AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.72 of 2008

(Arising out of the Judgment and Order of conviction dated 09.09.2008 passed by Sri J.J. Patro, learned Sessions Judge, Phulbani in S.T. No.26 of 2005, for the offence under Sections 302/201/34, I.P.C.)

Pabitra Pradhan .... ***Appellant***

Ms. Pragyan Paramita Mohanty, Advocate

-versus-

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

Mr. Sonak Mishra, Addl. Standing Counsel

P R E S E N T:

HONOURABLE SHRI JUSTICE S.K. SAHOO
AND
HONOURALE SHRI JUSTICE CHITTARANJAN DASH

Date of Judgment : 08.01.2024

Chittaranjan Dash, J.

1. The Appellant faced trial for the offence under Sections 302/201/34 of the Indian Penal Code, 1908 (in short, hereinafter referred to "IPC") for having committed murder of one Parameswar Pradhan (hereinafter called as the "deceased") with the assistance of another and caused disappearance of the dead body of the deceased by burying the dead body with an intention to screen himself from the legal punishment, and having found guilty thereunder, sentenced to undergo imprisonment for life and to pay fine of

Rs.500/- (Five Hundred), in default, to undergo R.I. for six months more for the offence u/s. 302, I.P.C. and R.I. for two years more and to pay fine of Rs.100/- (one hundred), in default, to undergo R.I. for one month more u/s.201, I.P.C. with a direction to suffer the sentences concurrently.

2. The prosecution case, bereft of unnecessary details, are that on 02.09.2004 at about 9.00 AM the deceased, as of his routine work, went to his cultivable land carrying a spade for cutting the ridges of the field and channeling the water to his land for the growing crops. But he did not return home thereafter. A search was conducted by the family members, but it did not fetch any result. One Sudam Bhoi (P.W.2), a relation of the Appellant and also the deceased went to the house of the Appellant to enquire about the health condition of the Appellant's elder brother, as he was suffering then. When said Sudam Bhoi asked the Appellant about the health condition of his elder brother, it is alleged that the Appellant voluntarily confessed/ disclosed before Sudam Bhoi that he had killed the deceased, as the latter had applied Black-Magic against his elder brother and confessed to have disposed of the dead body, and stated that his elder brother would be cured very soon. Thereafter, said Sudam Bhoi went to the son of the deceased and informed him about the confession made by the Appellant before him. In the meantime, of course, the informant (P.W.1) had already lodged a missing report before the Tikabali Police Station. However, on the information divulged to the informant regarding the confession made by the Appellant before Sudam Bhoi (P.W.2), a written report was lodged at the P.S. on 27.09.2004. As the report revealed a cognizable offence, the same was registered vide Tikabali P.S. Case No.50 of 2004 and investigation commenced.

HIGH COURT ORISSA

3. In course of the investigation, the I.O. (P.W.9) visited the spot on 27.09.2004 itself and prepared the Spot Map under Ext.8. He apprehended the Appellant who disclosed before him to have killed the deceased and to have buried the dead body in his courtyard and pointed out the said spot to the I.O. The I.O. recorded the statement of the Appellant under Ext.3, kept guarding the place pointed out by the accused-appellant and returned to the P.S. along with the Appellant in order to issue requisition for making arrangements for deputation of the Executive Magistrate and the Medical Officer. On reaching at the Police Station, he sent intimation to the S.P. and the C.D.M.O. for deputation of the Medical Officer and the Executive Magistrate. On 29.09.2004, after arrival of the Executive Magistrate and the Medical Officer, he again proceeded to the spot with them and the accused-Appellant, who was present at the P.S., accompanied them. He arrested the Appellant on 29.09.2004 at 1.00 P.M. at the spot. In presence of the Magistrate and the witnesses as well as the Medical Officer, the place pointed out by the Appellant was dug and the dead body of the deceased was recovered. The I.O. held inquest over the dead body of the deceased under Ext.2. The Medical Officer, who was present there, conducted post-mortem on the dead body. The Appellant led the I.O. and the witnesses to a 'Gadia' situated near his field, from where a spade was recovered, which was lying there. The I.O. seized the spade under Ext.4. The Appellant thereafter led the I.O. and the witnesses to his house, where he had concealed the weapon of offence, and on being brought out a "Lathi" from inside his house, the same was seized under Ext.5. The I.O. also seized the wearing apparel of the deceased under Ext.6. He examined the Medical Officer who had conducted post-mortem and also the Executive Magistrate

HIGH COURT ORISSA

and forwarded the accused-Appellant to Court. On 27.10.2004 he handed over charge of the investigation to his successor on his transfer.

4. Further, it came to light that one Gokul Pradhan (who is the nephew of the Appellant) and the elder brother of the Appellant had assisted the Appellant in burying the dead body of the deceased with an intention to cause disappearance of the evidence. However, said Gokul Pradhan being a juvenile, the case was split up against him and he was sent to the Juvenile Justice Board for his trial. Charge-sheet was submitted after completion of the investigation.

5. The plea of defence is one of complete denial and false implications.

6. To prove the guilt of the Appellant, the prosecution examined nine witnesses in all and proved documents vide Exts. 1 to 9. The defence on the other did not adduce any evidence either oral or documentary in support of its case.

HIGH COURT ORISSA सत्यमेव जयते

7. From amongst the witnesses examined by the prosecution, P.W.1 is Panua Pradhan - the informant, being the son of the deceased. P.W.2 - Sudam Bhoi is the witness to the alleged extra judicial confession made by the Appellant before him. P.W.3 - Birendra Pradhan is another son of the deceased and a witness to the disclosure statement made by the Appellant pursuant whereof he led the I.O and the witnesses for discovery of the dead body of the deceased. P.W.4 is a witness who assisted the Appellant in disinterring the dead body of the deceased. P.W.5 is also a witness to the disclosure statement and the discovery of the dead body of the deceased pursuant to the said disclosure statement. P.W.6 is the Scribe of the F.I.R. P.W.7 is the

O.I.C., Tikabali P.S. (the initial I.O.), P.W.8 is the Doctor - Sachidananda Mohanty who conducted autopsy on the dead body of the deceased, and P.W.9 is the Investigating Officer who submitted the Charge sheet.

8. Learned trial court found the case of the prosecution to be one successfully proved basing on the circumstantial evidence. The various circumstances emerged from the evidence categorized by the learned trial court are as follows: -

i) "MOTIVE – According to the prosecution, the elder brother of the accused suffered from prolonged illness and the accused was under the impression that the deceased had applied black magic against his elder brother and thus wanted to eliminate the deceased, in order to cure the elder brother

ii) That, the accused made extra judicial confession before the witness.

iii) The discovery of the dead body of the deceased from the land of the accused at the instance of the accused while in police custody.

iv) Leading to discovery of the weapon of offence given by the accused while in custody.

v) Leading to discovery of the spade of the deceased given by the accused while in custody."

9. Believing the ocular versions of P.Ws.1, 2, 3, 4, 5, 8 and 9 besides the circumstances appearing in the case, as described above, the learned trial court found the case of the prosecution to be cogent. Putting emphasis on the circumstance as to recovery of the dead body at the instance of the Appellant, the court further vouchsafe its conviction as to the authorship of the murder on the Appellant. The evidence of the I.O. (P.W.9) in connection to the circumstance leading to discovery pursuant to the

disclosure statement, inspired confidence on the learned trial court and as such it held that the evidence of the I.O. is free from embellishment and the same being clear and unambiguous, is explicitly reliable. This is more so because the dead body was buried in the cultivable land of the Appellant to his exclusive knowledge. It is also held by the learned trial court that the evidence of P.W.9 is sacrosanct to the effect that pursuant to the disclosure statement made by the Appellant who led P.W.9 and the witnesses P.Ws.4 and 5 to the place of concealment of the weapon of offence and gave recovery, thereby corroborated the version of P.W.2 as regards the extra-judicial confession made by the Appellant before him being consistent and coherent, leading unerringly towards the guilt of the Appellant and found him guilty and having convicted, sentenced him as stated above.

10. Learned counsel for the Appellant Ms. Pragyan Paramita Mohanty, inter alia, assailed the impugned judgment submitting that the extra judicial confession is a weak piece of evidence, and in the present case, there is no corroboration to such extra judicial confession. She further submitted that, making of such extra judicial confession before P.W.2 does not amount to the true definition of the term and, as such, is not admissible in evidence. She also submitted that the alleged recovery of the dead body at the instance of the Appellant is not admissible under Section 27 of the Evidence Act, as admittedly the Appellant was taken to custody only on 29.09.2004, but he made the confessional statement prior to that, i.e. on 27.09.2004 which was never recorded. So, the plea of the I.O. that he guarded the spot of burial on 27.09.2004, as pointed out by the accused to be dug on 29.09.2004 in the presence of doctor and Executive Magistrate, is an improvement by the I.O. She also submitted that the statement of P.W.1 to have found the dead body, wherein the testis and penis were found missing

and there were cut injuries on the ears besides a portion of the tongue and tip of the right little finger of the deceased, is inconsistent with the post-mortem report proved by the doctor (P.W.8). Furthermore, P.W.8 also stated that at the time of exhuming, the place of recovery was an open place and no outsider was present then, which is in contradiction to the statement of P.W.5 who stated about the presence of thousands of people at the spot. Thus, the statements of the witnesses and that of the doctor at the time of recovery of the dead body raises doubt to the prosecution case. Ms. Mohanty also submitted that the alleged recovery of the stick, i.e. the weapon of offence at the instance of the Appellant does not conclusively prove the guilt of the Appellant, because sticks are commonly found in everybody's house in villages and there is no connecting evidence, either oral or medical, to deduce the same to have been used as the weapon of offence in the murder of the deceased. No such injury to have been pointed out by the Doctor in the Post-Mortem report showing mark of assault. She relied on the decisions reported in ***State of Punjab v. Kewal Krishan, AIR 2023 SC 3226, 1992 OCR (SC) 539 and (2023)89 OCR (SC) 276,*** holding that the impugned judgment is not sustainable in the eye of law and liable to be set aside.

11. Learned Addl. Standing Counsel Mr. Sonak Mishra, on the contrary, supported the impugned judgment to be akin to the evidence. According to him, the consistent evidence brought through the testimony of P.Ws.1 to 5, combined with the medical evidence adduced by P.W.8 and the evidence leading to the discovery of the dead body buried in the field of the Appellant having in his exclusive knowledge, entirely points out guilt to be of the accused alone and there is no other hypothesis with regard to the intervention of anybody else in the death of the deceased and burial of the

HIGH COURT ORISSA

dead body to save and exempt the perpetrator. According to Mr. Mishra, law is well settled that the person having exclusive knowledge with regard to the dead body having buried in the field of the Appellant is clinching evidence. Having the exclusive knowledge of the Appellant could be the sole circumstance, basing on which this Court can believe the prosecution case to be true and beyond reproach in arriving at a conclusion that the trial court is justified in convicting the Appellant.

12. Considering the submissions of the parties and keeping in view the charge alleged, with which the Appellant faced the trial, obviously the moot question that trigger examination is with regard to the nature of death of the deceased. In this regard, the overall evidence led by the prosecution through the ocular witnesses as well as medical evidence weigh the factum of the nature of death of the deceased. While P.Ws.1, 2, 4, 5 and 9 have stated that the dead body was exhumed on being dug from the field of the Appellant at the instance of the Appellant himself found with the injuries, the doctor (P.W.8) also found the following during the post-mortem examination :

HIGH COURT ORISSA

*"**External Injuries** :-*

A) Upper neck posteriorly specially on the right side and extending up to mastoid look swollen and bruise involving an area of 10 cm x 4 cm. On dissection, we found as follows :-

i) On exploration external injury No.1 the soft tissue and muscles found contuse with infiltration of bluish-dark discoloured blood, not easily washable found involving an area of 12 cm x 5 cm surrounding C-5 and C-6 vertebra.

ii) The meninges look bluish specially at the right parito occipital area and on cut section dark-bluish discoloured blood tinted brain matter comes out.

iii) The neck muscles and the tracheal riggs looks flat with infiltration of blood (dark, bluish discoloured blood) in to an area of 8 cm x 5 cm in a transverse manner with underlying tracheal rings found fracture and contuse.

B) All the injuries described above were anti-mortem and homicidal in nature. All are of same duration and inflicted prior to the death.

C) All the injuries might have been caused by hard and blunt and forceful impact.

D) The external injury No.1 including its corresponding internal injury and internal injury No.3 if taken combinedly or even individually, are fatal to cause death in ordinary course of nature.

E) The deceased died of asphyxia resulting from compression of neck by hard and blunt force."

HIGH COURT
सत्यमेव जयते
ORISSA

13. Evidence of P.W.8 (doctor) could not be shaken by the defence on its substratum as to the cause of death and the nature of the dead body found on being exhumed from the earth. Furthermore, the evidence of P.W.9 – the I.O. and the inquest report under Ext.2 showing the immediate cause of death to be the injuries sustained by the deceased on being assaulted to his neck and stepping down on the throat of the deceased leads only to the conclusion that it can be possible by intervention of human factor and the death is homicidal in nature. Since the assessment of the learned trial court in this regard found to be justified, we have no hesitation to concur with the

view expressed by the learned trial court in holding the death of the deceased to be homicidal.

14. The next point is the authorship of the murder. In this regard, as already discussed above, the case of the prosecution hinges on the circumstantial evidence. It is apt to mention that, in a case of circumstantial evidence, the court is required to examine the evidence on the touchstone of the 5 golden principles, as held by the Apex Court in the matter of ***Sharad Birdhi Chand Sarda vs. State of Maharashtra*** **[AIR 1984 SC 1622].** These five golden principles constitute the ***Panchsheel*** areas under –

1. *Circumstances from which the conclusion of guilt is to be drawn should be fully established;*
2. *Fact so established should not be explainable on any other hypothesis except that accused is guilty;*
3. *Facts should be of conclusive nature;*
4. *The fact should exclude every possible hypothesis except the one to be proved;*
5. *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the must have been done by the accused.*

15. Therefore, we feel it incumbent to examine the various circumstances emerge in the case in hand one after the other, basing on which the trial court found the case of the prosecution to be sufficient to bring home the charge, as discussed in the forgoing paragraph.

HIGH COURT ORISSA

16. The first and second circumstances can be weighed with regard to motive and extra judicial confession. The F.I.R. story borne out from the case record is that the Appellant caused murder of the deceased by suspecting him to have practiced witchcraft on his elder brother, who was badly suffering from health problem, and the life of the deceased having been taken away, now that his elder brother would recover from suffering. This part of the narration in the F.I.R. found not deposed to by P.W.2 in exactitude in his substantive evidence by precision and words. The same is described by P.W.2 in the manner that the Appellant disclosed before him that the person who practiced witchcraft has been finished. P.W.2 stated that on his enquiry, the Appellant disclosed to him that the deceased had practiced witchcraft, for which his elder brother Sanatan fell ill. Here, even though the motive ascribed in the F.I.R. has not been deposed to by P.W.2 with precision and word, substantively it is clear to hold that P.W.2 in course of his meeting with the Appellant, believed that the Appellant hinted about causing the death of the deceased because of the witchcraft practiced by him on his elder brother. The question, therefore, arises whether the Appellant had ever divulged/confessed anything before P.W.2 as stated by him in his evidence. According to the learned counsel for the Appellant, such contention being not in conformity with law, is not a confession under the relevant provision, but would only be taken as a conduct. Perusal of overall evidence and the circumstances more particularly when the defence confronted the particular statement to P.W.2 having not stated by him before the I.O. and the I.O. in turn admitted that P.W.2 had not stated so before him, but in a different manner cannot obviously be said

HIGH COURT ORISSA

the Appellant confessed to have caused the murder of the deceased, which the P.W.2 simply understood from his gesture.

17. Another aspect of challenge by the learned counsel for the Appellant to the confessional statement is that, no such circumstance has been brought on record assigning the reason why the Appellant would repose confidence in P.W.2 to confess the factum of murder of the deceased before him. In this regard, of course, no such material could be brought out by the Appellant during the trial to doubt the testimony of P.W.2. Therefore, the fact emerges from the F.I.R. giving a narration with regard to the motive of the Appellant in taking away the life of the deceased coupled with the substantive evidence of P.W.2 to the effect that on his meeting, the Appellant confessed before him that his brother Sanatan would recover from illness, as the person who had practiced witchcraft has been finished can at best be said to have given rise to a motive. Elaborating further, it may be stated that the confession referred to is the statement made by the Appellant to P.W.2 in verbatim is that – SANATAN ETHARA BHALA HOIJIBA, JIE GUNI KARITHILA TAKU PAKA HOICHHI *(Sanatan would recover soon as the person who had applied witchcraft is given a beating/killed*). The very next version of P.W.2 that the Appellant having taken him to confidence asked him to not disclose that fact to anyone else is also an important factor. In local language, the word "PAKA HOICHHI" is invariably meant to "assault someone." When asked further who that "GUNIA (witchcraft practitioner)" is, the Appellant revealed that the deceased had done witchcraft on his elder brother Sanatan. So, P.W.2 inferred from the statement that the accused has killed the deceased. The accused-

Appellant never expressed literally that he is the one who has caused the death of the deceased but only implied about his knowledge of deceased's death.

18. Extra-judicial confessions are those which are made to any person other than those authorized by law to take confession. It may be made to any person or to police during investigation of an offence. These are proved by calling the person as witness before whom the extra-judicial confession is made and it is considered to be unsafe to base conviction on extra-judicial confession, because the court has to take care that no matter judicial or extrajudicial confession, the confession by the accused must be consistent with Article 20(3) of Indian Constitution which say "No one should be compelled to give evidence against himself" that means the confession should be on the will of the confessor and must be true, then only a person can be charged for any criminal offence. Extra-judicial confession alone cannot be relied upon and it needs corroboration of other supporting evidence.

HIGH COURT ORISSA सत्यमेव जयते

19. In ***Pakala Narayan Swami vs. King Emperor*, (1939)** ***41 BOMLR 428,*** the Court observed that "*Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions in order to have a general term for use in the three following*

articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Indian Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime."

20. The Supreme Court in ***Khurshid Ahmed vs. State of Jammu & Kashmir*, *Criminal Appeal No 872 of 2015***, observed that – *Motive is an emotion which compels the person to do a particular act. It will be very difficult for the prosecution to prove the real motive in all cases. Motive is a double-edged weapon when there is direct and reliable evidence available motive loses its importance. In a case of circumstantial evidence motive assumes greater importance than in the case of direct evidence. In a case of direct and compelling evidence even assuming that no motive is attributed, still the prosecution version has to be examined."*

HIGH COURT
सत्यमेव जयते
ORISSA

21. Analysing the evidence of P.W.2 in totality, nowhere it shows the Appellant ever disclosed to have caused the murder of the deceased. It is P.W.2 himself to have inferred from the statement of the Appellant. Consequently, the statement made to P.W.2 by the accused-Appellant does not turn out to be an extra-judicial confession, but substantially meet the requirement of law to believe that the Appellant being voluntarily disclosing about the cause of death of the deceased, could be read in the evidence to deduce that the Appellant had a motive against the deceased to do away with his life. In our humble view, therefore, the reason assigned by the learned trial court in accepting the version of

P.W.2 as an extra judicial confession made by the Appellant as a circumstance being not in consonance with law, cannot be accepted.

22. The third circumstance is with regard to disclosure statement made by the Appellant pointing the place of concealment of the dead body and leading the I.O. and the witnesses to the place of concealment and giving recovery of the dead body. In this regard, of course the evidence laid through independent witnesses is not of much help to the prosecution case. P.Ws.4 and 5 though have stated the Appellant to have led them as well as the police to the place of concealment and the statement of the Appellant was recorded, there is nothing in the evidence that the same was recorded in their presence. Consequently, it is tainted with cloud in as much as from the evidence of the I.O it is borne out the Appellant to have pointed out the place burial of the dead body before him two days prior to the recording of the statement.

23. The law under Section 27 of the Evidence Act is well settled now, wherein the Court in ***Geejaganda Somaiah v. State of Karnataka***, ***(2007) 9 SCC 315: (2007) 3 SCC (Cri) 135*** has observed as under: (SCC p. 324, para 22) – "*As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a*

statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act."

24. Furthermore, in ***Selvi v. State of Karnataka, (2010) 7 SCC 263***, wherein, it was stated:

> *"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 of the 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*."

25. ***Supreme Court of India*** in the matter of ***Bodh Raj @ Bodha and Others vs State of Jammu & Kashmir,*** on 3 September, 2002, held as under –

The words "so much of such information" as relates distinctly to the facts thereby discovered are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections 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. 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. The object of the provision, i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. 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 come from a person not in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and, if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that, if any fact is discovered as a search made on the strength of any Information obtained from a prisoner. Such a discovery is a guarantee that the Information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact, it becomes reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in ***Palukuri Kotayya v. Emperor AIR (1947) PC 67*** is the most quoted authority of

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. Dam Gopinath Shirde and Ors, (2000) Crl.L.J. 2301***. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

26. In the case in hand, according to the I.O. the Appellant confessed his guilt of committing murder of the deceased suspecting him to be practicing witchcraft on his family. He further stated the Appellant to have confessed regarding the assault to the deceased on 02.09.2004 morning at about 9.00 A.M. by means of a *lathi* to his backside neck at the courtyard of his house, and when the deceased fell on the ground, he stepped down on his throat causing his death (the story is in compliance with the post-mortem report). After his death, the Appellant concealed the dead body in his house and in the night at about 8 – 9 P.M. took the dead body to his cultivable land situated near his house with the help of his nephew Gokula Pradhan (s/o Sanatana Pradhan) and buried the body inside the ground using the spade of the deceased and thereafter pointed

the place burial. It is the evidence of the I.O that pursuant to the statement of the Appellant, he issued requisition seeking the presence of the Executive Magistrate and the Doctor. He too guarded the place of burial pursuant to the statement. This means the disclosure was made before the I.O. alone and that too two days prior to the actual recovery. Hence, the part of the evidence that after confessing the occurrence in presence of the witnesses (P.W.3, P.W.4 and P.W.5) and further the Executive Magistrate and the Doctor the dead body was recovered can't be taken as sacrosanct to meet the requirement of the mandate of section 27 of the Evidence Act.

27. The principle of ***ei incumbit probatio qui dicit, non qui negat*** (Proof lies on him who asserts, not on him who denies) is aptly to be applied here. What was required for the prosecution to establish is that the statement purported to have been made by the Appellant was in custody, voluntary and recorded in presence of the witnesses and so is the recovery in contemporaneous to the statement. As seen from the evidence of the I.O, by the time the Appellant made the statement and pointed out the place of burial admitting his guilt, none was present. The I.O. too did not record the statement then. Two days after the requisition was made by the I.O., on the basis of the disclosure statement of the Appellant pointing the place of concealment of dead body that the Appellant was arrested and that too after the dead body was exhumed, the statement was recorded which is absolutely contrary to the mandate of Section 27 of the Evidence Act.

HIGH COURT ORISSA

28. Further, it is well understood that the attesting witnesses did not depose the statement to have been recorded in their presence initially with regard to the discovery of the dead body which is the most vital circumstance in the case to ascribe the liability as to the authorship of murder on the Appellant and the statement. The evidence on this score, therefore, that comes from the mouth of the Police office (I.O) alone is not above board and suffers from embellishment and as such unsafe to accept the recovery as lawful and legally admissible.

29. As a necessary corollary, the position with regard to the fourth and fifth circumstances leading to the discovery of the weapon of offence, i.e. Lathi used by the Appellant and the Spade carried by the deceased even though would establish the same to have been discovered pursuant to the statement of the Appellant alone is not sufficient to form the chain of circumstances. On this score the evidence of the prosecution is scanty. This is because, there is absolutely no iota of evidence that the Lathi found and seized is the weapon of offence. More so, when the recovery of the dead body at the instance of the Appellant disowned by the Appellant found not established to its hilt by the prosecution and the Post-Mortem Report too does not disclose any mark of assault on the body of the deceased by means of Lathi, the recovery of the Lathi in itself cannot be a circumstance to hold the balance of the prosecution case to link the chain of circumstances as it loses its relevance in the whole gamut of the case. Admittedly, there being no evidence as to the use of the Spade in the crime but was the one carried by the deceased has no significance even to count it as a circumstance.

HIGH COURT ORISSA

30. Now, coming to the conduct of the Appellant, it is well put in the matter of ***State of Maharashtra vs. Suresh*** **2000 (1) ACR 266 (SC),** by the Apex Court as follows: -

> There are "*three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that, he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27of the Evidence Act.*"

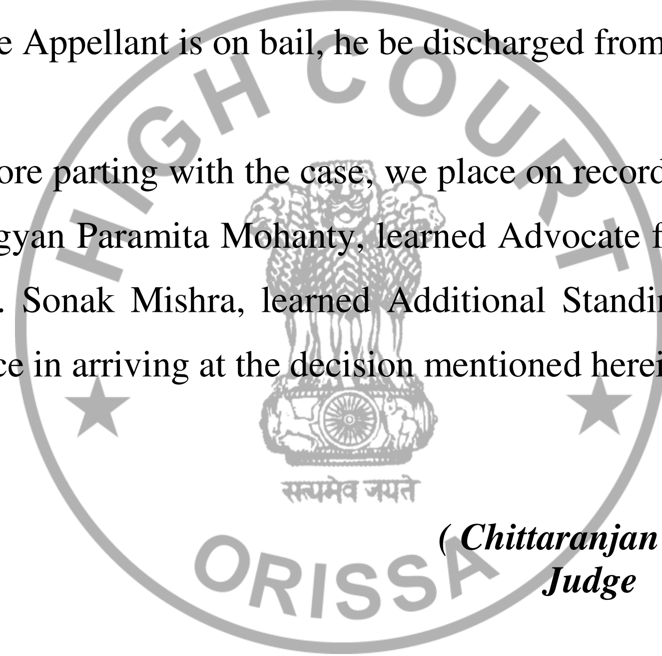
31. Arguably, the place of concealment would not have been known to anyone else other than the person who concealed it. There are no neighbouring houses in the area except the house of the Appellant's elder brother Sanatan. It is also true that the place where the burial of the dead

body took place do not have free access to the public and the burial being in such seclusion that it could not have been noticed except being pointed out by the Appellant himself. However, law is well settled that Section 106 of the Evidence Act does not come into play merely because the accused fails to provide any explanation regarding facts that should be within his knowledge, facts that could support theories compatible with his innocence, it applies to cases where the chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused. As discussed, keeping in view the analogy given by us herein above the Prosecution in the present has utterly failed to establish any circumstance leading to the involvement of the Appellant in the murder of the deceased in discharging its primary burden. Consequently, even if the Appellant did not explain the circumstance as to his knowledge of the place of burial of the dead body, the same alone would no way fasten him to be the author of the murder. As such, the conclusion that could only be arrived at is that, having regard to the infirmities pointed out on the material particular touching the substratum of the prosecution case which we have already noticed above, it can be said that acquittal is the only possible view. By applying the ratio as laid down by the judgments which are stated (supra), even assuming that another view is possible, the same is no ground to convict the Appellant for the offences alleged.

32. In our humble view, therefore, none of the circumstances emerge in the case established by the Prosecution formed the link to the chain of circumstances to hold that in all human probability the murder must have been done by the Appellant.

33. For the reasons stated above and the views taken by us as above, we hold that there is not enough evidence to hold the reason assigned by the learned trial court to be sufficient to convict the Appellant Pabitra Pradhan for any of the offences charged against him. We are, therefore, of the humble view that the impugned judgment cannot sustain in the eye of law and deserves to be set aside. The same is accordingly set aside. The JCRLA is allowed. The Appellant is acquitted from all the charges. Since the Appellant is on bail, he be discharged from the bail bond.

34. Before parting with the case, we place on record our appreciation for Ms. Pragyan Paramita Mohanty, learned Advocate for the Appellant and also Mr. Sonak Mishra, learned Additional Standing Counsel for their assistance in arriving at the decision mentioned hereinabove.



(Chittaranjan Dash)
Judge

S. K. Sahoo, J. I agree.

(S. K. Sahoo)
Judge

High Court of Orissa, Cuttack.
Dated, the 08th day of January, 2024.
S.K. Parida, ADR-cum-APS