger brother also suffered and they did not recover despite the treatment of the Doctor and that finally, his father Mangu died and thereafter they consulted one Ojha and came to know that the deceased was practicing sorcery by keeping God in his house and he used to quarrel with him and his brother for the family dispute and threatened them to kill by practicing such sorcery and by planning that he, his brother with the help of other have killed the deceased. No part of the above evidence has any value in the eye of law whatsoever. The exercise is one in futility, both at the end of investigation as well as during the Trial. Be that as it may, this witness has not stated that accused having narrated all these happenings as to his role as well as the role of others therein led them to the spot i.e. culvert of Mankadakenda where he had concealed weapon and then he proceeded to the spot and accused brought the weapon of offence from the spot and gave recovery of the same to them in presence of Bana Singh (P.W.7) and Sudhir Hembram (P.W.12) who has not supported the prosecution. In our considered view the evidence of P.W.21 what he has stated with regard to the recovery part at the instance of the accused, does not pass through the test as to the admissibility of the same under the provision of Section 27 of the Evidence Act for whatever limited purpose it may be. Therefore, giving recovery to the said Katuri where the accused had kept it concealed and was within his special knowledge, as a circumstance has not at all been proved.

30. On the conspectus of the analysis of the entire evidence let in by the prosecution, we are of the view that the finding of the Trial Court that the prosecution has established the charges against this accused Shiva @

Gurucharan beyond reasonable doubt by leading clear, cogent and acceptable evidence is not sustainable and, therefore, the judgment of conviction and the order of sentence as against Accused-Appellant Shiva @ Gurucharan Singh impugned in this Appeal are liable to be set aside.

31. Having held as above, this Appeal having been preferred by one of the accused persons, namely, Shiva @ Gurucharan Singh, out of the two accused persons, who have been convicted by the Court under section 302/34 and section 120 (B)of the IPC and that other convict, namely, Duna Singh @ Dinosar, who was on trial with the present Accused-Appellant (Shiva @ Gurucharan Singh) standing charged for the same offence, we have also heard learned counsel for the State as to what would be the impact of our findings upon the fate of the judgment of conviction and order of sentence in so far as accused Duna Singh @ Dinosar, who has not appealed is concerned.

In this context, it may be stated that while dealing with a Criminal Appeal filed by only one of the convicts if the Court finds that there is no evidence worth the name to sustain the conviction of not only the accused, who has filed the Appeal but also the other accused, who has not appealed, the power of this Court in view of the provisions contained in sections 401 & 482 of the Cr.P.C. can well be exercised in certain eventuality to aside the conviction and sentence passed on the other accused, who has not appealed so as to see that manifest injustice may not be continued to be perpetrated for merely non filing of the Appeal by the co-convict.

32. Upon discussion of evidence on record in great detail in the foregoing paragraphs, we have arrived at the conclusion that the

prosecution has failed to establish its case, which is based on circumstantial evidence beyond reasonable doubt by leading clear, cogent and acceptable evidence in proving the circumstances in showing that all those circumstance taken together complete the chain of events in every respect that all the hypothesis other than the guilt of the accused persons are ruled out. The findings rendered by us are inter-dependant and inextricably integrated in so far as the Appellant-Accused as well as the convict who has not filed the Appeal are concerned. In this context, we may refer to few authorative pronouncements which provide supports to the view that we are going to take.

33. In case of Parbati Devi –V- The State; AIR 1952 Calcutta 835; two persons were convicted under section 120-B read with section 366 of the IPC. One of them appealed against the judgment of conviction and order of sentence. His Lordships came to the conclusion that there was absolutely no evidence to sustain the conviction of the Appellant-accused or other non-Appellant-accused. Since the other co-accused had not appealed, the question then arose for consideration was whether the conviction and sentence passed on him can also be set aside even though he had not appealed. While dealing with that question, it has been observed as under:-

> "When we were considering the appeal by Parvati Devi we came to the definite conclusion that there was no evidence on the record which would justify a conviction for conspiracy as between Parvati Devi arid Shew Nath. It is not only in the exercise of the inherent power, but we consider it to be the duty of the Court to exercise jurisdiction in such a manner that manifest injustice may not be continued to be perpetrated. It does not matter that Shew Nath has not appealed. This matter having come to the notice of the Court, we think that we have got sufficient jurisdiction under the inherent powers of the Court under Section 561-A, Criminal P. C., 1898 to pass appropriate orders in the case of Shew Nath also."

34. In case of Hari Nath & Another –V- State of U.P.; AIR 1988 SC 345, the Hon'ble Supreme Court, while setting aside the judgment of conviction and order of sentence passed against the appealing accused, who had been convicted under section 396 of the IPC and sentenced thereunder, has also set aside the conviction and order of sentence passed against the non-appealing accused holding that the same cannot be sustain consistent with the finding in and the result of the Appeal as the findings are inter-dependent and inextricably integrated.

In case of Nirmal Pasi & Another –V- State of Bihar; (2003) 24 OCR (SC) 431, the Hon'ble Apex Court, upon discussion of the evidence, came to conclude that the prosecution case, which relates to the arrest of the Accused-Appellants suffers from serious infirmities. The Trial was also held to be defective as most of the relevant incriminating evidence had not been put to the Accused-Appellants in their statements under section 313 Cr.P.C. in seeking explanation from them. So, the conviction of the Accused-Appellants and the order of sentence for the offence under section 396 of the IPC and the consequential order of sentence were set aside. Having said so, coming to deal with the case of the third Accused whose conviction although had been maintained by the High Court, he had not chosen to file an Appeal before the Apex Court, it has been held as under:-

> " However, in view of what has been stated hereinabove, we find the case of Accused Krishna Choudhary not distinguishable from the cases of Sona Pasi and Nirmal Baheliya, Accused-Appellants and his conviction and the sentence passed therein should also be set aside."

Resultantly, the Hon'ble Court, while directing that the Accused-Appellants, namely, Sona Pasi and Nirmal Baheliya to be set at liberty forthwith, if not wanted in any other case, has also set aside the conviction for commission of offence under section 396 of the IPC and

the sentence passed thereon as against the third Accused, namely, Krishna Choudhary though he has not appealed and directed that he too be released forthwith if not wanted in any other case.

Keeping in view all the aforesaid, in view of our foregoing discussion and the position of law, we too in the case at hand conclude that the judgment of conviction and order of sentence passed by the Trial Court against Accused Duna @ Dinosar though he has not appealed are liable to be set aside.

35. In the result, this Appeal stands allowed. The judgment of conviction and order of sentence dated 20.01.2023 passed by the learned 2nd Additional Sessions Judge, Baripada, in Sessions Trial Case No.52 of 2019 arising out of G.R. Case No.486 of 2018 in respect of both the Accused persons i.e. Shiva @ Gurucharan Singh, who is in Appeal before us and the other one, namely, Duna @ Dinosar though he has not appealed, are hereby set aside. Accordingly, the accused persons, namely, Shiva @ Gurucharan Singh & Duna Singh @ Dinosar be set at liberty forthwith, if their detention is not wanted in connection with any other case.

(D. Dash),
Judge.

Dr.S.K. Panigrahi, J. *I Agree.*

(Dr.S.K.Panigrahi),
Judge.

GITANJALI NAYAK

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