Shahaja @ Shahajan Ismail Mohd. Shaikh vs The State Of Maharashtra on 14 July, 2022

Author: Surya Kant

Bench: Surya Kant

RE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 739 OF 2017

SHAHAJA @ SHAHAJAN ISMAIL MOHD. SHAIKH ……APPELLAN

VERSUS

STATE OF MAHARASHTRA .....RESP

JUDGMENT

J.B. PARDIWALA, J. :

1. This appeal, by special leave, is at the instance of a convict accused of the offence of murder punishable under Section 302 of the Indian Penal Code, 1860 (for short "IPC") and is directed against the judgment and order passed by the High Court of Judicature at Bombay dated 10.07.2015 in the Criminal Appeal No. 449 of 2014 by which the High Court dismissed the Appeal filed by convict accused and thereby affirmed the judgment and order of conviction passed by the 6th Ad-hoc Additional Sessions Judge, Sewree, Mumbai dated 08.09.2008 in the Sessions Case No. 256 of 2007.

15:43:49 IST Reason:

CASE OF THE PROSECUTION :

2. The deceased viz. Mahankal Jaiswal and the appellant herein were working as labourers at various places in the Vile Parle area, Mumbai & were known to each other. The deceased along with the other labourers used to sleep underneath or on the bridge situated near the Vile Parle Railway Station. There is also one Hanuman Temple situated near the bridge of the Vile Parle Railway Station. The original first

> informant Nandlal Ramnihor Mishra (PW-1) was the priest of the Hanuman Temple. Nandlal used to reside in a hut nearby the Temple. On 10.12.2006 at 10:30 P.M. a quarrel ensued between the appellant and the deceased on account of money. This quarrel took place near the ticket window of the Vile Parle Railway Station. The quarrel between the two was witnessed by the PW-1 Nandlal. At about 12:00 to 12:15 A.M. while the deceased Mahankal, the PW-8 Udaysingh and others were sleeping on the bridge near the temple, the PW-1 Nandlal heard a noise "Dhappa". No sooner he heard the noise than he woke up and tried to see what was happening by moving the curtain of his hut. The PW-1 Nandlal saw the appellant assaulting the deceased with a hammer on his head. The assault on the deceased by the appellant herein was also witnessed by the PW-8 Udaysingh who was sleeping nearby the deceased.

After the assault the appellant walked away from the place of the incident holding the hammer in his hand. The PW-1 Nandlal is said to have asked the appellant while he was walking away whether he had killed Mahankal (deceased). Thereupon, the appellant replied that he had killed Mahankal. It appears that nothing happened thereafter for the entire night. In the morning the police got into action and noticed that Mahankal was lying dead. The dead body of the Mahankal was sent for post mortem.

3. The PW-1 Nandlal lodged the First Information Report (Exh. 13) at the Andheri Police Station on 11.12.2006 which came to be registered as the FIR No. 91/06 for the offence punishable under Section 302 of the IPC. Upon registration of the FIR the police started with the investigation. In the course of the investigation, statements of various witnesses were recorded. It appears that the discovery panchnama of the weapon of the offence i.e. the hammer (Exh.23) was also drawn on 16.12.2006 under the provisions of Section 27 of the Evidence Act, 1872 (hereinafter referred to, "the Act").

4. The post mortem of the dead body conducted by PW-6 Dr. Shivaji Vishnu Kachare revealed the following external injuries:

> (i) C.L.W. at right frontal region 3 cm above, right eye 2.5 cm x 2.5 cm bone deep reddish;
>
> (ii) C.L.W. at right frontal region, lateral to injury No. (i) 4x2 cm bone deep reddish;
>
> (iii) Incised like wound at right temporal parietal region, 3x1 cm into bone deep reddish.

5. The following internal injuries were noted by Dr. Shivaji Vishnu Kachare :

> i. Injury under the scalp – hemorrhage are seen at right temporal and parietal and on frontal region, reddish in colour; ii. Scalp – compound fracture on right fronto temporal bone 2 cms x 1 cm;

iii. Brain – extradural hemorrhage at right fronto temporal and parietal region – 9 cm x 8 cm reddish;

iv. Subdural and subarchehnoid hemorrhage at right hemisphere reddish in colour.

6. The weapon of offence i.e. the hammer was sent to the Forensic Science laboratory for chemical analysis. As per the chemical analysis report (Exh .9) the hammer was found stained with human blood with few hairs stuck on it.

7. At the end of the investigation the investigating agency filed chargesheet against the appellant in the Court of the 22 nd Metropolitan Magistrate, Andheri for the offence of murder who, in turn, committed the case to the Sessions Court for trial under the provisions of Section 209 of the Code of Criminal Procedure, 1973 (for short "Cr.PC").

8. The trial court framed charge (Exh.2) against the appellant for the offence punishable under Section 302 of the IPC vide order dated 06.08.2007.

9. In the course of the trial, the prosecution examined, in all, ten witnesses. The evidence of the following witnesses is relevant for the purpose of deciding the present appeal.

(i) PW-1 Nandlal Ramnihor Mishra (Exh.12), the original first informant and eye witness;

(ii) PW-4 Amsu Hussain Sayyad (Exh. 21), the panch witness of the discovery panchnama of the weapon of offence;

(iii) PW-8 Udaysingh Ramsingh Thakur (Exh. 29), the eye witness.

(iv) PW-6 Dr. Shivaji Vishnu Kachare (Exh. 25), medical officer who performed the postmortem;

(v) PW-10 Maruti Dattatrya Raskar (Exh. 31), the investigating officer.

10. The trial court believed the oral testimony of the two eye witnesses i.e. the PW-1 Nandlal and PW-8 Udaysingh resply. Relying upon the oral testimony of both these two eye witnesses, the trial court recorded the finding of guilt against the appellant. The trial court also relied upon the evidence of discovery of weapon i.e. the hammer at the instance of the appellant as one of the incriminating circumstances pointing towards the guilt of the accused. The trial court accordingly passed the judgment and order of conviction dated 08.09.2008 and sentenced the appellant to undergo life imprisonment with fine of Rs. 1,000/- and in default to suffer further rigorous imprisonment of one month.

11. The appellant herein challenged the aforesaid judgment and order of conviction passed by the trial court by filing the Criminal Appeal No. 449 of 2014 in the High Court of Judicature at Bombay.

The High Court upon, reappreciation of the entire evidence on record, concurred with the findings recorded by the trial court and dismissed the appeal vide the judgment and order dated 10.07.2015.

12. In such circumstances referred to above, the appellant is here before this Court with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT :

13. The learned counsel appearing for the appellant vehemently submitted that the trial court as well as the High Court committed a serious error in recording the finding that the appellant is guilty of the offence of murder. The learned counsel would submit that both the courts below committed a serious error in believing the two so called eye witnesses as reliable witnesses. It was vehemently submitted that both the eye witnesses i.e. the PW-1 and PW-8 are unreliable witnesses. It is submitted that having regard to the genesis of the occurrence, the place of occurrence and the time of the occurrence the incident could not have been witnessed by the two eye witnesses.

14. The learned counsel further submitted as regards the unnatural conduct of the PW-1 Nandlal who claims to have witnessed the assault but kept quiet for the whole night and thought fit to lodge the FIR at the Andheri Police Station on the next day in the morning & that too only after the police got into action. It is submitted that the delay in informing the police, by itself, cast a doubt as to whether the PW-1 Nandlal had actually witnessed the assault.

15. The learned counsel further submitted that the courts below ought not to have placed any reliance on the evidence of discovery of weapon of offence at the instance of the appellant herein.

16. In such circumstances referred to above, the learned counsel appearing for the appellant prays that being merit in the appeal, the same may be allowed and the impugned judgments passed by the trial court & the High Court may be set aside and the appellant may be acquitted of the charge.
SUBMISSIONS ON BEHALF OF THE STATE :

17. Mr. Rahul Chitnis, the learned counsel appearing for the State of Maharashtra, on the other hand, has vehemently opposed this appeal by submitting that no error, not to speak of any error of law, could be said to have been committed by the courts below in holding the appellant herein guilty of the offence of murder. He would submit that this Court in exercise of powers under Article 136 of the Constitution may not disturb the concurring findings of fact recorded by the trial court and the High Court respectively. He would submit that both the courts below have thought fit to believe the oral testimony of the two eye witnesses and even otherwise also there is no good reason to disbelieve the two eye witnesses to the incident. He would submit that over and above the oral evidence of the two eye witnesses, there is an additional piece of evidence pointing towards the guilty of the accused in the form of the discovery of the weapon of offence (hammer) at the instance of the appellant. He would submit that the panchnama of the discovery of the weapon of offence drawn under the provisions of Section 27 of the Act is one additional circumstance going against the appellant.

18. In such circumstances referred to above, the learned counsel for the State prays that there being no merit in this appeal, the same may be dismissed. ANALYSIS :

19. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order?

SCOPE AND WIDTH OF APPEAL :

20. It is now well settled that the power of this Court under Article 136 of the Constitution of India is exercisable even in cases of concurrent findings of fact and such powers are very wide but in criminal appeals this Court does not inter- fere with the concurrent findings of fact save in exceptional circumstances. This view was expressed by this Court way back in the year 1958 in the case of State of Madras v. A. Vaidyanatha Iyer, (1958) SCR 580. In this decision, this Court held that in Article 136 the use of the words "Supreme Court, may in its discre- tion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India" shows that in criminal matters distinction can be made be- tween a judgment of conviction or acquittal. This Court further observed that this Court will not readily interfere with the findings of fact given by the High Court and the court of first instance but if the High Court acts perversely or otherwise improperly, interference may be made. In that decision, this Court had set aside a judgment of acquittal on facts as salient features of the case were not properly appreciated or given due weight by the High Court and its approach to the ques- tion whether a sum of Rs 800 was an illegal gratification or a loan was such that the High Court had acted perversely or otherwise improperly. From this decision it is, therefore, clear that this Court in the exercise of its power under Article 136 is entitled to interfere with findings of fact if the High Court acts perversely or oth- erwise improperly, that is to say, the judgment of the High Court was liable to be set aside when certain salient features of the case were not properly appreciated or given due weight by the High Court. Again, in H.P. Admn. v. Om Prakash, (1972) 1 SCC 249 : (1972) SCC (Cri) 88, this Court, while considering its power under Article 136 to interfere with the findings of fact observed as fol- lows: (SCC p. 256, para 4) "4. In appeals against acquittal by special leave under Article 136, this Court has undoubted power to interfere with the findings of fact, no distinction being made between judgments of acquittal and conviction, though in the case of acquittals it will not ordinarily interfere with the appreciation of evidence or on findings of fact unless the High Court 'acts perversely or otherwise improperly'."

21. Again, in Balak Ram v. State of U.P., (1975) 3 SCC 219: (1974) SCC (Cri) 837, this Court also held that the powers of the Supreme Court under Article 136 of the Constitution are wide but in criminal appeals this Court does not inter- fere with the concurrent findings of fact save in exceptional circumstances. In Arunachalam v. P.S.R. Sadhanantham, (1979) 2 SCC 297: (1979) SCC (Cri) 454, this Court, while agreeing with the views expressed on the aforesaid men- tioned decisions of this Court, has thus stated: (SCC p. 300, para 4) "4. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the court to set limits to itself within which to exercise such power. It is now the well-established practice of this Court to permit the invo- cation of the power under Article 136 only in very exceptional circum-

stances, as when a question of law of general public importance arises or a decision shocks the conscience of the court. But, within the re- strictions imposed by itself, this Court has the undoubted power to in- terfere even with findings of fact, making no distinction between judg- ments of acquittal and conviction, if the High Court, in arriving at those findings, has acted 'perversely or otherwise improperly'." (emphasis supplied)

22. In Nain Singh v. State of U.P., (1991) 2 SCC 432 : (1991) SCC (Cri) 421, in which all the aforesaid decisions as referred to hereinabove were considered and after considering the aforesaid decisions on the question of exercise of power under Article 136 of the Constitution and after agreeing with the views ex- pressed in the aforesaid decisions, the Court finally laid down the principle that the evidence adduced by the prosecution in that decision fell short of the test of reliability and acceptability and, therefore, was highly unsafe to act upon it. In State of U.P. v. Babul Nath, (1994) 6 SCC 29 : 1994 SCC (Cri) 1585, this Court, while considering the scope of Article 136 as to when this Court is entitled to upset the findings of fact, observed as follows: (SCC p. 33, para 5) "5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evi- dence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evi- dence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and mis-

reading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

23. From the aforesaid decisions of this Court on the exercise of power of the Supreme Court under Article 136 of the Constitution, the following principles emerge:

> (i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concur-

rent findings of fact save in exceptional circumstances.

(ii) It is open to this Court to interfere with the findings of fact recorded by the High Court if the High Court has acted perversely or otherwise improperly.

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) When the evidence adduced by the prosecution falls short of the test of re-

liability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, er- rors of record and misreading of the evidence,

or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

24. Keeping the aforesaid principles in mind, we shall proceed to scrutinize the materials on record.

25. It appears from the evidence on record, more particularly the evidence of the PW-1 Nandlal Ramnihor Mishra (Exh. 12), that both, the deceased and ap- pellant herein were known to him. The PW-1 Nandlal knew both as they all used to reside in the same locality i.e. nearby the Hanuman temple situated at the Vile Parle railway station. The PW-1 in his oral evidence has talked about the fight that first ensued at 10:30 P.M. between the deceased and the appellant some- where near the west ticket window of Vile Parle Railway Station. The fight be- tween the two was on account of money. It appears that thereafter at about 12:00 in the night while the deceased was sleeping, the appellant herein laid an assault on the head of the deceased with a hammer. The PW-1 Nandlal witnessed the same on hearing the noise. After the assault was over, the PW-1 is also said to have confronted the appellant herein by asking him whether he had killed the de- ceased. We do not find anything improbable in the examination-in-chief of Nand- lal (PW-1) more particularly considering a very scant & deficient cross-examina- tion. We take notice of the fact that except a minor contradiction in the form of an omission, nothing substantial could be elicited from the cross examination of the PW-1 so as to render his entire evidence doubtful.

26. The PW-8 Udaysingh Ramsingh Thakur (Exh.29) is also one of the eye witnesses to the incident. He also knew the deceased as well as the appellant as they all used to work as labourers in the locality of Vile Parle. So far as the evi- dence of the PW-8 Udaysingh is concerned the defence has been able to bring on record a major contradiction in the form of an omission as the PW-8 in his police statement recorded under Section 161 of the Cr.PC had not stated anything about the appellant inflicting blows with a hammer on the head of the deceased. The PW-8 in his cross-examination stated that he had no idea as to why the po- lice did not record in his police statement the factum of assault with the hammer. However, the PW-8 in his evidence has deposed that after the incident the appel- lant was confronted by the PW-1 Nandlal. Some part of the evidence of the PW-8 corroborates the oral testimony of the PW-1 Nandlal.

27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

> I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the

appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another. IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing

> cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.
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> [See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]

28. To put it simply, in assessing the value of the evidence of the eye- witnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.

29. There is nothing palpable or glaring in the evidence of the two eye-witnesses on the basis of which we can take the view that they are not true or reliable eye-witnesses. Few contradictions in the form of omissions here or there is not sufficient to discard the entire evidence of the eye-witnesses.

30. In the aforesaid context, we may refer to a decision of this Court in the case of State of U.P. v. Anil Singh, AIR 1988 SC 1998, wherein in para 15, it is observed thus :

> “15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other Both are public duties which the Judge has to perform.”

31. The medical evidence on record further corroborates the ocular version of the eye witnesses. The PW-6 Dr. Shivaji Vishnu Kachare (Exh. 25) in his evi- dence has deposed that the cause of death is due to the head injury. The expert witness has also deposed that all the injuries were in the nature of Contused Lac- erated Wound & could have been caused by a weapon like hammer.

32. The chemical analysis report (Exh.10) of the forensic science laboratory in- dicates that there were stains of human blood on the hammer matching with the blood group of the deceased i.e. 'A' group.

33. Thus, having regard to the aforesaid, we are of the view that both the courts below rightly believed the two eye witnesses i.e. the PW-1 and PW-8 re- sply. We see no good reason to take a different view of their evidence than the one taken by the two courts below.

DISCOVERY PANCHNAMA DRAWN UNDER SECTION 27 OF THE EVIDENCE ACT:

34. Having taken the view that there is no good reason for us to disbelieve the two eye witnesses referred to above, we could have stopped and closed the mat- ter. However, we have noticed something very important so far as the law on Section 27 of the Act is concerned as discussed by the two courts below. To put it otherwise, we have noticed a serious infirmity in the reasonings assigned by the trial court as affirmed by the High Court so far as the position of law as regards the discovery of weapon of offence under Section 27 of the Act is concerned. If we overlook or ignore the same then probably the trial courts may keep commit- ting the same mistake & in such circumstances, we would like to explain the cor- rect position of law and how to appreciate the evidence of discovery in accor- dance with the provisions of the Section 27 of the Act.

35. The prosecution examined the PW-4 Amsu Hussain Sayyad (Exh. 21) as one of the panch witnesses to prove the discovery panchnama (Exh. 23).

36. We must first look into the examination-in-chief of the PW-4 in this regard. The PW-4 in his examination-in-chief stated as under:

> "The police officers told me that I have to act as a panch witness. In my presence the person who is police custody narrated that, he concealed a weapon adjacent the shoe shop at parla. Accordingly in my presence his statement recorded by the police. Police obtained my signature on the memorandum-cum-statement of the accused. The memorandum-cum- statement now shown to me bears my signature. It contents are true and correct. The said memorandum is exhibited at Exh. 22. Thereafter, I myself, another person, two to three police officers and accused went in Vile Parle East, outside the railway station of Vile Parle East. There was a wooden bench near the shoe shop. The accused in our presence withdrew an iron hammer from the wooden bench and handed over the same to the police. Police recorded the panchnama of said hammer in my presence and took its possession. The panchnama now shown to me is the same. It bears my signature. It contents are true and correct. It is at Exh. 23."

37. We may not refer to the cross examination of the PW-4 at the instance of the defence as it is not relevant.

38. We may now look into the evidence of the PW-10, the investigating officer. In his examination-in-chief, he has deposed as regards the discovery as under:

> "On 16th December, 2006 the accused made a disclosure statement in presence of panch witnesses that he was ready and willing to point out the place where he had concealed the hammer in Vile Parle area. Accordingly, I drew the memorandum panchnama of the disclosure of statement of the accused in presence of panch witnesses. The memorandum panchanama at Ex. 22 now shown to me is the same. It bears my signature and signa- ture of panch witnesses. Its contents are true and correct. Thereafter, I my- self, panch witnesses and accused on the basis of information given by the accused went at the shop Jaibhawani footwear in Vile Parle on Vallab- hai Patel road. Thereafter, accused went in open place between railway compound wall and wooden bench. He picked the hammer from the said open place and handed over to us. Accordingly, I seized the said hammer by preparation of recovery panchanama. The hammer was having a wooden handle and iron case. I saw blood stains hairs sticked to the said hammer. The recovery panchanama at Ex. 23 now shown to me bears my signature and signature of panch witnesses. Its contents are true and cor- rect."

39. From the aforesaid it is evident that the learned public prosecutor who con- ducted the prosecution before the trial court did not take the pains to bring on record the substantive evidence of the aforesaid two witnesses i.e. the PW-4 and PW-10 resply, the fact of the accused having made a statement that he had con- cealed the hammer and he was inclined to show that spot, even though it has been recorded in the panchnama (Exh. 22) that the accused made such a state- ment. The learned public prosecutor does not appear to have realized that there should be substantive evidence on record in this regard and that the panchnama can be used only to corroborate the evidence of the panch and not as a substan- tive piece of evidence. It appears that the panchnamas (Exh.22 and 23 resply) were shown to the panch (PW-4) and he admitted his signature and, therefore, it was exhibited at Exhs.22 and 23 respectively. The examination-in-chief of the PW-4 does not show that he was read over the panchnama before it was exhib- ited. This Court has time and again impressed upon the necessity of reading over the panchnama which can be used as a piece of corroborative evidence. In spite of this, it is regrettable that the learned trial judge did not take the pains to see that the panchnama was read over to the panch before it was exhibited. A panch- nama which can be used only to corroborate the panch has to be read over to the panch and only thereafter it can be exhibited. If the panch has omitted to state something which is found in the panchnama, then after reading over the panchnama the panch has to be asked whether that portion of the panchnama is correct or not and whatever reply he gives has to be recorded. If he replies in the affirmative, then only that portion of the panchnama can be read into evidence to corroborate the substantive evidence of the panch. If he replies in the negative, then that part of the panchnama cannot be read in evidence for want of substan- tive evidence on record. It is, therefore, necessary that care is taken by the public prosecutor who conducts the trial that such a procedure is followed while examin- ing

the panch at the trial. It is also necessary that the learned trial judge also sees that the panchnama is read over the panch and thereafter the panchnama is exhibited after following the procedure as indicated above.

40. In the aforesaid context, we may refer to and rely upon the decision of this Court in the case of Murli and another v. State of Rajasthan reported in (2009) 9 SCC 417: (2010) 1 SCC (Cri) 12. We got the relevant observations:

> "34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box."

41. One another serious infirmity which has surfaced is as regards the author-

ship of concealment by the person who is said to have discovered the weapon.

42. The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

(1) Discovery of fact in consequence of an information received from accused;

(2) Discovery of such fact to be deposed to;

(3) The accused must be in police custody when he gave informations and
(4) So much of information as relates distinctly to the fact thereby

discovered is admissible – Mohmed Inayatullah vs The State of Maharashtra: AIR (1976) SC 483: (1975) Cur LJ 668 Two conditions for application – (1) information must be such as has caused discovery of the fact;

and (2) information must relate distinctly to the fact discovered

-Kirshnappa vs State Of Karnataka : AIR (1983) SC 446 : (1983)Cr LJ 846

43. We may refer to and rely upon a Constitution Bench decision of this Court in the case of State of Uttar Pradesh v. Deoman Upadhyaya reported in AIR (1960) SC 1125, wherein, the Supreme Court in Paragraph-71 has explained the position of law as regards Section 27 of the Act as under:

> "71. The law has thus made a classification of accused persons into two: (1) those two have the danger brought home to them by deten- tion on a charge; and (2) those who are yet free. In the former cate- gory 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, and in the case of the second category, only that portion, of the statement is admissible as is guar- anteed by the discovery of a

> relevant fact unknown before the state- ment to the investigating authority. That statement may even be con- fessional 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 result, and it can be proved that his death was due to in- juries received by a fall down the mineshaft."

44. The scope and ambit of Section 27 of the Act were illuminatingly stated in Phulukuri Kottaya v. Emperor, AIR (1947) PC 67, which have become locus classicus, in the following words:

> "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 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."

45. What emerges from the evidence of the PW-4 & PW-10 resply is that the appellant stated before the panch witnesses to the effect that "I will show you the weapon concealed adjacent the shoe shop at Parle". This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence.

46. In Dudh Nath Pandey v. State of U. P., AIR (1981) SC 911, this Court took into consideration a very similar fact situation and observed in paragraph 15 that, if the case is dependent on circumstantial evidence, different considerations would have prevailed because the balance of evidence after excluding the testimony of the two eye-witnesses was not of the standard required in cases dependent wholly on circumstantial evidence (as is the case here). This Court observed that the evidence of discovery of pistol at the instance of the appellant cannot, by itself, prove that he who pointed out the weapon wielded it in the offence. The statement accompanying the discovery was found to be vague to identify the authorship of concealment and it was held that pointing out the weapon may, at the best, prove the appellant's knowledge as to where the weapon was kept.

47. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the Investigating Officer in his evidence, and also without proving the contents of the panchnamas, the trial Court was not justified in placing reliance upon the circumstance of discovery of weapon.

48. Even while discarding the evidence in the form of discovery panchnama the conduct of the appellant herein would be relevant under Section 8 of the Act. The evidence of discovery would be admissible as conduct under Section 8 of the Act quite apart from the admissibility of the disclosure statement under Section 27, as this Court observed in A.N. Venkatesh v. State of Karnataka, (2005) 7 SCC 714,:

> "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand Vs. State (Delhi Admn.) [(1979) 3 SC 90]. Even if we hold that the disclosure statement made by the accused appellants (Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8."

49. In the State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600, the two provisions i.e. Section 8 and Section 27 of the Act were elucidated in detail with reference to the case law on the subject and apropos to Section 8 of the Act, wherein it was held:

> "Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either previous or subsequent conduct. There are two Explanations to the Section, which explains the ambit of the word 'conduct'. They are:
>
> Explanation 1 : The word 'conduct' in this Section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other Section of this Act.
>
> Explanation 2 : When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.
>
> The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. The Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute 'conduct' unless those

statements "accompany and explain acts other than statements". Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention.

(f) The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence --the police are coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

* * *

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

We have already noticed the distinction highlighted in Prakash Chand's case (supra) between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr.P.C. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as 'conduct' under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand's case. In Om Prakash case (supra) this Court held: Even apart from the admissibility of the information under Section, the evidence of the Investigating Officer and the Panchas that the accused had taken them to PW11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW11 himself would be admissible under Section 8 of the Evidence Act as 'conduct' of the accused".

50. Further, in the aforesaid context, we would like to sound a note of caution. Although the conduct of an accused may be a relevant fact under Section 8 of the Act, yet the same, by itself, cannot be a ground to convict him or hold him guilty and that too, for a serious offence like murder. Like any other piece of evi- dence, the conduct of an accused is also one of the circumstances which the court may take into consideration along with the other evidence on record, direct or indirect. What we are trying to convey is that the conduct of the accused alone, though may be relevant under Section 8 of the Act, cannot form the basis of conviction.

51. In the ultimate analysis, we have reached to the conclusion that there is no merit in the present appeal.

52. The appeal accordingly fails and is hereby dismissed.

.....J. (SURYA KANT) .....J. (J.B. PARDIWALA)
NEW DELHI;

JULY 14, 2022