



**AFR**

**HIGH COURT OF JUDICATURE AT ALLAHABAD**  
**CRIMINAL APPEAL No. - 4918 of 2022**

Gulabi Devi and 2 others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

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|                           |                                                                                                                            |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------|
| Counsel for Appellant(s)  | : Arun Kumar Shukla, Neelabh Srivastava, Rajnish Shukla, Sandeep Kumar Srivastava, Saroj Kumar Dubey, Shailesh Kumar Yadav |
| Counsel for Respondent(s) | : G.A.                                                                                                                     |

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**Court No. - 49**

**HON'BLE AJAY BHANOT, J.**  
**HON'BLE DIVESH CHANDRA SAMANT, J.**

**[PER: HON'BLE AJAY BHANOT, J.]**

1. The instant appeal arises out of the judgement dated 20.05.2022 rendered by the learned Sessions Court in Sessions Trial No. 201 of 2013 State vs. Gulabi Devi and others. The FIR which culminated in the judgement was registered as Case Crime No. 345 of 2012 under Section 302, 201 IPC at P.S. Campierganj, District Gorakhpur.

trial court also found the appellants guilty of offence under Section 201 IPC and accordingly punished them with five years rigorous imprisonment and imposed a fine of Rs. 10,000/-. Upon default of payment of fine the accused are liable to undergo simple imprisonment for six months.

3. The following appellants are before this Court in the instant appeal:

I. Gulabi Devi.

II. Rajendra Chaudhari.

III. Shivprasad Chaudhari.

#### **F.I.R.-Prosecution Case**

4. Briefly put the prosecution case set out in the FIR is that Ramkishore (father of the first informant) had illicit relations with Gulabi Devi. On 16.12.2012, Ramkishore left on motorcycle No. UP 53 Y 1299 for Chakdaha to give Gulabi Devi the ornaments that he had purchased for her. After reaching Chakdaha, he informed his family that he would return home the next day. Jagdish, uncle of first informant, while returning home had seen Ramkishore with Gulabi Devi, Rajendra and Shiv Prasad on the road from Campierganj to Nautanwa near Dhanidala at about 05:30 PM on 16.12.2012. Rajendra and Shiv Prasad also had illicit relations with the said

Prasad had done Ramkishore to death and threw his body in Mirhiriya Village near Rapti River. The body of the deceased was found near the river by the first informants.

### **Police investigations**

6. After lodgement of FIR, police investigations were set on foot. A chargesheet was filed against the appellants under Section 302/201 I.P.C. on 26.01.2013. Cognizance of the offence was taken by the learned trial court on 16.05.2013.

### **Charge:**

7. The learned trial court framed the following charges against the appellants on 02.07.2014

“आरोप

मै, शमसुल हक, अपर सत्र न्यायाधीश, कोर्ट नं० 07 कक्ष स0-12. गोरखपुर आप श्रीमती गुलाबी देवी, राजेन्द्र चौधरी व शिव प्रसाद चौधरी को निम्न आरोप से आरोपित करता हूँ-

प्रथमः यह कि दिनांक 16.12.2014 को समय भिन्न-भिन्न बहद ग्राम सिरहिया, थाना कैम्पियरगंत, जिला गोरखपुर में आप ने वादी के पिता राम किशोर की हत्या कारित किया। इस प्रकार आपने धारा 302 भा०द०सं० के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः यह कि उपरोक्त दिनांक, समय व स्थान पर आप ने वादी के पिता राम किशोर की हत्या कर साक्ष्य मिटाने के उद्देश्य से तथा वैध दण्ड से बचने के लिए मृतक की लाश को मिरहिया गांव के पास राप्ती नदी में फेंक दिया। इस प्रकार आपने धारा 201 भा०द०सं० के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

एतद्वारा आपको निर्देशित किया जाता है कि उक्त आरोपों में आपका परीक्षण इस न्यायालय द्वारा किया जायेगा।”

8. The charges were framed and explained to the accused. After the accused pleaded not guilty the case went to trial.

**Prosecution Witnesses**

| <b>Sr. No.</b> | <b>Witness No.</b> | <b>Name of Witness</b> | <b>Nature of Witness</b>                            |
|----------------|--------------------|------------------------|-----------------------------------------------------|
| 1.             | PW-1               | Ravindra Chauhan       | First Informant                                     |
| 2.             | PW-2               | Masendra               | Son of Deceased/Witness to Inquest                  |
| 3.             | PW-3               | Jagdish                | Brother of Deceased/Witness to Recovery and Inquest |
| 4.             | PW-4               | Pappu Chauhan          | Son of deceased                                     |
| 5.             | PW-5               | Dr. S.K. Yadav         | Doctor who conducted the post mortem                |
| 6.             | PW-6               | Lalji Chaudhary        | Head Constable & author of the chik                 |
| 7.             | PW-7               | Lakshman Rai           | Investigating Officer                               |

**Documentary Evidences:**

| <b>Sr. No.</b> | <b>Documents</b>                           | <b>Proved by</b>      | <b>Date</b> | <b>Exhibit</b> |
|----------------|--------------------------------------------|-----------------------|-------------|----------------|
| 1.             | Written Report                             | PW-1 Ravindra Chauhan | 23.12.2012  | Exh. Ka-1      |
| 2.             | Panchayatnama                              | PW-2 Masendra         | 23.12.2012  | Exh. Ka-2      |
| 3.             | Recovery memo of Motor Cycle               | PW-3 Jagdish          | 05.01.2013  | Exh. Ka-3      |
| 4.             | Recovery Memo of Rope, Muffler and One cap | PW-4 Pappu Chauhan    | 18.01.2013  | Exh. Ka-4      |
| 5.             | Post Mortem Report                         | PW-5 Dr. S.K.         | 24.12.2012  | Exh. Ka-5      |

|     |                                              |                         |            |            |
|-----|----------------------------------------------|-------------------------|------------|------------|
| 8.  | Inspection Place of Occurrence on 23.12.2012 | PW-7 Laxman Ray (S.H.O) | 23.12.2012 | Exh. Ka-8  |
| 9.  | Site Plan of Place of occurrence             | PW-7 Laxman Ray (S.H.O) | 25.12.2012 | Exh. Ka-9  |
| 10. | Inspection of recovery place of site plan.   | PW-7 Laxman Ray (S.H.O) | 18.01.2013 | Exh. Ka-10 |
| 11. | Charge Sheet                                 | PW-7 Laxman Ray (S.H.O) | 26.01.2013 | Exh. Ka-11 |

### **Material Exhibits:**

| <b>Sr No.</b> | <b>Material</b>     | <b>Exhibit</b>      |
|---------------|---------------------|---------------------|
| 1.            | Cap of deceased     | Material Exhibit -1 |
| 2.            | Muffler of deceased | Material Exhibit -2 |
| 3.            | Rope                | Material Exhibit -3 |

### **I. Written report/Tehrir**

10. P.W.-1/Ravindra Chauhan who is the son of the deceased stated that he along with persons residing in the nearby village had found the body of his father lying on the banks of the river. The P.W.1-Ravindra Chauhan dictated the tehrir to one Durgesh who belongs to their village. Durgesh reduced the tehrir to writing and thereafter read out its contents to P.W.1. P.W.1 put his signatures to the tehrir. The tehrir was submitted in the police station on 23.12.2012. P.W.1 identified his signatures on the tehrir and also proved the document which was thereafter marked as Exh. Ka-1. The F.I.R. was thereafter registered pursuant to the said tehrir.

19:30 hours. The F.I.R. was thereafter lodged as Case Crime No.349 of 2012 under Section 302 and 201 IPC at P.S. Campierganj, Gorakhpur. P.W.6 identified his handwriting and signatures on the chik F.I.R and proved the document. The F.I.R. was thereafter marked as Exh. Ka-6.

12. The G.D. entry no.34 referencing the F.I.R. was made at 19:30 hours on 23.12.2012 by P.W.6 in his handwriting. The P.W.6 identified his handwriting and signatures and proved the G.D. entry. The G.D. entry no.34 was marked as Exh. Ka-7.

### **Inquest proceedings**

13. On the basis of tehrir a police team reached the site near the river bank where the body of the deceased was lying. The inquest proceedings started on 23.12.2012 at 09:15 P.M. and concluded at 10:40 P.M. Inquest proceedings were conducted by P.W.7 Lakshman Rai who was working as Incharge Investigating Officer.

14. Sons of the deceased namely, Masendra-P.W.2; Pappu Chauhan-P.W.4 and Jagdish-P.W.3, brother of the deceased were witnesses to the inquest proceedings. The inquest report was proved by P.W.2-Masendra.

15. The cause of death in the opinion of Panchas as stated in the inquest report was injuries inflicted to person of the deceased.

16. The inquest report also states that various documentations pertaining to the body of the deceased including Photo Nash and Letter to the C.M.O. were completed. The report also

**Recoveries**

16. Motorcycle of the deceased was recovered from Solora crossing at the pointing of Ravindra Singh/P.W.1/son of the deceased. The recovery memo was drawn up on 05.01.2013 by Constable 590 Surendra Yadav, Constable 2719 Ajay Kumar, Constable 1833 Shiv Vachan Singh and Constable 57 Jagannath Yadav. P.W. 3 is a witness to the recovery memo who proved the said document. The recovery memo dated 05.01.2013 was marked as Exh. Ka-3.

17. A muffler and cap belonging to the deceased and a rope which was used in the offence was recovered at the pointing out of the accused-Rajendra Chaudhary. The muffler and cap were identified by the son of the deceased-Ravindra. Jagdish-P.W.3 stated that the recovered articles belonged to the deceased.

18. Pappu Chauhan-P.W-4 and Jagdish Chauhan-P.W.3 the son and brother of the deceased respectively were witnesses to the recovery proceedings. The recovery memo dated 18.01.2013 depicting the recovery of the muffler, cap and rope were proved by P.W.4 and marked as Exh. Ka-4.

**Site Plans****A. Site Plan of place where the body was found**

19. P.W.7/I.O. testified that after the lodgment of the F.I.R. he drew up the site plan of the place of discovery of the deceased's body on 23.12.2012. P.W. 7 identified his handwriting and signatures on the site plan and proved the document which was

**B. Site plan of place where personal effects of deceased were recovered.**

20. Site plan depicting the place from where the belongings of the deceased were recovered was drawn up by P.W.7 on 18.01.2013, at the pointing out of the accused Rajendra. The site plan was proved by P.W. 7 before the trial court and marked as Exh. Ka-10.

**C. Site plan of place where incident occurred:**

21. P.W.7/I.O. deposed that he visited the site of the incident with Gulabi Devi after she was arrested on 25.12.2012. P.W. 7 states that the site plan was drawn up at her pointing out. The site plan of the incident was drawn up by the I.O. in his handwriting on 25.12.2012 and the same bears his signatures. P.W.7/I.O. proved the Site Plan dated 25.12.2012 depicting the place of incident which was then marked as Exh. Ka-9.

**Postmortem Report:-**

22. Postmortem was conducted on 24.12.2012 at 03:00 PM by Dr. S.K. Yadav-P.W.5. The relevant findings of the postmortem report are as under:-

(a) Ante mortem injuries

“Contuse swelling present on left side of parietal region of size 8 cm x 6 cm. On cutting skin underneath brain and membranes blackening Brain material liquified.”

(b) Time since death: About 4 days

**PW 1-Ravindra Chauhan**

24. Ravindra Chauhan, PW-1 is the first informant and the deceased's son. PW-1 is not an eye-witness. PW-1 while deposing before learned trial court primarily reiterated the contents of the FIR and stated that his father had illicit relations with Gulabi Devi. On 06.12.2012 his father left for village Chakdaha on his motorcycle UP 53 Y 1299 with some ornaments for Gulabi Devi. After reaching village Chakdaha his father told him that he would return on the next day. His uncle Jagdish Chauhan had seen his father with the three accused persons at about 05:30 P.M. on 16.12.2012 on the road from Campierganj to Nautanwa. His father did not return home on the next date and the mobile phone of the latter was also switched off. They went on a look out for his father. On reaching Chakdaha village they came to know that 23.12.2012, his father was done to death by Gulabi Devi, Rajendra and Shiv Prasad. The accused thereafter threw the body of the deceased near the Rapti river flowing through village Mathia. After receiving the aforesaid information from the villagers at Chakdaha PW-1 reached village Mathia and found his father's body lying on the banks of the river Rapti. According to PW-1 the body of the deceased was pulled out of the river and laid at another place with the help of the villagers. PW-1 thereafter submitted a tehrir at police station Campierganj.

**PW-2-Masendra**

ornaments to Gulabi Devi and his disappearance thereafter. According to him his father was last seen on 16.12.2012 at 03:30 P.M. by his uncle-Jagdish on the road from Campierganj to Nautanwa. On the information provided by the villagers they reached the site where his father's body was lying on the bank of Rapti river.

**P.W.-3-Jagdish**

26. Jagdish who is the brother of the deceased was introduced as PW-3. PW-3 claims to be witness of last seen. PW-3 while testifying before the learned trial court stated that on 16.12.2012 his brother Ramkishore left his village to meet Gulabi Devi at her house. On the same day while returning to his village from Campierganj he saw his brother with Gulabi Devi, Rajendra and Shiv Prasad Chaudhary at 3:30 pm on the road from Campierganj to Nautanwa. PW-3 thereafter deposed that on that day his brother was done to death by the accused persons at about 09:30 P.M. The information about the murder was given to him by the crowd which had gathered near the Peepal tree. However, no one dared to come forward out of fear of the accused persons. They found his brother's body near the Rapti river and pulled out the same. The body was wrapped up in the "saree" of Gulabi Devi. Gulabi Devi wore the saree when she had visited their house. PW-3 categorically testified that he had not seen the incident. He came to know about the incident after two days. The body of the deceased was found 7 to 8 days

court in front of P.W.4. The P.W.4 identified the cap, muffler and the rope which was produced in the court which was then marked as Material Exhs. 1, 2 and 3 respectively. Under cross examination the P.W.4 stated that the sealed packet was opened in front of him. The packet containing the material exhibits did not bear the seal or signatures of the court.

**P.W.7-Lakshman Rai/Investigating Officer**

28. The Investigating Officer-Lakshman Rai was introduced by the prosecution as P.W.7. The P.W.7 who had effected the recoveries from the accused person testified that the police remand of accused-Rajendra was granted on 18.01.2013. The police took the said accused into custody from the jail and brought him to recover the rope which was used in the commission of murder. The said rope as well as the muffler and cap of the deceased was recovered in the presence of P.W.3-Jagdish and P.W.4-Pappu.

29. The P.W.7 also testified that the statement of P.W.3-Jagdish was recorded on 26.01.2013. The Investigating Officer also proved the charge-sheet which was marked as Exh.Ka-11.

**Submissions from the Bar:**

**Arguments on behalf of the appellants**

30. Shri Kamal Krishna, learned Senior Counsel and Amicus Curiae, assisted by Shri Neelabh Srivastava, learned counsel have canvassed the following submissions in favour of the appellants as under:

II. The case is based entirely on circumstantial evidence. However, the prosecution has not been able to establish the complete chain of incriminating evidences.

III. The P.W.1 and P.W.2 were not witnesses of last seen.

IV. The evidence of P.W.3 who claims to be a witness of last seen is unreliable.

V. There is a delay in recording the statement of P.W.3 which vitiates the same.

VI. Motive of the accused to commit the offence has not been established.

VI. Medical evidence contradicts the prosecution case.

VII. Recovery of the articles is contrary to the provisions of Section 27 of the Indian Evidence Act and cannot be pressed into service to implicate the accused persons.

VIII. The site plan of the incident is unreliable.

IX. The material incriminating circumstances were not put to the accused under Section 313 Cr.P.C.

X. The prosecution has failed to prove its case beyond reasonable doubt. In fact it is a case of no evidence.

XI. The learned trial court erred in law by finding the appellants guilty and convicting them against the weight of evidence.

**Arguments on behalf of the State:**

31. Shri Paritosh Kumar Malviya, learned A.G.A.-I and Shri Suchit Tandon, learned A.G.A. have vehemently opposed the submissions of learned Senior Counsel and have made the

II. The chain of incriminating circumstances against the accused has been fully established.

III. The prosecution has proved all the incriminating links in the chain of circumstances against the accused appellants.

IV. The motive to commit the offence against the accused persons has been established.

V. The evidence of last seen is reliable.

VI. The incriminating articles were recovered at the pointing out of the accused persons.

VII. The prosecution has established the case against the accused-appellants beyond reasonable doubt.

VIII. The judgement of the trial court has correctly appraised the evidences and is liable to be upheld.

### **Appraisal of Evidence:**

#### **I. F.I.R.: Delay**

32. The deceased disappeared on 16.12.2012. The family members of the deceased including PW 1, 2, 3 & 4 did not lodge any missing report in regard to the aforesaid disappearance. The testimonies of the said family members before the learned trial court also do not depict any urgent efforts to look out and search for the deceased. PW 1, PW 2, PW 3 and PW 4 also failed to inform the police immediately after the disappearance of the latter. The F.I.R. was lodged on 23.12.2012 after the body of the deceased was discovered near the banks of the Rapti river. The PW-3 as well as the family

33. The delay in the lodgement of the F.I.R. could not be explained by the prosecution before the learned trial court. The F.I.R. was got registered as an afterthought and the said delay in lodging the same is fatal to the prosecution case.

## **II Chain of incriminating circumstances:**

### **(i) Last Seen.**

34. This is a case of circumstantial evidence. The first incriminating circumstance brought out by the prosecution is that the deceased was last seen in the presence of the accused persons at about 3:30 PM on 16.12.2012 by P.W.3. The PW-3 has also testified to that effect before the learned trial court. The post mortem report which was drawn up on 24.12.2012 opines that the death had occurred 4 days prior in time. On the basis of the post mortem report, it is evident that the deceased was alive till 20.12.2012. There is real possibility of deceased meeting other people in the intervening period from 16.12.2012 to 20.12.2012. Even if the prosecution case is taken on its face value the accused persons were not seen with the deceased at a time proximate to the death of the latter.

35. Furthermore, the doctor PW-5 under cross-examination has stated that there is possibility that the deceased sustained the fatal injury in a fall. PW-3 therefore cannot be called a witness of last seen. The first link in the chain of incriminating circumstances is not established.

## **II Chain of incriminating circumstances:**

P.M. The deceased did not return home on the night of 16.12.2012, and in fact had disappeared thereafter. P.W.3 did not alert the police authorities or inform his family members about the event of last seen for a period of almost one week. Absence of pressing efforts by PW 3 to search for his missing brother or lodge a missing report or tender a complaint to the police authorities is evident from evidence in the record. The aforesaid conduct of P.W.3 is highly suspicious and dents his credibility. The possibility of P.W.3 of incriminating the accused persons as an afterthought cannot be ruled out. P.W. 3 is an unreliable witness. The second link in the chain of incriminating circumstances is thus broken irreparably.

## **II. Chain of incriminating circumstances:**

### **(iii) Delay in recording statement of P.W.3**

37. There is another aspect which impeaches the credibility of the prosecution case. PW-3 is the star witness of the prosecution. He was also a witness to the recovery and inquest proceedings. The inquest as well as recovery proceedings were drawn up on 23.12.2012. However, the statement of PW-3 was recorded by PW-7 on 26.01.2013. 38. The aforesaid delay in recording of the statement was not satisfactorily explained by PW-7 in his testimony. In fact, there was no cause for delay in recording the said statement of PW-7. The said delay renders the prosecution case suspect upon cumulative consideration of the facts, circumstances and evidences of this case.

effect of unexplained delay in recording the statement of a material witness by the Investigating Officer has held as under:

"20. The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they were not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eyewitnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, do not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and reappreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt."

## **II. Chain of incriminating circumstances:**

### **(iv) Motive**

40. The PW 1, PW 2 and PW 3 in their testimonies ascribe the illicit relationship of the appellant Gulabi Devi and the deceased as the motive for the offence. An illicit relationship of this nature is bound to create strains in any family equations.

warm and cordial relationship. There was no cause for Gulabi Devi to murder the deceased. The motive of illicit relationship between Gulabi Devi and the deceased ascribed by prosecution witnesses is not liable to be believed.

41. It is equally noteworthy that there is no evidence pertaining to the illicit relationship of Gulabi Devi with the other co-accused persons or for that matter any animosity between the deceased and the other two accused persons namely Shiv Prasad Chaudhary and Rajendra Chaudhary. Save the bald statements by PW 1, PW 2 and PW 3 which appear to be completely unreliable, there is no evidence to establish illicit relations of Gulabi Devi with other accused. The prosecution has failed to prove the motive for the accused appellants to commit the offence.

## **II Chain of incriminating circumstances:**

### **(v.) Recoveries**

42. The other link in the chain of incriminating circumstances as claimed by the prosecution is the recovery of muffler and cap which were the personal effects of the deceased. The recovery of the rope is of no avail since the death was not caused by strangulation.

43. The recovery was made from bushes in an open place. The place of recovery was accessible to one and all. Moreover, the recovery was made on 18.01.2013, which is almost one month after the deceased had disappeared. In these circumstances, lack

the said Rajendra Chaudhary was not recorded prior to effecting the said recoveries. Absence of the disclosure statements of Rajendra and failure to observe the imperative procedural prerequisites of Section 27 vitiates the recoveries. The aforesaid conclusion will be fortified by authorities holding the field.

45. The imperative mandate of recording discovery statement of an accused prior to the recovery was emphasized by the Supreme Court in **Rajesh and Anr. Vs. The State of Madhya Pradesh**<sup>1</sup>:

“22. Section 26 of the Indian Evidence Act, 1872 (for brevity, 'the Evidence Act'), provides that no confession made by any person whilst he is in the custody of a police officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. Section 27, thereafter, is in the nature of an exception to Section 26 of the Evidence Act. It states 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. Therefore, it is essential under Section 27 of the Evidence Act that the person concerned must be 'accused of an offence' and being in the 'custody of a police officer', he or she must give information leading to the discovery of a fact and so much of that information, whether it amounts to a confession or not, that relates distinctly to the fact discovered, may be proved against him. In effect, both aspects, viz, being in 'the custody of a

23. In this regard, reference may be made to *Bodhraj alias Bodha and others vs. State of Jammu & Kashmir*, (2002) 8 SCC 45 , wherein this Court had observed that the requirement of 'police custody' is productive of extremely anomalous results and may lead to the exclusion of valuable evidence in cases where a person, after committing a crime meets a police officer 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, and he is subsequently taken into custody and becomes an 'accused'. This Court pointed out that this information, which would otherwise be admissible, becomes inadmissible under Section 26 of the Evidence Act as it did not come from a person in the 'custody of a police officer' or rather, came from a person not in the 'custody of a police officer'. In other words, the exact information given by the accused 'while in custody', which led to recovery of the articles can be proved. It was noted that this doctrine is founded on the principle that if any fact is discovered as a search was 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.

24. Thereafter, in *State of Karnataka vs. David Rozario and another*, (2002) 7 SCC 728 , this Court held that information which is otherwise admissible under Section 27 of the Evidence Act would become inadmissible, if it did not come from a person in the 'custody of a police officer' or came from a person 'not in the custody of a police officer'. It was further held that what is admissible is the information and not the opinion formed on it by the police officer and, in other words, the exact information given

25. Again, in *Ashish Jain vs. Makrand Singh and others*, (2019) 3 SCC 770, this Court held that once a confessional statement of the accused is found, on facts, to be involuntary, it would be hit by Article 20(3) of the Constitution of India, rendering such a confession inadmissible. It was further noted that there is an embargo on accepting self-incriminatory evidence, but if it leads to the recovery of material objects in relation to a crime, it is most often taken to hold evidentiary value as per the circumstances of each case. This Court further cautioned that if such a statement is made under undue pressure and compulsion from the Investigating Officer, the evidentiary value of such a statement leading to the recovery is nullified.

26. More recently, in *Boby vs. State of Kerala*, Criminal Appeal No. 1439 of 2009, decided on 12.01.2023, this Court referred to the decision of the Privy Council in *Pulukuri Kotayya vs. King Emperor*, AIR 1947 Privy Council 67, wherein Section 27 of the Evidence Act had been considered at length and it was noted that Section 27 provides an exception to the prohibition imposed by the preceding provisions and enables certain statements made by an 'accused' in 'police custody' to be proved. It was observed that the condition necessary to bring Section 27 into operation is that the discovery of a fact in consequence of information received from a person 'accused of any offence' in the 'custody of a police officer' must be deposed to, and thereupon so much of the information, as relates distinctly to the fact thereby discovered, may be proved. It was observed that normally, Section 27 is brought into operation when a person in 'police custody' produces from some place of concealment some object, such as a dead

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. By way of example, it was elucidated that 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; as knives were discovered many years ago, but if 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. Noting this principle, this Court observed that Section 27 of the Evidence Act requires that 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 the said fact."

46. The mandatory requirement of the discovery statement under Section 27 of the Evidence Act was reiterated in **Ramanand v. State of U.P.** <sup>2</sup> held as follows:

"56. If, it is say of the investigating officer that the appellant-accused while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his bloodstained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out

be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or bloodstained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

57. The reason why we are not ready or rather reluctant to accept the evidence of discovery is that the investigating officer in his oral evidence has not said about the exact words uttered by the accused at the police station. The second reason to discard the evidence of discovery is that the investigating officer has failed to prove the contents of the discovery panchnama. The third reason to discard the evidence is that even if the entire oral evidence of the investigating officer is accepted as it is, what is lacking is the

of the weapon of offence and the bloodstained clothes. The second panch witness, namely, Pratap though available was not examined by the prosecution for some reason. Therefore, we are now left with the evidence of the investigating officer so far as the discovery of the weapon of offence and the bloodstained clothes as one of the incriminating pieces of circumstances is concerned. We are conscious of the position of law that even if the independent witnesses to the discovery panchnama are not examined or if no witness was present at the time of discovery or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the discovery evidence unreliable. In such circumstances, the Court has to consider the evidence of the investigating officer who deposed to the fact of discovery based on the statement elicited from the accused on its own worth.”

47. The recoveries made in the teeth of law laid down in **Rajesh(supra)** and **Ramanand(supra)** and do not incriminate the appellants nor link them with the offence.

#### **V. Site Plan:**

48. While drawing up the site plan of the place of incident the discovery statement of the accused Gulabi Devi pertaining to the place of occurrence at the site was not recorded. In absence of the discovery statement the site plan will not come to the aid of the prosecution. The failure of the prosecution to record the discovery statement of Gulabi Devi while drawing up the site plan of the place of incident renders the same inadmissible in

**Section 313 Cr.P.C.**

49. In the proceedings under Section 313 Cr.P.C., vague and general references were made to the prosecution evidence. Attention of the accused persons were called to incriminating circumstances by simply referencing the fact that P.W.1 to P.W.7 had given their testimonies and they had heard the same.

50. Admittedly, in proceedings under Section 313 Cr.P.C. attention of the accused persons was not drawn to specific incriminating evidences with material particulars. The failure of the prosecution to faithfully comply with the procedure of Section 313 Cr.P.C. led to violation of principles of natural justice which disabled the accused from effectively tendering their defence. The proceedings under Section 313 Cr.P.C. are vitiated.

51. The scope of Section 313 Cr.P.C. and adverse impact of non-compliance thereof have been stated in authorities of long standing.

52. The Supreme Court in **Nar Singh Vs. State of Haryana**<sup>3</sup> examined significance and propounded the scope of Section 313 Cr.P.C. by holding:-

“10. There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313 (1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under Section 313 (1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence.

to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.

11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.

16. Undoubtedly, the importance of a statement under Section 313 Cr.P.C., insofar as the accused is concerned, can hardly be minimised. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 Cr.P.C. statement is raised in the appellate court, then

the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as noncompliance of mandatory provisions of Section 313 Cr.P.C., it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal.

20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.”

53. A similar view was taken in **Sujit Biswas Vs. State of Assam**<sup>4</sup>:-

“12. It is a settled legal proposition that in a criminal trial, the

circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.

14. Whether the abscondance of an accused can be taken as a circumstance against him has been considered by this Court in *Bipin Kumar Mondal v. State of West Bengal*, AIR 2010 SC 3638 , wherein the Court observed: “27. In *Matru alias Girish Chandra v. State of U.P.*, AIR 1971 SC 1050 , this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person observing as under: ‘19. The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are

accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.’ 28. Abscondence by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, in view of the above, we do not find any force in the submission made by Shri Bhattacharjee that mere absconding by the appellant after commission of the crime and remaining untraceable for such a long time itself can establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience.” While deciding the said case, a large number of earlier judgments were also taken into consideration by the Court, including *Matru (supra)*; and *State of M.P. thr. CBI & Ors. v. Paltan Mallah & Ors.*, AIR 2005 SC 733.”

54. The Supreme Court in **State of U.P. Vs. Mohd Iqram & Anr.**<sup>5</sup> has held as under:-

“12. So far as the issue of rape of the deceased prior to her murder by Suresh Kumar, accused, her ex-husband, is concerned, the trial court has recorded findings of fact on this aspect in the negative. Undoubtedly, post-mortem report contains such observations, but Dr. G.R. Sharma (PW.1) has not made any such reference either in his examination-in-chief or cross-examination. Nor this aspect had ever been put to either of the three accused in their statements recorded under Section 313 of Code of Criminal Procedure, 1973

best known to it, did not prefer any appeal against the said order of acquittal. We are of the considered opinion that it was not permissible for the High Court to castigate the accused Suresh Kumar with such observations holding him guilty of committing rape and subsequently murder of his ex-wife Rashmi. Undoubtedly, the post-mortem report had been proved but that does not mean that each and every content thereof is stood proved or can be held to be admissible. Such observations cannot be termed to be a substantive piece of evidence. Dr. G.R. Sharma (PW.1) did not even whisper about the same in his statement made in the court which is the only substantive piece of evidence in law. The court cannot place reliance on incriminating material against the accused, unless it is put to him during his examination under Section 313 Cr.P.C. Thus, the High Court committed an error by taking into consideration the inadmissible evidence for the purpose of deciding the criminal appeals and holding the person guilty who had already been acquitted by the trial court. The post-mortem report had been examined at the time of framing of the charges. The trial court did not frame any charge under Section 376 IPC or Section 376 read with Section 511 IPC. More so, no witness had ever mentioned anything in this respect. Thus, it is beyond any stretch of imagination of any person, how such observations could be made by the High Court.”

55. The mechanical conduct of proceedings under Section 313 Cr.P.C. in the instant case is in the teeth of the law laid down in preceding case laws. In the facts and circumstances of this case the non compliance of Section 313 Cr.P.C. in the spirit of the precedents discussed earlier vitiates the impugned judgement

the matter for fresh initiation of proceedings under Section 313 Cr.P.C.

**Judgment of trial court**

56. Learned trial court erred in law by placing reliance on the testimony of PW 3 and treating him as a witness of last seen. The recoveries of personal effects of the deceased were in the teeth of Section 27 of the Evidence Act. However, the learned trial court placed reliance on the same to return home a finding of guilt against the appellants. The learned trial court erred in law by upholding the proceedings under Section 313 CrPC which was conducted in a mechanical manner and were vitiated.

57. The learned trial court neglected to consider the delay in lodgment of the FIR and also failure of the prosecution to prove the motive of the appellants to commit the offence.

58. The learned Court fell into error by returning home finding of guilt even though the links in the chain of incriminating circumstances could not be established and the hypothesis consistent with the innocence of accused is very strong.

59. The judgment rendered by the learned trial court is perverse and contrary to the evidences in the record. The impugned order dated 18.05.2022 and 20.05.2022 in Sessions Trial No.201 of 2013 (**State Vs. Gulabi Devi and others**) is liable to be set aside and is set aside.

**Conclusions:**

against the appellants beyond reasonable doubt. The accused appellants are acquitted of the charges which were laid against them by the trial court and which are the subject matter of this appeal.

61. The Criminal Appeal is **allowed**.

62. The appellants-Gulabi Devi, Rajendra Chaudhari and Shivprasad Chaudhari shall be forthwith released from prison and set forth at liberty unless required in any other criminal case.

63. The Court would also like to express its gratitude to Shri Kamal Krishna, learned Senior Counsel for assisting the Court as Amicus Curiae.

64. A copy of this judgment translated in Hindi to be served upon the appellants by the Secretary, District Legal Services Authority.

**(Divesh Chandra Samant,J.) (Ajay Bhanot,J.)**

**July 30, 2026**

Ashish/Vandit