

Mohd. Abid Alias Bengali Vs. State

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Court : Delhi

Decided On : May-12-2014

Judge : Sanjiv Khanna

Appellant : Mohd. Abid Alias Bengali

Respondent : State

Judgement :

\$~ *IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL
No.399/2014 Date of decision:

12. h May, 2014 MOHD. ABID alias BENGALI Appellant Through Mr. Chetan Lokur, Advocate. versus STATE Respondent Through Mr. Rajat Katyal, APP for the State with Inspector Sudhir Kumar, PS Jagatpuri. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE G.P. MITTAL SANJIV KHANNA, J.

(ORAL): Mohd. Abid @ Bengali by the impugned judgment dated 26th September, 2013 stands convicted under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Mohd. Illiyas on 3rd April, 2010 at about 1.40 a.m. under flyover at Karkari crossing. The conviction arises out of FIR No.135/2010, police station Jagatpuri, which was registered on 16th April, 2010 at 4.55 p.m. By order on sentence dated 5th October, 2013, the appellant has been sentenced to rigorous imprisonment for life and also to pay fine of Rs.1,000/-, in

default of which he has to undergo simple imprisonment for one month.

2. As noticed in paragraph 1 above, the occurrence in question had taken place on 3rd April, 2010 at about 1.40 a.m. and the FIR in question was registered after nearly 13 days on 16th April, 2010 at 4.55 p.m. This delay in registration of FIR in the facts of the present case has created doubt on the involvement of the appellant in terms of the testimony of Arvind Singh (PW-14), who claims that he was an eye witness to the occurrence. PW-14s statement under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) was recorded, as per the police version, on 17th April, 2010 i.e. after more than 14 days of the actual occurrence/incident.

3. PW-14 in his Court deposition recorded on 10th May, 2011 has stated that for the last 4-5 years, he was residing under the flyover chowk of Karkari crossing, Jagatpuri and used to beg there for living. He was addicted to substance abuse since 1985 and, therefore, was disowned by his family/parents. The deceased was a drug addict and sometimes used to come to the flyover crossing. The deceased, who became his friend, used to pick pockets of passersby and often sleep under the flyover and leave in the morning. In the intervening night of 2nd and 3rd April 2010, he was lying on pavement under the flyover with closed his eyes, but was not sleeping. At about 12 midnight, he had seen the appellant quarrelling with the deceased. When he questioned the appellant about the cause, the appellant responded that the deceased had stolen oranges and taken out money from his pocket. PW-14 had reprimanded the appellant stating that the deceased was not a person of that nature and would not have stolen the money from his pocket. He asked the appellant not to disturb and he should go to sleep. Thereafter, he saw the appellant picking up a cemented brick and assaulting the deceased on his head with the said brick 4-5 times. The appellant also gave leg blows on deceaseds waist 3-4 times. The appellant then went away from the spot. The deceased vomited and blood oozed out from his mouth and ears. Deceased took out his shirt and wiped his face with the shirt. Thereafter, he fell down and started breathing laboriously. PW-14 had requested one of the passersby to inform the PCR van, which was standing near the place of occurrence. Thereupon, PCR officials came and sprinkled water on the face of the deceased, but he did not

respond and was then taken to the hospital by the PCR officers. PW-14 had lifted the shirt of the deceased and kept it with him in a polythene bag.

4. The question and issue raised is whether Arvind Singh (PW-14) is a reliable and credible witness?. Did he see the said occurrence or is a planted witness?. It is alleged that PW-14 had been prompted to make the said statement and implicate the appellant as the police was not able to solve the case in question. The appellant has been implicated as a soft target.

5. ASI Bijender Rai and Constable Anil Kumar, PW-9 and PW-13 have deposed that in the intervening night between 2nd and 3rd April, 2010, they were on duty from 8 p.m. to 8 a.m. and had parked the PCR van under the flyover of Karkari crossing. At about 1.35 a.m., a passerby had informed them that a person was lying unconscious at Uturn of the flyover on the Gagan Vihar side. They went there and found one person lying on the ground. They tried to revive the said person, but in vain and thereafter took him to LBS Hospital where he was got admitted. Constable Anil Kumar (PW-13) had made a call at 100 number from his mobile. PW-13 has further testified that the said person aged about 25-26 years was bleeding from his nose and ears and vomit could also be also seen near his body. PW-13 has deposed in his examination-in-chief that they had come back to the spot and noticed a beggar there.

6. ASI Bijender Rai (PW-9) in the cross-examination has stated and clarified that the U-turn under the Gagan Vihar flyover was on the Karkardooma side and the deceased was wearing a brown colour pant and a white colour vest. The clothes were old and another beggar was sleeping on the footpath at a distance of about 5-6 yards. The said beggar had covered himself with a chaddar. PW-9 did not wake up the beggar or inquired about his name and address as they did not have the time. Constable Anil Kumar (PW-13) in the cross examination has stated that they removed the unconscious person in five minutes and at that time, the beggar was present, but he did not know his name and no inquiries were made from him. PWs-9 and 13 did not suspect foul play or involvement of any third person in the said occurrence or the injuries which had been caused on the deceased. It is apparent that PWs-9 and 13 came back to the place of occurrence and even

thereafter did not speak or ascertain details from the said beggar. They were not aware and have not deposed that a third person had caused injuries.

7. The deceased was first taken to LBS Hospital, where his MLC Ex.PW12/A was prepared at about 2 a.m. The MLC does not give details of the person who had been admitted, so the person was described as unknown. Dr. Sushil Kumar (PW-12) has deposed that he had examined the said unknown patient with alleged history of being found injured on the road side. The following injuries were noticed:

1. tender swelling with red abrasion over occipal region of scalp 2. red abrasion on Rt and Lt scalpular region 3. Tender swelling present over the nose with a fresh clot of blood in bilateral nostril of nose.

4. Lt side black eye present.

5. fresh clot of blood present in left ear.

6. loosening of teeth present over upper jaw with fresh injury in gum.

8. PW-12 had also proved the MLC Ex.PW12/A. In his cross- examination, PW-12 opined that the injuries mentioned in the MLC were possible on sudden fall on the ground while running.

9. SI Sandeep Kumar (PW-17) and ASI Gur Charan Singh (PW-

18) have deposed that on 3rd April, 2010 at about 11 a.m., they received information from LNJP Hospital, where the injured was referred by the previous hospital, that the patient had died. They went to the hospital and took into possession relevant papers including the MLC etc. They also came to know that the deceased was known as Mohd. Illiyas, son of Mohd. Ibrahim, resident of G-236, Shaheed Nagar, Jaipal Chowk, Ghaziabad. The said identification was confirmed on 6th April, 2010, when the relatives of the deceased were called to the hospital. Post mortem of the dead body was got conducted after preparing request letter marked Ex.PW17/A and B. After conducting the post mortem, the doctor concerned handed over blood gauze piece in an envelope with two sample seals, which were taken into possession vide seizure memo Ex.PW17/C dated 6th

April, 2010.

10. Dr. Kul Bhushan (PW-8) had conducted the said post mortem on 6th April, 2010 at about 10.05 p.m. As per the deposition of PW-8, on external examination, the following injuries were noticed:

1. Contusion abrasion of size 1 x 1 cm present over the right side of forehead, 5 cm above right eyebrow.
2. Contusion abrasion of size 1 x 1 cm present just above and outer end of right eyebrow.
3. Contusion of size 8 x 6.5 cm present over the left cheek, 4 cm below left eyelid.
4. Contusion of size 4 x 3 cm present over the left side of occipital region, 3 cm from the midline.
5. Contusion of size 15 x 6 cm present over the back of left shoulder, 2 cm from the midline.
6. Contusion of size 16 x 8 cm present over the outer aspect of left shoulder.
7. Contusion of 10 x 10 cm present over the back of right shoulder.

11. On internal examination, PW-8 noticed the following injuries:

1. Chest: Plural cavity, right lumb lung adherent to the chest wall.

2. Stomach : Stomach was empty.

3. Liver :

1230. grams and was pale.

4. Spleen :

116. grams and was pale.

5. Kidney : kidney were also pale.

6. Head : Scalp - effusion of blood present over whole of left side of scalp layer.
7. Skull : Linear fracture, 13 cm long present Over left parieto temporal region of skull.
8. Brain : Extra dural haemorrhage of size 12 x 10 cm present over left side of fronto temporal parietal region. Diffuse subdural haemorrhage present over both fronto parieto temporal region.

As per Dr. Kul Bhushan (PW-8), the death was due to cranio cerebral damage, consequent upon blunt force/surface impact to the head.

12. As noticed above, the post mortem was conducted on 6th April, 2010. There is no reason forthcoming and it has not been explained why the post mortem report was not collected on 6th April, 2010. As per the prosecution version, the post mortem report was collected by SI Sandeep Kumar (PW-17) on 15th April, 2010 and upon examination of the report, he observed that Section 302 IPC was attracted. Accordingly, rukka was prepared and the FIR in question was registered on 16th April, 2010 at 4.55 p.m. The endorsement made by PW-17 on the rukka was marked Ex.PW17/D. The FIR does not mention or record that the appellant was the perpetrator of the said crime. The rukka also does not mention or record that Arvind Singh (PW-14) was an eye witness. Thus, in the official records, presence of Arvind Singh (PW-14) at the spot in question was recorded on 16th April, 2010 and not before. The statements of ASI Bijender Rai (PW9) and Constable Anil Kumar (PW-13), who had seen the deceased in injured condition and had taken him to the hospital, were recorded under Section 161 Cr.P.C. on 16th April, 2010. It is noticeable that both PW-9 and PW-13 had stated that a passerby had informed them that a person was lying in an unconscious condition at Gagan Vihar flyover U-turn. We have examined the site plans marked Ex.PW19/A, B, C and D placed on record. Site plans marked Ex.PW19/B, C and D do not mention the location where the PCR van in question was standing. This is inspite of the fact that the site plan marked Ex.PW19/D is a scaled site plan and a detailed one. It was drawn up on 10th June, 2010. The site plan Ex.PW19/A prepared on 16th April, 2010, gives the location of the PCR van at point B and the location where the deceased was found in injured condition at point A. It is

noticeable that the two locations are very close to each other, though a concrete column obstructed and prevented the police officers from witnessing/seeing the place where the deceased was lying in unconscious condition. The PCR van was on the main road on the other side of the column. It would have taken less than 30 seconds for the police officers to reach the spot in question, where the deceased was lying. But more importantly, in case of a quarrel or a fight, it would not have gone unnoticed.

13. Arvind Singh (PW-14), as noticed above, in his deposition has mentioned that the appellant had lifted a cemented brick with his two hands and had hit the deceased on his head 4-5 times. As per the prosecution version, on the basis of the disclosure statement of the appellant marked Ex.PW18/D, a brick was seized from the spot on 17 th April, 2010. The prosecution case is that the said brick marked Ex.P1 was used to inflict the said injuries. The sketch of the said brick was marked Ex.PW8/B. The said brick is rather small in size and two hands are not required to lift it, being 19.5 cm 15.5 cm and weighing 3.5 kilograms. The delay in lifting/seizure of the brick, etc. makes the recovery a suspect, especially when the place of occurrence had substantial footfalls.

14. In his examination in chief, Arvind Singh (PW-14) has stated that on 4th April, 2010 itself, he had narrated the entire facts to ASI Gur Charan Singh (PW-18), who was from police station Jagatpuri. In other words, he had narrated the eye witness version, testified by him in the Court to ASI Gur Charan Singh on 4th April, 2010. ASI Gur Charan Singh (PW-18) has testified that he had made inquiries from one Arvind Baba and had come to know that the deceased was Mohd. Illiyas s/o Mohd. Ibrahim r/o G-236, Shaheed Nagar, Jaipal Chowk, Ghaziabad, U.P. and then on 5th April, 2010, Mohd. Fayyaz, brother of the deceased was informed, who then identified the dead body. He has deposed about the post mortem, which was conducted on 6 th April, 2010 and stated that blood gauze piece was taken into possession and seized vide seizure memo Ex.PW17/C. SI Sandeep Kumar (PW-17) in his examination-in-chief neither mentioned nor claimed that he had spoken to Arvind Singh (PW-14) on 4th April, 2010. PW-17 remained absolutely silent on interrogation of or information being furnished by Arvind Singh (PW-14) to the police on 4th April, 2010. However, PW17 has stated that he had joined the

investigation from 3rd April, 2010 to 6th April, 2010 and then again on 15th April, 2010, 16th April, 2010 and 26th April, 2010 etc. In the police case diary of contemporaneous date, there is no mention or reference to interrogation of PW-14 as an eye witness on 4th April, 2010. In fact, by then even the FIR was not registered. In case if PW-14 had given vital clues or information on 4th April, 2010, the police, in view of the post mortem report Ex.PW8/A dated 6th April, 2010, was required and normally should have acted promptly. The aforesaid factum when read with the delay in obtaining the post mortem report, which as per the police version, was obtained on 15th April, 2010, creates doubt about the authenticity, genuineness and truthfulness of the testimony of PW-14 as to whether he was actually an eye witness to the actual occurrence. As noticed above, ASI Bijender Rai (PW-9) and Constable Anil Kumar (PW-13) after getting the deceased admitted in the hospital had come back to the spot. At that time also, they did not interrogate or ask any question from one or two beggars, who were sleeping next to the place where the deceased was found in an injured and unconscious condition.

15. Arvind Singh (PW-14) in his cross examination has stated that the appellant was lying at a distance of about 3 feet from the place where he was lying and the deceased was sitting at some distance on the other side. The PCR van was standing at a distance of about 20-25 steps only. At the time of occurrence, PW-14 did not raise any alarm, but claimed that he could not save the deceased as he himself was handicapped. At the same time, he deposed that there were heated arguments between the appellant and the deceased, but it has not been explained why the PCR van, which was at a distance of only about 2025 steps, did not hear or notice anything. The PCR van officers, as per PW-14, reached the spot within 1-2 minutes, but did not see anyone running away.

16. PW-14 in the cross-examination claimed that ASI Gur Charan Singh (PW-18) had remained with him for about 15-20 minutes on 4th April, 2010 and on that day he had told him that he could get the appellant apprehended. He further claimed that on 3rd April, 2010 at 7 a.m. he had come to know that Illiyas/injured had expired and he along with the police officers had gone to the house of Mukhtiar at Trilokpuri, who was not available, but his wife was there. Subsequently, Mukhtiar

was contacted by ASI Gur Charan Singh (PW18) on telephone. It must be noted that these facts were not deposed to by PW-18.

17. Arvind Singh (PW-14) deposed that on 18th April, 2010, he had handed over to the police, the shirt worn by the deceased, which had remained with him. When questioned, why he kept the shirt with him, PW-14 stated that he was thinking and was under the belief that the police would interrogate and contact him and then he would hand over the shirt. He accepted that the shirt was handed over to the police on 18th April, 2010. This is not natural and is rather surprising as PW-14 has himself claimed, that on 4th April, 2010, he had narrated facts of the occurrence to ASI Gur Charan Singh (PW-18) and was with him for 15-20 minutes. The said shirt was seized vide seizure memo Ex.PW14/A dated 17th April, 2010 and not on 18th April, 2010. However, we are neither giving emphasis and nor placing any importance on the difference in dates as this can be explained as due to imperfect recollection. The assertion by PW-14 that he had kept the shirt with him as he wanted to handover the shirt to the deceased is unnatural and unacceptable as PW-14 has stated that he had come to know on 3rd April, 2010 that Illiyas had expired. In fact, recovery of the shirt from PW-14 is an incriminating fact against him and shows a possible involvement of PW-14. At best, it can be a neutral circumstance and cannot be used against the appellant. The FSL report Ex.PW20/E records that human blood of group A was found on the shirt and the same matches with the blood group on the underwear and pant of the deceased and gauze cloth piece. However, in view of the aforesaid discussion, we do not accept PW-14s deposition as primary evidence implicating the appellant to hold that he was the perpetrator, who had committed the offence. PW-14s version is highly debatable, unreliable and cannot be the basis of conviction, without other strong incriminating material and evidence against the appellant.

18. Dr. Kul Bhushan (PW-8) had also given his report/opinion Ex.PW8/C, after examining the cemented brick, Ex.P1. He had opined that the injuries mentioned in the post mortem report could have been caused with the said brick. Blood, however, could not be detected on the brick as per the CFSL report, Ex.PW20/E. The said brick is common and is frequently used as a tile. The brick as per sketch Ex.PW8/B is fairly small in size and can be easily picked up and thrown by one

hand. We also have some doubt whether the deceased had died because of a hit on the head by a brick. The post mortem report Ex.PW8/A records that the death was due to cranio cerebral damage, consequent upon blunt force/surface impact to the head. The report does not rule out the possibility of an injury on the head because of surface impact. Similarly, Dr. Sushil Kumar (PW-12) in the crossexamination has accepted that the injuries mentioned in the MLC, Ex.PW8/A could be possible due to sudden fall on the ground while running. However, PW-8 in the cross-examination has stated that the injuries mentioned in the MLC were not possible on falling from a bus etc. But, he did not dispute or deny the fact that injuries were possible upon blunt force/surface impact on the head.

19. The deceased was a drug addict and was found injured on a platform underneath the flyover. There were roads on either side. There is no viscera report and there is no finding whether or not the deceased was intoxicated at the time when he was admitted to the hospital. Blood samples etc. were not tested to elucidate and examine whether the deceased had taken drugs and was under their influence. The cause and reason for vomit, which is admitted to have been found at the spot, has been neither indicated nor stated.

20. Arvind Singhs (PW-14) statement was also recorded under Section 164 Cr.P.C. and has been proved by Mr. Amitabh Rawat, Metropolitan Magistrate, who had recorded the said statement on 19th April, 2010 marked Ex.PW3/B. It is noticeable that in the statement Ex.PW3/B, PW-14 has neither mentioned nor stated that he had spoken to the police officers on 4th April, 2010 about the involvement of the appellant and the fact that he was an eye witness to the occurrence. Further, PW-14 had stated that the appellant continued to come and sleep at the spot even after 3rd April, 2010. In case, PW-14 had informed the police officers about the involvement of the appellant on 4th April, 2010, the appellant in normal course would have been interrogated and asked to explain, specially when he had not absconded.

21. In view of the aforesaid position, we do not think that we can rely upon the ocular testimony of PW-14 to convict and hold that the appellant was the perpetrator, who had committed the said offence by hitting the concrete brick on

the head of the deceased at the place of occurrence. The testimony of PW-14 lacks credibility and we think that it will not be safe but precipitous to convict the appellant solely relying upon the said testimony.

22. Learned Additional Public Prosecutor has referred to the testimonies of Laxman Prasad (PW-15) and Bharat Singh (PW-16), photographer and videographer, who on 17th April, 2010 were called by the Investigating Officer at the place of occurrence. PW-15 has deposed that he had videographed the appellant and Arvind Singh (PW-14) and had recorded their conversation/interrogation. Similarly, Bharat Singh (PW-16) has deposed that on 17th April, 2010, he was called to the flyover where one beggar was being interrogated by the Investigating Officer and he had prepared the CD. Arvind Singh (PW-14) has stated that the police including Inspector Suresh Chand (PW-19) and other staff had come to the spot on 17th April, 2010 at about 10 a.m. and the appellant was lying there. Appellant was then apprehended and interrogated by the police as to how he had killed the deceased. Inspector Suresh Chand (PW-19) has deposed that the appellant was arrested on 17th April, 2010 vide arrest memo Ex.PW4/A. The time of arrest has been shown as 10.40 a.m. The time of arrest shown in the arrest memo shows that the arrest memo is apparently post timed in view of the testimony of PW-14. The appellant was in custody of the police officers since morning on 17th April, 2010. Bharat Singh (PW-16) has stated in the cross-examination that he had reached the spot at about 1.30 p.m. on 17th April, 2010. Laxman Prasad (PW-15) has stated that he had recorded the video on 17th April, 2010 at night. From the aforesaid testimonies, it is apparent that the photographs/video were taken by PW-15 and PW-16, when the appellant was already in custody and had been detained by the police officers. The confession made by the appellant, therefore, would be barred and inadmissible under Sections 25 and 26 of the Evidence Act.

23. In State of U.P. v. Deoman Upadhyaya, AIR 1960 SC1125 Shah, J.

speaking for Sudhanshu Kumar Das, J.L. Kapur, J.J.

and himself, had held as under:

16. Sections 25 and 26 are manifestly intended to hit at an evil viz. to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing of offences as it is concerned with protecting persons who may be compelled to give confessional statements. If Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases.

24. Elucidating on the scope and ambit of Sections 25 and 26 of the Evidence Act in *Aghnoo Nagesia v. State of Bihar* AIR 1966 SC119 it has been observed:

15. If proof of the confession is excluded by any provision of law such as s. 24, s. 25 and s. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as s. 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted. xxxxx

18. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not,

as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that information leading to a discovery may be a part of the confession of the accused and thus, fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, s. 30 permits the Court to take into consideration against a coaccused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession. xxxxx 20. Our attention is not drawn to any decision of this Court or of the Privy Council on the question whether apart from s. 27, a confessional first information report given by an accused is receivable in evidence against him. Decisions of the High Courts on this point are hopelessly conflicting. They contain all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. In *Harji v. Emperor* A. I. R. 1918 Lah. 69 and *Noor Muhammad v. Emperor* [1925]. 90 I. C. 148, the Lahore High Court held that the entire confessional first information report was inadmissible in evidence. In *Emperor v. Harman Kisha* I. L. R [1935]. Bom. 120, the Bombay High Court held that the entire confessional report dealing with events on the night of the offence was hit by s. 25, and it could not be said that portions of it dealing with the motive and the opportunity were not parts of the confession. In *King Emperor v. Kommoju Brahman* I.L.R. [1940]. Pat 301 the Patna High Court held that no part of the confessional first information report was receivable in evidence, the entire report formed a single connected story and no part of it had any meaning or significance except in relation to the whole, and it would be wrong to extract parts of the statement and treat them as relevant. This case was followed in *Adimoola Padayachi v. State* (1960]. M.W.N.28, and the Court admitted only the portion of the confessional first information report which showed it was given by the accused and investigation had started thereon. In *State of Rajasthan v. Shiv Singh*, the Court admitted in evidence the last part of the report dealing with the movements of the accused after the commission of the offence, but excluded the other parts of the statement including those ' relating to motive and opportunity. In *Legal Remembrancer v. Lalit Mohan Singh Roy* I.L.R. [1922]. Cal.

167, the Calcutta High Court admitted in evidence the narrative of the events prior to the night of the occurrence disclosing the motive of the offence. This case was followed by the Nagpur Court in *Bharosa Ramdayal v. Emperor*. In *Kartar Singh v. State*, the Court admitted in evidence the introductory part and the portion narrating the motive and the opportunity. In *Ram Singh v. The State*, the Rajasthan High Court held that where it is possible to separate parts of the first information report by an accused from that in which he had made a confession, that part which can be so separated should be admitted in evidence, and on this view, admitted a part of the report relating to motive and subsequent conduct including the statement that the accused had left the deceased lying wounded and breathing in the tibia and there was no hope of her surviving and he had come having covered her with a cloth. In *Lachhumart Munda v. The State of Bihar*, the Patna High Court admitted in evidence portions of the first information report relating to the motive, the opportunity and the entire narrative of events before and after the crime. This case was followed in the judgment under appeal. Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. We think that the separability test is misleading, and the entire confessional statement is hit by s. 25 and save and except as provided by s. 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.

25. The term custody includes constructive custody, though the conflict of opinion on the said aspect has to be noticed. In *Re Krishna Pillai*, (1960) ILR Mad 1082, the said term was examined and difference between Sections 25 and 26 of the Evidence Act was highlighted. It was observed that the bar applied even when a confession was made to a third person by a person in police custody. The term custody of a police officer was clarified to mean not necessarily detention or confinement as used in the Cr.P.C. but includes such state of affairs from which it could be ascertained and held that the accused was under some sort of surveillance and restriction and could not have broken from the company of the police officer and moved away. An accused was said to be in custody, if as a suspect he comes into the hand of the police officer and he was no longer at liberty and free, though the formal order of arrest etc. might have been passed

later on, unless there was clear and unmistakable evidence to the contrary. It can be thus concluded that the term custody is wide. Similar view has been taken by the Orissa High Court in *Paramhansa Jadab v. State* AIR1964 Ori 144, observing; It is now well settled that "police custody" for the purpose of Section 26 of the Evidence Act does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. In *Lay Maung v. Emperor* AIR1924 Rang 173 the learned Judge pointed out the danger of construing the expression "police custody" in Section 26 of the Evidence Act in a more narrow technical sense as commencing from the time when the accused is formally arrested. The learned Judge observed that if such a view be taken it will be very easy for the police to evade that section and that the correct interpretation would be that as soon as an accused or suspected person comes into the hands of a police officer he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in "custody" within the meaning of Sections 26 and 27 of Evidence Act".

26. We notice that the trial court has not relied upon the two CDs referred which were created/filmed by PWs-15 and 16 because they were not certified under Section 65B of the Evidence Act. However, we would not accept and refer the said CDs in view of the provisions of Sections 25 and 26 of the Evidence Act, which bars their admissibility once the accused is in custody of a police officer; whether the confession is made to the police officer or to a third person while the accused was in custody of a police officer.

27. Thus, the prosecution case solely and exclusively relied upon testimony of Arvind Singh (PW-14). If we accept that Arvind Singh (PW-14) had spoken and implicated the appellant during his interrogation on 4th April, 2010, still delay in confronting the appellant, FIR etc. remains unexplained. If we accept that PW-14 spoke to the police on 17th April, 2010, then the delay on the part of PW-14 affect and dents the claim that he was an eye witness. The prosecution version in either case, would be difficult to rely on. Other than the testimony of PW-14, there is no other evidence to implicate the appellant.

28. In view of the aforesaid discussion, we allow the present appeal and the conviction and sentence of the appellant are set aside. The appellant will be set forth at liberty and released unless required to be detained in accordance with law in any other case. The appeal is disposed of. SANJIV KHANNA, J.

G.P. MITTAL, J.

th MAY12, 2014 NA/VKR

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