

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1310 of 2019**

Arising Out of PS. Case No.-44 Year-2018 Thana- KHAJANCHI HAT District- Purnia

RAJENDRA SAH @ RAJENDRA PRASAD @ RAJENDRA PRASAD SAH
S/o Late Laxmi Prasad Sah R/o Mohalla- Anand Nagar Newalal Chowk, P.S.-
Khazan Hat (Maranga), District- Purnea

... .. Appellant/s

Versus

1. The State of Bihar
2. Dhiren Kumar @ Sunni Raj S/o Narayan Mehata R/o Mohalla- Prabhat Colony, Hanuman Nagar, P.S.- K. Hat (Maranga), District- Purnea
3. Balram Kumar S/o Raj Kumar R/o Mohalla- Koshi Colony, P.S.- K. Hat (Maranga), District- Purnea

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Awadhesh Kumar, Advocate Mr. Ajay Kumar, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH

SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 14-12-2022

This appeal has been preferred under the *proviso* to Section 372 of the Cr.P.C., putting to challenge a judgment dated 24.09.2019 passed by 3rd Additional Sessions Judge, Purnea in Sessions Trial Case No. 193/2018, arising out of K.Hat (Maranga) P.S. Case No. 44 of 2018, whereby the learned trial court has recorded acquittal of respondents no. 2 and 3 from the charge of commission of offences punishable under Sections



363, 364, 365, 302, 201 read with Section 34 of the Indian Penal Code.

2. The appellant (the informant) is the grandfather of the deceased and, therefore, a victim within the meaning of Section 2(wa) of the Code of Criminal Procedure, 1973 (Cr.P.C. for short). The FIR came to be registered based on his written statement to the effect that on 25.01.2018 at about 2:00 pm the respondent no. 2 who was a friend of his elder son Mohan Kumar (PW-1) had come to his residence enquiring about the Mohan Kumar, who was not present in the house. Respondent no. 2 is said to have told the informant that his son Mohan Kumar (PW-1) must pay to him his dues amount of Rs. 30000/- else the consequences would not be good. From the First Information Report, it appears that according to the informant there was another person also who was accompanying respondent no. 2, both of whom had returned thereafter. Outside the informant's house his grandson (i.e. the deceased), who happened to be the son of said Mohan Kumar (PW-1) was playing with others. Respondent no. 2 took the victim along with him, with an allurements to fetch him chocolates. The informant's grandson did not return thereafter, and in the meanwhile Mohan Kumar (PW-1), informed his wife that he



had received a call made by respondent no. 2 from Mobile No. 9297722676 that he had kidnapped his son and that he would kill him, should the said amount of Rs. 30000/- against recharge be not paid to him. They thereafter started searching for the deceased and in that course, she reached a shop belonging to one Ashok Kumar (PW-6), who told him that at about 2:00 pm the deceased had come with two young persons, who were seen alluring the deceased by fetching him chocolates. This incident was captured in a CCTV camera installed in his shop. Based on the said allegation, the aforesaid K.Hat (Maranga) P.S. Case No. 44 of 2018 was registered leveling commission of the offences punishable under Sections 363, 364, 365 read with Section 34 of the Indian Penal Code. It appears that based on suspicion, respondents no. 2 and 3 were apprehended by the police the same day from their respective houses. Owing to the disclosure said to have been made by the respondents no. 2 and 3 in their confessional statements recorded by the police in custody to the effect that they had abducted the victim, killed him and thrown the dead body into a river, Section 302/34 of the IPC was subsequently added in the FIR under the orders of the learned Magistrate. Upon completion of investigation the police submitted its charge-sheet, whereafter, cognizance was taken by



learned Chief Judicial Magistrate, Purnea and the case was committed to the Court of Sessions for trial.

3. At the trial, charges were framed against respondents no. 2 and 3 for commission of the offences punishable under Sections 302, 201, 363, 364, 365 read with Section 34 of the IPC, as said respondents denied the charges, they were put to trial.

4. At the trial following witnesses were examined:-

PW-1 Mohan Kumar (father of the victim)

PW-2 Nitesh Kumar

PW-3 Chandan Kumar

PW-4 Ashok Kumar Sah

PW-5 Tarun Kumar Das

PW-6 Ashok Kumar

PW-7 Bishwajeet Kumar Ray

PW-8 Dilip Yadav

PW-9 Om Prakash Bharti

PW-10 Dr. Yogendra Prasad

PW-11 Rajendra Prasad Sah (the informant)

PW-12 Varun Kumar Jha

PW-13 Pramod Goswami

5. The prosecution brought on record documentary evidence also to substantiate its case at the trial.

6. After closure of the evidence of the prosecution's witnesses, in compliance with the requirement of Section 313 of



the Cr.P.C., the trial court put certain questions with reference to the evidence pointing out towards their guilt for the purpose of giving them an opportunity to explain the circumstances. They, however, denied such circumstances as were explained to them, based on the evidence of the prosecution's witnesses.

7. The trial court, upon analysis of the evidence on record concluded that there were contradictions in the evidence of the prosecution's witnesses on several aspects and there were lapses on the part of the investigating agency also in finding out the truth to establish accusation against these respondents. The trial court doubted the prosecution's story of kidnapping of the deceased at about 2-2:30 pm and he being done to the death by the respondents no. 2 and 3 at or before 6:00 pm; more so for the reason that both the respondents no. 2 and 3 were found in their houses by the police soon after the occurrence, which was against normal course of human nature. According to the trial court, in natural course the respondents would have attempted to run away or conceal themselves after commission of such offence.

8. Mr. Awadhesh Kumar, learned counsel appearing on behalf of the appellant has submitted that the trial court has recorded finding of conviction in a mechanical and casual



manner. He has submitted that the trial court miserably failed to appreciate the effect of recovery of the dead body of the deceased based on the confessional statements made by respondents before the police during the course of investigation. He has contended that the learned trial court ought to have considered the scope of Section 27 of the Indian Evidence Act that a statement made in police custody is admissible to the extent, they can be proved by the subsequent discovery of facts by applying the doctrine of confirmation by subsequent facts. He has submitted that the learned trial court has avoided to deal with the evidence adduced at the trial to the extent it related to the recovery of the dead body of the deceased based on disclosure made by respondents no. 2 and 3 in their confessional statements before the police.

9. Considering the above mentioned submissions made on behalf the appellant, we are required to scrutinize the evidence of the prosecution's witnesses.

10. The PW-1 supporting the prosecution's case deposed at the trial that he had received a phone call, with the caller claiming himself to the respondent no. 2 demanding a ransom of Rs. 30000/-. It is evident from his evidence that he could not disclose the number of the mobile phone, from which



he had received the call said to have been made by respondent no. 2 and respondent no. 3. It is noteworthy that PW-1 and respondent no. 2 were closely associated and had business dealings too as would emerge from the evidence of the prosecution's witnesses. He did not depose that the said call was made through mobile number of respondent no.1.

11. The PW-2, deposed that he had seen respondents no. 2 and 3 giving toffees to the deceased at about 2:00 pm on 25.01.2018. He had further seen respondent no. 2 taking the victim in his motorcycle towards 'Basant Vihar'. At about 4:00 pm, the wife of PW-1 had come to his shop and had told him that her son had been abducted and a demand of Rs. 30000/- was being made as ransom. The mobile location of the mobile phone from which the call was received was obtained, which indicated that its last location was Gadhbandi. He learnt from CCTV footage in the shop of Ashok Kumar Sah (PW-4) that respondent no. 2 (Dhiren Kumar) was giving the deceased toffee. He along with the police reached the house of respondent no. 2, where respondent no. 2 was present. Respondent no. 2 disclosed the name of the other person who had accompanied him as Balram Kumar (respondent no. 3). They went to the house of respondent no. 3, where respondent no. 3 was present.



Both the respondents confessed their guilt before the police while in custody and admitted that they had kidnapped the child and killed him. On being enquired by the police about the location of the dead body, they disclosed that they had thrown the dead body after packing the same in a plastic bag near an iron bridge. For the verification of the disclosure made by the said respondents, the police went to the place so indicated by them. Next day they went to Dhankaniya Ghat, where on the basis of the disclosure made by the respondents no. 2 and 3, with the help of divers the dead body was recovered, which was found packed in a yellow-colour packet. An inquest report was prepared in his presence on which the PW-2 had put his signature. He identified his signature on the arrest memo and Exhibit-3. He also proved the seizure list prepared on the basis of seizure of the articles recovered from respondents no. 2 and 3. In his cross-examination, he disclosed that he was examined by the police at 3:00 pm on the next day i.e. 26.01.2018. He has seen respondent no. 2 giving the deceased toffee in the CCTV footage.

12. The PW-3, Chandan Kumar, in his evidence deposed that at 2:30 pm, the wife of PW-1 had come to his shop searching for her son and had told him that someone had



demanded ransom. He also deposed that he had seen CCTV footage with other members of the society and had seen two persons giving the deceased chocolate. He identified the persons who were seen giving the chocolate as respondents no. 2 and 3. He also proved his signature on the inquest report. He deposed that he had seen the CCTV footage at 6:00 to 7:00 pm. In his cross-examination, PW-3 deposed that his statement was not recorded by the police. Apparently, thus, for the first time he was deposing before the Court.

13. The PW-4, in his evidence deposed that respondent no. 2 (Dhiren Kumar) had come to his shop with whom three-four children including the deceased had come for purchasing toffees. The toffee which they wanted to have was not available in his shop, therefore, they had gone to another shop in front of his shop. After purchasing toffees from the said shop, he had distributed them amongst the children. At about 5:00 pm, the mother of the victim came to his shop complaining that the victim had been kidnapped and a demand for ransom was being made. PW-4, told the victim's mother that the victim had come with a boy and had showed her the CCTV footage, based on which the mother of the victim had identified the respondent no. 2 as Dhiren Kumar. On identification of the mother of the



deceased in the CCTV footage, PW-4 learnt that he was Dhiren Kumar. He proved his signature on the seizure list as Exhibit-12 and his signature on the written report of the informant. In his cross-examination, he admitted that he was not examined by the police during the course of investigation.

14. Similarly, PW-5 Tarun Kumar Das, in his deposition, at the trial, stated that he was informed about the occurrence by his wife, whereafter, he had returned to his house and found that his family members and other villagers had gathered in the shop of Ashok Kumar Sah (PW-4). Police were also present there. It was found in the CCTV footage that someone was giving the deceased toffee. It is evident from the evidence of PW-5 that he is a *hearsay* witness.

15. PW-6, Ashok Kumar, also deposed that he had seen in the CCTV footage that the respondents no. 2 was giving the deceased chocolate. Based on the CCTV footage, the respondents no. 2 and 3 were apprehended by the police and on whose confessional statement the dead body of the deceased was recovered.

16. PW-7 is another witness, whose evidence is based on CCTV footage. According to him, he learnt telephonically in the night, when he had already taken his dinner, from one



Guddu Kumar that two persons were apprehended by the police, who had confessed their guilt. It is evident from his cross-examination that he was not examined during the course of investigation and he too was deposing for the first time at the trial.

17. Evidence of PW-8 is only to the effect that two persons had come to his shop and purchased chocolates, which they had distributed among children. Subsequently, he learnt at about 2:00-2:30 pm that the deceased was kidnapped. By that time he had gone back to his house. When he returned to his shop, he noticed that many persons had assembled in front of the general store of Ashok Kumar Sah (PW-4) to watch CCTV footage. PW-8 declined to identify these respondents who were present in the Court nor did he support the prosecution's case in any other manner.

18. Similarly, evidence of PW-9 (Om Prakash Bharti) is based on CCTV footage. He identified respondents no. 2 and 3 who were present in the Court as the persons whom he had seen in the CCTV footage giving the deceased chocolate.

19. The Doctor, who had conducted the postmortem examination was examined as PW-10. According to him, the cause of death was due to asphyxia as a result of strangulation.



He proved following anetmortem injuries on the dead body of the deceased:-

2. I found following antemortem injuries:-

- a) On external examination- rigour mortis was present in all four limbs.
- b) Bruise over forehead on left side- 1' X ½" coloured reddish.
- c) Washerman's hands and feet appearance.
- d) Ligature mark over neck just below laryngeal prominent, all round neck, colour reddish-horizontal, width 1/4".

3. On dissection:-

- (i) Head- meninges and brain matter congested,
- (ii) Neck- chymosis present under the ligature mark in subcutaneous tissue of neck and adjacent muscle.
- (iii) Mucus of larynx and trachea- congested
- (iv) Chest- Lungs congested and adjudging dark colour from cut surface.
- (v) Heart- left chamber of heart empty and right chamber of heart contain dark colour blood.
- (vi) Abdomen- All abdominal viscera congested.
- (vii) Stomach contain semi-digested rice(food)
- (viii) Small and Large intestine- contains gas and fiscal matter.



(ix) Urinary Bladder- empty

(x) Genital within normal limits

20. The PW-11, the informant and the grandfather of the victim supported the prosecution's case. From his deposition it appears, *inter alia*, that he learnt the fact that respondent no. 2 had given the deceased toffee from the CCTV footage in which he had seen two persons giving the deceased toffee.

21. The Investigating Officer was examined as PW-12. From his evidence it appears that he had obtained tower location of the mobile phone which was used for demanding ransom. He deposed in his evidence that father of the deceased, Mohan Kumar (PW-1) in his statement had mentioned that it was not the voice of respondent no. 2 who had made the demand for ransom by the said mobile phone. He had, however, claimed himself to be Dhiren Kumar (respondent no. 2). According to him, at 4:30 pm on 26.01.2018 the confessional statement of respondents no. 2 and 3 were recorded. He (Dhiren Kumar) confessed that the SIM of the mobile phone of respondent no. 3 was used for making ransom call and as the demand for ransom was not met, they had strangled the deceased and killed him and thrown the dead body in the river. Thereafter, the police party had come to the house of Dhiren Kumar, whereafter,



seizure of certain articles were made. From the house of Dhiren Kumar, the police went to the house of respondent no. 3 (Balram Kumar) and apprehended him. At the Police Station, respondent no. 3 also confessed the guilt and confirmed the confessional statement made by respondent no. 2. He further deposed that on 26.02.2018, he had sealed the DVD in which the CCTV footage based on CCTV camera installed in the shop of Ashok Kumar Sah (PW-4) was recorded. He proved the said DVD as Exhibit-1. In his cross-examination, he deposed that he had reached the first place of occurrence within ten minutes. In his cross-examination, the Investigating Officer deposed that Nitesh Kumar (PW-2) had never stated before him during the investigation that respondent no. 2 (Dhiren Kumar) had come with another person and that he had seen Dhiren Kumar giving the deceased toffee. He had also not stated that he had seen both the persons (respondents no. 2 and 3) going towards Basant Vihar with the deceased but had not seen them returning. He also deposed that Nitesh Kumar (PW-2) had not stated that at 4:00 pm, the wife of PW-1 had come to his shop to tell him that the deceased was abducted and a ransom of Rs. 30000/- was being demanded. The deposition the Investigating Officer suggests that PW-2 made such depositions at the trial which he



had not disclosed to the police during the course of investigation, apparently made an improvement in his evidence.

22. PW-12, a Chowkidar posted in Maranga Police Station produced before the Court the certain seized articles which were kept in connection with the said case in Malkhana of the Police Station. From his cross-examination, it is evident that he could not prove as to who had written the case number over the said material exhibits. He simply deposed that he had brought those material exhibits under the orders of the SHO of the police station which came to marked as exhibit with objection.

23. We have outlined the evidence of different prosecution's witnesses adduced at the trial to have an overview of entire material brought on record by the prosecution to establish its case that the deceased was kidnapped for ransom and he was subsequently killed as the demand of ransom was not met. Following are broad aspects based on which the prosecution intended to establish its case :-

(i) Respondent no. 2 had made a demand for payment of Rs. 30000/- in relation to some business transaction between him and PW-1 and had threatened that if the amount was not paid the consequences would not be good. This had happened



according to the informant at 2:00 pm.

(ii) The respondent no. 3 was accompanying respondent no. 2 when they had gone to the house of the informant. Though, the informant was knowing respondent no. 2 from before, he did not know the other person who subsequently came out to be Balram Kumar (respondent no.3). Respondent no. 2 was seen in the CCTV footage giving chocolate to the deceased. Most of the witnesses have deposed that they learnt from the CCTV footage that respondent no. 2 was giving toffee to the deceased.

24. The needle of suspicion on these respondents came to be pointed apparently based on what was seen in the CCTV footage. The CCTV footage, which is an electronic document has not been proved in accordance with the statutory requirements under Section 65B of the Indian Evidence act. Production of the DVD containing the CCTV footage, in the Court's opinion was manifestly not in accordance with Section 65B of the Indian Evidence Act. The data stored in the DVD were not proved as a documentary evidence within the meaning of section 3 of the Evidence Act. It is trite that electronic evidence is inadmissible unless it is proved in accordance with the requirements of Section 65B of the Evidence Act.



25. Further, we have noticed that some of the witnesses including PWs- 3, 4 and 7, for the first time, appeared as witnesses before the trial court to prove the prosecution's case. They were not examined by the police during the course of investigating, as is evident from their own depositions. PW-5 is merely a *hearsay* witness. Evidence of PW-2 has been contradicted by the Investigating Officer (PW-12) as has been noticed hereinabove and is clear from the evidence of PW-12 in paragraphs 41 and 43. In such circumstance, it would not have been safe for the trial court to have recorded conviction based merely on the confessional statements of the respondents no. 2 and 3 before the police.

26. Learned counsel for the appellant has given much emphasis on the recovery of the dead body of the deceased based on confessional statements of respondents no. 2 and 3, while in police custody, applying the doctrine of confirmation of the information furnished by them. He has submitted that their confessional statement is admissible under Section 27 of the Evidence Act. It, however, does not appear from the submissions advanced on behalf of the appellant nor from the impugned judgment of the trial court that the so-called confessional statement of the respondents no. 2 and 3 were duly



recorded in police custody and proved, so as to make the same admissible under Section 27 of the Evidence Act. Further, the scope and ambit of Section 27 of the Evidence Act have been considered and law has been laid down by the Supreme Court and this Court on multiple occasions. The light thrown by the Privy Council in its decision in the case of ***Pulukuri Kottaya vs. Emperor (AIR 1947 PC 67)*** still illuminates the field as a standard for the elucidation on the subject. We may usefully quote relevant portion of paragraph 10 of ***Pulukuri Kottaya*** (supra) which reads as under:-

“10.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."

27. The position of law on the admissibility of evidence has been lucidly explained in the case of ***State of Uttar Pradesh vs Deoman Upadhyay (AIR 1960 1125)*** by the Supreme Court, paragraph 71 of which reads thus:-

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



mineshaft”, and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mine-shaft.”

28. We need not further encumber our judgment much with numerous precedents dealing with the requirements of admissibility of an evidence under Section 27 of the Evidence Act. We, while considering the issue are tempted to mention enunciation of law in this regard in case of ***Bodhray @ Bodha vs. State of Jammu and Kashmir*** reported in ***(2002) 8 SCC 45***, relevant portion of paragraph 18 of which reads thus:-

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



becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : (1946-47) 74 IA 65] is the most-quoted authority



for supporting the interpretation that the “fact discovered” envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See State of Maharashtra v. Damu Gopinath Shinde [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301].) No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which “distinctly relates to the fact thereby discovered”. But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.”

[Emphasis supplied]

29. The prosecution’s evidence in the present case is manifestly deficient, to bring home the charge against the appellant based merely on the so-called confessional statements of respondents no. 2 and 3 which too have not been duly proved.

30. It is worthwhile mentioning that PW-12 in his evidence in paragraph-9 deposed that the confessional statement of respondent no. 2 was recorded at 4:30 pm on 26.01.2018. It



emerges, however, from the consistent case of the prosecution that the dead body of the deceased was recovered in the morning of 27.01.2018.

31. Considering aforesaid circumstances, we are of the considered opinion that the view which has been taken by the learned trial court while recording finding of acquittal is reasonably possible view.

32. We do not find it to be a fit case for interference in the present appeal against acquittal. This appeal is accordingly dismissed, being devoid of merit.

(Chakradhari Sharan Singh, J)

(Chandra Prakash Singh, J)

anand/-

AFR/NAFR	NAFR
CAV DATE	NA
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