CASE NO.:
Appeal (crl.) 1105 of 1997

PETITIONER:
Anter Singh

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 05/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT,J.

This appeal has been preferred by accused Anter Singh (hereinafter referred to as 'the accused') who faced trial along with 3 others for allegedly having committed homicidal death of one Hansraj (hereinafter referred to as 'the deceased'). While accused-appellant was charged for alleged commission of offence punishable under Sections 302, 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC') and Section 25(1)(a) and 27 of the Arms Act, 1959 (for short 'the Arms Act'), the other three accused were charged for commission of offence punishable under Sections 302 and 302 read with Section 34 IPC.

Trial Court found that the accused-appellant was guilty of the alleged offences punishable under Section 302 IPC and Sections 25 and 27 of the Arms Act. Life imprisonment, one year and three years sentences respectively were imposed for the three offences. The other accused persons were found to be not guilty. The High Court affirmed the conviction and sentence.

Prosecution version as unfolded during trial is as follows:

On 11.4.1979, Ram Kumar (PW-21) found a crowd on the ground of Government college, Ganganagar at about 6.30 a.m. On reaching close to the spot, he found that a person was lying dead. While returning to his shop he found a police Constable whom he told about the dead body. The Constable Bhagwan Singh gave information to Hari Singh ASI and being satisfied that this was a murder, a case was registered under Section 302 IPC. Near the dead body some empty cartridges were found. Moulds of the footprints found nearby and the empty cartridges were collected. During Investigation four accused persons were arrested. The accused appellant while in custody gave information about a gun, which was treated to be information in terms of Section 27 of the Indian Evidence Act, 1872 (for short 'the Evidence Act'). Search was made in the presence of accused and a pistol was recovered. The empty cartridges and the pistol were sent for forensic examination. During post-mortem of the dead body of the deceased bullets were recovered which

were also sent for such examination. On completion of investigation, charge sheet was placed. The accused persons pleaded innocence.

37 witnesses were examined to substantiate the prosecution version. The Trial Court found that the evidence was not sufficient to fasten guilt on the co-accused, while holding appellant guilty as above noted. Appeal to the High Court did not bring any relief.

In support of the appeal, learned senior counsel for the appellant submitted that the fate of the case depends upon the acceptability of evidence relating to recovery purportedly on the basis of information given by the accused while in custody. He pointed out that there are several circumstances which show that the prosecution has tried to create evidence.

In essence it is submitted that the prosecution has failed to establish its case and has presented a fabricated and improper case to falsely implicate the accused.

When the witnesses who are supposed to have witnessed recovery have turned hostile, the evidence relating to alleged recovery is of really no consequence. The alleged recovery was made from an open space accessible and visible to anyone passing by. It was a place which was very close to the place where dead body was found. It is improbable that the police official could have missed the weapon and would wait for about 3 weeks when the purported information was given by the accused clearly not believable.

In response, Mr. V.N. Raghupathy, learned counsel for the State submitted that the Trial Court and the High Court have considered the material on record and have found the evidence to be cogent and credible. Merely because the witnesses did not support the prosecution version so far as the recovery is concerned, that will not affect the credibility of the evidence tendered by PW-36.

Merely because the gun was found in the open space that does not affect the evidence relating to recovery.

We shall first deal with the plea as to whether evidence relating to recovery is acceptable when non-official witnesses did not support the recovery and made departure from the statements made during investigation. In Modan Singh v. State of Rajsathan (1978 (4) SCC 435) it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was taken in Mohd. Aslam v. State of Maharashtra (2001 (9) SCC 362). It was held even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. But the crucial question which needs to be considered in this case is whether the prosecution has been able to show that the pistol recovered was the one which was used for commission of the offence. As rightly contended by learned counsel for the appellant there are several circumstances which affects credibility of the prosecution version. Firstly, the so-called information was recorded by the IO (PW-16), and he does not even indicate that the gun to which reference was

allegedly made was the weapon of assault. Further the custody of empty cartridges purported to have been recovered from the spot has not been established. In fact, the claim is that on 11.4.1979 empty cartridges were recovered. They were sent to the forensic science laboratory on 12.5.1979. It has not been explained as to where the empty cartridges were till then lying and with whom. Similar is the situation with the two bullets claimed to have been extracted from the dead body by the doctor. It has been accepted by PW-36 that the empty cartridges and the bullets were not deposited with the ballistic expert prior to the recovery of the pistol claimed to have been made on 29.4.1979. Significantly, though the witnesses claimed that the moulds, chappals found at the spot, the empty cartridges, the two bullets extracted and the pistol were sealed before being sent to the expert for examination and that they were sealed on the date they were recovered, but PW-23 who claimed to have taken the parcel to the laboratory categorically admitted that the packets were sealed in the Kotwali in his presence on the date he had taken for deposit with the laboratory i.e. 11.5.1979 and, in fact, the articles were deposited on 12.5.1979. Though the witness stated that different seals were used, a bare perusal of the materials on record clearly shows that only one seal was used. Additionally, PW-31 who took major part in the investigation had categorically admitted that the particular type of pistol which was allegedly seized could not have ejected any empty cartridges till all the six shots were fired and otherwise it could not be possible. In Exhibits 51 and 51A i.e. the spot map and the circumstances memo reference is made to the moulds. This was not possible because Exhibits 51 and 51A were prepared at about 9.30 a.m., while admittedly the moulds were taken much after as stated by the witnesses. Significantly in neither Exhibits 51 and 51A, reference is made to the recovery of any empty cartridges which was supposed to have been found near the dead body though reference was made to the moulds which were yet to come into existence. There was no evidence led as to when the bullets were handed over to the police by the doctor or where they were kept and in what condition. Though recovery from an open space may not always render it vulnerable, it would depend upon factual situation in a given case and the truthfulness or otherwise of such claim. In the case at hand the recovery was made from an open space visible from the place where the dead body was lying and at a close proximity. It is not clear from evidence that it was hidden in such a way so as making it difficult to be noticed. The evidence tendered is totally silent as to in whose custody were the bullets, empty cartridges and the pistol. The effect of such non-explanation was considered by this Court in Santa Singh v. State of Punjab (AIR 1956 SC 526). The Constitution Bench, inter alia, observed as follows:

"There is another element in the case which creates even greater difficulty. An empty cartridge case is alleged to have been recovered from the place of occurrence by the police on the 10th of September when they went there for investigation after receipt of the first information from Uttam Singh (P.W. 16); so also some blood-stained earth.

They were carefully packed and sealed in two separate packets and dispatched to

the Police Station. The sealed parcel of the earth was sent to the Chemical Examiner at Kasauli on the 11th October, 1954, and the sealed parcel of the empty cartridge case was sent to Dr. Goyle as late as the 27th October, 1954.

Even if we accept the explanation given by the Sub-Inspector of Police that the empty cartridge case had to be kept at the police station till the rifle used was recovered so that both might be sent to the expert for his opinion, nothing has been stated why after the rifle was recovered on the 28th September, 1954, along with 24 cartridges from the house of the accused, it was incumbent for the Police to retain the parcels of rifle and empty cartridge case with them till the 11th October, 1954.

Naturally this inordinate delay raises much suspicion and has given rise to the suggestion on the part of the accused made in the course of the cross-examination of the Sub-Inspector that the empty cartridge case ultimately sent to the expert relates to a cartridge that was fired by them at the Police Station and is not the one recovered at the spot."

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

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 information 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 related to the discovery of the knife in the house of the informant." (p. 77)

The aforesaid position was again highlighted in Prabhoo v. State of Uttar Pradesh (AIR 1963 SC 1113).
Although the interpretation and scope of Section 27 has been the subject of several authoritative

pronouncements, its application to concrete cases in the background events proved therein is not always free from difficulty. It will, therefore, be worthwhile at the outset, to have a short and swift glance at Section 27 and be reminded of its requirements. The Section says :

"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."

The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Section 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but 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 has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "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. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. (See Mohammed Inayuttillah v. The State of Maharashtra (AIR 1976 SC 483).

At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Palukuri Kotayya's case (supra) and in Udai Bhan v. State of Uttar Pradesh (AIR 1962 SC 1116).

The various requirements of the Section can be summed up as follows:

(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 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 accused's own act.
(4) The persons 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.
As observed in Palukuri Kotayya's case (supra) it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in K. Chinnaswamy Reddy v. State of Andhra Pradesh and Another (1962 SC 1788)

The several discrepancies and shortcomings in evidence as noticed supra considerably corrode credibility of the prosecution version. That being so, the inevitable conclusion is that the prosecution has not established the accusations against the accused-appellant beyond reasonable doubt and consequently he is entitled to be acquitted. Since he is on bail, the bail bonds be discharged. The appeal is allowed.