
(1985) 02 GAU CK 0002
In the Gauhati High Court

Phusu Koiri

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 11-02-1985

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 141, 19, 20
Criminal Procedure Code, 1973 (CrPC) — Section 162, 313
Evidence Act, 1872 — Section 25, 27, 32
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (1986) CriLJ 1057

Hon'ble Judges : T.N. Singh, J;T.C. Das, J

Bench : Division Bench

Judgement

T.N. Singh, J.—A lifer has challenged his conviction in this appeal preferred from jail raising a basic question. Can this Court put into his basket of rights, judicially secured to his tattered robe, another vital and pivotal right? Indeed, the right claimed by him is vital and pivotal not only for his freedom from bondage, should this Court hold his confinement to be illegal, but for also other prisoners similarly situated.

2. We propose, therefore, to examine first the basic question which indeed has surfaced in this case in the form of a preliminary objection pressed by learned P. P., Assam. Mr. G. Sarma. He drew our attention to the order passed in this appeal on 15-5-82 by which the appeal was admitted "keeping the question of limitation open." This Court also ordered issue of notice on the question of limitation. Mr. Sarma submitted that the appellant has not responded to the notice and as such the appeal is not ripe for hearing. The main thrust of his contention was that unless there was an application by the appellant u/s 5 of the Limitation Act for condoning the delay and unless this Court after hearing the State on that question had condoned the delay this appeal cannot be heard. We were not at all impressed by counsel's argument because since long before his conviction the appellant is undergoing the sentence and further curtailment of his liberty, without hearing the Case on merit, did not appear to us justified. From a perusal

of the office report we found that the appeal was out of time by only 12 days. However, from the printed note (Form No. 129) dated 22-4-82 of the Superintendent, District Jail, Dibrugarh, accompanying the petition of appeal, we also found that the copy of the judgment was received in jail on 16-2-82 though the judgment in the instant case was delivered on 9-2-82 and on the same date an application for copy was filed. We may also note that the order-sheet of the Sessions Court bears an endorsement under the order recorded on 9-2-82, by which free copy of the judgment was required to be furnished forthwith to the convict. Though this endorsement shows that the copy was delivered to the appellant on 9-2-82 we are not sure about the position. In any case whether the delay in filing the appeal was 12 days or 5 days was not, according to us, material for deciding the preliminary objection and therefore we decided to continue hearing of the appeal on merit and assured Mr. Sarma that we shall deal with the preliminary objection by reasoned order while disposing of the appeal.

3. What therefore is squarely in issue in deciding the preliminary objection is the object, scope and purport mainly of Sections 3 and 5 of the Limitation Act, for short, the Act. According to Section 3, "every suit instituted, appeal preferred, an application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence but this is subject to the provisions contained in Sections 4 to 24". While, Section 5 provides that an appeal or application "may be admitted after the prescribed period if the appellant or the applicant satisfied the court that he had sufficient cause for not preferring the appeal or making the application within such period". The general object of the Act admittedly is not to extinguish a right but to bar a remedy so that stale claims are not agitated as the Act is in substance a statute of repose and fulfills that purpose. Right to personal liberty being a fundamental right it can be taken away only in accordance with the procedure prescribed by law conforming to the mandate of Article 21. It will be futile to dispute today that such procedure must be reasonable and not arbitrary. See, *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . We have no doubt that Section 3 places a duty on the Court not only to see what right is agitated or for what right the remedy is pursued in court but also to see who has pursued it. This position appears clear to us from the purport of the provisions of Sections 4 to 24. Indeed, some provisions take notice of legal "disability" of a person while there are other provisions which take care of such situation where "exclusion of time" is allowed to override the bar of Section 9 which enjoins continuous running of time. That apart, the rigour of the duty enjoined on court u/s 3 is toned down by Section 5 which has invested a discretion in the Court to admit for hearing any appeal or application even beyond the prescribed period in a case in which the Court is satisfied that the appellant or the applicant had "sufficient cause" to prevent him from coming to the court within time.

4. Now, in a case where an appeal is "preferred" from jail can it be said that the appellant had the "freedom of decision and action" to exercise not only the statutory right to appeal but also the fundamental right to personal liberty? The

Court cannot blindly act u/s 3 and dismiss the appeal filed out of time without addressing itself to this question. Because, the Court is required to do so to enforce the constitutional mandate. Thus, the Court will be required to satisfy itself if there was any cause which prevented the prisoner from preferring the appeal (Illegible) because he did not have the "freedom" to do so. His "freedom" is prima facie curtailed by his incarceration and factually he is not presenting the appeal which is "forwarded" by the Jail Officials. What also appears to as to be axiomatic in this context is that the burden will be on the State, whose instrumentalities the Jail Officials are, to satisfy the Court that no "sufficient cause" existed to empower the Court to act u/s 5. We also bear in mind in this connection the mandate of Article 39A which envisages operation of the legal system to "promote justice on a basis of equal opportunity" and requires the State to provide free legal aid by suitable legislation or scheme or in any other way to ensure that "opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities". How it can be said that a convict in confinement has an "equal opportunity" of seeking justice from the Court? Is he free bird? Indeed, not. The position, therefore, we reiterate, is axiomatic that burden is constitutionally engrafted in such cases on the State. This burden may be discharged by the State by satisfying the court that prison restrictions statutorily provided were not unreasonable as would amount to denial of prison justice to the convict. Because he is not supposed to lose completely his right to live within prison a dignified life and enjoy such concomitant rights as are not inconformable with prison discipline enforced by the enacted law or even his right to secure legally full freedom and live in the free world an unexploited life.

5. The view we have taken receives support from several decisions of their Lordships of the Supreme Court. In *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, it was observed that Article 39-A was an interpretative tool for Article 21. It was noticed in that case that a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal and to enable him to exercise his right the court had power to assign counsel for doing complete justice to the prisoner. Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and ergo, unconstitutional, so it was stated. Because, according to their Lordships, Article 19 joins hands with Article 21 in this regard. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the Jail Administration was held affirmatively by the Court. Indeed, a prisoner disabled from engaging a lawyer on reasonable grounds such as indigence or incommunicado situation shall be helped by the court who shall assign competent counsel for prisoner's defence if the circumstances of the case, the gravity of the sentence and the ends of justice so require. Two *Sunil Batra* cases wherein valuable pronouncement of prison justice were made by their Lordships have also a direct relevance to the issue. In *Sunil Batra Vs. Delhi Administration and Others etc.*, the court insisted that notice must be taken of

the fact that the convict is in prison under the order and direction of the Court. Krishna Iyer, 1, further added that the operation of Articles 14: 19 and 21 may be pared down for a prisoner but not puffed out altogether. In Sunil Batra Vs. Delhi Administration and Others etc., , the court observed that "new legislation is the best solution, but when lawmakers take far too long for social patience to suffer, courts have to make-do with interpretation and carve on wood and sculpt on stone ready at hand and not wait for far away marble architecture". So holding, their Lordships carved out constitutional status for the right of a prisoner to liberal visits by family members, close friends and legitimate callers. The message was clear Any deprivation or curtailment of a prisoner's right to live with human dignity, whether or not in virtue of statutory powers, has to be tested on the anvil of Articles 14: 19 and 21 and measures (both positive and negative) tending to impinge on prison-justice must be blurred and blunted. Relying on the Batra cases and other decisions of the Apex Court, this Court in Smt Arambam Ningol Yumlembam Ongbi v. State of Manipur, Civil Rule (HC) No. 9/84 decided on 31-8-84 (Reported in (1985) 1 GLR 154) took the view, albeit in the context also of "regulations" that a prisoner's life long-tenancy in jail must see such measures adopted as rendered the incarceration not purely punitive and that burden will be lie on them who infringed this norm to satisfy the court the reasonableness of their action.

6. We may refer to some other more recent decisions also of the Apex Court having bearing on the interpretation of Articles 21 and 39 A. In Sheela Barse Vs. State of Maharashtra, complaint of torture of women prisoners arrested attention of the court. According to their Lordships the imperative and essential mandate of Articles 14: 21 and 39A manifested an "absolute" postulate which required legal assistance to be made available to prisoners in jail, whether undertrials or convicts. The court laid down guidelines not only for ensuring protection against torture and maltreatment in police lockups but also gave direction for making available legal aid to indigent persons. We have no hesitation to adopt, as a "judicial enactment" in virtue of the mandate of Article 141, the direction of their Lordships that whenever a person is arrested by the police and taken to the police lockup the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State's cost provided he is willing to accept such assistance. This judicial mandate which secures compulsory interposition of legal-aid committee to safeguard personal liberty of a citizen, in our opinion, is not meant to take care merely of the case of a pre-trial arrest because such process of interposition was intended to achieve fulfilment really of the mandates of Articles 14: 21 and 39A. Thus, therefore, even for a convict lodged in jail it must also be possible to avail the benevolent succour of the judicial mandate. In Ranjan Dwivedi Vs. Union of India (UOI), the court stressed the emerging primacy of Article 39A and held that though it is addressed to legislature and Executive, the courts too are bound by this mandate. In the case of Bandhua Mukti Morcha Vs. Union of India (UOI) and

Others, State's constitutional obligation to preempt violation of the right, particularly of a person belonging to weaker section of the community, to live with human dignity free from exploitation, which Article 21, assured, was underlined.

7. The above discussion leads us to a singular conclusion: Stone walls do not make a prison. It is not a poetic fantasy in Republican India. Judiciary can direct its lacer beam of Rule of Law to penetrate all impregnable barriers. The beam destroys institutional cancers and relieves all citizens inhaling free air in this free country howsoever and wheresoever they exist. It can restore to an incarcerated citizen his lost right to secure a dignified and unexploited existence outside prison. We must see, therefore, if and what the "prison regulations" are and if any "regulation" puffs out life from any living soul in prison or any soul lodged therein is suffocated by any act of any prison-minion dressed in brief authority. Because, we have to construe Sections 3 and 5 to accord with the inviolable mandate of Articles 14: 19: 21 and 39A. The term used in Section 3 is "preferred", implying freedom of the person concerned to act in the matter of making a free choice and acting freely in pursuing his legal remedy. Because of this the court is obligated, in deciding the question of "sufficient cause "Under Section 5, to take into consideration restrictions imposed on his choice of decision and action. It is the appellant's right to "prefer" appeal u/s 3 and if the process of his preferring the same is in any way restricted, burden will lie on him who stalls or staggers the process to show the legal authority the reasonableness thereof to support his action. Because, a person who is confined, has prima facie restricted or "regulated" choices. Unlike a free bird he cannot flutter. Articles 14: 19 and 21 spring into action, therefore, to protect his legitimate choices with Article 39A taking care of his compulsions of poverty and ignorance -- all joining to injunct State institutions to "promote justice on the basis of equal opportunity". We are forbidden by judicial discipline to rewrite a statute but duties enjoined on us by the Basic Statute we must discharge diligently and conscientiously and interpret the law to accord with the constitutional norms and ethos. Our attention was drawn to a decision of a learned Single Judge in Collector of Collector of Balasore Vs. Ashutosh Roy, wherein the question of a prisoner invoking Section 5 of the Act vis-a-vis the provisions of Order 9 Rule 12 CPC came up for consideration of the court. It was held that it was not the law that the period of imprisonment must be excluded. The imprisonment of a party may constitute a sufficient cause for excusing delay but the mere fact that the party was in jail without anything more is not necessarily a sufficient cause for extending the time. It depends on the fact and circumstances of each case. It was observed that the court has to consider whether in jail at the material time the defendant was in any way embarrassed or handicapped in his defence by reason of the jail authorities having not giving him proper facilities for giving instructions to his lawyer or otherwise having caused disability to the defence. In that context the court considered the provisions of Rules 24 and 29 of O.5 CPC and the provision of Section 420 (old) Cr. P.C was also referred to. The court was

not addressed on the constitutional aspect of the lis and therefore the question of burden could not and did not become an issue in that case. In the instant case what is directly in issue is infringement of Article 21 inasmuch as the provision for convict's right to appeal under Cr. P.C. derives its authority and potency therefrom. We have no doubt that the statutory duty imposed on the court u/s 3 of the Act must cave in to allow it to discharge its constitutional duty enjoined by Article 21. The court must check the procedure and State must satisfy the court that a reasonable procedure "was prescribed and it was scrupulously followed by jail officials by which prisoner's right to appeal to challenge his conviction was not impaired or indented.

8. The enactment with which we are concerned mainly, for resolving the present controversy, is Prisons Act 1894 of which Section 59 empowers the State Govt. to make rules for various purposes including rules for regulating the transmission of appeals and petitions of prisoners and, among others, for preparation and maintenance of their "history tickets". What is further required is that copies of such rules shall be exhibited, both in English and in vernacular as contemplated u/s 61, obviously to appraise the prisoners of their rights and also duties. We have no doubt that for carrying into effect the purpose of the Act a duty is therefore cast on the State to make rules, in particular, to deal with procedure for enabling convicts to prefer appeals in virtue of their statutory and constitutional right to personal liberty. Fortunately some "regulations", referable to the Prisons Act, 1894 embodied in Assam Jail Manual Vol. I (hereinafter Manual), were available to us. We are happy to note that the Manual came into being as early as in 1899 though it was revised mainly in 1934 and only minor amendments therein were made from time to time. It appeared clear to us that the situation all over the country as noted in the two Sunil Batra cases (supra) is the same in that jail administration is being run with the aid of outdated and obsolete "regulations". We have doubt, further, if the Manual is available in print in sufficient numbers not to speak of vernacular translation of its statutory provisions being exhibited in jail to subserve equally the object of prison-discipline and prison-justice. This position undoubtedly obtains in the State of Manipur, as noted in Arambam Ningol 1985 1 GLR 154 (supra), where also Assam Jail Manual has currency. We made these passing observations merely to stress the patent violation of the statutory mandate of Article 61 of the Act not to speak about the judicial mandate inscribed in Sunil Batra (2) 1980 Cri U 1099 (supra) as a result of which cause of prison justice has suffered immensely. Because, the constitutional injunction of Article 21 against adoption of unfair procedure in dealing with any right of the prisoner is thereby likely to be violated.

9. Chapter XXVI of Assam Prison Manual Vol. I deals with the subject of "appeals by prisoners". By para (or Rule) 474 of the Manual the Superintendent of the Prison is required to inform every convict on his first admission to jail of the period within which an appeal from the order under which he had- been committed to jail may be filed. It further requires him to make available to the convict "every facility" therefore of course should the convict so desires. Para 475

(c) injuncts the Superintendent that he shall not "detain appeal of any convict even though it be apparently-barred by limitation". Para 476 obligates the Superintendent to apply to the court concerned for a copy of the judgment or order against which appeal has to be filed in a case in which the convict is without friends, relatives or counsel to act for him. Para 477, we propose to extract:

477. SUPERINTENDENT IN CASE OF NECESSITY, TO GIVE ASSISTANCE IN WRITING APPEAL- When the copy of the judgment has been received, the date of its receipt shall be noted thereon, and the convict shall, if he is able to write, write his own petition of appeal, if not, the Superintendent shall cause his petition to be written by a jail officer and the convict's case shall, as far as possible, be recorded in his own words.

The provisions discussed above are indeed salutary and have a tremendous impact on the prisoner's right to challenge his conviction and secure his liberty but reference has to be made to few other rules which have an equally compelling significance. By para 478 it is made the duty of the Superintendent to forward the petition of appeal to the appellate court in the manner prescribed therein. It is made obligatory to append a note to the petition giving following informations:

- (a) the date on which the application for copy of the judgment was despatched:
- (b) the date on which the copy of the judgment was received; and
- (c) the date on which the convict presented the petition of appeal.

Para 479 authorises the Superintendent to deliver, "with prisoner's consent" to latter's friend or agent who undertakes to make the appeal. But, in such event para 480 contemplates that "the arrangement must be authorised by power of attorney signed by the prisoner and attested by the Superintendent". etc. What is further contemplated in para 481 is signally important. On the "history ticket" of the prisoner, is required to be recorded the date of decision of the convict as to whether he shall appeal or not and "subsequent entries relating to the appeal and its result" in case he decides to appeal. These provisions, in our opinion, leave no room for any doubt that there was statutory burden engrafted by the Prisons Act on the jail authorities to ensure that the prisoner can effectively and fruitfully exercise his right of appeal and in that regard carefully envisaged safeguards were made in the "Prison Regulations" to guard against the right being lost on account of the bar of limitation. It is true that these ancient and pre-constitutional "Regulations" do not, and cannot obviously, take notice of the constitutional imperatives and judicially inscribed right to "legal aid". Therefore, we have to read in para 477 such a right. We say so because of what has been held by their Lordships of the Supreme Court in *Sheela Barse Vs. State of Maharashtra*,

10. We have, therefore, no hesitation to hold that when an appeal is "preferred"

from jail the burden shall be on the State. Whose instrumentality, the Superintendent of the Prison concerned, being only given the right under para 478 of the Manual to "forward the petition of appeal" by which the freedom of the appellant (convict) to "prefer" appeal is curtailed. He has to satisfy the Court why the appeal was not forwarded within time. Materials have to be placed before the Court by the State to show that its instrumentality acted in accordance with the provisions of Chapter XXVI of the Manual, scrupulously observed the same and discharged the duty enjoined on him thereunder. From the materials it must be made clear to the court that indolence only of the convict was the cause of belated presentation of the appeal. The convict shall lose his right if he takes belated decision or for any belated action on his part the appeal could not be presented within time. Any other view would tantamount to allowing an unfair procedure to supervene the event when right accrued to the convict to appeal and presentation thereof as a result of which Article 21 would be violated. It is true that para 477 does not require counsel's aid in writing the petition of appeal and is limited to the right to have the petition written by Jail Officer in case the convict is not able to write the same. But, we feel inclined to observe that a convict may prefer to have legal assistance and may not trust a Jail Officer. In such a case it shall be necessary for the Superintendent to provide necessary legal assistance to the convict through the Legal Aid System in force in the State. Indeed, we consider it advisable for the State to provide legal assistance to convicts awarded life term or the extreme penalty by continuing the legal aid they were given during the course of trial so that filing of the appeals by them may not be delayed. In *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, (supra) this aspect was vocally projected and the Court acting under Article 136 had a jail appeal (SLP) filed after 4 years.

11. We have examined the "Rules" of this Court (the Gauhati High Court Rules) as also Criminal Rules and Orders Vol. 1 framed by this Court for the guidance of the subordinate courts. We do not find suitable provisions in either case but the absence thereof shall not deny us the opportunity of pronouncing on the legal and constitutional imperatives in this regard. It may be that these "Rules" and the Criminal Rules and Orders may need amendment and care thereof shall be taken by the Court on the administrative side. We may, however, examine first what happened in the instant case after this Court admitted the appeal on 15-5-82. The said order inter alia was : "Issue notice on the question of limitation". The Court did not in term ask the appellant to show cause and accordingly in the notice issued by the office we find that in the copy endorsed to P.P., Assam, there was an endorsement reading "he is requested to take notice that the appeal will be heard keeping the question of limitation open". It is true that a note in the same term was also appended in the copy endorsed to Miss Kalpana Shah, Advocate, who was engaged as *amicus curiae* in the undefended appeal received from jail. There was thus apparently no point for us to wait for a return from the appellant on which learned P.P., Assam, insisted. However, reasonable opportunity was given to the State to discharge its burden which it

failed to do. The State did not place any material before us to show that the superintendent of Jail who forwarded the instant appeal to this Court was not negligent or that it was due to the negligence on the part of the appellant that the appeal was preferred out of time. It was quite possible for the State to place before us entries from the ""history sheet" of the appellant to show that the petition of appeal was either drawn up or signed by the appellant on 22-4-82 and not earlier or rather the "decision" to "prefer" the appeal was not taken by the appellant until 22-4-82. We have already seen that the "date of decision" has to be entered in the "history ticket" according to para 481. We have already noted above that the copy of the judgment was received in jail on 16-2-82. How, therefore, the appeal came to be forwarded on 22-4-82? What happened during the intervening period had to be explained by the State which it failed to do. We have perused the petition of appeal which is written in English though it does not bear the name of the writer or any entry to indicate the date on which it was written. The appellant has affixed his signature on the petition of appeal in Vernacular and he has not put any date though the signature is attested by the Assistant Jailor who signed the same on 22-4-82. If the appeal petition was got written as per para 477 but belatedly, the appellant cannot be blamed therefor. Because, it appears to us that he could hardly affix his signature and he cannot be said to be a person who could write his own petition of appeal. On perusal of his examination u/s 313 Cr. P.C we are confirmed in this impression. He is a carpenter and from the prosecution evidence we find that he belongs to a family residing in a tea garden and in employment of the garden. That compulsions and ignorance and indigence hit him hard is vocally manifested on the records of the case.

12. For all the foregoing reasons we have no hesitation to hold that learned P.P.'s preliminary objection is meritless and must, therefore, be rejected. Because, the State has not discharged its burden to sustain the objection that there was no "sufficient cause" for the appellant for not preferring the appeal within time.

13. We may now enter into the merits of the case. For this we propose to state briefly the prosecution's case though, we may state even at this stage, that we find it difficult to ascertain the exact version of the case inasmuch as the date of occurrence itself is disputed. However, the gist of the case can be reflected in a thumb nail picture of some undisputed facts. On or about 27-1-81 deceased Joyram, aged 9/10 years was missing. About this two reports came to be lodged by his father Harinath on the same date on 29-1-81 (Exts. 1 and 4). What is described as the FIR in the case, however, came to be lodged on 7-2-81 on which date a human skeleton was recovered which prosecution alleged to be the dead body of missing Joyram and the "discovery" also, the prosecution alleged, was made at the instance of the appellant.

14. Prosecution examined 4 witnesses including the Autopsy Surgeon (PW. 2) and the Investigating Officer, PW. 4. Missing boy Joyram's father deposed as PW. 1 while PW. 3, a young boy of 12 years, gave evidence that he had seen Joyram

and the appellant together "on the date of occurrence whereafter the whereabouts of the missing boy Joyram could not be ascertained. That the evidence undoubtedly is wholly and solely circumstantial in nature is not disputed. Learned Sessions Judge entered the verdict of guilty against the appellant on the basis mainly of two circumstances. He relied on the "discovery"" and also on the evidence of PW. 3. About discovery we may say that he accepted prosecution's case that not only the dead body of Joyram was recovered at the instance of the appellant, a bicycle was also recovered at his instance which was an important link in the chain of circumstances. Because, the bicycle belonged to Harinath and the missing boy Joyram (his son) had left his house with the bicycle. Learned Sessions Judge also took into consideration what he called "admissions" of the appellant. These admissions are (1) recovery of bicycle and (2) his apprehension at Jamirah Tea Garden about which PW. 1 deposed.

15. Before as the conviction has been challenged on several grounds and indeed the main ground of challenge, as is expected to be in such a case, is that the circumstances alleged were neither proved nor were they cogent and convincing to sustain the conviction. Indeed, it is submitted that few links on which prosecution rely do not give complete chain to bind the accused besides the fact that the links dangled before the Court cannot stand the blow of judicial hammer if they are allowed to be placed on the anvil of law and subjected to a judicial test.

16. We propose now to examine each of the several contentions pressed by learned amicus curiae. As observed earlier her primary challenge is aimed at the discrepant and indefinite version of the prosecution case which shakes its very foundation knocking about its substratum. In Ex. 4 lodged by the father (PW. 1) of the missing boy Joyram it was stated that at about 2.30 p.m. on 27-1-81" mother of the boy (Joyram) came to buy betel nut and leaves from the nearby shop of Shri Binoy Mahato. From that day whereabouts of the missing boy along with the bicycle was not known. There is an endorsement on this document wherein relevant G. D. entry No. 469 dt. 29-1-81 is quoted. Besides, another endorsement refers to the writing time of the document giving it as 1.30 p.m. of 29-1-81 and stating the age of the missing boy Joyram as 10/11 years. In Ex. 1 it is stated as per ejahar lodged "today the 29-1-81 at 2.30 of the day" two boys named therein reported to the informant that the appellant was seen at about 2 p.m. on Monday the 26-1-81 taking his son on the bicycle towards Sukan Pukhuri." It is also stated, of course as a post-script, that on Monday the 26-1-81. Shri Chapa Mahat also saw the appellant with the missing boy Joyram at 2 p.m. of the day at Gobat (cow path). We did not refer to the FIR (Ex. 10) because it was admittedly written during the course of investigation after the appellant was arrested and is hit by Section 162 Cr. P.C. Learned amicus curiae rightly stressed that not only the discrepancies and contradictions in Exts. 1 and 4 but the prosecution's omission to prove G.D. entry No. 469 dt. 29-1-81 in which the earliest version of the prosecution case was recorded casts a serious doubt on the prosecution case. Because, if the date on which the boy (Joyram)

was missing was uncertain the only other evidence in the case about his being seen on a particular day by PW. 3. became irrelevant. The most important circumstance, according to us also, in such a case, to be proved distinctly is the date, place and time with respect to the missing person. Because, in such a case the truth and the probative value to be attached to other relevant circumstances proved in the case depend on the factum of "missing" of the concerned person (who became untraceable) as the doubt infecting the (illegible) link would be (illegible) killing the tissues of the other links of the evidence.

17. We may as well read the ocular evidence adduced in this case. PW. 1 deposed that appellant's father's house was situated at a distance of 100ft. away from his house and they were brothers. Appellant's father was his elder brother. It is also his evidence that since three months prior to the occurrence the appellant was not living with his father. He did not know where the accused and his wife resided. He deposed that appellant's father-in-law's house was at Jamirah Tea Estate, 30/32 miles away from his house. Some days after he lodged Ex. 1 he went to Jamirah Tea Estate and there he found the appellant whom he brought with him to his father's house. There the appellant was asked about the whereabouts of the missing boy Joyram at which he protested. Accordingly he was kept tied-up and police was informed. The appellant stated before the police that after killing Joyram he buried the dead body in a drain in Sukhan Pukhuri which was 3 k.m. from their house. The appellant led the police to a place from where the dead body was taken out. His further evidence was that the face of the boy was alright from which he could recognise that the dead body was of his son. He admitted he had no dispute with his elder brother or the appellant but deposed that the villagers disliked the appellant. He also proved seizure of a dao brought from appellant's father's house and of the bicycle which police gave into his custody. The shop of Binoy was at a distance of 1 k.m. from his house according to this witness. We have no doubt reading his evidence that one important link in the chain of circumstances having edifying significance, has not been proved. This witness did not state how he apprehended the appellant. What was the source of his information? Why he took so many days to do so if the appellant's whereabouts were known to him and it had also become known to him as early as on 29-1-81 that the appellant could enlighten him of the whereabouts of his missing son Joyram. These are very important circumstances to taint the prosecution case. Indeed, we also do not find from his evidence any explanation for non-examination of Binoy Mahato or Chapa Mahato and another boy who are referred respectively in Exts. 4 and 1. Their non-examination is also an important missing link which cannot be overlooked. We have also to say that the medical evidence discredits the story given by this witness about recognition or the identity of the dead body.

18. Before we read the evidence of the Autopsy Surgeon we may read what the star witness (PW. 3) had to say. His evidence is that he saw the missing boy Joyram coming to Binoy's shop on a bicycle. At that time the shop was closed and when he was waiting there the appellant appeared there from somewhere

and caught hold of the bicycle and asked the missing boy Joyram to accompany him to Sukhan Pukhuri. However, it is recorded albeit in his chief-examination itself by the Court, "later says he could not follow what words were exchanged between them." In his cross-examination he admits that he had seen appellant and Joyram from inside his own courtyard which was at the back-side of their house. His further evidence is that he did not see anything in appellant's hand. According to us nothing is proved by him. Because, whether he really saw and recognised appellant is itself doubtful. That apart, he does not depose about the date and the time on which he saw appellant and missing Joyram together or even when he reported about it to PW. 1 so as to give a cogent and complete version. And he is a "child witness."

19. The evidence of PW. 2, who conducted the post-mortem examination on the dead-body recovered in this case may now be seen. Reading his evidence we entertain no doubt at all that the dead body was in a highly decomposed state and its identity was beyond recognition. The Surgeon deposed that he examined a "skeleton with little fleshes" and found hairs present at the back of the scalp. He found upper limb bones absent but all the teeth to be present and healthy. He found membrane covering the brain absent and also the brain absent. His evidence gives the impression that jackals may have eaten-up the flesh and other edible matters leaving merely the bones. Though he deposed that he did not mention the particular place where "fleshes" were found we found it significant to note his evidence that hairs were present only at the back side of the scalp leaving no room for any doubt that there was no flesh on the face. Though he deposed that the dead-body was of a male child aged 12 years we find it difficult to accept his evidence because he did not give any data on the basis of which he tendered the opinion. Presence of all teeth rather proved the dead body to be of an adult and not a child. Indeed, he admitted that, the age of the child given by him was not a confirmed opinion. It is his evidence that there was a wearing apparel on the skeleton. But PW. 1 did not depose that he recognised the dead-body to be that of his son from the cloths found on the wearing of the dead-body. The post-mortem examination was held on 8-2-81 at 10.30 a.m., about 10 days after the boy Joyram was found missing. It is true that the Doctor also deposed that he did not find any mark of injury on the skeleton. This evidence is material because, according to us, it has not been proved by the prosecution that the dead body was that of the missing boy Joyram. In this connection we would also like to refer to the inquest report (Ex. 2). We find it mentioned therein also "fleshes gone off" and there were "few hairs on the head".

20. The very fact that the dead body recovered could not be proved to be that of Joyram rendered doubtful and useless prosecution's evidence of discovery u/s 27 of the Evidence Act. Learned amicus curiae rightly stressed that the statement leading to discovery has not been proved in the instant case and referred us to the evidence of the Investigating Officer (PW, 4). He tried to support PW. 1 stating in his chief-examination that he later recognised the dead body to be of

his son Joyram. Because the face was "at the stage of recognition". We do not, in view of the medical evidence, see any reason to place any reliance on his testimony. Because also of the fact that in his cross-examination he admitted that "the dead body had all the limbs but the flesh had gone off." His further evidence is that on 7-2-81 a man named Jimboo came to thana and informed him that the appellant was apprehended and was confined in the village of PW. 1. Accordingly, the man (appellant) was brought to the out post by sending two constables. When the appellant was arrested he led him to a spot where a dead body was found kept hidden. What statement of the appellant led to the discovery is not deposed to by this witness. Indeed, to cut short further discussion of evidence we would also say that similarly the statement leading to the alleged discovery of the bicycle is not deposed to by this witness. His evidence is that the bicycle was seized from the house of one Manik Borthakur which was about 20 miles away from the place of occurrence. That the receipt of the bicycle had not been seized is admitted by him which also renders doubtful the fact that the bicycle belonged to PW. 1. Non-examination of Manik Borthakur is also an important missing link because it is not proved that the appellant had kept the bicycle there.

21. Before discussing the case-law we propose now to refer to the appellant's statements in his examination u/s 313 Cr. P.C. We propose to reproduce the dialogue in the form recorded by learned Sessions Judge in respect of the two questions inasmuch as the replies given thereto were considered as "admissions" by the trial Court.

Q. From the evidence of witnesses Nos. 1 and 3, it is seen that on the day of occurrence, getting Joyram on his bicycle you took him somewhere from near the shop of Binay at Lohari Bahgaligaon. Since then Joyram was seen no more. What is your reply?

A. On the day of occurrence I took Joyram on bicycle and carried him is true.

Q. From the evidence of Investigating Officer again seen that as have been shown and spoken by you, the bicycle (M. Ext. 2) was seized from the house of Manik Borthakur. What is your reply?

A. This is a fact.

22. We have no doubt that both the questions were very vague and it is doubtful if the appellant understood the purport thereof. That apart, we may then consider the reply to see if any "admission" can be inferred therefrom. In the first question the date of occurrence and the destination were not mentioned. Though P.W.3 spoke of Sukhan Pukhari. Therefore, on which date 26-1-81 or 27-1-81 he took Joyram it is difficult to say. Also it is not admitted by him that the bicycle on which he took Joyram was Joyram's cycle or the cycle which Joyram was having. That apart, we find from the evidence not of PW 1 but only of PW 3 and that too the fact that Joyram was asked by the appellant to accompany him. Thus, his answer that he "carried" Joyram cannot be accepted

as an explanation of the circumstance appearing in the evidence adduced against him. The fact that he did not admit or state categorically that it was Joyram's cycle the second question also attributing to him the knowledge that it was Joyram's cycle must, therefore, be said to be misleading and vague. Accordingly, appellant's answer to the question in the affirmative cannot be accepted as his admission. That apart, as observed earlier, according to us, the fact that the bicycle seized from Manik Borthakur's house belonged to Joyram's father has not at all been proved in this case. The answer to the second question at best may mean that one bicycle was seized from Manik Borthakur's house by the Investigating Officer. Indeed, this fact is also reflected in Ex, 2. We have no doubt that when vague questions are asked and the appellant had no real opportunity to explain any particular circumstance to be used against him, the explanation given by him cannot be used against him. This proposition is well established by a long line of weighty authorities see *Tara Singh Vs. The State*, ; *Ajmer Singh Vs. The State of Punjab*, , *Ram Shankar Singh and Others Vs. State of West Bengal*, ; *State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another*, ; *Sharad Birdhichand Sarda Vs. State of Maharashtra*, . Besides, even unsatisfactory reply would not penalise an accused as held in *Abdul Karim Madan Sahab Vs. State of Mysore*,

23. Let us now deal with the other case law cited at the Bar. In *Bakhshish Singh Vs. State of Punjab*, , it was held that in a case based on circumstantial evidence chain of evidence must be such as not to leave any reasonable ground for conclusion to sustain with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In a similar vein it was observed in *Rahman v. State of U.P.* AIR 1972 SC 110 : 1972 Cri LJ 23 that circumstances forming the evidence must be conclusively established and even when so established they must form such a complete chain that it is not only consistent with the guilt but is inconsistent with reasonable hypothesis of accused innocence. It was further held that abscondance by itself was not conclusive either of guilt or of a guilty conscience. In *Umedbhai Jadavbhai Vs. The State of Gujarat*, stress was laid on the aspect of "missing link" and it was observed that the Court while bearing in mind the cumulative effect of all the circumstances in a given case weighed them as an integrated whole and therefore in some cases a "missing link" may be fatal to the prosecution case which must be noticed also. In a murder case based on circumstantial evidence the tests to be satisfied were indicated in *Gambhir Vs. State of Maharashtra*, which have been reiterated in a more recent decision, in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, Even the circumstance about absence of motive which weighed in favour of the accused had to be considered in such a case, so it was held by their Lordships in *Gambhir* (supra). The other well known test which, adverted earlier as laid down in the decisions referred, were also reiterated. It was further observed in *Gambhir* that the only circumstance that the accused was seen in the evening of the day of occurrence in the company of the missing person in the absence of any positive evidence

about the probable time of death cannot be accepted as either clinching or convincing. Because, there might be a "long gap" between the appellant being seen in the missing person's company and the time of death which it may not be possible for him to explain. According to us, this principle accords with the rule stressed in *Sharad* that the chain of evidence must be complete and must show that "in all human probability" the act must have been done by the accused. The decision in *Gambhir* squarely applied to the evidence of the instant case. The only fact proved in the instant case is that on or about 26-1-81 the missing boy was seen with the appellant and the dead body was recovered, long time thereafter on 7-2-81 which also, indeed, has not been proved to be that of the missing boy Joyram. That apart, in the instant case there is also no evidence of abscondance against the appellant. Because, where he was found was not an abnormal place inasmuch as it was his father-in-law's house and the evidence is that he did not live with his father and there is no evidence that he did not live with his father-in-law but somewhere else.

24. We may refer now to the cases cited in relation to the alleged circumstance of "discovery" u/s 27 of the Evidence Act. In 1983 (7) ACR 222 (SC) it was held that conduct and concealment are incriminating circumstances and their discovery becomes relevant and admissible u/s 27. But; as there was no "statement" on record about the alleged concealment the court held that there was no legal evidence on the record to connect the accused with the gun recovered. Indeed, what their Lordships observed in *Earabhadrapa v. State of Karnataka* deserves to be noted carefully. In the language itself of Section 27, it was held it was manifested that it must be established that the information statement must "relate distinctly" to the facts discovered u/s 27. This Court also examined the scope of a "discovery" u/s 27 in *Moirangthem Tomba Singh Vs. State of Manipur*, wherein accused's categorical statement of his concealing the incriminating object at a particular place was held to be admissible. We have no doubt that, the mere discovery of any object would not be accepted as an evidence against the accused unless the statement of the accused which led to the discovery was also proved. Indeed, this view was taken by this Court in *Bhanda Garh Vs. State of Assam*, wherein the Court held that proof of seizure-list in respect of the object discovered pursuant to the information gathered from the statement of the accused will not render admissible evidence of seizure. We feel constrained to observe that the statement must, according to the language and also object of Section 27, "relate distinctly" to the object discovered and in connection therewith it can be proved conclusively if the exact statement or words used are proved. We are, therefore, inclined to take the view that as in the case of a dying declaration or a confession, the Court should insist even in the case of Section 27 the same requirement that the prosecution must prove the "statement" *ipsisssima verba*. Because, it belongs to the same genus. We say so because in such cases also it is the statement of a person who cannot be called as a witness and the case would be covered by Section 32(3). In such cases a "discovery" is made in the course of investigation as envisaged u/s 162(2) Cr.

P.C. as a result of information gathered by the police from accused's "statement" which will be hit by Section 162(1) except to the extent saved by the words "so much of such information" of Section 27. That apart the statement may partake the colour or character of a confession by the accused as indeed the section itself contemplates. The provision being contemplated by the legislature as an exception to Section 25 it is to be strictly construed therefore, to fulfil the limited purpose and object which is sought to be achieved within the constitutional limitation. Fake "discoveries" are not contemplated; the authorship of the "discovery" must be attributed to the accused. The Court has a duty to discharge in this regard. The duty can be discharged if the entire statement, and particularly in the language of the accused, is proved. The Court has to satisfy itself of the truth and voluntariness of the "statement" to exclude possibility of violation of Article 20(3) of the Constitution. Indeed, the Constitution Bench in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, took the view that only such situations are excepted from the purview of Article 20(3) which manifest that evidence was being collected without in any manner compelling the accused or asking him to be a party to the process. We would say this much only for the present as in the instant case no "statement" at all has been proved. After he was arrested the accused, as per I.O.'s deposition "led to the spot where the dead body was kept hidden." We have, therefore doubt if any "statement" was at all recorded.

25. For all the foregoing reasons we have no doubt that the prosecution miserably failed to bring home to the appellant the offence of murder of missing boy Joyram. It has only proved few unconvincing and solitary circumstances leaving vital gaps unabridged. Indeed, the only two equivocal circumstances disclosed in the appellant's statement u/s 313 Cr. P.C., as discussed earlier, are not totally inconsistent with the hypothesis of his innocence. We have discarded the evidence of PW. 3 and indeed we have found that the dead body recovered has not been proved to be of missing boy Joyram. We do not refer once again to other vital missing links but only reiterate that the date when Joyram was found missing itself being not conclusively proved the whole prosecution case may founder and fail on that ground alone.

26. In the result the appeal is allowed. The conviction and sentences passed against the appellant are set aside. He shall be set at liberty forthwith.

27. Smt. K. Jadav who has admirably assisted the Court as *amicus curiae* shall be paid hearing fees for 3 days. She shall be entitled to fees admissible to the Public Prosecutor conducting the case in this Court for the State of Assam.

28. Let copies of the judgment be sent to the Chief Secretaries and Inspectors General of Prisons, Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh so that necessary steps may be taken by the authorities concerned to up date Prisons Manual and also plug loopholes in the light of observations made in the judgment so that convict's valuable right to appeal is not impaired in any manner. The records shall also be placed before the Hon'ble

Chief Justice so that this Court may consider whether any amendments are desirable in the case of Rules of this Court or of Criminal Rules and Orders framed by this Court.

T.C. Das, J.

29. I agree.