THE
SIKKIM LAW REPORTS

MARCH - 2018

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Mode of Citation
SLR (2018) SIKKIM

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SUBJECT INDEX

Code of Civil Procedure, 1908 – Order XLI Rule 27 – From the provision of Order XLI Rule 27, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the Appellate Court but for the three different situations which are enumerated in the provisions – In other words, the Appellate Court cannot issue an order to fill the lacuna in the evidence of the parties who has failed to succeed before the learned Trial Court. However, considering the spirit of S. 163 A of the Motor Vehicles Act, 1988 and it being a settled position of Law that it is not necessary in a proceeding under the Motor Vehicles Act to go by any rules of pleadings or evidence [*See Raj Rani and Others* v. *Oriental Insurance Co. Ltd. and Others, (2009) 13 SCC 654*] and for a just decision in the matter, without delving into the merits of the case, the matter is remanded to the Motor Accidents Claims Tribunal, East Sikkim at Gangtok, for the limited purpose of allowing the Appellants to furnish evidence with regard to the names of the deceased and his father.

Smt. Anita Tamang and Others* v. *The Branch Manager New India Assurance Company Limited, Gangtok Branch ***301-B***

Code of Criminal Procedure, 1973 – S. 100 – Search – Central Bureau of Investigation (Crime) Manual, 2005 reveals at Chapter 13, Clause 13.6 that it is mandatory, as per the provision of S. 100 (4) of the Cr.P.C., for an Officer making a search, to obtain two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if such inhabitant of the locality is available or is willing to be a witness to the search. That, non-compliance of the order amounts to an offence under Section 187 of the IPC provided under Section 11(b) of the Cr.P.C.

Ramayana Singh Meena* v. *State of Sikkim through CBI ***308-B***

Code of Criminal Procedure, 1973 – S. 164 – Object – It is an established legal proposition that S. 164 of the Cr.P.C. is to be used for the purposes of corroboration and contradiction apart from which it is intended to be a safeguard to preserve the truth which has emanated in the course of an investigation before trial. Evidently, there are some statements made by the victim before the Court which found no place in her S. 164 of the Cr.P.C. statement, but there is no necessity infact for Learned Counsel for the Appellant to raise this argument before this Court since it is clear that the Learned Trial Court has not taken such statements into consideration

neither has the Prosecution insisted by way of an Appeal on a conviction of the Appellant under Ss. 5(l), 5(m) and 5(n) of the POCSO Act which deals with the offence of aggravated penetrative sexual offence.
Subash Chandra Rai* v. *State of Sikkim ***346-A***

Code of Criminal Procedure, 1973 – S. 164 – Oaths Act, 1969, S. 4(2) – Recording of Confession – Administration of Oath – Under the scheme of the Oaths Act, 1969 administering oath to accused persons is not lawful and that the Magistrate while recording confession does not have the power to administer oath to an accused person unless he is being examined as a witness for the defence. A perusal of the Oaths Act, 1969 makes it clear that the said Act was enacted for the purpose of administration of oath to a witness or an interpreter to be examined in Court and not upon an accused making a confession. The specific bar under S. 4 (2) of Oaths Act, 1969 against administration of oath to an accused person in a criminal proceeding unless he himself is a defence witness is based on well founded criminal jurisprudence that accused cannot be forced to make any incriminatory statement on oath which would prejudice his defence. Under the Indian system of criminal jurisprudence the burden of proof is always on the prosecution except of course where the law creates a specific exception. Thus, even under the scheme of the Oaths Act, 1969 it is amply clear that administration of oath to an accused, unless he is being examined as a witness for the defence, is prohibited. The mandate of S. 4 (2) of the Oaths Act, 1969 also reflects a clear desire of the Legislature to insulate the accused from self-incrimination.
State of Sikkim* v. *Suren Rai ***108-I***

Code of Criminal Procedure, 1973 – Ss. 164, 281 and 463 – Recording of Confession – Administration of Oath – Prohibited, unlawful and illegal – Curable – Under the scheme of Cr.P.C. the accused has a right to remain silent. In fact it is a fundamental guarantee under Article 20 (3) of the Constitution of India. Under the scheme of Cr.P.C. it is only at the stage of examination of an accused under S. 313 Cr.P.C. an accused is asked to explain any circumstance appearing in evidence against him by the Court. Even at this stage sub-section (2) of S. 313 Cr.P.C. requires that no oath shall be administered to the accused when he is examined and under sub-section (3) thereof accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The recording of a statement of an accused under S. 313 Cr.P.C. cannot equate to taking of evidence as envisaged in S. 463 Cr.P.C.

for on the basis of such evidence taken in regard to such non-compliance, the Court is required to come to a definite finding whether the accused was injured or not. At no stage of a criminal trial can an accused be compelled to be a witness against himself. The narrow area within which an accused may be a competent witness is provided in S. 315 Cr.P.C – As per S. 315 Cr.P.C. an accused before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. Further, the accused shall not be called as a witness except on his own request in writing. In view of S. 315 Cr.P.C. an accused can waive his right under Article 20 (3) of the Constitution of India and tender himself as a witness if he so chooses as held by the Supreme Court in re: *P. N. Krishna Lal* v. *Government of Kerala*. To cure the irregularity under S. 463 Cr.P.C. the Court is required to take evidence in regard to such non-compliance and be satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement. Whether administration of oath on an accused person compelled the accused to incriminate himself is a question only the accused can answer. Under the scheme of Cr.P.C. we do not see any provision by which the evidence of the accused can be taken as required under S. 463 Cr.P.C. except under S. 315 Cr.P.C. and that too only if the accused so chooses. The illegal act of administering oath on an accused before recording his evidence would therefore take away the choice given to the accused under S. 315 Cr.P.C. and compel the accused to be a witness for the defence – This was not the eventuality contemplated under S. 463 Cr.P.C, which provides that the Court can notwithstanding anything contained in S. 91 of the Indian Evidence Act, 1872 take evidence in regard to such non-compliance as an exception to taking oral evidence to prove the contents of a document – The presumption under S. 80 of the Indian Evidence Act, 1872 is available only when the record purporting to be a confession is taken in accordance with law. Administering illegal oath upon an accused would denude the presumption in favour of the genuineness of the said document and that the statement was duly taken under the said proviso – Held, that not only administration of oath on an accused while recording his confession is prohibited, unlawful and illegal but also that the said act cannot be cured under S. 463 Cr.P.C. Administration of oath upon an accused while recording confession has a direct bearing on the voluntariness of the confession and voluntariness is sacrosanct.

State of Sikkim* v. *Suren Rai ***108-J***

Code of Criminal Procedure Code, 1973 – Ss. 164 and 281 – Oaths Act, 1969, S. 4 (2) – Constitution of India – Article 20 (3) – Held, in order to accept a confession as voluntary the Court must be absolutely certain that the confession is unblemished and there remains not an iota of doubt that the confession was actuated by undue influence, threat or promise. When a Magistrate takes the chair to record the confession, the mandate of the law prescribes the Magistrate to ensure that the mind of the accused is free from any external pressure. While doing so, if the Magistrate goes on to administer oath upon the accused it cannot be said that the said Magistrate complied with the statutory requirement of the law to ensure the voluntariness of the confession – The confession so made must not give any reason for the Court to doubt whether the said confession was the result of a hope in the mind of the accused or fear of the Magistrate, a person in authority, administering oath upon him to extract truth. S. 463 Cr.P.C. permits evidence of non compliance of Ss. 164 and 281 Cr.P.C. to be taken to examine if it has injured the accused. It does not permit violation of a fundamental right guaranteed under Article 20(3) of the Constitution of India to be cured. It must always be remembered that under the doctrine of Constitutional supremacy, the Constitution is the paramount law to which all other laws must conform. The Constitution of India must ever remain supreme and deemed written in every statute. We are, therefore, of the firm view that the substantial illegality of administering oath upon an accused before taking a confession which is prohibited cannot be termed as a curable irregularity under S. 463 Cr.P.C – Answering the first question referred by the Division Bench in the affirmative, we hold that the confessional statement recorded under the provision of S. 164 Cr.P.C. on oath is fatal and cannot be protected by the provision of S. 463 Cr.P.C. In the circumstances and consequently we hold that the judgment of the Division Bench of this Court in re: *Arjun Rai* is good law. We reiterate, as already held by the Supreme Court in re: *Brijbasi Lal Shrivastava*, that administration of oath while recording statements of the accused under S. 164 Cr.P.C. would amount to a concealed threat. If this be so then to permit further evidence to disprove what has been held to be a concealed threat would be to dilute the fundamental protection given to an accused under Article 20 (3) of the Constitution of India which we are not inclined to in today's context where the accused due to social conditions, lack of knowledge or advise may not be in a position to understand the nuances and intricacies of the laws.

State of Sikkim* v. *Suren Rai ***108-K***

Code of Criminal Procedure Code, 1973 – Ss. 164, 281 and 463 – Held, on examination of S. 164 (5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the mandate of S. 164 and S. 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, S. 463 Cr.P.C. would be applicable and the Court shall take evidence of non-compliance of S. 164 and S. 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence.

State of Sikkim* v. *Suren Rai ***108-L***

Code of Criminal Procedure, 1973 – S. 378 – Computation of the Period of Limitation – S. 378 (5) Cr.P.C. itself prescribes a period of limitation for an application for grant of special leave to appeal to be made under S. 378 (4) Cr.P.C. – The appellant has incorrectly calculated the delay in terms of Article 114 of the Limitation Act, 1963 which prescribes 90 days period to file an appeal from an order of acquittal under sub-section (1) or sub-section (2) of S. 417 Cr.P.C. while seeking special leave to appeal under S. 378 (5) Cr.P.C. – Time would begin to run against the appellant after the expiry of prescribed period of 60 days from the date of acquittal. As per S. 12 of the Limitation Act, 1963 the day from which such period is to be reckoned, shall be excluded so also the day on which judgment complained of was pronounced and the time requisite for obtaining a copy of the said judgment.

Ankit Sarda* v. *Subash Agarwal ***328-A***

Code of Criminal Procedure, 1973 – S. 378 – The provision of S. 378 (5) Cr.P.C. is a special provision which has no express provision excluding the application of S. 5 or S. 14 of the Limitation Act, 1963. In view of S. 29 (2) of the Limitation Act, 1963 the provisions of S. 4 to 24 of the Limitation Act, 1963 to the extent to which they are not expressly excluded are applicable even to Cr.P.C.

Ankit Sarda* v. *Subash Agarwal ***328-B***

Constitution of India – Article 20 (3) – Right Against Self-Incrimination – Rules Against Testimonial Compulsion – In re: *Selvi*, the Supreme Court would hold that the compulsory administration of certain scientific techniques, namely narco-analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) bare a "testimonial character" and thereby triggers the protection of Article 20 (3) of the Constitution.
State of Sikkim* v. *Suren Rai ***108-D***

Constitution of India – Article 20 (3) – Right against Self-Incrimination – Expression "to be a witness" – Scope – Code of Criminal Procedure, 1973 – S. 164 – To be a "witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as witness". It follows that the protection afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. It has been held and accepted that the case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing – A bare perusal of Article 20 (3) of the Constitution of India makes it abundantly clear that compulsion to be a witness against himself is the *sine-qua-non* of the fundamental guarantee. "Compulsion" is an essential ingredient of Article 20 (3) and covers a confession not made voluntarily. To compel is to cause or bring about by force, threats or overwhelming pressure. As held by the Supreme Court in re: *Kathi Kalu Oghad* compulsion in the context of Article 20 (3) of the Constitution of India means what in law is called "duress" – The purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.
State of Sikkim* v. *Suren Rai ***108-G***

Constitution of India – Article 20 (3) – Right Against Self-Incrimination – Code of Criminal Procedure, 1973 – S. 164 – Recording of confession – Administration of oath – Duty of Magistrate – Whether

administering oath to an accused while recording the confessional statement of an accused under S. 164 Cr.P.C. violates Article 20 (3) of the Constitution of India? – Not administering oath on an accused person while recording his confession is a Constitutional mandate to be zealously protected under Article 20 (3) of the Constitution of India. An accused person when brought before a Magistrate or appears before a Magistrate to record a confession is required to explain to the accused that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him under S. 164 Cr.P.C. It is, therefore, evident that the confession may be taken as evidence against the accused once made in compliance with S. 164 Cr.P.C. – Whether the accused was compelled to be a witness against himself can only be a question of fact requiring proof thereof. Compulsion, if proved would lead to a definite conclusion of violation of Article 20(3) of the Constitution of India. As held in re: *Brijbasi Lal Shrivastava* administration of an oath to the accused by a person in authority before taking a statement is by itself a concealed threat – Threat in any form be it concealed or otherwise directly affect voluntariness of the confession and render the same inadmissible in evidence – The process of finding out the truth must be undertaken keeping paramount Article 21 of the Constitution of India and the fundamental guarantee that no person shall be deprived of his life or personal liberty except in accordance to procedure established by law. In no circumstances can it be said that administration of oath to an accused before recording a confession which is prohibited by law and therefore illegal and unlawful pursuant to which the confession is recorded was done by a procedure established by law – Held, administering oath to an accused violates Article 20 (3) of the Constitution of India.

State of Sikkim* v. *Suren Rai ***108-H***

Constitution of India – Article 20 (3) and 21 – Right Against Self-Incrimination – "Personal liberty" – Right to Fair Trial – Inter-relationship between Rights – It is settled that in the Indian context, Article 20 (3) should be construed with due regard for the interrelationship between rights – To examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process". It has been made amply clear that Articles 20 and 21 have a non-derogable status within Part III of the Constitution of India.

State of Sikkim* v. *Suren Rai ***108-E***

Constitution of India – Article 20 (3) and 21 – Right Against Self-Incrimination – Underlying Purpose – Article 20(3) of the Constitution of India is a fundamental right. The privilege against self-incrimination is said to be a fundamental canon of common-law jurisprudence and this principle characteristics features are:- (i) that the accused is presumed to be innocent; (ii) that it is for the prosecution to establish his guilt, and (iii) that the accused need not make any statement against his will – Article 20 (3) mandates a fundamental guarantee that no person accused of any offence shall be compelled to be a witness against himself. The prohibitive umbrella of Article 20 (3) protects the accused back to the stage of police interrogation. A testimony by an accused person may be said to have been self-incriminatory when the compulsion comes within the prohibition of the constitutional provision and it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. As held by the Supreme Court the right against self-incrimination is now viewed as an essential safeguard in criminal procedure and its underlying rationale broadly corresponds with two objectives: firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily – As has been well settled when a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false which is undesirable since it impedes the integrity of the trial and the subsequent verdict. The purpose of the "rule against involuntary confessions" is therefore to ensure that the testimony considered during trial is reliable and worthy of credence. It has been conclusively held that Article 20 (3) of the Constitution of India protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20 (3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue.

State of Sikkim* v. *Suren Rai ***108-F***

Criminal Jurisprudence – It is the cardinal principle of Criminal Jurisprudence that the Prosecution will have to establish its case against the accused beyond a reasonable doubt.

Ramayana Singh Meena* v. *State of Sikkim through CBI ***308-C***

Indian Evidence Act, 1872 – S. 24 – Confession when Admissible – Must be True and Voluntary – Duty of Court – As per Taylor's Treaties on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person would make admission against his own

interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat – As held by the Supreme Court in re: *Navjot Sandhu* the authority recording the confession at the pre-trial stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter – To do so, the Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to speak the truth and confess the crime – In deciding whether a particular confession attracts the frown of S. 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.

State of Sikkim* v. *Suren Rai ***108-B***

Indian Evidence Act, 1872 – Ss. 24 and 17 – "Confession" – What is – Relationship with admission – Probative value of – Code of Criminal Procedure, 1973, S. 164 – "Confession" – Criminal Trial – "Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to

ensure that the confession is truthful and voluntary – Although the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: *Pakala Narayanaswami* v. *King Emperor* has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though.
State of Sikkim* v. *Suren Rai ***108-A***

Indian Evidence Act, 1872 – Ss. 24 and 17 – "Confession" – Vitiation of Voluntariness of Confession – Duty of Court – Must be True and Voluntary – Code of Criminal Procedure, 1973 – S. 164 – Criminal Trial – A confession is a direct admission or acknowledgment of guilt by the person committing the crime. A possible inducement, threat or promise in reference to an alleged confession leads to a presumption that the confession may become irrelevant. A confession made by accused person become irrelevant in criminal proceedings, if the making of confession appears to the Court to have been caused by any inducement, threat or promise. The inducement, threat or promise is directly relatable to a person in authority – If the Court would come to an opinion that the confession is a result of inducement, threat or promise which in the opinion of the Court would give the accused reasonable ground for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him then such confession would become irrelevant.
State of Sikkim* v. *Suren Rai ***108-C***

Indian Evidence Act, 1872 – S. 114 – Presumption – Illustration (g) – The I.O. admitted that he examined Amar Chand, recorded his statements and obtained his handwriting and signatures, but Amar Chand although listed as a Prosecution witness was not produced before the Learned Trial Court to establish the Prosecution case. Amar Chand appears to be a pivotal witness, therefore, on his non-production suspicion rears its head and enables this Court to draw an adverse inference under Section 114, Illustration (g) of the Evidence Act.
Ramayana Singh Meena* v. *State of Sikkim through CBI ***308-A***

Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 74 – Prohibition on Disclosure of Identity of Children – Neither for a child in conflict with law, or a child in need of care and protection, or a child victim, or witness of a crime involved in matter, the name, address, school

or other particulars which could lead to the child being tracked, found and identified shall be disclosed, unless for the reasons given in the proviso. The Police and Media as well as the Judiciary are required to be equally sensitive in such matters and to ensure that the mandate of law is complied with to the letter.

Subash Chandra Rai* v. *State of Sikkim ***346-C***

Limitation Act, 1963 – S. 5 – Extension of Prescribed Period in Certain Cases – An appeal may be admitted after the prescribed period, if the appellant satisfies the Court that he had "sufficient cause" for not preferring the appeal within such period. The explanation to S. 5 of the Limitation Act, 1963 provides that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be "sufficient cause" within the meaning of this section. S. 5 gives the Court a discretion which is to be exercised upon principles which are well understood. The words "sufficient cause" must be liberally construed to advance substantive justice when it is apparent there is no negligence nor inaction nor want of *bona fides* attributable to the appellant.

Ankit Sarda* v. *Subash Agarwal ***328-C***

Limitation Act, 1963 – S. 5 – Extension of Limiation Period in Certain Cases – The requirement of explaining everyday's delay does not mean that there should be a pedantic approach, but infact it should be a justice-oriented approach. In other words, priority is to be given to meting out justice on the merits of a case.

Ashim Stanislaus Rai* v. *State of Sikkim ***342-A***

Limitation Act, 1963 – S. 14 – Whether an appeal would lie before the Sessions Court or the appellant was required to seek special leave to appeal under S. 378 (5) Cr.P.C. before the High Court is a pure question of law. In such matters of the law it is advisable that a litigant seek legal advice. The question, therefore, is what if the legal advice received was wrong? Would the act of the appellant to agree to file an appeal before the Sessions Court on the wrong legal advice of his Counsel lead to an inference that the appellant did not prosecute the appeal with "due diligence" and "good faith"? – This lack of diligence of the appellant's Counsel may lead to an inference of the Counsel's carelessness but to saddle the lack of carelessness of the Counsel to the appellant and non-suit him on that count alone may lead to miscarriage of justice. There is no ground at all to

suspect that the appeals filed before the Session Court were not *bona fide*.
Ankit Sarda* v. *Subash Agarwal ***328-E***

Limitation Act, 1963 – Ss. 14 and 29 – Due Diligence – Good Faith – Under S. 14 read with S. 29 (2) of the Limitation Act, 1963 in computing the period of Limitation for any appeal, the time during which the plaintiff has prosecuting with "due diligence" another proceeding, whether in a Court of first instance or of appeal or revision, against the respondent shall be excluded, where the proceedings relates to the same matter in issue and is prosecuted in "good faith" in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it – "Due diligence" and "good faith" are two paramount requisites before the appellant could seek the benefit of S. 14 of the Limitation Act, 1963. "Due diligence" requires attention and care from the appellant in the given situation i.e. while prosecuting another proceeding. "Good faith" is defined in S. 2(h) of the Limitation Act, 1963 as "nothing shall be deemed to be done in good faith which is not done with due care and attention" – Whereas the power to condone delay and extend the prescribed period under S. 5 is discretionary, under S. 14, the exclusion of time is mandatory if the appellant satisfies the requisite conditions.
Ankit Sarda* v. *Subash Agarwal ***328-D***

Motor Vehicles Act, 1988 – S. 163 A – S. 163 A of this Act has been incorporated by the legislature in the Statute under the welfare scheme to provide benefits to the family of the injured persons falling within the income group extending up to ₹ 40,000/- (Rupees forty thousand) only, per annum. Compensation under this provision is to be in accordance with the Second Schedule which is a structured formula and is a benevolent legislation.
Smt Anita Tamang and others* v. *The Branch Manager, New India Assurance Company Limited, Gangtok Branch ***301-A***

Protection of Children from Sexual Offences Act, 2012 – S. 33 – Identity of the Child – S. 33 (7) of the POCSO Act enjoins upon the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The *Explanation* to the Section elucidates that the identity of the child includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed – Besides ensuring that the Court does not disclose the child's identity, the Learned Special Court is also vested with the responsibility of ensuring that this does not occur during

the investigation. In this context, it is for the Learned Special Court to devise methods for such steps. One would find on perusal of the charge-sheet that the name of the victim, her address and detail of school has been revealed therein flagrantly by the Investigating Agency throwing caution and the mandate of the Statute to the winds. The provisions in law which seek to protect the identity of the child are for the purpose of sheltering her from curiosity and prying eyes which could further traumatize her psychologically creating insecurity and apprehension in the victim's mind. It is also an effort, *inter alia*, to protect her future, to prevent her from being tracked, identified and for warding off unwanted attention and to prevent repetition of such offences on her on the assumption that she is easy prey. The Investigating Agency for their part should ensure that the identity of the victim is protected and not disclosed during investigation or in the charge-sheet. A separate File may perhaps be maintained in utmost confidence, for reference, if so required. Statutes have been enacted to protect children of crimes of which the Juvenile Justice (Care and Protection of Children) Act, 2015 and POCSO Act are of special relevance. These Acts impose an obligation not only on the Court and the Police, but also the Media and Society at large to protect children from the exponentially increasing sexual offences against children and to the best of their ability to take steps for prevention of such sexual exploitation of children.

Subash Chandra Rai* v. *State of Sikkim ***346-B***

Protection of Children from Sexual Offences Act, 2012 – Ss. 19 and 20 – Reporting of Offences – S. 19 which commences with a *non-obstante* clause envisages that any person which includes the child, has the apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to the Special Juvenile Police Unit or the local Police – The POCSO Act also imposes an obligation on personnel of the media, hotel, lodge, hospital, club, studio, photographic facilities, to provide information to the Special Juvenile Police Unit or to the local Police if they come across any material or object which is sexually exploitative of a child – S. 21 provides for penalty in the event of failure to report or record a case – S. 23 prescribes procedure for Media with a conjunctive penal provision for contravention of the provisions – These provisions ought to be borne in mind by all concerned to prevent any *faux-pas* with regard to the identity and other particulars of any victim, child or children as described hereinabove.

Subash Chandra Rai* v. *State of Sikkim ***346-D***

Sikkim University Act, 2006 – S. 12 – S. 12 (2) empowers the Respondent No.2, *inter alia*, to give effect to the decisions of all the authorities of the University which includes that of the Academic Council – If there is urgency in a matter, the Respondent No. 2 can exercise any power conferred on any authority of the University by or under the Act, with the rider that such steps shall be reported to the concerned authority at its next meeting. This provision makes the Respondent No. 2 accountable for his actions – Laying down a fresh criterion for promotion ought to be accorded the seriousness that such matters deserve by ensuring compliance of required formalities such as a meeting of the concerned authorities and information of the addition by way of notification. None of these formalities appear to have been observed by the Respondents No. 1 and 2 – *Sans* compliance of the provisions of the Act, the additional criterion is *nonest* in the eyes of law.

Dr. Vaidyanathan Krishna* v. *Sikkim University and Others ***81-C***

Sikkim University Act, 2006 – Ss. 12 and 23 – The Vice-Chancellor being the Principal Executive and Academic Officer of the University exercises general supervision and control over the affairs of the University and gives effect to the decisions of the authorities. The Academic Council co-ordinates and exercises general supervision over the Academic Policies. What is rather nebulous is as to who lays down the standards or criteria, such as the one inserted in Annexure-I as the Academic Council presumably exercises only supervisory powers over the Academic Policies and the Respondent No. 2 while exercising general supervision over the affairs of the University is vested with the responsibility of giving effect to the decisions of the authorities.

Dr. Vaidyanathan Krishna* v. *Sikkim University and Others ***81-B***

University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) (2nd Amendment) Regulations, 2013 – This amendment lays down with clarity that the Universities are empowered to devise appropriate additional criteria for screening of candidates at any level of recruitment with the mandate that the API scores given in Appendix-III shall not be changed – "recruitment" brings under its ambit "promotion" – Amended Clause 6.0.2 of the UGC Regulations would apply even to promotions under the CAS and not merely to initial recruitments. Besides, the provision is to be read conjointly and not disjunctively in order to cull

SLR (2018) SIKKIM 81

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 47 of 2017

Dr. Vaidyanathan Krishna Ananth ….. PETITIONER

Versus

Sikkim University and Others ….. RESPONDENTS

Petitioner in person.

For Respondent 1 and 2: Dr. Doma T. Bhutia and Mr. Umesh Gurung, Advocates.

For Respondent No. 3: Mr. Thinlay Dorjee Bhutia, Advocate.

Date of decision: 6th March 2018

A. University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) (2nd Amendment) Regulations, 2013 – This amendment lays down with clarity that the Universities are empowered to devise appropriate additional criteria for screening of candidates at any level of recruitment with the mandate that the API scores given in Appendix-III shall not be changed – "recruitment" brings under its ambit "promotion" – Amended Clause 6.0.2 of the UGC Regulations would apply even to promotions under the CAS and not merely to initial recruitments. Besides, the provision is to be read conjointly and not disjunctively in order to cull out the spirit of the clause – What emanates from the provisions of Clause 6.0.2 is the undisputed conclusion that the Respondent No.1 is clothed with powers to prescribe additional criteria apart from those set out in Clause 6.4.8 for screening of candidates at any level of recruitment which includes promotion.

(Paras 13 and 14)

B. Sikkim University Act, 2006 – Ss. 12 and 23 – The Vice-Chancellor being the Principal Executive and Academic Officer of the University exercises general supervision and control over the affairs of the University and gives effect to the decisions of the authorities. The Academic Council co-ordinates and exercises general supervision over the Academic Policies. What is rather nebulous is as to who lays down the standards or criteria, such as the one inserted in Annexure-I as the Academic Council presumably exercises only supervisory powers over the Academic Policies and the Respondent No. 2 while exercising general supervision over the affairs of the University is vested with the responsibility of giving effect to the decisions of the authorities.

(Paras 15 and 16)

C. Sikkim University Act, 2006 – S. 12 – S. 12 (2) empowers the Respondent No.2, *inter alia*, to give effect to the decisions of all the authorities of the University which includes that of the Academic Council – If there is urgency in a matter, the Respondent No. 2 can exercise any power conferred on any authority of the University by or under the Act, with the rider that such steps shall be reported to the concerned authority at its next meeting. This provision makes the Respondent No. 2 accountable for his actions – Laying down a fresh criterion for promotion ought to be accorded the seriousness that such matters deserve by ensuring compliance of required formalities such as a meeting of the concerned authorities and information of the addition by way of notification. None of these formalities appear to have been observed by the Respondents No. 1 and 2 – *Sans* compliance of the provisions of the Act, the additional criterion is *non est* in the eyes of law.

(Para 19)

Petition allowed.

Chronological list of cases cited:

1. The Chancellor and Another v. Dr. Bijayananda Kar and Others *and* Dr. Prafulla Kumar Mohapatra v. Dr. Bijayananda Kar and Others, (1994) 1 SCC 169.

2. Maharashtra State Board of Secondary and Higher Secondary Education and Another v. Paritosh Bhupeshkumar Sheth and Others

and Alpana V. Mehta v. Maharashtra State Board of Secondary Education and Another, (1984) 4 SCC 27.

3. K. Narayanan and Others v. State of Karnataka and Others, 1994 Supp (1) SCC 44.

4. B.S. Yadav and Others v. State of Haryana and Others, 1980 (Supp) SCC 524.

5. State of M.P. v. Sandhya Tomar, (2013) 11 SCC 357.

6. State of Rajasthan v. S.N. Tiwari, (2009) 4 SCC 700.

7. Ram Lal Khurana v. State of Punjab, (1989) 4 SCC 99.

8. Arun Kumar Agarwal v. Union of India, (2014) 2 SCC 609.

JUDGMENT

Meenakshi Madan Rai, J.

1. The grievance of the Petitioner pivots around the legality of his non-promotion under the Career Advancement Scheme (hereinafter 'CAS'), from Stage 4 to Stage 5, viz. from Associate Professor to Professor, despite fulfilment of eligibility criteria in terms of the University Grants Commission Regulations, 2010 (for short 'UGC' Regulations, 2010') . The reliefs sought for by the Petitioner, *inter alia*, are a direction to the Respondents No. 1 and 2 to complete the process of his promotion from Stage 4 to Stage 5 as per the UGC Regulations, 2010. To issue a Writ in the nature of Mandamus directing the Respondents No.1 and 2 to consider his Application for promotion under the 3rd amendment (of 4th May, 2016) of the UGC Regulations, 2010 and not under the 4th Amendment (of 11th July, 2016) thereof.

2. The facts summarised are that the Petitioner joined the Sikkim University, Gangtok, as an Associate Professor in the Department of Journalism and Mass Communication in 9.3.2012 and continued in service as an Associate Professor, Department of History from 1.7.2013, as per Orders of the Respondents No. 1 and 2. On completion of three years as an Associate Professor in Stage 4 on 30.6.2016, he accrued the requisite credit points as per the Academic Performance Indicator (for short 'API') based Performance Based Appraisal System (for short 'PBAS') methodology, provided in Table I-III, Appendix-IV of the UGC Regulations,

2010 and was thus eligible for appointment and designation as Professor from 1.7.2016. Consequently, he submitted his Application in terms of the 3rd amendment to the UGC Regulations, 2010, on 17.6.2016, in the prescribed format, for promotion under CAS from Stage 4 to Stage 5, along with evidence of API score. In response, he received a letter from the Respondents No. 1 and 2, dated 27.2.2017 requesting him to resubmit the application as the earlier Application could not be located. In compliance thereof, he resubmitted his Application on 1.3.2017 along with all necessary documents, duly received by the Respondents No.1 and 2. Pursuant thereto, he received an e-mail on 18.5.2017 from the Internal Quality Assurance Cell (for short 'IQAC') of the University, requesting submission of his application as per the format of UGC Regulations 4th Amendment and that his API Application would be computed accordingly. The Petitioner on 19.5.2017 responded that the request was fallacious as his date of eligibility (1.7.2016) preceded the enforcement of the 4th amendment (effective from 11.7.2016), apart from remonstrating that the e-mail was not from the appropriate authority which ought to be the Expert Committee. On 10.7.2017, an e-mail was received by him from the Respondent No.1 stating that he had qualified on all other points/requirements but required him to submit proof of Ph.D. awarded under his supervision to enable completion of interviews by early August, 2017. The Petitioner protested this as there was no stipulation in the UGC Regulations, 2010 of such a requirement and reminded the Respondent No.1 of the position taken by them in this regard in another matter vide a communication (Annexure P-13) sent to the Central Bureau of Investigation in April/May 2016, stating *inter alia*, that according to the UGC Regulations, 2010, the experience of guiding research at doctoral level is not required even for the post of Professor under CAS, leave alone for the post of Associate Professor, hence, arbitrary inclusion of a new criterion is improper. On 17.7.2017, he followed this up with another representation to the Respondent No.1 reiterating that the UGC Regulations of 2010 do not insist on a Ph.D. awarded under supervision of the person seeking promotion under CAS. Meanwhile, he learnt that meetings of various Selection Committees were held at New Delhi, from 31.7.2017, and in the week following thereto applications submitted much after the Petitioner's Application, in some other departments, were considered by the Selection Committee, duly constituted for promotion under CAS, while his case was excluded, thereby violating the provisions of Article 14 and 15 of the Constitution. That, due to non-consideration of his case for more than eighteen months, he is deprived of

appointments to various statutory bodies, membership to which are based on ex-cadre seniority. That, insertion of the additional qualification by the Respondents No.1 and 2 is arbitrary and *mala fide*, violating the Petitioner's rights guaranteed under Article 14 and 15 of the Constitution of India, hence the aforesaid prayers.

3. The Respondents No.1 and 2 filed a joint Counter-Affidavit disputing the averments of the Petitioner, contending that although the Petitioner seeks parity with other Associate Professors who have been promoted under CAS, he has failed to implead them as parties to the Petition, which thus suffers from non-joinder of parties and merits dismissal. That, the Petitioner has not challenged the Statutory Authority of the Autonomous Sikkim University with regard to Rule making Powers. Exercising this power under Section 12 (2) of the Sikkim University Act, 2006, the norm (at Annexure-I) requiring guidance to research scholars at the Doctoral level for promotion from Stage 4 to Stage 5, over and above UGC standards was included in order to maintain the quality of higher education which cannot be assailed. Besides, mere completion of three years as an Associate Professor does not *per se* entitle the Petitioner to promotion but merely places him in the zone of consideration. That, contrary to the averment of the Petitioner, no application of eligible candidates have been kept beyond the time limit of six months prescribed in the UGC Regulations, 2010. That, it was in good faith and to enable the Petitioner to avail the benefit of the 4th amendment to the Regulations, which relaxed the API calculations and expanded the UGC approved journals, that he was directed to resubmit his application on parity with other candidates. However, he failed to submit proof of having supervised award of Ph.D. course of any such scholar as per the required norms. That, no fault can be attributed to issuance of letter by the IQAC, in terms of the instructions of the answering Respondents. That, in fact, departmental inquiry against the Petitioner is being contemplated for utilising confidential documents, being document Annexure P-13, to fortify his case, apart from which the appointment referred to in the correspondence pertained to 2012 and 2013, prior to adoption of the new norm in 2015 and is of no avail to the Petitioner. That, a Selection Committee constituted in anticipation of the Petitioner's fulfilment of the University norms of 2015, had to be cancelled on the Petitioner's failure to produce the requisite proof as elucidated above. No question of discrimination arises as the other six candidates were promoted on the same norm and the Petitioner despite awareness of the

norm has approached this Court. It is prayed that the Petition be dismissed with costs.

4. The Respondent No. 3 in its Affidavit highlighted its functions and duties and while drawing attention to the provisions of the second amendment dated 13.6.2013 in the "*University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) (2nd Amendment) Regulations, 2013*" averred that in Clause 6.0.2 thereto, it has been laid down that the Universities can if they so desire, increase the minimum required score or devise appropriate additional criteria for screening of candidates at any level of recruitment. Further, that vide a Public Notice dated 21.11.2014, it was clarified that promotion under CAS would be covered by the UGC Regulations which were in operation on the date of eligibility and not on the date of interview.

5. In his Rejoinder, the Petitioner avers that he has not sought parity with other Associate Professors, his only plea being that the UGC Regulations, 2010 in general and Clause 6.3.1 and Clause 6.4.8 in particular be complied with. That, the provisions for promotion under CAS entails re-designation of posts involving no contest thereby requiring no impleadment of similarly placed persons in this Petition. That, the amendment to Clause 6.0.2 is applicable to direct recruitment and not for promotion under CAS. The amendment empowers the University to prescribe criteria, not higher or additional qualifications, while the power of Respondent No.2 is restricted to giving effect to decisions of the authorities and not to formulate policies. That, Annexure-I of the documents of the Respondents No. 1 and 2, prescribing the additional norm is devoid of any details apart from which the letter head created in August 2016 bears reference to a decision of August 2015, raising doubts about its authenticity. It was further pointed out that later in time, on 7.3.2017 (Annexure P-16), the Respondent No. 2 issued Circular inviting applications for promotion under CAS to all candidates who fulfil the eligibility criteria, service requirements and other conditions as laid down by the UGC, however no reference was made to any additional qualification as laid down in Annexure-I. With regard to Departmental Action contemplated against him, it is contended that Annexure P-13 (letter to the CBI) was handed over to him by the Office of the Respondent No.1 on the eve of his departure to Kolkata, to present himself before the S.P., CBI in

early June, 2016. He denies knowledge of the rejection of his Application and reiterates that the Respondents chose not to reply to his representations and remained silent.

6. By filing I.A. No. 1 of 2018, the Respondents No.1 and 2 sought to bring to the notice of this Court that the Petitioner vide his letter dated 20.11.2017 addressed to the Respondents No.1 and 2, informed them that he intended to join the SRM University, Amravati, Andhra Pradesh, as Chair and Professor in the School of Liberal Arts and Basic Sciences on lien, before 1.3.2018 and sought to be relieved by 25.2.2018. The Executive Council of the Respondent University approved his request effective from 23.2.2018. That, the Petitioner has thereby sought to retain his position as "Associate Professor" on lien, in which circumstance, the instant Petition becomes infructuous and the issues related therein become academic as he will be working in another University in the lien period. Refuting this contention, the Petitioner argues that the retention of his position in the University as Associate Professor on lien for a period of two years while he joins SRM University, Amravati, Andhra Pradesh, does not tantamount to waiving his rights or his prayers made before this Court and hence, the Petition deserves no consideration.

7. Opening his arguments, while reiterating the points made in his averments, the Petitioner urged that despite having fulfilled the requisite qualifications for promotion, yet the promotion has been denied to him. Drawing attention to the UGC Regulations, 2010, specifically Clause 6.4.8, it is contended that the criteria stipulated therein is to be achieved and duly assessed by a Selection Committee, the Regulation makes no provision for any additional qualification. Attention was also invited to the Sikkim University First Ordinances 2016, OB-4 which at Clause 4, provides that qualification and requirements for promotion under CAS shall be as per the Regulations adopted by the University from time to time and no other stipulation exists. While accepting that the University is an autonomous organisation, it is contended that exercise of its powers ought to be within the parameters of justice and equity and they are not empowered to insert a fresh qualification over and above the ones stipulated by the University Grants Commission (hereinafter "UGC"). Contrary to this, Annexure-I of the documents of the Respondents No.1 and 2, demands an additional qualification for promotion under CAS but is an unknown document bereft of official reference number, File number, process and date of decision or

the date of issuance neither was it circulated amongst faculty nor notified. This document, the Petitioner would urge, has only been manufactured for the purposes of the instant matter as apparent from the fact that the letter head on which it is issued was in fact adopted in August 2016 but contains details of adoption of higher qualifications since 2015. That, he has no contest with the other candidates already promoted, there being no specific vacancies to the posts of Professors the only requirement being eligibility as per the UGC Regulations, 2010, which they fulfilled and in any event he does not seek inter-se seniority *vis-à-vis* the six promoted candidates. That, the Respondents No. 1 and 2 misplaced his first Application and asked him to resubmit, to comply with the time limit of six months. That, ICAQ was in error in requiring him to resubmit his application under the 4th amendment since the amendment has no retrospective effect. That, the Respondents No.1 and 2, by procrastinating their decision on his Application for more than 18 months has prejudiced him, hence there should be a time frame ordered for disposal of his matter.

8. Resisting the contentions of the Petitioner, learned Counsel Dr. Doma T. Bhutia for the Respondents No.1 and 2, contended that the amended Clause 6.0.2 of the Principal Regulations permits the Universities to increase the minimum required score or devise appropriate additional criteria for screening of candidates at any level of recruitment. The Respondent No.1 thus inserted a norm according to which an Associate Professor shall be considered for promotion to the post of Professor only after acquiring the experience of guiding research at the doctoral level, in addition to the UGC norms under Section 26(1) of the UGC Act, 1956. Annexure I was issued thereby to inform all concerned. While admitting that there was no date, File notings, administrative process or documents to establish addition of the new criteria, it was pointed out that the Sikkim University *"PBAS proforma for promotion under CAS form"* at Number III D.1, enumerates that the applicant has to submit details of "*Ph.D. awarded/submitted* ". This detail suffices to establish that candidates who apply for promotion ought to have guided a research scholar who was then awarded a doctorate. That, the Petition suffers from non-joinder of necessary parties in the absence of the other six selected candidates and the Screening Committee, the Petition thus, ought to be rejected. That, although the Petitioner claims to have submitted his Application for promotion on 17.6.2016, however, no such application was in fact received by them and hence, the subsequent application submitted by him on 1.3.2017 has been considered well within the period of

six months. In any event no application is ever kept pending with the concerned authorities for more than a period of six months. The averment pertaining to lien was reiterated in her arguments. To buttress her submissions, she has placed reliance on ***The Chancellor and Anr.* v. *Dr. Bijayananda Kar and Ors and Dr. Prafulla Kumar Mohapatra* v. *Dr. Bijayananda Kar and Ors.***[1] and ***Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupeshkumar Sheth and Ors. and Alpana V. Mehta v. Maharashtra State Board of Secondary Education and Anr.***[2]**.**

9. Learned Counsel for the Respondent No.3, for his part called attention to Annexure R-3, the Public Notice dated 21st November, 2014 and also to the provisions of the second amendment dated 13.6.2013 to the UGC Regulations, specifically Clause 6.0.2, besides reiterating his averments.

10. The opposing arguments of the Petitioner appearing for himself, learned Counsel for the Respondents No. 1 and 2 and learned Counsel for the Respondent No.3 were heard at length. Their submissions have been given careful consideration and their pleadings and documents meticulously perused, as also the citations made at the Bar.

11. What falls for consideration before this Court is;

1. Whether the Petition suffers from non-joinder of necessary parties making it liable for dismissal?
2. Whether the Respondents No. 1 and 2 are competent to prescribe any new criterion or qualification in addition to the criteria enumerated in Clause 6.4.8 of the UGC Regulations, 2010 for promotion from Stage 4 to Stage 5 under the CAS, i.e. promotion from Associate Professor to the post of Professor?
3. Whether the Petitioner is entitled to consideration for promotion from the Stage 4 to Stage 5 under CAS, having fulfilled the necessary criteria as laid down in Clause 6.4.8 of the UGC Regulations, 2010 and whether the 4th amendment to the Regulations is applicable to his case?

[1] (1994) 1 SCC 169
[2] (1984) 4 SCC 27

4. Whether relieving the Petitioner for another posting on lien, as per his request, would tantamount to waiving his rights to promotion?

12. To address the first question, the Respondents No. 1 and 2 have failed to enlighten this Court as to how the Petitioner's case for promotion would affect the other candidates who have already been selected. It is not the Respondents' case that promotions are confined to specific number of seats or vacancies nor is there any proof of benefits that accrue to the six promotees on account of their promotion. The Petitioner in his averments and arguments has clarified that he does not seek to claim any inter-se seniority or benefits that may accrue to him on account of such inter-se seniority neither does he claim any reliefs against the aforesaid six candidates or against the Selection Committee. In the aforesaid facts and circumstances, when no reliefs are sought from the other six promoted candidates or the Selection Committee, I am of the considered opinion that the Petition does not suffer from non-joinder of necessary parties. The issue of non-joinder of parties to my mind, is a red herring introduced by the Respondents No.1 and 2, to digress from the main issue of promotion.

13. While considering the second question, it is not disputed that the Respondent No.2 is an Autonomous University and a Statutory Authority neither have its rule making powers been assailed. The apple of discord is whether an additional qualification can be inserted by the University, to the UGC prescribed qualifications, in view of the fact that the University has in "The Sikkim University First Ordinances, 2016" at OB-4 on Career Advancement Scheme of the Sikkim University Act, 2006, at Clause 4 adopted the UGC Regulations. The said Clause reads as follows;

> "4. Qualification and requirements for promotion under CAS shall be as per the UGC Regulations adopted by the University from time to time."

A reading of the provision impresses that the promotion under CAS would be as per the UGC Regulations. It is not in dispute that the University has adopted the UGC Regulations from time to time and is thereby bound by it. That having been said, to understand the matter in its correct perspective, it would be expedient now to peruse the "*University*

Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) (2nd Amendment) Regulations, 2013", dated 13.6.2013, more pertinently Clause 6.0.2, which lays down as follows;

> "....
>
> **1. Short title, application and commencement:**
>
> 1.1 These Regulations may be called University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) (2nd Amendment) Regulations, 2013.
>
> 1.2 .....
>
> 2. .....
>
> 3. The clause 6.0.2 of the Principal Regulations shall stand amended and be substituted by the following clause:-
>
> "**6.0.2** The Universities shall adopt these Regulations for selection committees and selection procedures through their respective statutory bodies incorporating the Academic Performance Indicator (API) based Performance Based Appraisal System (PBAS) at the institutional level for University Departments and their Constituent colleges/affiliated colleges (Government / Government aided / Autonomous/Private colleges) to be followed transparently in all the selection processes. An indicative PBAS template proforma for direct recruitment and for Career Advancement Schemes (CAS) based on API based PBAS is annexed in Appendix III. The Universities may adopt the

> template proforma or may devise their own self-assessment cum performance appraisal forms for teachers. While adopting this, universities shall not change any of the categories or scores of the API given in Appendix-III. The universities can, if they wish so, increase the minimum required score or devise appropriate additional criteria for screening of candidates at any level of recruitment.
> ....."
> [emphasis supplied]

14. This amendment lays down with clarity that the Universities are empowered to devise appropriate additional criteria for screening of candidates at any level of recruitment with the mandate that the API scores given in Appendix-III shall not be changed. I have to disagree with the arguments advanced by the Petitioner that any additional criteria as contemplated in Clause 6.0.2, would be applicable only at the time of recruitment and not for promotion. Firstly, let me clear the air on what recruitment entails. In this context, useful reference may be made to the decision of the Hon ble Supreme Court in ***K. Narayanan and Others v. State of Karnataka and Others***[3]**,** wherein at Paragraph 6 it was, *inter alia*, held as follows;

> "6. ..... 'Recruitment' according to the dictionary means 'enlist'. It is a comprehensive term and includes any method provided for inducting a person in public service. **Appointment, selection, promotion, deputation are all well-known methods of recruitment.** Even appointment by transfer is not unknown. ....."

The ratiocination in no uncertain terms elucidates that "recruitment" brings under its ambit "promotion" as laid down *supra*. On the anvil of this interpretation, it is clear that the amended Clause 6.0.2 of the UGC Regulations would apply even to promotions under the CAS and not merely to initial recruitments. Besides, the provision is to be read conjointly and not disjunctively in order to cull out the spirit of the clause. No further

[3] 1994 Supp (1) SCC 44

discussions need ensue on this point the argument of the Petitioner on this count having been thus addressed. Linked to this discussion would be the meaning of the words "Qualification" and "Criteria", which according to the Petitioner entail different connotations and that "criteria" does not extend to insertion of an additional "qualification" as wrongly interpreted by the Respondents No. 1 and 2, while adding the requirement of guiding scholars at the doctoral level. According to *Black's Law Dictionary, 10th Edition, Year 2014*, the meaning of the words "Qualification" and "Criteria" are as follows;

> Qualification :- *'The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function.'*
>
> Criterion :- *'A standard, rule or test on which a judgment or decision can be based or compared; a reference point against which other things can be evaluated a characterizing mark or trait."*

In my considered opinion, there cannot be too much hair splitting on the meanings, the prior one requiring possession of certain qualities, while the latter refers to a reference point to evaluate things. Qualification would be the educational qualification, while criteria would be a yardstick required by the Respondents No. 1 and 2, for evaluation of its candidates through constituted Committees. On a careful consideration of the facts before me, inserting a requirement of guiding research at the doctoral level is surely a criterion and not additional qualification. What emanates from the provisions of Clause 6.0.2 is the undisputed conclusion that the Respondent No.1 is clothed with powers to prescribe additional criteria apart from those set out in Clause 6.4.8 for screening of candidates at any level of recruitment which includes promotion.

15. It would now be relevant to look at the provisions of Section 12(2) of the Sikkim University Act, 2006 (hereinafter 'the Act'). Section 12 of the Act, reads as follows;

"**12.** (1) The Vice-Chancellor shall be appointed by the Visitor in such manner as may be prescribed by the Statues.

(2) **The Vice-Chancellor shall be the principal executive and academic officer of the University and shall exercise general supervision and control over the affairs of the University and give effect to the decisions of all the authorities of the University.**

(3) The Vice-Chancellor may, if he is of the opinion that immediate action is necessary on any matter, exercise any power conferred on any authority of the University by or under this Act and shall report to such authority at its next meeting the action taken by him on such matter:

Provided that if the authority concerned is of the opinion that such action ought not to have been taken, it may refer the matter to the Visitor whose decision thereon shall be final:

Provided further that any person in the service of the University who is aggrieved by the action taken by the Vice-Chancellor under this sub-section shall have the right to represent against such action to the Executive. Council within three months from the date on which decision on such action is communicated to him and thereupon the Executive Council may confirm, modify or reverse the action taken by the Vice Chancellor.

(4) The Vice-Chancellor, if he is of the opinion that any decision of any authority of the University is beyond the powers of the authority conferred by the provisions of this Act, the Statutes or the Ordinances or that any decision taken is not in the interest of the University, may ask the authority concerned to review its decision within sixty days of such decision and if the authority refuses to review the decision either in whole or in part or no decision is taken by it within the said period of sixty days, the matter shall be referred to the Visitor whose decision thereon shall be final.

(5) The Vice-Chancellor shall exercise such other powers and perform such other duties as may be prescribed by the Statutes or the Ordinances."

16. The provisions of Section 23 (1) of the Act may simultaneously be perused, which provides as follows;

"23. (1) The Academic Council shall be the principal academic body of the University and shall, subject to the provisions of this Act, the Statutes and the Ordinances, co-ordinate and exercise general supervision over the academic policies of the University."

What can be culled out from the above is that the Vice-Chancellor being the Principal Executive and Academic Officer of the University exercises general supervision and control over the affairs of the University and gives effect to the decisions of the authorities. The Academic Council co-ordinates and exercises general supervision over the Academic Policies. What is rather nebulous is as to who lays down the standards or criteria, such as the one inserted in Annexure-I (Page 143 of the Paper-Book) as the Academic Council presumably exercises only supervisory powers over the Academic Policies and the Respondent No.2 while exercising general

supervision over the affairs of the University is vested with the responsibility of giving effect to the decisions of the authorities. Nothing further is elucidated therein.

17. That having been said, we may now turn to Annexure-I at Page 143 of the Paper-Book, which has been called in question by the Petitioner, as a manufactured document. This is a document purported to be "*Statement about Sikkim University Norm for Professorship under CAS*" vide which an additional criterion for promotion has been inserted and is reproduced below for clarity;

> "....
>
> **Statement about Sikkim University norm for Professorship under CAS**
>
> This is to state that Vice-chancellor of Sikkim University, for the sake of quality of higher education, has since 2015, established a norm according to which an Associate Professor shall be considered for promotion to the post of Professor under Career Advancement Schemes only after acquiring the experience of guiding research at doctoral level, in addition to the norms established by the University Grants Commission under Section 26(1) of the UGC Act, 1956.
>
> The Vice-chancellor has established the above under Section 12(2) of the Sikkim University Act, 2006 (No. 10 of 2007).
>
> Sd/-
> (T.K. Kaul)
> Registrar"

18. Before proceeding further, it may be stated that "Norm" as per the *Oxford Dictionary, 12th Edition, 2011, reprinted in 2013, inter alia*, explains it as;

> *"A usual, typical or standard thing. A required or acceptable standard."*

For the present purposes, it may be accepted as a requirement of having guided a scholar at the doctoral level. '*Guided a scholar at the doctoral level'* is accepted by the contesting parties as a term for award of doctorate to the scholar supervised by the candidate seeking promotion.

19. Reverting to Section 12(2) of the Act, this provision empowers the Respondent No.2, *inter alia*, to give effect to the decisions of all the authorities of the University which obviously includes that of the Academic Council. The document (Annexure-I) extracted above details that it is the Respondent No. 2 who has "established" the norm of acquiring the experience of guiding research at doctoral level for promotion of an Associate Professor under Section 12(2) of the Act. However, Section 12(2) of the Act empowers the Respondent No.2 to give effect to the decisions of the authorities but does not spell out that he is empowered to make unilateral decisions as the one above. Section 12(3) of the Act, *inter alia*, clarifies that, if there is urgency in a matter, the Respondent No.2 can exercise any power conferred on any authority of the University by or under the Act, with the rider that such steps shall be reported to the concerned authority at its next meeting. This provision makes the Respondent No.2 accountable for his actions. The records furnished by the Respondents No.1 and 2, indicate no meeting of the Academic Council at any point of time or decision taken thereof to include the above criterion. If it is assumed that the Respondent No.2 had taken the decision treating the matter as urgent, then as per Section 12(3) of the Act, he is required to bring the steps taken by him to the notice of the concerned authority. No documents in this regard bear witness to such proceedings. It goes without saying that laying down a fresh criterion for promotion ought to be accorded the seriousness that such matters deserve by ensuring compliance of required formalities such as a meeting of the concerned authorities and information of the addition by way of notification. None of these formalities appear to have been observed by the Respondents No.1 and 2, which can be concluded from the absence of documents before this Court to buttress their case. Thus, it stands to reason that *sans* compliance of the provisions of the Act, the additional criterion is *non est* in the eyes of law.

20. The argument of the Petitioner that Annexure-I is a subsequently prepared letter head i.e. after August 2016, stands to reason in as much as the letter head appearing at Annexure P-13, which is a letter dated 24.5.2016, addressed to the Superintendent of Police, CBI, Government of India, is different. Annexure P-13 having been issued in May 2016 ought to have been in the same letter head as Annexure-I, which contains a decision purportedly adopted in 2015. The difference in letter heads lends credence to the argument of the Petitioner that it was prepared for the purposes of this Case. The document *sans* date or details indeed appears to have been put together rather hastily.

21. The preparation and issuance of Annexure-I is shrouded in mystery. Would it therefore be fair on the aspiring candidates if the Respondents No.1 and 2 chose to keep the criterion closeted? It is axiomatic that ignorance of any provision would lead to the inability of the candidate to refer to it or take advantage of the provisions. Annexure-I having not been notified or circulated and evidently known only to the Respondents No. 1 and 2, the additional criterion fails to hold any value. Besides, the assertion that the other six promoted candidates were subjected to the same criterion remains unfortified in the absence of documents furnished for scrutiny by this Court.

22. The above discussions would necessarily take us to the next question flagged. The criteria enumerated in Clause 6.4.8 of the UGC Regulations, 2010 for promotion from Stage 4 to Stage 5, reads as follows;

> "**6.4.8.** Associate Professor completing three years of service in stage 4 and possessing a Ph.D. Degree in the relevant discipline shall be eligible to be appointed and designated as Professor and be placed in the next higher grade (stage 5), subject to (a) satisfying the required credit points as per API based PBAS methodology provided in Table I-III of Appendix IV stipulated in these Regulations, and (b) an assessment by a duly constituted selection committee as suggested for the direct recruitment of

Professor. Provided that no teacher, other than those with a Ph.D., shall be promoted or appointed as Professor."

23. Clause 6.3.1 relied on by the Petitioner reads as follows;

"**6.3.1** A teacher who wishes to be considered for promotion under CAS may submit in writing to the university/college, with three months in advance of the due date, that he/she fulfils all qualifications under CAS and submit to the university/college the Performance Based Appraisal System proforma as evolved by the concerned university duly supported by all credentials as per the API guidelines set out in these Regulations. In order to avoid delays in holding Selection Committee meetings in various positions under CAS, the University/College should immediately initiate the process of screening/selection, and shall complete the process within six months from the date of application. Further, in order to avoid any hardships, candidates who fulfill all other criteria mentioned in these Regulations, as on 31 December, 2008 and till the date on which this Regulation is notified, can be considered for promotion from the date, on or after 31 December, 2008, on which they fulfil these eligibility conditions, provided as mentioned above."

24. It would be necessary to first consider the arguments of learned Counsel for the Respondents No.1 and 2, that the Application dated 17.6.2016 was never received by them. The Petitioner for his part had drawn the attention of this Court to Annexure P-1 at Page 30 of the Petition, wherein his Application for promotion under CAS from Stage 4 to Stage 5 has been endorsed as "received" and signature follows therein, although the signature remained unidentified. Later in time,

Annexure P-5, dated 27.2.2017, addressed to the Petitioner by the Assistant Registrar reads as follows;

> "....
>
> SU/2014/REG-03/CAS/2885/1756 Date: 27.02.2017
>
> To,
>
> Dr. V. Krishna Ananth,
> Associate Professor,
> Department of History,
> Sikkim University.
>
> Sub.: Application for promotion under CAS – Regarding.
>
> Dear Sir,
>
> With reference to your application for promotion under CAS, we have not been able to locate your application form. Hence, I am directed to request to kindly **re-submit** your application. Any inconvenience is regretted.
>
> Yours sincerely,
> Sd/-
> (Grace D. Chankapa)
> Assistant Registrar
>
> Copy to:
>
> 1. P.S. to VC for kind information of the Vice-Chancellor"

The very language employed in the correspondence indicates that the Petitioner had indeed submitted his application previously which apparently has been misplaced by the Respondent No.1 and hence, the request to "re-submit the application". The request for resubmission is

evidently to ensure compliance of the time frame of six months mandated in Clause 6.3.1 for disposal of such petitions.

25. Clause 6.4.8 (*supra*) is self explanatory laying down the requisite qualifications for promotion. A perusal of Annexure P-1 of the Petitioner's document at Page 47 of the Petition, being '*Summary of Category I and II*' would reveal that the scores obtained by him undisputedly are over and above the requisite scores. The '*Summary of Category III'* would also indicate that the requisite qualifications for making him eligible for promotion from Stage 4 to Stage 5 have been fulfilled. Annexure P-1 reveals that in Category I, his score is 286.8 whereas the requirement is of 70 per annum. In Category II, his score is 95 as against the requirement of 50. In Category III, the scores of the Petitioner at 182.50 is above the requisite of one hundred. In all, the total requirement is 250, however, simple calculations would reveal that his scores are well above the requirement. Annexure P-1 would also reveal the list of his publications and research publications. Annexure P-10 (documents of the Petitioner), is an e-mail addressed to the Petitioner and one Dr. Satyanarayana dated July 10, 2017 of which the contents, *inter alia*, are as herein below;

> "..... Your application for CAS has been scrutinised by the committee. Whereas you qualify for all other points but it is reported that there is no documentary proof attached with the application establishing the fact of supervising award of PhD. PhD award notification bearing the name of the supervisor may have been issued by the competent authority. It would be appreciated if the documentary evidence of successfully supervising PhD is submitted by sending scanned copy by e-mail at the earliest. We plan to hold interviews in the first week of August, hence urgency in the matter. ....."

The e-mail, thus, makes it abundantly clear that the Petitioner has qualified for promotion in terms of the criteria enumerated in Clause 6.4.8 of the UGC Regulations, 2010. The only stumbling block to his promotion is the alleged new criterion added by the Respondent No.2. From the foregoing

discussions, it clear that the said additional criterion is *non est* having failed to comply with the Act and not having been circulated or notified thereby placing it outside the scope of consideration for any purpose.

26. It would be apposite to state that the 4th amendment of the UGC Regulations, 2010 was enforced from 11.7.2016. From the facts discussed hereinabove, it is clear that the Petitioner is eligible to be considered for appointment and designation as Professor from 1.7.2016 having accrued the requisite credit points as per the API based PBAS methodology of the UGC Regulations. The request of the Respondents No.1 and 2 to the Petitioner requiring him to submit his Application under the 4th amendment is fallacious since it is not for the Respondents No.1 and 2 to dictate terms to the Petitioner, when specific criteria has been laid down by the UGC Regulations and he was eligible before the 4th amendment came into force on 11th July, 2016. This is reinforced by the Public Notice of the UGC dated 21st November, 2014 already extracted and which for brevity is not being reproduced. The alleged good faith extended by the Respondents No.1 and 2, while requiring him to submit his application under the 4th amendment finds no place in the legal scheme of things. Needless to add that no rule can be applied retrospectively unless it is specified therein for special consideration. In the instant matter no such specification has been laid down. It was clarified by the Respondents No.1 and 2 that no Forms have been prepared as per the 3rd amendment, be that as it may, this should not debar the Petitioner from applying as per the Regulations applicable to him and not as per the choice and directions of the Respondents No.1 and 2. The argument advanced by the Respondents No.1 and 2 that the Form provided by them for applying for promotion under CAS, suffices as proof of the additional criterion, is at best a feeble argument befitting no consideration or discussion. At this juncture, it is worth noticing that the Circular dated 7.3.2017 (Annexure P-16) inviting applications for promotion under CAS, is silent about the additional norm. Perhaps it would be fair to assume that the criterion was meant to be applicable only to the Petitioner.

27. So far as retrospective application of rules is concerned, in ***K. Narayanan and Others v. State of Karnataka and Others*** (supra), the Hon'ble Supreme Court at Paragraph 7, *inter alia*, held as follows;

> "**7.** Rules operate prospectively. Retrospectivity is an exception. Even where the statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be permitted normally to act in the past. …….....……"

28. In ***B.S. Yadav and Others v. State of Haryana and Others***[4]**,** the Hon'ble Supreme Court observed as herein below;

> "**76.** …….Since the Governor exercises a legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. …….....…."

The above would stand in good stead for the instant matter.

29. The ratiocination relied on by the Respondents No. 1 and 2 are now taken up for consideration. In ***The Chancellor and Anr. v. Dr. Bijayananda Kar and Ors and Dr. Prafulla Kumar Mohapatra v. Dr. Bijayananda Kar and Ors.*** (*supra*), relied on by learned Counsel for the Respondents No. 1 and 2, the Hon'ble Supreme Court was pleased to caution that the decisions of the academic authorities should not ordinarily be interfered with by the Courts. Whether a candidate fulfils the requisite qualifications or not is a matter which should be entirely left decided by the academic bodies and the concerned selection committees which invariably consist of experts on the subjects relevant to the selection. In that matter, one Dr. Kar in his representation before the Chancellor specifically raised the issue that one Dr. Mohapatra did not possess the specialisation in the

[4] 1980 (Supp) SCC 524

"Philosophical Analysis of Values" as one of the qualifications. The representation was rejected by the Chancellor. The Hon.ble Supreme Court was in no doubt that the Chancellor must have looked into the question of eligibility of the said Dr. Mohapatra and got the same examined from the experts before rejecting the representation of Dr. Kar. In ***Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupeshkumar Sheth and Ors. And Alpana V. Mehta v. Maharashtra State Board of Secondary Education and Anr.*** (supra)**,** also relied on by learned Counsel for the Respondents No. 1 and 2, the Hon'ble Supreme Court had cautioned that the Courts should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them.

It is evident that the matter at hand is clearly distinguishable from the matters referred to hereinabove. In the instant case, there is no quarrel with the findings of the authorities with regard to the qualifications laid down by the UGC for promotion. The sore point is the purported additional norm which is being taken into consideration by the Respondents No. 1 and 2, for promotion of the Petitioner when it has failed to comply with established legal norms such as circulation and notification, besides other formalities already discussed hereinabove. This Court by no stretch of the imagination seeks to substitute its views in place of those formulated by academicians but is only seeking to mete out justice where it is being denied.

30. Coming to the question of the matter being infructuous because of the Petitioner having been relieved from the University to join another posting on lien, is based on an erroneous appreciation of the law. In this context, it would be worthwhile to refer to ***State of M.P. v. Sandhya Tomar***[5]**,** the Honble Supreme Court observed as follows;

> "**10.** 'Lien' connotes the civil right of a government servant to hold the post '*to which he is appointed substantively*.' The necessary corollary to the aforesaid right is that such appointment must be in accordance with law. A person can be said to have acquired lien as regards a particular post only when

[5] (2013) 11 SCC 357

his appointment has been confirmed, and when he has been made permanent to the said post. 'The word "lien" is a generic term, and standing alone, it includes lien acquired by way of contract, or by operation of law'. Whether a person has lien depends upon whether he has been appointed in accordance with law, in substantive capacity and whether he has been made permanent or has been confirmed to the said post."

31. In ***State of Rajasthan v. S.N. Tiwari***[6], it was held that;

"**17.** It is well settled that when a person with a lien against the post as appointed substantively to another post, only then he acquires a lien against a latter post. Then and then alone, the lien against the previous post disappears. Lien connotes the right of a civil servant to hold the post substantively to which he is appointed. The lien of a government employee over the previous post ends if he is appointed to another permanent post on permanent basis. In such a case the lien of the employee shifts to the new permanent post. It may not require a formal termination of lien over the previous permanent post."

32. While explaining the word 'lien' in ***Ram Lal Khurana v. State of Punjab***[7] the Honble Supreme Court elucidated that;

"**8.** Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed."

33. The ratiocination in ***Arun Kumar Agarwal v. Union of India***[8] lays down that;

"**58.** It is a settled proposition of law that a deputationist would hold the lien in the parent department till he is absorbed in any post. ….."

[6] (2009) 4 SCC 700
[7] (1989) 4 SCC 99
[8] (2014) 2 SCC 609

34. In ***Ram Lal Khurana v. State of Punjab*** (supra), the Honble Supreme Court while explaining the word lien also held that;

> "**19.** The term "lien" comes from the Latin term "ligament" meaning "binding". The meaning of lien in service law is different from other meanings in the context of contract, common law, equity, etc. The lien of a government employee in service law is the right of the government employee to hold a permanent post substantively to which he has been permanently appointed."

35. Need this Court explain any further on the term "lien" when the aforesaid judgments so succinctly illuminate the meaning and import thereof. It is evident that the submission of the Respondents No.1 and 2 on this Court is based on an erroneous understanding of the word 'lien'. As the substantive post of the Petitioner is an Associate Professor in the Sikkim University, it would include any promotion that he obtains thereof. The question of the Petition being infructuous and only academic consequently does not arise.

36. In conclusion, considering the entirety of the facts and circumstances as discussed hereinabove, the Petition is allowed with the following directions;

(a) The Respondents No. 1 and 2 shall take steps to consider the promotion of the Petitioner from Stage 4 to Stage 5, in terms of the UGC Regulations, 2010, Clause 6.4.8 and any other relevant provision. While doing so, due consideration shall be taken of the observations in the e-mail dated July 10, 2017 addressed to the Petitioner and one Dr. Sathyanarayanan from Mr. T.K Kaul, Registrar, Sikkim University, wherein the Petitioner has been informed that he qualifies on all other points except the criterion added vide Annexure-I. No consideration whatsoever shall be attached to the impugned

additional criterion inserted by the Respondent No.2 vide Annexure-I (Page 143 of the Paper-Book), viz. requiring supervising award of Ph.D., the same being *non est* in the eyes of law.

(b) The Respondents No. 1 and 2 shall consider the Application of the Petitioner for promotion under the 3rd amendment dated 4th May, 2016 of the UGC Regulations, 2010 which are applicable to him and not under the 4th amendment dated 11th July, 2016, which has no retrospective effect.

(b) All necessary steps shall be completed within sixty days hence.

37. No order as to costs.

SLR (2018) SIKKIM 108

(Before Hon'ble the Chief Justice,
Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 17 of 2016

State of Sikkim ….. APPELLANT

Versus

Suren Rai ….. RESPONDENT

For the Appellant: Mr. J. B. Pradhan, Public Prosecutor, Mr. Karma Thinlay, Addl. Public Prosecutor with Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

For the Respondent: Mr. B. Sharma, Senior Advocate with Mr. B. N. Sharma and Mr. Sajal Sharma, Advocates.

Mr. A. Moulik, Senior Advocate, Mr. N. Rai, Senior Advocate with Ms. K. D. Bhutia, Mr. Ranjit Prasad, Ms. Tamanna Chettri and Ms. Malati Sharma, Advocates as *Amicus Curiae*.

Date of decision: 10th March 2018

A. Indian Evidence Act, 1872 – Ss. 24 and 17 – "Confession" – What is – Relationship with admission – Probative value of – Code of Criminal Procedure, 1973, S. 164 – "Confession" – Criminal Trial – "Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from

suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary – Although the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: *Pakala Narayanaswami* v. *King Emperor* has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though.

(Para 47)

B. Indian Evidence Act, 1872 – S. 24 – Confession when admissible – Must be true and voluntary – Duty of Court – As per Taylor's Treaties on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat – As held by the Supreme Court in re: *Navjot Sandhu* the authority recording the confession at the pre-trial stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter – To do so, the Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to speak the truth and confess the

crime – In deciding whether a particular confession attracts the frown of S. 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.

(Para 47)

C. Indian Evidence Act, 1872 – Ss. 24 and 17 – "Confession" – Vitiation of Voluntariness of Confession – Duty of Court – Must be True and Voluntary – Code of Criminal Procedure, 1973 – S. 164 – Criminal Trial – A confession is a direct admission or acknowledgment of guilt by the person committing the crime. A possible inducement, threat or promise in reference to an alleged confession leads to a presumption that the confession may become irrelevant. A confession made by accused person become irrelevant in criminal proceedings, if the making of confession appears to the Court to have been caused by any inducement, threat or promise. The inducement, threat or promise is directly relatable to a person in authority – If the Court would come to an opinion that the confession is a result of inducement, threat or promise which in the opinion of the Court would give the accused reasonable ground for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him then such confession would become irrelevant.

(Para 48)

D. Constitution of India – Article 20 (3) – Right against Self-Incrimination – Rules Against Testimonial Compulsion – In re: *Selvi*, the Supreme Court would hold that the compulsory administration of certain scientific techniques, namely narco-analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) bare a "testimonial character" and thereby triggers the protection of Article 20 (3) of the Constitution.

(Para 61)

E. Constitution of India – Article 20 (3) and 21 – Right against self-incrimination – "Personal liberty" – Right to Fair Trial – Inter-Relationship Between Rights – It is settled that in the Indian context, Article 20 (3) should be construed with due regard for the

interrelationship between rights – To examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process". It has been made amply clear that Articles 20 and 21 have a non-derogable status within Part III of the Constitution of India.

(Para 64)

F. Constitution of India – Article 20 (3) and 21 – Right against Self-Incrimination – Underlying Purpose – Article 20(3) of the Constitution of India is a fundamental right. The privilege against self-incrimination is said to be a fundamental canon of common-law jurisprudence and this principle characteristics features are:- (i) that the accused is presumed to be innocent; (ii) that it is for the prosecution to establish his guilt, and (iii) that the accused need not make any statement against his will – Article 20 (3) mandates a fundamental guarantee that no person accused of any offence shall be compelled to be a witness against himself. The prohibitive umbrella of Article 20 (3) protects the accused back to the stage of police interrogation. A testimony by an accused person may be said to have been self-incriminatory when the compulsion comes within the prohibition of the constitutional provision and it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. As held by the Supreme Court the right against self-incrimination is now viewed as an essential safeguard in criminal procedure and its underlying rationale broadly corresponds with two objectives: firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily – As has been well settled when a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false which is undesirable since it impedes the integrity of the trial and the subsequent verdict. The purpose of the "rule against involuntary confessions" is therefore to ensure that the testimony considered during trial is reliable and worthy of credence. It has been conclusively held that Article 20 (3) of the Constitution of India protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory.

Article 20 (3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue.

(Para 65)

G. Constitution of India – Article 20 (3) – Right Against Self-Incrimination – Expression "to be a witness" – Scope – Code of Criminal Procedure, 1973 – S. 164 – To be a "witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as witness". It follows that the protection afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. It has been held and accepted that the case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing – A bare perusal of Article 20 (3) of the Constitution of India makes it abundantly clear that compulsion to be a witness against himself is the *sine-qua-non* of the fundamental guarantee. "Compulsion" is an essential ingredient of Article 20 (3) and covers a confession not made voluntarily. To compel is to cause or bring about by force, threats or overwhelming pressure. As held by the Supreme Court in re: *Kathi Kalu Oghad* compulsion in the context of Article 20 (3) of the Constitution of India means what in law is called "duress" – The purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

(Paras 68 and 69)

H. Constitution of India – Article 20 (3) – Right Against Self-Incrimination – Code of Criminal Procedure, 1973 – S. 164 – Recording of Confession – Administration of Oath – Duty of

Magistrate – Whether administering oath to an accused while recording the confessional statement of an accused under S. 164 Cr.P.C. violates Article 20 (3) of the Constitution of India? – Not administering oath on an accused person while recording his confession is a Constitutional mandate to be zealously protected under Article 20 (3) of the Constitution of India. An accused person when brought before a Magistrate or appears before a Magistrate to record a confession is required to explain to the accused that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him under S. 164 Cr.P.C. It is, therefore, evident that the confession may be taken as evidence against the accused once made in compliance with S. 164 Cr.P.C. – Whether the accused was compelled to be a witness against himself can only be a question of fact requiring proof thereof. Compulsion, if proved would lead to a definite conclusion of violation of Article 20(3) of the Constitution of India. As held in re: *Brijbasi Lal Shrivastava* administration of an oath to the accused by a person in authority before taking a statement is by itself a concealed threat – Threat in any form be it concealed or otherwise directly affect voluntariness of the confession and render the same inadmissible in evidence – The process of finding out the truth must be undertaken keeping paramount Article 21 of the Constitution of India and the fundamental guarantee that no person shall be deprived of his life or personal liberty except in accordance to procedure established by law. In no circumstances can it be said that administration of oath to an accused before recording a confession which is prohibited by law and therefore illegal and unlawful pursuant to which the confession is recorded was done by a procedure established by law – Held, administering oath to an accused violates Article 20 (3) of the Constitution of India.

(Para 69)

I. Code of Criminal Procedure, 1973 – S. 164 – Oaths Act, 1969, S. 4(2) – Recording of confession – Administration of oath – Under the scheme of the Oaths Act, 1969 administering oath to accused persons is not lawful and that the Magistrate while recording confession does not have the power to administer oath to an accused person unless he is being examined as a witness for the defence. A perusal of the Oaths

Act, 1969 makes it clear that the said Act was enacted for the purpose of administration of oath to a witness or an interpreter to be examined in Court and not upon an accused making a confession. The specific bar under S. 4 (2) of Oaths Act, 1969 against administration of oath to an accused person in a criminal proceeding unless he himself is a defence witness is based on well founded criminal jurisprudence that accused cannot be forced to make any incriminatory statement on oath which would prejudice his defence. Under the Indian system of criminal jurisprudence the burden of proof is always on the prosecution except of course where the law creates a specific exception. Thus, even under the scheme of the Oaths Act, 1969 it is amply clear that administration of oath to an accused, unless he is being examined as a witness for the defence, is prohibited. The mandate of S. 4 (2) of the Oaths Act, 1969 also reflects a clear desire of the Legislature to insulate the accused from self-incrimination.

(Para 116)

J. Code of Criminal Procedure, 1973 – Ss. 164, 281 and 463 – Recording of Confession – Administration of Oath – Prohibited, unlawful and illegal – Curable – Under the scheme of Cr.P.C. the accused has a right to remain silent. In fact it is a fundamental guarantee under Article 20 (3) of the Constitution of India. Under the scheme of Cr.P.C. it is only at the stage of examination of an accused under S. 313 Cr.P.C. an accused is asked to explain any circumstance appearing in evidence against him by the Court. Even at this stage sub-section (2) of S. 313 Cr.P.C. requires that no oath shall be administered to the accused when he is examined and under sub-section (3) thereof accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The recording of a statement of an accused under S. 313 Cr.P.C. cannot equate to taking of evidence as envisaged in S. 463 Cr.P.C. for on the basis of such evidence taken in regard to such non-compliance, the Court is required to come to a definite finding whether the accused was injured or not. At no stage of a criminal trial can an accused be compelled to be a witness against himself. The narrow area within which an accused may be a competent witness is provided in S. 315 Cr.P.C – As per S. 315 Cr.P.C. an accused before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person

charged together with him at the same trial. Further, the accused shall not be called as a witness except on his own request in writing. In view of S. 315 Cr.P.C. an accused can waive his right under Article 20 (3) of the Constitution of India and tender himself as a witness if he so chooses as held by the Supreme Court in re: *P. N. Krishna Lal* v. *Government of Kerala*. To cure the irregularity under S. 463 Cr.P.C. the Court is required to take evidence in regard to such non-compliance and be satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement. Whether administration of oath on an accused person compelled the accused to incriminate himself is a question only the accused can answer. Under the scheme of Cr.P.C. we do not see any provision by which the evidence of the accused can be taken as required under S. 463 Cr.P.C. except under S. 315 Cr.P.C. and that too only if the accused so chooses. The illegal act of administering oath on an accused before recording his evidence would therefore take away the choice given to the accused under S. 315 Cr.P.C. and compel the accused to be a witness for the defence – This was not the eventuality contemplated under S. 463 Cr.P.C, which provides that the Court can notwithstanding anything contained in S. 91 of the Indian Evidence Act, 1872 take evidence in regard to such non-compliance as an exception to taking oral evidence to prove the contents of a document – The presumption under S. 80 of the Indian Evidence Act, 1872 is available only when the record purporting to be a confession is taken in accordance with law. Administering illegal oath upon an accused would denude the presumption in favour of the genuineness of the said document and that the statement was duly taken under the said proviso – Held, that not only administration of oath on an accused while recording his confession is prohibited, unlawful and illegal but also that the said act cannot be cured under S. 463 Cr.P.C. Administration of Oath upon an accused while recording confession has a direct bearing on the voluntariness of the confession and voluntariness is sacrosanct.

(Paras 123 and 124)

K. Code of Criminal Procedure Code, 1973 – Ss. 164 and 281 – Oaths Act, 1969, S. 4 (2) – Constitution of India – Article 20 (3) – Held, in order to accept a confession as voluntary the Court must be absolutely certain that the confession is unblemished and there remains

not an iota of doubt that the confession was actuated by undue influence, threat or promise. When a Magistrate takes the chair to record the confession, the mandate of the law prescribes the Magistrate to ensure that the mind of the accused is free from any external pressure. While doing so, if the Magistrate goes on to administer oath upon the accused it cannot be said that the said Magistrate complied with the statutory requirement of the law to ensure the voluntariness of the confession – The confession so made must not give any reason for the Court to doubt whether the said confession was the result of a hope in the mind of the accused or fear of the Magistrate, a person in authority, administering oath upon him to extract truth. S. 463 Cr.P.C. permits evidence of non compliance of Ss. 164 and 281 Cr.P.C. to be taken to examine if it has injured the accused. It does not permit violation of a fundamental right guaranteed under Article 20(3) of the Constitution of India to be cured. It must always be remembered that under the doctrine of Constitutional supremacy, the Constitution is the paramount law to which all other laws must conform. The Constitution of India must ever remain supreme and deemed written in every statute. We are, therefore, of the firm view that the substantial illegality of administering oath upon an accused before taking a confession which is prohibited cannot be termed as a curable irregularity under S. 463 Cr.P.C – Answering the first question referred by the Division Bench in the affirmative, we hold that the confessional statement recorded under the provision of S. 164 Cr.P.C. on oath is fatal and cannot be protected by the provision of S. 463 Cr.P.C. In the circumstances and consequently we hold that the judgment of the Division Bench of this Court in re: *Arjun Rai* is good law. We reiterate, as already held by the Supreme Court in re: *Brijbasi Lal Shrivastava*, that administration of oath while recording statements of the accused under S. 164 Cr.P.C. would amount to a concealed threat. If this be so then to permit further evidence to disprove what has been held to be a concealed threat would be to dilute the fundamental protection given to an accused under Article 20 (3) of the Constitution of India which we are not inclined to in today's context where the accused due to social conditions, lack of knowledge or advise may not be in a position to understand the nuances and intricacies of the laws.

(Para 125)

L. Code of Criminal Procedure Code, 1973 – Ss. 164, 281 and 463 – Held, on examination of S. 164 (5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the mandate of S. 164 and S. 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, S. 463 Cr.P.C. would be applicable and the Court shall take evidence of non-compliance of S. 164 and S. 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence.

(Para 126)

Chronological list of cases cited:

1. Arjun Rai v State of Sikkim, 2004 SCC OnLine Sikk 24.
2. Rabindra Kumar Pal alias Dara Singh v. Republic of India, (2011) 2 SCC 490.
3. State of Uttar Pradesh v. Singhara Singh and Others, AIR 1964 SC 358.
4. Taylor v. Taylor, [(1875) 1 Ch D 426, 431].
5. Mohd. Ajmal, Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1.
6. Ram Singh v. Sonia and Others, (2007) 3 SCC 1.
7. Babubhai Udesinh Parmar v. State of Gujarat, (2006) 12 SCC 268.
8. Brijbasi Lal Shrivastava v. State of Madhya Pradesh, AIR 1979 SC 1080.
9. Madhu v. State of M.P, 2008 SCC OnLine MP 177.
10. State (NCT of Delhi) v. Navjot Sandhu *alias* Afsan Guru, (2005) 11 SCC 600.

11. Haridasan Palayil v. Speaker of 11th Kerala Legislative Assembly, AIR 2003 Kerala 328.

12. Kehar Singh and Others v. The State (Delhi Admn.), (1988) 3 SCC 609.

13. Shanti v. The State, AIR 1978 Orissa 19 (FB).

14. A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602.

15. The State of Assam v. Akanman Bora, 1988 SCC OnLine Gau 154.

16. Philips v. State of Karnataka, (1980 Cr.L.J. 171).

17. State v. Suram Singh, 1976 Cri LJ 96.

18. Atmaram Namdeo v. State of Maharashtra, AIR 1969 Bom 189.

19. Selvi v. State of Karnataka, (2010) 7 SCC 263.

20. Mahadeo and Another v. King Emperor, AIR 1924 Oudh 65, 1923 SCC OnLine Oudh 124.

21. Nandalal Ghose v. King-Emperor, 1943 SCC Online Cal 103, AIR 1944 Cal 283.

22. Akanman Bora v. State of Assam, 1987 SCC OnLine Gau 33.

23. Baldeo and Another v. State of U.P. MANU/UP/2965/2012.

24. N. Senthil @ Senthilkumar v. State Rep. by the Inspector of Police, South Gate Police Station, Madurai City, 2016 SCC OnLine Mad 28793.

25. Thimma and Thimma Raju v. State of Mysore, (1970) 2 SCC 105.

26. Kanda Padayachi *alias* Kandaswamy v. State of Tamil Nadu, (1971) 2 SCC 641.

27. Bharat v. State of U.P, (1971) 3 SCC 950.

28. Veera Ibrahim v. State of Maharashtra, (1976) 2 SCC 302.

29. Satbir Singh v. State of Punjab, (1977) 2 SCC 263.

30. Pakala Narayanaswami v. King Emperor, 66 IA 66, AIR 1939 PC 47.

31. State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.

32. Nandini Satpathy v. P.L Dani, (1978) 2 SCC 424.

33. R. Dineshkumar v. State, (2015) 7 SCC 497.
34. Nazir Ahmad v. King Emperor, AIR 1936 Privy Council 253 (2).
35. Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322.
36. Chandra Kishore Jha v. Mahavir Prasad, (1999) 8 SCC 266.
37. Dhananjaya Reddy v. State of Karnataka, (2001) 4 SCC 9.
38. Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755.
39. State of Rajasthan v. Mohinuddin Jamal Alvi and Another, (2016) 12 SCC 608.
40. Sarwan Singh Rattan Singh v. State of Punjab, AIR 1957 SC 637.
41. Shivappa v. State of Karnataka, (1995) 2 SCC 76.
42. Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230.
43. Mohd. Jamiludin Nasir v. State of W.B., (2014) 7 SCC 443.
44. Babu Singh v. State of Punjab, 1964 (1) Cri.LJ. 566.
45. State v. Nalini, (1999) 5 SCC 253.
46. Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat, (2009) 7 SCC 254.
47. State of Rajasthan v. Darshan Singh, (2012) 5 SCC 789.
48. Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62.
49. SEBI v. Gaurav Varshney, (2016) 14 SCC 430.
50. P. N. Krishna Lal v. Government of Kerala, 1995 Supp. (2) SCC 187.
51. State of Sikkim v. Suren Rai, 2017 SCC OnLine Sikk 07.

JUDGMENT

The Judgment of the Court was delivered by ***Bhaskar Raj Pradhan, J.***

A Division Bench of this Court vide order dated 03.07.2017 had referred three questions for consideration before the Full Bench. The said three questions were :

"(i). *Whether the confessional statement recorded under the provisions of Section 164 Cr.P.C on oath, is fatal or could it be still protected by the provisions of Section 463 Cr.P.C and if so protected, then whether the judgment of the Division Bench of this Court reported in re:* ***Arjun Rai v State of Sikkim***[1] *is good law?*

(ii). *Whether the mere administering of oath to an accused while recording his confessional statement keeping in mind sub section 5 of section 164 Cr.P.C, without anything more, lead to an inference that the confessional statement is not voluntary and thus in violation to the fundamental requirement of Section 164 Cr.P.C and thus fatal ?*

(iii). *Whether administering oath to an accused while recording the confessional statement of an accused under Section 164 Cr.P.C violates Article 20 (3) of the Constitution of India?"*

Rival Contentions:

2. Mr. B. Sharma, learned Senior Advocate appearing for the appellant would submit that administering oath to an accused person before recording a confessional statement is fatal and cannot be cured under section 463 Cr.P.C. He would submit that the prohibition is found in Article 20 (3) of the Constitution of India as well as section 164 (5) Cr.P.C. and section 4 (2) of the Oaths Act, 1969. He would rely upon the judgment of the Supreme Court in re: ***Rabindra Kumar Pal alias Dara Singh v. Republic of India***[2], and submit that non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. He would further rely upon the judgment of the Supreme Court in re: ***State of Uttar Pradesh v. Singhara Singh & Ors.***[3] and submit that the rule adopted in

[1] 2004 SCC OnLine Sikk 24
[2] (2011) 2 SCC 490
[3] AIR 1964 SC 358
[4] [(1875) 1 Ch D 426, 431]

Taylor v. Taylor[4] is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed is squarely applicable. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164.

3. Mr. J. B. Pradhan, learned Public Prosecutor, appearing for the Appellant would commence his arguments stating that section 164 Cr.P.C. was in three parts. The first part i.e. sub section (1) thereof dealt with empowering certain Magistrates to record any confession or statement. The second part i.e. sub section (2), (3) and (4) thereof are safeguards for recording confessions and therefore mandatory. The provisions of sub section (2), (3) and (4) of section 164 Cr.P.C. would make it amply clear that the guidelines prescribed therein are for the purpose of safeguarding the accused and to ensure that the confession is voluntary and not made on account of any extraneous influence. He would submit that once the Magistrate complies with the above provisions and comes to the satisfaction that the accused is making the confession voluntarily without any inducement, threat or promise the Magistrate proceeds to record the confession. The third part comprising of sub section (5) of section 164 Cr.P.C. which deals with the manner in which a statement (other than a confession) was to be recorded. Mr. J. B. Pradhan, would submit that the provision of sub section (5) of section 164 Cr.P.C. makes it evident that a Magistrate cannot administer oath upon an accused and therefore the recording of a confession on oath is prohibited. However, if there was full compliance of sub section (2), (3) and (4) of section 164 Cr.P.C. by the Magistrate and the Court is assured of the voluntariness of the said statement, the administration of oath to an accused person while recording a confessional statement would be a curable defect under section 463 Cr.P.C. He would rely upon the judgment of the Supreme Court in ***Mohd. Ajmal, Amir Kasab v. State of Maharashtra***[5] and draw the attention of this Court to paragraph 457 thereof:-

> ***"457.*** *The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the*

[5](2012) 9 SCC 1

materials lawfully collected in the course of investigation. The test to judge the constitutional and legal acceptability of a confession recorded under Section 164 CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally."

He would submit that the Supreme Court has held that right against self-incrimination under article 20 (3) does not exclude any voluntarily statement made in exercise of free will and volition.

4. Mr. J.B. Pradhan would further submit that the bare reading of section 463 Cr.P.C. would reveal that the violation of section 164 Cr.P.C. is curable under section 463 Cr.P.C. and the Court can admit such an evidence if it has not injured the accused in his defence on the merit. He would draw reference of the judgment of the Supreme Court in re: ***Singhara Singh & Ors. (supra)*** and in re: ***Ram Singh v. Sonia & Ors.***[6] and submit that section 463 permits oral evidence to be given to prove that the procedure laid down in section 164 Cr.P.C. had in fact been followed and if the confession is not recorded in proper form as prescribed by section 164 Cr.P.C. read with section 281 it is a mere irregularity and curable under section 463 Cr.P.C..

5. Mr. J.B. Pradhan would refer to the judgment of the Supreme Court in re: ***Babubhai Udesinh Parmar v. State of Gujarat***[7] and submit that it was held that a judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. He would submit that the Supreme Court also held that the voluntarily nature of the confession depends upon whether there was any inducement, threat or

[6](2007) 3 SCC 1
[7](2006) 12 SCC 268

promise and its truth is judged on the basis of the entire prosecution case. Mr. J.B. Pradhan would also draw the attention of this Court to the judgment of the Supreme Court in re: ***Brijbasi Lal Shrivastava v. State of Madhya Pradesh***[8] and submit that in the said case the Supreme Court had observed that administration of oath while recording statements of the accused under section 164 Cr.P.C. would amount to a concealed threat but would go further to point out that the Supreme Court did not, even then, hold it to be illegal or inadmissible but only went to the extent of holding that its probative value would be precise little. He would submit that the Division Bench of the Madhya Pradesh High Court in re: ***Madhu v. State of M.P.***[9] having relied upon both in re: ***Babubhai Udesinh Parmar (supra) and Brijbasi Lal Shrivastava (supra)*** has held that administration of oath while recording statements of an accused may not be fatal in view of section 463 Cr.P.C.

6. Mr. J.B. Pradhan would submit that during the trial it is for the learned Trial Judge to determine as to whether the administration of oath had prejudiced and injured the defence of the accused which can be done during the proceedings under section 313 Cr.P.C. and if the learned Trial Judge comes to the conclusion that the said confession of the accused was voluntarily without any inducement, threat or promise the learned Trial Judge can always accept and admit the confession in evidence. However, during the trial if the accused retracts or in his examination under Section 313 Cr.P.C submits otherwise then the probative value of such evidence would be little.

7. Mr. J.B. Pradhan would rely upon the Supreme Court judgment in re: ***State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru***[10] would submit that the confessions are considered highly reliable because no rational person would make admission against his interest prompted by his conscience to tell the truth. He would hasten to add though that a confession of an accused recorded under section 164 Cr.P.C. is not a substantive piece of evidence. He would submit that in spite of oath having been administered if the Court would find substantive material establishing the guilt of the accused then even such a confession could have corroborative value although its probative value would be diminished by the administration of oath.

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[8]AIR 1979 SC 1080
[9]2008 SCC OnLine MP 177
[10](2005) 11 SCC 600

8. Mr. A. Moulik, learned Senior Advocate assisting this Court as *Amicus Curiae* would straight away rely upon the judgment of the Supreme Court in re: ***Brijbasi Lal Shrivastava (supra)*** and would submit that the Supreme Court had clearly held that there is always a concealed threat to the accused when oath is administered to him even if it is his voluntarily statement under section 164 Cr.P.C. and that section 164 (5) Cr.P.C. prohibits administration of oath in cases of confession. Drawing the attention of this Court to the judgment of the Division Bench of the Kerala High Court in re: ***Haridasan Palayil v. Speaker of 11th Kerala Legislative Assembly***[11], he would submit that taking confession on oath involves the idea of calling God to witness what is averred as truth which itself amounts to invoking fear in the mind of the confessor taking the oath. He would further submit that Article 20 (3) of the Constitution of India prohibits self-incrimination and therefore recording of confession would violate the said constitutional safeguard. He would submit that section 164 (5) of Cr.P.C., Section 281 Cr.P.C. and section 4 (2) of the Oaths Act, 1969 specifically prohibits administration of oath to an accused person in a criminal proceeding.

9. Mr. A. Moulik would submit that confessional statement taken on oath is not at all curable under section 463 Cr.P.C., Section 463 Cr.P.C. falls under chapter XXXV of Cr.P.C. relating to *"irregular proceedings"* and non compliance of the mandatory provision of 164 (5) Cr.P.C. would not just be irregular proceeding but illegal proceedings as being specifically prohibited by law and therefore not curable as irregular proceedings under section 463 Cr.P.C. Once it is clear that administrating oath to an accused while recording confessional statement under section 164 Cr.P.C. is illegal the question of prejudice or injury to the accused in his defence has no relevance. He would draw the attention of this Court to the judgment of the Supreme Court in re: ***Kehar Singh & Ors. v. The State (Delhi Admn.)***[12] and submit that non compliance of the provisions of section 164 (2) is a substantial defect and is not curable under section 463 Cr.P.C. He would therefore submit that similarly non compliance of the mandatory provision of section 164 (5) Cr.P.C. is also not curable under section 463 Cr.P.C. Relying upon a full Bench decision of the Orissa High Court in re: ***Shanti v. The State***[13] Mr. A. Moulik would submit substantial non compliance of

[11]AIR 2003 Kerala 328
[12](1988) 3 SCC 609
[13]AIR 1978 Orissa 19 (FB)

the provision of section 164 Cr.P.C. is not curable. He would further argue that Article 20 (3) of the Constitution of India is a fundamental right and therefore could not be violated by administering oath even if no prejudice is caused to the accused person. He would rely upon the judgment of the Supreme Court in re: ***A.R. Antulay v. R.S. Nayak***[14] in which it was held: *"No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void."*

10. Mr. A Moulik would submit that the Supreme Court in re: ***Babubhai Udensing Parmar (supra)*** had clearly held that section 164 Cr.P.C. prohibits administration of oath and that there should be strict compliance of the provisions of section 164 Cr.P.C. He would respectfully submit that the Supreme Court was not called upon to consider the provision of section 463 Cr.P.C. He would therefore submit that the law laid down by this Court in re: ***Arjun Rai (supra***); by the High Court of Gauhati in re: ***The State of Assam v. Akanman Bora***[15]; by the High Court of Karnataka in re: ***Philips v. State of Karnataka***[16]; by the High Court of Jammu & Kashmir in re: ***State v. Suram Singh***[17]; by the High Court of Bombay in re: ***Atmaram Namdeo v. State of Maharashtra***[18] is good law and the moment oath is administered to an accused before recording his confession under section 164 Cr.P.C. it shakes the very purpose of recording such a confession of an accused. Such confession being under compulsion is not admissible in evidence and therefore not curable under section 463 Cr.P.C. Mr. A Moulik would further submit that in view of the judgment of the Supreme Court in re: ***Mohd. Ajmal Amir Kasab (supra)*** the right against self-incrimination under Article 20(3) of the Constitution of India does not proscribe voluntary statements made in exercise of free will and volition and further the right against self-incrimination under Article 20(3) has been statutorily incorporated in the provisions of Cr.P.C. (i.e. Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with statutory provisions is also compliance with the constitutional requirements.

11. Mr. N. Rai, learned Senior Advocate and also assisting this Court as

[14](1988) 2 SCC 602
[15]1988 SCC OnLine Gau 154
[16](1980 Cr.L.J. 171
[17]1976 Cri LJ 96
[18]AIR 1969 Bom 189

Amicus Curiae would rely upon the judgment of the Supreme Court in re: ***Selvi v. State of Karnataka***[19], and submit that confession having a *"testimonial character"* cannot be categorized as material evidence. He would further buttress his argument by referring to the meaning assigned to the word *"testimony"* in Black's Law Dictionary, 7th Edition as *"Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition- also termed personal evidence- testimonial."* Mr. N.Rai would submit that a confession of an accused recorded by the Magistrate on oath is not admissible in evidence. Once oath is administered, it is a concealed threat to the accused and same takes the character of a *"testimony"* and loses its character of a statement of an accused. The testimonial compulsion therefore amounts to self-incrimination and such a defect of substantial nature cannot be cured by section 463 Cr.P.C.

12. Mr. N. Rai would submit that section 4 (2) of the Oaths Act, 1969 has to be read conjunctively with section 8 thereof. Read together, Mr. N. Rai would submit that the Oath's Act, 1969 specifically makes the administration of oath to an accused, unlawful.

Appreciation of the Judgments in re: Administration of oath on an accused person:-

13. In the judgment rendered by a Division Bench of the Oudh Judicial Commissioners Court in re: ***Mahadeo & Anr. v. King Emperor***[20]***; Wazir Hasan, A.J.C***. held as under:-

> ***"****Having regard to the circumstances in which Mangu Lal gave evidence and in the absence of any reliable and independent corroborative evidence as to the material particulars of the story for the prosecution, it would not be safe to accept his statement as to the complicity of the appellants in the act of murdering Ram Lal.*
>
> ***15.*** *There is one matter to which I wish to make a particular reference. Mangu Lal stated in*

[19](2010) 7 SCC 263
[20] AIR 1924 Oudh 65: 1923 SCC OnLine Oudh 124

the witness box "When I was in dock and before I had made my plea of guilty my pleader and also the Court had carefully explained to me that I should speak the truth and that I wanted to." There is no note by the Court that the above is untrue. This to my mind is a serious thing. Now Mangu Lal was an accused person standing his trial for the offence of murder when he was told by the Court to speak the truth. It was practically equivalent to administering an oath to an accused person. This is contrary to all civilized systems of jurisprudence. In this particular case, it might well have aroused hopes in the mind of Mangu Lal that he would escape punishment if he spoke the truth, which according to his judgment, affected by the surroundings in which he stood, was to be a narrative of the complicity of the appellants.

16. *I agree with my learned colleague that the appeal of Mahadeo and Gokaran be allowed and that the appeal of Mangu Lal be dismissed.***"**

(Emphasis supplied)

14. Way back in 1920 the Oudh Judicial Commissioner's Court would hold that administering an oath to an accused person is contrary to all civilized systems of jurisprudence and having taken oath it might well have aroused hopes in the mind of the accused that he would escape punishment if he spoke the truth, which according to his judgment, affected by the surroundings in which he stood, was to be a narration of the complicity of the Appellants.

15. A Division Bench of the Calcutta High Court speaking through ***Lodge, J***. in re: ***Nandalal Ghose v. King-Emperor***[21] would in the year 1943, while setting aside a conviction and sentence passed under section 193 and 199 of the Indian Penal Code and examining the provisions of section 5 of the Oaths Act, would hold thus:-

[21] 1943 SCC OnLine Cal 103: AIR 1944 Cal 283

> ***"****…….. In our opinion, this Rule must be made absolute. In the first place, the affidavit was sworn before a first class Magistrate who had no jurisdiction to take evidence in this particular matter. The first class Magistrate had, therefore, no authority under sec. 4 of the Oaths Act to administer an oath in the matter. Further, the Petitioner was the accused in criminal proceedings which were the subject-matter of the proceedings before the Sub-Divisional Officer. Under sec. 5 of the Oaths Act there is no authority to administer an oath to an accused in a criminal proceeding. For this reason also no oath ought to have been administered to this accused. Such being the case, the Petitioner ought not to have been prosecuted for making a false statement on oath and ought not to have been convicted therefor……..****"***
>
> *(Emphasis supplied)*

16. A Division Bench of the Bombay High Court in re: ***Atmaram Namdeo (supra)*** while examining a conviction under section 302 of the Indian Penal Code would examine the amendments made to the Cr.P.C. by the State to various provisions including section 164 of the old Cr.P.C. whereby the Magistracy in the State had been divided into two distinct categories. The contention of the State on the construction of section 37 of the old Cr.P.C. as amended was that the State Government could authorize a District Magistrate to invest any Magistrate subordinate to him with the powers under section 164 of the old Cr.P.C. amongst others and on the issuance of the notification the said Executive Magistrate subordinate would *ipso facto* get authority to record the statement under the said section. Repelling the said construction the Division Bench would hold:-

> ***"14****. in this division of function with regard to the powers enumerated in Part II of the fourth Schedule, we see a clear legislative intent and scheme. The powers under Section 164 are ordinarily required to be exercised by a Magistrate of experience. Even in the original Code, it will*

be seen that the only Magistrate other than the Magistrate of the first class, who is eligible to be invested with the powers under Section 164, is a Magistrate of the second class and that investment has to be at the instance of the State Government and not the District Magistrate. We are unable to hold that the State Legislature, in effecting amendment of the scheme of the Code, would have intended such a violent departure in the matter of investing any Magistrate, be he a Magistrate of the third class, or even an Executive Magistrate, with powers of recording statements and confessions under Section 164. The reason for restricting the investment of powers under Section 164 to experienced Magistrate is obviously that the Magistrate must have enough experience to judge whether a statement is being made voluntarily or otherwise. The Magistrate must be competent to understand why a person is making a confession and more or less convicting himself out of his own mouth. The detailed and elaborate provision made to ensure that the confession is made in a free and fair manner and without any duress of restraint or under pressure or for any reward, requires that such powers should be exercised by experienced and competent Magistrates. Before investing a Magistrate with such important functions, the authority concerned, which, in our opinion, is the State Government alone, will apply its mind to find out whether the person recommended for being invested with such powers deserves to be entrusted with such functions. The very instance in this case shows the danger of investing all and sundry with powers under Section 164. The learned Taluka Magistrate in this case administered oath to the accused and thus violated the most elementary principle that statements have to be voluntarily made. The

argument that in spite of the oath, the voluntary nature of the confession may not be affected is difficult to understand. The reason why oath is not to be administered to a person coming forward to make a statement in the nature of confession is that there should be no kind of pressure either of oath or of affirmation or of any other kind operating on the mind compelling him to disclose something which ordinarily that person would not disclose or state. The manner in which the confession is to be recorded, the preferable form being questions and answers, and the whole record being in the language of the deponent, are all salutary safeguards which have to be observed and non-observance of which imperils the acceptance of the statements as good evidence or reliable evidence in criminal prosecutions."

(Emphasis supplied)

17. The Division Bench of the Bombay High Court would also hold in 1969 that administration of oath to an accused would violate the most elementary principle that statements have to be voluntarily made. The Division Bench of the Calcutta High Court would hold that under Section 5 of the Oaths Act there is no authority to administer oath to an accused and that no oath ought to have been administered on such an accused. The Oudh Judicial Commission and the Calcutta High Court would hold so much before the people of India gave themselves the Constitution of India in the year 1951.

18. The Bombay High Court in the year 1969 would hold that the reason why oath is not to be administered to a person coming forward to make a statement in the nature of confession is that there should be no kind of pressure either of oath or of affirmation or of any other kind operating on the mind compelling him to disclose something which ordinarily that person would not disclose or state. The manner in which the confession is to be recorded, the preferable form being questions and answers, and the whole record being in the language of the deponent, are all salutary safeguards which have to be observed and non-observance of which imperils the acceptance of the statements as good evidence or reliable evidence in criminal prosecutions.

19. In the year 1975 the same question arose before the Jammu and Kashmir High Court. In re: ***State v. Suram Singh (supra)*** while deciding an appeal against acquittal of the accused of the offence under sections 302 and 451 R.P.C. a Division Bench of the Jammu & Kashmir High Court would examine the confessional statement vis-a-vis section 164 Cr.P.C., section 24 of the Indian Evidence Act and Article 20 (3) of the Constitution of India. ***Mufti, J.*** would hold:-

> ***"8***. *Assuming that the confessional statement was voluntary, it would still be inadmissible because it was made under compulsion, of oath. Here it may not be violative of Section 24 of the Evidence Act in its not having been proceeded from threat promise or inducement. But it does violate Article 20 (3) of the Constitution according to which no person accused of an offence shall be compelled to be a witness against himself. That the accused made a confessional statement before a Magistrate which could be read against him at the trial cannot be disputed. That he did so when he stood in the character of an accused person cannot also be disputed. The confession is therefore a statement made by an accused who was driven to make it under compulsion of an oath. That being so, the use of confession against the accused at the trial would constitute a violation of clause 3 of Article 20. That is what renders it inadmissible. Viewed from any angle, therefore, the confession cannot be treated as a circumstance adverse to the accused."*

Jaswant Singh, C.J.:- would, however, hold:—***"****I have had the advantage of going through the judgment which my learned brother, Mufti, J., has taken great pains to prepare. While I agree with the conclusion arrived at by him as also the observations made by him that the*

confessional statement purporting to have been made by the accused under Section 164 of the Criminal P.C. is inadmissible in evidence as it was made on oath and as a result of the pressure exercised by the police, I regret I find myself unable to subscribe to the view expressed by him in the last paragraph of the judgment that even assuming that the confessional statement was voluntary, it was still violative of cl. (3) of Article 20 of the Constitution as it was made under compulsion of oath. C1. (3) of Art. 20 of the Constitution provides that no person would be compelled to be a witness against himself. As held in State of Bombay v. Kathi Kalu. AIR 1961 SC 1808 : (1961 (2) Cri LJ 856) the compulsion contemplated by this clause means duress which in the context means physical objective act and not the state of mind of the person making the statement, and unless duress is exercised against an accused, he cannot be held to have been compelled to be a witness against himself If that be so, I doubt if the mere administration of oath to an accused by a Magistrate while recording his statement under Section 164 of the Criminal P.C. can fall within the purview of compulsion as contemplated by clause (3) of Article 20 of the Constitution, and amount to a compelled testimony."

(Emphasis supplied)

20. In re: ***Suram Singh (supra)*** while ***Mufti, J.*** would hold that even if the confessional statement is voluntary, it would still be inadmissible because it was made under compulsion of oath and violated Article 20(3) of the Constitution of India, ***Jaswant Singh, C.J.*** would express doubt whether mere administration of oath to an accused by a Magistrate while recording his statement under Section 164 Cr.P.C. can fall within the purview of compulsion as contemplated by clause (3) of Article 20 of the Constitution and amount to compelled testimony.

21. In re: ***Brijbasi Lal Shrivastava (supra)*** the Supreme Court would deal with an appeal against conviction and sentence under section 409, 467 and 477-A, Indian Penal Code and section 5(2) of the Prevention of Corruption Act. The appellant was a Principal of a School. A case was started against the appellant on a basis of a complaint made by a clerk who had actually drawn the amount on the orders of the appellant and who was later on dismissed from service by the appellant for some irregularities. The central evidence against the appellant consisted of a *"sort of a confession"* made by the appellant to the Assistant Divisional Superintendent, Education who further took the abundant caution of taking a written statement signed by him from the appellant. In this statement the appellant admitted to have falsely drawn up ₹ 500/- towards the salary of a chowkidar which was re-deposited into the treasury subsequently. The High Court and the Special Judge relied heavily on this document which formed the sheet-anchor of the prosecution case. The Supreme Court would examine the effect of the confession made by the appellant to the Assistant Divisional Superintendent, Education on his guilt. The Supreme Court would note that the said confession contained an admission not only of the misappropriation of ₹ 500/- but also of the two items of ₹ 20/- and ₹ 43/- which was the subject-matter of withdrawal by the same contingent bill and which formed the basis of Special Criminal Case No.2 of 1966 tried by the same Special Judge. The Special Judge had disbelieved the prosecution case and acquitted the appellant regarding these two items. The Supreme Court would observe that the purported confession had been found to be un-reliable with respect to two out of the three items which fact appears to have been completely overlooked by the Special Judge as well as the High Court. The Supreme Court would observe that it was not in dispute that the confession was made by the appellant to the Assistant Divisional Superintendent, Education who was his superior officer and was, therefore, a person in authority. The Supreme Court would also note that the appellant in his statement under section 342 of the old Cr.P.C. (now section 313 Cr.P.C.) while answering the question put to him regarding the said document has stated that the Assistant Divisional Superintendent, Education and his party had forced him to write the said confession. In such factual circumstances the Supreme Court would observe:-

> ***"10****. The evidence of PW 10 the officer who had taken the statement of the appellants shows that he had administered an oath to the*

appellant before taking his statement although he was not empowered to administer any oath. This circumstance by itself would amount to a concealed threat, because if the statement was found to be false the appellant may have entertained a genuine belief that he might be prosecuted."

(Emphasis supplied)

22. The Supreme Court in the year 1979 would hold that the circumstance of administration of oath to an accused person by itself would amount to a concealed threat, because if the statement was found to be false the accused may have entertained a genuine belief that he might be prosecuted.

23. In re: ***Philips (supra)*** the Karnataka High Court would examine the judicial confession said to have been made by the accused vis-à-vis section 164, 281 and 463 Cr.P.C. The First Additional Session Judge had chosen not to act on this confession on three grounds. The two questions put to the accused had not been put on record, the accused had been administered oath while recording the confessional statement and the Magistrate had recorded the confession knowing he himself was the committal Magistrate and therefore ordinarily ought not to have proceeded to record the confessional statement of the accused. The Division Bench would observe that the First Additional Session Judge had not taken trouble of adverting to section 463 Cr.P.C. The Division Bench, thereafter, would examine the said provision of section 463 Cr.P.C. in detail and would hold:-

"8. *.....The First Additional Sessions Judge has not weighed the evidence of P.W.1 to find out whether he had stated the truth about putting those two questions to the accused but had not recorded those questions in the proceedings he held on 17-12-1977. It was his duty to apply his mind to the evidence of P.W. 1 in regard to this aspect and come to a conclusion one way or the other. If his conclusion was that P.W.1 had stated the truth, then in view of Section 463, Cr.P.C., it would have been*

incumbent on him to hold that the recording of confession by P.W.1 had been done by him – except in regard to administering of oath to the accused – in a manner as required by the provisions in Section 164, Cr.P.C.. .....”

“9*. We do not consider it necessary to go into the evidence of P.W.1 to find out whether P.W.1 had recorded Ex. P.4 in accordance with the provisions in Section 164 of the Code of Criminal Procedure in the light of Section 463 of the Code as in our opinion the fact that P.W. 1 had administered oath on the accused while recording the confessional statement, deprives the statement Ex. P. 4 of any evidentiary value. In this connection the First Additional Sessions Judge has in para VII (gg) of his judgment, adverted to the provision in Section 5 of the Indian Oaths Act, 1873. Here again, the First Additional Sessions Judge has exhibited his ignorance of the law holding the field because Indian Oaths Act, 1873, has been repealed by the Indian Oaths Act, 1969. Section 5 of the Indian Oaths Act, 1969 is not in parimateria with Section 5 of the Indian Oaths Act, 1873. Section 5 of the Indian Oaths Act 1969, has no application in regard to this question.*

10*. Section 164 (4) Cr. P. C, lays down that such confession shall be recorded in the manner provided in Section 281 of the Code for recording the examination of an accused person and shall be signed by the person making the confession and so on. In view of this provision, it was incumbent on P. W. 1 to record the confessional statement of the accused by following the manner and method laid down in Section 281 Cr. P. C. Section 281 reads as follows:*

"281. Record of examination of Accused.- (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in that behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

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(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was

taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

11. *It is clear from the above that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate, When this specific provision is made, the other provisions of the Indian Evidence Act etc., regarding recording of statements, will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of Section 281, Cr. P.C.. It is well settled by a series of Judgments of the Privy Council as well as the Supreme Court that when the mandate of the law is that a particular act has to be done in a particular manner, it has got to be done in that manner or it should not be done at all. Therefore, recording of Ex. P. 4 by P. W. 1 confessional statement by the Magistrate after administering oath to the accused, is not as provided by Section 281 Cr. P. C. and as such Ex, P. 4 loses its evidentiary value. Moreover, the object behind this provision viz. Section 164 (4) Cr . P. C. is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that he would be incurring the wrath of law. In fact similar is the object in regard to the manner and method of recording the statements of witnesses during the investigation by the police, under Section 161 Cr. P. C. There, it is provided that the signatures of the persons*

are not expected to be taken below their statements so recorded. If this aspect viz., recording of examination of the accused is gone deeper into by looking into the provisions of the Code of Criminal Procedure, it will be clear that there are three stages at which examination of the accused is provided. First stage is Section 232 Cr. P. C. That would be during a sessions trial when the prosecution closes its case. The next is Section 239 of the Code. That is the stage at which in a trial of warrant case on police report a Magistrate has to decide whether he should frame charge or pass an order of discharge. The third is Section 313 of the Code which is a general provision because it states that an accused may be examined at any stage in any enquiry or trial, to enable him to explain personally any circumstances appearing in evidence against him, Section 313 (2) Cr. P. C. specifically lays down that no oath shall be administered to the accused when he is examined under Sub-section (1) of that Section. It is easy to see that it has no application to the recording of a confession of an accused under Section 164 (4) Cr. P. C. and in that behalf only the provisions in Section 281 of the Code are specifically made applicable.

12. *In view of the foregoing, we hold that administering oath to the accused by P. W. 1 before recording Ex. P. 4 the confessional statement, is an illegality and hence, Ex. P. 4 loses its evidentiary value. It is of course true that the learned First Additional Sessions Judge had reached the same conclusion, but what we have observed is in regard to the reasoning put forth by him and the manner in which he has exhibited his ignorance of the provisions of law and the rules, which he is expected to know;***"**

(Emphasis supplied)

24. The Karnataka High Court in the year 1980 would hold that administration of oath to an accused person while recording the confessional statement deprives the statement of any evidentiary value and is an illegality and therefore it is not necessary to go into the evidence of the Magistrate to find out whether he had recorded the confession as per Section 164Cr.P.C in the light of Section 463 Cr.P.C.

25. In re: ***Akanman Bora v. State of Assam***[22] a Division Bench of the Gauhati High Court would examine a confessional statement taken on administration of oath by the Magistrate vis-à-vis section 164 and 281 Cr.P.C. and Article 20 (3) of the Constitution of India. ***S. Haque J***. would hold:-

> ***"5***. *An accused is at liberty to make any statement or complain verbally or in writing to the arresting authority or to the Magistrate before whom he is produced for the purpose of remand. His statement in writing or verbal, as to his complicity in a crime, made to police is inadmissible in evidence; whereas such statement before a Magistrate is admissible in evidence. If such verbal statement as to his complicity in a crime makes before a Magistrate or expresses to make it, then it is mandatory to the Magistrate to record the same after duly observing all formalities prescribed under the provision of Section 164 of the Criminal Procedure Code and by following the instructions given in the Schedule Form referred to above. Section 4(2) of the Oath Act prescribes administering of oath to a witness. This Act nowhere prescribes administration of oath to an accused at any stage of investigation, inquiry or trial. Exception to this general rule is to be made applicable under the provision of Section 315 of the Code of Criminal Procedure when the accused offers himself as a defence witness. At such stage he is characterized not as an accused but as a competent witness. Administering oath is barred in the recording of*

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confessional statement by the clear provision of Sub-Section (5) of Section 164 of the Criminal Procedure Code which runs as:—

> *"Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.*

6. *Confession should be recorded in the manner provided for recording statement of an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character in so far the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Article 20(3) of the Constitution of India read with sub-section (5) of Section 164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean that recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in the evidence.*

7. *This subject was dealt by a Division Bench of Karnataka High Court in Philips v. State of Karnataka reported in 1980 Cri. L.J. 171. It was held that the manner of recording confession has provided under section 281 for the*

purpose of memorandum as laid down by Section 164(4), there is no provision for administering oath to an accused making a confessional statement before a Magistrate. When such specific provision is made, the other provision of the Evidence Act etc, regarding recording of statement, will not operate. Therefore, no question of administering oath arises and in fact if oath is administered; it will be contrary to the provision of Section 281. It is an illegality and as a such the confessional statement loses its evidentiary value. The object behind Section 164(4) is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that, he would be incurring the wrath of law.

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9. *The confession of the accused-appellant Akanman Bora was recorded on 25.5.1981 by the Magistrate Shri Birupaksha Sarma after administering oath. The recording of the confession in that manner was illegal and inadmissible in evidence. Learned Sessions Judge ought to have been cautious in considering the confession as substantive piece of evidence for application against the appellant in murder charge. It appears that the learned Sessions Judge failed to read and scrutinise thro ugh the entries recorded in the Confessional Statement From, Ext. 1 in a trial of serious charge. This only exposes non-application of mind by the Sessions Judge at the proceeding of the trial. Either the learned Sessions Judge was ignorant of the law on the subject or superficially disposed of the trial of a serious charge. It reflects lack of legal equipment and merit of the trial Judge. Learned Sessions*

Judge committed illegality in convicting the accused appellant on the basis of an illegal and inadmissible confession.

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11. *In a criminal trial, an accused can be examined by court at different stages under the provisions of Cr. P.C. and his statement can be recorded, such as, under section 329 before the charge, section 240(2) and 251 at the framing of charge and stating particulars of the offence respectively, and sections 227/228 at the hearing and framing of charges and finally section 313 after close of the evidence. The accused is also examined and his statement can be recorded under section 248(2) and section 235(2) at the trial on the question of sentence. The manner of examination and recording statement of an accused by courts have also been prescribed under section 282 Cr. P.C. At no stage, administering oath is required to be made to an accused. The accused is at liberty to make statement or com plain before the Court at any stage of the trial and recording such statement need not require administering oath.* ***"***

(Emphasis supplied)

26. ***J. Sangma J.*** while concurring with ***S. Haque J.*** *in re:* ***Akanman Bora (supra)*** would hold:-

"15.*…….. A Magistrate has to record the confession of accused in accordance with the provisions made in Sections 164 and 281 of the Code of Criminal Procedure. Those Sections, among other things, require a Magistrate to record the confession only after removing all fears from the mind of the accused and by explaining*

to him that he was not bound to confess and that, if he did so, it would be used as evidence against him. He must fully satisfy himself that the confession was made voluntarily. Sub-section (5) of Section 164 of the Code provides as follows:—

> *"Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner herein after provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case: and the Magistrate shall have power to administer oath to the person whose statement is so recorded."*

16. *It is clear from the words of this sub-section that a Magistrate should not administer oath/solemn affirmation for recording the confession. Apparently this was considered necessary because the accused has the liberty to retract the confession either at that time itself or at the trial and the prosecution has to prove the confession by giving evidence that the accused had made it voluntarily. Oath is meant to bind down the maker of statement. Therefore if a Magistrate administered the oath before recording confession, it would not be open to the accused to retract at that time or even subsequently before the trial court, because in that case he would be subject to the consequences of his oath/ solemn affirmation. So I share the opinion of my learned Senior brother Haque J., in holding that giving an oath/solemn affirmation before recording confession of the appellant in this case has vitiated the confession and that has made it inadmissible in evidence……..***"*

(Emphasis supplied)

27. The Gauhati High Court would follow the dictum of Karnataka High Court in re: ***Philips (supra)*** and in the year 1987 hold that administration of oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Article 20 (3) of the Constitution of India read with sub-section (5) of Section 164 Cr.P.C. and further administration of oath for recording confession will only mean that recording of evidence of the maker for use in subsequent stage against the maker which is prohibited in law and inadmissible in evidence.

28. In re: ***Arjun Rai (supra)*** a Division Bench of this Court would examine a confession statement recorded on oath vis-à-vis section 164 (5) and 281 Cr.P.C., Article 20(3) of the Constitution of India as well as section 4(2) of the Oaths Act, 1969 and hold:-

> ***"12****. It is evident from the confessional statement (Exhibit P8) that the learned Magistrate administered oath to the appellant before his statement was recorded. The question as to what is the effect of administering oath to an accused before his confessional statement is recorded came up for consideration before a Division Bench of the Lahore High Court in Karam Ilahi v. Emperor (AIR 1947 Lah 92) : (1946 Cri LJ (47) 772). Considering S. 164 of the old Code and S. 5 of the Indian Oaths Act, 1873 the Bench held that a person becomes an accused soon after his arrest by the police for an offence which forms the subject-matter of investigation and a confession made by him in the course of an investigation comes within the ambit of S. 5 of the Indian Oaths Act. 1873 and the Magistrate acted illegally in recording such a confession on solemn affirmation. The Bench however held such confession is admissible in evidence in absence of any proof of occasioning miscarriage of Justice.*
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> ***13.*** *The same question came up for consideration before the Division Bench of the*

Karnataka High Court in Philips v. State of Karnataka. 1980 Cri LJ 171. In that case the Magistrate administered oath on the accused while recording the confessional statement. On reading of S. 164(4) and S. 281, Cr. P.C. the Bench observed as follows:

> *"It is clear from the above that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate. When this specific provision is made, the other provisions of the Indian Evidence Act etc., regarding recording of statements will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of S. 281, Cr. P.C..... Therefore, recording of Ex. P. 4 by P.W. 1 confessional statement by the Magistrate after administering oath to the accused, is not as provided by S. 281, Cr. P.C. and as such Ext. P. 4 loses its evidentiary value. Moreover, the object behind this provision viz. S. 164(4), Cr. P.C. is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that he would be incurring the wrath of law."*

14. *The very question came up for consideration before a Division Bench of the Gauhati High Court in Akanman Bora v. State of Assam, 1988 Cri LJ 573. After referring to sub-section (5) of S. 164, Cr. P.C. in paragraph 6 of the judgment, the Bench observed as follows:—*

"Confession should be recorded in the manner provided for statement of an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character insofar the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Art. 20(3) of the Constitution of India read with sub-section (5) of S. 164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence."

15. *May it be stated that sub-section (1) of S. 164, Cr. P.C. empowers a Metropolitan, Magistrate or a Judicial Magistrate, whether or not he has Jurisdiction in the case, to record any confession or statement made to him in the course of an investigation or at any time afterwards before the commencement of any inquiry or trial. Sub-section (2) requires that before recording any confessional statement the Magistrate to explain to the person making confession that he is not bound to make any confession and that, if he does so it may be used against him. The said provision further mandates the Magistrate not to record any such confession unless, he is satisfied that it is being made voluntarily. Sub-section (4) states that such confession shall be recorded in the manner*

provided in S. 281, Cr. P.C. and the Magistrate has to append a note of memorandum at the foot of the confession. Subsection (5) has direct bearing on the point at issue. A close reading of it would indicate that any statement other than a confession made under sub-section (1) shall be recorded in the manner prescribed for recording of evidence and the Magistrate shall have the power to administer oath to such person. Therefore the expression "statement recorded other than a confession" provides key to the question. It means that if he records the statement of a person other than the accused he shall have the power to administer oath to him but if it is a case of recording a confession, he shall not administer oath to such person (accused). At that stage, we may have a look at sub-section (2) of S. 4 of the Oaths Act. 1969 which states inter alia that nothing in the said section shall render it lawful to administer, in a criminal proceeding oath or affirmation to the accused person unless he is examined as a witness for the defence. Therefore recording of confession of the accused by administering oath or affirmation to him is illegal and, therefore, is inadmissible.

16. *In the case at hand, the learned Magistrate did administer oath to the appellant before she recorded his confessional statement. For the reasons foregoing, we have no hesitation to hold that the confessional statement (Exhibit P8) is inadmissible and the same is not available to be considered.***"**

(Emphasis supplied)

29. In re: ***Arjun Rai (supra)*** the Division Bench of this Court would accept the dictum of the Karnataka High Court in re: ***Philips (supra)*** and in re: ***Akanman Bora (supra)*** and in the year 1987 hold that confessional statement is inadmissible and the same is not available to be considered.

30. In re: ***Babubhai Udesinh (supra)*** the Supreme Court would examine a case in which the accused therein was found guilty of the commission of rape and murder of a minor girl principally relying on or on the basis of a judicial confession. The learned Sessions Judge having taken into consideration the fact that the accused had been found guilty of commission of similar offences as also other offences imposed death penalty on him and the High Court affirmed the said judgment of conviction and sentence. The High Court while recording that the confession was found not only to be true but having been voluntarily being made, opined that the same could be relied upon. At the same time, the High Court proceeded on the basis that the accused was free to make retraction of his confession when his statement under section 313 Cr.P.C. was recorded. The High Court further noticed that oath should not have been administered to the accused but opined that the same is not of much significance but proceeded on the basis that the decisions of the Supreme Court have often said that the Court cannot solely rely on the retracted confession and make it a foundation for convicting the accused. But, while purporting to keep the confessional statement of the appellant aside, examined the purported circumstances used against him. The Supreme Court would observe that nothing had been brought on record to show the existence of any circumstance which would lead to the conclusion that the appellant alone is guilty of commission of the offence. The Supreme Court would also note that it was not disputed that apart from the purported judicial confession there is no other material which can be said to be sufficient to establish the guilt of the appellant. The Supreme Court would note the various discrepancies in the recording of the confessional statement including the administration of oath on the accused which is prohibited and ultimately disagreeing with the ultimate findings of the learned Sessions judge as also the High Court and considering the merit of the appeal set-aside the judgment of conviction and sentence. In such fact situation the Supreme Court would go on to examine in detail the confessional statement recorded. The Supreme Court would find inconsistencies appearing in the prosecution case vis-à-vis the confessional statement. The Supreme Court would also hold in paragraph 10 thereof:

> ***"10.*** *We do not appreciate as to why oath had to be administered to the accused while recording confession. Taking of a statement of an accused on oath is prohibited. It may or may not be*

of much significance. But, it may assume significance when we examine that a purported deposition of the accused was taken on 10-3-2003 wherein also his evidence on oath is recorded in the following terms:

"*I hereby state on oath that:*

My name: Babubhai

My father's name: Udesing Parmar

My age about: 27 years

My occupation: Labour work

Village of residence: Native Umrav Tadia Pura, at present Karamsad

Question: Have you received copy of documents of police investigation?

Answer: Yes.

Question: Is the charge-sheet, Ext. 4 read over to you? Do you admit the offence? Or you want to proceed further the judicial proceedings?

Answer: I do not admit the offence.

Question: Have you engaged private advocate for your self-defence or you want to engage advocate at the cost of the Government?

*Answer: I have engaged free advocate.***"**
(Emphasis supplied)

31. It must be noted that in the afore-quoted evidence on oath of the accused in reply to a specific question as to whether in the charge-sheet, exhibit-4 was read over to him and whether he admitted the offence, the

accused had specifically answered that he did not admit the offence. The Supreme Court would then go on to examine the various judicial pronouncements of the Supreme Court and ultimately hold thus:

> ***"15.*** *Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance with the statutory provisions in a routine or mechanical manner.*
>
> ***16.*** *The court must give sufficient time to an accused to ponder over as to whether he would make confession or not. The appellant was produced from judicial custody but he had been in police custody for a period of 16 days. The learned Magistrate should have taken note of the said fact. It would not be substantial compliance of law. What would serve the purpose of the provisions contained in Section 164 of the Code of Criminal Procedure are compliance with spirit of the provisions and not merely the letters of it. What is necessary to be complied with, is strict compliance with the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance with the statutory provisions in letter and spirit. We do not appreciate the manner in which the confession was recorded. He was produced at 11.15 a.m. The first confession was recorded in 15 minutes' time which included the questions which were required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The learned Magistrate, therefore, should have*

allowed some more time to the appellant to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the appellant."

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***20**. There is another aspect of the matter which must be taken into consideration. The same being the manner in which the case has been dealt with by the courts below.*

***21.** The judgment of the learned trial Judge gives an impression that he had proceeded on the basis that the appellant is guilty of commission of crime in large number of crimes. The High Court although taken note of the propositions of law, while pointing out the corroborative pieces of evidence, repeated only the evidences brought on record which proved the commission of offence. The purported corroborative evidence brought on record by the prosecution and as noticed by the High Court did not indicate that the appellant was guilty of commission of the offence. The circumstances were not such which formed links in the chain and point out only to the guilt of the accused and the accused alone.*

***22.** We, therefore, with respect, are constrained to record disagreement with the ultimate findings of the learned Sessions Judge as also the High Court. We, however, may observe that we have only considered the merit of the present appeal. Each case against the appellant must be judged on the basis of the legal evidence brought on record. Our observations, we are sure, would not influence the learned Judges dealing with other cases involving the appellant and pending before them.*

> ***23***. *The judgment of conviction and sentence is set aside and the appeal is allowed.***"**
> *(Emphasis supplied)*

32. The observation of the Supreme Court in paragraph 10 and especially the sentence "*It may or may not be of much significance*" seems to us to be in reference to the observation of the High Court that even though oath should not have been administered to the accused the same was not of much significance. The Supreme Court thus has clearly pronounced that taking of a statement of an accused on oath is prohibited. It is also clear that one of the reasons why the Supreme Court set-aside the judgment of conviction was the act of the Magistrate administering oath on the accused which was held to be prohibited.

33. In *contra*, the Division Bench of the Madhya Pradesh High Court in re: ***Madhu (supra)*** has respectfully disagreed with the view expressed by the Karnataka High Court in re: ***Philips (supra)*** and by the Jammu and Kashmir High Court in re: ***State v. Suram Singh (supra)*** and held:-

> ***"20***. *It is apparent from the aforesaid exposition of law in the aforesaid decisions that administering of oath to an accused is prohibited. However, at the same time the Apex Court has not laid down in Babubhai Udesinh Parmar vs. State of Gujarat (supra) and Brijbasi Lal Shrivastava vs. State of M.P. (supra) that if oath is administered, statement will be rendered wholly inadmissible. Considering the provisions of section 463 of Criminal Procedure Code, it is apparent that if any Court before which a confession or other statement is made evidence against an accused person is recorded, or purporting to be recorded under section 164 or section 281, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, take evidence in regard to such non-compliance, and may, if satisfied that "such non-compliance has not*

injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement." The provisions of section 463(1) makes it clear that non-compliance of the provision is fatal in case it has caused injury to the accused in his defence on merit. Though there was non-compliance in the instant case inasmuch as oath was administered, it was violative of section 164(5) of Criminal Procedure Code, it may not be fatal. The evidenciary value of such confessional statement is required to be considered and Court is required to find that such non-compliance has injured the accused in his defence on merits and whether he duly made statement recorded. In our opinion, such statement may be admitted in case it has not caused prejudice on merit in the facts of the case to the accused. In the instant case accused Shamim had retracted the confession (PW-59) by way of filing application (D-4), after 6 days it was recorded. He never felt boundan (sic bounden) by oath which was administered wrongly to him and oath has to be simply ignored. The administering the (sic of) oath simpliciter cannot be said to have injured the accused in his defence on merit in the instant case. We disagree with the finding recorded by the Court below that due to administering of the oath the confessional statement (P-59) was rendered inadmissible. We respectfully disagree with the view expressed in Philips vs. State of Karnataka (supra) by Karnataka High Court and State vs. Suram Singh (supra) by Jammu & Kashmir High Court. In our opinion it has to be seen whether administering of the oath has injured the accused in his defence on merit of a case."

(Emphasis supplied)

[23]MANU/UP/2965/2012

34. In re: ***Baldeo and Anr. v. State of U.P.***[23] was a case based on circumstantial evidence. One of the circumstances taken against the accused persons was the judicial confessions recorded. The learned Sessions Judge would rely upon the said judicial confessions as vital evidence against the accused persons. One of the accused had retracted the confession while giving a statement under section 313 Cr.P.C. The Allahabad High Court would examine the said confession vis-à-vis section 164 (5) and 281 Cr.P.C. as well as Article 20 (3) of the Constitution of India and hold:-

> ***"15****. The Magistrate has given a certificate below the statement of the accused as required under Section 164 Cr.P.C. Learned Amicus Curiae has, however, contended that the record does not indicate the basis on which the learned Magistrate had reason to believe that the statement was given voluntarily and there was no pressure on the accused from any side. Before recording confession of an accused under Section 164 Cr.P.C. it is the duty of the Magistrate to satisfy himself that the accused was giving statement voluntarily and for this he has to put certain questions to the accused and from the answers given to the questions, the Magistrate would come to the conclusion as to whether the confession which the accused is going to make would be voluntary or under some duress or inducement. The questioning of the accused before recording confession as to whether it was voluntary is a matter of substance and not a mere formality. A Magistrate should ascertain at the beginning of the statement and not at the end whether the confession made is voluntary. In the instant case before us, from the statement of the learned Magistrate, it is clear that he had not put any question to the accused before making confession, but he had given only warning as has been given in the certificate. It is, therefore, clear that before recording the confession, the learned Magistrate had not at all made any enquiry by*

> *putting question to the accused for satisfying himself that the confession made by the accused was voluntary and not under duress and inducement. Further, the learned Magistrate has committed gross illegality in administering oath to each accused before recording their confessional statement. Section 164(5) Cr.P.C. specifically provides that no oath shall be administered to an accused while recording his confession. Administration of oath to the accused in his confessional statement is violative of mandatory provisions of Article 20(3) of the Constitution and Section 281 Cr.P.C. Thus, the Magistrate cannot administer oath to the accused before recording his confessional statement and if he does so, the statement is illegal and should be excluded from consideration.***"***
>
> *(Emphasis supplied)*

35. The Allahabad High Court in the year 2012 would hold that administration of oath to an accused in his confessional statement is violative of the mandatory provisions of Article 20 (3) of the Constitution of India as well as Section 281 Cr.P.C and such statement being illegal should be excluded from consideration.

36. The Division Bench of the Madras High Court in re: ***N. Senthil @ Senthilkumar v. State Rep. by the Inspector of Police, South Gate Police Station, Madurai City***[24] would hold:

> ***"13****. The Trial Court has relied on the judicial confession made by the second accused to PW-15, the then learned Judicial Magistrate, No. VI, Madurai. We have got very serious reservation about the manner in which the said judicial confession had been recorded by the learned Judicial Magistrate. At the outset, we should say that it was illegal on the part of the learned Judicial Magistrate to administer oath on the*

[24] 2016 SCC OnLine Mad 28793

*second accused. Administering oath on the accused would amount to compulsion, which is unconstitutional, as the same would amount to testimonial compulsion. On this score alone, the judicial confession made by the second accused could be rejected.***"**

(Emphasis supplied)

37. The Madras High Court in the year 2016 would have serious reservations about the manner in which the confession was recorded. The High Court would hold that administering oath to an accused was illegal and amount to compulsion which is unconstitutional as it would amount to testimonial compulsion.

Answers to the three questions referred by the Division Bench vide order 03.07.2017

38. For clarity and to avoid prolixity we would address the third question referred by the Division Bench of this Court on 03.07.2017 first i.e.:-

(iii). Whether administering oath to an accused while recording the confessional statement of an accused under Section 164 Cr.P.C. violates Article 20 (3) of the Constitution of India?

39. Section 17 of the Indian Evidence Act, 1872 defines *"admission"* as:

"17. Admission defined.- *An admission is a statement, oral or documentary or contained in electronic for, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.***"**

40. Section 24 of Indian Evidence Act, 1872 reads thus:

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding*.-A confession made by an accused*

person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

41. In re: ***Thimma and Thimma Raju v. State of Mysore***[25], the Supreme Court would hold:-

> ***"9***. …….. *An unambiguous confession, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possesses a high probative force because it emanates directly from the person committing the offence. But in the process of proof of an alleged confession the court has to be satisfied that, it is voluntary, it does not appear to be the result of inducement, threat or promise as contemplated by Section 24 of the Indian Evidence Act and the surrounding circumstances do not indicate that it is inspired by some improper or collateral consideration suggesting that it may not be true. For this purpose, the court must scrutinise all the relevant factors, such as, the person to whom the confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used……."*
>
> *(Emphasis supplied)*

42. In re: ***Kanda Padayachi alias Kandaswamy v. State of Tamilnadu***[26], the Supreme Court would hold:-

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[25](1970) 2 SCC 105
[26](1971) 2 SCC 641

> ***"9***. *Sections 24 to 26 form a trio containing safeguards against accused persons being coerced or induced to confess guilt. Towards that end Section 24 makes a confession irrelevant in a criminal proceeding if it is made as a result of inducement, threat or promise from a person in authority, and is sufficient to give an accused person grounds to suppose that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him. Under Section 25, a confession made to a police officer under any circumstances is not admissible in the evidence against him. Section 26 provides next that no confession made by a prisoner in custody even to a person other than a police officer is admissible unless made in the immediate presence of a Magistrate.*
>
> *(Emphasis supplied)*

43. In re: ***Bharat v. State of U.P.*** [27] the Supreme Court would hold:-

> ***"7***. *The law as to confessions is perhaps too widely stated. Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker……"*
>
> *(Emphasis supplied)*

44. In re: ***Veera Ibrahim v. State of Maharashtra*** [28]**,** the Supreme Court would hold:-

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[27](1971) 3 SCC 950
[28](1976) 2 SCC 302

> ***"14***. *To attract the prohibition enacted in Section 24 of the Evidence Act, these facts must be established:*
>
> *"(i) that the statement in question is a confession;*
>
> *(ii) that such confession has been made by an accused person;*
>
> *(iii) that it has been made to a person in authority;*
>
> *(iv) that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;*
>
> *(v) such inducement, threat or promise, must have reference to the charge against the accused person;*
>
> *(vi) the inducement, threat or promise must in the opinion of the court be sufficient to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".***"**
>
> *(Emphasis supplied)*

45. In re: ***Satbir Singh v. State of Punjab***[29]**,** the Supreme Court would hold:-

> *"**28***. *In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.***"**
>
> *(Emphasis supplied)*

[29] (1977) 2 SCC 263

46. In re: ***State (NCT of Delhi) v. Navjot Sandhu (Supra)*** the Supreme Court would summarize the law regarding confession and hold thus:

> *"**26.** We shall, now, deal with certain legal issues, which have been debated before us in extenso. These issues have a bearing on the admissibility/relevancy of evidence and the evidentiary value or weight to be attached to the permissible evidence.*
>
> ***Law regarding confessions***
>
> ***27.** We start with the confessions. Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be proved against an accused. "Confessions" which is a terminology used in criminal law is a species of "admissions" as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a*

person in authority, the confession is liable to be excluded from evidence. The expression "appears" connotes that the court need not go to the extent of holding that the threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer. Confessions leading to discovery of a fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence vis-à-vis confessions. The allied provision which needs to be noticed at this juncture is Section 162 CrPC. It prohibits the use of any statement made by any person to a police officer in the course of investigation for any purpose at any enquiry or trial in respect of any offence under investigation. However, it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it explicit that the embargo laid down in the section shall not be deemed to apply to any statement falling within clause (1) of Section 32 or to affect the provisions of Section 27 of the Evidence Act.

28. *In the Privy Council decision of Pakala Narayana Swami v. Emperor [AIR 1939 PC 47 : 40 Cri LJ 364] Lord Atkin elucidated the meaning and purport of the expression "confession" in the following words: (AIR p. 52)*

> *"[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession…."*

29. *Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law." (Vide Taylor's Treatise on the Law of Evidence, Vol. I.) However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.*

> ***30.*** *Section 164 CrPC is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police.***"**
>
> *(Emphasis supplied)*

47. "Confessions" are one species of the genus *"admission"* consisting of a direct acknowledgement of guilt by an accused in a criminal case. *"Confessions"* are thus *"admissions"* but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary. Although the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: ***Pakala Narayanaswami v. King Emperor***[30] has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though. As per ***Taylor's Treaties on the law of Evidence, Vol. I*** a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat. As held by the Supreme Court in re: ***Navjot Sandhu (supra)*** the authority recording the confession at the pre-trial

[30] 66 IA 66

stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter. To do so the Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to speak the truth and confess the crime. In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.

48. A confession is a direct admission or acknowledgment of guilt by the person committing the crime. A possible inducement, threat or promise in reference to an alleged confession leads to a presumption that the confession may become irrelevant. A confession made by accused person become irrelevant in criminal proceedings, if the making the confession appears to the Court to have been caused by any inducement, threat or promise. The inducement, threat or promise is directly relatable to a person in authority. If the Court would come to an opinion that the confession is a result of inducement, threat or promise which in the opinion of the Court would give the accused reasonable ground for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him then such confession would become irrelevant.

49. Article 20 (3) of the Constitution of India reads thus:

> ***"20****. (3) No person accused of any offence shall be compelled to be a witness against himself."*

50. ***Wigmore on Evidence, (Tillers revision, 1983) Volume VIII (S.2250)*** gives a detailed historical perspective of the history of privilege against self-incrimination. It states that:-

> ***"2250. History of the privilege****. The history of the privilege against self-incrimination*

has something more than the ordinary interest of a rule of evidence – not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdiction, nor merely because the tracing of its origin takes us so far afield, in our survey, as the administrative policy of William the Conqueror and the criminal procedure of Louis XIV and the French Revolution, but particularly because the woof of its long story is woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the courts of the common law and of the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial stuarts. To disentangle these various elements, while keeping each in sight and unbroken, is a complicated task.

To begin with, two distinct and parallel lines of development must be kept in mind – the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the ex officio oath of the ecclesiastical courts; the second is the history of the opposition to the incriminating question in the common law courts – i.e., of the present privilege in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200s, and lasts well into the 1600s; the second part begins in the early 1600s, and runs on for another century.

I. [History of the opposition to the ex officio oath of the ecclesiastical courts.] *Under the Anglo-Saxon rule, the bishops had sat as*

judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide the [ecclesiastical] causes according to the ecclesiastical law [, not according to the law of the hundred, and not in the hundred courts]; whence sprang up a separate system and a double judicature. By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II temporarily gained the advantage. By another century, Stephen and John had lost ground; and under Henry III the influence of the leaders of the church, foreign born and foreign educated, was in the ascendant. When Henry married his French wife, in 1236, there came over four uncles with her, one of whom, by name Boniface, was placed in the see of Canterbury as archbishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho. These two men were active in developing the local church law of England. First to be noted is a constitution of Otho, promulgated at a Pan-Anglican council in London, 1236: "Jusjurandum calumniae in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo utveritas facilius aperiatur, et causae celeries terminentur, statuimus praestari de caetero in regno Angliae secundum canonicas et legitimas sanctiones, obtenta consuetudine in contrarium non obstante." Next, in 1272, came a similar constitution from Boniface: "Statuimus quod laici, ubi de subditorum peccatis et excessibus corrigendis per praelatos et judices ecclesiasticos inquiritur, ad praestandum de veritate dicenda juramentum per excommunicationis sententias, si opus fuerit, compellantur." Meanwhile, the general struggle between papal and royal claims

of jurisdiction had gone on. Under Edward I, the statute of "Circumspecte Agatis" (1285) favored the former's rights. But by the early 1300s the statute "De Articulis Cleri" set fairly definite limits; it was enacted that the royal officers should not permit "quod aliqui laici in ballione sua in aliquibus locis conveniant ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis."

Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest?

First of all, we may note that the opposition therein reflected has nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence; they concerned only the questions (a) who should have the right to do this, and (b) how it should be done. Moreover, the former of these things is alone at first concerned: later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (I) to Elizabeth I's time, (2) to Charles I's, (3) and afterwards.

(I) ***[To Elizabeth I's time.]*** *(a) Who should have the rights of jurisdiction? This was in the 1200s and 1300s the great question. The statute "De Articulis Cleri" settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church courts in England. The forms of writs of prohibition were thereafter based on this statute. A century later, in 1402, under Henry IV, the papal or clerical power obtained some sort*

of enlargement of its "liberties and privileges", and under Henry VIII this foreign and papal domination was repudiated, and in 1533 all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be enforced. Under Mary, for a moment, in 1554, the statute of Henry was repealed; but Elizabeth I, in 1558, took care promptly to restore it. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

(b) In the other important respect, namely, how the church courts should proceed, there is, as yet in the 1200s and 1300s, apparently no interference or hostile feeling at all in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface above quoted, authorizing certain oaths to be employed, met with anymore opposition than other acts done in assertion of the church's jurisdiction. The oath was plainly permitted, by the statute "De Articulis Cleri," in causes matrimonial and testamentary; there was no objection to it as such. How could there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear themselves by their oaths with oath helpers – where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury trial? The writs of prohibition, set forth by Britton and Fitzherbert, mentioned an oath, to be sure; but, in the first place, this might equally be the compurgation oath (not the "jusjurandum calumniate" or "de veritate"); and, in the next place, and chiefly, it was mentioned simply as a descriptive feature of the forbidden jurisdiction as if one should forbid writs of habeas corpus to be

issued by a probate judge, not meaning in the least to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no valid reason to believe that the statute "De Articulis Cleri" had among its motives any animus against the church's imposition of an oath as such.

(i) Nevertheless (thought the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the "jusjurandum de veritate dicenda" (which we may call the inquisitional oath, as distinguished from the compurgation oath) was then, for the church, an innovation. Hitherto, the trial by compurgation, or formal swearing of the party with oath helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200s, under the organizing influence of Innocent III, one of the first great canonists in the papal chair (1198-1216), new ideas were rapidly germinating in church law. The trial by ordeal was formally abolished by the church in 1215. The trial by compurgation oaths "was already becoming little better than a force." There was a decided need of improvement in method. One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200s, chiefly by the decretals of Innocent III. The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or "Gottesurtheil"; there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath helpers. But the new oath pledged the accused to answer truly, and this was followed by a rational process of judicial probing by questions to the specific

details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200s and 1300s, was paralleled, in a near degree, not only for ecclesiastical procedure but also for the secular criminal procedure of the Continent, by this inquisitional oath of the 1200s.

There were, to be sure, as time went on, several varieties of form to the oath. The chief forms were the simple "juramentum de veritate dicenda,"used in Boniface's English Constitution of 1272 (quoted supra [at note 7]), and the broader "jusjurandum calumniate de veritate dicenda", used in Otho's English constitution of 1236 (quoted supra [at note 6]; but their unity consisted in the subjection of the accused to a rational specific interrogation for the purpose of informing the judge.

(ii) Yet there was a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or private prosecutors or the like (corresponding to our notion of a "qui tam" or a grand jury)? Or might it be begun by an official complaint (somewhat like our information "ex relatione" by the attorney general)? Or might the judge "ex officio mero" summon the accused and put him to answer in hopes of extracting a confession

which would suffice? And in the last method, must the charge at least be brought first to the judge's notice "per faman," or per clamosam insinuationem," "common report" or "notorious suspicion"?

Such were the questions of procedure which later formed the essential subject of dispute. The last question became in the subsequent history the most important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless, the matter was complicated by the varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that the third method of trial – the "inquisitor," or proceeding "ex officio mero" – became a favorite one for heresy trials; and that is canonical lawfulness in some shape was supported by clear authority. About the year 1600, there came to be in England much pamphleteering anent this; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "Licet nemo tenetur seipsum prodere [i.e., accuse], tamen proditus per famam tenetur seipsum ostendere utrum posit suam innocentiam ostendere et seipsum purgare".

Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer "ex officio mero" without some sort of witnesses or presentment or bad repute; and in this sense on oath "ex officio" (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under

Elizabeth and Jams, the "ex officio" proceeding, lawful enough on Innocent III's conditions about "clamosa insinuation" and "fama publica," would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable.

In short, the common abuse, in later days, of the "ex officio" proceeding led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful, though, in truth, by the theory of the cannon law, it might be either, according to the circumstances of presentment.

(c) But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble the lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute "De Articulis Cleri," in the early 1300s, the royal powers is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the limits of that jurisdiction.

Otho's and Boniface's constitutions of the 1200s were issued under a new and improved procedure in the church; if the king's lawyers had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-fashioned compurgation methods. But the jurisdictional controversy was the vital one, as the "Articuli Cleri," show in every paragraph. Wherever the king and his counselors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In this very statute, indeed, "De Articulis Cleri,"

they concede the church's oath procedure where jurisdiction is conceded, i.e., in matrimonial and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Toward the end of Richard II's time, during the Lollard agitation, the church began, in 1382, to receive temporal sanction for its claims in the field of heresy; finally, in 1401, Henry IV's statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when "defamed or evidently suspected," until they "do canonically purge him or themselves," the diocesan to "determine that same business according to the canonical decrees." Here is no objection to the oath or to the "ex officio" procedure, but a sanction of the church's usual rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics; and under it were all subsequent prosecutions conducted for more than a century..

After a long period, however, there finally appears the little rift within the lute. In 1533, under Henry VIII, the old statute of Henry IV, of 1401 was repealed by a statute which did not take away the church's jurisdiction over heresy, nor yet oppose its power to put the accused on inquisitional oath, but did not insist on something more than "ex officio" proceedings; it provided that "every person presented or indicted of any heresy, or duly accused by two lawful witnesses, may be . . . committed to the ordinary [of the church] to answer in open court."

Here was the first portent of the new phase of the contest. Under the brief liberality of Edward VI, in 1547, this whole jurisdiction over

heresy was taken away; but under Mary, in 1554, the extreme statute of Henry IV was revived. Then, Mary's statute was in turn repealed, in 1558, by Elizabeth I, who at the same time took into her own hands the church's powers, and, with the Court of High Commission, introduced new features into the controversy.

(2) ***[To Charles I's time]*** *(a) Under Elizabeth and James, and to the end of the story, there appears no further doubt (material to us now) as to the jurisdiction of the ordinary church courts; it was confined, in its control of laymen, to causes "matrimonial and testamentary"; and it was constantly prohibited from holding them to answer in other classes of cases. So also the Court of High Commission in Causes Ecclesiastical, which Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary instrument for carrying out her church policy, worked under similar limitations, though it constantly strove to exceed them, and though it perhaps had jurisdiction over heresy. So, too, that offshoot of the Privy Council, known as the Court of the Star Chamber (first sanctioned by statute in 1487, but not beginning until Elizabeth's time to exercise actively its great and for some time useful powers), had by its charter so broad jurisdiction that little dispute could be made on that score.*

(b) Thus, the emphasis of controversy now shifted. It had in the 1300s concerned jurisdiction; it now concerned methods. The objection portended in 1533, in the statute of 25 Hen. VIII, c. 14 (quoted supra), was now to be the vital one. The Court of High Commission of course followed ecclesiastical rules; the Court of

Star Chamber did likewise, in what concerned the procedure of trial. No one is going yet to object to their general process of putting the accused to answer upon oath; but there is to be much opposition to the preliminary methods, to the lack of a presentment, to charging a person "ex officio mero." There was here some room (as we have seen) for uncertainty as to the proper canonical methods; and these courts were to strain all the possibilities, and even to exceed them.

The Court of Star Chamber seems to have raised no special antagonism during the 1500s, nor until James' time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head – a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest "ex officio" style. From this time onwards there is much concerning this oath. That it was canonically and statutably lawful was at least arguable. The repealed statute of 25 Hen. VIII, c. 14, in 1533 (quoted supra), which might otherwise have been urged against its methods, was now of doubtful validity.

Furthermore, the royal courts of common law, early in the agitation, had plainly declared these things lawful on certain conditions. In 1589, the question had been first raised in the Common Pleas, in Collier v. Collier. In 1591, in Dr. Hunt's Case, the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency since "the oath cannot be ministered to the party but where the offence is presented first by two men, 'quoted fuit concessum'; and it was said, it was so in this

case." So also, in the same year, when the case of the preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final settlement, all the chief judges and law officers gave it as their opinion that the refusal was unlawful. Up to this time,then, it would seem that the stricter ecclesiastical rule was conceded by the highest authorities to be unimpeachable by common law courts. When James I came to the throne, in 1603, the church's claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an engine against heretics as the proceeding "ex officio". In the first scenes of his career, he appears plainly vouching for it. So, too when Bancroft succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common law judges seem to have been still complaisant.

But in 1606 Sir Edward Coke comes to be Chief Justice of the Common Pleas, and a change begins gradually. Coke had been counsel for Collier in 1589, and had perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical courts' pretensions in general. At first, however, he avoided a direct issue on the "ex officio" oath. His first case in 1609, he decided on other points. His next, in 1615, was allowed to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the Court of High Commission to yield a point and avoid the direct issue. The plain opinion of Coke, and apparently, the final decision of the court, was that the oath was improperly put by the ecclesiastical court; yet the objectionable thing seemed to be not that the

accused should be compelled to answer but that he should be charged ex officio, in a cause not testamentary or matrimonial but penal. In the meantime (in 1610, 1611 and 1615), three other cases had come before the common law courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was now prevailing there. The change had thus substantially been effected. Archbishop Abbott, a man of less rabid views, had in 1610 succeeded Bancroft; Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect to the ecclesiastical claims) that no more cases occurred, until in 1640, statute (quoted later [in note 69]) put an end, for the time, to further doubt.

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, "ex officio", to penal charges. But this did not touch the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offense that it chose to pursue. The very statute that sanctioned it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such restrictions as the ecclesiastical law conceded; and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII and Elizabeth, all through the 1500s. But as James' reign went on, and its practices became arrogant and obnoxious, so its use of the "ex officio" oath came to share the burden of criticism and discontent which that

procedure in the ecclesiastical courts excited. The common law courts seem to have found no handle against its oath procedure, even after Coke's accession to the bench. But though there was no explicit judicial condemnation, there was, after a time more than one formal questioning of it. The analogy of the doctrine already settled by Coke in 1607-16, for the ecclesiastical courts, was naturally invoked. Toward the end of its career, it would seem that some impression was being made on the court's own theory of orthodoxy.

(3) ***[After Charles I's time.]*** *But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637,- a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Freeborn John"), constituted somewhere between a patriot and a demogogue, had the obstinacy to force the issue. A decade later, he came into a similar collision with the Parliament's government, but he makes his entrance as a victim of the King's Star Chamber:*

"Lilburn's Trial, 3 How. St. Tr. 1315 (1637-45) *[the following is a summary prepared by Dean Wigmore of the report]: John Lilburn was committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; on examination, while under arrest, by the Attorney General, having denied these charges, he was further asked as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you to about by this examination to ensnare me; for*

seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more ; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories". Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do". Then, when examined before the Chamber itself, he again refused, saying, "I had fully answered all things that belonged to me to answer unto," but as to things "concerning other men, to insnare me, and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry," i.e., ex officio, "and of the same nature as the High Commission oath," which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, "if I had been proceeded against by a bill, I would have answered". Then the Council condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath, "without which many offenses might go "undiscovered and unpunished"; and in April 1638, 13 Car. I, the sentence was executed. On Nov. 3. 1640, he preferred a complaint to Parliament; and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was "illegal and against the liberty of the subject," and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13.,

1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality. "The ground whereof being that Mr. Lilburn refused to taken an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser"; and Mr. Cook arguing that, without an information, "to administer an oath was all one with the High Commission," where on the Lords ordered that the said sentence "be totally vacated . . . as illegal, and more unjust, against the liberty of the subject and law of the land and Magna Charta"; and on Dec, 21, 1648, he was finally granted £3000 in reparation.

Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes. These were both passed July 2-5 of the same year, and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical court, the administration ex officio of any oath requiring answer as to matters penal. This clause was in substance reenacted as soon as the Restoration of the Stuarts was effected.

But was the oath hereby totally abolished in ecclesiastical courts – that is, was it the "ex officio" proceeding only that was abolished, and could a man still be put to answer in a penal

matter, in a cause lying within the court's jurisdiction and begun by proper canonical presentment ?This question fairly remained open under the first statute, though less plausibly under the second one. During the next twenty years after the enactment of the second statute, the matter came often before the courts, in applications for prohibitions. The various rulings are hardly to be reconciled. But, by the end of the 1600s, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture.

Such, at any rate, beginning with the 1700s, was the application of the law ever after, without question. The statutes had abolished, in those courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.

II. [History of the principle in common law courts in jury trials.] But what, in the meantime, of the common law, and of jury trial? Thus far the controversy here examined had been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common law courts had concerned themselves with it simply by virtue of their superior authority to keep the church courts and other courts to their proper boundaries. In their enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, on answering on oath; the objection is as to who shall require it, and how it shall be required. On the very eve of the statute of 16 Car. I, and of the disappearance of the Star Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to "such

things as do not belong unto me." He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common law courts in jury trials?

(I) [Before the seventeenth century.] Down to the early 1600s, at any rate, it was certainly lacking. If we look at what the common law had to build upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no scruples against such compulsion. Compurgation, under its later name of "wager of law," was enforced in the 1500s without objection. Jury trial came to be approved as a trial so much more effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden. In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing, and as a method of summary self-exoneration which would be entirely too facile; it was the jurors' oaths that were to "try" him, not his own; and so, in jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500s the stature book records the sanction of oaths to accused persons. The Star Chamber statute of 1487 (3 Hen.VII, c. I) had expressly sanctioned the examination of

the accused on oath at the trial, because "little or nothing may be found by inquiry" of the ordinary sort. The statute of Hen. VIII, in 1533, authorized the common law officers to turn over indicted heretics for examination by the ordinaries upon oath. Wherever a party is committed to jail by the judges for fraud or other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it. Persons charged as bankrupts, as Jesuits, as abusers of warrants were to be examined on oath by common law officers. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial, and, so far as appears, not a murmur was ever heard against this process till the middle of the 1700s and no statutory measure was taken to caution the accused that his answer was not compellable until well on in the 1800s. The everyday procedure in the trials of the 1500s and the 1600s, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial, the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection. Furthermore, as the trial goes on, the accused, in all this period of 1500-1620, is questioned freely and judged by the judges to answer; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer.

A striking example is found in the jury trial of Udall, in 1590, for seditious libel; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previously, had plainly based his refusal on the illegality of making a man accuse himself by inquisition, has here, before a common law jury with witnesses charging him, no such claim to make:

Udall's Trial, 1. How. St. Tr. 1271, 1275, 1289 (1590): *Udall pleaded not guilty; and after argument made and witnesses testifying, Judge Clarke: "What say you? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it not?" declaring this to be a favor; Udall refused, and the judge finally asked: "Will you but say upon your honesty that you made it not?" Udall again refused; Judge Clarke: "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself"; then, to Udall: "Do not stand in it; but confess it". The same features appear still in1606, in the Jesuit Garnet's trial for the Gunpowder Plot; called before the Council inquisitorially, he denies his liability to answer; but, tried on indictment before a common law jury and the chief common law judges, he is questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from answer. And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.*

It is true that precedents apparently to the contrary have been alleged to exist – by Coke, for example, who invokes two common law cases to support his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common law rule. Even Coke himself, whose writings have since served as the chief source of information on this subject, does not actually go so far as to apply his arguments to any effect but the limitation of the ecclesiastical courts' proceedings. He is willing to stop them from requiring answers "which may be an evidence against him at the common law upon the penal statute"; but he says nothing about a common law illegality; indeed, this argument of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon law phrase (whose origin has been examined above) "nemo tenetur seipsum prodere"; but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in the king's common law proceedings.

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500s. Some of these, at first sight, might be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-incriminating. Other explanations, however, lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief,

apart from discovery, to enforce a forfeiture; on this ground (and remembering that an "answer" in chancery is a pleading as well as testimony) are explainable the cases refusing to compel an answer as to a forfeiture. In the next place, the Chancellor had almost no jurisdiction over criminal charges, hence, in cases of this nature, cognizance might be declined by refusing to compel an answer. But, where this jurisdiction was not disputable, there seems to have been no objection to compelling the answer. Finally, the chancery practice is to be interpreted by the rules of the ecclesiastical courts, already examined. The Chancellor was forming his procedure (hardly organized until Bacon's time, in the early 1600s) almost precisely after that of the ecclesiastical courts. So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the Chancellor's and the church's courts makes it plain that we need not look to the former for light upon the common law notions of the time-especially when that practice stands out plainly in the full and abundant reports throughout this whole period.

(2) ***[The early 1600s.]*** *For nearly a generation onwards, in the 1600s. there is no*

acknowledgment of any privilege in common law trials. Under Coke's leadership, from 1607 to 1616, the ecclesiastical courts had been kept within bounds; but here were as yet no bounds in common law proceedings. With 1620 begin indications ;that some impression was being transferred into that department. Nevertheless, in the parliamentary remonstrances to Charles I, and the discussion over ship money and forced loans and the Petition of Right, in the Parliament which ended in 1629, there is nothing about such a privilege".

(3) ***[The recognition of the privilege in the middle 1600s.]*** *Finally, however, in 1637-41, comes Lilburn's notorious agitation; and in 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished, and the "ex officio" oath to answer criminal charges is swept away with them. With all this stir and emotion, a decided effect is produced and is immediately communicated, naturally enough, to the common law courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer an incriminating question; he had merely claimed a proper proceeding of presentment or accusation. But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound to incriminate himself on any charge (no matter how properly instituted) or in any court (not merely in the ecclesiastical or Star Chamber tribunals). Then this claim comes to be conceded by the judges – first in criminal trials, and*

even on occasions of great partisan excitement; and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation. By the end of Charles II's reign, under the Restoration, there is no longer any doubt, in any court; and by this period, the extension of the privilege to include an ordinary witness, and not merely the party charged, is for the first time made. It is interesting to note, in passing, that the privilege, thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers.

Moreover, the privilege as yet, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard – did not disappear, indeed until the 1700s had begun.

So the interesting question is, How did this result come about? How did a movement which was directed, originally and throughout, against a method of procedure in ecclesiastical courts, produce in its ultimate effect a rule against a certain kind of testimony in common law courts? The process of thought, popular and professional, is to be accounted for. Now, for our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common

law privilege did not antedate the Restoration; and, in this instance, his explanation of the process of thought by which the transmutation took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the association of ideas – an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation. Read in the light of the foregoing details, the great reformer's words serve as a correct analysis of motives: ……

The privilege, thus creeping in by indirection, appears by no means to have been regarded in England as the constitutional landmark that the later American legislation has made it. In all the parliamentary remonstrances and petitions and declaration that preceded the expulsion of the Stuarts, it does not anywhere appear. Even by 1689, when the courts had for a decade ceased to question it, and at the English Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking. Whatever it was worth to the American constitution-makers of 1789, it was not worth mentioning to the English constitution-menders of 1689.

(4) ***[The appearance of the privilege in the American Bill of Rights.]*** *How then did it*

come to make its appearance in the constitutional discussions and the Bill of Rights to 1787-89?

The novelty and recentness of it all in common law tradition is apparent not only in the very gradual progress of the recognition in criminal trials after 1641 but also in the fact that it remained an unknown doctrine for that whole generation in the colony of Massachusetts – a colony not only familiar enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other lawbooks to inform its court and keep abreast of the times. In this colony the privilege (which had begun its career in England after the departure of its founders from England) was unrecognized till at least as late as 1685: more, they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed.

It might be supposed that the explanation of the Colonial conventions' insistence on it in the 1780s was to be found in the agitation then going on in France against the inquisitional feature of the Ordonnance of 1670. There appears no allusion, in Elliot's Debates on the Constitution, to the contemporary French movement: but the delegates who had been over there must have known of it. The proposals of reforms laid before the French Constitutional Assembly from the Provinces, in 1787, show how strong was the popular agitation. The Third Estate in every district, in their "cahiers" sent up to Paris, had voted to abolish compulsory sworn interrogation of the accused, and

the clergy in ninety-one districts had done the same. The decree of 1789 (though keeping the interrogation) abolished the oath "de veritate"; art. 12: "For this interrogatory, and for all others, the oath shall not be required from the accused"; and the Instructions of 1791 added: "Mere good sense suffices to convince of the uselessness and immorality of such an oath".

But an examination of the contemporary French literature shows that this was not the correct explanation, and that the process of inspiration was in fact just the reverse, i.e., from the American example to the French legislation. The Colonies had had their own experiences with highhanded prerogative courts. In the course of time they had developed the privilege in their own history, fortified no doubt by the legal learning brought back by the Colonial lawyers who had gone over to the Inns of Court for their education. So the proposals agitated in France in the 1780s were based explicitly on an acquaintance with the constitution of the prior decade in the new American states:

PITMAN, The Colonial and Constitutional History of the Privilege Against Self-crimination in America, 21 Va. L. Rev 763, 764-66, 783 (1935): [T] his privilege had been inserted in the constitutions or bills of right of seven [765] American States before 1789; namely, Virginia (June 1776), Pennsylvania (Sep. 1776), Maryland (Nov, 1776), North

Carolina (Dec. 1776) Vermont (July 1777), Massachusetts (Mar. 1780), and New Hampshire (1784).

French editions of these American constitutions were published in Paris as fast as they came from the separate State conventions. [Franklin writes (May 1777) "They (the French) read the translations of our separate colony constitutions with rapture,"] The demand for them became so great that Franklin was induced to get out an official edition of all the American constitutions in 1783. Sir Samuel Romilly, upon visiting the American Envoy in Paris, while these constitutions were being distributed by the thousands, expressed surprise that they were not suppressed by the government, and observed that they "certainly produced a very great sensation at Paris, the effects of which were probably felt many years afterwards." In fact, the greater part of those who were demanding a Declaration of Rights in 1789 had "imbibed their principles in America." [La Fayette heard Gen. Greene extend the privilege to Major Andre in 1780.] Nowhere was this American influence testified to more strongly than upon the floor of the National Convention. For example, in August 1789, Rabaut de Saint Ettienne, speaking from the floor said: "You have resolved upon a Declaration of Rights because your Cashiers impose it as your duty, and your Cahiers mentioned it because France has had America as its model." The records of those Assembly debates reveal conclusive evidence of the

> *fact that the stream of influence was running towards France and not towards America at this time.*
>
> *If we attempt to ascribe the influence upon America to the writings of the French political philosophers, we are faced with [766] the fact that those who cried loudest against the inquisitional feature of the Ordinance of 1670, such as Voltaire and Montesquieu, had all made their studies on this question in England. So the facts drive us to seek other grounds of explanation. . . .*
>
> *[783] The real reason for the American insistence that the privilege against self-incrimination be made a constitutional privilege may possibly be traced to the proceedings of the prerogative courts of Governor and Council, which constituted the Supreme colonial courts, and the proceedings instituted to enforce the laws of trade in the colonies.***"**
>
> *(Emphasis supplied)*

51. The Supreme Court in re: ***Selvi (supra)*** would examine the historical origins of the "right against self-incrimination" which perhaps is required to be reiterated and thus the following paragraphs from the rendition of the Supreme Court is quoted herein below:-

> ***"92****. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the "right to fair trial". There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in*

the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and the High Commissions which required the defendants and suspects to take ex officio oaths. These bodies mainly decided cases involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the defendant was required to answer all questions posed by the Judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a "right to silence".

***93**. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim nemo tenetur seipsum prodere (i.e. no one is bound to accuse himself) and the evolution of the concept of "due process of law" enumerated in the Magna Carta. [Refer Leonard Levy, "The Right against Self-Incrimination: History and Judicial History" [84(1) Political Science Quarterly 1-29 (March 1969)] .]*

***94**. The use of the ex officio oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the*

contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the "right to silence".

***95**. However, in 1648 a Special Committee of Parliament conducted an investigation into the loyalty of Members whose opinions were offensive to the army leaders. The Committee's inquisitional conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn what they regarded as a revival of the Star Chamber tactics. John Lilburne was once again tried for treason before this Committee, this time for his outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of Parliament in the English Civil War. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common law indictment and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-incrimination and the guarantee of a fair trial by invoking the idea of "due process of law" which had been stated in the Magna Carta.*

***96**. John H. Langbein (1994) has offered more historical insights into the emergence of the "right to silence". [John H. Langbein, "The Historical Origins of the Privilege against Self-Incrimination at Common Law" [92(5) Michigan Law Review 1047-1085 (March 1994)] .] He draws attention to the fact that even though ex officio oaths were abolished in 1641, the practice*

of requiring the defendants to present their own defence in criminal proceedings continued for a long time thereafter.

***97**. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists and political dissenters, thereby attracting considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer ("right to counsel") or the right to request the presence of the defence witnesses ("right of compulsory process"). Hence, the defendants were more or less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the Judge and the prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the case of the prosecution and lead to conviction.*

***98**. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A watershed in this regard was the Treason Act of 1695 (c. 3) which provided for a "right to counsel" as well as "compulsory process" in cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel was limited in the early years. For instance the defence lawyers could only help their clients with questions of law and could not make submissions related to the facts.*

99. *The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial system i.e. the testimony of the accused is viewed as the "best evidence" that can be gathered. The premise behind this is that innocent persons should not be reluctant to testify on their own behalf. This approach was followed in the inquisitional procedure of the ecclesiastical courts and had thus been followed in other courts as well. The obvious problem with compelling the accused to testify on his own behalf is that an ordinary person lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the Judge. Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition.*

100. *Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the "right to counsel" that the accused's "right to silence" became meaningful. With the consolidation of the role of the defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. <u>This</u>*

*segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level playing field between the prosecution and the defence. In addition to a defendant's "right to silence" during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.***"**

(Emphasis supplied)

52. In England the principle of protection against self-incrimination seem to be the result of an systematic development of law through a long period of progressive revulsion against the inquisitorial methods adopted and the barbarous sentences imposed by the Ecclesiastical Court and ultimately resulting in the abolition of the Court of Star Chamber after the final revolt by John Lilburn **(3 State Trials 1315)** resulting in the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. The Lilburn trial dates back to the year 1637 and the abolition of the Court of the Star Chamber in the year 1641.

53. ***Wigmore on Evidence, (Tillers revision, 1983) Volume VIII (S.2263 at page 362-363*** states:-

" *Form of Disclosure Protected*

2263. General Principle. *In the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses; this much is now conceded (2252 supra). It is therefore immaterial that the witness is protected by one constitution from "testifying," or by another from "furnishing evidence," or by another from "giving evidence," or by still another from "being a witness." These various*

phrasings have a common conception, in respect to the form of the protected disclosure. What is that conception?

Does it apply only (1) to self-incriminating disclosures which are testimonial (i.e. communicative, or assertive) in nature? Or (2) to self-incriminating disclosures which, whether or not testimonial, involve cooperative participation by the witness? Or (3) to all evidence obtained from a witness which incriminates him, whether or not his cooperation is involved?

It should be agreed, at least, that evidence satisfying only the third description – evidence obtained from a witness without compelling his cooperation, testimonial or otherwise, is not within the privilege, E.g, viewing, measuring, placing a hat on and even moving a limb of the relaxed body of the individual do not offend the policies of the privilege (2251 supra) and are not the sort of things which historically gave rise to the privilege (2250 supra). There is an understandable difference of opinion, however, as to whether it is the first or the more inclusive second description which correctly circumscribes the form of disclosure protected. Compare, e.g. (1) requiring the witness to make a verbal communication of an incriminating fact (testimonial cooperation), with (2) requiring him to write a sample of his handwriting for comparison purposes (nontestimonial cooperation).

The history of the privilege (2250 supra) – especially the spirit of the struggle by which its establishment came about – suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an

admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn communication of his knowledge of facts which would incriminate him. Such was the process of the ecclesiastical court, as opposed through two centuries – the inquisitorial method of putting the accused upon his oath in order to supply the lack of required two witnesses. Such was the complaint of Lilburn and his fellow objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath.

Such, too, is the main thrust of the policies of the privilege (2251 supra). While the policies admittedly apply to some extent to nontestimonial cooperation, it is in testimonial disclosures only that the oath and private thoughts and beliefs of the individual – and therefore the fundamental sentiments supporting the privilege – are involved.

In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The latter idea is as essential as the former."

(Emphasis supplied)

54. The doctrinal origins of the right against self-incrimination is traced back to the latin maxim *"nemo tenetur seipsum prodere"* (i.e. no one is bound to accused himself) and the evolution of the concept of *"due process of law"* enumerated in the Magna Carta.

55. The Supreme Court in re: ***Selvi (supra)*** would underline the rationale of the right against self-incrimination and hold:-

"Underlying rationale of the right against self-incrimination

102. *As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.*

103. *The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is*

*a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.***"**

(Emphasis supplied)

56. In re: ***State of Bombay v. Kathi Kalu Oghad***[31] the Supreme Court would hold:-

"11. *The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness". "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral*

[31] AIR 1961 SC 1808

testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma case [(1954) SCR 1077] that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the court to produce that document in accordance with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observations of this court in Sharma case [(1954) SCR 1077] that Section 139 of the Evidence Act has no bearing on the connotation of the word "witness" is not entirely well-founded in law. It is well established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a

light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a "personal testimony". The giving of a "personal testimony" must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression "to be a witness".

12. *In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by*

themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based another pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of "testimony".

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15. *In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement. "Compulsion" in the context, must mean what in law is called "duress". In the Dictionary of English Law by Earl Jowitt, "duress" is explained as follows:*

> *"Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per mines). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person."*

The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the

mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.

16. *In view of these considerations, we have come to the following conclusions:*

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused

person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".

(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".

(5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

(Emphasis supplied)

57. In re: ***Nandini Satpathy v. P.L Dani***[32], the Supreme Court speaking through ***Krishna Iyer J.*** would hold:-

> ***"57****. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes "compelled testimony", violative of Article 20(3).*
>
> ***58****. A police officer is clearly a person in authority. Insistence on answering is a form of*

[32](1978) 2 SCC 424

*pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.***"**

(Emphasis supplied)

58. In re: ***Selvi (supra)*** the Supreme Court would have occasion to examine the question whether the involuntary administration of Narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test violates the *"right against self- incrimination"* enumerated in Article 20 (3) of the Constitution. While doing so the Supreme Court would hold:-

"88. *In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] . Hence, we must examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process".*

89. *It must also be emphasised that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourty-fourth Amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a Proclamation of Emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:*

> ***"359***. *Suspension of the enforcement of the rights conferred by Part III during Emergencies.—(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.***"**
>
> *(Emphasis supplied)*

59. While examining the question what constitutes incrimination for the purpose of Article 20 (3) of the Constitution of India the Supreme Court in re: ***Selvi (supra)*** would hold :-

> ***"133***. *We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation*……**"**
>
> *(Emphasis supplied)*

60. In conclusion and in answer to the pivotal question posed the Supreme Court in re: ***Selvi (supra)*** would hold:-

> *"**262**. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the*

reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence."

(Emphasis supplied)

61. In re: ***Selvi (supra)*** the Supreme Court would hold that the compulsory administration of certain scientific techniques, namely narco-analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) bare a "*testimonial character*" and thereby triggers the protection of Article 20(3) of the Constitution.

62. In re: ***Mohd. Ajmal, Amir Kasab (supra)*** the Supreme Court would hold:-

"458*. In light of the above discussion, we are in agreement with the submissions of Mr Subramanium as formulated in paras 438.2. and 438.3. (supra) of his summing up. We accept that the right against self-incrimination under Article 20(3) does not exclude any voluntary statements made in exercise of free will and volition. We also accept that the right against self-incrimination*

under Article 20(3) is fully incorporated in the provisions of CrPC (Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with these statutory provisions is also equal compliance with the constitutional guarantees."

(Emphasis supplied)

63. In re: ***R. Dineshkumar v. State***[33], the Supreme Court while examining the provision of Section 132 of the Indian Evidence Act, 1872, would hold that the Supreme Court has held in re: ***Nandini Satpathy (supra)*** that the protection afforded by Section 161 (2) is wider than the protection afforded by Article 20(3) of the Constitution in some respects and that terminological expansion apart, Section 161(2) Cr.P.C. is a parliamentary gloss on the constitutional clause. The Supreme Court would hold that the rule against self-incrimination found expression in Indian law much before the advent of the Constitution of India under Article 20(3) and a facet of such rule is seen in Section 161 Cr.P.C., 1898 which corresponds to Section 161 Cr.P.C., 1973. It was held another facet of the rule against self-incrimination finds expression in Sections 25 and 26 and the proviso to Section 132 of the Evidence Act, 1872 which existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India.

64. It is settled that in the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights. Hence, we are required to examine the *"right against self-incrimination"* in respect of its relationship with the multiple dimensions of *"personal liberty"* under Article 21, which include guarantees such as the *"right to fair trial"* and *"substantive due process"*. It has been made amply clear that Articles 20 and 21 have a non-derogable status within Part III of the Constitution of India.

65. Article 20(3) of the Constitution of India embodies the right against self-incrimination. It is a fundamental right. The privilege against self-incrimination is said to be a fundamental canon of common-law jurisprudence and this principle characteristics features are:- (i) that the

[33] (2015) 7 SCC 497

accused is presumed to be innocent; (ii) that it is for the prosecution to establish his guilt, and (iii) that the accused need not make any statement against his will. Article 20(3) of the Constitution of India mandates a fundamental guarantee that no person accused of any offence shall be compelled to be a witness against himself. The prohibitive umbrella of Article 20(3) protects the accused back to the stage of police interrogation. A testimony by an accused person may be said to have been self-incriminatory when the compulsion comes within the prohibition of the constitutional provision and it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. As held by the Supreme Court the right against self-incrimination is now viewed as an essential safeguard in criminal procedure and its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. As has been well settled when a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false which is undesirable since it impedes the integrity of the trial and the subsequent verdict. The purpose of the *"rule against involuntary confessions"* is therefore to ensure that the testimony considered during trial is reliable and worthy of credence. It has been conclusively held that Article 20(3) of the Constitution of India protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) of the Constitution of India aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue.

66. The question, therefore, is would administration of oath to an accused, in the circumstances, make the confession testimonial?

67. Three things are absolutely necessary to invoke Article 20 (3) of the Constitution of India viz (i) An accused person; (ii) his being compelled to be a witness and (iii) such compulsion being against himself.

68. As held by the Supreme Court to be a *"witness"* means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise. The phrase used in Article 20 (3) is *"to be a witness"* and not to *"appear as witness"*. It follows that the protection afforded to an accused in so far as it is related, to the phrase *"to be a witness"* is not merely in respect of testimonial compulsion

in the Court room but may well extend to compelled testimony previously obtained from him. *"To be a witness"* in its ordinary grammatical sense means giving oral testimony in court. It has been held and accepted that the case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.

69. A bare perusal of Article 20(3) of the Constitution of India makes it abundantly clear that compulsion to be a witness against himself is the *sine-qua-non* of the fundamental guarantee. *"Compulsion"* is an essential ingredient of Article 20 (3) of the Constitution of India and covers a confession not made voluntarily. To compel is to cause or bring about by force, threats or overwhelming pressure. As held by the Supreme Court in re: ***Kathi Kalu Oghad (supra)*** compulsion in the context of Article 20(3) of the Constitution of India means what in law is called *"duress"*. As held by the Supreme Court in re: ***Nandini Satpathi (supra)*** *"We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3)*". As held by the Supreme Court in re: ***Selvi (supra)*** *"When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions"* is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts. In view of the aforesaid not administering oath on an accused person while recording his confession is a Constitutional mandate to be zealously protected under Article 20 (3) of the Constitution of India. An accused person when brought before a Magistrate or appears before a Magistrate to record a confession is required to explain to the accused that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him under Section 164 Cr.P.C. It is, therefore,

evident that the confession may be taken as evidence against the accused once made in compliance with Section 164 Cr.P.C. We are of the view that whether the accused was compelled to be a witness against himself can only be a question of fact requiring proof thereof. Compulsion, if proved would lead to a definite conclusion of violation of Article 20(3) of the Constitution of India. As held in re: ***Brijbasi Lal Shrivastava (supra)*** administration of an oath to the accused by a person in authority before taking a statement is by itself a concealed threat. We are of the view that threat in any form be it concealed or otherwise directly affect voluntariness of the confession and render the same inadmissible in evidence.

As pointed out by Mr. J. B. Pradhan, it is true that the object of criminal law process is to find out the truth and not to shield the accused from the consequences of his wrong doings. However, it is equally true that the process of finding out the truth must be undertaken keeping paramount Article 21 of the Constitution of India and the fundamental guarantee that no person shall be deprived of his life or personal liberty except in accordance to procedure established by law. In no circumstances can it be said that administration of oath to an accused before recording a confession which is prohibited by law and therefore illegal and unlawful (as we shall explain later) pursuant to which the confession is recorded was done by a procedure established by law. We are, thus, of the view that administering oath to an accused violates Article 20(3) of the Constitution of India and accordingly answer the first question in the affirmative.

70. We shall now attempt to answer the first two questions referred by the Division bench of this Court vide order dated 03.07.2017. As the first two questions referred are inter-related we shall seek to answer both together. The first two question seeking judicial determination are:-

> *(i). Whether the confessional statement recorded under the provisions of Section 164 Cr.P.C on oath, is fatal or could it be still protected by the provisions of Section 463 Cr.P.C and if so protected, then whether the judgment of the Division Bench of this Court reported in re:* ***Arjun Rai (supra)*** *is good law?*
>
> *(ii) Whether the mere administering of*

oath to an accused while recording his confessional statement keeping in mind sub-section (5) of section 164 Cr.P.C, without anything more, lead to an inference that the confessional statement is not voluntary and thus in violation to the fundamental requirement of Section 164 Cr.P.C and thus fatal ?

71. Section 164 Cr.P.C. reads thus:

> ***"164***. *Recording of confessions and statements.(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:*
>
> *Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:*
>
> *Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.*
>
> *(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.*

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.
Magistrate".

(5) Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

[5A)(a) In cases punishable under section 354, section 354A, section 354B, section 354C, Section 354D, sub-section (1) or sub-section (2) of

section 376, section 376B, section 376C, section 376D, section 376E, or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed;

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.]

*(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.***"**

72. In the oft cited and followed judgment of the Privy Council in re: ***Nazir Ahmad v. King Emperor***[34], it was held at page 588:-

[34] AIR 1936 Privy Council 253 (2)

"The matter to be considered and decided is one of plain principle and first importance—namely, is such oral evidence as that of the magistrate, Mr Vasisht, admissible? It was said for the respondent that it was admissible just because it had nothing to do with s. 164 or with any record. It was argued that it was admissible by virtue of ss. 17, 21, 24 and 26 of the Evidence Act, 1872, just as much as it would be if deposed by a person other than a magistrate.

It was also said, and with this argument their Lordships agree, that if the oral evidence was admissible then s. 91 of the Evidence Act requiring evidence in writing did not apply, because the matter would in such a case not be one which had to be reduced to writing. For the appellant, it was said that the magistrate was in a case very different from that of a private person, and that his case and his powers were dealt with and delimited by the Criminal Procedure Code, and that if this special Act dealing with the special subject-matter now in question set a limit to the powers of the magistrate the general Act could not be called in aid so to allow him to do something which he was unable to do, or was expressly or impliedly forbidden to do, by the special Act. The argument was that there was to be found by necessary implication in the Criminal Procedure Code a prohibition of that which was here attempted to be done: in other words that the magistrate must proceed under s. 164 or not at all.

To this contention it was answered that there was no ground for reading the word "may" in s. 164 as meaning "must" on the principle described in Julius v. Lord Bishop of Oxford. There is no need to call in aid this rule of

construction—well recognized in principle but much debated as to its application. It can hardly be doubted that a magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing madman, or for any other reason the magistrate thought it to be incredible or useless for the purposes of justice. Whether a magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognized rule—namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts—Taylor v. Taylor —and although the magistrate acting under this group of sections is not acting as a Court yet he is a judicial officer, and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to s. 164.

On the matter of construction ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of s. 164 is to allow evidence to be put in a form in which it can prove itself under ss. 74 and 80 of the Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by ss. 164 and 364 would be

of such trifling value as to be almost idle. Any magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of s. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.

As a matter of good sense, the position of accused persons and the position of magistracy are both to be considered. An examination of the Code shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. Nor is this surprising in a jurisdiction where it is not permissible for an accused person to give evidence on oath. So with regard to the magistracy: it is for obvious reasons most undesirable that magistrates and judges should be in the position of witnesses in so far as it can be avoided. Sometimes it cannot be avoided, as under s. 533; but where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. In their Lordships' view, it would be particularly unfortunate if magistrates were asked at all generally to act rather as police-officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police-officers under s. 162 of the Code; and to be at

the same time freed, notwithstanding their position as magistrates, from any obligation to make records under s. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses, and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships are, however, clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case. The evidence of Mr. Vasisht should therefore, in the opinion of their Lordships, have been rejected by the Court. The admission in evidence of Mr. Vasisht's memorandum, such as it was, is a minor point. It does not appear to have been used by him merely to refresh his memory, but to have been put in as a document. This is of no great importance, because if the oral evidence was allowed perhaps no more mischief was done by the admission of the memorandum; but it has always to be remembered that weight, or apparent weight, is lent to oral testimony by a written version of it closely related in time to the events described, and it is an additional objection to the proceedings under review that such a record as this should have been admitted in evidence."

(Emphasis supplied)

73. In re: ***Nazir Ahmed (supra)*** the Privy Council would lay down a fundamental rule of criminal jurisprudence following the dictum of in re: ***Taylor (supra)*** that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. The proposition of law stated first

in re: ***Taylor (supra)*** and adopted later by the Judicial Committee in re: ***Nazir Ahmad (supra)*** has been followed by the Supreme Court in a series of Judgments including ***Rao Shiv Bahadur Singh v. State of Vindhya Pradesh***[35], ***Singhara Singh (supra), Chandra Kishore Jha v. Mahavir Prasad***[36], ***Dhananjaya Reddy v. State of Karnataka***[37], ***Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd.***[38] and ***State of Rajasthan v. Mohinuddin Jamal Alvi & Anr.***[39]

74. In re: ***Nazir Ahmed (supra)*** the Privy Council would also hold on examination of Section 164 of the old Cr.P.C. that it carefully and precisely defined a procedure regulating what may be asked for, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. The Privy Council would also observe: *"Nor is this surprising in a jurisdiction where it is not permissible for an accused person to give evidence on oath."*

75. In re: ***Nazir Ahmed (supra)*** the Privy Council would also hold that it is for obvious reasons most undesirable that Magistrates and Judges should be in the position of witnesses in so far as it can be avoided but it cannot be avoided in cases falling under Section 533 (now section 463 Cr.P.C.).

76. In re: ***Sarwan Singh Rattan Singh v. State of Punjab***[40] the Supreme Court while examining the provisions of Section 164 of the old Cr.P.C. would hold:-

> ***"10.*** *..... It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code of Criminal Procedure is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of Section 164 are fully satisfied.*
>
> *It would of course be necessary in every case to put the questions prescribed by the High Court circulars but the questions intended to be*

[35] AIR 1954 SC 322
[36] (1999) 8 SCC 266
[37] (2001) 4 SCC 9
[38] (2008) 4 SCC 755
[39] (2016) 12 SCC 608
[40] AIR 1957 SC 637

put under sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary.

Incidentally, we may invite the attention of the High Court of Punjab to the fact that the circulars issued by the High Court of Punjab in the matter of the procedure to be followed, and questions to be put to the accused, by Magistrates recording confessions under Section 164 may be revised and suitable amendments and additions sade in the said circulars in the light of similar circulars issued by the High Courts of Uttar Pradesh, Bombay and Madras.

The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian Evidence Act. …….…..."

77. In re: ***Dara Singh (supra)*** the Supreme Court would have occasion to examine the confessions recorded of various accused persons under section 164 Cr.P.C. which was contested by the defence as being not voluntary. It was contested that the accused persons were produced before the Magistrate from Police custody and remanded back to police custody. In so far as one accused was concerned it was contested that he was produced from police custody and the other accused made a confession when he was on bail and in no case the Magistrate had assured the accused persons that if they decline they would not be sent to police custody. In such fact situation the Supreme Court would hold thus:-

"64*. The following principles emerge with regard to Section 164 Cr.P.C.:*

(i) The provisions of Section 164 CrPC must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply

his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement."
(Emphasis supplied)

78. In re: ***Shivappa v. State of Karnataka***[41] the Supreme Court would observe:-

"6. *……..it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same……."*

"7. *……. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the*

[41] (1995) 2 SCC 76

*court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.***"**

79. In re: ***Aloke Nath Dutta v. State of West Bengal***[42] the Supreme Court would hold:-

"Confession generally

> ***87.*** *Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.*
>
> *104. Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should sometime, in our opinion, be more intrusive than what is required in law. (See Babubhai Udesinh Parmar v. State of*

[42] (2007) 12 SCC 230

Gujarat [(2006) 12 SCC 268 : (2007) 1 SCC (Cri) 702 : (2006) 12 Scale 385].)"

(Emphasis supplied)

80. In re: ***Mohd. Jamiludin Nasir v. State of W.B.***[43] the Supreme Court would hold:-

> ***"21***. *Going by the prescriptions contained in Section 164 CrPC, what is to be ensured is that the confession is made voluntarily by the offender, that there was no external pressure particularly by the police, that the person concerned's mindset while making the confession was uninfluenced by any external factors, that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for suffering the conviction which may result in the imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not to make the confession after appearing before the Magistrate, the Magistrate should ensure that he is not entrusted to police custody. All the above minute factors were required to be kept in mind while recording a confession made under Section 164 CrPC in order to ensure that the confession was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and relied upon by the prosecution, the duty of the*

[43] (2014) 7 SCC 443

Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if while making such analysis the learned Sessions Judge develops any iota of doubt about the confession so recorded, the same will have to be rejected at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under Section 164 CrPC and convince itself that none of the above factors were either violated or given a go-by to reject the confession outright. Therefore, if the Sessions Judge has chosen to rely upon such a confession recorded under Section 164 CrPC, the appellate court as well as this Court while examining such a reliance placed upon for the purpose of conviction should see whether the perception of the courts below in having accepted the confession as having been made in its true spirit provides no scope for any doubt as to its veracity in making the statement by the accused concerned and only thereafter the contents of the confession can be examined."

(Emphasis supplied)

81. In India the privilege against self-incrimination appears in various relevant statutory provisions as stated above. The rule against self-incrimination seem to have found expression in Indian law much before the advent of the Constitution of India under Article 20(3) and as held by the Supreme Court, facets of such rule are seen in Section 161 Cr.P.C., 1898 which corresponds to Section 161 Cr.P.C., 1973, Sections 25 and 26 and the proviso to Section 132 of the Evidence Act, 1872 which existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As held by the Supreme Court in re: ***Mohd. Azmal Amir Kasab (supra)*** the right against self-incrimination under Article 20 (3) is fully incorporated in the provisions of Cr.P.C. (Section 161, 162, 163 and 164) and the Evidence Act, 1872 as manifestations of enforceable due process, and thus compliance with

these statutory provisions is also equal compliance with the constitutional guarantees.

82. Section 281 Cr.P.C. reads thus:

> ***"281***. *Record of examination of accused.- (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.*
>
> *(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.*
>
> *(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.*
>
> *(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.*
>
> *(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and*

hearing and that the record contains a full and true account of the statement made by the accused.

*(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.***"**

83. A perusal of Section 281 Cr.P.C. requires a Magistrate under sub-section (2), while recording the confession to record the whole of the examination of the accused, including every question put to him and every answer given by him in full and if the Magistrate is unable to do so owing to a physical or other capacity, and officer of the Court appointed by the Magistrate in this behalf must do so. The record is required, if practicable, to be in the language of the Court. This record is then required to be shown or read to the accused, or, if he does not understand the language in which it is written, to be interpreted to him in a language which he understands, and the accused shall be at liberty to explain or add to his answers. Thereafter the said record is required to be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

84. Section 463 Cr.P.C. reads thus:-

"463*. Non-compliance with provisions of section 164 or section 281.-(1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non- compliance, and may, if satisfied that such non- compliance*

has not in-jured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

*(2) The provisions of this section apply to Courts of appeal, reference and revision.***"**

85. The Supreme Court in re: ***Babu Singh v. State of Punjab***[44] would find that the confessions had not been recorded by the Magistrate in his own hands for the reason that he was not familiar with the writing in Urdu which meant that the requirement of Section 364 (3) of the old Cr.P.C. (now Section 281 Cr.P.C.) had not been complied with. In such factual narrative the Supreme Court would seek to answer: *"12. If the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of S. 364 (3) of the Code of Criminal Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as to make them inadmissible. ……."*. To answer the said question the Supreme Court would examine Section 164, Section 364 and Section 533 (now Section 463) of the Code of Criminal Procedure and hold:-

"12. *If the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of Section 364(3) of the Code of Criminal Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as to make them inadmissible. The decision of this question would naturally take us to three sections of the Code of Criminal Procedure. Section 164 of the Code confers power on the Magistrates specified in Section 164(1) to record statement and confessions. Section 164(2) provides a safeguard to protect the interest of innocent persons. It lays down that such statements, meaning the statements authorised to be recorded by Section 164(1) shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in the opinion of the*

[44] 1964 (1) Crl. LJ. 566

Magistrate, best fitted for the circumstances of the case. Then the section adds that such confessions shall be recorded, and signed in the manner provided in Section 364 and they shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried. It would thus be seen that sub-section (2) requires that the confessions should be recorded in the manner prescribed by Section 364; that is one safeguard provided by this section. Sub-section (3) then proceeds to provide further safeguards, it lays down that the Magistrate shall before recording, any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and it provides that when the confession is recorded after following the procedure prescribed by it the Magistrate shall make a memorandum at the foot of such record to the following effect.

13. *When we turn to Section 364 we find that sub-section (1) provides for the recording of the confession in full in the manner prescribed therein and for explaining the contents of the same to the accused in a language which he understands, and the accused shall be at liberty to explain or add to his answers. Sub-section (2) lays down that when the whole of the confession is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate, and the Magistrate shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. Sub-section (3) is*

important for our purpose. It provides that in cases in which the examination of the accused is not recorded by the Magistrate or judge himself, he shall be bound as the examination proceeds to make a memorandum thereof in the language of the court or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or judge with his own hand and annexed to the record. It also says that if the Magistrate is unable to make a memorandum as required, he shall record the reason of such inability. It would thus be clear that if a confession is recorded not by the Magistrate himself as required by Section 364(1) it is necessary that the Magistrate should make a memorandum as the examination proceeds and the memorandum should be signed by him. It is conceded that in the present case, the confessions were not recorded as required by Section 364(1) and yet the safeguard prescribed by Section 364 (3) has not been complied with. Mr Rana contends that the failure to comply with the requirements of Section 364(3) makes the confessions inadmissible.

14. *In dealing with this question we must consider the provisions of Section 533 of the Code. It is on the provisions of this section that Mr Khanna, for the respondent, relies. Section 533(1) lays down that if any court before which a confession recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding anything contained in*

Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Mr Khanna contends that the Magistrate has in fact given evidence in the trial court and the evidence of the Magistrate shows that the statement has been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the Magistrate in not complying with Section 364(3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention.

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19. *We have also been disturbed to notice that in recording the confessions the Magistrate has adopted a somewhat casual attitude. It is unnecessary to emphasise that the safeguards provided by Section 164(3) and Section 364(3) are valuable safeguards intended to protect the interest of innocent persons. The recording of a confession is a solemn and serious act, and so any Magistrate who records confessions must see to it that a tone of casualness does not enter in the transaction. Having regard to the evidence given by the Magistrate in the present case we are constrained to observe that when he got the confessions recorded in the present case he was not fully conscious of the solemnity and the seriousness of what he was doing. That is another factor which has weighed in our minds. Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore excluded from consideration it is impossible to sustain the*

charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of the appellants for the offence under Section 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are left out of consideration the charge of murder cannot be sustained. The result is the conviction of both the appellants for the offence under Section 302 read with Section 34 is set aside and consequently the sentence imposed on them for that offence is also set aside."

(Emphasis supplied)

86. In re: ***Babu Singh (supra)*** the Supreme Court would find some force in the contention of the learned Counsel for the State of Punjab that in view of Section 533 of the old Cr.P.C. unless it is shown that prejudice had been caused to the accused the irregularity committed by the Magistrate in not complying with Section 364 (3) of the old Cr.P.C. will not vitiate the confessions nor will it make them inadmissible based on the premise that the Magistrate had in fact given evidence in the Trial Court and the evidence of the Magistrate showed that statement had been duly recorded. Section 364 (3) of the old Cr.P.C. provided that in cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound as the examination proceeds to make a memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand and annexed to the record. It also provided that if the Magistrate is unable to make a memorandum as required he shall record the reason of such inability. It was conceded in the said case that the confessions were not recorded as required by Section 364 (1) and yet the safeguard prescribed by Section 364 (3) had not been complied with. The defence had contended that the failure to comply with the requirements of Section 364(3) makes the confession inadmissible. It would also reiterated that the safeguards provided by Section 164 (3) and

Section 364 (3) are valuable safeguards intended to protect the interest of innocent persons.

87. The Supreme Court in re: ***Singhara Singh (supra)*** would examine a case in which a Second Class Magistrate not specially empowered by the State Government to record a statement or confession under section 164 of the Code of Criminal Procedure had purported to record the confession of the accused under section 164. The only point argued before the Supreme Court in appeal was as to the admissibility of certain oral evidence, which evidence if held not admissible, there would be no other evidence to convict the respondents. This oral evidence was given by the Magistrate of the confessions of guilt made to him by the respondents and purported to have been recorded by him under section 164 of the Code of Criminal Procedure. The Supreme Court would examine the provisions of section 164, 364 and 533 of the Code of Criminal Procedure and hold that:-

> ***"5***. *A confession duly recorded under Section 164 would no doubt be a public document under Section 74 of the Evidence Act which would prove itself under Section 80 of that Act. Mr Dixit, who recorded the confession in this case was a Second Class Magistrate and the prosecution was unable to prove that he had been specially empowered by the State Government to record a statement or confession under Section 164 of the Code. The trial, therefore, proceeded on the basis that he had not been so empowered. That being so, it was rightly held that the confessions had not been recorded under Section 164 and the record could not be put in evidence under Sections 74 and 80 of the Evidence Act to prove them. The prosecution, thereupon called Mr Dixit to prove these confessions, the record being used only to refresh his memory under Section 159 of the Evidence Act. It is the admissibility of this oral evidence that is in question.*
>
> ***6***. *The Judicial Committee in Nazir Ahmed v. King-Emperor [LR 63 IA 372] held that when*

a Magistrate of the First Class records a confession under Section 164 but does not follow the procedure laid down in that section, oral evidence of the confession is inadmissible. Nazir Ahmed case [LR 63 IA 372] naturally figured largely in the arguments presented to this court and the courts below. The learned trial Judge following Ashrafi v. State [(1960) 2 ILR 488] to which we will have to refer later, held that Nazir Ahmed case [LR 63 IA 372] had no application where, as in the present case, a Magistrate not authorised to do so purports to record a confession under Section 164, and on that basis admitted the oral evidence. The learned Judges of the High Court observed that the present case was governed by Nazir Ahmed case [LR 63 IA 372] and that Ashrafi case [(1960) 2 ILR 488] had no application because it dealt "with the question of identification parades held by Magistrates. There was no occasion to discuss the question of confessions recorded before Magistrates". In this view of the matter the learned Judges of the High Court held the oral evidence inadmissible and acquitted the respondents. It would help to clear the ground to state that it had not been argued in Nazir Ahmed case [LR 63 IA 372] that Section 533 of the Code had any operation in making any oral evidence admissible and the position is the same in the present case. It would not, therefore, be necessary for us to consider whether that section had any effect in this, case in making any evidence admissible.

***7**. In Nazir Ahmed case [LR 63 IA 372] the Judicial Committee observed that the principle applied in Taylor v. Taylor [(1875) 1 Ch D 426, 431] to a court, namely, that where a power is given to do a certain thing in a certain*

way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under Section 164 and, therefore, held that the Magistrate could not give oral evidence of the confession made to him which he had purported to record under Section 164 of the Code. It was said that otherwise all the precautions and safeguards laid down in Sections 164 and 364, both of which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves".

8. *The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates*

the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.

9. *Mr Aggarwala does not question the validity of the principle but says that Nazir Ahmed case [LR 63 IA 372] was wrongly decided as the principle was not applicable to its facts. He put his challenge to the correctness of the decision on two grounds, the first of which was that the principle applied in Taylor v. Taylor [(1875) 1 Ch D 426, 431] had no application where the statutory provision conferring the power was not mandatory and that the provisions of Section 164 were not mandatory as would appear from the terms of Section 533.*

10. *This contention seems to us to be without foundation. Quite clearly, the power conferred by Section 164 to record a statement or confession is not one which must be exercised. The Judicial Committee expressly said so in Nazir Ahmed case [LR 63 IA 372] and we did not understand MrAggarwala to question this part of the judgment. What he meant was that Section 533 of the Code showed that in recording a statement or confession under Section 164, it was not obligatory for the Magistrate to follow the procedure mentioned in it. Section 533 says that if the court before which a statement or confession of an accused person purporting to be recorded under Section 164 or Section 364 is tendered in evidence, "finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded". Now a statement would*

not have been "duly made" unless the procedure for making it laid down in Section 164 had been followed. What Section 533, therefore, does is to permit oral evidence to be given to prove that the procedure laid down in Section 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in Section 164 is not intended to be obligatory, Section 533 really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually had been followed in certain cases where the record which ought to show that does not on the face of it do so.

11. *The second ground on which Mr Aggarwala challenged the decision in Nazir Ahmed case [LR 63 IA 372] was that the object of Section 164 of the Code is to permit a record being kept so as to take advantage of Sections 74 and 80 of the Evidence Act and avoid the inconvenience of having to call the Magistrate to whom the statement or confession had been made, to prove it. The contention apparently is that the section was only intended to confer a benefit on the prosecution and, therefore, the sole effect of the disregard of its provisions would be to deprive the prosecution of that benefit, for it cannot then rely on Sections 74 and 80 of the Evidence Act and has to prove the confession by other evidence including the oral evidence of the Magistrate recording it. It was, therefore, said that the principle adopted in Nazir Ahmed case [LR 63 IA 372] had no application in interpreting Section 164.*

12. *A similar argument was advanced in Nazir Ahmed case [LR 63 IA 372] and rejected by the Judicial Committee. We respectfully agree with that view. The section gives power to make a record of the confession made by an accused which may be used in evidence against him and at the same time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in evidence. The record, if duly made may no doubt be admitted in evidence without further proof but if it had not been so made and other evidence was admissible to prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were obviously not created for nothing and it could not have been intended that the safeguards might at the will of the prosecution be bypassed. That is what would happen if oral evidence was admissible to prove a confession purported to have been recorded under Section 164. Therefore it seems to us that the object of Section 164 was not to give the prosecution the advantage of Sections 74 and 80 of the Evidence Act but to provide for evidence being made available to the prosecution subject to due protection of the interest of the accused.***"***

13. *Mr Aggarwala then contended that Nazir Ahmed case [LR 63 IA 372] was distinguishable. He said that all that the Judicial Committee decided in Nazir Ahmed case [LR 63 IA 372] was that if a Presidency Magistrate, a Magistrate of the First Class or a Magistrate of the Second Class specially empowered in that behalf records a statement or confession under Section 164 but the procedure laid down in it is not complied with, he cannot give oral evidence*

to prove the statement or confession. According to Mr Aggarwala, it does not follow from that decision that a Magistrate of a First Class not mentioned in the section, for example, a Magistrate of the Second Class not specially empowered by the State Government cannot give oral evidence of a confession made to him which he had purported to record under Section 164 of the Code.

***14**. It is true that the Judicial Committee did not have to deal with a case like the present one where a Magistrate of the Second Class not specially empowered had purported to record a confession under Section 164. The principle applied in that decision would however equally prevent such a Magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by Section 164 on certain Magistrates of higher classes. Obviously, it was not intended to confer the power on Magistrates of lower classes. If, therefore, a proper construction of Section 164, as we have held, is that a Magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by Section 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and could be ignored, where the confession had been made to a Magistrate of a lower class and that such a Magistrate was, therefore, free to give oral evidence of the confession made to him. We*

cannot put an interpretation on Section 164 which produces the anomaly that while it is not possible for higher class Magistrates to practically abrogate the safeguards created in Section 164 for the benefit of an accused person, it is open to a lower class Magistrate to do so. We, therefore, think that the decision in Nazir Ahmed case [LR 63 IA 372] also covers the case in hand and that on the principle there applied, here too oral evidence given by Mr Dixit of the confession made to him must be held inadmissible;

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***"21**. The result is that the appeal fails and is dismissed."*

(Emphasis supplied)

88. In re: ***Singhara Singh (supra)*** the Supreme Court would notice that in re: ***Nazir Ahmed (supra)*** it had not been argued that Section 533 of the old Cr.P.C. had any operation in making in any oral evidence admissible and therefore it would not be necessary to consider in re: ***Singhara Singh (supra)*** whether that section had any effect in that case in making any evidence admissible. Further, in re: ***Singhara Singh (supra)*** the Supreme Court would hold that a statement would not be *"duly made"* unless the procedure for making it as laid down in Section 164 Cr.P.C. had been followed. The Supreme Court would further hold that Section 533 of the old Cr.P.C. emphasizes that the procedure provided for in Section 164 of the old Cr.P.C. must be followed and further Section 533 only permits oral evidence to prove that the procedure had actually had been followed in certain cases where the record which ought to show that does not on the face of it do so.

89. At this stage it would be relevant to examine certain legislative changes made to the erstwhile Section 533 of the old Cr.P.C while enacting the new provision of Section 463 Cr.P.C. The following chart would clearly reflect the said changes:-

Section 533 old Cr.P.C	Section 463 Cr.P.C
"533. *Non compliance with provisions of Section 164 or 364:* ***(1)*** *If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and, notwithstanding anything contained in the Indian Evidence Act, 1872, Section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.* ***(2)*** *The provisions of this section apply to Courts of Appeal, Reference and Revision.****"***	***"463.*** *Non-compliance with provisions of section 164 or section 281.-****(1)*** *If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non- compliance, and may, if satisfied that such non-compliance has not in-jured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.* ***(2)*** *The provisions of this section apply to Courts of appeal, reference and revision.****"***

90. Under Section 533 of old Cr.P.C the Court was required to take evidence that such person duly made the statement recorded when it finds that the provisions of Section 164 or 364 of old Cr.P.C have not been complied with and notwithstanding Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Under Section 463 Cr.P.C the Court is now required to take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded,

admit such statement. The historical perspective to this legislative change is that there were conflicting decisions rendered by different Courts on the scope and applicability of Section 533 of the old Cr.P.C. The Law Commission of India vide its Forty-First Report dated September, 1969 recommended that sub-section (1) of Section 533 of the Old Cr.P.C. be amended. The said recommendation was accepted and Section 463 Cr.P.C enacted. Details of the said recommendation is quoted hereunder:-

> ***"Law Commission of India, Forty-First Report (The Code of Criminal Procedure, 1898), September, 1969 (Vol.I), Government of India, Ministry of Law.***
>
> Chapter XLV
>
> ***Irregular Proceedings***
>
> ***Introductory. 45.1*** *Chapter 45 deals with the effect of irregularities in procedure on the validity of the proceedings in which they occur. The Code recognizes the principle that is not every deviation from, or neglect of, procedural formalities and technicalities that would vitiate the proceedings of a Court. Broadly speaking, only irregularities that have caused susbstantial prejudice to the accused will render the proceedings invalid, while minor or inconsequential errors or omissions are considered curable. The Chapter contains specific provisions saving irregularities on certain matters, as also a residuary provisions saving irregularities in general. At the same time, there are certain provisions of the Code which are considered so vital that their disregard must vitiate a fair and proper trial and, therefore, destroy the validity of the proceedings.*
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45.6. *Section 533 provides that if the Court before which a statement or confession of the accused person purporting to be recorded under section 164 and section 364 is tendered in evidence, finds that any of the provisions of such sections have not been complied with by the Magistrate recording the statement, it shall "take evidence that such person duly made the statement recorded". This expression seems to have created some difficulty in interpretation, as is evidenced by the conflicting decisions of the various Courts.*

One has to distinguish between two questions, (1) whether the confession or other statement was "duly made", that is to say, made after giving the necessary warning and after putting the required questions under section 164, and (ii) whether the confession or other statement, duly made, was properly recorded.

In the first case, section 533 should not apply, because, to apply the section in such cases would defeat the very object of sections 164 and 364, thereby depriving the accused of a beneficial provision on a matter on which the law has always shown its anxious concern. It is only the second kind of defect- defect in recording – that should be curable. The Magistrate should have complied with the substantial provisions of section 164, and there can be no saving for a non-compliance on that account. If such compliance is not apparent from the record. It can be proved otherwise. That is all that section 533 is intended to provide for.

As observed by the Supreme Court –

"Now a statement would not have been 'duly made' unless the procedure for making it laid down in section 164 had been followed. What section 533 therefore does is to permit oral evidence to be given to prove that the procedure laid down in section 164 had in fact been followed when the Court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in section 164 is not intended to be obligatory, section 533 really emphasizes that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so."

45.7. *We would, therefore, recommend that sub-section (1) of section 533 be amended as follows to clarify that the evidence given should relate to the apparent non-compliance with the statutory provisions:-*

"(1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is rendered or has been received in evidence finds that any of the provisions of either of such sections has not been complied with by the Magistrate recording the statement, it may notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and

> *may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement."*

91. The Forty First Report of the Law Commission of India was for the revision of the old Cr.P.C. A Bill on the Code was introduced in the Parliament which became law on 25.01.1974.

92. In re: ***Kehar Singh (supra)*** the Supreme Court would examine the death sentence imposed by the Trial Judge on the two appellants for the charge of murder of Smt. Indira Gandhi. While examining the appeal from the High Court which confirmed the order of conviction and sentence passed by the Trial Court, the Supreme Court would have occasion to examine the case where the Magistrate was found to have not complied with the mandate of sub-section (2) of Section 164 of Cr.P.C. and the curability of non-compliance of such a mandate under Section 463 Cr.P.C. and hold:-

> ***119***. *On a consideration of the above decisions it is manifest that if the provisions of Section 164(2) which require that the Magistrate before recording confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. The compliance of the sub-section (2) of Section 164 is therefore, mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub-section (2) of*

Section 164 read with Section 281 have in fact been complied with. If the court comes to a finding that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under Section 463 (Section 533 of the old Criminal Procedure Code) but when there is non-compliance of the mandatory requirement of Section 164(2) of the Criminal Procedure Code and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate, this substantial defect cannot be cured under Section 463, Criminal Procedure Code.

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124. *In the instant case the accused Satwant Singh who was in police custody was produced before the Magistrate Shri S.L. Khanna on 29-11-1984. On that day the accused made an application (Ex. PW 11-A) stating that he wanted to make a statement about the facts concerning Indira Gandhi Assassination Case. The Magistrate directed the remand of the accused in judicial custody till 1-12-1984 giving the accused time to reconsider and reflect. The Magistrate also told him that he was not bound to make any statement and if any statement is made the same might be used against him. The Magistrate also directed to send a letter to the Secretary, Legal Aid Committee to provide legal assistance to the accused at the expense of the State. On 1-12-1984, the Magistrate enquired of the accused whether he wanted to make a statement whereon the accused stated that he wanted to make a statement. He was allowed to consult his counsel, Shri I.U. Khan, advocate who conferred with him*

for about 15 minutes privately. As the accused insisted that his statement be recorded, the application was sent by the Magistrate, Shri S.K. Khanna to the Link Magistrate, Shri Bharat Bhushan for recording his statement. Before recording his statement Dr Vijay Kumar was called to examine the accused. Dr Vijay Kumar stated in his report (Ex. PW 11-B) that in his opinion the accused is fit to make his statement. It appears from Ex. PW 11-B-2 as well as from the questions and answers which were put to the accused (Ex. PW 11-B-3) that the Link Magistrate, Shri Bharat Bhushan warned the accused that he was not bound to make any confessional statement and in case he does so it may be used against him during trial. The accused in spite of this warning wanted to make a statement and thereafter the confessional statement Ex. PW 11-C was recorded by the Link Magistrate. In the certificate appended to the said confessional statement it had been stated that there was no pressure upon the accused and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. Therefore, it appears that the accused was put the necessary questions and was given the warning that he was not bound to make any statement and in case any statement is made, the same might be used against him by the prosecution for his conviction. Of course, no question was put by the Magistrate to the accused as to why he wanted to make a confessional statement. It also appears from the evidence of the Magistrate, Shri Bharat Bhushan (Ex. PW 11) that the confessional statement was made voluntarily by the accused. So the defect in recording the statement in the form prescribed is cured by Section 463 of the Code of Criminal Procedure. It is indeed appropriate to mention in

*this connection that the defect in recording the statement in appropriate form prescribed can be cured under Section 463 of the Code of Criminal Procedure provided the mandatory provisions of Section 164(2) namely explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him, have been complied with and the same is established on an examination of the Magistrate that the mandatory provisions have been complied with..***"**

(Emphasis supplied)

93. In re: ***Kehar Singh (supra)*** the Supreme Court would specifically examine the provision of Section 463 Cr.P.C. After a detailed and thorough analysis of the judgments of the Supreme Court and various High Courts it would categorically hold that on a consideration of the decisions it is manifest that if the provisions of Section 164(2) Cr.P.C. which requires the Magistrate before recording confession to explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reason to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. It was held by the Supreme Court that the compliance of sub-section (2) of Section 164 is therefore, mandatory and imperative and non compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub-section (2) of Section 164 read with Section 281 have in fact been complied with. If the Court comes to a finding that such a compliance had in fact been made, the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under section 463 but when there is non-compliance of the mandatory requirement of Section 164(2) of Cr.P.C. and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate, the substantial defect cannot be cured under Section 463 Cr.P.C. While holding so the Supreme Court would examine the evidence of the Magistrate in detail to appreciate whether the confession was voluntary or not and being satisfied

come to the conclusion that the defect in recording the statement in the form prescribed is cured by Section 463 of the Cr.P.C. It would also hold that the defect in recording the confession in appropriate form prescribed can be cured under Section 463 if the mandatory provision of Section 164 (2) had been complied with.

94. A similar question arose before the Supreme Court in re ***State v. Nalini***[45] while examining the case relating to the assassination of former Prime Minister of India, Rajiv Gandhi by a human bomb while dealing with the death reference of accused Nalini the Supreme Court would examine the confession of Nalini who had denied in her statement under section 313 Cr.P.C. that a confession was voluntary. The Supreme Court would observe:-

> ***"400****. Coming to the confession of Nalini (A-1), it was submitted by Mr Natarajan that she, in her confession, referred to Murugan (A-3), Arivu (A-18), Bhagyanathan (A-20) and Padma (A-21) among the accused now arraigned before the Court. She also referred to Jayakumar (A-10) though he comes in the picture after the act of assassination had been completed. Nalini (A-1) who was present at the scene of the crime is the sole surviving accused of the group that had gone to Sriperumbudur in furtherance of the conspiracy to assassinate Rajiv Gandhi.* Nalini (A-1) has denied in her statement under Section 313 of the Code that her confession was voluntary. *She said blank papers were got signed from her. This confession does not satisfy the requirement of law under Section 15 of TADA and Rule 15(3) of the TADA Rules though it is not disputed that all the confessions are recorded by V. Thiagarajan (PW 52), Superintendent of Police.*
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> ***401.*** *It was submitted that the certificate required to be recorded under Rule 15(3) of the Rules of TADA is on the same lines as given in Section 164(4) of the Code. Section 164(4) of the Code is as under:*

[45] (1999) 5 SCC 253

"164. (4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect—

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate.' "

402. *It is unnecessary to refer to the provisions of Section 281 of the Code as it is not disputed that otherwise the confessions of the accused have been properly recorded. Contention in the case of Nalini (A-1) is that the mandatory provisions of Rule 15(3) have been violated as it is not signed by Nalini (A-1) whose signatures are required at the end of the confession. It was thus submitted that since the confession does not bear the signatures of Nalini (A-1) it could not be said to be a valid confession. It is important that the accused signs the confession at the end. In that way he comprehends that he has made confession. Confession of Nalini (A-1), it was submitted, has to be rejected in its entirety. Confession is said to be in 18 pages out of which only pp. 1 to 16 bear her signatures while pp. 17 and 18, which are crucial to the confession, do not bear her*

signatures. It may be said that the police officer has appended his certificate at the end of the confession but his recording of the certificate is immaterial if the accused did not append his signatures at the end of the confession. Omission of signatures of Nalini (A-1) cannot cure the defect. V. Thiagarajan (PW 52), who recorded the confession, merely stated in the examination-in-chief that his not getting the signatures of Nalini (A-1) was an omission. No explanation has been given as to why the omission occurred and it was not for the accused to bring out in cross-examination as to the circumstances under which signatures of Nalini (A-1) could not be obtained at the end of the confession. It is also not relevant if each page of the confession is signed, signature has to be put on the last page at the end of the confession and only then endorsement by the police officer recording the confession has a meaning. Both the signatures at the end of the confession and the certificates of the police officer must go together. Rule 15 provided an assurance that confession recorded is as per prescribed provisions. In support of the submission Mr Natarajan referred to a Constitution Bench decision of this Court in Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] where this Court considered constitutional validity of the provisions of Section 15 of TADA and Rule 15 of the TADA Rules. It was submitted that the constitutional validity of TADA was upheld because of the safeguards provided by Rule 15 for recording confession by police officer which under ordinary law is impermissible. In Kartar Singh case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] the Court said: (SCC p. 680, para 254)

> *"254. In view of the legal position vesting authority on higher police officer*

to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hypercriticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability as it could be ironically put that when a Judge remarked, 'Am I not to hear the truth', the prosecution giving a startling answer, 'No, Your Lordship is to hear only the evidence'."

This is how this Court analysed Section 15 and Rule 15: (SCC pp. 681-82, paras 257-62)

"257. As per Section 15(1), a confession can either be reduced into writing or recorded on any mechanical device like cassettes, tapes or soundtracks from which sounds or images can be reproduced. As rightly pointed out by the learned counsel since the recording of evidence on mechanical device can be tampered, tailored, tinkered, edited and erased, etc., we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession under Section 15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent.

258. Sub-section (2) of Section 15 enjoins a statutory obligation on the part

of the police officer recording the confession to explain to the person making it that he is not bound to make a confession and to give a statutory warning that if he does so it may be used as evidence against him.

259. Rule 15 of the TADA Rules imposes certain conditions on the police officer with regard to the mode of recording the confession and requires the police officer to make a memorandum at the end of the confession to the effect that he has explained to the maker that he was not bound to make the confession and that the confession, if made by him, would be used as against him and that he recorded the confession only on being satisfied that it was voluntarily made. Rule 15(5) requires that every confession recorded under Section 15 should be sent forthwith either to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and the Magistrate should forthwith forward the recorded confession received by him to the Designated Court taking cognizance of the offence.

260. For the foregoing discussion, we hold that Section 15 is not liable to be struck down since that section does not offend either Article 14 or Article 21 of the Constitution.

261. Notwithstanding our final conclusion made in relation to the intendment of Section 15, we would hasten

to add that the recording of a confession by a Magistrate under Section 164 of the Code is not excluded by any exclusionary provision in the TADA Act, contrary to the Code but on the other hand the police officer investigating the case under the TADA Act can get the confession or statement of a person indicted with any offence under any of the provisions of the TADA Act recorded by any Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate of whom the two latter Magistrates are included in Section 164(1) by sub-section (3) of Section 20 of the TADA Act and empowered to record confession.

262. The net result is that any confession or statement of a person under the TADA Act can be recorded either by a police officer not lower in rank than a Superintendent of Police, in exercise of the powers conferred under Section 15 or by a Metropolitan Magistrate or Judicial Magistrate or Executive Magistrate or Special Executive Magistrate who are empowered to record any confession under Section 164(1) in view of sub-section (3) of Section 20 of the TADA Act."

Reference was also made to a Division Bench decision of the Bombay High Court in Abdul Razak Shaikh v. State of Maharashtra [1988 Cri LJ 382 : 1987 Mah LJ 863 (Bom)] which relying on a decision of the Privy Council in Nazir Ahmad v. King-Emperor [AIR 1936 PC 253 (2) : 63 IA 372] held

"that the provision that the Magistrate after recording confession should obtain the signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory".

The High Court said that this omission cannot be cured by examining the Magistrate under Section 463 of the Code. Section 463 of the Code is as under:

"463. Non-compliance with provisions of Section 164 or Section 281.— (1) If any court before which a confession or other statement of an accused person recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence finds that any of the provisions of either or such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of Appeal, reference and revision."

In Nazir Ahmad v. King-Emperor [AIR 1936 PC 253 (2) : 63 IA 372] the

Magistrate, who purportedly recorded the confession, was called as a witness. He said that the accused made a full confession of his participation in the crime. The Magistrate said that he made rough notes of what he was told and, after dictating to a typist memorandum from the rough notes, destroyed them. The Board then noticed:

> *"He produced, and there was put in evidence, a memorandum, called a note, signed by him, containing the substance but not all of the matter to which he spoke orally. The note was signed by him and at the end, above the signature, there was appended a certificate somewhat to the same effect as that prescribed in Section 164, and in particular stating that the Magistrate believed that 'the pointing out and the statements were voluntarily made'. But it was not suggested that the Magistrate, though he was manifestly acting under Part 5 of the Code, either purported to follow or in fact followed the procedure of Sections 164 and 364 (old Code). Indeed, as there was no record in existence at the material time, there was nothing to be shown or to be read to the accused, and nothing he could sign or refuse to sign. The Magistrate offered no explanation of why he acted as he did instead of following the procedure required by Section 164."*

403. *The Board did not express any opinion in this case on the question of the operation or scope of Section 533 (old) corresponding to Section 463 of the present Code.*

It was conceded that the Magistrate neither acted nor purported to act under Section 164 or Section 364 (old) and nothing was tendered in evidence as recorded or purporting to be recorded under either of the sections. The Board then went on to hold as under:

> *"On the matter of construction Sections 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of Section 164 is to allow evidence to be put in a form in which it can prove itself under Sections 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions*

of Section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case."

In Abdul Razak Shaikh case [1988 Cri LJ 382 : 1987 Mah LJ 863 (Bom)] the Bombay High Court also relied on a decision of the Nagpur High Court in Neharoo Mangtu Satnami v. Emperor [AIR 1937 Nag 220 : 38 Cri LJ 642] where also the Nagpur High Court relying on the aforesaid decision of the Privy Council in Nazir Ahmad v. King-Emperor [AIR 1936 PC 253 (2) : 63 IA 372] held that the evidence of the Magistrate, who recorded the confession of the accused and did not obtain his signatures thereon, was inadmissible. The Magistrate also while recording the confession of the accused did not follow the provisions of Sections 164 and 364 of the Code (old) and did not record the confession of the accused with required care and formality. He also did not record the certificate as required by Section 164 and also failed to obtain the signature of the accused. The Magistrate subsequently went into the witness box for the prosecution and deposed that the confession was made by the accused voluntarily. In these circumstances the High Court held that the evidence of the Magistrate was inadmissible and the confession recorded by him was ineffective.

***404**. In the case before the Bombay High Court contention was that*

"as per the provisions of sub-section (4) of Section 164 CrPC it is mandatory for the Magistrate, after recording the confession,

to obtain the signature of the accused thereon and as in the present case the learned Judicial Magistrate failed to obtain the signature of the accused on the confession recorded by him, that confession could not be admitted in evidence and the defect could not be cured by invoking the provisions of Section 463 CrPC".

This contention was upheld by the High Court relying on the aforesaid two decisions, one of the Privy Council and the other of the Nagpur High Court. We do not think the view taken by the Bombay High Court and the Nagpur High Court is correct. It may be noted that the Privy Council did not consider the scope and applicability of Section 463 in the circumstances of the case before it. In that case it was conceded that the confessions were not recorded either under Section 164 or Section 281 of the Code. The view taken by the Bombay High Court appears to us to be rather too technical and if we accept this view it would be almost making Section 463 of the Code ineffective. Confession of Nalini (A-1) runs into 18 pages. The certificate as required by Rule 15(3) of the TADA Rules in the form prescribed has been appended by V. Thiagarajan (PW 52), SP, at the end of the confession. Signatures of Nalini (A-1) appear on pp. 1 to 16. In his testimony V. Thiagarajan (PW 52) has submitted that his not getting signatures of Nalini (A-1) at the end of the confession is an omission. There is no cross-examination of V. Thiagarajan (PW 52) as to why the omission occurred. It has not been suggested that the omission was deliberate. Statement of V. Thiagarajan (PW 52) is forthright. There could certainly be a human error but that would not mean that Section 463 of the Code becomes

inapplicable. Mr Natarajan is correct in his submission that when the requirement of law is that confession should be signed by the person making it, it would mean his signatures at the end of the confession. What Section 463 requires is that evidence could be led of police officer recording the confession as to why provisions of Rule 15(3) could not be complied with while recording the confession. It has not been suggested or brought on record as to how not getting signatures of Nalini (A-1) on the last pages of the confession has injured her in her defence on the merits of the case. The confession has been corroborated in material particulars by means of an independent evidence even if the confessions of the co-accused are set apart. Confession of Nalini (A-1) was recorded on 7-8-1991 and was sent to the Court of the Chief Judicial Magistrate on the following day and on 9-8-1991 it was sent to the Designated Court. We find that the confession was duly made, which was recorded by V. Thiagarajan (PW 52). We are, therefore, inclined to admit the confession of Nalini (A-1) overruling the objection that Rule 15(3) of the TADA Rules has been violated.

405**. We think sufficient time was given to the accused in the circumstances of the case for them to reflect if they wanted to make confession. Merely because confession was recorded a day or so before the police remand was to expire would not make the confession involuntary. No complaint was made before the trial court that confession was the result of any coercion, threat or use of any third-degree methods or even playing upon the psychology of the accused."**

95. In re: ***Nalini (supra)*** the Supreme Court would hold that the view taken by the Bombay High Court in Abdul Razak Shaikh case (1988 Cri.LJ

382) and the Nagpur High Court in Neharoo Mangtu Satnami v. Emperor (AIR 1937 Nag. 220) relying upon the decision of the Privy Council in re: ***Nazir Ahmed (supra)*** is not correct. The Bombay High Court had held that the provision that the Magistrate after recording confession should obtain the signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory. The High Court also held that this omission cannot be cured by examining the Magistrate under Section 463 of the Code. The Bombay High Court also relied on a decision of the Nagpur High Court relying upon the decision in re: ***Nazir Ahmed (supra)*** had held that the evidence of the Magistrate, who recorded the confession of the accused and did not obtain his signature thereon, was inadmissible. The Supreme Court once again held that the Privy Council had not considered the scope and applicability of Section 463 of Cr.P.C. in the circumstances of the case before it. The Supreme Court would hold that the view taken by the Bombay High Court was too technical and if that view was accepted it would be almost making Section 463 of the Code ineffective. While holding so the Supreme Court would examine the confession of Nalini intricately. It would examine as to why the Magistrate had failed to obtain the signature of the accused on the confession recorded by him. The Supreme Court would then hold:-

> ***"404.*** *…….In his testimony V. Thiagarajan (PW 52) has submitted that his not getting signatures of Nalini (A-1) at the end of the confession is an omission. There is no cross-examination of V. Thiagarajan (PW 52) as to why the omission occurred. It has not been suggested that the omission was deliberate. Statement of V. Thiagarajan (PW 52) is forthright. There could certainly be a human error but that would not mean that Section 463 of the Code becomes inapplicable. Mr Natarajan is correct in his submission that when the requirement of law is that confession should be signed by the person making it, it would mean his signatures at the end of the confession. What Section 463 requires is that evidence could be led of police officer recording the confession as to why provisions of*

Rule 15(3) could not be complied with while recording the confession. ……..…..…..….."

96. In re: ***Ram Singh (supra)*** the Supreme Court would have occasion to examine a situation where a confessional statement had been recorded by the Magistrate as per the provisions of section 164 Cr.P.C. but had failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement. The said Magistrate had however, stated in his evidence before the Court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that the accused was not under any pressure from any corner, that in the room in which the said confessional statement was recorded it was only he and the Doctor who were present and none else and that no police officer was available even within the precincts of the hospital. On such fact situation the Supreme Court would hold that the said defect is cured by section 463 as the mandatory requirement provided under section 164 (2), namely, explaining to the accused that he was not bound to make a statement and if a statement was made the same might be used against him had been complied with and the same is establish from the certificate appended to the statement and from the evidence of the Magistrate. It was in this context that the Supreme Court distinguished the judgment of the Judicial Committee in re: ***Nazir Ahmed (supra)*** and observed:

"***18***. *Turning now to the next submission of learned counsel appearing on behalf of the accused as to the judicial confession (Ext. 187) made by A-1 before PW 62, it would be useful to refer to the relevant provisions in the Criminal Procedure Code that deal with the recording of a judicial confession by a Judicial Magistrate and see whether the judicial confession recorded by PW 62 of A-1 is according to the procedure prescribed by these provisions or whether any violation thereof has been made by the Magistrate while recording it. The relevant sections in CrPC are Sections 164, 281 and 463.*

19. *Sub-section (2) of Section 164 CrPC requires that the Magistrate before recording*

confession shall explain to its maker that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession shall be recorded by the Magistrate. Sub-section (4) of Section 164 provides that the confession so recorded shall be in the manner provided in Section 281 and it shall be signed by its maker and the recording Magistrate shall make a memorandum at the foot of such record to the following effect:

> *"I have explained to [name] that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.*
>
> *(signed)*
> *Magistrate"*

***20**. Sub-section (1) of Section 463 provides that in case the court before whom the confession so recorded is tendered in evidence finds that any of the provisions of either of such sections have not been complied with by the recording Magistrate, it may, notwithstanding anything contained in Section 91 of the Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.*

21. *In the case on hand, the application that was made to PW 62 was for recording a dying declaration as A-1 was suspected to have consumed poison. Learned counsel appearing on behalf of the accused submits that as there was no danger to the life of A-1, there was no reason for the prosecution to call PW 62 for recording dying declaration of A-1. We have perused the indoor charts of Janta Hospital (Exts. 192 and 193), which clearly depict that hers was a case of suspected poison. We have also been taken through the evidence of Dr. Jagdish Sethi, PW 52, who, in his testimony, has also stated that A-1 was admitted to Janta Hospital in the morning of 24th August as a suspected case of poison and, therefore, she was declared to be unfit to make any statement. In our view, the prosecution rightly sent for PW 62 for recording dying declaration of A-1.*

22. *Before adverting to the three decisions relied upon by the learned counsel for the accused, we shall first analyse the judicial confession (Ext. 187) recorded by PW 62 and see whether it has been recorded according to the procedure prescribed by Section 164.*

23. *On 24-8-2001, upon receipt of an application moved by Superintendent of Police for recording dying declaration of A-1 by a Magistrate, DSP Man Singh, who partly investigated the case, approached the Chief Judicial Magistrate, Hissar, who, in turn, marked the said application to Pardeep Kumar, PW 62. On its presentation to PW 62 by DSP Man Singh at 10 p.m. the same day, both PW 62 and DSP Man Singh left for Janta Hospital, Barwala. After reaching the hospital and before recording the statement, PW 62 first sought opinion of Dr.*

Anant Ram (PW 32) as to the fitness of A-1 to make the statement. As in the opinion of PW 32, A-1 was fit to make the statement, PW 62 proceeded to record it, which is in question and answer form. It appears from Ext. 187 as well as from the questions and answers which were put to A-1 that PW 62 warned A-1 that she was not bound to make any confessional statement and in case she did so, it might be used against her as evidence. In spite of this warning, A-1 volunteered to make the statement and only thereafter the statement was recorded by PW 62. In the certificate that was appended to the said confessional statement PW 62 has very categorically stated that he had explained to A-1 that she was not bound to make a confession and that if she did so, any confession she would make, might be used as evidence against her and that he believed that the confession was voluntarily made. He further stated that he read over the statement to the person making it and admitted by her to be correct and that it contained a full and true account of the statement made by her. It has been further stated by PW 62 in his evidence that at the time of recording of the confession it was he and PW 32, who were present in the room and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. It also appears from the evidence of PW 62 that it took about 2½ hours for him to record the statement of A-1, which runs into 5 pages, which he started at 10.53 p.m. and ended at 1.28 a.m. which goes to show that A-1 took her time before replying to the questions put. PW 62 has also stated that she had given the statement after taking due time after understanding each aspect. It also appears that he was satisfied that she was not under any pressure from any corner.

Therefore, it is evident from the certificate appended to the confessional statement by PW 62 that the confessional statement was made by the accused voluntarily. Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW 62 having stated in his evidence before the court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that A-1 was not under any pressure from any corner, that in the room in which the said confessional statement was recorded it was only he and PW 32 who were present and none else and that no police officer was available even within the precincts of the hospital. The said defect, in our view, is cured by Section 463 as the mandatory requirement provided under Section 164(2), namely, explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him has been complied with and the same is established from the certificate appended to the statement and from the evidence of PW 62. Therefore, in the light of our discussion above, we have no hesitation in holding that the judicial confession (Ext. 187) having been recorded according to the procedure set out in Section 164 read with Section 281 and the defect made while recording the same being curable by Section 463, it is admissible in evidence.

24. *We now advert to the decisions relied upon by the learned counsel appearing on behalf of the accused. In Nazir Ahmad [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] the accused, who was charged with dacoity and murder, was convicted on the strength of a confession said to have been made by him to a Magistrate of the*

class entitled to proceed under the provisions of Section 164 relating to the recording of confession. The confession was not recorded according to the procedure and the record of the confession was not available as evidence either. The Magistrate, however, appeared as a witness and gave oral evidence about the making of the confession. He stated that he made rough notes of what he was told, got a memorandum typed from the typist on the basis of the rough notes and thereafter destroyed the rough notes. The said memorandum, signed by him contained only the substance but not all of the matter to which he spoke orally. The recording Magistrate in the said memorandum just above his signature appended a certificate somewhat to the same effect as that prescribed in Section 164 and, in particular, stating that the Magistrate believed that the statements were voluntarily made. As there was no record in existence at the material time, there was nothing to be shown or to be read to the accused and nothing he could sign or refused to sign. The Judicial Committee held that the oral evidence of the Magistrate of the alleged confession was inadmissible. The Magistrate offered no explanation as to why he acted as he did instead of following the procedure required by Section 164. When questioned by the Sessions Judge, the response of the accused was a direct and simple denial that he had ever made any confession. The Judicial Committee, considering the abject disregard by the Magistrate of the provisions contained in Section 164 of the Code, observed that "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all". Nazir [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] is a case where recording Magistrate did not at all follow the procedure prescribed by Section 164 of the

Code as a result of which, he violated the provisions thereof whereas in the case on hand the omission that has been made by the Magistrate is his failure to record the question that he asked to the accused whether she was under any pressure, threat or fear to make a confession in the confessional statement and the answer given by A-1. In his evidence before the court, PW 62 stated that he asked A-1 whether she was under any pressure, threat or fear and after he was satisfied that she was not under any pressure from any corner, he recorded in the memorandum that was appended to the confessional statement of A-1 that he believed that the confession was voluntarily made. In our view, Nazir [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] has no application to the facts of the present case as the failure of PW 62 to record the question put and the answer given in the confessional statement has not caused prejudice to the accused in her defence and is a defect that is curable under Section 463.

25. *In Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] the accused was arrested on 17-6-1973 and when produced before the Magistrate on the following day he was sent to police custody, where he remained until 22-6-1973 and, thereafter he was sent to judicial custody. Upon being produced before a Magistrate on 25-6-1973 for recording his confession, he was given two hours' time to reflect. After cautioning the accused that he was not bound to make a confession and that if he did so, it might be used against him, the Magistrate went on to record his confession. Failure of the recording Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-*

section (4) was termed by this Court as flagrant violation of the provisions of Section 164(2) and in utter disregard of the mandatory requirements of the said section. Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] is a case where the accused remained in police custody for six days immediately before the recording of his confession by the Magistrate and, therefore, could be said to have been pressurised, tortured and harassed by the police. In such a situation, omission on the part of the recording Magistrate to put a question to the accused to satisfy himself that the confession was being made voluntarily can be said to be flagrant violation of law. However, in the case on hand, A-1 was removed by the police from the place of occurrence to the hospital in the morning of 24-8-2001 where she remained until her arrest by the police in the evening of 26-8-2001. It was at 10.58 p.m. on 24-8-2001 i.e. during her hospitalisation, that PW 62 recorded her confessional statement after cautioning her that she was not bound to make any confession and that if she did so, it might be used as evidence against her. PW 62 in his evidence has stated that it was only after administering the above caution and satisfying himself that A-1 was making the statement voluntarily that he proceeded on to record her confession. It also appears from his evidence that no police official was present either in the room in which he recorded the confessional statement of A-1, or in the hospital. Therefore, in the absence of any evidence to show that she was under direct or indirect vigil of the police authorities during her hospitalisation and she having already confessed the crime in her suicide note, the omission on the part of the recording Magistrate to record the question and the answer given in the confessional statement cannot be said to be flagrant violation

of law, especially in view of the fact that the recording Magistrate has stated in his evidence that he orally asked A-1 if she was under any pressure, threat or fear and it was only after satisfying himself that she was not under any pressure from any corner that he recorded her confessional statement. In the certificate that was appended to the confessional statement as well, PW 62 has stated that he believed that confession that A-1 made was voluntary. In our view, the defect committed being curable under Section 463 has not injured the accused in her defence on the merits and that she duly made the statement.

26. *Similarly, in Tulsi Singh [(1996) 6 SCC 63 : 1996 SCC (Cri) 1118] , also relied upon by the learned counsel for the accused, the recording Magistrate did not explain to the accused that he was not bound to make a confession and that if he did so, it might be used against him, nor did he put any question to him to satisfy that the confession was being voluntarily made although, an endorsement to this effect was made by him in the certificate that was appended to the confessional statement. This Court, while setting aside the conviction and sentence recorded against the accused under Section 302 IPC, held that the Special Court was not at all justified in entertaining the confession as a voluntary one, observing that mere endorsement would not fulfil the requirements of sub-section (4) of Section 164. This case too has no application at all to the facts of the present case for two reasons—firstly, in this case too the appellant remained in police custody for a week and secondly, it is a case in which the recording Magistrate neither explained to the accused that he was not bound to make a confession and if he did so, it might be used against him nor satisfied himself upon questioning*

the accused that the confession was being voluntarily made. In the case on hand, PW 62 in his evidence has stated that he did ask the accused the question whether she was under any pressure, threat or fear and only after satisfying himself that she was not under any, that he proceeded on to record her confessional statement.

27. *Therefore, in view of our above discussion, the three decisions relied upon by the learned counsel for the accused in Nazir [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] , Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] and Tulsi [(1996) 6 SCC 63 : 1996 SCC (Cri) 1118] are of no help to the accused.*

28. *In Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] reliance on which has been placed by Mr Tulsi, appearing on behalf of the appellant in Crl. Appeal No. 895 of 2005, a three-Judge Bench of this Court, while dealing with the question whether non-compliance with the provisions of Section 164 or Section 364 (Section 281 of the new Code) is a defect which could be cured by Section 533 (Section 463 of the new Code) observed at SCR pp. 759-60 thus:*

"Section 533(1) lays down that if any court before which a confession recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding anything contained in Section 91 of the Evidence Act, 1872 such statement shall be

admitted if the error has not injured the accused as to his defence on the merits. Mr Khanna contends that the Magistrate has in fact given evidence in the trial court and the evidence of the Magistrate shows that the statement had been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the Magistrate in not complying with Section 364(3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention.

> *… But for the purpose of the present appeals we are prepared to assume in favour of the prosecution that the confessions have been proved and may, therefore, be considered on the merits if they are shown to be voluntary and that is the alternative argument which has been urged before us by Mr Rana."*

29. *After observing that the confessions were duly recorded, the Bench proceeded to discern from the factual matrix of the case whether the confessions were voluntary or not and taking note of three unusual features qua the confession recorded, namely, (1) that the accused was kept in the police custody even after the substantial part of the investigation was over; (2) that the confession so recorded did not indicate as to how much time the accused was given by the Magistrate before they made their confessions, and (3) that the Magistrate who recorded the confession had taken part in assisting the investigation by attesting recovery memos in two cases, the confessional statement of the accused was excluded from consideration. It was observed at SCR p. 764 thus:*

> *"Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore, excluded from consideration it is impossible to sustain the charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of the appellants for the offence under Section 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are left out of consideration, the charge of murder cannot be sustained."*

30. *The three unusual features noticed by the Bench in Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] impelled the learned Judges to exclude from consideration the confessional statement made before the Magistrate by the accused after having observed that the confession was inadmissible in evidence. As the charge of murder was founded exclusively on the confession, both the accused persons were acquitted of the charge under Sections 302/34 IPC.*

31. *In our view, the factual matrix in Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] was distinct from the one with which we are dealing. In Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] both the accused remained in police custody for a long time and even after the substantial portion of the investigation was*

over. If one were or held to be in police custody, question of pressure, threat or fear would arise. We have already held that in the facts and circumstances of the present case, A-1 cannot be said to be in police custody during her hospitalisation and, therefore, question of her being pressurised, threatened or put under any kind of fear does not arise.

32. *In State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] a three-Judge Bench of this Court observed that if the confession is not recorded in proper form as prescribed by Section 164 read with Section 281, it is a mere irregularity which is curable by Section 463 on taking evidence that the statement was recorded duly and has not injured the accused in defence on merits. It was observed at AIR p. 362, para 10 thus:*

> *"What Section 533 [Section 463 of the new Code] therefore, does is to permit oral evidence to be given to prove that the procedure laid down in Section 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in Section 164 is not intended to be obligatory, Section 533 [Section 463 of the new Code] really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so."*

> ***33.*** *In the light of the above discussion, we are of the view that Ext. 187 is admissible, having been recorded according to the procedure prescribed under law and the same is voluntary and truthful.***"**

97. In re: ***Ram Singh (supra)*** the Supreme Court would find that the certificate appended to the confession would show that it was voluntary. The Supreme Court would further notice that the Magistrate had failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement. The Supreme Court would also notice that the said Magistrate had stated in his evidence that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that he was not under any pressure from any corner; that in the room in which the confession was recorded it was only he and another witness who were present and no police officer was available even within the precincts of the hospital. In such factual narrative the Supreme Court would hold that the said effect is cured by Section 463 Cr.P.C. as the mandatory requirement provided under Section 164(2) Cr.P.C. of explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him had been complied with established by the certificate from the Magistrate.

98. In re: ***Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat***[46] a three Judge Bench of the Supreme Court would examine statutory appeals under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 against the order passed by the Designated Court whereby the learned Designated Judge convicted the appellants under Section 302 read with Section 120-B IPC, Section 25 (1) (c) and 27 of the Arms Act and Section 5 of the TADA Act. The appellant's main contention was that the conviction based on confessional statements of the appellants without any corroborative evidence is not sustainable. It was also contended that even those alleged confessional statements of the accused are not admissible as not fulfilling the conditions prescribed under Rule 15 (3) (b) of the TADA Rules. It was further contended that without a certificate of the competent person in clear categorical terms about his satisfaction or belief as to the voluntary nature of the confession recorded by him would be fatal to the admissibility and the same cannot be cured by

[46] (2009) 7 SCC 254

placing any other material. It was submitted that no contemporaneous record to support the confessions were produced. The Supreme Court would also pronounce its view on the omission to obtain signature of the accused at the end of confession thus:-

> ***"53.*** *It is also clear that while recording confessional statement, if there is omission to obtain signature of the accused at the end of the confession, the same is admissible and the omission made by the competent officer is curable in view of the provision contained in Section 463 CrPC. In the same manner, the Court has held that even if there was any omission in respect of the certificate which the competent officer is required to append under sub-rule (3) at the foot of the confession, it can be cured as provided under Section 463 CrPC. Such approach is permissible in view of Section 463 CrPC in regard to the omission in recording confession under Section 164 CrPC, the Court has clarified that the same approach can be adopted in respect of confession recorded under Section 15 of the TADA Act.****"***

99. Section 3 of the Oaths Act, 1969 reads thus:

> ***"3. Power to administer oaths****.—(1) The following courts and persons shall have power to administer, by themselves or, subject to the provisions of sub-section (2) of section 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:—*
>
> > *(a) all courts and persons having by law or consent of parties authority to receive evidence;*
> >
> > *(b) the commanding officer of any*

military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station.

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf—

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or

*(b) by the State Government, in respect of other affidavits.***"**

100. Section 4 of the Oaths Act, 1969 reads thus:

"4. Oaths or affirmations to be made by witnesses, interpreters and jurors*.—(1) Oaths or affirmations shall be made by the following persons, namely:—*

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

*(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.***"**

101. Section 6 the Oaths Act, 1969 reads thus:

***"6. Forms of oaths and affirmations**.—(1) All oaths and affirmations made under section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case:*

Provided that if a witness in any judicial proceeding desires to given evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.

*(2) All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be.***"**

102. Section 7 of the Oaths Act, 1969 reads thus:

"7*. Proceedings and evidence not invalidated by omission of oath or irregularity.— No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."*

•

103. Section 8 of the Oaths Act, 1969 reads thus:

"8*. Persons giving evidence bound to state the truth.—Every person giving evidence on any subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.***"**

104. The schedule to the Oaths Act, 1969 reads thus:

"*THE SCHEDULE*
(See section 6)
FORMS OF OATHS OR AFFIRMATIONS
Form No. 1 (Witnesses):—

I do swear in the name of God/ solemnly affirm that what I shall state shall be the truth, the whole truth and nothing but the truth.

xxxxxxxxxxxxxxxxxxxxxxxx"

105. In re: ***State of Rajasthan v. Darshan Singh***[47], the Supreme Court would hold:-

> ***"24****. This Court in Rameshwar v. State of Rajasthan [AIR 1952 SC 54 : 1952 Cri LJ 547] has categorically held that the main purpose of administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility. However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence."*

106. Although, the Kerala High Court in re: ***Haridasan Palayil (supra)*** was dealing with taking of oath by member of State legislature and whether variation of such prescribed form was permissible or not it would have occasion to examine the meaning of the expression oath and hold that an oath is *"form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. It involves the idea of calling in God to witness what is averred as truth, and it is supposed to be accompanied with an invocation of his vengeance, or a renunciation of his favour, in the event of falsehood."*

107. Sub Section (2), (3) and (4) of Section 164 Cr.P.C. all relate to ensuring the voluntariness of the statement of the accused vis-à-vis the investigating agencies. The question raised here is somewhat different. It does not relate to allegation of any undue influence, threat or promise made to the accused by the investigating agencies, at least not at this stage. What is required to be answered is whether administering of oath per se by the

[47] (2012) 5 SCC 789

Magistrate on the accused would amount to undue influence, threat or promise.

108. A perusal of Section 164 Cr.P.C. makes it unequivocally clear that whereas Section (2), (3) and (4) exclusively relates to confession, sub-section (5) thereof relates to manner of recording statement other than confession and therefore necessarily not the method for recording confessions which ought to be done in the manner laid down in sub-section (4) under Section 281 of Cr.P.C. The legislative intent of using the words *"other than a confession"* within brackets after the words *"any statement"* is to limit the mandate of sub-section (5) of Section 164 Cr.P.C. to recording of statement only and not confessions. Therefore, it is also limiting the requirement of sub-section (5) of Section 164 Cr.P.C. to the recording of statements of witnesses only other than confessions. In other words the requirement of administering oath is limited to witnesses only and not to an accused making a confession.

109. In the Criminal Procedure Code, 1893, as it stood before the amendment of 1973, the relevant provision was section 164(2); it read as follows:

> **Section 164(2)**: **"***such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.***"**

110. The Forty First Report of the Law Commission, which preceded the introduction of Section 164(5) Cr.P.C. had stated:-

> **"***The earlier Report (37th) considered the question whether the statements recorded under section 164 should be on oath or not and recommended that they should be. The actual practice, we understand varies; but it would certainly*

be proper if such statements are always made on oath and this should be provided in the section itself" [as it has been done by the new sub-section (5).]"

111. The new Cr.P.C. came into force on the 1st of April 1974. The Objects and Reasons of Section 164 Cr.P.C. is as follows:-

> **"***The Law Commission in its 41st Report (page 75, para.14, 17) had remarked thus while recommending re-arrangement of the provisions of sub-sections (2) and (3):*
>
> *The earlier Report (37th), considered the question whether statements recorded under S. 164 should be on oath or not and recommended that they should be. The actual practice we understand, varies; but it would certainly be proper if such statements were always made on oath and this should be expressly provided in the section itself". (See sub-section (5).*
>
> *As a further safeguard to ensure that the confession in voluntary, a new sub-clause has been added prohibiting a remand to police custody of a person who expresses his unwillingness to make the confession when produced before the Magistrate. This does not of course mean or imply that remand has to be made if the accused wants to confess"- J.C.R (See sub-section (3) now).***"**

112. The Legislature has advisedly used the word "*statement*" while referring to statement of witnesses and the word "*confession*" while referring to confessions of the accused in Section 164 Cr.P.C. A comparison of Section 164 (2) of the old Cr.P.C. with section 164 (5) Cr.P.C. would reflect that the former part of the old sub-section (2) of Section 164 of the old Cr.P.C. has become sub-section (5) of Section 164 Cr.P.C. Section 164 (5) Cr.P.C. now contains an express provision for administration of oath by the Magistrate to the person whose statement is recorded. Section 164

Cr.P.C. provides for recording of confession by accused persons and statements by any person including an accused.

113. A confession by an accused person cannot be made the basis of a prosecution for perjury under Section 193 Cr.P.C. However, a statement is to be recorded in the manner prescribed for recording evidence may be made the basis of a charge for perjury under Section 193 I.P.C. perjury. Substantive evidence is one which is given by witness in Court on oath in presence of accused whereas statement recorded under Section 164 is not substantive evidence.

114. Under the scheme of Section 164 Cr.P.C. confessions by an accused persons and statements of persons can be recorded. Whereas confessions are required to be recorded in the manner provided by sub section (2), (3) and (4) of Section 164 and Section 281 Cr.P.C. statements other than confession are required to be recorded in the manner provided under sub-section (5) of Section 164 Cr.P.C. A reading of Section 164 (2), (3) and (4) with Section 281 Cr.P.C. makes it amply clear that there is no provision to administer oath on an accused person. The Magistrate while doing so must, before recording any such confession, explain to the accused that he is not bound to make a confession and that, if he does so it may be used *"as evidence"* against him. Under Section 281 Cr.P.C. the record of examination of accused is to be made by the concerned Magistrate and signed by the accused as well as the Magistrate who is required to certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. A reading of Section 164 (5) Cr.P.C. makes it evident that a statement other than confession is to be recorded by the Magistrate in the manner provided for recording of evidence and the said Magistrate shall have power to administer oath to the person whose statement is so recorded. The word 'evidence' used in Section 164 (5) Cr.P.C. is defined in Section 3 of the Indian Evidence Act, 1872. The word *"evidence"* as defined means and includes *"(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry, such statements are called oral evidence; (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."* The Legislature has advisedly not desired that confessions be recorded in the manner provided for recording of evidence. Thus, it is

evident that under the scheme of Section 164 Cr.P.C. as well as Section 281 Cr.P.C. there is no provision for recording a confession on oath. It is quite evident that Section 164 Cr.P.C has been designed and scripted to ensure that the privilege against self-incrimination is protected.

115. The Supreme Court in re: ***Babubhai Udensinh Parmar (supra)*** has categorically held that administration of oath while recording statements of accused is prohibited and there should be strict compliance of the provision of Section 164 Cr.P.C. The word prohibited in the context would mean forbidden by law. It is seen that oath cannot be administered to an accused person while recording a confession under the provision of Section 164 Cr.P.C. Section 164(4) Cr.P.C. provides that the confession shall be recorded in the manner provided in Section 281 Cr.P.C. Section 281 Cr.P.C. provides for the manner of recording examination of an accused. Section 281 Cr.P.C. is a combination of Section 362 (2 A) and 364 of the Old Cr.P.C. Section 281 Cr.P.C. does not prescribe administration of oath upon an accused while taking his confession. The provision of section 164 Cr.P.C., must be complied with not only in form, but in essence. It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

116. While deciding this question it is vital to examine the effect of administration of oath. Under Section 3 of the Oaths Act, 1969 all Courts and persons having by law or consent of parties authority to receive evidence shall have power to administer oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law. Thus, as a natural corollary a Magistrate while recording a confession would not be recording evidence and thus would not have the necessary power to administer oath on accused under Section 3 of the Oaths Act, 1969. Under Section 4 of the Oaths Act, 1969 oath or affirmation shall be made by witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examined such persons or to receive evidence. Section 4(2) of the Oaths Act, 1969 specifically provides that nothing in this section shall render in lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any Court, after he has entered on

the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties. Section 4 of the Oaths Act, 1969 makes it clear that oath shall not be administered to an accused and it would be unlawful to do so in a criminal proceeding unless the accused is examined as a witness for the defence. In fact, Section 4(2) of the Oaths Act, 1969 not only prohibits the administration of oath to an accused person but also prohibits and renders it unlawful to administer oath even to the official interpreter of any Court, after he has entered on the execution of the duties of his office. Under Section 6 of the Oaths Act, 1969 all oaths and affirmation made under Section 4 shall be administered according to such one of the forms given in the schedule as may be appropriate to the circumstances of the case. As per the schedule to the Oaths Act, 1969 a person required to administer oath or affirmation is required to swear in the name of god or solemnly affirm that what he states shall be the truth, the whole truth and nothing but the truth. Under Section 8 of the Oaths Act, 1969 every person giving evidence on any subject before a Court or person authorized to administer oaths and affirmations shall be bound to state the truth on such subjects. A Judicial oath is a pledge made by witness i.e. evidence is given in the name of God to speak the truth. The main purpose of administration of oath is to render persons who give false evidence liable for prosecution. It is also to remind the witness of the solemnity of the occasion and to impress upon him the duty of speaking the truth. After the administration of oath every person giving evidence on any subject before any Court shall be bound to state the truth of such subject and the Court is the authority to either compel or excuse the witness from complying with the requirement. It is, however, seen that under the scheme of the Oaths Act, 1969 administering oath to accused persons is not lawful and that the Magistrate while recording confession does not have the power to administer oath to an accused person unless he is being examined as a witness for the defence. A perusal of the Oaths Act, 1969 makes it clear that the said Act was enacted for the purpose of administration of oath to a witness or an interpreter to be examined in Court and not upon an accused making a confession. The specific bar under Section 4 (2) of Oaths Act, 1969 against administration of oath to an accused person in a criminal proceedings unless he himself is a defence witness is based on well founded criminal jurisprudence that accused cannot be forced to make any incriminatory statement on oath which would prejudice his defence. Under the Indian system of criminal jurisprudence the burden of proof is always on the prosecution except of course where the law creates a specific exception.

Thus, even under the scheme of the Oaths Act, 1969 it is amply clear that administration of oath to an accused, unless he is being examined as a witness for the defence, is prohibited. The mandate of Section 4 (2) of the Oaths Act, 1969 also reflects a clear desire of the Legislature to insulate the accused from self-incrimination.

117. Let us now examine whether administration of oath on accused while recording a confession under Section 164 Cr.P.C. which is prohibited, unlawful and illegal can still be cured under Section 463 Cr.P.C.? Section 463 Cr.P.C. provides that the Court before which a confession or other statement of an accused person is recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

118. The judicial pronouncements of the Supreme Court quoted hereinabove makes it clear that:-

(i) That the provision of Section 164 Cr.P.C. must be complied with not only in form but in essence.

(ii) Non compliance with Section 164 Cr.P.C. goes to the root of the Magistrates Jurisdiction to record the confessions and renders the confession unworthy of credence.

(iii) Section 164 Cr.P.C. provides a detailed procedure for recording confessions and statements of witnesses. Law requires that when the power is given to do a certain thing in a certain way it must be done in that way or not at all and that other methods of performance are necessarily forbidden.

(iv) Section 463 Cr.P.C. permits taking of evidence in regard to non compliance of the provision of Sections 164 and 281 of Cr.P.C.

(v) If any Court in which a confession recorded under Sections

164 and 281 Cr.P.C. by the Magistrate is tendered in evidence finds that any of the provisions of Section 164 and / or 281 Cr.P.C. have not been complied with by the Magistrate while recording the confession it shall take evidence that such person duly made the confession recorded. The recording of the confession is mandatory and failure to record the confession cannot be cured under Section 463 Cr.P.C. If it is proved that the confession was duly recorded then Section 463 Cr.P.C. further provides that notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(vi) What Section 463 Cr.P.C., therefore, does is to permit oral evidence to be given to prove that the procedure laid down in Section 164 and 281 Cr.P.C. had in fact been followed when the Court finds that the record produced before it does not show that that was so.

(vii) Omission to record the confession in the proper form would not render the confession inadmissible and the defect is cured under Section 463 Cr.P.C.

(viii) Under Section 463 Cr.P.C. evidence could be led as to why the provision of Sections 164 and 281 Cr.P.C. could not be complied with while recording the confession.

(ix) When the voluntariness of the confession recorded by the Magistrate is established the failure or the defect or the irregularity or the error of the Magistrate in recording the said confession in the manner provided by Section 164 and 281 Cr.P.C. is curable under Section 463 Cr.P.C.

119. It was argued before us that Section 463 Cr.P.C. falls under chapter XXXV under the head *"irregular proceedings"* and thus what Section 463 Cr.P.C. permits is the curing of irregularities and not illegalities.

120. The Supreme Court in re: ***Sarah Mathew v. Institute of Cardio***

Vascular Diseases[48] would hold:-

> ***"47.*** *So far as the "heading" of the chapter is concerned, it is well settled that "heading" or "title" prefixed to sections or group of sections have a limited role to play in the construction of statutes. They may be taken as very broad and general indicators or the nature of the subject-matter dealt with thereunder but they do not control the meaning of the sections if the meaning is otherwise ascertainable by reading the section in proper perspective along with other provisions. In Frick India Ltd. v. Union of India [(1990) 1 SCC 400 : 1990 SCC (Tax) 185] , this Court has observed as under: (SCC p. 405, para 8)*
>
> > *"8. It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."*

121. The Supreme Court in ***SEBI v. Gaurav Varshney***[49] would hold:-

> ***"51.*** *We have given our thoughtful consideration to the last submission advanced at the hands of the learned Senior Counsel for the Board. It is, however, not possible for us to accept the same. We are of the considered view,*

[48] (2014) 2 SCC 62
[49] (2016) 14 SCC 430

*which clearly emerges from the observations rendered in Bhooraji case [State of M.P. v. Bhooraji, (2001) 7 SCC 679 : 2001 SCC (Cri) 1373] , that Section 465 CrPC pertains to omissions or irregularities in matters of procedure. It is, therefore, that both the sub-sections of Section 465, pointedly refer to proceedings under the CrPC. Added to the above, it is of some significance that Chapter XXXV of CrPC includes Sections 460 to 466. The heading of the instant Chapter is "Irregular Proceedings". Not only that, each one of the sections in Chapter XXXV of CrPC make pointed reference only to matters of procedure. There can be no doubt, therefore, that omissions and/or irregularities in matters of procedure can be overlooked, subject to the condition that such an omission or irregularity does not occasion "failure of justice". This is our understanding of Section 465 CrPC.***"***

122. It is thus clear that Section 463 Cr.P.C. also pertains to omission or irregularities in matters of procedure in recording statement or a confession under Section 164 and 281 Cr.P.C. To understand the intent and scope of Section 533 of old Cr.P.C. it was important to distinguish between (a) whether the confession or other statement was "*duly made"* after giving the necessary warning and after putting the required questions under Section 164 and (b) whether the confession or other statement, duly made, was properly recorded. Section 533 of the old Cr.P.C would not apply in the first case because to do so would be to defeat the very object of Section 164 and 281 Cr.P.C. It is only the second kind of defect i.e. defects in recording the confession or other statement, duly made, that was curable. Section 463 Cr.P.C. thus sought to clarify that the evidence given should relate to apparent non-compliance with the statutory provisions. It is also clear that substantial illegality of not recording a confession as mandated by Section 164 Cr.P.C. as opposed to mere irregularity in the procedure in recording the same cannot be cured under Section 463 Cr.P.C. The question therefore is whether administration of oath on an accused person is a substantial illegality or a curable irregularity?

123. We have already held that administration of oath on an accused while recording his confession is unconstitutional, prohibited, unlawful and illegal. Section 164 Cr.P.C. has been meticulously designed in great detail to ensure voluntariness and truthfulness. The rationale as to why oath ought not to be administered on an accused while recording confession seems to date back to the period in England when the accused were administered oath and confessions extracted in the ecclesiastical courts. The revulsion against this practice came to a head in the case of John Lilburn before the Court of Star Chamber and was ultimately abolished in 1641. Thereafter, it was firmly recognized that accused should not be put on oath and that no evidence should be taken from him. The privilege against self incrimination is now firmly embodied in various statutory provisions and other Constitutions of the world including the 5th Amendment of the Constitution of the United States as part of the Bill of Rights and, *inter-alia*, protects individuals from being compelled to be witness against themselves in criminal cases. The Constitution of India provides this safeguard under Article 20 (3) of the Constitution of India. In re: ***Brijbasi Lal Shrivastava (supra)*** the Supreme Court would observe:— *"The evidence of PW 10 the officer who had taken the statement of the appellants shows that he had administered an oath to the appellant before taking his statement although he was not empowered to administer any oath. This circumstance by itself would amount to a concealed threat, because if the statement was found to be false the appellant may have entertained a genuine belief that he might be prosecuted"*. To our mind, therefore, it seems quite clear that a positive act of the Magistrate to administer oath on an accused while recording his confession may lead to an inference that the accused being compelled to state the facts which are self-incriminatory by a method prohibited by law made the self-incriminating statement. This lingering doubt troubles the judicial mind to accept the confession as voluntary. To hold that this illegality is curable under Section 463 Cr.P.C. would be to allow evidence of the Magistrate to come in to explain whether the illegal administration of oath upon the accused by the said Magistrate resulted in injury to the accused. To our mind the prohibition not to administer oath upon an accused is a protective umbrella to safeguard the accused from self-incrimination and therefore, it has been made unlawful upon the Magistrate to administer oath on an accused while recording confession. To allow the said prohibition and illegality to be cured under Section 463 Cr.P.C. would perhaps expose the accused to self-incrimination which may not always be voluntary if the accused were to believe that having been

administered oath he is now compelled to self-incriminate. We thus hold that not only administration of oath on an accused while recording his confession is prohibited, unlawful and illegal but also that the said act cannot be cured under Section 463 Cr.P.C. Administration of Oath upon an accused while recording confession has a direct bearing on the voluntariness of the confession and voluntariness is sacrosanct. Let us look at the problem from yet another perspective. Under the scheme of Cr.P.C. the accused has a right to remain silent. In fact it is a fundamental guarantee under Article 20 (3) of the Constitution of India. Under the scheme of Cr.P.C. it is only at the stage of examination of an accused under Section 313 Cr.P.C. an accused is asked to explain any circumstance appearing in evidence against him by the Court. Even at this stage sub-section (2) of Section 313 Cr.P.C. requires that no oath shall be administered to the accused when he is examined and under sub-section (3) thereof accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The recording of a statement of an accused under Section 313 Cr.P.C. cannot equate to taking of evidence as envisaged in Section 463 Cr.P.C. for on the basis of such evidence taken in regard to such non-compliance, the Court is required to come to a definite finding whether the accused was injured or not. At no stage of a criminal trial can an accused be compelled to be a witness against himself. The narrow area within which an accused may be a competent witness is provided in Section 315 Cr.P.C. which reads:-

> ***"315****.Accused person to be competent witness-(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:*
>
> *Provided that-*
>
> *(a) he shall not be called as a witness except on his own request in writing;*
>
> *(b) his failure to give evidence shall not be made the subject of any comment*

by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

*Provided that in proceedings under section 108, section 109, or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.***"**

124. As per Section 315 Cr.P.C. an accused before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. Further, the accused shall not be called as a witness except on his own request in writing. In view of Section 315 Cr.P.C. an accused can waive his right under Article 20 (3) of the Constitution of India and tender himself as a witness if he so chooses as held by the Supreme Court in re: ***P. N. Krishna Lal v. Government of Kerala***[50]. To cure the irregularity under 463 Cr.P.C. the Court is required to take evidence in regard to such non-compliance and be satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement. Whether administration of oath on an accused person compelled the accused to incriminate himself is a question only the accused can answer. Under the scheme of Cr.P.C. we do not see any provision by which the evidence of the accused can be taken as required under Section 463 Cr.P.C. except under Section 315 Cr.P.C. and that too only if the accused so chooses. The illegal act of administering oath on an accused before

[50] 1995 Supp. (2) SCC 187

recording his evidence would therefore take away the choice given to the accused under Section 315 Cr.P.C. and compel the accused to be a witness for the defence. We are thus of the view that this was not the eventuality contemplated under Section 463 Cr.P.C. Section 463 Cr.P.C. provides that the Court can notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 take evidence in regard to such non-compliance as an exception to taking oral evidence to prove the contents of a document. Section 80 of the Indian Evidence Act, 1872 provides that:- *"Whenever any record is produced before the Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume- that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, is true, and that such evidence, statement or confession was duly taken."* The presumption under Section 80 of the Indian Evidence Act, 1872 is available only when the record purporting to be a confession is taken in accordance with law. Administering illegal oath upon an accused would denude the presumption in favour of the genuineness of the said document and that the statement was duly taken under the said provision.

125. A bare perusal of Section 164 Cr.P.C. ought to make it clear to the Magistrate that the entire exercise to be meticulously conducted by the Magistrate while recording the confession is to ensure its truthfulness and voluntariness. These are paramount safeguards provided in the law under Section 164 and 281 Cr.P.C., Section 4 (2) of the Oaths Act, 1969 as well as Article 20 (3) of the Constitution of India. This is to ensure not only that the accused person is absolutely insulated from being compelled into self-incrimination but also to see that the accused not effected and not pressured by any external influences is willing to confess a crime committed by him which would be accepted as evidence against him. It would be strange that the Magistrate so empowered, to ensure its truthfulness and voluntariness himself commits an illegality which is prohibited giving reason to doubt not only of a failure of proper application of mind but also as to whether the confession itself was involuntary, under pressure of illegal oath administered. It has been held that administering oath to an accused before recording his

confession is prohibited, unlawful and illegal. It has been held that administering oath on an accused infringes the fundamental guarantee against self-incrimination under Article 20 (3) of the Constitution of India. The Supreme Court has in no uncertain terms held that no prejudice may be proved for enforcing fundamental right. Violation of fundamental right itself renders the impugned action void. The Supreme Court has also held that compulsion must be understood to mean "*duress*" and that compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore extorted. The Magistrate while administering oath on an accused before recording the confession commits an illegality and unlawful act prohibited by law. Any information received which may be self-incriminatory in violation of the laws as well as the Constitutional guarantee, which may have compelled the accused to self-incriminate cannot but be termed "*duress*" or "*undue influence*". While it is true that the demand or requirement for speaking truth is absolute both by a witness after he is administered oath and by an accused while making a confession, administering oath upon an accused while recording his confession would lead to disastrous consequences. A perusal of Section 164 read with Section 281 Cr.P.C. makes it evident that the record of the examination of the accused is required to be done in a question and answer format. Section 281 Cr.P.C. mandates that whenever an accused is examined by any Magistrate the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in his behalf. The administration of illegal oath upon the accused at the first instance and thereafter questioning the accused person and seeking information which is self-incriminatory cannot but fall squarely within the ambit and scope of "*testimonial compulsion*". When any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the Policeman (a person in authority) for obtaining information from an accused strongly suggestive of guilt becomes "*compulsion testimony*" as held by the Supreme Court in re: ***Nandini Satpathy (supra)*** it can also be said that the same act by a Magistrate who also is a person in authority for obtaining self-incriminatory information from the accused is also "*compelled*

testimony". We hold that in order to accept a confession as voluntary the Court must be absolutely certain that the confession is unblemished and there remains not an iota of doubt that the confession was actuated by undue influence, threat or promise. When a Magistrate takes the chair to record the confession, the mandate of the law prescribes the Magistrate to ensure that the mind of the accused is free from any external pressure. While doing so, if the Magistrate goes on to administer oath upon the accused it cannot be said that the said Magistrate complied with the statutory requirement of the law to ensure the voluntariness of the confession. We further hold that the confession so made must not give any reason for the Court to doubt whether the said confession was the result of a hope in the mind of the accused or fear of the Magistrate, a person in authority, administering oath upon him to extract truth. Section 463 Cr.P.C. permits evidence of non compliance of Section 164 and 281 Cr.P.C. to be taken to examine if it has injured the accused. It does not permit violation of a fundamental right guaranteed under Article 20(3) of the Constitution of India to be cured. It must always be remembered that under the doctrine of Constitutional supremacy the Constitution is the paramount law to which all other laws must conform. The Constitution of India must ever remain supreme and deemed written in every statute. We are, therefore, of the firm view that the substantial illegality of administering oath upon an accused before taking a confession which is prohibited cannot be termed as a curable irregularity under Section 463 Cr.P.C. Answering the first question referred by the Division Bench in the affirmative we hold that the confessional statement recorded under the provision of Section 164 Cr.P.C. on oath is fatal and cannot be protected by the provision of Section 463 Cr.P.C. In the circumstances and consequently we hold that the judgment of the Division Bench of this Court in re: ***Arjun Rai (supra)*** is good law. We reiterate, as already held by the Supreme Court in re: ***Brijbasi Lal Shrivastava (supra)***, that administration of oath while recording statements of the accused under section 164 Cr.P.C. would amount to a concealed threat. If this be so then to permit further evidence to disprove what has been held to be a concealed threat would be to dilute the fundamental protection given to an accused under Article 20 (3) of the Constitution of India which we are not inclined to in today's context where the accused due to social conditions, lack of knowledge or advise may not be in a position to understand the nuances and intricacies of the laws.

126. It is also evident that on examination of Section 164(5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the mandate of Section 164 and 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, Section 463 Cr.P.C would be applicable and the Court shall take evidence of non-compliance of Section 164 and 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence. We answer the second question accordingly.

127. Hearing of this matter was confined to the legal issues referred to the Full Bench of three Judges as per the order of reference dated 03-07-2017 passed in Criminal Appeal No. 17 of 2016 in re: ***State of Sikkim v. Suren Rai***[51]. Through the above judgment we have answered the reference. Let the said appeal be placed before the appropriate Bench for final disposal

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[51] 2017 SCC Online Sikk 07

SLR (2018) SIKKIM 301

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

M.A.C. App. No. 8 of 2017

Smt. Anita Tamang and Others ….. APPELLANTS

Versus

The Branch Manager, New India Assurance Company Limited, Gangtok Branch. ….. RESPONDENT

For the Appellants: Mr. Ajay Rathi and Ms. Phurba Diki Sherpa, Advocates.

For the Respondent: Mr. Sudesh Joshi, Advocate.

Date of decision: 14th March 2018

A. Motor Vehicles Act, 1988 – S. 163 A – S. 163 A of this Act has been incorporated by the legislature in the Statute under the welfare scheme to provide benefits to the family of the injured persons falling within the income group extending up to ₹ 40,000/- (Rupees forty thousand) only, per annum. Compensation under this provision is to be in accordance with the Second Schedule which is a structured formula and is a benevolent legislation.

(Para 12)

B. Code of Civil Procedure, 1908 – Order XLI Rule 27 – From the provision of Order XLI Rule 27, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the Appellate Court but for the three different situations which are enumerated in the provisions – In other words, the Appellate Court cannot issue an order to fill the lacuna in the evidence of the parties who has failed to succeed before the learned Trial Court. However, considering the spirit of S. 163 A of the Motor Vehicles Act, 1988 and it being a settled position of Law that it is not necessary in a proceeding under the Motor Vehicles Act to go by

any rules of pleadings or evidence [*See Raj Rani and Others* v. *Oriental Insurance Co. Ltd. and Others, (2009) 13 SCC 654*] and for a just decision in the matter, without delving into the merits of the case, the matter is remanded to the Motor Accidents Claims Tribunal, East Sikkim at Gangtok, for the limited purpose of allowing the Appellants to furnish evidence with regard to the names of the deceased and his father.

(Para 13)

Chronological list of cases cited:

1. Union of India v. Ibrahim Uddin and Another, (2012) 8 SCC 148.
2. A. Andisamy Chettiar v. A. Subburaj Chettiar, AIR 2016 SC 79.

JUDGMENT

Meenakshi Madan Rai, J

1. Dissatisfied with the Judgment dated 30.05.2017, passed by the learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok (hereinafter 'Claims Tribunal'), in MACT Case No. 42 of 2015, dismissing the Claim Petition seeking compensation of Rs.2,22,300/- (Rupees two lakhs, twenty-two thousand and three hundred) only, on account of the death of the husband of Appellant No. 1 and father of the Appellants No. 2 and 3, the instant Appeal has been preferred.

2. For the purposes of the instant matter, the ground raised is that the deceased was known by the names of Nima Tamang alias Passang Tamang, while his father was known both as Karma Tamang and Dil Bahadur Tamang. As per the Appellants, this is evident from the fact that the name of the deceased was recorded as Passang Tamang, son of Late K. Tamang in his Driving Licence (Exhibit-13), in the Authorisation letter bearing his photograph (Exhibit-19) and in the Report of the Motor Vehicles Inspector (Exhibit-20). While in the Death Certificate of the deceased, his name has been reflected as Nima Tamang, son of Late Dil Bahadur Tamang, Resident of Changu, Gangtok, Sikkim (Exhibit-21), as also in the Final Report submitted by the Investigating Officer (Exhibit-23). The Voters Identity Card of the Appellant No.1, bears the name of the deceased her husband, as Nima Tamang (Exhibit-25), so does her Certificate of Identification (Exhibit-

26). The Certificate of Identification of the Appellant No.2 reveals his fathers name to be Nima Tamang, son of Karma Tamang (Exhibit-27) and his School Transfer Certificate also bears his fathers name as Nima Tamang (Exhibit-28). The Birth Certificate of the Appellant No.2 reveals his fathers name to be Nima Tamang (Exhibit-29) as also the Certificate of Identification of the Appellant No.3 (Exhibit-30), his Birth Certificate (Exhibit-31), Admit Card (Exhibit-32). Besides, the Aadhar Card of the deceased bears the details of his name as Nima Tamang and his fathers name as Dil Bahadur Tamang (Exhibit-33). A comparison of the photograph affixed on the Driving Licence of the deceased and his Aadhar Card, clearly reveal them to be of one and the same person. The Voters Identity Card of the deceased bears his name Nima Tamang, son of Late Dil Bahadur Tamang (Exhibit-34), as also his PAN Card and the Certificate of Identification. Therefore, in view of all of the above documents, it is clear that the deceased had and was known by two names which were used interchangeably, as countenanced by the documents furnished before the learned Claims Tribunal. Hence, the learned Claims Tribunal erred in rejecting the Petition of the Claimants despite relevant facts of the name of the deceased being placed before it.

3. Learned Counsel for the Respondent, repelling the arguments of the Appellant canvassed that no proof by way of witnesses was put forth before the learned Claims Tribunal to establish the fact that Nima Tamang and Passang Tamang were one and the same person. Mere furnishing of documents does not suffice to establish the interchangeability of names of the person as contended. That, no error manifests in the conclusion of the learned Claims Tribunal dismissing the Claim Petition filed by the Appellants.

4. The Appellants also filed a Petition under Order XLI Rule 27 of the Code of Civil Procedure, 1908, read with Section 151 and Section 107(1)(b)(d) of the Code of Civil Procedure, 1908, being I.A. No. 1 of 2017. It was submitted by learned Counsel for the Appellants that the Claim Petition before the learned Claims Tribunal was filed under Section 163A of the Motor Vehicles Act, 1988, which is benevolent legislation. The only shortfall on the part of the Appellant was failure to establish by any witness that Nima Tamang and Passang Tamang were one and the same person and his father was also known as Dil Bahadur Tamang and Karma Tamang. That, the Appellants seek to produce the area Panchayat to prove the

above facts, hence the Petition. This was objected to by the Respondent on grounds that it was filed belatedly, apart from which the Petition requires no consideration having failed to satisfy the conditions required under the provision invoked.

5. The opposing arguments of the parties were heard *in extenso* and careful consideration given. I have perused the evidence, the documents on record and also the impugned Judgment.

6. The facts before the learned Claims Tribunal were that the deceased was a driver by profession, aged about 57 years, at the time of accident, with a monthly income of Rs.3325/- (Rupees three thousand, three hundred and twenty-five) only. He was driving a Tata Sumo passenger vehicle bearing No. SK 01-T-1533 registered in the name of the Claimant No.1/ Appellant No.1 herein, on 17.1.2015. At around 14:30 hours, at Changu Commercial Complex, under the jurisdiction of the Sherathang Police Station, the vehicle with passengers while proceeding towards Gangtok, met with an accident and careened off twenty feet below the road. The deceased succumbed to his injuries on the spot while the passengers escaped with minor injuries. The Sherathang Police Station accordingly registered Sherathang Police Station Case No. 02/2015 dated 17.1.2015, under Section 279/337/338/304 'A' of the Indian Penal Code, 1860 and the autopsy of the deceased was conducted at STNM hospital. The Insurance Policy of the vehicle extending from 17.8.2014 to the midnight of 16.8.2015 was valid on the date of the accident and the claimant had also paid a sum of Rs.50/- (Rupees fifty) only, on account of legal liability to the Driver. The total compensation claimed was Rs.2,22,300/- (Rupees two lakhs, twenty-two thousand and three hundred) only.

7. Learned Counsel for the Respondent denied and disputed the claims of the Appellants, primarily on the ground that the driver of the vehicle who died in the accident was Passang Tamang, son of K. Tamang, as evident from his Driving Licence, FIR, Inquest Report and Challan forwarding the dead body for postmortem and not Nima Tamang, son of Dil Bahadur Tamang. That, no records exist to indicate that he also went by the name Nima Tamang or that his father was also known as Karma Tamang. That, the deceased had no connection with the Claimants who have in fact put forth a fallacious story of two names for one person as detailed above, to

defraud the Opposite Party/Respondent (herein). The other grounds raised were that the compensation claimed was excessive and it was denied that the deceased had an income.

8. On the basis of the pleadings of the parties, the learned Claims Tribunal framed one Issue.

> "Whether the Claimants are entitled to the compensation claimed? If so, who is liable to compensate them?"

9. After consideration of the evidence and documents on record, the learned Claims Tribunal concluded that the Claimants have failed to establish that Passang Tamang, son of Late K. Tamang and Nima Tamang, son of Dil Bahadur Tamang are the names of one and the same person who was the deceased. That, the Claimants have further failed to establish that the deceased who died in the motor accident was indeed the husband of the Claimant No.1 and the father of the Claimants No.2 and 3.

10. The Petition of the Appellant filed under Order XLI Rule 27 of the Code of Civil Procedure, 1908 was taken up along with the hearing of the main Appeal, in view of the observation of the Hon'ble Supreme Court in ***Union of India vs. Ibrahim Uddin and Another***[1], wherein it was held in Paragraph 52 as follows;

> "**52.** Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such

[1] (2012) 8 SCC 148

> evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored"

11. This stand was reiterated in ***A. Andisamy Chettiar vs. A. Subburaj Chettiar***[2], wherein it was observed as follows;

> "**16.** In Union of India v. Ibrahim Uddin and another [(2012) 8 SCC 148], this Court has held as under:
>
> "49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/ or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.
> …….....…….....""

12. This Court is aware and conscious that Section 163A of the Motor Vehicles Act, 1988, has been incorporated by the legislature in the Statute under the welfare scheme to provide benefits to the family of the injured persons falling within the income group extending up to Rs.40,000/- (Rupees forty thousand) only, per annum. Compensation under this provision is to be in accordance with the Second Schedule which is a structured formula and is a benevolent legislation.

13. It is indeed trite law that the conditions laid down under Order XLI Rule 27 of the Code of Civil Procedure, 1908 are to be fulfilled if the said

[2] AIR 2016 SC 79

law is to be applied. From the provision of Order XLI Rule 27 of the Code of Civil Procedure, 1908, which is not being reproduced herein to avoid prolixity, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary, in the Appellate Court but for the three different situations which are enumerated in the provisions. In other words, the Appellate Court cannot issue an order to fill the lacuna in the evidence of the parties who has failed to succeed before the learned Trial Court. However, considering the spirit of Section 163A of the Motor Vehicles Act, 1988, and it being a settled position of Law that it is not necessary in a proceeding under the Motor Vehicles Act to go by any rules of pleadings or evidence [See Raj Rani and Ors. V. Oriental Insurance Co. Ltd. and Ors. : (2009) 13 SCC 654] and for a just decision in the matter, without delving into the merits of the case, I deem it appropriate to remand the matter to the Motor Accidents Claims Tribunal, East Sikkim at Gangtok, for the limited purpose of allowing the Appellants to furnish evidence as sought hereinabove with regard to the names of the deceased and his father. Thereafter, the learned Claims Tribunal shall proceed in accordance with law.

14. The impugned Judgment of the learned Claims Tribunal is accordingly set aside.

15. It is hereby ordered that MACT case be readmitted to its original Number in the Register of Motor Accidents Claims Tribunal, East Sikkim at Gangtok and all necessary steps be completed within six months.

16. Appeal is disposed of accordingly.

17. Copy of this Judgment be transmitted to the learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok, for information and compliance.

18. In the circumstances, no order as to costs.

19. Records be remitted forthwith.

SLR (2018) SIKKIM 308

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 29 of 2016

Ramayana Singh Meena alias Ramayan Singh ….. **APPELLANT**

Versus

State of Sikkim through CBI ….. **RESPONDENT**

For the Appellant: Mr. Sudesh Joshi and Mr. Sujan Sunwar, Advocates.

For the Respondent: Mr. Md. Ashraf Ali, Advocate.

Date of decision: 15th March 2018

A. Indian Evidence Act, 1872 – S. 114 – Presumption – Illustration (g) – The I.O. admitted that he examined Amar Chand, recorded his statements and obtained his handwriting and signatures, but Amar Chand although listed as a Prosecution witness was not produced before the Learned Trial Court to establish the Prosecution case. Amar Chand appears to be a pivotal witness, therefore, on his non-production suspicion rears its head and enables this Court to draw an adverse inference under Section 114, Illustration (g) of the Evidence Act.

(Para 21)

B. Code of Criminal Procedure, 1973 – S. 100 – Search – Central Bureau of Investigation (Crime) Manual, 2005 reveals at Chapter 13, Clause 13.6 that it is mandatory, as per the provision of S. 100 (4) of the Cr.P.C., for an Officer making a search, to obtain two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if such inhabitant of the locality is available or is willing to be a witness to

the search. That, non-compliance of the order amounts to an offence under Section 187 of the IPC provided under Section 11(b) of the Cr.P.C.
(Para 24)

C. Criminal Jurisprudence – It is the cardinal principle of Criminal Jurisprudence that the Prosecution will have to establish its case against the accused beyond a reasonable doubt.
(Para 28)

Petition allowed.

Chronological list of cases cited:

1. Kumari Madhuri Patil and Another v. Addl. Commissioner, Tribal Development and Others, (1994) 6 SCC 241.
2. State of Maharashtra and Others v. Ravi Prakash Babulalsing Parmar and Another, (2007) 1 SCC 80.
3. Vineet Narain and Others v. Union of India and Another, (1998) 1 SCC 226.
4. Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellant (hereinafter A2) was convicted under Section 471 of the Indian Penal Code, 1860 (for short IPC) by the Court of the Special Judge, Prevention of Corruption Act, 1988, East District at Gangtok, East Sikkim, vide Judgment dated 30-08-2016, in S.T.(CBI) Case No.01 of 2013. He was sentenced to undergo simple imprisonment for 2 (two) years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, under Section 466 of the IPC for the offence defined under Section 471 of the IPC, with a default clause of imprisonment, vide Order on Sentence dated 31-08-2016. The period of imprisonment already undergone by A2 during investigation and trial was set off against the sentence imposed.

2. The grievance of A2 hinges around the finding of the Learned Trial Court, which he alleges, concluded without any basis that the Caste

Certificate, Exhibit 81, submitted by him, is false and fabricated, therefore, he is guilty of dishonestly using as genuine a forged Scheduled Tribe Certificate. That infact, the Prosecution is in possession of two Caste Certificates issued in the name of "Ramayan Singh." Exhibit 75 is a Certificate issued in the name of A2 as "son of Munshi," while Exhibit 81 is another Certificate issued in his name as son of Rameshwar Dayal. In Exhibit 81, in the column pertaining to father's name the Prosecution alleges that 'Munshi' has been erased and the name of "Rameshwar Dayal" has been inserted. A2 being in possession of this document had submitted it for employment, but was convicted and sentenced in the aforesaid case, as detailed hereinabove. Assailing the Judgment Learned Counsel for the Appellant exposited that the Trial Court failed to consider the evidence of Om Prakash Yadav, P.W.14, who deposed that the Dispatch Register, Exhibit 78, is an official document maintained by the dealing Clerk and kept in his possession. That, Exhibit 78, at Sl. No.1090, indicates no alteration, thereby vouching for the authenticity of Exhibit 81. Although the Prosecution placed reliance on Exhibit 76 as the application submitted by A2 for issuance of Caste Certificate to him, the said document cannot be attributed to A2 as it bears the name of 'Munshi' as the father of Ramayan Singh, while A2 is the son of "Rameshwar Dayal", besides no evidence exists to establish that Exhibit 76 was submitted by A2. Moreover, Surendra Singh Khairiya, P.W.10 has deposed that Exhibit 76 bears no date nor does it bear the details of which Certificate the Applicant had sought. However, his statement that Sl. No.1090 in Exhibit 78 is a false entry, finds no substantiation the entry being untampered. Inviting the attention of this Court to the impugned Judgment, Learned Counsel would further contend that the Learned Trial Court merely stated that P.W.10 confirmed the evidence given by P.W.14 without considering the evidence of P.W.10 in its entirety.

3. It was further contended that Kamlesh Jain, P.W.31, admitted to taking over charge of the concerned Section from Amar Chand, the Clerk who was maintaining Exhibit 78 and was responsible for forwarding the papers to the then Tehsildar P.W.14. The seizure of Exhibit 78 was made in the presence of P.W.31 from their Office, thereby augmenting his statement that Exhibit 78 was kept in the safe custody of the Lower Division Clerk (LDC) and outsiders were not permitted to make entries in the document, but his evidence was ignored. That, Deepak Gaur, P.W.32, the Inspector of Police, CBI (ACB), Jaipur, who partly investigated the case admitted that neither he saw nor seized any Rules pertaining to issuance of Scheduled

Caste Certificates. No personal efforts were made by him to trace out the Office copy of Exhibit 81 issued in the name of "Ramayan Singh," son of "Rameshwar Dayal" and not son of 'Munshi' in the Office of the Tehsildar. Although the witness admitted to examining Amar Chand who was responsible for making entries in Exhibit 78, but curiously he was not a Prosecution Witness nor were his specimen handwriting and signatures forwarded for Forensic analysis. The Learned Trial Court ignored the statement of P.W.32 who stated that no verification was made to test the authenticity of Exhibit 81. That, although Exhibit 81 was sent to the Handwriting Expert Shri B. P. Mishra, P.W.29, at CFSL, Kolkata, the specimen handwritings and signatures of A2 in Hindi were admittedly not supplied to him by the Investigating Agency for comparison with the questioned documents. The finding of the Learned Sessions Court that the name 'Munshi' has been erased or scratched and the name of "Rameshwar Dayal" inserted contradicts the evidence of P.W.29 who admitted that the erased writing though visible in Exhibit 81, was not decipherable, thus evidently no fingers point at A2 in this context.

4. That, contradictions existed between the statements of A2 and Kuntan Gain, P.W.26 with regard to the seizure of Exhibit 81. Learned Counsel would urge that it is not the Prosecution case that the Appellant is not a Scheduled Tribe, based on this premise there would be no necessity for him to forge the Certificate. Munshi Ram, P.W.18, in his evidence stated that he had no son by the name of "Ramayan Singh," thus raising doubts about the authenticity of Exhibit 76 as also Exhibit 75, the Office copy of the Certificate, which was purportedly issued on the basis of Exhibit 76 and which finds no mention in the Dispatch Register, Exhibit 78. Placing reliance on the decision of the Hon'ble Supreme Court in ***Kumari Madhuri Patil and Another*** vs. ***Addl. Commissioner, Tribal Development and Others***[1] and ***State of Maharashtra and Others*** vs. ***Ravi Prakash Babulalsing Parmar and Another***[2] it was contended that the Learned Trial Court ought to have referred the case of A2 with regard to the verification of the Caste Certificate to the Caste Scrutiny Committee and had the said Committee found the Certificate to be false then necessary action could have been initiated against A2 under the provisions of the IPC.

5. It was also urged that the seizure of the documents, namely, Exhibits

[1] (1994) 6 SCC 241
[2] (2007) 1 SCC 80

75, 76, 78 and 81, by the CBI was not in accordance with the CBI Manual as it is clear that P.W.32 who purportedly seized the document vide Seizure Memo Exhibit 74 on 20-08-2010 has not obtained the signature of any independent witness and the signature of only one witness appears on Exhibit 83 when seizure of Exhibit 77 was made. Placing reliance on the decision of the Hon'ble Supreme Court in ***Vineet Narain and Others*** vs. ***Union of India and Another***[3] it was urged that the CBI Manual provides essential guidelines for the functioning of the CBI which must be scrupulously adhered to, *inter alia*, during raids, seizure and arrest. A deviation thereof ought to be dealt with severe disciplinary action. That, the Prosecution in view of the aforestated grounds has not been able to establish the ingredients of Section 471 of the IPC against A2. Hence, the impugned Judgment and Order on Sentence be set aside and the Appellant be acquitted of the Charge against him.

6. The *contra* arguments on behalf of the CBI is that P.W.10, the Tehsildar, Nadbai, has described the procedure of obtaining a Caste Certificate, which entails submission of details by the applicant in prescribed Form or fresh application, on receipt of which verification is carried out by necessary Officials, the Tehsildar on being so satisfied issues the Certificate. Details thereof are entered in the Register and two copies of the Caste Certificate are issued out of which one is made over to the applicant and the other maintained in the Office records. On receipt of the Certificate the applicant affixes his signature on the Register (Exhibit 78) and the Office copy of the Certificate (Exhibit 75). That, Exhibit 75 is the original office copy of the Certificate issued to Ramayan Singh, "son of Munshi" of Village Karomev, Tehsil Nadbai. However, the entries made in Exhibit 78 as "son of Rameshwar" are false entries duly supported by Exhibit 79, the Spot Verification Report, which indicates that there is no person by the name of "Ramayan Singh," son of Rameshwar, by Caste "Meena in Village Karomev. 'Munshi,' whose name appears on Exhibit 75 is the son of "Banni Ram" and has two minor school going sons, namely, Ravi and Vinod, indicating submission of a false application Exhibit 76, by A2. Exhibit 80 which is a letter addressed to the CBI by the Tehsildar, Nadbai based on Exhibit 79 is proof of the fact that no "Rameshwar Dayal" lived in Karomev. That, Exhibit 81 reveals that the father's name 'Munshi' has been scratched out and the name of "Rameshwar Dayal" inserted in its place fraudulently. That,

[3] (1998) 1 SCC 226

due procedure was followed when Exhibit 81 was seized as per Seizure Memo Exhibit 92. It was further urged that P.W.31 has duly corroborated the evidence of P.W.10 and P.W.14 while P.W.29 has proved the forgery of the Caste Certificate. Thus, from the evidence of the Prosecution, it is clear that A2 by utilising the forged Caste Certificate obtained appointment in service, hence, the conviction and sentence require no interference.

7. In order to appreciate the matter, we may briefly advert to the facts of the Prosecution case. An Order of this High Court, dated 09-06-2006, in Writ Petition (C) No.22 of 2006, filed by one Hishey Sherpa, directed the CBI to conduct an enquiry into the process of selection and appointment made by the Regional Research Institute (Ay) Gangtok, particularly the Officer-in-Charge therein and Dr. Pratap Makhija (hereinafter "A1)", the Research Officer and Chairman of the Selection Committee at the relevant time and should a *prima facie* case be found against any Officer, to investigate the case in accordance with law. In compliance thereof, the CBI, SCB, Kolkata, conducted an enquiry, where a *prima facie* case was established against A1 as well as against three candidates, namely, Ramayan Singh Meena (A2), Surendra Mohan Sihara (A3) and Mukesh Kumar (A4) who had been appointed in three different posts at the RRI (Ay), Gangtok. A Regular Case was registered on 25-10-2006 under Sections 120B read with 420, 468, 471 of the IPC read with Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. During the course of enquiry by the CBI, A2 filed SLP(C) No.CC 118/2007 in the Hon'ble Supreme Court of India assailing the Order of this High Court dated 09-06-2006. The matter was remitted back to the High Court for fresh disposal and discontinuance of CBI investigation. Consequently, the CBI filed a Closure Report dated 27-02-2007 before the Court of the Special Judge, East Sikkim, at Gangtok on 08-03-2007. However, in Civil Appeal No.684 of 2008 arising out of SLP(C) No.2301 of 2007, filed by the Central Council for Research in Ayurveda and Siddha (CCRAS), New Delhi, the Supreme Court vide an Order dated 25-01-2008 clarified that no opinion had been expressed about criminal proceedings which were initiated. In pursuance of the said Order, the CBI filed a Petition on 08-10-2009 in the Court of the Special Judge, East Sikkim, seeking permission to investigate into the closed case which was duly granted.

8. Investigation would reveal that in 2004 the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy (Ayush) under

Ministry of Health and Family Welfare, Government of India, took the initiative of filling up backlog vacancies reserved for SC & ST categories. The Ministry clarified that direct recruitment in backlog reserved vacancies would be determined as per post based reservation rosters, but prohibited exchange of reservation between SC and ST rosters. The RRI (Ay) Gangtok despite directions failed to maintain the post based reservation roster. Recruitment of the Group C and D posts were to be done through local Employment Exchanges or the Central Employment Exchange, as the case may be. In the event of non-availability of local candidates and issuance of Certificates to such effect, the Director was to advertise or authorize the Project Officer to advertise the vacancies through Central Employment Exchange. However, this was flouted and an advertisement was issued in the local newspapers on 04-10-2005, reiterated on 10-10-2005, subsequent to which the local Employment Exchange was approached on 13-10-2005, which furnished sufficient candidates suitable for the posts advertised.

9. That, an incompetent Scrutiny Committee was constituted who violated all norms for screening of candidates. A2 had applied for the post of General Duty Assistant (GDA) bereft of Experience Certificate or Typing Certificate, but the intervention of A1 ensured acceptance of his application with the assurance of subsequent submission of requisites. A2 while submitting his application mentioned his father's name as "Late Rameshwar Dayal," his address for correspondence as Dara Gaon, Tadong, along with a fake Caste Certificate. For the purposes of the instant matter, it would suffice to state that A2 despite lacking the requisite qualification was appointed at the RRI (Ay) Gangtok, his appointment letters collected by one Malay Kumar Saha, P.W.6, Pharmacist of RRI (Ay) Gangtok and handed over to A2. Further investigation would reveal that Ration Card No.864 (Document X), issued to "Munshi Ram" filed by A2 along with his application seeking Caste Certificate was fake, as the Ration Card issued to "Munshi Ram" was numbered "925" (Exhibit 77) and not "864" (Document 'X'). The name of "Binod, son of Munshi Ram," at Sl. No.6 was found to have been erased from Document 'X' and the name of "Ramayan Singh" inserted. It further came to light that Tara Chand (A5) had certified the application of A2 as the son of Munshi, Caste Meena and resident of Village Karomev, Tehsil Nadbai. The name of Munshi was erased from the Caste Certificate, Exhibit 81 and the name of Rameshwar Dayal inserted which was submitted by A2 along with his application before the RRI (Ay)

Gangtok seeking appointment. The Prosecution case is that A1 by abusing his official position and in conspiracy with three candidates, being A2, A3 and A4 and others got them appointed in various posts in the RRI (Ay), Gangtok fraudulently and dishonestly thereby depriving the genuine local candidates of employment. That, the three candidates had furnished false information to prove their eligibility and establish themselves as local residents of Sikkim. Hence, Charge-sheet was submitted against all the Accused Persons under Sections 120B read with 420, 468, 471 of the IPC read with Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

10. After hearing Learned Special Public Prosecutor for the CBI and the Learned Defence Counsel, the Learned Trial Court framed Charge against A2 under Sections 420, 471, 120B of the IPC. The Prosecution furnished and examined 33 (thirty-three) witnesses. Thereafter, A2 was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") and his individual responses recorded, whereupon A2 sought to and examined himself and one Lekhraj as witnesses. Arguments were heard and concluded and the impugned Judgment and Order on Sentence were pronounced.

11. The opposing arguments of Learned Counsel for the parties were heard at length and given due consideration. Careful examination has been made of the evidence and documents on record and the citations made at the Bar as also the impugned Judgment and Order on Sentence.

12. The question that falls for consideration before this Court is, Whether the Learned Trial Court correctly convicted the Appellant under Section 471 of the IPC or did A2 deserve an acquittal. To determine this, we may now consider the evidence of the relevant witnesses and documents on record.

13. Before delving into the documents and the evidence, it would indeed be essential to extract Section 471 of the IPC. The said Section reads as follows;

> **"471. Using as genuine a forged document or electronic record**.—Whoever fraudulently or dishonestly uses as genuine any document or

> electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.**"**

Hence, using of a forged document with knowledge that it was forged or with reason to believe that it was forged entails the same penalty as if he had forged the document. Walking back to the provisions of Section 463 of the IPC this Section defines forgery and reads as follows;

> **"463. Forgery**.—Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.**"**

To establish an offence under Section 471 the requisites would be, (a) fraudulent or dishonest use of a document as genuine and (b) the person using it must have knowledge or reason to believe that the document is a forged one. On the anvil of the above principles, it would now be essential to gauge whether A2 committed the offence.

14. The evidence of P.W.10, a retired Tehsildar, who was posted as Tehsildar, Nadbai, sheds light on the various modes of applying for a Scheduled Caste/Scheduled Tribe Certificate which is not disputed. The witness identified Exhibit 75 as the Caste Certificate maintained in the Office records and stated in rather uncertain terms as follows;

> **"***…… I also find a signature of a person signing as Ramayan Singh who received the Certificate. ……***"**

Although he identified Exhibit 76 as the original application for issuance of the Caste Certificate he admitted to lack of personal knowledge as to who made the application or who signed on Exhibit 75 when receiving the original or whether A2 infact appeared in person to receive Exhibit 81.

That, A5 Patwari at the relevant time had reported that the applicant A2 was the son of "Munshi of Karomev, Nadbai," but the application is devoid of a date. When the witness was confronted with Exhibit 78 the Dispatch Register of Caste Certificates issued from his Office, he admitted that at Page No.87, under Sl. No.1090, dated 30-08-2000, an entry has been made showing "Ramayan Singh S/o Rameshwar Dayal Meena Karomev" who has been issued a Scheduled Tribe Certificate from the Office of the Tehsildar, Nadbai under the signature of Om Prakash, Deputy Tehsildar, P.W.14. That, at the relevant time, one Amar Chand was the concerned Clerk dealing with issuance of such Certificates and that records pertaining to the Scheduled Caste and Scheduled Tribe Certificates issued by the Office of the Tehsildar at Nadbai were kept in the custody of the said Amar Chand. The witness also stated that the handwritings appearing in Sl. No.1090 at Exhibit 78 is of Amar Chand. It also transpires that issuance of Exhibit 75 was on the basis of the report of the Patwari on Exhibit 76. He also claimed that along with Exhibit 75 the Document 'X', viz; Ration Card bearing No.864 in the name of "Munshi Ram" was submitted. Pausing here for a moment, Prosecution by this statement seeks to garner strength for their allegation that the Ration Card itself bore a false entry showing insertion of the name of A2, as son of "Munshi Ram" at Sl. No.6, by allegedly removing the name of one of Munshi Ram's sons already there. Firstly, no such proof of submission of the Document 'X' with Exhibit 75 is on record, besides the document is in photocopy sans reasons for non-production of the original and hence, is outside the purview of the consideration of this Court. The witness also identified Exhibit 77 as the Ration Card of Munshi bearing No.925, but this is of no assistance to the Prosecution case as nothing therein has been tampered with. The witness voluntarily disclosed that Sl. No.1090 in Exhibit 78 is a false entry and that false entries are made in his Office with the connivance of certain staff, but this was unsubstantiated. Nothing cogent could be established against A2 from his evidence, besides it was confirmed by the witness as follows;

> **"***The handwritings appearing in Serial No.1090 of Exbt. 78 belongs to the concerned clerk, Amarchand* **"**.

15. P.W.11, a retired Land Records Officer in the Office of the Tehsildar, Nadbai Tehsil, District Bharatpur, on being shown Exhibit 79, identified it as the Spot Verification Report prepared by him along with one

Ramcharan Gupta, Patwari of Karomev Village on 01-04-2010. Ramcharan Gupta was not a Prosecution witness. The evidence of P.W.11 on careful consideration is of no avail to the Prosecution case as Exhibit 79 identified by him as a Spot Verification Report prepared by him and Ramcharan Gupta and certified by P.W.10 is a document in photocopy. No explanation is furnished for filing of the photocopy and the fate of the original is unknown. The Learned Trial Court therefore ought not to have admitted the document as evidence being in contravention to the provisions of the Indian Evidence Act, 1872 (for short "Evidence Act"), consequently irrelevant for the present purpose. Although the witness identified Exhibit 80 as a letter dated 05-04-2010 addressed to the Superintendent of Police, CBI, Jaipur, from the Tehsildar P.W.10, the contents thereof remained unproved on the objection of Learned Counsel for A2 before the Learned Trial Court the document allegedly having been prepared by P.W.10 who was already examined, but not shown the document by the Prosecution despite having it in their possession. The evidence of P.W.11 bolsters the evidence of P.W.10 that Exhibit 81, Caste Certificate, in the name of Ramayan Singh, son of "Rameshwar Dayal" had been issued from the Office of the Tehsildar Nadbai under the signature of the then Naib Tehsildar, Om Prakash Yadav, P.W.14 and admitted that in Rajasthan "Meena" is a Scheduled Tribe. Exhibit 80 the letter sent to the CBI (based on Exhibit 79) indicates that Rameshwar Dayal did not live in Karomev village in the year 2010, but no such verification appears to have been made for the year 2000 when Exhibit 81 was issued. The witness also admitted that Sl. No.1090 in Exhibit 78 bears no entry of "Ramayan Singh, son of Munshi" and details reflected in Exhibit 75 have not been entered in Exhibit 78.

16. P.W.14 had worked as a Naib Tehsildar in the same Tehsil Office where his job included issuance of Caste Certificate. The witness while corroborating the evidence of P.W.10 pertaining to procedure for preparation of Scheduled Caste/Tribe Certificate, proceeded to state that in Exhibit 81, the name "Munshi" had been deleted and words "Rameshwar Dayal" incorporated in the vacant space, but admitted that at Sl. No.1090 of Exhibit 78 the name "Ramayan Singh, son of Rameshwar Dayal Meena Karomev," was written. Alike P.W.10 he stated that the dealing Clerk at the relevant time was Amar Chand who could throw light on Exhibit 75 and Exhibit 81, which were in Amar Chand's handwriting as also on Exhibit 78 maintained by him. Although his evidence indicated that the dealing Clerk appeared to have obtained the signature of the recipient on Exhibit 75 itself,

but this was followed by the admission that he did not see the applicant affixing his signature on Exhibit 75. That, in Exhibit 76 there was no endorsement made by him under his signature approving the issuance of Caste Certificate in favour of the applicant, Ramayan Singh "son of Munshi." Under cross-examination, it was conceded that Caste Certificate was issued to Ramayan Singh, "son of Rameshwar Dayal Meena," Caste "Meena" from their Office, bearing Sl. No.1090, vide Exhibit 78. While dissecting the evidence of this witness although he testified that the name 'Munshi' had been deleted and the name "Rameshwar Dayal" incorporated subsequently, this was not buttressed by any evidence. As we shall discuss later the Handwriting Expert also drew a blank on this aspect. Thus, he is unable to illuminate this Court as to who was responsible for the alleged insertion in Exhibit 81, of the name "Rameshwar Dayal" where previously Munshi allegedly existed.

17. P.W.17 would depose that a CBI Officer in the year 2010 seized from his possession one Ration Card No.925 of Munshi Ram, Exhibit 77. To establish insertion of A2's name in the Ration Card reliance was placed on Document 'X' which as already discussed brooks no consideration. P.W.18 of the Prosecution was Munshi Ram, whose evidence lends no succour to the Prosecution case.

18. P.W.31 an Upper Division Clerk in the Tehsil Office admitted that when he was posted in the Office from March 2009 to February 2011 one Amar Chand was the LDC at the said Office. His evidence substantiates the evidence of P.W.10 and P.W.14 to the effect that Amar Chand was the dealing Clerk. The witness identified the handwriting appearing on Exhibit 76, marked Exhibit 76(c) as that of A5 Tara Chand, the Patwari of the Tehsil at the relevant time and Exhibit 75 as the office copy of the Caste Certificate issued from the Office of Tehsildar in the name of "Ramayan Singh, son of Munshi of Village Karomev." The witness conceded that Exhibit 78 maintained in their Office, at Page No.87, Sl. No.1090, indicated that the Caste Certificate had been issued to "Ramayan Singh, son of Rameshwar Dayal Meena" of Karomev and the Register had been taken by him from his Office and handed over to the Tehsildar.

19. As the conspectus of the Prosecution case revolves around the alleged insertion made in Exhibit 81, viz., the name "Rameshwar Dayal" and whether Exhibit 75 is the Office copy of Exhibit 81 and who made the

entries in Exhibit 78, the Dispatch Register, it becomes imperative to closely examine the evidence of P.W.29, the Handwriting Expert. Exhibit 107 is his opinion pertaining to the different specimen handwritings and questioned documents forwarded to him for analysis and opinion. We may straightaway go to Exhibit 106 (S32 to S37) which are the signatures of A2 in English. Similarly, Exhibit 37 and Exhibit 38 bear the signatures marked "Q7 and Q8" by the P.W., purportedly the English signatures of A2. Forwarding of these signatures for analysis was obviously bereft of logic and assistance to the Prosecution case as the questioned/contested entries are all made in Hindi/Devanagari script. The witness has admitted that the specimen handwritings and signatures of A2 in Hindi were not supplied to him by the Investigating Agency. His further admission is that he cannot say whether document Exhibit 81 was actually blank or with the erasures or whether the words had been filled at a later time. He would further go on to state that there are marks of erasures at Q23 in Exhibit 81, in the space for "father's name" and prior to the word "Rameshwar Dayal" in Hindi. That, remnants of the erased writings are visible, but not completely decipherable. What emanates is lack of assistance to the Prosecution case by the evidence of this witness. P.W.31, the LDC who took charge from Amar Chand would depose that the Caste Certificate vide Exhibit 78 was issued to "Ramayan Singh son of Rameshwar Dayal Meena" and Exhibit 78 was taken out from his Office and handed over to the Tehsildar.

20. The Investigating Officer (I.O.) of the case P.W.32, Deepak Gaur admitted that he had recorded the statement of Amar Chand and had also obtained his specimen handwritings and signatures. Correlated to this is his admission that he did not refer the document marked Exhibit 75 to an Expert to determine whether the seal appearing therein marked Exhibit 75(d) or the signatures appearing therein were genuine.

21. What manifests from the evidence of the witnesses extracted hereinabove is that, in the first instance, Exhibit 81 which is the Scheduled Tribe Certificate in the name of A2, "Ramayan Singh, son of Rameshwar Dayal," was issued vide Exhibit 78, the Dispatch Register, which at Sl. No.1090 clearly reveals the name of "Ramayan Singh, son of Rameshwar Dayal." Exhibit 75 is a Caste Certificate in the name of "Ramayan Singh son of Munshi" purporting to be the Office copy of Exhibit 81, allegedly received by A2 after acknowledging receipt on Exhibit 75 by signing on it. Both Exhibits were admittedly issued by the Tehsildar, Nadbai and Exhibit

75 remained in the Office records. The evidence of P.Ws 10, 11, 14 and 31 clarifies that Exhibit 81 was issued from the Tehsil Office at Nadbai. The Prosecution case rages around the contention that Exhibit 81 is a forged document utilized by A2 to obtain employment at RRI (Ay) Gangtok. Although the Prosecution case is that Exhibit 76 was the application submitted by A2 in the printed proforma of the concerned Tehsil, addressed to the Tehsildar recording his father's name as "Munshi," no proof of this allegation exists. Exhibit 81 has been issued on 30-08-2000, but Exhibit 76 has not been dated by the applicant, it is only the concerned Officer who has endorsed a date below his signature. The signature alleged to be of A2 is unidentified and it is not proved that A2 is the applicant. Even assuming that Exhibit 81 was the offshoot of Exhibit 76, it has not been established by the Prosecution that the insertion of the name "Rameshwar Dayal" was infact made by A2 or that he had knowledge of such insertion or whether Exhibit 76 pertained at all to Exhibit 81. In other words, there could have been two persons by the name of "Ramayan Singh," of which one could have been the son of "Munshi" and the other the son of "Rameshwar Dayal." It is the constant refrain of the Prosecution that Exhibit 75 is the office copy of the Scheduled Tribe Certificate issued to A2 and is, therefore, the correct version of the document issued. If this be so, then one cannot help but be perplexed at the entry in the Dispatch Register Exhibit 78 which shows issuance of Certificate to "Ramayan Singh, son of Rameshwar Dayal" and not "Ramayan Singh, son of Munshi." The evidence on record has also clearly established that the Dispatch Register, Exhibit 78 remains in the custody of the Office and more specifically with the dealing Clerk, one Amar Chand and the general public have no access to it. The entries in Exhibit 78 are said to have been made by Amar Chand. It is not the claim of any of the witnesses that the entry in Exhibit 78 was made by A2. A2 had no access to Exhibit 78 as per evidence on record. The I.O. has admitted that he examined Amar Chand recorded his statements and obtained his handwriting and signatures, but Amar Chand although listed as a Prosecution witness was not produced before the Learned Trial Court to establish the Prosecution case. Amar Chand appears to be a pivotal witness, therefore, on his non-production suspicion rears its head and enables this Court to draw an adverse inference under Section 114, *Illustration* (g) of the Evidence Act. It is also questionable as to why Ramcharan who accompanied P.W.11 was not produced as a witness although listed as a Prosecution witness.

22. Another factor that also baffles the mind is as to why the I.O., P.W.32 would collect the signatures of A2 in English, being Exhibit 106 and not in the Devanagari Script/Hindi, when, the questioned entries have been made in Hindi. The evidence of the other I.O., P.W.33, R. K. Bhattacharjee is also laden with contradictions, in his evidence-in-chief he claims to have collected the specimen handwriting and signatures of the accused persons and witnesses and forwarded it to CFSL Kolkata through his Branch Head and received the opinion. Contrarily, under cross-examination he admits that he had obtained the specimen signatures and handwritings of A2 in English, but did not send the same to GEQD for their opinion as he did not find it relevant. That, he did not send the specimen handwritings and signatures of A2 obtained in Hindi to GEQD for comparison with handwritings and signatures appearing in Exhibit 76. The vacillating evidence of this I.O. would lead to the inevitable inference of his unreliability as a witness. He would testify that the handwritings appearing in Exhibit 76 and Exhibit 81 could not be ascertained by him. He went on to admit that there is nothing on record to show that Exhibit 81 was tampered by A2 and further stated that Sl. No.1090 was inserted between Sl. No.1089 and 1091 in Exhibit 78. At best this is an incongruous statement as nothing could be more obvious than the fact that the number '1090' would logically follow the number '1089'. Assuming that the Handwriting Expert had stated that the name 'Munshi' was written earlier and erased and the name "Rameshwar Dayal" inserted, which I hasten to add he has not, would it have solved the Prosecution case to establish cogently that it was A2 who was responsible or that it was done at his behest? In my considered opinion, this has to be answered in the negative as no proof whatsoever exists to foist the responsibility on A2 of having inserted the name "Rameshwar Dayal" or having instigated someone else to do it for him nor can any inference be gathered from the evidence that he had knowledge that the document was a forged one.

23. The cavernous gap in the Prosecution case, which stares one in the face, is the lack of investigation on "Rameshwar Dayal" whose existence is shrouded in mystery apart from the statement of A2 that Rameshwar Dayal is his father as recorded when he was examined under Section 313 of the Cr.P.C. and in the documents relied on by him during his evidence being Exhibits AZ 9 and AZ 10. Then the next question that emerges is whose son is A2? It is an admitted fact that no effort was made to check any records or make inquiries as to whether any "Rameshwar Dayal" lived in

the area in the year 2000. At the same time, it is not denied that A2 indeed belongs to the Caste 'Meena' a Scheduled Tribe as validated by the evidence of the Prosecution witness. If that be so, then what would necessitate the forging of a Scheduled Tribe Certificate showing the name of a third person 'Munshi' as his father is indeed mind boggling. When the Prosecution has not been able to establish through any clinching, consistent and cogent evidence that the document Exhibit 81 was a forged document, the question of A2 using Exhibit 81 as genuine does not arise. Added to this is the admission of the I.O., P.W.32, that he did not look for the original of Exhibit 81. Thus, it is not disproved that A2 is the son of Rameshwar Dayal.

24. It was next contended that Exhibit 74 vide which seizures of Exhibits 75, 76 and 78 was made were not in terms of the Central Bureau of Investigation (Crime) Manual – 2005 and the I.O., P.W.32 had admitted that there was no witness to Exhibit 74. Perusal of Exhibit 74 would indicate that there was indeed a witness to the seizure, i.e., P.W.10. If we revert to the evidence of P.W.10, he had identified Exhibit 74(a) and Exhibit 74(b) as his signatures on Exhibit 74. He further went on to state that the CBI Officer had prepared the Receipt Memo at the time of seizure of Exhibits 75, 76 and 78. His evidence withstood the cross-examination. However, it has to be reflected here that Central Bureau of Investigation (Crime) Manual – 2005, reveals at Chapter 13, Clause 13.6 that it is mandatory, as per the provision of Section 100(4) of the Cr.P.C., for an Officer making a search, to obtain two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if such inhabitant of the locality is available or is willing to be a witness to the search. That, non-compliance of the order amounts to an offence under Section 187 of the IPC provided under Section 11(b) of the Cr.P.C. The second seizure was made by the I.O., P.W.33, vide seizure Memo Exhibit 92 whereby Exhibit 81 was seized. A perusal of Exhibit 92 would indicate that two witnesses were present during the seizure, i.e., P.W.26 and one N. T. Bhutia, who was numbered as Prosecution Witness 42 in the Charge-Sheet, but who was not produced before the Learned Trial Court for his evidence. From the evidence, it cannot be said that the seizures were in compliance to the CBI (Crime) Manual thereby placing it outside the ambit of consideration, the seizures themselves being doubtful.

25. So far as the allegation that A2 had intentionally suppressed the fact of his original address as Rajasthan/New Delhi and knowingly furnished a false local address to establish himself as a local resident, finds no support. In this context, if we peruse Exhibit 3, the advertisement, issued by the RRI (Ay), Gangtok, it is clear that in the proforma for application, the requirements at Sl. No.8 are for Permanent and Correspondence address. A2 has submitted his correspondence address. It was for the Scrutiny Committee to have rejected his application, if requirements were incomplete, in this regard, A2 cannot be held at ransom.

26. The Learned Trial Court at Paragraphs 76 to 79 of the Judgment had discussed the evidence with regard to Exhibits 75, 76, 78 and 81 and concluded at Paragraph 80 as follows;

> **"**80. At this juncture, it would be profitable to compare the Scheduled Tribe Certificate (Exhibit-81) with its Office copy (Exhibit-75). All the entries mentioned in both the certificates are identical except in the certificate (Exhibit-81), the name of the father "Munshi" has been erased or scratched and the name "Rameshwar Dayal" inserted. If one compares both the certificates properly, even to an untrained eye, the erasure on the portion meant for the father's name is visible. This has also been confirmed by the handwriting expert, B.P Mishra (PW-29). Hence, it is palpable that after the said certificate was received by accused No.2, the father's name "Munshi" was erased and "Rameshwar Dayal" inserted.**"**

27. In my considered opinion, firstly the Learned Trial Court has not stated that the entry was made by A2 or at his behest, the Learned Trial Court has also failed to discuss as to why the entry at Sl. No.1090 on Exhibit 78 reveals the name of "Ramayan Singh" son of "Rameshwar Dayal Meena" and not the name of "Ramayan Singh, son of Munshi". Apart from which, it cannot but be noticed that the Learned Trial Court has also taken into consideration the contents of Document 'X', a photocopy of Ration Card of Munshi bearing No.864 which is clearly inadmissible in evidence as also Exhibit 79, a document in photocopy. Further, the Learned Trial Court failed to consider that the custodian of the documents Exhibits 75, 76 and

78, Amar Chand, was never examined by the Prosecution. At Paragraph 83, the Learned Trial Court also observed, *inter alia*, as follows;

> **"**83. ……. The fact that the said certificate (Exhibit-81) was seized by the I.O in the Office of CBI at Kolkata has also been admitted. Under such circumstances, it becomes imperative on the part of accused No.2 to explain how his father's name was changed from "Munshi" to "Rameshwar Dayal" in the Scheduled Tribe Certificate (Exhibit-81)**."**

28. I have to disagree on this count as it is the cardinal principle of Criminal Jurisprudence that the Prosecution will have to establish its case against the accused beyond a reasonable doubt. In the instant matter, merely because Exhibit 81 was seized by the I.O. from A2 it is unfathomable as to why the Learned Trial Court is of the opinion that it becomes 'imperative' on the part of A2 to explain the change in his father's name from 'Munshi' to "Rameshwar Dayal." In this context, I once again revert to the insertion at Sl. No.1090 in Exhibit 78, unless this is explained by the Prosecution, the question of Exhibit 81 being a forged document remains unfortified and unproved.

29. Germane herein would be the provisions of Section 106 of the Evidence Act, which reads as follows;

> **"106. Burden of proving fact especially within knowledge**.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> *Illustrations*
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> .
>
> (b) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him**."**

This Section cannot be invoked to fill up the lacunae in the Prosecution case or the inability of the Prosecution to produce evidence pointing to the guilt of the accused. In ***Shambhu Nath Mehra*** vs. ***The State of Ajmer***[4], Vivian Bose, J., while considering a case against the Appellant under Section 420 of the IPC and Section 5(2) of the Prevention of Corruption Act, 1947, observed that Section 106 of the Evidence Act is designed to meet exceptional cases in which it would be nigh impossible for the Prosecution to establish certain facts which are particularly in the knowledge of the accused. In Paragraph 11, it was observed as follows;

> **"**(11) This lays down the general rule that in a criminal case the burden of proof is on the prosecution and S.106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.
>
> The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.
> ……**"**

30. On pain of repetition, it may be stated that the entry in Exhibit 78 and Exhibit 81 are the same and it was for the Prosecution to have established that 'Munshi' allegedly scored out in Exhibit 81 correlated to the entry in Exhibit 78, but this is not so as the evidence and documents on record have revealed.

[4] AIR 1956 SC 404

31. In view of the gamut of discussions, it cannot but be concluded that the Prosecution has failed to bring home the Charge of Section 471 of the IPC against A2 of which he is accordingly acquitted.

32. Consequently, the Appeal is allowed.

33. The impugned Judgment and Order on Sentence of the Learned Trial Court is set aside.

34. The Appellant is discharged from his bail bonds.

35. Copy of this Judgment be transmitted to the Learned Trial Court for information along with records of the Learned Trial Court.

SLR (2018) SIKKIM 328
(Before Hon'ble Mrs. Justice Bhaskar Raj Pradhan)

I. A. No. 1 of 2017
in
Crl. L.P. No. 10 of 2017

Ankit Sarda ….. **APPELLANT**

Versus

Subash Agarwal ….. **RESPONDENT**

AND

I. A. No. 1 of 2017
in
Crl. L.P. No. 11 of 2017

Ankit Sarda ….. **APPELLANT**

Versus

Kailash Agarwal ….. **RESPONDENT**

For the Appellant: Mr. Jorgay Namka, Ms. Panila Theengh, Mr. Karma Sonam Lhendup and Ms. Tashi Doma Sherpa, Advocates.

For the Respondent: Mr. Rahul Rathi.

Date of decision: 19th March 2018

A. Code of Criminal Procedure, 1973 – S. 378 – Computation of the Period of Limitation – S. 378 (5) Cr.P.C. itself prescribes a period of limitation for an application for grant of special leave to appeal to be made under S. 378 (4) Cr.P.C. – The appellant has incorrectly

calculated the delay in terms of Article 114 of the Limitation Act, 1963 which prescribes 90 days period to file an appeal from an order of acquittal under sub-section (1) or sub-section (2) of S. 417 Cr.P.C. while seeking special leave to appeal under S. 378 (5) Cr.P.C. – Time would begin to run against the appellant after the expiry of prescribed period of 60 days from the date of acquittal. As per S. 12 of the Limitation Act, 1963 the day from which such period is to be reckoned, shall be excluded so also the day on which judgment complained of was pronounced and the time requisite for obtaining a copy of the said judgment.

(Paras 13 and 14)

B. Code of Criminal Procedure, 1973 – S. 378 – The provision of S. 378 (5) Cr.P.C. is a special provision which has no express provision excluding the application of S. 5 or S. 14 of the Limitation Act, 1963. In view of S. 29 (2) of the Limitation Act, 1963 the provisions of S. 4 to 24 of the Limitation Act, 1963 to the extent to which they are not expressly excluded are applicable even to Cr.P.C.

(Para 18)

C. Limitation Act, 1963 – S. 5 – Extension of Prescribed Period in Certain Cases – An appeal may be admitted after the prescribed period, if the appellant satisfies the Court that he had "sufficient cause" for not preferring the appeal within such period. The explanation to S. 5 of the Limitation Act, 1963 provides that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be "sufficient cause" within the meaning of this section. S. 5 gives the Court a discretion which is to be exercised upon principles which are well understood. The words "sufficient cause" must be liberally construed to advance substantive justice when it is apparent there is no negligence nor inaction nor want of *bona fides* attributable to the appellant.

(Para 19)

D. Limitation Act, 1963 – Ss. 14 and 29 – Due Diligence – Good Faith – Under S. 14 read with S. 29 (2) of the Limitation Act, 1963 in computing the period of Limitation for any appeal, the time during which the plaintiff has prosecuting with "due diligence" another

proceeding, whether in a Court of first instance or of appeal or revision, against the respondent shall be excluded, where the proceedings relates to the same matter in issue and is prosecuted in "good faith" in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it – "Due diligence" and "good faith" are two paramount requisites before the appellant could seek the benefit of S. 14 of the Limitation Act, 1963. "Due diligence" requires attention and care from the appellant in the given situation i.e. while prosecuting another proceeding. "Good faith" is defined in S. 2(h) of the Limitation Act, 1963 as "nothing shall be deemed to be done in good faith which is not done with due care and attention" – Whereas the power to condone delay and extend the prescribed period under S. 5 is discretionary, under S. 14, the exclusion of time is mandatory if the appellant satisfies the requisite conditions.

(Paras 20, 21 and 22)

E. Limitation Act, 1963 – S. 14 – Whether an appeal would lie before the Sessions Court or the appellant was required to seek special leave to appeal under S. 378 (5) Cr.P.C. before the High Court is a pure question of law. In such matters of the law it is advisable that a litigant seek legal advice. The question, therefore, is what if the legal advice received was wrong? Would the act of the appellant to agree to file an appeal before the Sessions Court on the wrong legal advice of his Counsel lead to an inference that the appellant did not prosecute the appeal with "due diligence" and "good faith"? – This lack of diligence of the appellant's Counsel may lead to an inference of the Counsel's carelessness but to saddle the lack of carelessness of the Counsel to the appellant and non-suit him on that count alone may lead to miscarriage of justice. There is no ground at all to suspect that the appeals filed before the Session Court were not *bona fide*.

(Paras 23 and 24)

Applications allowed.

Chronological list of cases cited:

1. Mahesh Kumar Sinha v. State of Jharkhand and Another, 2013 SCC OnLine Jhar 1847.

2. National Plywood Industries and Others. v. State of West Bengal and Another, 2013 SCC OnLine Cal 4421.

3. Subhash Chand v. State (Delhi Administration), (2013) 2 SCC 17.

ORDER

Bhaskar Raj Pradhan, J

1. The facts necessary for the purpose of disposal of the present applications for condonation of delay are limited. On 30.11.2016 and 01.12.2016 two judgments would be rendered by the learned Judicial Magistrate in P. C. Case No.03 of 2015 and P. C. Case No. 04 of 2015 respectively by which it would be held that the complainant, the appellant herein, had failed to prove the ingredients of Section 138 of the Negotiable Instruments Act, 1881 against the respondents and acquit them of the charge.

2. Against the said two judgments passed by the learned Judicial Magistrate the appellant would prefer appeals before the Sessions Court i.e. Criminal Appeal No. 10 of 2016 and Criminal Appeal No. 11 of 2016 respectively. Both the Criminal Appeals would be presented and registered on 28.12.2016 and decided on 25.09.2017. The learned Sessions Judge would hold that the appeal was not maintainable and dismiss the said appeals.

3. On 04.10.2017 the appellant would prefer Crl.L.P. No.10 of 2017 and Crl.L.P. No.11 of 2017 respectively before this Court against the judgments dated 30.11.2016 and 01.12.2016 adverted to above.

4. The above Criminal Leave Petitions would be preferred under Section 378 (4) of the Code of Criminal Procedure, 1973. Due to the delay in filing the said Criminal Leave Petitions the appellant would also prefer the present interlocutory applications seeking condonations of delay. The said interlocutory applications would be preferred under Section 5 of the Limitation Act, 1963. The appellant would content that there is a delay of 218 days in preferring Crl. L.P. No. 10 of 2017 and a delay of 217 days in preferring Crl. L.P. No. 11 of 2017.

5. In both the interlocutory applications the appellant would plead that the appellant, represented by his Counsel, on the assumption that the complainant also fell in the category of the term *"victim"* was entitled to file an appeal before the Sessions Court. The appellant would further plead that until recently the High Courts of the country held two views on this aspect one of which clearly entitled the appellant to file an appeal before the Sessions Court.

6. Mr. Jorgay Namka, learned Counsel for the appellant would explain this further by citing two judgments of the High Court of Jharkhand and the Calcutta High Court.

7. In re: ***Mahesh Kumar Sinha v. State of Jharkhand & Anr***.[1] the High Court of Jharkhand would examine an appeal before it under the provisions of Section 378 (4) Cr.P.C. against an acquittal from the charge under Section 138 of the Negotiable Instruments Act, 1881. The High Court would, vide order dated 15.04.2013, ultimately come to the conclusion that:

> ***"7.*** *In view of this facts, reasons and judicial pronouncements, there is no substance in this appeal and therefore, we are not inclined to grant special leave to prefer an appeal to this appellant under sub-section (4) of Section 378 of the Cr PC. He has statutory right to prefer an appeal hence this application/appeal is hereby dismissed.***"**

8. In re: ***National Plywood Industries & Ors. v. State of West Bengal & Anr.***[2] the Calcutta High Court would examine a petition under Section 401 read with Section 482 Cr.P.C. praying for setting aside the order passed by the Court of the Additional Sessions Judge entertaining an appeal against an acquittal in a case relating to Section 138 of the Negotiable Instruments Act, 1881. The High Court vide order dated 12.03.2013 would hold:-

> **"**..... *Therefore, if the definition of "victim" given under Section 2(wa) read with Section 2(y)*

[1] 2013 SCC OnLine Jhar 1847
[2] 2013 SCC OnLine Cal 4421

of the Code of Criminal Procedure along with definition of 'injury' given under Section 44 of the Indian Penal Code and Section 22 of the Indian Penal Code, which defines movable property, are taken into consideration, a liberal interpretation is to be given to hold that non-encashment of the cheque causes injury to the person in whose favour cheque has been issued. Therefore, holder of the cheque is to be determined both complainant and victim. Section 378(4) of the Code of Criminal Procedure, which gives right to a complainant to seek leave to appeal, vest right only to those complainants where complaints are filed in furtherance of common good. To illustrate this, complaint filed by a Food Inspector under the provisions of Food Adulteration Act, will vest a right in the complainant to seek leave to appeal under Section 378(4) of the Code of Criminal Procedure. The illustrations may be many, they cannot be put in watertight jackets. Suffice it to say that holder of the cheque is a victim and he can prefer an appeal by invoking proviso to Section 378 of the Code of Criminal Procedure.

*Hence, the impugned order suffers from no infirmity as the Court below had rightly entertained the appeal. Having expressed the above opinion, this Court uphold the impugned order, hence, the present revision petition is dismissed.***"**

9. Mr. Jorgay Namka would, thus, submit that the appellant having filed the appeals before the Sessions Judge *bona fide* on the advice of his Counsel on a misconception of law and thereafter pursuing the said appeals before a wrong forum would be *"sufficient cause"* making it apparent that the delay was neither negligent or deliberate.

10. Mr. Rahul Rathi, learned Counsel on the other hand would vociferously submit that the contention of the appellant of there being two

diverse views of the High Courts was incorrect as the matter had been authoritatively settled by the Supreme Court in re: ***Subhash Chand v. State (Delhi Administration)***[3] decided on 08.01.2013 in which it would be held:-

> ***"20.*** *Since the words "police report" are dropped from Section 378(1)(a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A "police report" is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a "complaint" to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. The Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence, shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs and Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of the Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved*

[3] (2013) 2 SCC 17

therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is, even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Sessions Court. This appears to be the right approach and correct interpretation of Section 378 of the Code."

[Emphasis supplied]

11. Mr. Rahul Rathi would further contend that the delay of 218 and 217 days respectively, as averred by the appellant are miscalculations and in fact the delay would be 248 and 247 days in terms of Section 378 (5) Cr.P.C. Sub-sections (4) and (5) of Section 378 Cr.P.C. reads thus:-

***"378 (4)** If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.*

***(5)** No application under sub-section (4) for the grant of special leave to appeal from an*

*order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.***"**

12. Mr. Rahul Rathi would thus contend that as the appellant was not a public servant an application under 378(5) Cr.P.C. ought to have been filed within a period of 60 days computed from the date of the order of acquittal.

13. This contention raised by Mr. Rahul Rathi is absolutely correct. Section 378 (5) Cr.P.C. itself prescribes a period of limitation for an application for grant of special leave to appeal to be made under Section 378 (4) Cr.P.C. The appellant has incorrectly calculated the delay in terms of Article 114 of the Limitation Act, 1963 which prescribes 90 days period to file an appeal from an order of acquittal under sub-section (1) or sub-section (2) of Section 417 Cr.P.C. while seeking special leave to appeal under Section 378 (5) Cr.P.C.

14. The order of acquittal was dated 30.11.2016. 60 days computed from the order of acquittal would be 30.01.2017. The appellant, on the advice of his learned Counsel, admittedly preferred an appeal before the Sessions Court instead of approaching the High Court under the provision of 378 (5) Cr.P.C. Admittedly the appeals were pending before the Sessions Court from 28.12.2016 to 25.09.2017 till the orders, both dated 25.09.2017, were passed by the learned Sessions Judge. The Criminal Leave Petitions were filed before this Court on 04.10.2017 within a period of 10 days thereafter. It is also seen that a total number of 300 days were spent by the appellant pursuing a remedy before a Sessions Court out of the 309 days taken by the appellant to approach this Court under Section 378 (5) Cr.P.C. Time would begin to run against the appellant after the expiry of prescribed period of 60 days from the date of acquittal. As per Section 12 of the Limitation Act, 1963 the day from which such period is to be reckoned, shall be excluded so also the day on which judgment complained of was pronounced and the time requisite for obtaining a copy of the said judgment. So calculated, even if one were to take the calculation of Mr. Rahul Rathi to be correct it would be clear that substantially all the delay would be attributable to the appellant pursuing a wrong remedy. The

appellant had preferred the appeals before the Sessions Court within a period of 28 days from the date of acquittal. The issue that the said appeals were not maintainable was raised by the respondent before the Sessions Court which vide its order dated 25.09.2017 decided the issue and held that the said appeals before the Sessions Court were not maintainable. From the date of the said order dated 25.09.2017 the appellant took 10 days to prefer the Criminal Leave Petitions before this Court. Thus, excluding the time taken to pursue a wrong remedy before the Sessions Court a total number of 38 days were taken by the appellant to approach this Court well within the statutory period of 60 days under Section 378 (5) Cr.P.C. The only question, therefore, which needs examination is whether the time during which the appellant had been pursuing the appeals before the Sessions Court, if diligently, is liable to be excluded in computing the period of limitation?

15. Section 5 of the Limitation Act, 1963 provides:-

> ***"5. Extension of prescribed period in certain cases.***— *Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation.— The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."*

16. Section 14 of the Limitation Act, 1963 provides:-

> ***"14. Exclusion of time of proceeding bona fide in court without jurisdiction.*** *- (1) In computing the period of limitation for any suit the time during which the plaintiff has been*

prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3)Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

> *(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;*

> *(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;*
>
> *(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.***"**

17. Section 29 (2) of the Limitation Act, 1963 provides:-

> ***"29. (2)** Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.***"***

18. The provision of Section 378 (5) Cr.P.C. is a special provision which has no express provision excluding the application of Section 5 or Section 14 of the Limitation Act, 1963. In view of Section 29 (2) of the Limitation Act, 1963, as quoted above, the provisions of Section 4 to 24 of the Limitation Act, 1963 to the extent to which they are not expressly excluded are applicable even to Cr.P.C.

19. Under Section 5 of the Limitation Act, 1963 an appeal may be admitted after the prescribed period, if the appellant satisfies the Court that he had *"sufficient cause"* for not preferring the appeal within such period. The explanation to Section 5 of the Limitation Act, 1963 provides that the fact that the appellant was mislead by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be *"sufficient cause"* within the meaning of this section. Section 5 of the

Limitation Act, 1963 gives the Court a discretion which is to be exercised upon principles which are well understood. The words *"sufficient cause"* must be liberally construed so as to advance substantive justice when it is apparent there is no negligence nor inaction nor want of *bona fides* attributable to the appellant.

20. Under Section 14 read with Section 29 (2) of the Limitation Act, 1963 in computing the period of Limitation for any appeal, the time during which the plaintiff has prosecuting with *"due diligence"* another proceeding, whether in a Court of first instance or of appeal or revision, against the respondent shall be excluded, where the proceedings relates to the same matter in issue and is prosecuted in *"good faith"* in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

21. *"Due diligence"* and *"good faith"* are two paramount requisites before the appellant could seek the benefit of Section 14 of the Limitation Act, 1963. *"Due diligence"* requires attention and care from the appellant in the given situation i.e. while prosecuting another proceeding. *"Good faith"* is defined in Section 2(h) of the Limitation Act, 1963 *as "nothing shall be deemed to be done in good faith which is not done with due care and attention"*.

22. Whereas the power to condone delay and extend the prescribed period under Section 5 of the Limitation Act, 1963 is discretionary, under Section 14 of the Limitation Act, 1963 the exclusion of time is mandatory if the appellant satisfied the conditions mentioned therein.

23. Whether an appeal would lie before the Sessions Court or the appellant was required to seek special leave to appeal under Section 378 (5) Cr.P.C. before the High Court is a pure question of law. In such matters of the law it is advisable that a litigant seek legal advice. The question, therefore, is what if the legal advice received was wrong? Would the act of the appellant to agree to file an appeal before the Sessions Court on the wrong legal advice of his Counsel lead to an inference that the appellant did not prosecute the appeal with *"due diligence"* and *"good faith"*?

24. Mr. Jorgay Namka has placed the judgment of the Jharkhand High Court which would hold that an appeal under the provision of Section 378 (4) Cr.P.C. was not maintainable and the Calcutta High Court which would

hold that an appeal before the Sessions Court was maintainable. The appellant quite clearly pleads in his interlocutory applications that he had approached the Sessions Court on the wrong advice of his Counsel. Mr. Rahul Rathi may be absolutely correct in his submission that the learned Counsel for the appellant ought to have been diligent to know that the Supreme Court had already settled the issue in re: ***Subhash Chand (supra)***. This lack of diligence of the appellant's Counsel may lead to an inference of the Counsel's carelessness but to saddle the lack of carelessness of the Counsel to the appellant and non-suit him on that count alone may lead to miscarriage of justice. There is no ground at all to suspect that the appeals filed before the Session Court were not *bona fide*. It does not stand to reason that the appellant would prefer the appeals before the Session Court having no jurisdiction instead of this Court for any *mala fide* reason.

25. In view of the aforesaid, this Court is of the view that the time taken by the appellant to *bona fide* pursue the appeals before the Sessions Court ought to be excluded while computing the period of limitation. In so doing, it is quite clear that the Criminal Leave Petitions are well within the prescribed period of 60 days under Section 378 (5) Cr.P.C. The present interlocutory applications i.e. I.A. No. 1 of 2017 in Crl. L. P. No. 10 of 2017 and I.A. No. 1 of 2017 in Crl. L. P. No. 11 of 2017 are allowed.

SLR (2018) SIKKIM 342

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

I.A. No.01 of 2018
in
Crl. A. No. 03 of 2018

Ashim Stanislaus Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. K.T. Tamang, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Karma Thinlay with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 20th March 2018

A. Limitation Act, 1963 – S. 5 – Extension of Limiation Period in Certain Cases – The requirement of explaining everyday's delay does not mean that there should be a pedantic approach, but infact it should be a justice-oriented approach. In other words, priority is to be given to meting out justice on the merits of a case.

(Para 6)

Application allowed.

Chronological list of cases cited:

1. Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others, (1987) 2 SCC 107.

2. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

ORDER

Order of the Court was delivered by ***Meenakshi Madan Rai, J***

1. Heard on I.A. No.01 of 2018, which is an Application for condonation of delay.

2. The Appellant seeks condonation of delay of 22 (twenty-two) days, as calculated by him, in view of the grounds set out in the Application as follows;

(i) That the impugned Judgment convicting the Appellant under Sections 354B, 376(2)(i), 376(2)(f) of the Indian Penal Code, 1860 and Sections 5(m)/6, 5(f)/6 of the Protection of Children from Sexual Offences Act, 2012, and the impugned Order on Sentence, were pronounced on 22-09-2017, by the Learned Special Judge (POCSO), North Sikkim, at Mangan, in Sessions Trial (POCSO) Case No.01 of 2017.

(ii) On 25-10-2017, Learned Counsel was appointed by the Sikkim State Legal Services Authority (SSLSA), vide its letter dated 25-10-2017 received by the Applicant on 27-10-2017.

(iii) On 13-11-2017, the Legal Aid Counsel for the Applicant/ Appellant was provided with the certified copy of the case records by the SSLSA vide letter of the same date, pursuant to which the Legal Aid Counsel visited the State Jail, Rongyek, East Sikkim, and obtained instructions from the Appellant.

(iv) Consequently, the Counsel filed the Appeal on 03-02-2018 resulting in delay of 22 (twenty-two) days of which, he seeks condonation.

3. Learned Additional Public Prosecutor submitted that the limitation has been calculated incorrectly and the delay would be of 74 (seventy-four) days and not 22 (twenty-two) days, as stated in the Application. That, the

Learned Counsel has failed to specify the date on which he obtained instructions from the Jail where the Applicant is lodged and details of steps taken from 13-11-2017 to 03-02-2018 when the Appeal was filed. In the absence of satisfactory grounds, the application merits no consideration and ought to be dismissed.

4. We have heard Learned Counsel for the parties at length.

5. The period of limitation for filing the instant Appeal is 60 (sixty) days, thereby the instant Appeal ought to have been filed on 21-11-2017. However, as per the submission of Learned Counsel for the Appellant, Legal Aid was made available by the Applicant only on 25-10-2017 while certified copy along with case records by the SSLSA was made available on 13-11-2017. Although it has to be pointed out that no reasons for the delay from 13-11-2017 have been detailed in the Application, however, during the verbal submissions, it was put forth that apart from the aforesaid grounds for the delay, certain unavoidable personal pre-occupation of Learned Counsel also arose which contributed to the delay.

6. As far back as in 1987, in ***Collector, Land Acquisition, Anantnag and Another*** vs. ***Mst. Katiji and Others***[1] that the requirement of explaining everyday's delay does not mean that there should be a pedantic approach, but infact it should be a justice-oriented approach. In other words, priority is to be given to meting out 'justice on the merits of a case. More recently, in ***Esha Bhattacharjee*** vs. ***Managing Committee of Raghunathpur Nafar Academy and Others***[2] it has been laid down, *inter alia*, that –

> *(i) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*
>
> *(ii) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

[1] (1987) 2 SCC 107
[2] (2013) 12 SCC 649

(iii) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(iv) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(v) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

7. From the grounds put forth before us, it cannot be said that the Applicant has been negligent. Satisfactory grounds have been furnished for the delay to which the personal pre-occupation of Learned Counsel also comprised a contributory factor.

8. In such circumstances, we are inclined to exercise our discretion to condone the delay of 74 (seventy-four) days on being satisfied that there has been no gross negligence or deliberate inaction or lack of *bona fides* imputable to the party.

9. Consequently, the delay is condoned and Application is allowed.

10. I.A. No.01 of 2018 stands disposed of.

SLR (2018) SIKKIM 346
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 17 of 2017

Subash Chandra Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Karma Thinlay Namgyal and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors with Mrs. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 31st March 2018

A. Code of Criminal Procedure, 1973 – S. 164 – Object – It is an established legal proposition that S. 164 of the Cr.P.C. is to be used for the purposes of corroboration and contradiction apart from which it is intended to be a safeguard to preserve the truth which has emanated in the course of an investigation before trial. Evidently, there are some statements made by the victim before the Court which found no place in her S. 164 of the Cr.P.C. statement, but there is no necessity infact for Learned Counsel for the Appellant to raise this argument before this Court since it is clear that the Learned Trial Court has not taken such statements into consideration neither has the Prosecution insisted by way of an Appeal on a conviction of the Appellant under Ss. 5(l), 5(m) and 5(n) of the POCSO Act which deals with the offence of aggravated penetrative sexual offence.

(Para 22)

B. Protection of Children from Sexual Offences Act, 2012 – S. 33 – Identity of the Child – S. 33 (7) of the POCSO Act enjoins upon

the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The *Explanation* to the Section elucidates that the identity of the child includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed – Besides ensuring that the Court does not disclose the child's identity, the Learned Special Court is also vested with the responsibility of ensuring that this does not occur during the investigation. In this context, it is for the Learned Special Court to devise methods for such steps. One would find on perusal of the charge-sheet that the name of the victim, her address and detail of school has been revealed therein flagrantly by the Investigating Agency throwing caution and the mandate of the Statute to the winds. The provisions in law which seek to protect the identity of the child are for the purpose of sheltering her from curiosity and prying eyes which could further traumatize her psychologically creating insecurity and apprehension in the victim's mind. It is also an effort, *inter alia*, to protect her future, to prevent her from being tracked, identified and for warding off unwanted attention and to prevent repetition of such offences on her on the assumption that she is easy prey. The Investigating Agency for their part should ensure that the identity of the victim is protected and not disclosed during investigation or in the charge-sheet. A separate File may perhaps be maintained in utmost confidence, for reference, if so required. Statutes have been enacted to protect children of crimes of which the Juvenile Justice (Care and Protection of Children) Act, 2015 and POCSO Act are of special relevance. These Acts impose an obligation not only on the Court and the Police, but also the Media and Society at large to protect children from the exponentially increasing sexual offences against children and to the best of their ability to take steps for prevention of such sexual exploitation of children.

(Para 26)

C. Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 74 – Prohibition on Disclosure of Identity of Children – Neither for a child in conflict with law, or a child in need of care and protection, or a child victim, or witness of a crime involved in matter, the name, address, school or other particulars which could lead to the

child being tracked, found and identified shall be disclosed, unless for the reasons given in the proviso. The Police and Media as well as the Judiciary are required to be equally sensitive in such matters and to ensure that the mandate of law is complied with to the letter.

(Para 27)

D. Protection of Children from Sexual Offences Act, 2012 – Ss. 19 and 20 – Reporting of Offences – S. 19 which commences with a *non-obstante* clause envisages that any person which includes the child, has the apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to the Special Juvenile Police Unit or the local Police – The POCSO Act also imposes an obligation on personnel of the media, hotel, lodge, hospital, club, studio, photographic facilities, to provide information to the Special Juvenile Police Unit or to the local Police if they come across any material or object which is sexually exploitative of a child – S. 21 provides for penalty in the event of failure to report or record a case – S. 23 prescribes procedure for Media with a conjunctive penal provision for contravention of the provisions – These provisions ought to be borne in mind by all concerned to prevent any *faux-pas* with regard to the identity and other particulars of any victim, child or children as described hereinabove.

(Paras 28, 29, 30 and 31)

Appeal dismissed.

Chronological list of cases cited:

1. State of U.P. v. Ashok Dixit and Another, (2000) 3 SCC 70.
2. Darpan Potdarin v. Emperor, AIR 1938 Patna 153.
3. Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54.
4. Narain and Others v. State of Punjab, AIR 1959 SC 484.
5. Panchhi and Others v. State of U.P., (1998) 7 SCC 177.
6. Rajoo and Others v. State of M.P., AIR 2009 SC 858.

7. Robin Gurung v. State of Sikkim, MANU/SI/0048/2017 : 2017 SCC OnLine Sikk 160.
8. State of Rajasthan v. Chandgi Ram and Others, (2014) 14 SCC 596.
9. State of Rajasthan v. N. K. The Accused, (2000) 5 SCC 30.
10. State of Madhya Pradesh v. Ramesh and Another, (2011) 4 SCC 786.
11. Shivasharanappa and Others v. State of Karnataka, (2013) 5 SCC 705.
12. State of H.P. v. Shree Kant Shekari, (2004) 8 SCC 153.
13. Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771.
14. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
15. State of Andhra Pradesh v. Thadi Narayana, AIR 1962 SC 240.
16. Budha Singh Tamang v. State of Sikkim, MANU/SI/0008/2016 : 2016 SCC OnLine Sikk 48.
17. Premiya *alias* Prem Prakash v. State of Rajasthan, (2008) 10 SCC 81.

JUDGMENT

Meenakshi Madan Rai, J

1. Assailing the Judgment and Order on Sentence, both dated 19-04-2017, of the Court of the Learned Special Judge (POCSO), North Sikkim, at Mangan, in Sessions Trial (POCSO) Case No.01 of 2016, the instant Appeal has been preferred. The Appellant was convicted under Sections 9(l), 9(m) and 9(n) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and Section 354 of the Indian Penal Code, 1860 (for short "IPC") and sentenced to undergo simple imprisonment for a period of 5 (five) years and to pay a fine of Rs.25,000/- (Rupees twenty five thousand) only, under each of the above offences with a default stipulation each. The sentences were ordered to run concurrently, duly setting off the period of imprisonment already undergone by the convict as an under-trial prisoner.

2. Claiming an acquittal for the Appellant, it was put forth by his Counsel that the evidence of the victim, P.W.3, is not creditworthy as her testimony given before the Learned Special Judge (POCSO), North Sikkim, at Mangan, bore substantial exaggerations from her statement under Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") recorded by the Magistrate. Her evidence lacked corroboration and being a child witness she was susceptible to influence from her mother, therefore, her evidence ought to have been evaluated carefully. Emphasising this point the attention of this Court was drawn to the decision in ***State of U.P.*** vs. ***Ashok Dixit and Another***[1], ***Darpan Potdarin*** vs. ***Emperor***[2] and ***Rameshwar S/o Kalyan Singh*** vs. ***The State of Rajasthan***[3]. That, P.W.4 deposed that she did not want to continue in the marriage with the Appellant thereby indicating a troubled marriage and likelihood that she had tutored the victim. Three other children of the Appellant and P.W.4 living along with them were not listed as witnesses to the instant case sans reasons, leading to an adverse inference against the Prosecution. Admittedly, the family shared a single room, but P.W.4 never witnessed a single sexual assault by the Appellant on P.W.3, leading to a high degree of improbability of the offence having been committed. The Medical Report of the victim fails to support the Prosecution case of sexual assault. That, the Learned Trial Court ought to have ignored the evidence of the minor victim living as she was admittedly with a police personnel at the relevant time thereby raising the degree of the probability of her being tutored by the Police. Hence, in view of the grounds put forth, the Appellant be acquitted. Strength was drawn from the ratio of ***Narain and Others*** vs. ***State of Punjab***[4], ***Panchhi and Others*** vs. ***State of U.P.***[5] and ***Rajoo and Others*** vs. ***State of M.P.***[6]

3. Repelling the arguments of the Appellant, Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, would contend that the evidence of the victim establishes with clarity the commission of the sexual assault on her, duly corroborated by the evidence of her mother P.W.4 as well as P.W.1 and P.W.5, the Complainants, who were told of the incident by P.W.3, who had also previously narrated the incident to P.W.4. That, it

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[1] (2000) 3 SCC 70
[2] AIR 1938 Patna 153
[3] AIR 1952 SC 54
[4] AIR 1959 SC 484
[5] (1998) 7 SCC 177
[6] AIR 2009 SC 858

is now well-established that the evidence of a victim of sexual assault requires no corroboration if the evidence given by her is cogent and consistent. That, in the instant matter, the evidence given by the victim has been consistent despite her age and in her cross-examination she did not vacillate. Besides, Section 29 of the POCSO Act clearly lays down that when the victim makes an allegation of sexual assault the Court shall presume that such an incident has indeed taken place. As the conviction meted out to the Appellant is based on the evidence on record, the Appeal be dismissed. To buttress his submissions, reliance was placed on the decision of this Court in ***Robin Gurung*** vs. ***State of Sikkim***[7]. Reliance was also placed in ***State of Rajasthan*** vs. ***Chandgi Ram and Others***[8].

4. The rival contentions of Learned Counsel have been heard and the evidence and documents on record carefully perused. It would now be essential to determine whether the conviction handed out to the Appellant is justified on the anvil of the evidence on record. We may briefly advert to the facts of the case to appreciate the matter at hand.

5. On 14-04-2016, at around 0900 hours, the Mangan P.S., North Sikkim, received a First Information Report (FIR), Exhibit 2, from one Yeshey Ongmu Bhutia, P.W.5 and Anniela Bhutia, P.W.1, informing that the Appellant, a resident of Mangan, allegedly sexually assaulted the minor victim girl P.W.3, aged about 12 years, which was brought to the notice of Mingma Doma Bhutia, P.W.6 a Member of the Sikkim Juvenile Police Unit and a Para-Legal Volunteer, resident of Mangan Bazar on 11-04-2016. On receiving the Complaint, it was registered as Mangan P.S. Case No.6(4)016, dated 14-04-2016, under Section 354(A) of the IPC read with Sections 8/10/12 of the POCSO Act, against the Appellant Subash Rai and taken up for investigation. During investigation, the formalities thereof which included inspection of the place of occurrence, preparation of rough sketch map, recording of statement of the witnesses, medical examination of the accused and the victim, seizure of relevant documents were completed and the statement of the victim and her mother were recorded under Section 164 of the Cr.P.C.

6. Investigation would reveal that the victim, P.W.4 and the Appellant were living in rented premises at Mangan. Prior to that, they had been living

[7] MANU/SI/0048/2017 : 2017 SCC OnLine Sikk 160
[8] (2014) 14 SCC 596

at Tumin village, East Sikkim, for close to 5/6 years. P.W.1 and P.W.5 both Social Workers were informed by P.W.6 that the victim was being sexually exploited by the Appellant. Accordingly, P.W.1 and P.W.5 met the victim on 11-04-2016 who failed to confide in them at the first instance. On 14-04-2016, they met the child for the second time when she disclosed to them that the Appellant used to sexually exploit her. It also came to light that not only was the Appellant guilty of such offences, but his friend one Hangjit Rai had also perpetrated such acts on the child. Consequently, on completion of investigation, Charge-Sheet was filed against the Appellant under Sections 8 and 10 of the POCSO Act and against Accused Hangjit Rai under Section 354 of the IPC read with Sections 4 and 12 of the POCSO Act.

7. In view of the fact that the offence committed by the Appellant was in the North Sikkim, while that of Hangjit Rai was in East Sikkim, the Learned Special Judge (POCSO) North Sikkim, at Mangan, vide Order dated 30-08-2016, separated the trial of the Appellant and Hangjit Rai. The trial against the Appellant proceeded in the Court of the Learned Special Judge (POCSO), North Sikkim, at Mangan. It may be mentioned here that so far as Hangjit Rai @ Raj Rai is concerned, the State was before this Court in a Transfer Petition being Tr.P.(Crl.) No.04 of 2016 wherein it was, *inter alia*, submitted that the Prosecution had bifurcated the trial against the Appellant and Hangjit Rai, however, it appeared that there was no FIR against the Accused Hangjit Rai and, therefore, the Prosecution be allowed to take necessary steps in this regard. Vide Order dated 06-10-2016 of this Court in the said Transfer Petition, the Prosecution was permitted to take necessary steps, as prayed.

8. The Learned Trial Court on 30-08-2016 after hearing the parties and considering the materials on record framed Charge against the Appellant under Sections 354A(1)(i) of the IPC and Sections 7, 9(l), (m) and (n) of the POCSO Act. The Charges under Sections 9(l), 9(m) and 9(n) of the POCSO Act were framed as one consolidated Charge instead of separate Charges. On 27-09-2016, the Learned Trial Court added a Charge under Section 3(a) of the POCSO Act against the Appellant. By an Order dated 25-10-2016 of the same Court, remedial measures was taken for separation of the Charges under Sections 9(l), 9(m) and 9(n) of the POCSO Act by framing them as individual and distinct Charges. On the same date, it was also ordered that Charge under Section 3(a) of the POCSO Act be altered to Sections 5(l), 5(m), 5(n) of the POCSO Act. Further, Charges under

Sections 376(2)(n), 376(2)(i), 376(2)(f), 293, 354, 354A(1)(iii) of the IPC and Section 11(iii) of the POCSO Act were added. The said Charges were in addition to the Charges already framed under Section 7 of the POCSO Act and Section 354A(1)(i) of the IPC.

9. The Charges so framed were read over and explained to the Appellant. On his plea of "not guilty", trial commenced with 12 (twelve) witnesses being examined by the Prosecution to establish its case beyond a reasonable doubt, on closure of which the Appellant was extended an opportunity under Section 313 of the Cr.P.C. to explain any circumstances appearing in the evidence against him. The final arguments followed and the trial concluded with the impugned Judgment and sentence.

10. What emanates from the evidence on record is that apart from the victim, P.W.3 there is no other witness to the sexual assault committed on her. The witness has categorically deposed that when she, her mother and the Appellant were living in Tumin, East Sikkim, the Appellant used to come to her bed, disrobe her and rub his genital on her anus. On his repeating the act several times, she informed her mother, P.W.4 of it, who asked the victim to sleep with her in the Kitchen. The Appellant however was prone to enter the Kitchen during the night and commit the same offence, besides he also showed her videos of naked boys and girls which were stored in his mobile. After they shifted to Mangan, North Sikkim, he continued with the offence, but her mother remained helpless despite knowledge of the perverse acts as she herself used to be physically assaulted by the Appellant. A careful perusal of the cross-examination which the victim was subjected to would reveal that no questions were put to the victim to contradict her evidence pertaining to the act of sexual assault on her. Thus, her evidence regarding the sexual act committed on her by the Appellant remained uncontroverted.

11. Having perused the evidence of this witness, it would be appropriate to turn to the evidence of P.W.1 and P.W.5. According to P.W.1 she was told by P.W.6 that the victim was repeatedly sexually assaulted by the Appellant. Later when P.W.1 herself counselled the victim P.W.3, she was told by her that the Appellant had on several occasions while they were sleeping touched her private part and rubbed his private part against her anus. The fact of such disclosure to P.W.1 by P.W.3 although tested under cross-examination remained steadfast. P.W.5 corroborating the evidence of

P.W.1 reiterated that on enquiry from P.W.3 she told them that the Appellant used to come to her bed at night disrobe her and rub his genital on her anus. Her evidence-in-chief withstood the cross-examination and although a suggestion was put to her that the victim had falsely implicated the accused at the behest of P.W.4, this remained a mere suggestion as the victim asserted that it was not a fact.

12. Along with evidence of P.W.1 and P.W.5, it is indeed imperative to consider the evidence of P.W.6 who was informed on 08-04-2016 by the North Zilla Adhyaksha, that a minor girl had reportedly been raped at Mangan Bazar. The following day, she went to the Mangan Police Station (P.S.) and enquired about the matter, the P.S. negatived report of any such case till then. Later, the same day, when she was at Mangan Bazar, she came across P.W.4 and while conversing with her P.W.4 revealed that the victim, P.W.3 used to be sexually assaulted by the Appellant repeatedly on several occasions. Apart from rubbing his genital on the anus of the minor victim, he used to make the minor victim touch his genital. P.W.3 for her part told P.W.6 of the sexual assault perpetrated on her by one Hangjit Rai at Tumin. On 11-04-2016, P.W.6 reported the matter to P.W.1 and P.W.5, whereupon on the same date they all met P.W.3 and enquired into the matter. The victim was reticent and did not disclose anything, however, on 14-04-2016, after affording her time from 11-04-2016, on meeting the victim again, she confided to them about the repeated sexual assaults perpetrated on her by the Appellant and one Hangjit Rai. This disclosure led to the lodging of the FIR, Exhibit 2. The fact of disclosure by P.W.3 to P.Ws 1, 5 and 6 remained uncontroverted during cross-examination. Although Learned Counsel for the Appellant while relying on the Medical Report, Exhibit 11, canvassed that besides absence of external injury on the victim, her hymen was also found to be intact, thereby ruling out sexual assault, I am afraid this argument holds no water. In this context, it would but be appropriate to rely on the decision on ***State of Rajasthan*** vs. ***N. K. The Accused***[9] wherein it was, *inter alia*, held as follows;

> **"18.** ..... The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the

[9] (2000) 5 SCC 30

> time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. ……."

Besides the allegation of the victim is not of penetrative sexual assault by the Appellant into her genital, hence the condition of her hymen is irrelevant herein.

13. Related to the evidence of the above four witnesses is that of P.W.4, the victim's mother who while substantiating the evidence of P.W.1 confirmed that the victim had told her that the Appellant had sexually assaulted her by touching her private part and had even attempted to insert his genital into hers. Although it was admitted by her under cross-examination that she did not witness any of the alleged sexual assaults it is evident that her examination-in-chief remained undemolished during her cross-examination.

14. On an analysis of the evidence of the aforestated witnesses, it is the constant refrain of the witnesses that the Appellant had sexually assaulted the victim by rubbing his genital against her anus. Although P.W.4 had gone further and stated that the Appellant had rubbed his genital against the private part of the victim, this is a minor aberration from the other evidence on record, but does not negate or affect the Prosecution case. The victim who had to suffer the ignominy of a sexual assault by the Appellant was but 12 years old at that time. Her evidence has been constant and unwavering and she has cogently as well as consistently described the sexual act committed by the Appellant on her.

15. I am not inclined to accept nor appreciate the argument of Learned Counsel for the Appellant that the child was susceptible to tutoring from her mother. The evidence of P.Ws 1, 5 and 6 reveal that besides the child disclosing the incidents of sexual assault to them in the absence of P.W.4, she was resolute in her stand that the Appellant had sexually assaulted her and described the reprobate acts perpetrated on her by him. Merely because P.W.4 was presumably not in a cordial relationship with her husband did not mean that she would have made the victim a bait to bail out of the marriage by accusing him of depraved and degenerate acts. Such

accusations could not have assured her of an escape from her marriage without recourse to legal procedure. The evidence of the child being consistent is found to be beyond reproach by this Court, it would be beneficial to refer to the ratio in ***State of Madhya Pradesh*** vs. ***Ramesh and Another***[10] where the Hon'ble Supreme Court held as follows;

> **"11.** The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra* [(2009) 6 SCC 712 : (2009) 3 SCC (cri) 1 : AIR 2009 SC 2292)**"**

In the matter under consideration, the Learned Trial Court had put certain questions to the victim before recording her evidence to test her competence to depose. On being so satisfied, the Court has proceeded to examine her which indicates that the Court was satisfied that the child was able to discern right from wrong, no statement in her cross-examination would indicate that the child lacked competence to testify, this Court finds no reason to differ.

16. In ***Shivasharanappa and Others*** vs. ***State of Karnataka***[11] it was held as hereinbelow;

> **"17.** Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought

[10] (2011) 4 SCC 786
[11] (2013) 5 SCC 705

on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of the witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, apply to a child witness who is competent and whose version is reliable.**"**

The above decision would indeed lend succour to the matter at hand, testimony of the victim is found to be consistent with no evidence of tutoring and requires no corroboration.

17. I also deem it appropriate to refer to the ratiocination in ***State of H.P.*** vs. ***Shree Kant Shekari***[12] wherein it was held by the Hon'ble Supreme Court in Paragraph 21 as follows;

"21. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice.**"**

The victim herein has no reason to implicate the Appellant and it is but trite to mention that the nature of the act itself would ensure exclusion of other witnesses.

[12] (2004) 8 SCC 153

18. In ***Dinesh alias Buddha*** vs. ***State of Rajasthan***[13], the Hon'ble Supreme Court held as follows;

> **"11.** In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracised by society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sexual offence is entitled to great weight, notwithstanding the absence of corroboration. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in *Rameshwar* v. *State of Rajasthan* [1952 SCR 377 : AIR 1952 SC 54 : 1952 Cri LJ 547] were: (SCR p. 386) "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge,…" **"**

This speaks volumes on the question of the testimony of the victim, thus requiring no elucidation. The victim's evidence in the matter is trustworthy and thus acceptable to the Court sans corroboration.

[13] (2006) 3 SCC 771

19. Counsel for the Appellant expositing the argument that the non-production of the other children of the Appellant and P.W.4 leads to an adverse inference, garnered strength from the ratio in ***Narain*** (*supra*) where the Hon'ble Supreme Court held, inter alia, as follows;

> **"**(13) ..... It is an accepted rule as stated by the Judicial Committee in Stephen Seneviratne v. King, (AIR 1936 PC 289) that "witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution". It will be seen that the test whether a witness is material for the present purpose is not whether he would have given evidence in support of the defence. The test is whether he is a witness "essential to the unfolding of the narrative on which the prosecution is based". Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied. It is not however that the prosecution is bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. But apart from this, the prosecution should call all material witnesses.**"**

What this engenders is that material witnesses who are essential to the unfolding of the narrative on which the Prosecution is based must be called by the Prosecution. In the instant matter, non-production of the minor children of the Appellant and P.W.4 cannot be said to affect the Prosecution case as it is not their case that the minors had witnessed any sexual assault on P.W.3 nor did investigation in the matter lead to any such revelation.

20. The age of the victim has not been contested and, therefore, it is not necessary enter into a verbose discussion on this aspect suffice it to say that Exhibit 5 the Infant Immunisation Record of the victim reveals her date of birth to be "18-03-2006" duly verified by Exhibit 14, a copy of the page of the Admission Register of the School attended by the victim, pertaining to the year 2012, where, at Sl. No.7, her date of birth is reflected as "18-03-

2006". She was thus a child on 12 years when she became the object of the lascivious acts of the Appellant.

21. I now turn my attention to the contention of Learned Counsel for the Appellant that there was an exacerbation of the victim's evidence before the Court vis-a-vis her statement under Section 164 of the Cr.P.C. While explaining the object of recording statements under Section 164 of the Cr.P.C. the Hon'ble Supreme Court in ***R. Shaji*** vs. ***State of Kerala***[14] observed as follows;"

> **27.** So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide *Jogendra Nahak* v. *State of Orissa* [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and *CCE* v. *Duncan Agro Industries Ltd.* [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])
>
> **28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.**"**

22. It is an established legal proposition that Section 164 of the Cr.P.C. is to be used for the purposes of corroboration and contradiction apart from which it is intended to be a safeguard to preserve the truth which has

[14] (2013) 14 SCC 266

emanated in the course of an investigation before trial. Evidently, there are some statements made by the victim before the Court which found no place in her Section 164 of the Cr.P.C. statement, but there is no necessity infact for Learned Counsel for the Appellant to raise this argument before this Court since it is clear that the Learned Trial Court has not taken such statements into consideration neither has the Prosecution insisted by way of an Appeal on a conviction of the Appellant under Sections 5(l), 5(m) and 5(n) of the POCSO Act which deals with the offence of aggravated penetrative sexual offence. The ratio in ***State of Andhra Pradesh*** vs. ***Thadi Narayana***[15] is appropriate for reference wherein it was held by a three-Judge Bench of the Hon'ble Supreme Court, *inter alia*, as follows;

> **"10.** ..... If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction it is only the order of acquittal which falls to be considered by the appellate court and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the appellate court and not the order of acquittal. Therefore, the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well founded and as such it cannot be pressed into service in construing the expression "alter the finding"."

23. Taking into consideration the discussions hereinabove, it concludes that the Judgment and Sentence meted out by the Learned Trial Court warrants no interference.

24. Accordingly, the Appeal stands dismissed.

25. The discussion that follows hereinafter being of relevance and importance is taken up before closing the matter. This Court in ***Budha Singh Tamang*** vs. ***State of Sikkim***[16] and in ***Robin Gurung*** (*supra*) referred to the ratiocination in ***Premiya alias Prem Prakash*** vs.

[15] AIR 1962 SC 240
[16] MANU/SI/0008/2016 : 2016 SCC OnLine Sikk 48

State of Rajasthan[17], wherein it was held as follows;

> **"3.** We do not propose to mention the name of the victim.
>
> > "2. … Section 228-A IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, the High Court or the lower court, the name of the victim should not be indicated."
>
> We have chosen to describe her as "the victim" in the judgment. (See *State of Karnataka* v. *Puttaraja* [(2004) 1 SCC 475], at SCC pp. 478-79, para 2 and *Dinesh* v. *State of Rajasthan* [(2006) 3 SCC 771]**"**

26. In the instant matter, I have to note that the Learned Trial Court has been largely circumspect with regard to the identity of the victim during the trial. However, it would be worthwhile to indicate here that Section 33(7) of the POCSO Act enjoins upon the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The *Explanation* to the Section elucidates that the identity of the child includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. There are a few slip-ups in this regard in the Order of the Learned Trial

[17] (2008) 10 SCC 81

Court dated 30-08-2016 and the impugned Judgment. Besides ensuring that the Court does not disclose the child's identity, the Learned Special Court is also vested with the responsibility of ensuring that this does not occur during the investigation. In this context, it is for the Learned Special Court to devise methods for such steps. One would find on perusal of the Charge-sheet that the name of the victim, her address and detail of school has been revealed therein flagrantly by the Investigating Agency throwing caution and the mandate of the Statute to the winds. The provisions in law which seek to protect the identity of the child are for the purpose of sheltering her from curiosity and prying eyes which could further traumatize her psychologically creating insecurity and apprehension in the victim's mind. It is also an effort, *inter alia*, to protect her future, to prevent her from being tracked, identified and for warding off unwanted attention and to prevent repetition of such offences on her on the assumption that she is easy prey. The Investigating Agency for their part should ensure that the identity of the victim is protected and not disclosed during investigation or in the Charge-Sheet. A separate File may perhaps be maintained in utmost confidence, for reference, if so required. Statutes have been enacted to protect children of crimes of which the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "Juvenile Justice Act") and POCSO Act are of special relevance. These Acts impose an obligation not only on the Court and the Police, but also the Media and Society at large to protect children from the exponentially increasing sexual offences against children and to the best of their ability to take steps for prevention of such sexual exploitation of children.

27. Reference may necessarily be made to the Juvenile Justice Act, Chapter IX, "Other Offences Against Children", in Section 74, which reads as follows;

> **"74. Prohibition on disclosure of identity of children**.
>
> (1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any

other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

(2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both.**"**

The mandate of the provision requires no further clarification. Suffice it to say that neither for a child in conflict with law, or a child in need of care and protection, or a child victim, or witness of a crime involved in matter, the name, address, school or other particulars which could lead to the child being tracked, found and identified shall be disclosed, unless for the reasons given in the proviso extracted hereinbefore. The Police and Media as well as the Judiciary are required to be equally sensitive in such matters and to ensure that the mandate of law is complied with to the letter.

28. In addition to the above, Chapter V of the POCSO Act prescribes the procedure for reporting of cases. Section 19 which commences with a *non-obstante* clause envisages that any person which includes the child, has the apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to the Special Juvenile Police Unit or the local Police. The details have been laid down in this Section.

29. The POCSO Act also imposes an obligation on personnel of the media, hotel, lodge, hospital, club, studio, photographic facilities, to provide information to the Special Juvenile Police Unit or to the local Police if they come across any material or object which is sexually exploitative of a child. The relevant provision is as follows;

"20. Obligation of media, studio and

> **photographic facilities to report cases**.—Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.**"**

30. That apart, it would also do well to highlight here that Section 21 of the POCSO Act provides for penalty in the event of failure to report or record a case. Section 21 of the POCSO Act reads as follows;

> **"21. Punishment for failure to report or record a case**.—(1) Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.
>
> (2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.
>
> (3) The provisions, of sub-section (7) shall not apply to a child under this Act.**"**
>
> These provisions ought to be borne in mind by all concerned to prevent any *faux-pas* with regard to the identity and other particulars of any victim, child or children as described hereinabove.

31. In addition to the above, the POCSO Act prescribes procedure for

Media with a conjunctive penal provision for contravention of the provisions. Section 23 of the POCSO Act reads as follows;

> **"23. Procedure for media**.—(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.
>
> (2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.
>
> (3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.
>
> (4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.**"**

The aforesaid provisions have been extracted and highlighted for the purpose of information and compliance of all concerned.

32. In the circumstances, no order as to costs.

33. Copy of this Judgment be transmitted to the Learned Trial Court for information along with records of the Learned Trial Court.

34. The Judgment also be made over to Police Stations across the State for their information and compliance.

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