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Dharma Vs. the State

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Court : Rajasthan

Decided On : Jul-27-1965

Reported in : 1966CriLJ441

Judge : I.N. Modi and; B.P. Beri, JJ.

Acts : Evidence Act, 1872 - Sections 25, 26, 27, 60, 159 and 160; Indian Penal Code (IPC), 1860 - Sections 201, 204, 302 and 411

Appeal No. : Criminal Appeals Nos. 349 and 575 of 1963

Appellant : Dharma

Respondent : The State

Advocate for Def. : B.C. Chatterjee, Dy. Govt. Adv.

Advocate for Pet/Ap. : Sardar Singh, Adv.; M.C. Bhandari, Adv.

Judgement :

Modi, J.

1. These are two connected appeals arising out of the judgment of the Additional Sessions Judge, Sirohi, dated the 16th April, 1963, by which the accused Dharma has been convicted under Sections 201 and 411 I. P. C. and sentenced to four years' and one year's rigorous imprisonment respectively. Another accused

Hansia has been convicted under Section 411 I. P. C. and sentenced to three years' rigorous imprisonment. Both these accused were acquitted of the charge under Section 302 I. P. C. and the third accused Mst. Khasi was acquitted altogether. Appeal No. 349 of 1963 has been filed by Dharma from jail against his conviction and sentence. Appeal No. 575 of 1963 has been filed by the State, and the prayer is that all the three accused should have been convicted under Section 302 I. P. C. We propose to dispose of both these appeals by a single judgment.

2. All the three accused were charged with the murder of one Mst. Hanja under Section 302 I. P. C. and also under Section 411 I. P. C. for having received certain stolen property which was in the deceased's possession. Mst. Hanja, mother of Amrit Lal P.W. 13 and daughter of Uma Shanker P.W. 16 was a widow. She lived in the house of her father Uma Shanker in village Bamnera. Uma Shanker himself resided in village Pipla near Nagpur at the relevant time. Mst. Hanja became a widow some eighteen years ago before she was murdered. Both mother and son used to live in their ancestral house for about fourteen years but they started living in the house of Uma Shanker some five years ago. No one else used to live in that house. Four rooms in this house were in the possession of Mst. Hanja, and the fifth was retained by Uma Shanker in his own possession and locked by him. Certain ornaments and cash of Uma Shanker were kept in this room, so also the ornaments inherited by Amrit Lal from his father. All these ornaments lay buried in a pit in an Ala or cupboard in one of the walls of the room. On the night between the 8th and 9th May, 1962, Amrit Lal slept in his ancestral house while Mst. Hanja slept in the other house, that is, the one belonging to her father Uma Shanker. The two houses are situated at a distance of about one furlong from each other. On the morning of the 9th May, 1962, when Amrit Lal went to his Nana's house, he found that his mother was not there. He waited for her for some time and then searched for her but without any avail. He then seems to have informed his mother's sister's husband Durga Shanker P.W. to come and see what had happened. Another relation of Amrit Lal namely Chunnilal P.W. who had gone to his Susral at village Utman, was sent for. Chunnilal arrived on the morning of the 10th May. The woman could not be traced for all this time. It was found that the lock of the room which contained the ornaments had been broken open and it was lying on the floor, the 'Patiara' (cupboard) had also been interfered with and several tins which

contained the gold and silver ornaments were lying on the ground scattered and empty. It is alleged that the Gram Panchayat authorities were informed of this incident in the morning of the 10th May, 1962. The Sarpanch prepared the report Ex. P-21 in which it was stated that gold and silver ornaments and clothes and cash worth about nine thousand rupees had been stolen from Uma Shanker's house and that Mst. Hanja Bai widow of Uma Shanker and mother of Amrit Lal had also disappeared since the 9th May. Some details of the property stolen were also furnished; but it was mentioned that full particulars of the entire property could only be furnished on the arrival of Uma Shanker. The case for the prosecution is that the Panchayat authorities had forwarded the papers prepared by them to the Sub Inspector of Police Sumerpur; but the latter did not do anything for about two or three days. P. Ws. Amrit Lal and Durga Shanker and some other persons then approached the Sub Inspector, but the latter told them that they should make a search for Mst. Hanja and that the police were also doing the same. The Sub Inspector's version, however, is that the first report of this incident had been made to him only on the 17th May, 1962, by Amrit Lal. This is Ex. P-18. P.W. Uma Shanker father of the deceased seems to have arrived at Bamnera on Baisakh Sudi 15 corresponding to the 19th May, 1962; and the list of the stolen articles which were lying concealed in the Patiyara as given by him is Ex. P-19.

3. The Sub Inspector reached the spot on the 17th May and started the investigation. The accused Dharma and Hansia were arrested on the night of the 17th. Mst. Khasi was arrested on the 19th May, 1962. After these accused had been arrested, the dead body of Mst. Hanja and certain ornaments were recovered at the instance of Dharma accused and as a result of certain information furnished by him. The dead body was recovered from a well tied in a bundle with the Ghaghra and the Orna of the deceased. The relevant exhibits are Exs. P-6, P-7, P-11 and P-12. Of these, Ex. P-6 is the list of five gold ornaments, some of which were in pairs, and which were recovered from the possession of the accused Mst. Khasi to whom they had been handed over by the accused Dharma. Ex. P-7 is the list of certain silver ornaments recovered from the possession of Teja brother of the accused Dharma. Ex. P-11 relates to the recovery of a pair of Murkies from one Heera who had stated that the same had been given to him by Dharma. Ex. P-12 relates to the recovery of a quantity of melted silver from the

possession of Lalchand, which remained after a silver Kandora had been melted by him at the instance of Dharma and a silver Bedi had been prepared from a part of it. The recoveries made at the instance of the accused Hansia from his own house are contained in Ex. P-5 and Ex. P-13. An identification proceeding with respect to all these ornaments was held before the Tehsildar Magistrate at Bali on the 18th June 1962, vide Ex. P-17. At this proceeding, Uma Shanker correctly identified ornaments Ex. 12 a pair of gold Karas, Ex. 13 a gold Fansi, Ex. 15 a gold Soonk, Ex. 16 a gold Madaliya, Ex. 20 a pair of gold ear-rings, Ex. 22 a gold Mooth, studded with imitation stones, Ex. 23 a gold Bajar tiki also studded with a green and red imitation stone, Ex. 24 gold Modaliyas five, Exs. 26 to 33--a number of silver ornaments for wearing on legs, Ex. 35 a pair of silver Pazeb, Ex. 36, a pair of silver ear-drops, and Ex. 37, a pair of silver Totis or ear studs.

4. The post-mortem examination of the dead body of Mst. Hanja was performed by Dr. C.S. Arora P.W. 4, the medical officer in charge of the dispensary at Sanderao on the 19th May, 1962. The dead body was identified to be that of the deceased by her uncle Pareshwar P.W. 15. According to the doctor, the dead body was in a highly decomposed condition and rigor mortis had completely disappeared. The doctor was of the opinion that it was not a case of death due to drowning because there was no fluid present either in the right or the left lung. The only injury on the body of Mst. Hanja was the fracture of the Thyroid cartilage, and, therefore, in the opinion of the doctor, the case of death was asphyxia due to throttling.

5. The police in due course challaned all the three accused under Sections 302 and 411 I. P. C., and, after commitment, the accused Mst. Khasi was acquitted altogether and the two other accused Dharma and Hansia have been convicted and sentenced as already stated. Both of them have, however, been acquitted under Section 302.

6. All the accused denied to have had anything to do with the offences with which they were charged. They did not lead any evidence in defence.

7. Now we may state at once that the learned Deputy Government Advocate has not pressed his appeal for the conviction of Mst. Khasi at all and that of Hansia under Section 302 I. P. C. Therefore Khasi's acquittal must be maintained as

correct, and so also there is no question of convicting Hansia under Section 302. It may also be mentioned at this place that Hansia has not filed any appeal against his conviction under Section 411. The only appeals which, therefore, survive relate to the accused Dharma. The prayer in his appeal is that he should have been acquitted altogether as no offence is established against him beyond all reasonable doubt, and the State's appeal against him is that he should have been convicted not merely under sections 201 and 411 but also under Section 302 I. P. C. We, therefore, propose to address ourselves to these questions now.

8. What then is the evidence against the accused Dharma? Put tersely, it consists of:

(1) the recovery of the dead body at his instance vide Ex. P-26 and Ex. P-2 dated the 18th May, 1962;

(2) the recovery of stolen articles at his instance. The most important items so recovered were from the possession of Mst. Khasi vide Ex. P-6. Certain recoveries were also made from Tejia, brother of the accused, and Heera and Lalchand vide Exs. P-7, P-11 and P-12. But these do not necessarily connect the accused with the crime, and, therefore, we shall ignore them for the present purpose;

(3) confession of the co-accused Hansia; and

(4) evidence of certain eye-witnesses namely P.W. 3, Bhika, P.W. 12 Ota and P.W. 19 Gulabsingh. These witnesses allege to have seen all the three accused and Mst. Hanja together at night some time in the month of Baisakh that is May, 1962.

We shall first consider on the basis of the various kinds of evidence available against the accused Dharma whether an offence under Section 421 I. P. C. is satisfactorily made out against him.

9. So far as this aspect of the case goes, there is, in our opinion, abundant evidence to hold that the accused Dharma is guilty of this offence beyond a shadow of doubt. This evidence consists of the statements of P.W. 13 Amrit Lal (deceased's own son) P.W. 14 Chunnilal (deceased's uncle), P.W. 15 Pareshwar

(deceased's another uncle) and P.W. 16 Uma Shanker (deceased's father). The evidence of these witnesses, read together leaves no doubt whatsoever in our minds that on the night between the 8th and 9th May, 1963, a large number of gold and silver ornaments and clothes and cash of the value approximately of nine thousand rupees had been stolen away from the house of P.W. 16 Uma Shanker where the deceased and P.W. Amrit Lal used to live at the relevant time. This evidence also goes to show that Mst. Hanja, Amrit Lal's mother, had disappeared on that night while Amrit Lal was sleeping in his ancestral house and she alone occupied the relevant house on that night, and that she could not be traced. Then, there is the evidence of the recovery of some of the stolen articles and that too at the instance of the accused himself. The recovery of gold ornaments vide Ex. 6 from the house of Mst. Khasi is extremely significant in this connection. This consists or a fairly large number of gold ornaments which a man in the position of Dharma or a woman in the position of Mst. Khasi could not be normally expected to possess. One of these articles Ex. 13 bore the monogram PH and according to Uma Shankar these were initials of his brother Pareshwar Heeralal P.W. 15. The evidence of Uma Shanker is that this particular ornament had been prepared by Pareshwar, but it fell to the share of Uma Shanker at the family partition some ten years ago. P.W. 15 Pareshwar has fully corroborated this. That these articles were recovered from the possession of Mst. Khasi is proved by the evidence of the Circle Inspector Girdharilal P.W. 20, P.W. 11 Shankerlal and P.W. 1 Durga Shanker. The trial court has believed the evidence of these witnesses, and no valid reason has been pointed out to us to the contrary. We also have it from P.W. 16 Uma Shanker that these articles had been kept by him concealed in a pit in an Ala of the room which was locked by him and the key whereof had been retained by him. The ornaments are proved to have belonged to Uma Shanker and Amritlal by the evidence of these witnesses and they have been satisfactorily identified by them at an identification proceeding Ex. 17 before the Tehsildar Magistrate Bali, and we see no reason to doubt this evidence either. The accused Dharma has not been able to explain how he came to have possession of these ornaments. He does not claim these to be his own. All that he was able to say in his examination under Section 342 Cr. P. C. was that he had neither led the police party and the Motbirs to Mst. Khasi's house nor had he asked the latter to produce the

ornaments. This statement of the accused is, in our opinion, absolutely false. It is not possible to accept that these ornaments had been given to him by the deceased Mst. Hanja. These articles were recovered from the possession of Mst. Khasi at the accused's own instance soon after the occurrence. Khasi does not claim them to be her own, nor could she be expected to possess ornaments of this type. In these circumstances, we have no manner of hesitation that the accused has been rightly convicted under Section 411 I. P. C. and that his conviction in this behalf does not call for any interference.

10. The next and the more difficult question is whether the accused on the evidence which has been brought on the record can be held guilty under Section 302 I. P. C. of the murder of Mst. Hanja. The evidence in this connection consists, first, of the statements of three eyewitnesses namely P.W. 3 Bhika, P.W. 12 Ota and P.W. 19 Gulab Singh who are said to have seen the deceased last in the company of the three accused before her alleged murder. The learned trial Judge has not believed the evidence of these witnesses. We have carefully perused their evidence and are not prepared to believe it as correct. Apart from the other infirmities, to which this evidence is open, we consider it sufficient to point out that each one of these witnesses came to be examined by the police a month or a month and a half after the matter was reported to them. Their evidence, therefore, becomes highly doubtful, if it is not entirely false.

11. The second and the most important circumstance in this connection is, however, the recovery of the dead body of Mst. Hanja at the instance of this accused. This is proved by Ex. P-26 read with Ex. P-2 dated the 18th May, 1962. The memo of information prepared in this connection when translated in English reads as follows:

'At midnight on the third day of the last Akha Teej, I, with the assistance of Gurda Hansia killed Mst. Hanja widow of Uma Shanker Brahmin, resident of Bamnera, at the bank of river Sukri near the well of a Purohit under a 'Barokhana' tree by strangulating her. Thereafter I tied her dead body into a bundle with her Ghaghra and Orna and put therein a stone and a brick which I had taken out from the well and dropped that bundle into the well of the Purohit, which was unused. I am

ready to point out the place where I killed the woman and the well into which I threw her dead body as also that part of the well from where I had taken out the stone and the brick. The ornaments of gold and silver which Mst. Hanja had brought with herself are with Hansia. Some ornaments namely the sold Karas, a pair of Thelas, a Pansi, and a Madaliva which Hanja had given to me, I have entrusted them to the wife of Varda Purohit of Korta and I am prepared to accompany and have them produced.'

Thereafter the accused took the police in the presence of two Motbirs Durga Shanker and Gulab Singh to the unused well of Purohit Rama which was on the eastern bank of the river Sukri about half a mile on the west and stated that he had thrown the dead body of Mst. Hanja into that well and pointed it out. At that time the corpse was floating on the surface of the well. It was tied in a bundle of clothes. One Chhaganlal Brahmin of Bamnera was asked to go into the well and bring out the corpse. After the corpse was taken out, it was found that it had been tied with a blue Ghaghra and a white printed Sari. There was also a Kanchli on the breasts of the deceased. When the bundle was opened, a stone about 15 seers in weight and a brick were found tied with it. There was another blue Sari on the corpse (See Ex. P-2 in this connection).

12. Learned counsel for the accused raised a two-fold objection against the reception and consideration of this evidence against the accused. In the first place, it was contended that Ex. P-26 had not been proved in accordance with law and therefore could not be read as evidence. What learned counsel for the accused seemed to us to stress was that before Ex. P-26 could be taken into consideration, the police officer who prepared it should have himself reproduced its contents in evidence either orally, or, if he was not able to remember the contents thereof, then he should have reproduced the contents by refreshing his memory after reference to Ex. P-26. The second contention was that a very considerable portion of Ex. P-26 was not at all admissible in evidence and consequently this should be entirely left out of account.

13. Now, taking up the second objection first, it does seem to us that a very considerable part of Ex. P-26 is inadmissible having regard to the provisions of

Section 27 of the Evidence Act. It is well established that a confession made by an accused person to a police officer is irrelevant by virtue of the provision contained in Section 25 of the Evidence Act. Likewise, any confession made by any person while he is in custody of the police officer cannot be proved against such person unless it is made in the immediate presence of the Magistrate by virtue of the provision contained in Section 26 of the same Act. Then comes Section 27 which is a proviso to both these sections, and this reads as follows:

'Provided 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.'

If we may say so, the language of Section 27 is by no means clear. But, put in plain language, what it says is that where an accused is in the custody of a police officer and furnishes some information in consequence of which some material fact is discovered, then so much of such information as relates distinctly to the fact so discovered can be proved, and it would not matter whether such information amounts to a confession or not. This section is based on the doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, then such discovery is a guarantee that the confession made was true. But what is important to note is that only that portion of the information can be proved which relates distinctly or strictly to the facts discovered. The word 'distinctly which has been used in the section is very important, and it is intended to confine the information which may be proved within certain strict Limits and would not permit the inclusion of everything which may relate to that information. The expression 'distinctly' means 'clearly' or 'positively'. It follows that where the accused makes a compound statement, it would be the duty of the court to divide it into its component parts and only admit that part which has distinctly led to the discovery of the particular fact and reject the rest.

14. Thus the view which at one time used to be taken in Madras and in some other High Courts according to which a wider interpretation was sought to be put on the

section holding that the entire statement accompanying the discovery was admissible even though it contained an acknowledgment of guilt or other incriminatory statements can no longer be sustained as correct after the pronouncement of the Privy Council in Pulukuri Kottaya v. Emperor, AIR 1947 PC 67. The following passage from their Lordships' judgment appears to us to be very instructive:

'In their Lordships' view 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 stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.'

It seems to us that the portion of the statement contained in Ex. P-26 relating to the discovery of the dead body which would be admissible under Section 27 should be confined to that part of the statement given by the accused as a result of which the dead body was found. This part was that he had thrown the dead body of Mst. Hanja in the particular well tied in a bundle consisting of her own clothes and containing a stone and a brick therein. It is this information which distinctly relates to the recovery of the dead body from the well in the condition in which it was found. The rest of the portion that he had killed her at a particular place or that he had strangulated her would not be admissible because these parts cannot be said to distinctly relate to the fact discovered which in this case was the dead body. As for the recovery of the ornaments, the statement also contains information relating to the ornaments of the deceased Hanja, and as to these, that portion only will be relevant which led to their recovery from Hansia or Varda

Purohit's wife that is Mst. Khasi. The rest of this part of the statement would also be irrelevant as that could not be said to distinctly relate to the recovery of the ornaments. Ex. P-2 would show, that as a result of the information supplied by this accused, a bundle was found floating on the surface of the well and that in this bundle was contained the dead body of Mst. Hanja, We may mention in passing that no controversy whatever was raised before us that there was any doubt about the identification of the dead body as being that of the deceased Hanja. We are, therefore clearly of the opinion that the portions of Ex. P-26 which we have specified above are clearly admissible in evidence as being evidence of the facts discovered in consequence of the information supplied by the accused while he was under the custody of the police.

15. Now before we deal with the effect of this, we should like to dispose of the other objection raised by learned counsel for the accused that Ex. P-26 is not at all admissible in evidence because it was not proved in the manner in which it should have been. The contention, as already adverted to, is that the precise mode which should have been adopted by the police officer who prepared this memo, namely, mat he should have reproduced it in the witness-box, was not followed in this case, and, therefore, it could not be read in evidence. In support of this objection, reliance is placed on In re Seetha Rami Reddi, AIR 1939 Mad 766; Bhagirath v. State of Madhya Pradesh, AIR 1959 Madh Pra 17 and a case of our own Court decided by a learned single Judge in Kammu v. State, ILR (1964) 14 Raj 715. The contention which is sought to be supported is that documents prepared by the police are not substantive evidence in themselves and that the proper course for the witness is to state in court everything material, though in doing so he may refer to the document which he had prepared at the time under Section 159 of the Evidence Act.

16. Now, Chhangani J. who has decided the last-mentioned case has dealt with this matter at length and therefore we need not specifically refer to the other decisions cited above. The propositions laid down by the learned Judge are as follows:

'(1) Whenever a police officer is intimated that the accused proposes to give information leading to discovery he should proceed to record it as far as possible in the language spoken by the accused and in the first person, otherwise, doubts are likely to be entertained as to the accuracy and correctness of the information.

(2) Although as a matter of law the presence of motbir witnesses at the time of recording information is not necessary but as a matter of prudence the police officer should secure the presence of motbir witnesses, if such witnesses are available without much inconvenience or difficulty. The presence of the motbir witness at the time of recording the information and the subsequent production of a motbir witness are likely to lend considerable support to the testimony of the police officer.

(3) As regards the proving of such information, ordinarily the police officer or motbir witness should state in court from memory what information was given by the accused and, it such a witness is in a position to give the precise information, he should do so without referring to the written memo containing the information.

(4) If the police officer or the motbir witness on account of lapse of time or otherwise, is not in a position to state with the help of memory what the information was thus makes out a case for referring to the memo for refreshing his memory, he is entitled to do so. But, even then he should not merely remain content by proving his signatures on the information memo but should reproduce in court the information given.'

As we understand some of the dicta laid down by the learned Judge, they are obviously intended to be laid down as rules of prudence and not of law. The learned Judge has. himself recognised that it may not be easy or possible to produce a Motbir witness before whom the information should have been given in the very first instance and in such a case the presence of the Motbir cannot possibly be insisted upon. In fact we fear that a punctilious observance of this rule may perhaps lead to a certain amount of difficulty because it may conceivably be argued in certain cases that the information having been already supplied to the police officer, when he could not have thought of having a Motbir, the further discovery thereof before the Motbir subsequently called was meaningless as a fact

which had already been discovered to the police officer could not be further discovered, and, therefore, such discovery is inadmissible under Section 27.

17. Now as regards the proving of such information, the matter seems to us to be governed by Sections 60, 159 and 160 of the Evidence Act. It is correct that statements and reports prepared outside the court cannot by themselves be accepted as primary or substantive evidence of the facts stated therein. Section 60 of the Evidence Act lays down that oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it, and if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it and so on. Section 159 then permits a witness while under examination to refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in the memory. Again, with the permission of the court, the witness may refresh, his memory by referring to a copy of such document. And the witness may even refer to any such writing made by any other person but which was read by him at the time the transaction was fresh in his memory and when he read it, he knew it to be correct. Section 160 then provides for cases where the witness has no independent recollection say, from lapse of memory, of the transaction to which he wants to testify by looking at the document and states that although he has no such recollection he is sure that the contents of the document were correctly recorded at the time they were. It seems to us that where a case of this character arises and the document itself has been tendered in evidence, the document becomes primary evidence in the case. See Jagan Nath v. Emperor, AIR 1932 Lah 7.

The fundamental distinction between the two sections is that while under Section 159 it is the witness's memory or recollection which is evidence, the document itself not having been tendered in evidence; under Section 160, it is the document which is evidence of the facts contained in it. It has been further held that in order to bring a case under Section 160, though the witness should ordinarily affirm on oath that he does not recollect the facts mentioned in the document, the mere omission to say so will not make the document inadmissible provided the witness

swears that he is sure that the facts are correctly recorded in the document itself. Thus in Partab Singh v. Emperor, AIR 1926 Lah 310 it was held that where the surrounding circumstances intervening between the recording of a statement and the trial would as a matter of normal human experience render it impossible for a police officer to recollect and reproduce the words used, his statement should be treated as if he had prefaced it by stating categorically that he could not remember what the deceased in that case had said to him. Putting the whole thing in somewhat different language, what was held was that Section 160 of the Act applies equally when the witness states in so many words that he has no independent recollection of the precise words used, or when it should stand established beyond doubt that that should be so as a matter of natural and necessary conclusion from the surrounding circumstances.

18. Again, in Krishnama v. Emperor, AIR 1931 Mad 430 a Sub-Assistant Surgeon recorded the statement made by the deceased just before his death, which took place in April, 1930, and the former was called upon to give evidence some time in July, 1930. In the Sessions Court he just put in the recorded statement of the deceased which was admitted in evidence. On appeal it was objected that such statement was wrongly admitted inasmuch as the witness did not use it to refresh his memory nor did he attempt from recollection to reproduce the words used by the accused. It was held that he could not have been expected to reproduce the words of the deceased, and therefore, he was entitled to put in the document as a correct record of what the deponent had said at the time on the theory that the statement should be treated as if the witness had prefaced it by stating categorically that he could not remember what the deceased had said.

19. Again in Public Prosecutor v. Venkatarama Naidu, AIR 1943 Mad 542, the question arose how the notes of a speech taken by a police officer be admitted in evidence. It was held that it was not necessary that the officer should be made to testify orally after referring to those notes. The police officer should describe his attendance, the making of the relevant speech and give a description of its nature so as to identify his presence there and his attention to what was going on, and that after that it was quite enough it he said 'I wrote down that speech and this is what I took down,' and if the prosecution had done that, they would be considered

to have proved the words. This case refers to a decision of the Lahore High Court in Om Prakash v. Emperor, AIR 1930 Lah 867 wherein the contention was raised that the notes of a speech taken by a police officer were not admissible in evidence as he did not testify orally as to the speech and had not refreshed his memory under Section 159 of the Evidence Act from those notes. It was held that instead of deposing orally as to the speech made by the appellant, the police officer had put in the notes made by him, and that there would be no difference between this procedure and the police officer deposing orally after reference to those notes, and that for all practical purposes, that would be one and the same thing.

20. The same view appears to us to have been taken in Emperor v. Balaram Das, AIR 1922 Cal 382 (2).

21. From the discussion that we have made, we think that the correct legal position is somewhat like this. Normally, a police officer (or a Motbir) should reproduce the contents, of the statement made by the accused under j Section 27 of the Evidence Act in Court by refreshing his memory under Section 159 of the Evidence: Act from the memo earlier prepared thereof by him at the time the statement had been made to him or in his presence and which was recorded at the same time or soon after the making of it and that would be a perfectly unexceptionable way of proving such a statement. We do not think in this connection, however, that it would be correct to say that he can refer to the memo under Section 159 of the Evidence Act only if he establishes a case of lack of recollection and not otherwise. We further think that where the police officer swears that he does not remember the exact words used by the accused from lapse of time or a like cause or even where he does not positively say so but it is reasonably established from the surrounding circumstances (chief of which would be the intervening time between the making of the statement and the recording of the witness's deposition at the trial) that it could hardly be expected in the natural course of human conduct that he could or would have a precise or dependable recollection of the same, then under Section 160 of the Evidence Act, it would be open to the witness to rely on the document itself and swear that the contents thereof are correct where he is sure that they are so and such a case would

naturally arise where he happens to have recorded the statement himself or where it has been recorded by some one else but in his own presence, and in such a case the document itself would be acceptable substantive evidence of the facts contained therein. With respect, we should further make it clear that in so far as Chhangani, J.'s judgment holds to the contrary, we are unable to accept it as laying down the correct law. We hold accordingly.

22. Now let us apply these principles to the case before us. The statement of P.W. 20 Girdharilal, the Circle Inspector was that the accused Dharma had given information about the dead body of the deceased after he had been taken under police custody and that the information given by the accused was taken down by him as Ex. P-26, and that having recorded that information in Ex. P-26, he proceeded to village Bamnera along with the accused Dharma and he had taken Durga Shanker and Gulabsingh with him as Motbirs. They reached the well of Rama Purohit to which Dharma had led them and Dharma pointed out the dead body of Hanja in the well as a result of which it was taken out from there. He also stated that a stone and a brick were found tied with the dead body which were Exs. 3 and 4. The evidence of this witness further was that pursuant to the information given to him in Ex. P-26, the accused led the police to the house of Mst. Khasi when they were accompanied by two Motbirs named above and Shanker, P.W. 11, and there Dharma called upon Mst. Khasi to produce certain ornaments as a result of which she brought them from inside the house. The witness further stated that the information given by the accused and reduced to writing in Ex. P-26 was duly read over to him and he admitted its contents to be true and affixed his thumb impression thereon. It is further important to bear in mind that Ex. P-26 was drawn up by this witness on the 18th May 1962, and was examined in the trial Court on the 13th March 1963.

23. Turning next to P.W. 21, Jaswant Singh, the other investigating officer and who is also a signatory to Ex. P-26, his evidence was that the information given by the accused Dharma after he had been taken under police custody was reduced to writing by the Circle Inspector, Girdharilal, in Ex. P-26 in his presence and that it bore his signature. A question was then put to this witness whether the dead body was recovered at the instance of the two accused Dharma and Hansia, and his

reply was that it was recovered at the instance of Dharma only. This officer was examined in the trial Court on the 13th March 1963.

24. The position, therefore, is that both the Circle Inspector and the Sub-Inspector have referred to Ex. P-26 in their evidence and stated that it bore their signatures, and the Circle Inspector has further stated that whatever information had been given to him by the accused Dharma was recorded by him in Ex. P-26. He has also deposed that Dharma had thereafter led them to the well of Rama Purohit and pointed out the dead body of Mst. Hanja therein. Finally he stated that the information given by the accused and recorded in Ex. P-26 was duly read over to him and he had admitted it to be correct. It is important to bear in mind in this connection that both these officers were examined in the trial Court more or less after ten months after the information having been supplied by the accused and recorded as Ex. P-26. We think that it would be straining human credulity almost to a breaking point to expect that any one of these officers, having regard to the nature of their duties from day to day during, the intervening period, could possibly remember orally the precise information furnished to them by the accused within the meaning of Section 27 of the Evidence Act or could reproduce it in Court. Their lack of recollection should be implicit in, the very nature of things. Therefore, Section 160 would clearly be attracted in the present case; and even though the witnesses did not say in so many words that they were unable to depose orally to the precise information which was furnished to them by the accused, they must need be understood as having said so, and as the principal investigating officer vouched for the correctness of the memo in which this information was reduced to writing, we are definitely disposed to think that Ex. P-26 was in itself good substantive evidence in this case.

25. We should also like to add that after the investigating officers had said what they did about Ex. P-26, there was ample opportunity for the defence to cross-examine them with respect to the contents thereof and in fact such cross-examination was directed but without any tangible effect. The evidence of the police officers that the dead body of Mst. Hanja was discovered from the unused well of Purohit Rama at the instance of this accused is further corroborated by the Motbir P.W. 1 Durga Shanker whose evidence we see no reason to disbelieve. In

these circumstances, we are entirely unable to hold that Ex. P-26 is inadmissible in evidence against Dharma.

26. The next and the more important question is, what is the effect of this evidence Is it sufficient to connect the accused with the murder of Mst. Hanja beyond all reasonable doubt We have given our most careful and anxious consideration to this aspect of the case and are inclined to hold that the information supplied by the accused Dharma that the dead body of Mst. Hanja was in the unused well of Rama Purohit and that the dead body had been thrown there tied in a bundle along with a piece of heavy stone and a brick and the consequent recovery of the dead body from the well in that particular condition is extremely tell-tale. No other person could have known the whereabouts of the dead body having regard to the details that were supplied except the person who was in fact connected with the murder. It is also significant that the dead body was found in a well which was not in working order at or about that time, and, therefore, one would not easily expect a person who was not connected with the crime to know how the same had. been thrown into it. Moreover, we have found above that a number of gold ornaments belonging to P.W. 16 Uma Shanker and P.W. 13 Amrit Lal were also recovered at the instance of Dharma within about a week of this incident. We are not prepared to believe for a single moment that the deceased Mst. Hanja had given away any of these ornaments to Dharma or for that matter to any other person. For, if that had been done so, we do not think that there should have been any occasion for the murder of this unfortunate woman. The fact that she was killed and did not die a natural death was not at all disputed before us and the medical evidence is clear that she was throttled to death. The stealing of the ornaments and the death of Mst. Hanja clearly seem to us to be integral parts of one and the same transaction. Indeed, it is well settled that in cases where murder and robbery or a like offence form parts of one transaction, recent and unexplained possession of stolen property, while it would be presumptive evidence on a charge of theft or robbery or receiving stolen property, would similarly be evidence on a charge of murder. In Tulsiram v. State, AIR 1954 SC 1, it was laid down that

'If ornaments or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several

months expire in the interval, the presumption may not be permitted to be drawn having regard to the circumstances of the case.'

The same presumption was raised in Sunderlal v. State of Madhya Pradesh, AIR 1954 SC 28.

27. There is, therefore, no doubt that where murder and robbery (or theft or receipt of stolen property) are proved to have been integral parts of a certain transaction, the presumption that can be drawn from the possession of the property may, consistent with all the facts proved in the case, be not only that the person to whom such possession was traced committed the theft or received the stolen property but also that he committed the murder which forms part of the same transaction as theft or robbery.

28. We should like to point out even if we have to repeat ourselves that the accused Dharma precisely knew the place, more or less solitary, where the dead body of Mst. Hanja had been concealed and that too in a deserted well on a bank of a river and tied in a bundle of the deceased's clothes into which a heavy stone and a brick had also been placed for reasons not far to see. Dharma then led the police and the motbirs to this well from which her dead body was recovered in the very condition pointed by the accused, that is, tied in a bundle of clothes in which a stone and a brick had also been placed. Dharma has not been able to explain how he knew that the deal body of Mst. Hanja was in this deserted well. The only explanation that he offers is that he did not supply any information to the police in that behalf. This version seems to us to be entirely false. The discovery of the dead body in the well at the instance of this accused, in our opinion, is reasonably consistent with the only hypothesis that he was the murderer and no other. Then this accused gave discovery of certain gold ornaments which undoubtedly belonged to P.Ws. Uma Shanker and Amritlal, father and son of the deceased woman, as a result whereof they were found in the possession of Mst. Khasi to whom he had given them. The woman and the ornaments had disappeared both at one and the same time, that is, on the night between the 8th and 9th May 1962, and those were recovered at the instance of the accused within a very short time thereof. These facts, in our opinion, are sufficient in law and fact to lead us to the

conclusion that the accused was not only guilty of theft or having received stolen property but of murder as well. We also think that they are compatible with no other reasonable hypothesis. We should like to say, in passing, that it is somewhat of a mystery to us as to how and in what circumstances Mst. Hanja the deceased left or was made to leave her house. But that does not affect the conclusion at which we have arrived above, for, we have no doubt that she was killed after she had so left and it was in the act of killing that the accused came into possession of or received the ornaments of her father and her son which were undoubtedly stolen property. We also think that if the woman should have been willing to part with the valuables in question, there should have been no occasion for her being murdered at all.

29. We should like to make it clear that in coming to this conclusion we have completely left out of account the confession of the co-accused Hansia Ex. P-15 because although it implicates Dharma in the offence of murder, it is wholly self-exculpatory so far as Hansia himself is concerned and, therefore, cannot be used against the accused Dharma and we would leave it at that.

30. Our conclusion, therefore, is that the trial Court was wrong in acquitting Dharma under Section 302, I. P. C. and that an offence under that section is established against him beyond all reasonable doubt. In this view of the matter, we further think that his conviction under Section 201, I. P. C. cannot be sustained for the simple reason that a murderer by throwing the body of the person murdered by him from one place to another cannot be held to screen himself, as the person to be screened must be obviously somebody else than the offender himself within the meaning of Section 201, I.P.C., and, therefore, his conviction under this section will have to be set aside.

31. The net result is that we allow the appeal of the State, set aside the acquittal of the accused Dharma under Section 302, I. P. C. and convict him thereunder and sentence him to life imprisonment. His conviction and sentence under Section 411, I. P. C. are maintained intact while his conviction and sentence under Section 201, I. P. C. are set aside. Both sentences shall run concurrently. The appeal against the other two accused Hansia and Mst. Khasi is dismissed. The appeal of Dharma

substantially fails and is hereby dismissed.

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