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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No. 697 of 2022

Reserved on: 13.11.2024

Date of Decision: 29.11.2024

State of H.P. ...Applicant.

versus

Vijay Kumar Singh ...Respondent.

Coram

Hon'ble Mr Justice Vivek Singh Thakur, Judge.

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?[1] Yes.

For the Applicant : Mr. Varun Chandel, Additional Advocate General.

For the Respondent : None

Rakesh Kainthla, Judge

The State has filed the present application seeking leave to appeal against the judgment dated 31.08.2021 passed by learned Additional Sessions Judge-II, Solan, District Solan (learned Trial Court) vide which the respondent (accused before learned Trial Court) was acquitted of the commission of offences punishable under Sections 302 & 201 of Indian Penal Code (in short 'IPC'). *(Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).*

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan against the accused for the commission of offences punishable under Sections 302 and 201 of IPC. It was asserted that Ram Rattan (PW9) Pradhan Gram Panchayat Barotiwala informed the police on 03.06.2014 at 4 PM that the naked dead body of Meena, wife of the accused, was found in a water tank. An entry (Ex.PW13/C) was recorded in the Police Station. SI/SHO Kashma Dutt (PW15), SI Anil Thakur, ASI Manmohan Singh, ASI Naseem Khan, LC Rushpal, LC Raj Kumari, and LC Kulwinder Devi went to the spot to verify the correctness of the information. Up Pradhan Gurbaksh Singh (PW2), Harinder Singh, Vijay Singh and other persons had gathered on the spot. The dead body of a lady covered with the branches of a Sheesham tree was found in an empty water tank. The signs of injuries and strangulation marks were present on the body. Accused Vijay Kumar identified the dead body as that of his wife Meena. Gurbaksh Singh (PW2) made a statement (Ex.PW2/A) that he was Up Pradhan of Gram Panchayat Barotiwala. Ram Rattan (PW9), Pradhan told him telephonically on 03.06.2014 at 4 PM that Vijay Singh informed Ram Rattan (PW9) about the discovery of the dead body of his wife who had been missing since 01.06.2014. Ram

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Rattan also informed Gurbaksh Singh (PW2) that he had told the police about the recovery of the dead body. It appeared that some unknown persons had murdered Meena and put her dead body in the water tank. Kashma Dutt (PW15) sent the statement (Ex.PW2/A) to the Police Station through LC Rushpal. FIR (Ex.PW12/A) was recorded in the Police Station. Inspector Kashma Dutt (PW15) prepared the inquest report (Ex.PW15/A). He moved an application (Ex.PW3/A) to the Medical Officer Civil Hospital Nalagarh for conducting the postmortem examination of the deceased. Dr. Amarjit Singh (PW3) conducted the postmortem examination of the deceased. He found a fracture of thyroid cartilage on the right side. It was not possible for him to opine whether the injuries were antemortem or postmortem in nature because of the highly decomposed state of the body. He preserved the viscera and handed it over to the accompanying police official. He issued the report (Ex.PW3/B). Inspector Kashma Dutt (PW15) conducted the investigation. He took the photographs (Ex.PW15/B-1 to Ex.PW15/B-9) with the help of an official camera. He found a pair of slippers (Ex.P12) at a distance of 20-25 meters from the spot. He put them in a parcel and sealed the parcel with five impressions of seal ‘A’. The parcel was seized vide memo

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(Ex.PW2/B). Sample seal (Ex.PW2/C) was taken in possession. The slippers were identified by the accused as belonging to his wife. Inspector Kashma Dutt (PW15) seized blood-stained mud and dry leaves in two different jars. These were put in a parcel and the parcel was sealed with five impressions of seal 'A'. These were seized vide memo (Ex.PW2/D). He prepared the spot map (Ex.PW15/C) and recorded the statements of witnesses as per their version. The accused had reported to the police that his wife was missing. Copy of missing report (Ex.PW13/A) was taken in possession. Kashma Dutt (PW15) interrogated the accused. He made a disclosure statement (Ex.PW2/E) that he could get the hollow iron pipe recovered that was concealed by him in his jhuggi. The accused led the police and the witnesses to his jhuggi from where a hollow iron pipe (Ex.P10) was recovered concealed in a wooden box. Its sketch (Ex.PW2/H) was prepared and it was seized vide memo (Ex.PW2/G). The parcel was sealed with seal 'E'. Sample seal (Ex.PW2/J) was taken on a separate piece of cloth. The police searched the jhuggi of the accused and recovered two shirts (Ex.P14 and Ext. P17) and two trousers (Ex.P15 and Ex.P18). These were sealed in two different parcels and seized vide memo (Ex.PW2/K). Photographs of the recovery (Ex.PW15/D1 to

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Ext.PW15/D9) were taken. Spot map of the recoveries (Ex.PW15/E) was prepared. The accused made another disclosure statement (Ex.PW-2/R) that he could show the place where he had killed his wife. He led the police to the place. Memo (Ex.PW2/M) was prepared. Threads (Ex.P5) and a button (Ex.P2) were found on the spot. These were put in a parcel and the parcel was sealed with five seals impression of seal 'E'. These were seized vide memo (Ex.PW2/T). Spot map (Ex.PW15/F) of the place of recovery was prepared. Photographs (Ex.PW15/G1 to Ex.PW15/G3) were taken. The accused also made a disclosure statement (Ex.PW2/M) that he could show the spot where he had burnt the clothes of his wife. The accused led the police to the spot where he had burnt the clothes of his wife. A memo of identification (Ex.PW2/Q) was prepared. Pieces of half-burnt Sari along with the ashes were put in a jar. Controlled samples from a distance were taken in a separate jar. The jars were put in two separate parcels and each parcel was sealed with five impressions of seal I. These were seized vide memo (Ex.PW2/P). Seal impression (Ex.PW2/N) was taken on a separate piece of cloth. The spot map of the recovery (Ex.PW2/H) was prepared. The photographs of the spot (Ex.PW15/J1 to Ex.PW15/J3) were taken. The blood sample of the daughter of the deceased was taken by Dr.

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Anil Kumar. It was seized vide memo (Ex.PW15/P). An identification certificate (Ex.PW15/M) was prepared. The case property was deposited with HC Randheer Singh (PW12) who deposited it in Malkhana and made an entry (Ex.PW12/C) in the register of Malkhana. He sent the case property to the SFSL Junga, vide R.Cs. (Ex.PW12/D and Ex.PW12/E). The results of analysis (Ex.PW17/A, Ex.PW18/A, Ex.PW18/B and Ex. PX) were issued stating that no poison was detected in the viscera; human blood was detected on the vaginal swab of the deceased, blood-stained swab lifted from the spot and shirt of the accused; the controlled sample of soil was similar to the sample lifted from the spot; the threads recovered from the spot were similar to the threads found in the shirt; the button recovered from the spot was similar to the button of the shirt; the DNA profile obtained from the vaginal swab of the deceased, and the blood sample on the FTA card were consistent with the biological mother and the daughter; the DNA profile obtained from the shirt of the accused pertained to a male which did not match the DNA profile obtained from the vaginal swab of the deceased; and the blood-stained soil lifted from the spot yielded highly degraded, DNA, which did not show amplification. Dr. Amarjit Singh (PW3) issued a final report after

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the receipt of the report of analysis stating that the head injury was sufficient in the ordinary course to cause death and that strangulation was possible in case a person is strangulated with a cloth by Saree. The statements of the remaining witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and presented before the learned Additional Chief Judicial Magistrate Kasauli who committed it to learned Sessions Judge, Solan for trial. Learned Sessions Judge, Solan assigned the case to learned Additional Sessions Judge-II, Solan (learned Trial Court).

3. The learned Trial Court charged the accused with the commission of offences punishable under Sections 302 and 201 of IPC to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined 17 witnesses to prove its case. Santosh Kumar (PW1) and Tara Chand (PW6) accompanied the accused in search of his wife. Gurbaksh Singh (PW2) is the informant and witness to various recoveries. Dr. Amarjit Singh (PW3) conducted the postmortem examination of the deceased. Ami Chand (PW4) is the owner of the land where the jhuggies were constructed. Shashi Pal (PW5) proved that the accused and his wife were employed at Haripur Paper Company, Barotiwala. Devinder

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Kumar (PW7) is the Nodal Officer who proved the call details record. Shashi Kant Verma (PW8) is the Nodal Officer of Idea Cellular who proved the call details record. Ram Rattan (PW9) is the Pradhan to whom the accused told about the recovery of the dead body. HHC Baljit Singh (PW10), and HHC Rakesh Kumar (PW11) carried the case property to SFSL, Junga. HC Randheer Singh PW(12) was posted as MHC with whom the case property was deposited. Constable Dev Raj (PW13) registered the FIR. LC Rushpal (PW14) carried the rukka from the spot to the Police Station. Inspector Kashma Dutt (PW15) conducted the investigation. Dr Anil Kumar (PW16) preserved the blood sample of Sarswati, the daughter of the deceased. Nasib Singh Patiyal (PW17) proved the report of analysis. SI Daya Ram (PW18) prepared the supplementary challan.

5. The accused in his statement recorded under Section 313 of Cr.P.C. admitted the relationship between him and the deceased. He denied the rest of the prosecution case. He stated that he had lodged the missing report with the police. A false case was instituted against him and he was innocent. No defence was sought to be adduced by the accused.

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6. The learned Trial Court held that the prosecution case was based upon circumstantial evidence. The prosecution did not examine the daughter of the deceased who was the best person to depose about the relationship between the accused and the deceased. The statement made by the accused under Section 27 of the Indian Evidence Act can not lead to any inference that he had committed the murder. The accused was searching for his wife and the recovery of the button and the shirt of the accused in the bushes near the tank from where the dead body was recovered cannot lead to an inference that he had committed the murder. The DNA report did not connect the blood found on the shirt of the accused to the deceased. The pipe was not connected to the commission of crime. The Medical Officer categorically stated that he could not say whether the injuries sustained by the deceased were antemortem or postmortem. The prosecution case was not proved beyond a reasonable doubt; therefore, the accused was acquitted.

7. Being aggrieved from the judgment passed by the learned Trial Court, the State has filed the present application seeking leave to appeal. It has been asserted that the learned Trial Court failed to properly appreciate the evidence. The accused was

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acquitted on flimsy ground. The testimonies of prosecution witnesses were discarded without any reason. The blowing pipe was recovered at the instance of the accused. Gurbaksh Singh (PW2) proved the disclosure statement and the recovery. The accused had identified the place where he had set the clothes of his wife on fire. He identified the place where he had strangulated his wife. The police recovered the button and the threads from the bushes. The call details record also proved the presence of the accused near the place of the incident. Human blood was found on the shirt of the accused for which no explanation was provided. Therefore, it was prayed that the present application be allowed and the leave to appeal be granted to the State.

8. We have heard Mr Varun Chandel, learned Additional Advocate General for the applicant/State and have gone through the records carefully.

9. Mr Varun Chandel, learned Additional Advocate General for the applicant/State submitted that the learned Trial Court erred in acquitting the accused. It was duly proved on record by the circumstantial evidence that the accused had committed murder. First, he had pointed out the tank from where the dead body was recovered which can only lead to an inference that he was aware of

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the existence of the dead body in the water tank. He got the iron pipe recovered. The Medical Officer stated that injuries caused to the deceased could have been caused by the iron pipe. The button and the threads of the shirt of the accused were found near the place of the incident. The call details record also proved the presence of the accused on the spot. All these circumstances taken together can lead to only one inference that the accused had committed the murder of the deceased and learned Trial Court erred in acquitting the accused. Hence, he prayed that the application be allowed and the leave to appeal be granted to the State.

10. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

11. The present appeal has been filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in ***Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130*** that while deciding an appeal against acquittal, the High Court should see whether the evidence was properly appreciated on record or not; second whether the finding of the Court is illegal or affected by the error of law or fact and thirdly; whether the view taken by the Trial Court was a possible view, which could have been

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taken based on the material on record. The Court will not lightly interfere with the judgment of acquittal. It was observed:

> "**25.** We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.
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> **26.** No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.
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> **27.** It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "*two-views theory*" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the accused. For,

the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

28. In ***Selvaraj* v. *State of Karnataka* [*Selvaraj* v. *State of Karnataka*, *(2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]***: (SCC pp. 236-37, para 13)

> "*13.* Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in ***Jagan M. Seshadri v. State of T.N. [Jagan M. Seshadri v. State of T.N., (2002) 9 SCC 639: 2003 SCC (L&S) 1494]*** has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus : (SCC p. 643, para 9)
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> > '*9.* ... We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could

be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

29. In ***Sanjeev v. State of H.P. [Sanjeev v. State of H.P., (2022) 6 SCC 294: (2022) 2 SCC (Cri) 522]***, the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7)

"7. It is well settled that:

7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see ***Vijay Mohan Singh v. State of Karnataka [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586***] and ***Anwar Ali v. State of H.P. [Anwar Ali v. State of H.P., (2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395]***).

7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see ***Atley v. State of U.P. [Atley v. State of U.P., 1955 SCC OnLine SC 51: AIR 1955 SC 807]***).

7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see ***Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412: 1998 SCC (Cri) 1320]***)."

12. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

13. Santosh Kumar (PW1) stated that he went to the Police Station on 05.06.2014 and the accused told in his presence that his

wife was talking to someone in Bengal on her Mobile Phone and he had killed her with a stick and strangulated her with a Saree. He lodged the missing report so that nobody could suspect his involvement. He specifically stated in his cross-examination that the accused was in police custody on 05.06.2014. The Police Officer told him in the Police Station that he would make him (Santosh Kumar) hear what the accused had told the previous night.

14. This statement clearly shows that the accused was in police custody and the statement made by the accused to the police heard by this witness cannot be proved in view of Section 26 of the Indian Evidence Act which prohibits the reception of any confession made by the accused while in custody. In ***King-Emperor v. Pancham, 1933 SCC OnLine Oudh CC 198: 1933 OWN 348*** the accused was in the custody of a village chowkidar who went away and the accused confessed to the villagers. It was held that the confession was hit by Section 26 of the Indian Evidence Act as the accused was in custody when he had confessed. It was observed at page 354:

> "The learned Government Advocate has in the first place laid great stress upon the evidence adduced on behalf of the prosecution which goes to prove that the accused Pancham admitted his guilt before independent and respectable villagers the day after the murder had been committed. The

evidence in proof of this extra-judicial confession said to have been made by the accused Pancham consists of the testimony of Bhabhuti Singh (P.W. 12), Gajraj Singh (P.W. 13) and Lila (P.W. 15). We are of opinion that it is not open to the prosecution to prove this extra-judicial confession of Pancham in the present case in view of the provisions of section 26 of the Indian Evidence Act. Section 26 of the Indian Evidence Act is as follows:—

> "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."

It follows from this section that only if the confessing accused is not in the custody of the police can any confession made by him to any third person be admissible in evidence. In the present case the evidence of the prosecution witnesses which goes to prove the extra-judicial confession itself shows that the accused Pancham was in the custody of the village chaukidar Himma when he admitted his guilt before certain villagers. In ***Empress v. Lester [20 Bom. 165.]***, it was held by the Acting Chief Justice of the Bombay High Court that when a person had been arrested on a charge of murder and while in the temporary absence of the policeman had made a confession to a friend, such a confession was not admissible in evidence in view of the provisions of section 26 of Act 1 of 1872. It was further held that notwithstanding the temporary absence of the policemen the accused was still in police custody and that in view of section 26 of the Indian Evidence Act, the question relating to the confession of the prisoner must be disallowed.

Again in ***Emperor v. Mallangowda [42 Bom. 1.]***, the facts were that an accused, (an under trial prisoner) was sent up by the Magistrate in whose lockup he was in the custody of two policemen to a hospital for treatment and the policemen made him over to the doctor and waited in the verandah to take him back and while with the doctor in his room, the accused made a confession of his guilt. At the trial, the confession was allowed to be proved. A question having arisen whether the confession was properly let in, it was held that the confession was excluded by the provisions of

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section 26 of the Indian Evidence Act because the accused who was in police custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah.

Similarly in ***Gurdial Singh v. King Emperor [139 Ind. Cas. 429.]***, it was held by the Lahore High Court that the expression "police custody" to be found in section 27 of the Indian Evidence Act did not necessarily mean formal arrest but that it also included some form of police surveillance and restriction on the movements of the person concerned by the police.

In ***Emperor v. Sheo Ram [108 Ind. Cas. 398.]***, the facts were that the accused was a postmaster who had been in the police lock-up for three days and was brought out temporarily and taken to the house of the Superintendent of Post Offices and before that officer, the accused made a confession and was again brought back to the lock-up. In these circumstances, it was held that no breach of the police custody was occasioned by the temporary separation of the accused from the sub-inspector of police and the confession made by the accused was inadmissible in evidence.

In ***Maung Lay v. King Emperor [1 Rang 609.]***, it was held by the High Court at Rangoon that as soon as an accused person or a suspected person came into the hands of a police officer, he was in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and was therefore in the custody of the police within the meaning of sections 26 and 27 of the Indian Evidence Act.

It follows from the rulings cited above that the extrajudicial confession alleged to have been made by Pancham before certain villagers is not admissible in evidence in view of the provisions of section 26 of the Indian Evidence Act because Pancham was in police custody at the time. It has been held by Mr Justice Lindsay in ***Dal v. King Emperor [1 O L J 687.]***, that a village chaukidar is a police officer within the meaning of section 25 of the Indian Evidence Act, and this ruling has been followed by this Court in all subsequent cases.

The result, therefore, is that we must exclude from our consideration the evidence of the villagers P.W. 12 Bhabhuti

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> Singh, P.W. 13 Gajraj Singh and P.W. 15 Lila, so far as it concerns the extra-judicial confession said to have been made by Pancham in their presence. Ground No. 4 of the memorandum of appeal must therefore fail."

15. It was laid down by the Hon'ble Supreme Court in ***Kartar Singh v. State of Punjab, (1994) 3 SCC 569: 1994 SCC (Cri) 899*** that the confession made by the accused in the custody of the police officer is inadmissible. It was observed at page 722:

> "**383.**...Sections 24 to 30 of the Evidence Act deal with the provability or relevancy of a confession. A confession made by an accused person is irrelevant if it appears to the court to have been caused by inducement, promise or threat having a reference to the charge proceeding from a person in authority. By Section 25 there is an absolute ban at the trial against proof of a confession to a police officer, as against a person accused of any offence. The partial ban under Section 24 and total ban under Section 25 applied equally with Section 26 that no confession made to any person while the accused is in the custody of a police officer unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 makes an exception to Sections 24, 25 and 26 and 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 such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The provisions in Sections 28 to 30 are not relevant for discussion. The fascicule of Sections 24 to 30 aims to zealously protect the accused against becoming the victim of his own delusion or the mechanisation of others to self-incriminate in crime. The confession, therefore, is not received with assurance, if its source be not *omni suspicious mojes*, above and free from the remotest taint of suspicion. The mind of the accused before he makes a confession must be in a state of perfect equanimity and must not have been

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> operated upon by fear, hope or inducement. Hence threat promise or inducement held out to an accused makes the confession irrelevant and excludes it from consideration. A confession made to a police officer while the accused is in custody or made before he became an accused, is not provable against him on any proceeding in which he is charged to the commission of the said offence. Equally, a confession made by him, while in the custody of the police officer, to any person is also not provable in a proceeding in which he is charged with the commission of the offence unless it is made in the immediate presence of the Magistrate. The police officer is inherently suspected of employing coercion to obtain a confession. Therefore, the confession made to a police officer under Section 25 should totally be excluded from evidence. The reasons seem to be that the custody of police officers provides easy opportunities of coercion for extorting confession. Section 25 rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion or by enticement. The legislative policy and practical reality emphasise that a statement obtained, while the accused is in police custody, truly be not the product of his free choice. So a confessional statement obtained by the law enforcement officer is inadmissible in evidence."

16. It was held in ***M.V. Mahesh v. State of Karnataka, 1995 SCC OnLine Kar 244 : (1995) 5 Kant LJ 712: 1996 Cri LJ 771*** that a confession made in the presence of the police official to a reporter cannot be proved. It was observed at page 734:

> **31.** The next circumstance relied on by the prosecution to drive home the guilt of the accused is the extra-judicial confession supposedly made by the accused-appellants before P.W. 27, a press reporter. The report of the confession is published in the newspaper and the same is produced at Ex. P-29. P.W. 27 - Alan Mendonsa is a reporter for the

> *Indian Express daily*. He has stated that after learning that the appellants were in police custody he went to the Rajajinagar police station and saw the accused he talked with them and put them certain questions and the two accused answered his questions and whatever they told him was published in the *Indian Express* daily on 27-8-1988 and a copy of the said publication is produced at Ex. P-39(a). This witness admits that he talked with the accused when the accused were in police custody. He also admits that Sub-Inspector was there with him and plain clothes police were also speaking with the accused when he went there. Section 26 of the Evidence Act lays down that no statement made by any person while he is in the custody of a Police Officer unless it is made in the presence of a Magistrate shall be proved against the said person. It is not the evidence of P.W. 27 that there was any Magistrate present in the police station at the time when the two appellants were alleged to have made the statements. As per the admission of the witness himself, the appellants were in police custody and the Police Officials were also present there. In view of these admissions, Ex. P-39(a) is hit by the provisions of Section 26 of the Evidence Act and the alleged statement cannot be held to have been proved against the accused/appellants. It is admitted by P.W. 27 in his evidence that D.C.P. West, Bharani was present when he went there and he gave the history of the case to all the newspapers and the same was published. His admission that the papers published the history given to them by Bharani goes to show that he had known the history of the case from the D.C.P. Thus, the extra-judicial confession cannot be treated as held to have been proved against the accused.

17. It was laid down by the Hon'ble Supreme Court in ***Allarakha Habib Memon v. State of Gujarat, (2024) 9 SCC 546: 2024 SCC OnLine SC 1910*** that a confession recorded by a doctor of an accused in custody is inadmissible being hit by section 26 of Indian Evidence Act. It was observed at page 570:

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> "**39.** The trial court as well as the High Court, placed extensive reliance on the confessions of the appellants-accused Mohmedfaruk alias Palak Safibhai Memon and Amin alias Lalo recorded by the Medical Officer, Dr Arvindbhai (PW 2) while preparing the injury reports of the accused.
>
> **40.** We find that these so-called confessions are *ex-facie* inadmissible in evidence for the simple reason that the accused persons were presented at the hospital by the police officers after having been arrested in the present case. As such, the notings made by the Medical Officer, Dr Arvindbhai (PW 2) in the injury reports of Mohmedfaruk alias Palak and Amin alias Lalo would be clearly hit by Section 26 of the Evidence Act, 1872 (hereinafter being referred to as "the Evidence Act"). As a consequence, we are not inclined to accept the said admissions of the accused as incriminating pieces of evidence relevant under Section 21 of the Evidence Act. The circumstance regarding the identification of place of incident at the instance of the accused is also inadmissible because the crime scene was already known to the police and no new fact was discovered in pursuance of the disclosure statements."

18. Therefore, the learned Trial Court had rightly rejected this piece of evidence.

19. Santosh Kumar (PW1) stated that he joined the accused to search his wife in the adjoining area. They went for about half a kilometre in a jungle, when the accused pointed out to an empty water tank and said that some freshly cut branches of the tree had been put therein. Accused and Mukesh went down in the tank. They removed the branches and found the dead body of the wife of the accused in a naked condition. She had sustained injuries.

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20. Tara Chand (PW6) stated that on 03.06.2014 about 15-20 inhabitants of the shanties searched in the adjoining area for the wife of the accused. Santosh asked to check the empty water tank. The accused was also told to check the empty water tank. Mukesh, Santosh and the accused went into the water tank and found the dead body covered with the branches of Sheesham. He stated in his cross-examination that the dead body was not visible from above. The branches lying in the water tank were noticed by Santosh, Mukesh and other persons. The accused was on the other side. He was called near the empty water tank.

21. The testimony of this witness shows that the water tank was checked at the instance of Santosh and it was a routine checking. Tara Singh specifically stated that Santosh and not the accused had told them to check the empty water tank. Therefore the statement of Santosh that the accused had asked the persons to check the water tank cannot be believed. Hence, this circumstance will not establish the complicity of the accused.

22. The prosecution asserted that the accused suspected that his wife was talking to some person from Bengal. Learned Trial Court had rightly pointed out that the statement of the daughter of the deceased was essential to prove this fact. Being the

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inmate of the house, she was the best person to depose about the relationship between the accused and his wife. Learned Trial Court had rightly drawn an adverse inference against the accused in the absence of the examination of the daughter of the deceased.

23. The prosecution relied upon the recovery of the iron pipe. Learned Trial Court had rightly pointed out that this iron pipe is not connected to the commission of crime. The iron pipe was not sent to SFSL, Junga to determine whether it contained the blood on it or not. Dr Amarjit Singh (PW3) categorically stated in his examination-in-chief that in view of the highly decomposed state of the body, it was not possible to opine whether the injuries were antemortem or postmortem. He stated that the injuries can be caused by an article like an iron pipe. He again clarified in the cross-examination that it was not possible to opine about the strangulation and the injuries due to the decomposition of the body. Therefore, the medical evidence does not unequivocally show that the deceased had sustained injuries from the iron pipe recovered by the accused; hence, the recovery of the iron pipe does not connect the accused with the commission of crime.

24. The prosecution relied upon the recovery of the blood-stained shirt; however, the DNA analysis did not connect the blood

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to the deceased as the same does not show that the DNA profile taken from the blood on the shirt of the deceased matched with the DNA profile taken from the blood of the deceased. Hence, the presence of blood stains on the shirt will not help the prosecution.

25. The prosecution also relied upon the recovery of the button and the threads from the spot. The site plan (Ex.PW15/F) shows that the place from where the thread and button were recovered was at a distance of about 80 meters from the water tank. It is an admitted case of the prosecution that the accused was searching for his wife when the dead body was recovered. Therefore, the recovery of the button and the thread from the vicinity of the water tank from where the dead body was found cannot lead to an inference that the accused had murdered the deceased at that place. The fact that the threads were entangled in the berries can also lead to an inference that these were trapped while passing through the bushes. Therefore, this piece of evidence will not help the prosecution.

26. The prosecution has also relied upon the recovery of the burnt pieces of Saree. The disclosure memo (Ex.PW-2/E) shows that the accused stated that he could show the place where the clothes were burnt and this place was known to him. The site plan

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(Ex.PW15/H) shows the place from where the burnt pieces of clothes were found was an open place. There is no evidence that the burnt pieces were hidden. It was laid down by the Hon'ble Supreme Court in ***Manjunath v. State of Karnataka, 2023 SCC OnLine SC 1421***, that where the recoveries were effected from a place accessible to the public, the same cannot be relied upon. It was observed:

> "25. The next aspect is the recovery of the alleged weapons, we have noted the particulars thereof while discussing the findings of the Trial Court. Such recoveries were discarded by the trial court stating that the clubs were recovered from a place accessible to the public and, the chopper and the rods were recovered from a house where other persons were also residing which compromises the sanctity of such recovery and takes away from the veracity thereof.
>
> 26. Further discovery made, to be one satisfying the requirements of Section 27, Indian Evidence Act it must be a fact that is discovered as a consequence of information received from a person in custody. The conditions have been discussed by the Privy Council in ***PulukuriKotayya v. King Emperor 1946 SCC OnLIne PC 47*** and the position was reiterated by this Court in ***Mohd. Inayatullah v. State of Maharashtra (1976) 1 SCC 828***, in the following terms:—
>
> > *"12...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", or "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..." (Emphasis supplied)

27. Prima facie, in the present facts, the 3 conditions above appear to be met. However, the Trial Court held, given that the discoveries made were either from a public place or from an area where other persons also resided, reliance thereupon, could not be made. We find this approach of the trial court to be correct.

27.1 This court has, in various judgments, clarified this position. Illustratively, in ***Jaikam Khan v. State of U.P. (2021) 13 SCC 716*** it was observed:—

> "One of the alleged recoveries is from the room where deceased Asgari used to sleep. The other two recoveries are from the open field, just behind the house of deceased Shaukeen Khan i.e. the place of the incident. It could thus be seen that the recoveries were made from the places, which were accessible to one and all and as such, no reliance could be placed on such recoveries."

27.2 Also, in ***Nikhil Chandra Mondal v. State of W.B. (2023) 6 SCC 605*** the Court held:—

> "20. The trial court disbelieved the recovery of clothes and weapons on two grounds. Firstly, that there was no memorandum statement of the accused as required under Section 27 of the Evidence Act, 1872 and secondly, the recovery of the knife was from an open place accessible to one and all. We find that the approach adopted by the trial court was in accordance with the law. However, this circumstance which, in our view, could not have been used, has been employed by the High Court to seek corroboration to the extra-judicial confession."

28. As reflected from the record, and in particular the testimony of PW-15 it is clear that the discovery (stick as shown by A10, for instance) was a eucalyptus stick, found from the eucalyptus plantation, which indisputably, is a public place

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> and was found a week later. A second and third stick purportedly found half a kilometre away on that day itself, was found by a bush, once again, a place of public access. Two further sticks recovered at the instance A6 and A7, were also from public places. An iron chain produced from the house of A1 and A2 is not free from the possibility that any of the other occupants of their house were not responsible for it. We, further cannot lose sight of the fact that sticks, whether bamboo or otherwise, are commonplace objects in village life, and therefore, such objects, being hardly out of the ordinary, and that too discovered in places of public access, cannot be used to place the gauntlet of guilt on the accused persons.

27. Therefore, no advantage can be derived from the recovery of the burnt pieces.

28. The site plan (Ex.PW15/H) also shows that the place was at a distance of about 300 meters from the water tank from where the recovery was effected. The police and other persons had already visited the spot on the date of the discovery of the dead body and it is highly unlikely that they would not have noticed the burnt pieces on that day. It was held by Allahabad High Court in ***Amin v. State, 1957 SCC OnLine All 331: AIR 1958 All 293: 1958 Cri LJ 462*** that where the investigating officer could have effected the recovery earlier, the subsequent recovery at the instance of the accused is suspect. It was observed at page 303:

> "**109.** Sri Naim appears to us to be quite capable of recovering the ornaments on the 13th and staging a recovery on the 16th. The story of the division of these ornaments is also highly suspicious and seems to us to be an attempt to

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> incriminate Shrimati Shakira by proving her exclusive possession over some of the property. It does not stand to reason that the mother and son would divide the ornaments, and, even if they intended to do so, they will do it immediately and will not bury them at the same place."

29. Delhi High Court also took a similar view in ***Vijay Kumar v. State, 1995 SCC OnLine Del 364 : (1995) 60 DLT 261: 1996 Cri LJ 2429 : (1995) 2 ALT (Cri) (NRC 2) 23*** and observed at page 271:

> **42.** As far as the recovery of a piece of hockey from the room of the appellant, Vijay, is concerned, the said piece of hockey was not lying hidden anywhere. *A casual search of the room by the police would have yielded the said piece of hockey. Section 27 of the Evidence Act could make such a disclosure statement of the accused in custody admissible which leads to the discovery of a material fact but if a material fact is self-evident to the police, the disclosure statement of the accused of such material fact becomes inadmissible.* In case a particular material fact is in exclusive knowledge of the accused and he makes a disclosure statement pertaining to the same which leads to recovery of such material fact, then and then only such disclosure statement of the accused is admissible in evidence. So, this recovery of a piece of hockey cannot be linked to the accused Vijay in view of the above reasons. Moreover, Premwati had stated in Court that Vijay had thrown away the second piece of hockey outside his house. If that is so, the disclosure statement of the appellant, Vijay, becomes all the more doubtful. (Emphasis supplied)

30. It was held in ***Mani v. State of T.N., (2009) 17 SCC 273: (2011) 1 SCC (Cri) 1001: 2008 SCC OnLine SC 75*** that the discovery of an article at some distance from a dead body at the instance of the accused cannot be believed because it is difficult to believe that the

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investigating officer would not have searched the nearby places after the discovery of the dead body. It was observed at page 278:

> **24.** Now, it is nobody's case that at the time the discovery was made by Accused 1, Accused 2 also made certain discoveries. Therefore, the witness (PW 15) was not certain as to who made the discovery. This is apart from the fact that discovery admittedly was made from 300 ft away from the dead body of Sivakumar and after Sivakumar's body was inspected by PW 14 as early as 25-11-1996. *It would be impossible to believe that the Inspector did not search the nearby spots and that all the articles would remain (sic remained) in the open, unguarded till 6-12-1996 when the discovery had allegedly been made.* This was nothing but a farce of a discovery and could never have been accepted particularly because all the discovered articles were lying in bare open barely 300 ft away from the body of the deceased Sivakumar." (Emphasis supplied)

31. The prosecution also relied upon pointing out the place by the accused where the murder was committed, however, no recovery was effected from that spot, in the absence of which the statement will not be admissible under section 27 of the Indian Evidence Act. It was laid down by the Hon'ble Supreme Court in ***State of Maharashtra v. Damu, (2000) 6 SCC 269: 2000 SCC (Cri) 1088: 2000 SCC OnLine SC 842*** that where no recovery was effected from the place, the statement is inadmissible. It was observed at page 283:

> "**37.** How did the particular information lead to the discovery of the fact? No doubt, the recovery of the dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. *If nothing more was*

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> *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)

32. The reference was made to the call detail records. The learned Trial Court had rightly pointed out that since the accused had visited the spot to search his wife, therefore, his presence near the place from where the dead body was recovered cannot lead to an inference that he had murdered his wife.

33. Therefore, the learned Trial Court had taken a reasonable view while acquitting the accused and the leave to appeal cannot be granted; hence, the present application fails and the same is dismissed

34. A copy of this judgment along with the records of the learned Trial Court be sent back forthwith. Pending miscellaneous application(s), if any, also stand(s) disposed of.

(Vivek Singh Thakur)
Judge

(Rakesh Kainthla)
Judge

29th November, 2024
(Nikita)