

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.289 of 2015

Arising Out of PS.Case No. -155 Year- 2009 Thana -CHAKAI District- JAMUI

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1. Md. Kamrul @ Karu @ Md. Kamrul Ali Karu Son of Md. Musa @ Md. Musa
Ansari resident of village - Dhobiakura, Police Station - Jhajha, District - Jamui

.... Appellant/s

Versus

1. The State of Bihar

... Respondent/s

with

Criminal Appeal (SJ) No. 220 of 2015

Arising Out of PS.Case No. -155 Year- 2009 Thana -CHAKAI District- JAMUI

=====

1. Md. Salam Khan Son of Late Subham Khan resident of Village- Gongakura, P.s
Jhajha, District Jamui.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 318 of 2015

Arising Out of PS.Case No. -155 Year- 2009 Thana -CHAKAI District- JAMUI

=====

1. Bahadur Hembram @ Mahto Hembram S/o Lado Hembram resident of village -
Barakola, P.S. Chakai, District - Jamui

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 290 of 2015

Arising Out of PS.Case No. -155 Year- 2009 Thana -CHAKAI District- JAMUI

=====

1. Basanti Marandi wife of Bahadur Hembram @ Mahto Hembream, resident of
village- Barakola, P.S.- Chakari, District- Jamui

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 171 of 2015

Arising Out of PS.Case No. -155 Year- 2009 Thana -CHAKAI District- JAMUI

=====

1. Md. Akhtar Khan Son of Late Md. Halim Khan Resident of Village - Nagari Tola
Mirbigha, P.S. Chakai, District Jamui.

.... Appellant/s

Versus



1. The State of Bihar.

.... Respondent/s

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Appearance :
(In CR. APP (SJ) No.289 of 2015)
For the Appellant/s : Mr. M.S. Hoda, Adv.
Mr. Surya Narayan Yadav, Adv.
For the Respondent/s : Mr. Sujit Kumar Singh, APP
(In CR. APP (SJ) No.220 of 2015)
For the Appellant/s : Mr. Umesh Prasad, Adv.
For the Respondent/s : Mrs. Abha Singh, APP
(In CR. APP (SJ) No.318 of 2015)
For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Adv.
Priyanka Sinha, Adv.
For the Respondent/s : Mr. Binod Bihari Singh, APP
(In CR. APP (SJ) No.290 of 2015)
For the Appellant/s : Mr. Mr. Javed Aslam, Adv.
For the Respondent/s : Mr. S.A. Ahmad, APP
(In CR. APP (SJ) No.171 of 2015)
For the Appellant/s : Mr. Satya Prakash Parashar, Adv.
For the Respondent/s : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 12-10-2017

Umbrageous conduct of the prosecution as well as abducent approach of the learned lower court ulmic the trial and that happens to be reason behind, before proper identification of the respective appellants inconsonance with the appeals, a glimpse over the inappropriate activity of the prosecution as well as learned lower court should be.

2. Chakai PS Case no. 155/2009 was registered on the basis of self statement of S.I., Bhagwan Prasad Gupta alleging inter alia that on the alleged date that means to say on 03.12.2009 while he along with other police personnel was on routine patrolling, got a



confidential information with regard to transportation of huge cache of arms and ammunition and was to be supplied to the outfit organization (Maoist) and then, they began to check and during course thereof, a Tata Magic being properly escorted by a motorcycle was seen coming from Giridih side whereupon signalled to stop. Seeing the police the motorcyclist as well as some of the occupants of the Tata Magic jumped out, ran away who were chased and during course thereof, two were apprehended who disclosed their identity as Md. Salam Khan and Md. Kamrul @ Karu @ Md. Kamrul Ali Karu. On the other hand, informant interrogated the driver of the Tata Magic who disclosed his identity as Tabrez and further disclosed that he was hired by one Md. Afroz to carry consignment from Deoghar to the place of Basanti Marandi(Mukhiya) of Village-Barakola. Then, after presence of Md. Salam Khan as well as Md. Kamrul @ Karu @ Md. Kamrul Ali Karu, they were interrogated who made inculpatory extra-judicial confessional statement and on the basis thereof, at their instance, house of Basanti Marandi as well as her husband, Bahadur Hembram @ Mahto Hembram were searched and during course thereof, 10 bags of Potassium Chlorate, component of explosive were seized. As per discloser of aforesaid Md. Salam Khan as well as Md. Kamrul @ Karu @ Md. Kamrul Ali Karu, place of transporter at Deoghar was also searched which was properly identified by them.



Then thereafter, as per their discloser from the place of Jasim Ali arms and ammunitions, cash were also seized. From the place of Salman Khan 33 KG of Explosive Substance was also seized.

3. It is evident from the lower court record that as Md. Salam Khan as well as Md. Kamrul @ Karu @ Md. Kamrul Ali Karu were apprehended at the spot after chase, on account thereof, at first instance charge-sheet was submitted against them. After committal of case, Sessions Trial No. 452/2010 was registered. Subsequently thereof, another set of accused were sent up for trial, namely, Bahadur Hembram, his wife Basanti Marandi and Md. Akhtar Khan and after committal of their case Sessions Trial No. 763/2010 was registered. It is further evident from the lower court record of both the Sessions Trial namely, 452/2010 and 763 of 2010, it sailed through different courts, non cognito. In Sessions Trial No. 452/2010 charges were framed on 30.01.2012 and witnesses began to be examined since 20.04.2013 while in Sessions Trial No. 763/2010, charge was framed on 22.10.2011 and witnesses began to be examined since 01.02.2012. Had there been proper vigil at the end of the learned lower court, then in that event, both the trial might have been amalgamated during course of framing of charge or before examination of the witness begin which, never occurred. In likewise manner, it is also evident that in spite of the fact that Sessions Trial No. 763/2010 happens to be



separated trial, even then during course of trial neither the prosecution nor the court where both the trials were pending and was being proceeded with on fixing the same date cared to call for the original document which was available in the record of Sessions Trial No. 452/2010 and that happens to be the reason behind that in spite of presence of relevant documents on record, due to negligence at the end of the prosecution as well as non sensitization of the learned lower court, neither both the records were amalgamated at the stage of both the trials which sailed up to 01.02.2012 and in likewise manner, got the relevant documents, an exhibit of both the records. Furthermore, it transpires that in S.Tr. No. 452/2010, seven PWs have been examined while in S. Tr. No. 763/2010 eight PWs have been examined. These events have been highlighted only to show as to how the prosecuting agency conducted the trial and in what manner, the court performed its duty.

4. Furthermore, from the record it is evident that in Sessions Trial no. 452/2010, the accused were charged for an offence punishable under Section 120B IPC, 121/34 IPC, 3 of the Explosive Substance Act, 4B of Explosive Substance Act, 5 of the Explosive Substance Act, 10 of Unlawful Activity (Prevention Act) 2004, 10 (b) (ii) of Unlawful Activity (Prevention Act), 13 of Unlawful Activity (Prevention Act), 17 of CLA Act but the appellants, namely, Md.



Kamrul @ Karu @ Md. Kamrul Ali Karu (Cr. Appeal (SJ) No. 289/2015) and Md. Salam Khan (Cr. Appeal (SJ) No. 220/2015) have been found guilty vide judgment of conviction dated 17.03.2015 and order of sentence dated 21.03.2015 under Section 17 of CLA Act and sentenced to undergo RI for 3 years, under Section 10(b) (ii) UAP (Prevention Act), read with 120B of the IPC and each one has been sentenced to undergo RI for 10 years as well as to pay fine of Rs. 20,000/- in default thereof, to undergo SI for one year also appears to be glaring example of non application of mind in the background of the fact that from the sanction order Ext-9, it is evident that the District Magistrate, Jamui had granted sanction for prosecution under Sections 3, 4, 5 of the Explosive Substance Act in terms of power vested under Section 7 of Explosive Substance Act but, with regard to Section 17 of the CLA Act, it has been incorporated that the State Government has been requested to accord sanction which has not been on the record. In likewise manner, the aforesaid sanction order relates to Chakai PS Case No. 155/2009 whereunder all the appellants including these two happened to be accused.

5. Now coming to the status of the Sessions Trial No. 763/2010, it is evident that appellant, Md. Akhtar Khan (Cr. Appeal (SJ) No. 171/2015), Bahadur Hembram @ Mahto Hembram (Cr. Appeal (SJ) No. 318/2015) and Basanti Marandi (Cr. Appeal (SJ) No.



290/2015), they were charged for an offence punishable under Sections 121/34 of the IPC, Sections 3, 4, 5 of the Explosive Substance Act, 120B IPC and 414 IPC and after concluding the trial Bahadur Hembram @ Mahto Hembram as well as Basanti Marandi have been found guilty for an offence punishable under Sections 5 of the Explosive Act and each one has been sentenced to undergo RI for 7 years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for 1 year, while all the three named accused, namely, Bahadur Hembram, Basanti Marandi and Md. Akhtar y for an offence punishable under Sections 414, 120B IPC and sentenced to undergo RI for 3 years, Section-4 of the Explosive Substance Act read with Section 120B of the IPC and each one has been directed to undergo RI for 10 years as well as to pay fine of Rs. 20,000/- and in default thereof, to undergo SI for 1 year with a direction to run the sentences concurrently vide judgment of conviction dated 17.03.2015 and order of sentence dated 21.03.2015 passed by Sessions Judge, Jamui is found apathy of prosecution as well as learned lower court in the background of the fact that on account of their non sincerity as well as failure on their part to procure original document from the separate trial bearing Sessions Trial No. 452/2010 and in likewise manner, though the appellants kept silence as on account of negligence having at the end of prosecution as well as learned lower court they were



ultimate beneficiary but failed to acknowledge the Court discharging their status to be part and parcel of the court and so, it suggests miscarriage of justice having been carried out at the level of learned lower court.

6. In *Ajay Kumar Ghoshal v. State of Bihar* as reported in *2017(1) PLJR 458 SC*, it has been held as follows:-

10. [Section 386](#) Cr.P.C. deals with the powers of the appellate court. As per [Section 386](#) (b) [Cr.P.C.](#), in an appeal from a conviction, the appellate court may:- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.

11. Though the word “retrial” is used under [Section 386\(b\)\(i\)](#) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

12. ‘De novo’ trial means a “new trial” ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate



court has power to direct the lower court to hold ‘de novo’ trial. But the question is when such power should be exercised. As stated in [Pandit Ukha Kolhe vs. State of Maharashtra](#) (1964) SCR 926, the Court held that: “An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.”

13. This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the [SC/ST Act](#), this Court stated, “a de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable; it should be limited to the extreme exigency to avert ‘a failure of justice’. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial”. [In State of M.P. vs. Bhooraji and Ors.](#) (2001) 7 SCC 679, the Court went on to say further as follows:

“8....This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after



erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting “a failure of justice”. The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.”

14. In Bhooraji’s case, the Court referred to Chapter XXXV of the Code and, particularly, [Sections 461](#), [462](#) and [465](#) (1). After noticing the above provisions, the Court observed in paragraphs (15) and (16) of the order as follows:

“15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned “a failure of justice” the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by a failure of justice occasioned on account of such error, omission or irregularity? This Court has observed in [Shamnsaheb M. Multtani vs. State of Karnataka](#) {2001 (2) SCC 577} thus:

“23. We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes,



as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment*, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.”

15. [In Gopi Chand vs. Delhi Administration](#) AIR 1959 SC 609, a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in [the Code](#) of Criminal Procedure, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; accordingly, set aside the orders of conviction and sentence and the Constitution Bench held as under:-

“29.the offences with which the Appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the Appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the Appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible.”

16. [In Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.](#) (2004) 4 SCC 158, [Best Bakery case] being an extraordinary case, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a ‘de novo’ trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in Best Bakery case for



retrial was in the extraordinary circumstances and cannot be applied for all cases.

17. After considering the question a “speedy trial” and “fair trial” to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in [Mohd. Hussain @ Julfikar Ali vs. State \(Govt. of NCT of Delhi\)](#) (2012) 9 SCC 408, this Court held as under:-

“41. ‘Speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of [Article 21](#). There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under [Section 386](#) of the Code. That is clear from the bare language of [Section 386\(b\)](#). Though such power exists, it should not be exercised in a routine manner. A ‘de novo trial’ or retrial is not the second trial; it is continuation of the same trial and same prosecution. The



guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under [Section 386\(b\)](#) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

7. Now coming to the status of appellants, Md. Salam Khan as well as Md. Kamrul @ Karu @ Md. Kamrul Ali Karu, it is evident that due to slackness having been committed at the trial stage as indicated above, the learned lower court also failed to consider the inculpatory extra-judicial confessional statement which led recovery of potassium chlorate from the house of Basanti Marandi as well as Bahadur Hembram who are none else than spouses as well as recovery of arms from the house of Md. Jasim as well as recovery of explosive from the house of Md. Salman and those parts happen to be admissible under Section 27 of the Evidence Act, apart from the fact that same is found relevant towards co-accused in terms of Section 29 of the Evidence Act, which the learned lower court completely ignored.

8. In *Kala @ Chandrakala v. State* as reported in (2016) 9 SCC 337, it has been held as follows:-

6. Firstly, we will examine whether the extra-judicial confession which is a weak kind of evidence, inspire the confidence. Susheela, P.W.4 has stated that



Murugesan was married to the appellant 14 years before the incident. She came in search of his brother Murugesan to the house of the deceased. Murugesan has told her on 12.5.2005 that appellant had threatened to kill him as he was habitual of consuming alcohol. When she did not receive any telephone call for 15 days from the deceased, she went to his village. On enquiry she was informed by the appellant that she, her nephew Prakasam and father murdered the deceased and threw his body under the bridge. Susheela, P.W.4 further stated that the appellant touched her legs and stated that she would give properties of her father to two children and that she should not inform the police. Thereafter, P.W.4 went to the police station on the same day and lodged the complaint, Ext.P2. The police showed her the photograph, shirt and slippers and asked her to identify the same. She identified them to be of her brother. She has further stated to have gone to police station after 5 days with photograph of deceased. In the cross-examination, she has also stated that she had signed the agreement for sale of land executed by the accused.

7. It is apparent that accused was not having good relationship with Susheela, PW.4. Making confession to such an inimical person is most unlikely. When the witness had gone in search of the deceased to the house of the accused it is most unlikely that the confessional statement would be made to her readily. It is not that the appellant had gone to the house of P.W.4 to make the confession. On the other hand query was made by the daughter of the deceased to Susheela, P.W.4 as to the whereabouts of the deceased, meaning thereby the whereabouts of the deceased were not known even to his daughter. In case the deceased had been killed in the house, perhaps the daughter would have known about the offence having been committed by the accused.

8. In *Sahadevan and Anr. v. State of Tamil Nadu* (2012) 6 SCC 403, it has been observed that extra-judicial confession is weak piece of evidence. Before acting upon it the Court must ensure that the same inspires confidence and it is corroborated by other prosecution evidence. In *Balwinder Singh v. State of Punjab* 1995 Supp (4) SCC 259, it has been observed that extra-judicial confession requires great deal of care and caution before acceptance. There should be no



suspicious circumstances surrounding it. In *Pakkirisamy v. State of Tamil Nadu* (1997) 8 SCC 158 it has been observed that there has to be independent corroboration for placing any reliance upon extra-judicial confession. In *Kavita v. State of Tamil Nadu* (1998) 6 SCC 108 it has been observed that reliability of the same depends upon the veracity of the witnesses to whom it is made. Similar view has been expressed in *State of Rajasthan v. Raja Ram* (2003) 8 SCC 180, in which this Court has further observed that witness must be unbiased and not even remotely inimical to the accused. In *Aloke Nath Dutta v. State of West Bengal* (2007) 12 SCC 230 it has been observed that the main features of confession are required to be verified. In *Sansar Chand v. State of Rajasthan* (2010) 10 SCC 604 it has been observed that extra-judicial confession should be corroborated by some other material on record. In *Rameshbhai Chandubhai Rathod v. State of Gujarat* (2009) 5 SCC 740 it has been observed that in the case of retracted confession it is unsafe for the Court to rely on it. In *Vijay Shankar v. State of Haryana* (2015) 12 SCC 644 this Court has followed the decision in *Sahadevan*.

9. In *Charandas Swami v. State of Gujarat* reported in

2017 CrLJ 2904, it has been held as follows:-

45..... The Courts below have accepted the case of the prosecution that the disclosure made by Accused No.3 about the location where the dead body of Gadadharanandji was dumped by him, was admissible under [Section 27](#) of the Evidence Act. The appellants, however, take exception to that by relying on the reported decisions. In our view, the decision in the case of *Navjot Sandhu* (Supra) has adverted to all the previous decisions and restated the legal position. In paragraph 114, while considering the arguments advanced by the parties regarding the sweep of [Section 27](#) of the Evidence Act, the Court formulated two questions which read thus:

“(i) Whether the discovery of fact referred to in [Section 27](#) should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things — concrete



or non- concrete.

(ii) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance. The subsequent event of discovery by the police with the aid of information furnished by the accused — whether can be put against him under [Section 27](#).” In the context of these questions, the argument of the counsel for the State in that case has been adverted to in paragraphs 115 to 118. The Court then after analyzing [Section 27](#) of the Evidence Act, in paragraphs 120 to 144 adverted to the relevant decisions on the point. In paragraphs 120 and 121, the Court noted thus:

“120. The history of case-law on the subject of confessions under [Section 27](#) unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by [Section 27](#) are physical, material objects or the mental facts of which the accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by [Section 27](#). (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under [Section 27](#). The decision of the Privy Council in Kottaya case which has been described as a locus classicus, had set at rest much of the controversy that centred round the interpretation of [Section 27](#). To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council’s decision has not been questioned in any of the decisions of the highest court either in the pre-or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State.

121. The first requisite condition for utilising [Section 27](#) in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information



received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of [Section 27](#) relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case⁶⁴: (AIR p. 70, para 10) “clearly the extent of the information admissible must depend on the exact nature of the fact discovered” and the information must distinctly relate to that fact. Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10) “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.” We have emphasised the word “normally” because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety.



Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10) "If this be the effect of [Section 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." Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10) "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)

46. This Court has restated the legal position that the facts need not be self-probatory and the word "fact" as contemplated by [Section 27](#) is not limited to "actual physical material object". It further noted that the discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. In paragraph 128, the Court noted the statement of law in *Udai Bhan* (Supra) that, "A discovery of a fact



includes the object found, the place from which it is produced and the knowledge of the accused as to its existence.” The Court then posed a question as to what would be the position if the physical object was not recovered at the instance of the accused. That issue has been answered on the basis of precedents, as can be discerned from Paragraphs 129 to 132 of the reported judgment. In paragraph 139, the Court noticed the decision in the case of Damu (Supra) which had dealt with the case where broken glass piece was recovered from the spot matched with broken tail lamp and in paragraph 37 of that decision, the Court observed thus:

“37. How did the particular information lead to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the investigating officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.” (emphasis supplied).

The Court then noted that the above view taken in Damu’s case does not make it a dent on the observations made and the legal position spelt out in Om Prakash (supra) which distinguishes Damu’s case because there was discovery of a related physical object at least in part. We may usefully reproduce paragraph No.142 to 144 of the same reported decision, wherein the Court observed thus:

“142. There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of [Section 27](#). We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under [Section 27](#). It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of



other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of [Section 27](#). Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under [Section 27](#), though it may be one of the aspects that goes into evaluation of that particular piece of evidence.” “143. How the clause “as relates distinctly to the fact thereby discovered” has to be understood is the next point that deserves consideration. The interpretation of this clause is not in doubt. Apart from Kottaya case various decisions of this Court have elucidated and clarified the scope and meaning of the said portion of [Section 27](#). The law has been succinctly stated in Inayatullah case. Sarkaria, J. analysed the ingredients of the section and explained the ambit and nuances of this particular clause in the following words: (SCC p. 832, para 12) “The last but the most important condition is that only ‘so much of the information’ as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word ‘distinctly’ means ‘directly’, ‘indubitably’, ‘strictly’, ‘unmistakably’. The word has been advisedly used to limit and define the scope of the provable information. The phrase ‘distinctly relates to the fact thereby discovered’ is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.” In the light of the legal



position thus clarified, this Court excluded a part of the disclosure statement to which we have already adverted.

144. In *Bodhraj v. State of J&K* this Court after referring to the decisions on the subject observed thus: (SCC p. 58, para 18) “The words ‘so much of such information’ as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. 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.” (emphasis supplied)

47. Reliance was also placed on the recent decision of this Court in the case of *Dupare* (supra). The Court adverted to the relevant precedents and observed thus, in paragraphs 23 to 29:-

“23. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in [Pulukuri Kotayya v. King Emperor](#) has held thus: (IA p.77) “... 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.

24. [In Mohmed Inayatullah v. The State of Maharashtra](#), while dealing with the ambit and scope of Section 27 of the [Evidence Act](#), the Court held that:

“11. Although the interpretation and scope of Section 27 has been the subject of several authoritative



pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:

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.

12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which 'may be indirectly or remotely related to the fact discovered.



13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan v. Emperor*, *Ganu Chandra Kashid v. Empror*). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya v. Emperor*, [Udai Bhan v. State of U P](#)). (emphasis in original)

25. [In Aftab Ahmad Anasari v. State of Uttaranchal](#) after referring to the decision in *Palukuri Kotayya*, the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that: (*Aftab Ahmad Anasari Case*, SCC p. 596, para 40) “40. ...the part of the disclosure statement, namely, that the Appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible Under Section 27 of the [Evidence Act](#) because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the Appellant pursuant to the voluntary disclosure statement made by the Appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits.”

26. [In State of Maharashtra v. Damu](#) it has been held as follows:

“35. ...It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the [Evidence Act](#), 1872]. The decision of the Privy Council in [Pulukuri Kotayya v. King Emperor](#) 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.” The similar principle has been laid down in [State of Maharashtra v. Suresh](#), [State of Punjab v. Gurnam Kaur](#), [Aftab Ahmad Anasari v. State of](#)



[Uttaranchal](#), [Bhagwan Dass v. State \(NCT of Delhi\)](#) , [Manu Sharma v. State \(NCT of Delhi\)](#) and [Rumi Bora Dutta v. State of Assam](#).

27. In the case at hand, as is perceptible, the recovery had taken place when the Appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.

28. Additionally, another aspect can also be taken note of. The fact that the Appellant had led the police officer to find out the spot where the crime was committed, and the tap where he washed the clothes eloquently speak of his conduct as the same is admissible in evidence to establish his conduct. In this context we may refer with profit to the authority in [Prakash Chand v. State \(Delhi Admn.\)](#) wherein the Court after referring to the decision in H.P. Admn. v. Om Prakash held thus: (Prakash Chand Case, SCC p.95, para 8) “8. ...There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible Under Section 8 of the [Evidence Act](#), if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of [the Code](#) of Criminal Procedure. What is excluded by Section 162, Code of Criminal Procedure is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, Under Section 8 of the [Evidence Act](#), irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the [Evidence Act](#).”

29. [In A.N. Vekatesh and Anr. v. State of Karnataka](#) it has been ruled that: (SCC p. 721, para 9) “9. By virtue of Section 8 of the [Evidence Act](#), the conduct of



the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct Under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in [Prakash Chand v. State \(Delhi Admn.\)](#). Even if we hold that the disclosure statement made by the accused-Appellants (Exts. P- 15 and P-16) is not admissible Under Section 27 of the [Evidence Act](#), still it is relevant Under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence Under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible Under Section 8 of the [Evidence Act](#).” (emphasis supplied) The other decision relied upon is the case of Pandurang Kalu Patil (supra).

48. It is not necessary to multiply the authorities on this aspect. In our opinion, the Courts below have rightly placed reliance on the fact discovered by the Investigating Officer (PW64) on the basis of the disclosure made by the Accused No.3 on 2nd April 1999, after his arrest on 29th March, 1999, as recorded in Exh. 188. The panchanama Exh.188 was proved by pancha witness PW30. The fact that PW30 was not on good terms with the accused cannot be the basis to discard his evidence. This aspect has been considered by the High Court and in our opinion, rightly, that the evidence of PW30 was relied upon for the limited purpose to prove the panchanama and not for any other relevant fact. We affirm the view taken by the courts below about the admissibility of disclosure of the spot where the dead body of Gadadharanandji was disposed of by Accused No.3. The same stood corroborated from the recovery of a dead body of an unknown person from the same spot by the Rajasthan Police on 4th May, 1998 on the information provided by PW50. That dead body, on subsequent medical



examination was found to be of none other than that of Gadadharanandji.

10. Making scrutiny of overall situation being explicit from records of both the sessions trials, it is apparent that since inception of both the trials the learned lower court failed to adopt the right procedure at the cost of justice and on account thereof the finding recorded by the learned lower court is found completely unsustainable. Accordingly, the same is set aside. Appeals are allowed.

11. The matter is remitted back to the learned lower court to proceed with the trial at the stage framing of charge after amalgamating both the trials and will dispose of the same within one year and for that Director General of Police, Bihar, Patna is directed to procure attendance of all the witnesses so that it be concluded within the aforesaid time frame failing which the official concerned will be held responsible for the disobedience of the court's order.

12. To facilitate the execution of the order, let a copy of this judgment be served upon the learned Advocate General, Bihar, Patna.

13. Office to comply accordingly. Appellants are directed to appear before the learned lower court within fortnight with a prayer of bail which the learned lower court will consider in accordance with



law.

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(Aditya Kumar Trivedi, J)

