

Dhunmun Yadav Vs. the State of Bihar

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Court : Patna

Decided On : Jan-27-2014

Judge : I.a. Ansari & Samarendra Pratap Singh

Appeal No. : Criminal Appeal (DB) No.787 of 2006

Appellant : Dhunmun Yadav

Respondent : The State of Bihar

Judgement :

I.A. Ansari, J.

1. This appeal is directed against the judgment, dated 28.07.2006, and order, dated 29.07.2006, passed, in Sessions Trial No. 344/2006, by the learned Sessions Judge, Buxar, whereby the present two appellants, namely, Dhunmun Yadav and one Arvind Dubey @ Gandhi (since deceased) stood convicted under Sections 364A, 302 and 201 read with Section 34 of the Indian Penal Code (hereinafter referred to as I.P.C.). Following their conviction under Section 302 read with Section 34 I.P.C., while accused-appellant, Arvind Dubey @ Gandhi (since deceased) was, sentenced to death, the present appellant, Dhunmun Yadav, was sentenced to imprisonment for life. Similarly, for their conviction under Section 364A read with Section 34 I.P.C., while accused-appellant, Arvind Dubey @ Gandhi (since deceased), was sentenced to imprisonment for life with fine of Rs. 10,000/- (ten thousand) and, in default of payment of fine, suffer imprisonment

for six months, the present appellant, Dhunmun Yadav, was sentenced to undergo imprisonment for life. For their further conviction under Section 201 read with Section 34 I.P.C., while accused-appellant, Arvind Dubey @ Gandhi (since deceased), was sentenced to undergo rigorous imprisonment for seven years and pay a fine of Rs. 5,000/-(five thousand) and, in default of payment of fine, suffer imprisonment for three months, the present appellant, Dhunmun Yadav, was sentenced to undergo rigorous imprisonment for seven years and pay a fine of Rs. 2,000/- (two thousand) and, in default of payment of fine, suffer imprisonment for a period of one month. The sentences were, however, directed to run concurrently.

2. The case of the prosecution, as unfurled at the trial, may, in brief, be described as under:

(i) Accused Arvind Dubey @ Gandhi (since deceased) was a cousin of Baby Devi (P.W. 8), he being son of the sister of Baby Devis father, namely, Sachchidanand Dubey (P.W. 4). On 19.06.2006, between 4.00 and 5.00 P.M., while Awkash Kumar, son of Baby Devi (P.W.8), was proceeding to attend his tuition class, accused Arvind Dubey @ Gandhi proceeded with him on the pretext of providing C.D. to him, but they did not return home till evening. Initially, Baby Devi thought that her son Awkash, accompanied by accused Arvind Dubey @ Gandhi, had gone to the house of Ramashish Dubey, father of accused Arvind Dubey, but on the third day, Baby Devi (P.W.8) started looking for her son and went, for this purpose, to the house of accused Arvind Dubey, who used to live, with his parents, in village Anyayipur, at Chausa. Accused Arvind Dubey's father, Ramashish Dubey, informed Baby Devi (P.W. 8) that neither Arvind nor Awkash had come there. At the time, when Baby Devi went to the house of Ramashish Dubey, she was accompanied by her sister, Puja Singh (P.W.-5), and her husband, Ramesh Singh (P.W.-6).

(ii) While the search for Awkash was on, a telephone call was received, on the mobile of Mukesh Kumar Singh (P.W. 10), son-in-law of the land-lord of the house, where Baby Devi (P.W.8) used to live on rent. Though the caller wanted to speak to Baby Devi (P.W. 8), her sister, Puja Devi (P.W.-5) received the call, because of the fact that Baby Devi was not available at her rented house, and was told by the

caller, who was none other than accused Arvind Dubey, to reach Chausa railway station with Rs. 2 lakhs to obtain custody of Awkash. Though Baby Devi was unable to collect the huge sum of Rs. 2 lakhs, she went to Chausa railway station from Buxar. In the meanwhile, however, her father, Sachchidanand Dubey (P.W. 4), went to accused Arvind Dubey's father's house and when he met accused Arvind there, Arvind asked Sachchidanand Dubey (P.W. 4) to come to Chausa Station, where he would bring Ravi. From Chausa, accused Arvind Dubey took Sachchidanand Dubey (P.W. 4) to village Pauni, but on reaching there, accused Arvind Dubey told Sachchidanand Dubey (P.W.4) that he would have to come to Chausa railway station, where his nati (grandson) would be handed over to him (P.W.4). Thereafter, Baby Devi's father, Sachchidanand Dubey (P.W. 4), came to Chausa station, where Baby Devi was already present, and, on a query made by Baby Devi, her father told her that Arvind Dubey would return Awkash by 4.00 P.M. at the said station. However, though accused Arvind Dubey came to Chausa railway station, he left on the pretext of taking dinner and never returned thereafter.

(iii) A fardbeyan (Ext.3) was, then, lodged, on 29.06.2006, with Buxar (T) Police Station. Treating the said fardbeyan as First Information Report (in short 'F.I.R.'), Buxar (T) P.S. Case No. 187, under Section 364A I.P.C., was registered against accused Arvind Dubey. During the course of investigation, when accused Arvind Dubey was arrested, he allegedly made a confessional statement to the police to the effect that Awkash had been put to death by accused Dhunmun Yadav (i.e., the present appellant). In his interrogation by the police, accused Arvind Dubey admitted to have kidnapped and taken away Awkash and the reason assigned by him was that he had come to learn about illicit relation of his cousin, Baby Devi, with another person and wanted to, therefore, basically kill Baby Devi, but he did not succeed in his plan as Baby Devi came to Chausa railway station accompanied by her father and other persons.

(iv). Based on the alleged confessional statement of accused Arvind Dubey, Awkash's dead body and some of the articles, such as, pencil, school bag, etc., which Awkash was carrying at the relevant point of time and his wearing apparels were recovered and seized.

(v). In course of time, the present appellant, Dhunmun Yadav, too, was arrested and, then, a charge-sheet was submitted against both the accused persons, namely, Dhunmun Yadav and accused Arvind Dubey @ Gandhi under Sections 364A/302/ 201/34 I.P.C.

3. At the trial, when charges, under Sections 364A, 302 and 201 read with Section 34 I.P.C. were framed, both the accused persons, namely, Dhunmun Yadav (present appellant) and Arvind Dubey @ Gandhi (since deceased) pleaded not guilty thereto.

4. In support of their case, prosecution examined altogether 11 (eleven) witnesses. The two accused aforementioned were, then, examined under Section 313(1)(b) Cr.P.C. and, in their examinations aforementioned, they denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. No evidence was, however, adduced by the defence.

5. The learned trial Court, having found both the accused aforementioned, guilty of the offences, which they had been charged with, convicted them accordingly and passed sentences against them as we have mentioned above.

6. Since accused Arvind Dubey @ Gandhi stood sentenced, as indicated hereinabove, to death for the offence of murder, which, according to learned trial Court, accused Arvind Dubey @ Gandhi had committed, a reference for confirmation of his sentence was made to this Court in terms of the provisions of Section 366 Cr.P.C. The reference came to be registered as Death Reference No. 6, dated 05.08.2006.

7. Aggrieved by their conviction and sentences, which stood passed against them, both the convicted persons, namely, accused Arvind Dubey @ Gandhi (since deceased) and Dhunmun Yadav (present appellant) preferred appeals.

8. While the appeal, preferred by Arvind Dubey, as a convicted person, gave rise to Cr. Appeal (D.B.) No. 912 of 2006, the appeal, preferred by the present appellant, Dhunmun Yadav, came to be registered as Cr. Appeal (D.B.) No. 787 of

2006.

9. During the pendency of Death Reference No. 6, dated 05.08.2006, and Cr. Appeal (D.B.) No. 912 of 2006, Arvind Dubey @ Gandhi died on 15.06.2007, while he was being transmitted to Sadar Hospital, Buxar.

10. By an order, dated 20.07.2007, a Division Bench of this Court disposed of the said Death Reference as well as the Cr. Appeal, which Arvind Dubey @ Gandhi had preferred, by holding that the said appeal had abated and the Death Reference had become infructuous. The present appeal, however, remained pending.

11. We have heard Mr. Surendra Kumar Singh, learned Counsel, appearing for the accused-appellant, and Mr. Ashwini Kumar Sinha, learned Additional Public Prosecutor, for the State.

12. While considering the present appeal, it needs to be noted that the learned trial Court has, for the purpose of convicting the present appellant, has relied upon two pieces of evidence, which have come on record, against the present appellant, Dhunmun Yadav, inasmuch as Baby Devi (P.W. 8) has identified, at the trial, the present appellant, Dhunmun Yadav, and deposed that he (i.e., Dhunmun Yadav) was present along with accused Arvind Dubey (since deceased) at Chausa station and the other piece of evidence is the statement, which was allegedly made by co-accused, Arvind Dubey @ Gandhi (since deceased) to the police leading to the recovery of the dead body and other articles, which we have pointed out above.

13. While considering the above aspects of the case, it needs to be carefully noted that there is no evidence on record that any conversation had taken place, within the hearing of the present appellant, Dhunmun Yadav, between accused Arvind Dubey, on the one hand, and Baby Devi and/or her father, Sachchidanand Dubey (P.W. 4), on the other.

14. There is, therefore, some force in the submission, made on behalf of the present accused-appellant, Dhunmun Yadav, that merely because of the fact that this appellant was present, at Chausa Station, with accused Arvind Dubey, it will

not necessarily follow, as a corollary, that the present appellant was a party to the offences, which had been committed by Arvind Dubey.

15. With regard to the above, it is also worth mentioning that the learned trial Court has brought on record the entire confessional statement, allegedly made by accused Arvind Dubey and recorded by the Investigating Officer, on the ground that the said statement was admissible under Section 27 of the Evidence Act.

16. It must be borne in mind that a confession, made to a police officer, by an accused, in the custody of a police officer, is not admissible in evidence except to the extent that the statement, which may or may not amount to confession, leads to the discovery of a fact. The fact discovered is not equivalent to recovery of dead body or any other incriminating articles.

17. While dealing with the scope of Section 27 of the Evidence Act, it needs to be noted that a bare reading of Section 25 of the Evidence Act makes it clear that this Section (Section 25) mandates that no confession, made to a police officer, shall be proved as against a person accused of an offence. Similarly, Section 26 of the Evidence Act provides that the confession, made by an accused person, while in the custody of a police officer, cannot be proved against him unless, of course, the confession is made in the immediate presence of a magistrate.

18. Thus, while Section 25 of the Evidence Act completely bars confession of an accused person, made to a police officer, from being proved against the accused, Section 26 of the Evidence Act bars from being proved a confession made by an accused person to anyone whomsoever if the accused person was, at the time of making the confession, in the custody of the police, unless the confession has been made in the immediate presence of a magistrate. However, to the bar, so imposed, by Sections 25 and 26 of the Evidence Act, on the use of confession made by an accused person, Section 27 of the Evidence Act carves out an exception inasmuch as it provides that when any fact is discovered as discovered in consequence of information received from a person accused of any offence, while the accused person is 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.

19. Thus, Section 27 of the Evidence Act acts as proviso to Sections 25 and 26 of the Evidence Act. A statement, which falls under Section 27 of the Evidence Act and is generally termed as 'disclosure statement' is allowed to be used on the basis of the view that when a fact is actually discovered in consequence of information given by an accused person, some guarantee is afforded that the disclosure statement was true. Thus, Section 27 of the Evidence Act permits limited use of the information, which an accused may have disclosed to the police, while he was in the custody of the police.

20. While considering the scope of Section 27 of the Evidence Act, what needs to be borne in mind is that the first condition, which is necessary in order to apply Section 27 of the Evidence Act, 1872, is that there must be discovery of a fact, albeit a relevant fact, in consequence of information received from a person, who is accused of an offence. The second condition for application of Section 27 of the Evidence Act is that the discovery must be deposed to. This, in turn, means that the factum of discovery has to come on record by way of evidence and not otherwise. The third condition is that at the time of receiving the information, the accused must have been in police custody. The fourth, but, perhaps, the most important condition is that only "so much of the information", as relates 'distinctly' to the 'fact thereby discovered', is admissible. The rest of the information, which an accused person might have given, must be kept excluded.

21. The meaning of the expressions, 'so much of the information', and 'distinctly', have been subject of interpretation in a number of judicial pronouncements. The expression, 'so much of the information', means only that part of the information, supplied by the accused, which is the direct and immediate cause of the discovery.

22. The idea behind the partial lifting of the ban against the use of a confessional statement, made by a person, accused of any offence, to the police, is that if a fact is actually discovered in consequence of the information given by the accused, it provides some guarantee of truth to that part of the information, which was the clear, immediate and approximate cause of discovery.

23. To put it a little differently, the provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of the

information given, some guarantee is afforded thereby that the information was true and consequently, the said information can safely be allowed to be given in the evidence, because if such an information is further fortified and confirmed by the discovery of articles or the weapon of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. (See *Suresh Chandra Bahri v. State of Bihar* MANU/SC/0500/1994).

24. The word 'distinctly', appearing in Section 27, means 'directly', 'indubitably', 'strictly' and 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly' relates 'to the fact thereby discovered' and is the linchpin of the provision. This phrase refers to that part of the information, supplied by the accused, which is the direct and immediate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement, which may indirectly or remotely relate to the fact discovered. (See *Mohd. Inayatulla v. State of Maharashtra* reported in MANU/SC/ 0166/1975).

25. It is necessary to point out, at this stage, that a fact discovered is not same as the recovery of an incriminating material or object, such as, a weapon of assault, etc. The courts have been reminding, time and again, that the discovery fact is not to be confused or equated with the recovery of incriminating material object, such as, weapon of assault, etc. The fact discovered embraces the place from where the object was produced/recovered and the knowledge of the accused as regards such subject-matter.

26. At one time, it was held that the 'fact discovered', as envisaged in Section 27 of the Evidence Act, is restricted to a physical or material fact, which can be perceived by the senses, and that it does not include a mental fact. (See *Sukhan v. Crown* ILR 10 Lah 283 : 1929 Cri LJ 414, MANU/MH/0264/1931 : ILR 56 Bom 172 : AIR 1932 Bom 286 : 1932 (33) Cri LJ 396). However, it is no longer doubted that the expression, 'fact discovered', includes not only the physical object produced, but also the place from where it was produced and the knowledge of the accused as to such fact. (See *Palukuri Kotayya v. Emperor* AIR 1947 PC 67 : 1947 Cri LJ 533 and *Udai Bhan v. State of Uttar Pradesh* MANU/UP/0227/1960 : AIR 1962 SC 1116 : 1962 (2) Cri LJ 251).

27. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated, in *Phulukuri Kottaya* (supra), 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 as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.?

28. 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, which is sought to be admitted into evidence, must be such as would make the information understandable to a man of ordinary prudence. Mere statement that the accused led the police and the witness to the place, where he had concealed the articles is not indicative of the information given. (see *Bodhraj v. State of J. and K.* reported in MANU/SC/0723/2002). Section 27 of the Evidence Act would, therefore, not be attracted to a case, wherein no witness deposes that the accused person, while in the custody of the police, gave information, which, on being acted upon, led to the discovery of a fact.

29. In *State of Maharashtra v. Damu* reported in MANU/SC/0299/2000, the Supreme Court has explained as to what the commonly used expression, "fact discovered", means. In *Damu's* case (supra), the accused, on his arrest, told the Investigating Officer "Dipak's dead body was carried by me and Guruji (A-2) on his motor cycle and thrown in the canal". The High Court did not treat the said

statement of A-3 (Mukinda Thorat) as admissible in evidence on the ground that the dead body, spoken to by A3, was not recovered pursuant to the said statement. In this regard, the Supreme Court has pointed out that pursuant to the said statement, made by A3, that he would point out the spot, police took him to the spot and, on arriving there, the Investigating Officer found a broken piece of glass lying on the ground. This piece of glass was picked up by the Investigating Officer. The recovery of the said broken piece of glass was considered by the Supreme Court in the light of another piece of evidence on record, namely, a motorcycle, which had been recovered from the house of A2 (Guruji) and its tail lamp was found broken and one piece of this tail lamp was missing. However, when the broken piece of glass, recovered from the spot (pointed out by A3), was placed on the broken sites of the tail lamp of the motor cycle, it fitted the space, in the said tail lamp, in such a way that the said piece of glass was gathered to be the missing part of the broken tail lamp of the motorcycle.

30. Dealing with such a fact situation, the Supreme Court, in Damu's case (supra), speaking through K. T. Thomas, J., observed and held as under:

œ36. 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 in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of Privy Council in Pulukuri Kottayya v. Emperor AIR 1947 PC 67 : 1947 Cri LJ 533 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

37. 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 the information admitted should be consistent with understandability. In this case, the fact discovered by P.W. 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motor cycle.

38. How the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motor cycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motor cycle up to the spot.

39. In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji that the dead body of Dipak was carried on the motor cycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent.? (Emphasis is added)

31. We may also point out that the decision in Damu's case (supra), was also referred to, and relied upon, in the case of Sanjay alias Kaka v. State (NCT) of Delhi (MANU/SC/0088/2001). The principles deducible from Damu's case (supra), were discussed in State (NCT) of Delhi v. Navjot Sandhu, (MANU/SC/0465/2005 : (2005) 11 SCC 600), and not dissented from.

32. In Avtar Singh v. State of Rajasthan reported in MANU/SC/0096/2004 : (2004) 10 SCC 657 : 2004 Cri LJ 1380, the Supreme Court has summarized the requirements of Section 27 as follows:

œ(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.?

33. Let us, now, turn to the question as to how one should determine which part of the statement of an accused person would be admissible in evidence by taking resort to Section 27 of the Evidence Act. In the case of *Mohmed Inayatulla* MANU/SC/0166/1975 : (1976 Cri LJ 481) (supra), the Supreme Court has pointed out that the first step, in the process of determination as to what fact has been discovered, in consequence of a statement made by an accused person, is to pinpoint that fact, which can be said to have been discovered in consequence of the statement of the accused person. In *Mohd. Inayatulla* (supra), the statement of the accused read thus:

œI will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August. In the statement so made by accused Inayatull. the facts discovered, as pointed out by the Supreme Court, in *Mohd. Inayatulla* (supra), were three fold, namely, (a) chemical drums, (b) the place, where the chemical drums lay deposited and (c) the knowledge of the accused as regards

the fact that such chemical drums lay deposited at the said place. The next step, according to the Supreme Court, ought to have been to split the said statement into its various components and to separate the admissible component from the inadmissible ones and, thereafter, only that component or portion which was the immediate cause of discovery, ought to have been recorded as the legal evidence and not the rest of the statement, for, the rest of the statement ought to have been excised and rejected. Thus, on splitting up the said statement of accused Inayatulla, the Supreme Court found that only the first part of the said statement, namely, "I will tell the place of deposit of the three chemical drums", was the immediate and direct cause of the fact discovered and, hence, out of the whole statement of the said accused person, only that portion, namely, "I will tell the place of deposit of the three chemical drums", was held admissible in evidence under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder of first August", constituted only the past history of the drums or their theft by the accused and since this part of the statement of accused Inayatulla was not the distinct and proximate cause of the discovery, the same was ruled out of evidence altogether.?

34. We, now, turn to yet another important aspect of Section 27 of the Evidence Act. In view of the fact that Section 27 of the Evidence Act makes only "so much of the information, as relates distinctly to the fact thereby discovered" provable, it clearly follows that a Court is required to know as to what exactly the accused had stated to the police so that the Court, before acting upon the evidence given, knows as to how much of the information, given by the accused, relates 'distinctly' to the fact thereby discovered. The word, 'distinctly', as pointed out in Mohd. Inayatulla (supra), has been used in order to define the scope of provable information.

35. Considering the fact that the present accused-appellant has been convicted of offences, which he had, according to the learned Trial Court, committed along with Arbind Dubey (since deceased) in furtherance of their common intention and this conviction is based primarily, on the confessional statement, which Arvind Dubey had allegedly made, it is necessary to take note of the law, which governs the admissibility and use of the confessional statement of a co-accused as

distinguishable from the confession of an accused made against his own interest.

36. To put it a little differently, the scope and use of confessional statement of an accused made against his ownself is quite distinct and distinguishable from the scope and use of the confessional statement of a co-accused.

37. When the prosecution seeks conviction of an accused on the basis of the confession of an accused himself, there is no impediment in basing the conviction of the accused on his own confession if the Court finds such a confession voluntary and true; yet, as a rule of practice, it is unsafe to rely upon a confession, particularly, if the confession stands retracted unless the Court is satisfied that the retracted confession is voluntary and true and the same has been corroborated in material particulars. We may refer to *Sarwan Singh Rattan Singh v. State of Punjab* (MANU/SC /0038/1957 : AIR 1957 SC 637), wherein the Supreme Court laid down as follows:

œIt is, however, true that Sarwan Singh has made a confession and in law, it is always open to the Court to convict an accused on his confession itself though he has retracted it at a later stage. . Nevertheless usually Courts require some corroboration to the confessional statement before convicting an accused person on such statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case.? (Emphasis is added)

38. What is, however, important to note is that there may be general corroboration of the confession by the materials on record and the corroboration need not be with mathematical accuracy. This aspect of the matter is easily discernible from the decision in *Pyare Lal Bhargava v. State of Rajasthan* (MANU/SC/0152/1962 : AIR 1963 SC 1094), wherein it was contended that the accused-Appellant No. 2, in his confession, did not own up that he, too, had stabbed, at least, one of the two deceased. The Supreme Court did not pay any importance to this aspect of the matter on the ground that when the confession is read as a whole, the same leave no doubt that the accused appellant No. 2 had admitted the complete role played by him in association with other assailant for causing death of their two victims. The relevant observations of the Supreme Court made, in *Pyare Lal Bhargava*

(supra), run as follows:

œ17. Shri Vishwanathan then contended that A-2 in his confession did not own that he also stabbed at least one of the two deceased. That does not matter much, because a reading of the confession as a whole leaves no doubt that A-2 has admitted the full length role played by him in association with the other two assailants for murdering the two ladies. Hence, the very fact that he did not say in so many words that he also inflicted one stab injury on the deceased is of no consequence. In a way, this aspect is a further assurance to us that his confession was not what the police wanted him to say to the Magistrate.?

39. In fact, in *Pyare Lal Bhargava* (supra), wherein the Supreme Court laid down as follows:

œA retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It can not even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for, a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.? (Emphasis is added)

40. That there is no impediment in law in conviction an accused solely on his own confession, even if retracted, provided that the Court believes such a confession as voluntary and true has been made clear, by the Supreme Court in *Kehar Singh v. The State (Delhi Administration)* (MANU/SC/ 0241/1988 : AIR 1988 SC 1883). That no Court can throw away confession merely because the confession is retracted has been clearly laid down in *State of Tamil Nadu v. Kutty alias Lakshmi Narashinhan* (MANU/SC/0443/2001 : 2001 CRI L.J. 4168), wherein the Supreme Court has observed and held as follows:

œLearned Judges of the High Court declined to act on the said confession mainly for two reasons. First is that the confession was retracted by the maker thereof and second is that the recovery of articles was made prior to the confession. We may state at the outset itself that both reasons are too insufficient for overruling the confession. It is not the law that once a confession was retracted the Court should presume that the confession is tainted. As a matter of practical knowledge we can say that non-retracted confession is a rarity in criminal cases. The retract from confession is the right of the confessor and all the accused against confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The Court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The twin test of a confession is to ascertain whether it was voluntary and true. Once these tests are found to be positive the next endeavour is to see whether there is any other reason, which stands in the way of acting on it. Even for that, retraction of the confession is not the ground to throw the confession overboard.? (Emphasis is added)

41. In K.I. Parunny v. Asstt. Collector (HQ), Central Excise collectors, Cochin, (MANU/SC/2070/1997 : (1997) 3 SCC 721), the Supreme Court has, in no uncertain words, clarified that in a criminal trial punishable under the provisions of the Indian Penal Code it is, now, well settled legal position that confession can form the sole basis of conviction.

42. After taking into consideration a number of its own decisions, the Supreme Court, in R.I. Parunny (supra), has laid down succinctly the law with regard to basing of conviction of an accused, on his own confession, in the following words:

œIt would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the

confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the court is satisfied from the evidence that it was voluntary then it is required to examine whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution.? (Emphasis is added)

43. What follows from the above discussion, if we may reiterate, is that there is no legal bar in basing the conviction of an accused on his own confession if the confession is found to be voluntary and true; but safer it is, as a rule of general practice and prudence, that the Court seeks some corroboration from other materials on record and if such corroboration is received, conviction can be safely based on the confession of the accused. We may also point out that when a confession is found to be voluntary and true, the same cannot be refused to be acted upon merely on the ground that the confession stands retracted, for, even a retracted confession can form legal basis of conviction if the Court is, as observed in *Pyare Lal Bhargava* (supra), satisfied that the confession is true and voluntary.

44. The law with regard to the use of confession of a co-accused is, however, strikingly differently.

45. It is Section 30 of the Evidence Act, which makes the confession of a co-accused relevant. There is a marked difference between the probative value of the confession of an accused vis-a-vis the confession of a co-accused and this difference appears to have, quite often, created confusion and incorrect approach, though the law on the use of the two kinds of judicial confessions is very well settled.

46. The confession, made by an accused, if found voluntary and true, can be made basis for his own conviction. Though corroboration of such a confession is not a condition precedent for making use of the confession as basis for conviction, prudence requires that some corroboration of the material particulars of the

confession is received from the evidence on record. As against such use of confession against the maker of his own confession, the confession of a co-accused is no evidence at all and it cannot be used as a foundation for conviction of the accused, who is not maker thereof, though the same can, indeed, be used as a supporting piece of evidence against the accused, who is not the maker thereof.

47. The reasons for not treating the confession of a co-accused as evidence are, broadly speaking, that the confession of a co-accused is not given on oath; it is neither given in the presence of the accused against whom the confession is sought to be relied upon nor is the maker's version is tested by cross-examination. In fact, such a confession is a weaker type of evidence than the evidence of an approver, for, the approver is cross-examined by the accused, whereas the confession of a co-accused is not subjected to cross-examination and brought on record without allowing the accused against whom such a confession is sought to be proved any opportunity of cross-examining the co-accused and testing the veracity or otherwise of the confession of the co-accused.

48. A confession is relevant against the maker, because the maker implicates himself in a crime, but the confession of the co-accused differs in this regard inasmuch as it is some one else's confession, which is sought to be used against a person, who never owned up the guilt or the truth of the confession of his co-accused. (See *Bhuboni Sahu v. The King* 76 Ind. App. 147 and *Emperor v. Lalit Mohan* 12 CRI LJ 2 (Cal)53.)

49. A co-accused, who confesses his guilt, stands on no better footing than an accomplice. The law insists that the accomplice's evidence be not used without corroboration. Prudence demands that when such an accomplice implicates another, then, the person, who is so implicated, has a right to test the evidence given against him by his co-accused; but no such opportunity is available in law to the person, who implicates his co-accused by making a confession.

50. The resultant effect is that the confession of a co-accused is used against another accused without giving him any opportunity of testing the veracity of the confession by cross-examining the maker thereof. No wonder, therefore, that the

Supreme Court has laid down that the confession of the co-accused is not really 'evidence' in its stricto sensu and cannot be made foundation for conviction of the person, who did not make the confession, though such confession can be used as an additional reason for believing the evidence on record provided that the evidence on record, independent of the confession of the co-accused, convinces the Court of the guilt of the accused against whom such a confession is relied upon. A reference, in this regard, may be made to *Kashmira Singh v. The State of Madhya Pradesh* (MANU/SC/0031/1952 : AIR 1952 SC 159), wherein the Supreme Court observed and laid down as follows: æThe confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 8. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then, of course it is not necessary to call the confession in aid. But cases may arise, where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and, thus, fortify himself in believing what without the aid of the confession he would not be prepared to accept.?

51. It is of immense importance to note that the above observations, made in *Kashmira Singh* (supra), were in respect of Section 30 of the Evidence Act, that is, for using the confession of a co-accused and, hence, the decision, in *Kashmira Singh* (supra), becomes relevant, when the confession of a co-accused is sought to be used as basis for conviction. In short, *Kashmira Singh* (supra) lays down the law with regard to use of the confession of a co-accused.

52. Drawing the distinction between the use of confession against its maker under Section 24 of the Evidence Act and the use of the confession against a co-accused under Section 30 of the Evidence Act, the Supreme Court, in *K.I. Pavunny* (supra), observed and held as follows:

21. In *Kashmira Singh's* case (supra), the co-accused, Gurcharan Singh, made a confession. The question arose whether the confession could be relied upon to prove the prosecution case against the Appellant, Kashmira Singh. In that context, Bose, J. speaking for a Bench of three Judges laid down the law that the court requires to marshal the evidence against the accused excluding the confession altogether from consideration. If the evidence de hors the confession proves the guilt of the Appellant, the confession of the co-accused could be used to corroborate the prosecution case to lend assurance to the Court to convict the Appellant. The Court considered the evidence led by the prosecution, de hors the confession of co-accused and held that the evidence was not sufficient to bring home the guilt of Appellant Kashmira Singh of the charge of murder. The Appellant was acquitted of an offence under Section 302 IPC but was convicted for the offence under Section 201 IPC for destroying the evidence of murder and sentenced him to seven years' rigorous imprisonment.

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xxx xxx xxx xxx xxx xxx

53. In *Haricharan Kurmi v. State of Bihar* (AIR 1964 SC 1184), a Constitution Bench was to consider as to when the confession of co-accused would be used as evidence under Section 3 of the Evidence Act. It was held as follows:

the confession of a co-accused can not be treated as substantive evidence. If the court believed other evidence and felt the necessity of seeking an assurance in support of its conclusion deductible from the said evidence, the confession of the co-accused would be used. It was, therefore, held that the court would consider other evidence adduced by the prosecution. If the court on confirmation thereof, forms an opinion with regard to the quality and effect of the said evidence, then, it is permissible to turn to the confession in order to receive assurance to the conclusion of the guilt of the accused. It is, thus, seen that the distinction has been made by the Court between the confession of an accused and uses of a confession of the co-accused at the trial.? (Emphasis supplied)

54. Thus, what emerges from the above discussion is that before using the confession of a co-accused, the Court has to, first, marshal the evidence against the accused, who is sought to be roped in with the help of the confession of the co-accused, and if, on such marshalling of evidence, the Court finds that independent of the confession of the co-accused, the evidence on record reveals sufficient incriminating materials for believing the complicity of the accused in the offence, then, in such an event, the confession of the co-accused can be used as a supporting piece of evidence for lending assurance to the other evidence on record and in order to fortify the Court in believing that the conclusion that it had reached that the accused is guilty is correct.

55. In short, the confession of a co-accused is not substantive piece of evidence on which can rest the entire foundation for conviction of the accused, who is not the maker of the confession. Far from this, confession of a co-accused can be used merely for the purpose of lending assurance to the conclusion already reached by the Court that the accused against whom the confession of a co-accused is sought to be used already stands proved to have committed the offence. It is in this context that the decision, in *Kashmira Singh* (supra), needs to be read, whereas there is no impediment, we feel impelled to clarify, in basing the conviction of an accused on his own confession if the confession is found to be voluntary and true, though, generally, corroboration of such a confession is desirable.

56. In *Balbir Singh v. State of Punjab* MANU/SC/0101/1956 : AIR 1957 SC 216, when it was suggested that the confession of the two accused should be read together in order to condemn both, for, both the confession were inconsistent with, and contrary to, each other, the Supreme Court held and observed as follows:

œSo far as the confessional statement of Jagir Singh is concerned, it may be taken into consideration against the Appellant if it fulfils the conditions laid down in Section 30 of the Evidence Act. One of the conditions is that the confession must implicate the maker substantially to the same extent as the other accused person against whom it is sought to be taken into consideration. On reading Jagir Singh's confession as a whole, it appears that he was really trying to throw the main blame

on the Appellant, though he admitted that he entered into the house of Mst. Chinti, brought out a Kirpan lying there, and took some silver ornaments from that house. He denied that he had anything to do with the murder of the two boys; he more or less tried to make out that he was an unwilling spectator of the crime committed by the Appellant. In these circumstances, the utmost that can be submitted on behalf of the Appellant is that the confession of Jagir Singh should not be used at all against the Appellant. At one stage of his argument Mr. Sethi did submit that the confession of Jagir Singh should be excluded altogether from consideration against the Appellant; later, however, he submitted that both the confessions should be read together in order to condemn both as untrue on the ground of the difference between the two confessions. We are unable to accept this submission of Mr. Sethi. We have pointed out that some of the differences are immaterial, some are due to the desire of Jagir Singh to throw the blame on the Appellant—a circumstance of which the benefit has been given to the Appellant, and some other differences are clearly resolved by other evidence on the record. We do not think that in these circumstances the confessional statements can be condemned out of hand or in limine as untrue.

(15) In this case, both the confessions were retracted subsequently, and the proper approach in case of this nature is to consider each confession as a whole on its merits and use it against the maker thereof, provided the Court is in a position to come to an unhesitating conclusion that the confession was voluntary and true; and though a retracted confession, if believed to be true and voluntarily made, may form the basis of a conviction, the rule of practice and prudence requires that it should be corroborated by independent evidence.?

57. Referring to the decision in *Balbir Singh* (Supra), the Supreme Court, in its later decision, in *K.I. Pavunny* (Supra), observed thus:

œThis Court upheld the conviction and held that it is no necessary that each item of fact or circumstances mentioned in the confessional statement required to be corroborated separately and independently. It would be sufficient if there is general corroboration.?

The ratio in *Kashmira Singh* case was referred to.

58. Thus, the principle, deducible from the decision in Balbir Singh (Supra), Pyare Lal Bhargava (Supra) and K.I. Pavunny (Supra), is that a confession made by an accused can be relied upon if the Court is satisfied that the same is voluntary and true. In short, thus, even if the confession is retracted, such a retracted confession can be treated as true if it receives general corroboration from the evidence on record and it is unwise for the court to read together two confessions made by two accused persons and condemn both even though both the confessions are found to be voluntary and the inculpatory parts thereof receive general corroboration from the remaining evidence on record.

59. The above position of law is further fortified by the decision of the Supreme Court in Parmananda Pegu vs. State of Assam (AIR 2004 SC 4197 : 2004 (7) SCC 799), wherein the Supreme Court, referring to its earlier decision, in Chandrakant Chiminlal Desai v. State of Gujarat, has made it clear that the decision, rendered in Chandrakant Chiminlal Desais case (supra), is per incuriam inasmuch as it has been incorrectly laid down, in Chandrakant Chiminlal Desais case (supra), that a retracted confession is not evidence and the Court wrongly applied the law, laid down in Kashmira Singhs case (supra), to the case of an accused, who retracts his own confession, while the case of Kashmira Singh (supra) is a case, which relates to the use of confession of a co-accused. The relevant observations, made in Parmananda Pegus case (supra), read as under: "The decision of this Court in Chandrakant Chiminlal Desai v. State of Gujarat (MANU/SC/0467/1992 : 1992 Cri LJ 2757) has created some difficulty in understanding the law, which is otherwise so well settled. The learned Judges imported the observations which were made in Kashmira Singh (supra), in the context of evidentiary value of the confession of co-accused and applied them to the case of retracted confession. It appears that the learned Judges went by the head-note in the AIR, which opens up with the sentence "The confession of an accused person....." However, in the text of the judgment, it is crystal clear that the entire discussion and the statement of law was only with reference to the confession of the co-accused. While clarifying that the confession of the co-accused is not evidence in the ordinary sense of the term as pointed out by the Privy Council, this Court observed, in Kashmira Singh's case, that such a confession cannot be made the foundation of a conviction and can only be used in

support of other evidence. In Chimanal's case, the learned Judge, after referring to the Head-note portion of the MANU/SC/0031/1952 : 1952 Cri LJ 839 , proceeded to apply the test applicable to the confession of the co-accused to a case of retracted confession. The Court observed: "The High Court has on the other hand made this confessional statement as the basis and has then gone in search for corroboration. It concluded that the confessional statement is corroborated in material particulars by prosecution witnesses without first considering and marshalling the evidence against the accused excluding the confession altogether from consideration. As Held in the decision cited above only if on such consideration on the evidence available, other than the confession a conviction can safely be based then only the confession could be used to support that belief or conclusion."

In view of the error in comprehending the scope of the decision in Kashmira Singh's case, the decision in Chimanal's case falls close to the category of decisions rendered per incuriam. If followed, it would run counter to a catena of coordinate Bench decisions and the larger Bench decision in Pyare Lal Bhargavas case (supra).? (Emphasis supplied)

60. In short, thus, even if the confession is retracted, a confession made by an accused can be relied upon if the Court is satisfied that the same is voluntary and true. Such a retracted confession can be treated as true if it receives general corroboration from the evidence on record.

61. As against the above use and probative value of a confession made by an accused against his own interest, the use and probative value of the confession of a co-accused stands on a different footing inasmuch as before using the confession of a co-accused, the Court has to, first, marshal the evidence against the accused, who is sought to be roped in with the help of the confession of the co-accused, and if, on such marshalling of evidence, the Court finds that independent of the confession of the co-accused, the evidence on record reveals sufficient incriminating materials for believing the complicity of the accused in the offence, then, in such an event, the confession of the co-accused can be used as a supporting piece of evidence for lending assurance to the other evidence on

record and in order to fortify the Court in believing that the conclusion that it had reached that the accused was guilty is correct.

62. To put it a little differently, the confession of a co-accused is not substantive piece of evidence on which can rest the entire foundation for conviction of the accused, who is not the maker of the confession. Far from this, confession of a co-accused can be used merely for the purpose of lending assurance to the conclusion already reached by the Court that the accused against whom the confession of a co-accused is sought to be used already stands proved to have committed the offence. It is in this context that the decision, in *Kashmira Singh* (supra), needs to be read. There is no impediment, we feel impelled to clarify, in basing the conviction of an accused on his own confession if the confession is found to be voluntary and true, though, generally, corroboration of such a confession is desirable.

63. In the backdrop of the law, which we have discussed above, when come to the facts of the case at hand, we notice, as already indicated above, that the only incriminating evidence, admissible against the present appellant, is his identification, at the trial, by Baby Devi (PW 8) stating to the effect that this appellant was present, at the said railway station, along with Arbind Dubey (since deceased). In this regard, we have already pointed out that this piece of evidence cannot be of much avail to the prosecution inasmuch as no conversation is proved to have taken place, within the hearing of the present appellant, Dhunmun Yadav, between accused Arvind Dubey, on the one hand, and Baby Devi and/or her father, Sachchidanand Dubey (P.W. 4), on the other

64. We have, therefore, concluded, at paragraph 14, that it will not necessarily follow, as a corollary, that the present appellant was a party to the offences, which had alleged to have committed with co-accused, Arvind Dubey.

65. When the evidence on record is wholly insufficient to hold the present appellant, Dhunmun Yadav, guilty of the offences, which he stood charged with, the confession of the co-accused Arbind Dubey (since deceased) could not have been used to base the conviction of the present appellant. If, therefore, the alleged confessional statement of the co-accused, Arbind Dubey (since deceased), is kept

excluded from the purview of our consideration, which we must do, there remains really no such evidence, which can be made basis of conviction of the accused-appellant. 66. Because of what discussed and pointed out above, we are clearly of the view that the accused-appellant could not have been held guilty of the offences, which he stood charged with, and he ought to have been acquitted, at least, by giving benefit of doubt.

67. In the result, and for the reasons discussed above, this appeal is allowed. The conviction of the accused-appellant and the sentences passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offences, which he has been convicted of, and he is acquitted of the same under benefit of doubt.

68. Let the accused-appellant be released from custody, forthwith, unless he is required to be detained in connection with any other case.

69. Let the Lower Court records be sent back to the learned Court below with a copy of this judgment and order.

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