

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.437 of 2014**

Arising Out of PS. Case No.-65 Year-2011 Thana- SANGRAMPUR District- East
Champaran

=====

Sonu Akhtar Khan Son of Sabir Akhtar Khan resident of village - Rehua
Maghargawa, P.S. Kotwa, Distt. - East Champaran, Motihari

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Vikram Deo Singh, Advocate Mr. Nafisuzzoha, Advocate Md. Jawed Ahmad, Advocate
For the Respondent/s	:	Mr. Prince Kumar Mishra, Amicus Curiae

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 02-08-2022

By this appeal, appellant/convicted accused Sonu Akhtar Khan is challenging the judgment and order dated 14th March 2014 and 22nd March 2014 respectively, passed by the learned 5th Additional Sessions Judge, East Champaran, Motihari, in Sessions Case No. 29 of 2012/27 of 2012, thereby convicting him of offences punishable under Sections 364A, 302, 120B and 201 of the Indian Penal Code. For the reasons best known to it, the learned trial court had not sentenced the accused for the offence punishable under Section 120B of the Indian Penal Code. For the offence punishable under Section



364A of the Indian Penal Code, he is sentence to suffer imprisonment for life apart from imposition of fine of Rs. 50,000/- and in default to undergo simple imprisonment for six months. For the offence punishable under Section 302 of the Indian Penal Code, similar sentence was imposed on him. For the offence punishable under Section 201 of the Indian Penal Code, the appellant is sentenced to undergo rigorous imprisonment for three years apart from fine of of Rs. 10,000/- and in default to undergo rigorous imprisonment for three months. For the sake of convenience, the appellant shall be referred to in the original capacity as an accused.

2. Facts in brief leading to the prosecution of the accused, projected from the police report, can be summarized thus:-

(a). Accused Sonu Akhtar Khan had married daughter of Sakir Khan, resident of village Dariyapur No. 2 falling under jurisdiction of the Police Station Sangrampur of East Champaran District. He was residing with his in-laws at that village. First informant/PW 8 Meraz Khan was neighbor of Sakir Khan being resident of village Dariyapur No. 2. Salman Khan (since deceased) was son of First Informant/PW 8 Meraz Khan. He was friend of accused Sonu Akhtar Khan. According



to the prosecution case, Sonu Akhtar Khan wanted to go to Saudi Arabia and was in need of money. Therefore, he along with his friends, namely, Pawan Pandey and Dheeraj Pandey hatched conspiracy to abduct Salman Khan for demand of ransom from his relatives. That is how, according to the prosecution case, on 18.06.2011, accused Sonu Akhtar Khan went to the house of Salman Khan (since deceased) and took him. At the canal of the village, Salman Khan was made to drink liquor in excessive quantity. He was then confined at the house of Pawan Pandey. Calls for demanding ransom were made to brothers of Salman Khan and for his release, an amount of Rs. 700000/- came to be demanded. Subsequently, Salman Khan was confined at the house of Dheeraj. As name of the accused has started surfacing in the matter of missing of Salman Khan, the accused took him to the field of Arun Srivastava. Salman Khan was killed there on 29.06.2011 by slashing his neck by a sharp edged weapon. His dead body was buried in the said field. The 'Kudal' used for digging the soil for burying the dead body was then kept in the Bamboo hut belonging to PW 4 Heera Sharma as its handle was broken in the said process.

(b). PW 1 Iklaque Khan and PW 7 Ekraj Khan are brothers of Salman Khan. They were staying at Delhi. On



24.06.2011, they got a phone call from the accused demanding ransom of rupees seven lakhs for releasing Salman Khan. In the meanwhile, their father PW8 Meraj Khan had informed the fact of missing of Salman Khan to his son PW 1 Eklaque Khan. Therefore, PW Eklaque Khan along with his brother PW 7 Ekraj Khan started proceeding to their village Dariyapur No. 2. When they reached Motihari Railway Station on 26.06.2011, they received telephone call from the accused demanding ransom of rupees seven lakhs for releasing their brother Salman Khan. On return to their village, they accompanied their father PW8 Meraj Khan for lodging the FIR of the crime in question.

(c). On 01.07.2011 PW 8 Meraj Khan lodged report of the incident to PW 10 Rajnish Kumar, Police Station Office, Sangrampur, at his own house at Dariyapur No. 2. That is how Crime No. 65 of 2011 for the offence punishable under Section 364 and 120 B of the Indian Penal Code came to be registered against the accused as well as others.

(d). According to the prosecution case, the accused came to be arrested at about 11:00 pm of 01.07.2011 from the house of his in-laws situated in Dariyapur No. 2 village itself. At the very same village, in the morning hours of 02.07.2011, confessional statement of the accused came to be recorded by



PW 10 Rajnish Kumar. At his instance it was revealed that the dead body of Salman Khan was buried in the field of Arun Srivastava and on pointing out that location, the dead body of Salman Khan came to be exhumed on 02.07.2011 itself. After taking inquest notes, the dead body was sent for post mortem examination at the Sadar Hospital Motihari. PW 11 Dr. Uday Shankar Pathak conducted the post mortem examination on the dead body of the Salman Khan. The 'Kudal' used for digging the pit for concealing the dead body came to be recovered from the Bamboo hut of PW 4 Heera Sharma and the same came to be seized. The soil from the pit used for burying the dead body also came to be seized by preparing seizure memo. Statement of witnesses came to be recorded and on completion of investigation, the accused came to be charge sheeted.

(e). The learned Trial Court had framed the charge against the accused. He pleaded not guilty and claimed trial.

(f). In order to bring home the guilt to the accused, the prosecution has examined in all eleven witnesses. PW 1 Eklaque Khan is brother of the deceased. PW 2 Kasim Khan is a Panch witness to the seizure of 'Kudal'. PW 3 Zamil Akhtar is a politician from the village who acted as a Panch witness. PW 4 Hira Sharma is a Panch to the seizure of 'Kudal'. PW 5 Md.



Imtiyaz Khan claims to be the Panch witness to the disclosure statement of the accused and he acted as a Panch witness to the inquest Punchnama. PW 6 Mohammad Ashique is brother-in-law of the father of the deceased. He is a Panch witness to the seizure of soil from the pit. PW 7 Ekraj Khan is another brother of deceased Salman Khan. Pw 8 Meraj Khan is the first informant and father of deceased Salman Khan. PW 9 Siraj Khan is an uncle of the deceased and brother-in-law of the accused. He also claims to be a witness to the confessional statement of the accused. PW 10 Rajnish Kumar, Police Station Officer, Sangrampur Police Station is the Investigating Officer, whereas PW 11 Dr. Uday Shankar Pathak, Medical Officer of the Sadar Hospital Motihari is an Autopsy Surgeon.

(g). The defence of the accused was that of total denial. As per the defence version, Salman Khan was having love affair with a girl named Gudiya. Because of this affair, there was quarrel between her family members and the accused. The family members of Gudiya, according to the defence version, has killed Salman Khan because of that love affair.

(h). Upon hearing the parties, the learned Trial Court was pleased to convict the accused and to sentence him as indicated in the opening para of the judgment.



(i). The learned trial court, for convicting and sentencing the accused has placed explicit reliance on the entire confessional statement Exhibit-9 made by the accused while in custody to PW 10 Rajnish Kumar, Police Station Officer. In addition to this confessional statement, the learned Trial Court relied on the circumstance that dead body of Salman Khan was recovered at the instance of the accused and the accused kept the broken 'Kudal' at the Bamboo hut of PW 4 Heera Sharma. Relying on these circumstances, the learned Trial Court has held that the accused by hatching the conspiracy with others for getting ransom had abducted Salman Khan and had killed him. Thus, the circumstances relied by the learned Trial Court for convicting the accused are his confessional statement made to the police, recovery of the dead body of Salman Khan at his instance as well as keeping the broken 'Kudal' at the hut of PW 4 Hira Sharma.

3. We heard the learned counsel appearing for the appellant/accused at sufficient length of time. He argued that evidence on record shows that the accused was taken in custody by police even before lodgment of the FIR by PW 8 Meraj Khan. Thereafter he was subjected to ill treatment. It is further argued that then the farce of recording of his confessional



statement is done by the prosecution. There is no admissible evidence to hold that the dead body was recovered at the instance of the accused. The discovery of fact is not proved as the accused was subjected to beating by the Investigating Officer for extracting confession. Therefore, according to the learned counsel for the appellant, he is entitled for acquittal.

4. As usual none appeared for the respondent/State of Bihar. At this stage we deem it appropriate to reproduce our observation made in para-4 in our judgment dated 25.07.2022 in the matter of **Nepali Yadav and Another Vs. State of Bihar** which reads thus:

“4. As usual, none appeared to represent the Prosecuting Agency, i.e., the State of Bihar, in these two appeals. It is considered that when a crime takes place in a society, it is not just the victim who is affected. The entire society and in fact the State gets affected and therefore the prosecution is taken up by the State instead of allowing the victims of the crime to prosecute the accused. The State as such is duty bound to provide the Public Prosecutor for prosecuting the case so as to ensure that justice is being done in an impartial manner. The Public Prosecutor is an important and significant component of the Judicial System who is supposed to safeguard rights of the



victim as well as the accused person as per the facts of the case, by assisting the Court. We are at pains to note that in many of the old cases taken up by this Court, the Public Prosecutors are not entrusted by the State of Bihar. There seems to be something fundamentally wrong with the concerned Department of the State of Bihar. This tendency of not appointing the Prosecutor for representing the State of Bihar even in the appeal relating to the offence under Section 302 IPC needs to be depreciated and is depreciated by us. Left with no other alternative, we appointed Mr. Prince Kumar Mishra, the learned Advocate, to assist us as an Amicus Curiae for deciding these appeals in order to enable us to keep the interest of the Prosecuting Agency i.e. the State of Bihar safeguarded, in absence of the appointment of the Public Prosecutor by it in these appeals.”

This position has not changed even in the instant appeal and as the respondent/State of Bihar was going unrepresented, we were constrained to appoint Mr. Prince Kumar Mishra, the learned Advocate to act as an *Amicus Curiae* in this matter also in order to see that interest of all stake holders including the State are protected.

5. Mr. Prince Kumar Mishra, the learned *Amicus*



Curae by placing reliance on judgment in the matter of **Selvi and Others Vs. State of Karnataka** reported in **(2010) 7 SCC 263** argued that the confessional statement made by the accused while in custody of police is inadmissible in evidence. He further argued that if ultimately such confessional statement results in discovery of fact then only such portion of that confessional statement which result in discovery of fact can be made use of as one of the circumstance for which inferring guilt of the accused. In his submission evidence of the prosecution must show that there was no coercion or undue influence on the accused while making such statement leading to the discovery of fact. He further argued that the confessional statement as a whole cannot be allowed to be proved before the Court in the light of ban imposed by Sections 25 and 26 of the Evidence Act. It is further argued that the learned trial Court has committed patent error of law by getting the entire confessional statement proved through the evidence of Investigating Officer PW 10 Rajnish Kumar. He further argued that this Court will have to see whether the prosecution has proved the chain of circumstances leading to the only inference as to the guilt of the accused.

6. Death of Salman Khan is not disputed by the



defence. Evidence of his brothers PW 1 Eklaque Khan, PW 7 Ekraj Khan so also his father PW 8 Meraj Khan shows that on 02.07.2011, dead body of Salman Khan was found to be buried in the field of Arun Srivastava. PW 10 Rajnish Kumar, the Investigating Officer has deposed that after taking inquest notes, the dead body of Salman Khan came to be dispatched to the Sadar Hospital, Motihari, for post mortem examination. Unimpeachable evidence of PW 11 Dr. Uday Shankar Pathak who conducted the post mortem examination on the dead body shows that the dead body of Salman Khan was having following two anti mortem wounds:

I. Incised wound 2 ½” X ¾” X 1 ½” on the back of neck.

II. Incised wound 1 ½” X 1” X 1” on the vertex.

This Medical Officer, on the basis of examination of the dead body opined that the injuries were caused by sharp cutting substance and deceased died due to instantaneous haemorrhage shock. This evidence is sufficient to hold that Salman Khan died homicidal death.

7. We have considered the submissions so advanced and we have also perused the record and proceedings including oral and documentary evidence adduced by the prosecution.



8. Case of the prosecution is based on circumstantial evidence as there is no eyewitness available for deposing that the accused had committed murder of Salman Khan. The prosecution is faintly alleging that deceased Salman Khan was lastly seen in the company of the accused. It is well settled that the inference of guilt can be justified in a case based on circumstantial evidence only when all incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt.

9. In the case of **Padala Veera Reddy Vs. State of Andhra Pradesh and Ors** reported in **AIR 1990 SC 79**, the Supreme Court has held that the following tests must be passed in order to record conviction in a case resting upon circumstantial evidence:-

“(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete



that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

Similarly, in the case of **Sharad Birdhichand Sarda V. State of Maharashtra** reported in **AIR 1984 SC 1622**, the Supreme Court has held that onus is on the prosecution to prove that the chain of circumstantial evidence is complete and the infirmity or lacuna in the case of prosecution cannot be cured by false defence or plea.

10. Thus, in a case of circumstantial evidence, the Court is required to look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence pointing out the guilt of the accused. In such cases, the Court is required to adopt a cautious approach and great care is required to be taken in evaluating such evidence. If evidence in the nature of circumstances relied on by the



prosecution is reasonably capable of two inferences, the one in favour of the accused is required to be accepted.

11. The prosecution has propounded the last seen theory with an averment that the accused, at about 3:00 PM of 18.06.2011 had visited the house of Salman Khan (since deceased) and took Salman Khan with him. Thereafter, Salman Khan was never seen alive and his dead body was ultimately found on 02.07.2011. Therefore, it is necessary to put on record the law relating to the last seen theory.

In **State of U.P. V. Satish** reported in (2005) 3 SCC 114 it is held thus in paragraph 22:-

“22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be



hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2.”

Similarly, in **Ramareddy Rajesh Khanna Reddy V. State of A.P.** reported in **(2006) 10 SCC 172**, it is held thus in paragraph 27:

“27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration.”

Keeping in mind these principles relating to appreciation of evidence in a case based on the circumstantial evidence in which the last seen theory is propounded, let us examine evidence of the prosecution in order to ascertain whether it is establishing the circumstances, the cumulative effect of which unerringly points out the guilt of the accused in the crime in question and that those circumstances are consistent



only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

12. The first circumstance which the prosecution has attempted to establish on record is that deceased Salman Khan was lastly seen in company of the accused. According to the prosecution case, on 18.06.2011, by visiting his house, the accused has taken deceased Salman Khan with him and thereafter Salman Khan did not return and his dead body was ultimately found on 02.07.2011. This theory is sought to be propounded through evidence of PW 8 Meraj Khan-father of the deceased. Let us see what this witness speaks about this aspect of the matter. It is in evidence of PW 8 Meraj Khan that at about 3:00 PM of 18.06.2011, his son Salman Khan had left his house with accused Sonu Akhtar Khan. Thereafter, his son Salman Khan did not return to the house. PW 8 Meraj Khan has further stated that he came to know that Salman Khan went with the accused for eating fried eggs at Nawada Square. In his cross-examination, PW 8 Meraj Khan disclosed that it was wife of Hasan Khan who saw deceased Salman Khan in company of the accused. If really through his private source PW 8 Meraj Khan came to know that after leaving his house, his son Salman was partying with the accused at Nawada Square, he would have



certainly disclosed the names of persons who saw Salman Khan with the accused at the Nawada Square enjoying fried eggs at some eatery. However, PW 8 Meraj Khan had not disclosed names of such persons either to the police while recording his FIR or before the Court while in the dock. Similarly, had it been true that wife of one Hasan Khan had subsequently seen Salman Khan in company of the accused, the prosecution would have certainly examined her in order to establish the last seen theory. This exercise is not done by the prosecution creating doubt in its case. Moreover, evidence of PW 8 Meraj Khan that the accused has taken his son on 18.06.2011 is also doubtful. His neighbour PW 2 Kashim Khan is stating that Salman Khan went missing on 18.06.2011. PW 2 Kashim has not spoken that it was the accused who had taken Salman Khan with him. PW 6 Md. Ashique is brother-in-law of First Informant father Meraj Khan. As per version of PW 6 Md. Ashique on 18.06.2011, Salman Khan had gone to the Bazar and did not return home thereafter. PW 7 Ekraj Khan is brother of deceased Salman Khan. As per his version, on 18.06.2011, at about 4:00 PM, deceased Salman Khan has left the house and did not return thereafter. PW 9 Siraj Khan (uncle of deceased Salman Khan) who accompanied PW 8 Meraj Khan to the Police Station for lodging the FIR has



categorically disclosed that on 18.06.2011 Salman Khan went missing from his house. This uncle of the deceased had not stated that the accused had taken Salman Khan from the house. Thus, it is not possible to accept evidence of PW 8 Meraj Khan that at about 3:00 PM of 18.06.2011, the accused had taken Salman Khan with him from the house of Salman Khan.

13. Apart from it, case of the prosecution is that the dead body of Salman Khan came to be recovered on 02.07.2011 i.e., more than twelve days after Salman Khan went missing. The last seen theory comes into play only when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any other person than the accused being the author of the crime become impossible. The prosecution has not adduced any evidence on record to show that in between this large gap of time from 18.06.2011 to 02.07.2011, the accused was ever seen in company of deceased Salman Khan. It is worthwhile to mention here that evidence of the prosecution witnesses shows that the house of in-laws of the accused where the accused used to reside was in the neighbourhood house of the deceased and that the deceased was friend of the accused. Not a single prosecution witness has stated that during this gap



of time, the accused was not seen in their village Dariyapur No.II. Thus, the prosecution has failed to establish the circumstance that it was the accused who took Salman Khan on 18.06.2011 and within a short time thereafter, Salman Khan was found dead. Medical evidence coming on record through the mouth of PW 11 Dr. Uday Shankar Pathak shows that Salman Khan died within 72 hours of 3:30 PM of 02.07.2011. Thus, Salman Khan might have died on or about 29.06.2011. Thus time gap is too large.

14. Next circumstance relied by the prosecution is recovery of the dead body of Salman Khan on the basis of disclosure statement made by the accused, which is admissible under Section 27 of the Evidence Act. It is trite that confession made before the police is inadmissible and cannot be proved. Use of such confessional statement leading to the discovery of fact was considered by the Supreme Court in the matter of **Selvi and Others V. State of Karnataka** reported in (2010) 7 SCC 263 paragraph 128, 133 to 136 of that judgment are relevant for our purpose and they are reproduced hereunder:-

“128. We can now examine the various circumstances that could “expose a person to criminal charges”. The scenario under consideration is one where a person in



custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways:

- The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence.

- Another possibility is that of “derivative use” i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.

- Yet another possibility is that of “transactional use” i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated.

- A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration.

133. We have already referred to the language of Section 161 CrPC which protects



the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the “theory of confirmation by subsequent facts” i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which “furnish a link in the chain of evidence” needed for a successful prosecution. This provision reads as follows:

“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.”



134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda* warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad* [AIR 1961 SC 1808. It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

“13. ... The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory



information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. *It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information.”*

(emphasis supplied)

This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)

“15. ... Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.”

136. The minority opinion also



agreed with the majority's conclusion on this point since Das Gupta, J., held at SCR p. 47: (*Kathi Kalu Oghad case* [AIR 1961 SC 1808])

“36. ... Section 27 provides 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 the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a ‘witness’ during the investigation. Unless however he is ‘compelled’ to give the information he cannot be said to be ‘compelled’ to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information



without any compulsion.”

15. The prosecution has attempted to prove that the accused was knowing the place where the dead body of Salman Khan was buried and this discovery of fact at the instance of the accused incriminates him in the crime in question. Let us, therefore, examine whether there is infact discovery of any fact in consequence of information received from the accused while in custody of a Police Officer. The time and date of arrest of the accused is not free from doubt. As per version of PW 8 Meraj Khan, the First Informant, after his son Salman Khan went missing on 18.06.2011, he heard about demand of ransom by telephone call to his son. This witness has spoken about filing of the FIR and consequent arrest of the accused. PW 8 Meraj Khan had not disclosed the date on which he lodged the FIR or the date on which the accused came to be arrested. He is however, very specific about the fact that he had gone to the Police Station along with witnesses PW 1 Eklaque Khan, PW 5 Md. Imtiyaz and PW 3 Jamil Akhtar @ Tukdu Khan. If we compare this evidence of First Informant/PW 8 Meraj Khan with that of his FIR (Exhibit-6) proved by PW 10 Rajnish Kumar, the Investigating Officer, then it becomes clear that the FIR of PW 8 Meraz Khan was not recorded at Police Station



Sangrampur but it was recorded by PW 10 Rajnish Kumar by visiting the village Dariyapur No.II at 9:00 AM of 01.07.2011. It is recorded in the FIR that it was written in front of house of PW 8 Meraz Khan. What was the occasion for PW 10 Rajnish Kumar, the Police Station Officer of Sangrampur Police Station, to visit the house of PW 8 Meraj Khan suo moto on 01.07.2011 is not explained by the prosecution. Similarly, the date of arrest of the accused is also shrouded in mystery. PW 10 Rajnish Kumar has deposed that after lodgment of the FIR by PW 8 Meraj Khan on 01.07.2011, he arrested the accused at 11:00 PM of that day. However, PW 1 Eklaque Khan who is a witness to the FIR having signed that FIR has categorically deposed that accused Sonu Akhtar Khan was arrested by police from the house of his father-in-law situated at his village Dariyapur No.II on 30.06.2011 itself. This fact is again confirmed by PW 7 Ekraj Khan who is very specific about narrating the dates chronologically. PW 7 Ekraz Khan has deposed that the accused came to be arrested on 30.06.2011. Both these witnesses are brothers of deceased Salman Khan and sons of First Informant PW 8 Meraj Khan. They had specifically came from Delhi to village Dariyapur No.II for tracing out their missing brother Salman Khan. Both are unanimously stating that the accused



was arrested on 30.06.2011. This fact coupled with the recital in the FIR that it was recorded at village Dariyapur No.II and in front of the house of PW 8 Meraj Khan at 9:00 AM of 01.07.2011 create serious doubt in the prosecution case regarding discovery of the dead body on the basis of confessional statement of the accused. A lurking doubt arises in the judicial mind that initially the accused must have been apprehended without there being any offence registered against him and after subjecting him to the third degree treatment by police, confessional statement might have been extracted from him and then the FIR against him might have been obtained in the morning hours of the next day i.e., 01.07.2011 from PW 8 Meraj Khan.

16. There are more than one reason to infer that the case of the prosecution is not free from doubt. It is rather shrouded in mystery. PW 1 Eklaque Khan-brother of the deceased, who was resident of Delhi, has stated that on 24.06.2011 he got a telephonic call from mobile phone No.8873278472 demanding ransom of rupees seven lakhs for releasing his brother Salman Khan. This call according to PW 1 Eklaque Khan was from the accused and his friends, namely, Pawan and Dhiraj. As per his version when they reached



Motihari Railway Station, he again received a call demanding ransom. This had happened on 26.06.2011, as seen from the evidence of his brother PW 7 Ekraj Khan, who was accompanying this witness PW 1 Eklaque Khan. It is in evidence of PW 7 Ekraj Khan that he received telephonic call on 26.06.2011 at Delhi that ransom of rupees seven lakhs will have to be paid for releasing his brother Salman Khan. Hence, according to PW 7 Ekraj Khan, he along with his brother PW 1 Eklaque Khan proceeded to return to their village Dariyapur No.II on 25.06.2011. On 26.06.2011 they reached Motihari Railway Station where they again received a call demanding ransom. As per version of PW 7 Ekraj Khan, that call was from the accused. PW 7 Ekraj Khan further deposed that then he along with his father PW 8 Meraj Khan, his brother PW 1 Eklaque Khan and PW 6 Md. Ashique went to the Police Station and lodged the report.

17. This evidence of PW 1 Eklaque Khan and his brother PW 7 Ekraj Khan shows that they returned to their village on 26.06.2011. After getting two calls demanding ransom for release of their brother Salman Khan they accompanied by their father went to the Police Station for lodging the report. This gives the indication that soon after



reaching their village, PW 1 Eklaque Khan, PW 7 Ekraj Khan and their father PW 8 Meraj Khan accompanied by other witnesses had been to the Police Station for informing the police about the incident of missing of Salman Khan and demand of ransom for release. The FIR was then lodged at the Police Station. However, this First Information about commission of cognizable offence is either suppressed by the prosecution or in order to give the desired shape to the prosecution case, the Investigator has not deliberately recorded it. This evidence gives an indication that instead of recording the FIR and registering the crime firstly the accused came to be apprehended on 30.06.2011. Evidence of PW 1 Eklaque Khan and PW 7 Ekraj Khan gives this impression as they both have deposed that the accused was apprehended on 30.06.2011 i.e., prior to recording the FIR (Exhibit-6) of PW 8 Meraj Khan which is on record of this Court.

18. Mysterious circumstances are further emerging on record from bare perusal of the FIR allegedly lodged by PW 8 Meraj Khan on 01.07.2011 in front of his house at Dariyapur No.II with PW 10 Rajnish Kumar. As stated in foregoing para, evidence on record shows that PW 1 Eklaque Khan and PW 7 Ekraj Khan had received calls for demanding ransom for



releasing Salman Khan on 24.06.2011 and 26.06.2011. Ransom of rupees seven lakhs was demanded, allegedly by the accused. PW 7 Ekraj Khan went ahead by stating that when he along with his father and brother had been to the Police Station for lodging the FIR, his brother PW 1 Eklaque had received a call for demanding ransom at that point of time and the voice on that call was identified by them as that of the accused. To crown this all, PW 8 Meraj Khan went forward and stated in his evidence that they have given tape-recorded conversation regarding demand of ransom to the police. If these events were happening after missing of Salman Khan in the month of June, 2011 itself then all these happenings, in normal course should have found their place in the FIR allegedly recorded by PW 10 Rajnish Kumar, Investigating Officer at Dariyapur No. II, in front of the house of PW 8 Meraj Khan on 01.07.2011. Surprisingly, all these events which were allegedly known to PW 8 Meraj Khan and his sons PW 1 Eklaque Khan and PW 7 Ekraj Khan are missing from the FIR (Exhibit-6) of PW 8 Meraj Khan. All these circumstances surfacing on record indicates that the police was already knowing about the incident of missing of Salman Khan prior to lodgment of this FIR dated 01.07.2011. The First Informant and his sons, in all probability had rushed to the



Police Station on or after 26.06.2011 i.e., return of PW 1 Eklaque Khan and PW 7 Ekraj Khan to village Dariyaganj No.II from Delhi. In all probability, the police might have apprehended the accused on 30.06.2011 as stated by the brothers of the deceased. This gives a jolt to the truthfulness of version of the prosecution.

19. Be that as it may, let us now examine the truthfulness of the disclosure statement of the accused which has allegedly resulted into discovery of fact that the accused was knowing the place where dead body of Salman Khan was buried. This discovery is according to the confessional statement of the accused. In the case in hand, the learned trial Court has adopted a very strange procedure unknown to law by getting the entire confessional statement of the accused proved through the evidence of Investigating Officer PW 10 Rajnish Kumar, Police Station Officer, Sangrampur. In paragraph-5 of his evidence, Investigating Officer PW 10 Rajnish Kumar has deposed and the learned trial Court without taking any objection has recorded that he (the Investigating Officer) recorded the confessional statement of Sonu Akhtar Khan at 7:00 AM of 02.07.2011 in his village itself and in that confessional statement, Sonu Akhtar Khan has admitted his guilt and has disclosed names of his



associates. In para-6 of his deposition, PW 10 Rajnish Kumar, the Investigating Officer, has deposed and the learned trial Court has recorded that Sonu Akhtar Khan had disclosed him how he had murdered Salman Khan. In para-7 of his deposition, it is stated by this witness and recorded by the learned trial Court that Sonu Akhtar Khan has accepted that he had committed murder of Salman Khan in the evening hours of 29.06.2011 and, then, had buried the dead body at Rahua Jirat. The confessional statement of accused Sonu Akhtar recorded on 02.07.2011 was shown to PW 10 Rajnish Kumar, the Investigating Officer, during course of recording of his evidence and this witness has stated that it is the same confessional statement of Sonu Akhtar recorded by him on 02.07.2011 at village Dariyapur and it is in his hand writing and it bears his signature as well as signature of accused Sonu Akhtar. This witness while in the dock has identified the said confessional statement and the learned trial Court then straightway proceeded to hold it as proved and exhibited it as Exhibit-9 as a piece of admissible evidence. It is crystal clear that the learned trial Court was oblivious of the provisions of Sections 25 and 26 of the Evidence Act which reads thus:

***“25. Confession to police-officer not
to be proved.-No confession made to a police-***



officer, shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him.-

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”

20. Mr. Prince Kumar Mishra, the learned Amicus Curiae, has rightly relied on judgment of the Supreme Court in **Venkatesh @ Chandra and Another Vs. State of Karnataka** reported in **(2022) SCC Online SC 765** on this aspect. Paragraph 20 to 23 of this judgment are relevant and needs reproduction which reads thus:

“20. Before we consider the merits of the matter, some of the features of the present case which we have found to be quite disturbing must be noted and deliberated upon. The Trial Court in paragraphs 27 to 30 of its judgment extracted voluntary statements of the appellants. First and foremost, going by the parameters of Section 27 of the Evidence Act only so much of information which relates distinctly to the facts thereby discovered can be stated to have been proved. The extent and ambit of said provision as well as applicability



*thereof were considered by the Privy Council in **Pulukuri Kotayya v. King-Emperor** as under:*

“10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime



of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the “fact discovered” is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of 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. On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships view it is fallacious to treat the “fact



discovered” within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added “with which I stabbed A” these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

(Emphasis added)

21. As was observed by the Privy Council the words - “with which I stabbed A” were inadmissible since they did not relate to the discovery of knife in the house of the informant. Applying this logic, only that part of the statement which leads to the discovery of certain facts alone could be marked in



evidence and not the entirety of the statement. Coming to the instant case and going by the principle and the illustration highlighted by the Privy Council, out of the statement of accused No. 1, only the following portion except the words printed in “italics” would be admissible and can be marked in evidence:

“.....If I am taken there, I will show the spot *where we committed murder*, and we will show the place where we have thrown the knife and the rod. And we will show the shop in which we sold the jewelleryes.”

22. The expression “where we committed murder” must not come on record. Similarly, all the earlier facts narrated in the statement about past history which are in the nature of self-implication, would be inadmissible as amounting to a confession made to a Police Officer. All the statements namely, Exhs. P-21 to P-24 must be read accordingly.

23. We must observe that we have repeatedly found a tendency on part of the Prosecuting Agency in getting the entire statement recorded rather than only that part of the statement which leads to the discovery of facts. In the process, a confession of an accused which is otherwise hit by the principles of Evidence Act finds its place on record. Such kind of statements may have a



direct tendency to influence and prejudice the mind of the Court. This practice must immediately be stopped. In the present case, the Trial Court not only extracted the entire statements but also relied upon them.”

In the case in hand also the learned trial Court has not only allowed the entire confessional statement of the accused to be proved through the Investigating Officer but has also acted upon the same. It was marked as Exhibit-9. It was made use of for recording conviction of the accused as seen from para-20 of the impugned judgment. This approach of the learned trial Court is ex facie illegal. One fails to understand as to how the Senior Officer from the cadre of the Additional Sessions Judge can be oblivious of the basic concept of law and provisions of the Evidence Act.

21. The discovery is sought to be proved by the prosecution by showing that it was witnessed by independent Panch witnesses PW 5 Md. Imtiyaz and PW 9 Siraj Khan. The confessional statement at Exhibit-9 which is thoroughly inadmissible in law and as such cannot look into by the Court even does not bears signature of these two witnesses as Panch witnesses thereof. PW 2 Kasim Khan, the co-villager, who had spoken about disclosure of the accused to the police, in his chief



examination itself has stated that after his arrest, the police had beaten accused Sonu Akhtar Khan and then the accused told police that the dead body is buried in the field. PW 2 Kasim Khan had also witnessed seizure of the 'Kudal'- an instrument of digging from the bamboo hut of PW 4 Hira Sharma. Evidence of PW 2 Kasim Khan in his chief examination that after apprehending the accused, the police had beaten him and then he made a disclosure statement went virtually unchallenged as he was not cross examined on this aspect by the prosecutor. The prosecution was free to declare this witness as hostile and to cross-examine him on this aspect. However, the prosecution has chosen to remain silent on this aspect and allowed statement of PW 2 Kasim Khan regarding third degree treatment to the accused went unchallenged. Thus, the way of obtaining the self-incriminating inadmissible confessional statement of the accused at Exhibit-9 clearly offends the provision of Article 20(3) of the Constitution and it cannot be made use of as a circumstance to connect the accused to the crime in question. The confessional statement so far as it relates to discovery of fact is an outcome of beating and assault on the accused by the police after his arrest.

22. PW 5 Md. Imtiyaz Khan claiming to be a Panch



witness to the discovery of dead body has stated that along with PW 1 Eklaque he had gone to the Police Station Sangrampur where the accused had made confessional statement and then the police took the accused to the field of Arvind Srivastava from where the dead body was recovered. PW 9 Siraj Khan in a similar manner deposed that after arrest of the accused, he was taken to the Police Station where he gave the confessional statement and disclosed that the dead body is buried in the field. Thereafter, as per version of PW 9 Siraj Khan, the accused led the police to that place from where the dead body was recovered. So far as evidence of PW 9 Siraj Khan on this aspect is concerned, the same is coming on record by way of omission. This witness has admitted that he has not disclosed these facts to police while recording his statement. When evidence regarding both these witnesses is compared with that of the Investigating Officer PW 10 Rajnish Kumar, then this entire evidence regarding alleged voluntarily disclosure statement leading to the discovery of fact becomes doubtful. PW 10 Rajnish Kumar has stated that after arrest of the accused at 11:00 PM of 01.07.2011, his confessional statement was recorded at 7:00 AM of 02.07.2011 at village Dariyapur itself. It was not recorded at the Police Station. However, witnesses to this alleged confessional



statements are stating that the confessional statement was made at the Police Station. It is hard to accept this discrepant evidence regarding voluntary statement and resultant discovery particularly when no Panchnama to that effect was prepared by the Investigating Officer nor there is any official record of the investigation to show that these two persons namely, PW 5 Md. Intiyaz and PW 9 Siraj Khan were the Panch witnesses to the alleged discovery.

23. PW 8 Miraj Khan, the First Informant-father had claimed that he had furnished tape-recorded conversation with the person demanding ransom to the police. The prosecution has not come up with forensic evidence on this aspect nor such tape-recorded conversation was ever produced before the Court. In fact, it was incumbent on the part of the prosecution to take up audio forensic investigation by conducting voice analysis test in order to ascertain whether the voice of the person demanding ransom is matching with that of the accused. This evidence is not forthcoming.

24. Similarly, though PW 1 Eklaque Khan had given mobile phone number of the person demanding ransom from him as 8873278472, the prosecution has not placed on record any evidence collected from the Service Provider to show as to



who is the owner of this mobile phone number. The prosecution is satisfied with oral statement of PW 10 Rajnish Kumar that this number was belonging to the father of the accused. Such statement cannot be accepted. Even the Cellphone number or SIM Card of this number was not seized by the Investigator leave apart the work of collection of the Call Detailed Records and that of proving the same before the Court.

25. Seizure of 'Kudal' from the Bamboo hut of PW 4 Hira Sharma is of no consequence as that is the instrument of digging used by the villagers commonly. There is nothing on record to suggest that the earth on the blade of such 'Kudal' was having the DNA of the deceased.

26. The net result of foregoing discussion requires we to hold that the prosecution has utterly failed to prove the charge against the accused entitling him to acquittal. Unfortunately, the learned trial Court has shown ignorance to the basic principles of law and has illegally relied on the confessional statement of the accused made to the police to convict him of such a serious offence.

27. In the result, the appeal deserves to be allowed and is allowed by this Judgment. The impugned judgment and order of conviction and resultant sentence imposed on the



appellant/accused is quashed and set aside. The appellant/accused is acquitted of the offences held to be proved against him. He be set at liberty if not required in any other case.

28. We put on record words of appreciation for the able assistance rendered by Mr. Prince Kumar Mishra, learned Amicus Curiae, to this Court in arriving at the proper conclusion for deciding in that appeal. We direct the High Court Legal Services Authority to pay an amount of Rs.5,000/- to Mr. Prince Kumar Mishra, learned Amicus Curiae, for the services rendered by him.

29. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

Mkr./-

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