

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRIMINAL APPEAL No. 866/2011**

% **Reserved on: 23rd July, 2012**
Date of Decision: 27th September, 2012

RAKESH KUMAR JHA Appellant
Through Mr.Anupam S. Sharma, Advocate.

Versus

STATE OF DELHI...Respondent
Through Ms.Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.:

Rakesh Kumar Jha, the appellant herein, impugns his conviction under Section 302 of the Indian Penal Code, 1860 (IPC) for having committed murder of Suman Rai. He has been sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.5,000/-. In default of payment of fine, he has to undergo Simple Imprisonment for six months.

2. One Suman Rai was found dead in House No. E-50, Ist Floor, Gautam Nagar, New Delhi on 14th May, 2006. She had died a homicidal death, as her body, found in a pool of blood, had injury marks. The post mortem report (Ex. P-17/A) establishes that it was an unnatural death. These facts remain undisputed.

3. The core question is whether the appellant is responsible and has committed the said offence?

4. The prosecution's case is that on 14th May, 2006, at about 1.00 P.M., the appellant went to Police Station, Lajpat Nagar and confessed that he had murdered Suman Rai in House No. E-50, Ist Floor, Gautam Nagar, New Delhi (vide DD Entry No. 11A). The prosecution, in addition, relies upon one Srinivas Kumar (PW-20), who was working for the deceased. As per the charge sheet, Srinivas Kumar had stated that the appellant had confessed to him on telephone, that he had committed murder of Suman Rai, on 14th May, 2006. Immediately thereafter, at 1.20 P.M, Srinivas Kumar had passed on the information to Police Control Room (PCR) at No. 100. The statement made by PW-20, in the Court, varied from the charge-sheet and has been discussed below.

5. Before we proceed further, we need to decide to what extent confession made by the appellant, recorded under DD Entry No. 11A, or the alleged extra judicial confession to Srinivas Kumar (PW-20) is admissible. On record, appellant's case is that he made no extra judicial confession to PW-20, over the telephone. However, statement of PW-20 needs to be deliberated upon only if we hold that Sections 25 and 26 of the Evidence Act do not prohibit or bar admission of the alleged extra judicial confession.

6. In *State of U.P. v. DeomanUpadhyaya*, AIR 1960 SC 1125, Shah, J. speaking for Sudhanshu Kumar Das, J.L. Kapur, J.J. and himself, had held as under:-

“16. Sections 25 and 26 are manifestly intended to hit at an evil viz. to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The

State is as much concerned with punishing offenders who may be proved guilty of committing of offences as it is concerned with protecting persons who may be compelled to give confessional statements. If Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases.”

7. In *Aghnoo Nagesia v. State of Bihar* AIR 1966 SC 119, the accused had himself gone to the police station and lodged a report, which was in the form of a confession. The principal question which arose was whether the said statement, or any portion thereof, was admissible in evidence. The Supreme Court reproduced the entire First Information Report and divided it into 18 parts. Sections 24 to 30 of the Evidence Act were elucidated upon and explained. The term ‘confession’ was interpreted to mean a statement made by an accused suggesting that he had committed the crime. Confession is an admission made by the person who admits the offence or substantially all the facts which constitute the offence. It is a statement made by a person suggesting that he has committed a crime. Whether a statement which is partly self-exculpatory amounts to a confession or not, is a question which need be examined in the present appeal. It was observed that although a confession may consist of several parts, and

some parts may not relate to actual commission of offence, but some may relate to the motive, the cooperation, the opportunity, the provocation, the weapon used, the intention, concealment of the weapon and the subsequent conduct of the accused. Elucidating upon the scope and whether the bar of Sections 25 and 26 of the Evidence Act will apply to such statements, it was held as under:-

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

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18. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that information leading to a discovery may be a part of the confession of the accused and thus, fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, s. 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

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20. Our attention is not drawn to any decision of this Court or of the Privy Council on the question whether apart from s. 27, a confessional first information report given by an accused is receivable in evidence against him. Decisions of the High Courts on this point are hopelessly conflicting. They contain all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. In *Harji v. Emperor* A. I. R. 1918 Lah. 69 and *Noor Muhammad v. Emperor* [1925] 90 I. C. 148, the Lahore High Court held that the entire confessional first information report was inadmissible in evidence. In *Emperor v. Harman Kisha* I. L. R [1935] Bom. 120, the Bombay High Court held that the entire confessional report dealing with events on the night of the offence was hit by s. 25, and it could not be said that portions of it dealing with the motive and the opportunity were not parts of the confession. In *King Emperor v. Kommoju Brahman* I.L.R. [1940] Pat 301 the Patna High Court held that no part of the confessional first information report was receivable in evidence, the entire report formed a single connected story and no part of it had any meaning or significance except in relation to the whole, and it would be wrong to extract parts of the statement and treat them as relevant. This case was followed in *Adimoola Padayachi v. State* (1960] M.W.N.28, and the Court admitted only the portion of the confessional first information report which showed it was given by the accused and investigation had started thereon. In *State of Rajasthan v. Shiv Singh*, the Court admitted in evidence the last part of the report dealing with the movements of the accused after the commission of the offence, but excluded the other parts of the statement including those 'relating to motive and opportunity. In *Legal Remembrancer v. Lalit Mohan Singh Roy* I.L.R. [1922] Cal. 167, the Calcutta High Court admitted in evidence the narrative of the events prior to the night of the occurrence disclosing the motive of the offence. This case was followed by the Nagpur Court in *Bharosa Ramdayal v. Emperor*. In *Kartar Singh v. State*, the Court admitted in evidence the introductory part and the portion narrating the motive and the opportunity. In *Ram Singh v. The State*, the Rajasthan High Court held that where it is possible to separate parts of the first information report by an accused from that in which he had made a confession, that part which can be so separated should be admitted in evidence, and on this view, admitted a part of the report relating to motive and subsequent conduct

including the statement that the accused had left the deceased lying wounded and breathing in the tibia and there was no hope of her surviving and he had come having covered her with a cloth. In *LachhumartMunda v. The State of Bihar*, the Patna High Court admitted in evidence portions of the first information report relating to the motive, the opportunity and the entire narrative of events before and after the crime. This case was followed in the judgment! under appeal. Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. We think that the separability test is misleading, and the entire confessional statement is hit by s. 25 and save and except as provided by s. 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.”

8. Accordingly, the statement recorded in the First Information Report was admissible, in respect of the identity of the accused as the maker of the same i.e. his name, address and other details and the fact that he had come to the police station to make the report, which was recorded and read over to him. The other portions of the statement recorded in the First Information Report were not admissible, save and except the portions which come within the purview of Section 27 of the Evidence Act. Therefore, the other portions had to be excluded.

9. The Supreme Court also referred to the term “custody” which includes constructive custody, and discerned the observations in *Deoman Upadhyaya’s* case (supra). It was duly noticed that there was a conflict of opinion on the said question.

10. The Supreme Court went on to examine the effect of First Information Report and determine whether it is a substantive piece of evidence. Reference was made to Section 154 of CrPC. and Sections 145 and 157 of the Evidence Act. Earlier decision in *Faddi v. State of*

M.P. AIR 1964 SC 1850 was referred to and it was observed that the First Information Report is not substantive evidence but can be used to corroborate or contradict the informant under Section 157 or 145 of the Evidence Act, if the informant is called as a witness. When the First Information is given by the accused himself, the fact of his giving the information is admissible against him, as evidence under Section 8 of the Evidence Act. Further, if the information given is non-confessional, it is admissible against the accused as an admission under Section 21 of the Evidence Act and therefore becomes relevant.

11. In *Re Krishna Pillai*, (1960) ILR Mad 1082 examines what is meant by the term custody. The Madras High Court noted the difference between Sections 25 and 26 of the Evidence Act. It was observed that there was a coma between the words “person accused of an offence” and the words “in the custody of a police officer”. Thus, they have to be read distinctively and in that context there is no question of admissibility being restricted only to a confession of a person in custody to a police officer. The bar applies even when a confession is made to a third person, by a person in police custody. The term “custody of a police officer” was also clarified. It was held that it does not necessarily mean detention or confinement, as used in the Code of Criminal Procedure, i.e., formal custody, but includes such state of affairs from which it can be ascertained and held that the accused is under some sort of surveillance and restriction, and cannot break the company of the police officer and get away. As soon as an accused or suspect comes into the hands of the police officer, unless there is clear and unmistakable evidence to the contrary, he is no

longer at liberty and, therefore, would deem to be in custody though the formal order of arrest etc. may be passed later on. It can thus be concluded that the term “custody” is wide.

12. A similar view has been taken by the Orissa High Court in ***Paramhansa Jadab v. State*** AIR 1964 Ori 144, observing;-

“It is now well settled that "police custody" for the purpose of Section [26](#) of the Evidence Act does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. In *Lay Maung v. Emperor* AIR 1924 Rang 173 the learned Judge pointed out the danger of construing the expression "police custody" in Section [26](#) of the Evidence Act in a more narrow technical sense as commencing from the time when the accused is formally arrested. The learned Judge observed that if such a view be taken it will be very easy for the police to evade that section and that the correct interpretation would be that as soon as an accused or suspected person comes into the hands of a police officer he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in "custody" within the meaning of Sections [26](#) and [27](#) of Evidence Act".

13. In ***Bheru Singh v. State of Rajasthan*** (1994) 2 SCC 467, there are some observations which purport that the motive recorded in the self-implicating First Information Report are admissible and not hit by Section 25 of the Evidence Act, as they do not amount to confession of committing any crime. However, as clarified by a Division Bench of this Court in ***Mukesh v. State*** *Crl. Appeal No. 615/2008 decided on 4.5.2010*, in ***Aghnoo Nagesia*** case (supra) three Judges of the Supreme Court have firmly held that confession not only includes admission of the offence but also other admissions of incriminating facts relating to the offence. Motive, therefore, has to be excluded.

14. Read in this manner, we have to completely ignore and discard the extra judicial confession allegedly made to PW-20 on telephone, on 14th May, 2006 at 1.15 -1.20 P.M., i.e. after the appellant had gone to Police Station, Lajpat Nagar and DD entry No. 11A (Ex. PW1/A) was recorded at 1.00 P.M. The alleged extra judicial confession to PW-20 is hit by Section 26 of the Evidence Act. DD entry No. 11-A(Ex. PW1/A) is admissible to the limited extent that it discloses identity of the appellant, address and details of the maker of the First Information Report. This portion is admissible under Section 8 of the Evidence Act. Other portions of DD entry 11A have to be excluded, except the portion(s) which comes under the purview of Section 27 of the Evidence Act. This portion, noticed below, will consist of appellant's statement that dead body of Suman Rai was lying in flat No. E-20, First Floor, Gautam Nagar, New Delhi, and the knife used and blood stained clothes of the accused were lying in the same flat.

15. Head Constable Raghubir Prasad(PW-1) was the duty officer at the Police Station, Lajpat Nagar and had first interaction with the accused, at Police Station, Lajpat Nagar, where he had recorded his confessional statement, vide DD entry No. 11A(Ex. PW1/A). The DD entry reads

"I reside at 50 E, First Floor, Gautam Nagar, New Delhi in the Flat of Smt. Suman Roy and loved her. I came to know about her illicit relations with some other persons, on which some hot arguments took place between us. As a result whereof I became furious and today at about 8:00 O'clock in the morning I finished her by giving knife blows. I had kept the blood stained knife and clothes at the locale itself. I have locked the flat and the key of the flat is in my possession. I have come here at Lajpat Nagar Police Station to inform you, because I knew about the Lajpat Nagar Police Station only."

(The underlined portion of the DD entry is admissible)

16. The said DD entry further records that PW-1 had, thereafter, made a phone call to Police Station, Defence Colony, the concerned police station having jurisdiction, and had informed duty officer, Head Constable Surender Kumar. The said duty officer had recorded DD entry No. 9A. He had stated that SHO, Police Station, Defence Colony was informed and necessary steps were being taken.

17. DD entry No. 9A (Exhibit No. PW-2/A), Police Station, Defence Colony was proved on record by Head Constable Surender Kumar (PW-2). The said DD entry records that Head Constable Raghubir (PW-1), duty officer Police Station, Lajpat Nagar had telephoned at about 1.05 P.M. and informed that one person, Rakesh Kumar Jha, had confessed that he had killed Suman Rai, whom he used to love, at 8 A.M. in the morning. His statement was noted down as DD No. 11A in Police Station, Lajpat Nagar. The SHO had been informed on the telephone, as he was at AIIMS Hospital on urgent duty. The confession recorded in Ex.PW 2/A is inadmissible. DD Entry 9A can be used as corroborative evidence to prove that DD Entry 11A (Exh.PW1/A) was recorded at about 1.00 P.M., on the statement of the appellant.

18. Now we proceed to examine the recoveries made pursuant the disclosure statement (Ex.PW1/A) and the subsequent investigation.

19. Inspector Ravinder Kumar (PW-23) was posted as SHO Police Station, Defence Colony. According to his statement, , on 14th May, 2006 at 1.10 P.M., on receipt of information, he along with other staff members went to Police Station, Lajpat Nagar and met the duty officer. Rakesh Kumar was present in the Police Station, Lajpat Nagar and was taken into custody. After brief interrogation, the police team and the

appellant went towards Gautam Nagar. The crime team assembled near the ganda nala. Public persons agreed to join the crime team. A private videographer Vishnu (PW-4) joined. The appellant took the police team to the house in question and opened the gate, after taking the key from his pocket. In the first room, they found a dead body of a lady, who was identified as Suman Rai by the appellant. The appellant also pointed out towards the knife kept in that room. The crime team inspected the spot. Photographs were taken. There was a pool of blood near the dead body. Purse and three mobile phones were lying there. PW-23 made a DD endorsement (marked Exhibit PW-23/A) prepared a rukka and handed over the same to the Head Constable Pramod Kumar for registration of the FIR. On the basis of said rukka(Exhibit PW23/A), DD entry No. 11A was recorded,at 3.05 P.M, and FIR No. 367/2006 under Section 302 IPC was registered in Police Station, Defence Colony. Blood stained clothes of the appellant lying in the bathroom sink were seized (vide memo Exhibit PW-3/B). The dead body was sent to AIIMS and after completion of the investigation, the room was closed and the house/room key(marked Exhibit PW-3/E) was seized. The sketch of the knife was prepared at the spot and given mark Exhibit PW-3/C. Chance finger prints were also lifted from one glass in the kitchen, which was seized vide seizure memo Exhibit PW-3/A. Purse and three mobile phones were seized vide seizure memo Exhibit PW-3/G. The said witness proved the CFSL report (Exhibit PX) and one sofa set, the chatai, the chunni, lower track suit, the T-shirt and the knife which were marked Exhibits P-1, P-2, P-3, P-4, P-5 and P-6 respectively. The glass was identified and marked Exhibit P-7 and the key as Exhibit P-8. The witness

identified the video cassette and CD, which was recorded by the videographer and handed over to him, as Exhibit P9 and P10, respectively.

20. SI Suresh Sharma (PW-10) was part of the investigation team with PW-23, and had gone to Police Station, Lajpat Nagar, where the appellant had disclosed commission of the offence. He had also made a similar statement. Rakesh Kumar took them to the first floor of E-50, Gautam Nagar, took out the key from his pocket, and opened the iron gate, and thereafter the wooden door. In the first room of the house, a dead body of the lady was found. The weapon of offence, i.e., knife was also seized. Photographs were taken and FIR was registered.

21. PW-15, SI Naveen Kumar was in charge of the crime team and, at the request of the PW-23, he along with this team had gone to the ganda nala, Gautam Nagar. Private videographer, along with camera man, was called by the IO and the appellant took the police team to the house in question. The door was opened and the dead body was found over the chatai, with her face down. Photographs were taken. The finger print proficient lifted the chance print from the glass.

22. In addition to these official witnesses, we also have statements of three public witnesses Bhagat Singh Verma (PW-3), Vishnu (PW-4), the Videographer and Jitender Ahuja (PW-6), a shopkeeper. PW-3 has stated that, on 14th May, 2006 at about 1.45P.M., when he was going to his residence from the shop, he saw that a crowd had gathered near the nala, and had caught one boy. The appellant was recognized by him in the Court. He had joined the team, as a public witness, at the request of the SHO, Police Station, Defence Colony. The photographer

had reached there within 5 to 7 minutes and they went to the house in question. The appellant took out the key from his right side pocket and opened the lock. PW-6 was also with them. A dead body of a female was lying there and blood was scattered on the sofa, floor and the chatai. The blood was fresh. A purse and three mobile phones were also there. A knife was lying between the sofa and the dead body. Proceedings were conducted and seizure memos were written with the police lifting the chunni, one glass from the kitchen, blood stained clothes in the sink of the bathroom, the knife, key, blood stained earth, purse and three mobile phones. The said witness duly recognized the sofa, chatai, chunni, lower track suit, T-shirt, knife, a glass, key, mobile phones etc. Jitender Ahuja (PW-6) has stated that, on 14th May, 2006 between 1.30 and 2.00P.M., he was standing in front of his juice shop near the nala. At police request, he joined investigation. The appellant took the police party on foot to the flat. The police had videographed the episode, as the appellant led to the parties to the house, took out the key from his pocket, opened the iron gate and thereafter the wooden door. Inside the room the deceased was there, with stab wounds in the neck and abdomen. Blood was there on the sofa and the floor. One purse and three mobile phones were there. One towel was lying on the mat and one knife was found inside the room. Appellant's clothes were recovered from the sink in the bathroom. One glass was recovered from the kitchen. Seizure memos were prepared. The said witness recognized the seized articles, when shown in the court.

23. Srinivas Kumar Das (PW-20) in his statement had stated that he had worked with the deceased, whom he described as Sikha madam. He stated that it was his job to bring clients, to the shop of Sikha madam, and leave them there. He used to prepare food and Madam Sikha used to ask him to go outside, when with clients. On 13th May, 2006, the appellant-Rakesh Kumar, whom he knew and identified in the Court, had gone out and was not to return till 11A.M./noon, the next day. On 13th night, Srinivas Kumar Das had brought one 'sir' in between 11.00 P.M. and midnight, had served food, and thereafter had gone outside. Sir and Madam went inside to sleep. On 14th May 2006, at 7.00 AM when he was preparing coffee, the appellant came there, though he was to return later, at about 11.00 A.M. The appellant enquired regarding who was inside with Madam. PW-20 informed him that madam and one sir were inside the room. The appellant became enraged and started behaving like a mad person. PW-20 came out. Subsequently, the appellant made a telephone call on his mobile No. 9899428313 and told him that Sikha madam had been murdered. PW20, thereafter, made a call to 100 number. Police came and took him along with them. He was cross-examined by the Public Prosecutor. He denied having made a statement that the appellant had confessed committing murder, by calling on his mobile. He, however, admitted that he was standing near Gate No. 4 of Father Agnel School, where the police came, and he subsequently accompanied them to the flat in question. In cross-examination, he had stated that he was working for Sikha for 1 or 1 ½ months prior to the incident. He informed that the appellant had started working for her after PW-20's joining. He accepted that the clients used to remain over

night, but volunteered that the clients did not visit during the presence of the appellant. He had stated that the deceased and the appellant had got married subsequently, though it was correct that the deceased was already married and having a child. She was residing at Uttam Nagar and had taken a room on rent at Gautam Nagar. In reply to one of the questions in the cross-examination, PW-20 had stated that the appellant had told the deceased to give up the profession and he would earn and feed her. In his subsequent cross-examination, on 19th September, 2009, he repudiated stating to the police that the appellant knew the deceased or they had any relationship. He also denied having the telephone number in question in his name. He said that it belonged to one Ajit, a friend. Ajit had expired. He had stated that he made a telephone call to the police on number 100, after receiving the call from the appellant. He had given the caller's name as Rakesh. However, he could not give the number from where the phone call was made by the appellant. PW-20 has been ambiguous and oscillating in his statement. We have disregarded his statement, except to the limited extent that the appellant was personally close to the deceased and the deceased was in a peculiar kind of trade.

24. The submissions made by the appellant can be summarized as under:

- (i) Ex. PW1/A is a fabricated document. It is submitted that it refers to DD entry no. 11A (Ex. PW2/A) recorded by PW-2 in Police Station, Defence Colony. It also refers to the instructions given by the SHO, Lajpat Nagar.

- (ii) The prosecution has not placed on record material/evidence of call details from the mobile operator to show and establish that a call was made to PW-20 at 1.16 P.M. and if so then from which number. Our attention is drawn to the statement of PW-23, who on one occasion had stated that he had collected particulars and data from the mobile service provider but subsequently stated that the data was not provided by the mobile service provider. The call data has not been placed on record.
- (iii) PW-20, on recall for further examination and in the cross-examination dated 19th September, 2009, had accepted that he had not stated to the police that the appellant had said that he would not come at night but come next day between 11-12 noon, or that he actually came there on the next morning, at 7.00AM instead, and upon arriving had asked PW-20 to prepare coffee. According to PW-20, he did not ask the appellant that he had to return at 11 A.M. and the appellant did not ask who was inside the room/house. Neither did PW-20 inform the appellant that one sir was with madam or had stated that the appellant acted like a mad person, on hearing that one sir was with madam.
- (iv) As per PW-20, the phone was taken away by the police and handed over to the SHO but the phone was neither produced in Court nor was its seizure reflected in any document. Further, as per PW-20 the said telephone connection was in the name of Ajit. However, PW-23 categorically stated that the number belonged to one Rajesh, who was not produced as

a witness. The call details of the said number were also not filed. The appellant maintains that the above circumstances clearly illustrate that no call was made at all by the appellant to PW-20. Our attention was drawn to the cross-examination of PW-20 and the statement of the appellant under Section 313 that Ajit and PW-20 had committed the offence.

- (v) Testimony of PW-20 is untrustworthy and not truthful.
- (vi) The prosecution had tried to establish two parallel stories. First being that the appellant made a confession to PW-2 at the Lajpat Nagar Police Station, and secondly that he made a telephone call to PW20, on the basis of which PW-9 picked up PW-20 and reached the spot. Neither PW-9 nor PW-20 had stated that they met the appellant at the spot. This, according to the appellant, illustrates that the appellant had not pointed out the place of occurrence nor did he make any disclosure statement.
- (vii) SI Manoj Kumar Singh (PW-5) in his statement, under Section 161 Cr.P.C., had stated that he had left the spot after arrival of the Investigating Officer. In his testimony in the Court, he had stated that PW-5 had reached the spot at 1.20 P.M., stayed for about 10 minutes and, thereafter, had left the spot at about 1.30 P.M. The Investigating Officer (PW-23) had stated that he had reached the spot at 1.45 P.M. There is a contradiction in the statement of PW-5 and PW-23. Further PW-5 has accepted that rukka(Exhibit PW-23/A) was prepared in his own hand writing. The rukka was sent for registration of FIR at 2.45 P.M. The trial court has erred in

holding that PW-5 had come back to the spot on the basis of re-examination of PW-5 by the Additional Public Prosecutor. In the 161 statement under Cr.P.C., PW-5 has not stated that he returned to the spot after departing on the first occasion.

- (viii) Seizure memo of the key (Exhibit PW-3/E) was prepared by PW-5. However, as per the Investigating Officer(PW-23), they had remained at the spot till 8.15P.M. The keys were required for closing the flat and, therefore, the said seizure memo and other seizure memos were not prepared as per law and there is a possibility that they may have been fabricated.
- (ix) The PCR form 19-A records that the local police had reached the spot on 1422 hours, i.e., 2.22 P.M., which is contrary to what is indicated and stated by the local police officers.
- (x) The timings given in PCR form PW-19/A do not match with the timings indicated by the local police officers or the timing for dispatch of rukka Exhibit PW-2/A and Exhibit PW-23/A, at 2.45 p.m. and registration of FIR Exhibit PW-2/B at 3.05 p.m. The Investigating Officer PW-23 when confronted with the PCR form (Exhibit PW-19/A) had no answer.
- (xi) DD entries 11A and 9A(Exhibit PW-1/A and Exhibit PW-2/A), as well as, the statements of PW-1, 2, 3, 4, 6, 23 and 10 are not credible and deserve to be rejected. Learned counsel has referred to the Exhibit PW-19/A (Form 1) of the PCR. In the said form, it is mentioned that at 1.21 P.M. on 14th May, 2006 informant Nivas had from telephone No. 9899428313 informed that he was standing near gate No. 4 Father Agnel School, Gulmohar Park. His friend had telephoned him and

told him that he had committed a murder. On the basis of the said information, message was transmitted to a PCR van at 1.22 P.M. and the PCR van reached the spot at 1.31 P.M. Subsequently, report was received from the PCR van at 1.45 P.M. The report at 1.45 P.M. indicates that enquiries were being conducted. Thereafter, in Part II of the Form it is recorded that Police Station, Defence Colony was conducting investigation. The said exhibit also records that at 2.22P.M. ACP Defence Colony and SHO had come to the spot. At 2.56 P.M. the dead body was brought to the chowki. At 3.08 P.M., SHO, Defence Colony had reported that Suman Rai was murdered by knife blows injuries on the neck, arm, chest etc. She was found dead at the spot.

- (xii) Telephone instrument of PW-20 was not produced in the Court and not exhibited.
- (xiii) The videographer Vishnu (PW-4) had admitted that continuous video was not taken but there were cuts and gaps. This has resulted in fabrication and manipulation of the video recording. For example the appellant could not be seen taking out the key of the flat.
- (xiv) The CFSL report is inadmissible, as the senior scientific expert conducting the CFSL is not covered under Section 293 Cr.P.C. Further, the appellant maintains that prior to sending the dead body for post mortem, it was brought to the police post where the dead body was tampered with and the appellant's hair was planted.

- (xv) Photographs do not show presence of third party hair in the hands or on the arms of the deceased. CFSL report (Exhibit PX) states that hair was recovered from hands of the deceased (Exhibit PW-5/B) by the doctor, who conducted the post mortem. Comparison of said exhibit with the hair of the deceased seized (vide memo Exhibit PW-5/A) was unbelievable and should be rejected. The inquest report also does not mention presence of hair in the hand or on arm of the deceased. It cannot be explained why the alleged hair of the appellant remained in the arm of the deceased till post mortem was conducted.
- (xvi) PW-21 Constable Jagdish Prasad had not stated that hair was deposited with him and had not proved the entry in the malkhana register.
- (xvii) Statements of public witnesses Rakesh Kumar (PW-8), Bhagat Singh Verma (PW-3), and Jitender Ahuja(PW-6) were unreliable. They were close friends and had gone out of the way to help and support the prosecution.
- (xviii) The disclosure statement (Exhibit PW-23/C) was allegedly recorded by SHO Ravinder Kumar (PW-23) on 15th May, 2006 but the witness thereto Constable Kailash had not been examined.
- (xix) Inspector Ravinder Kumar(PW-23) had stated that the disclosure statement was made on 14th May, 2006. PW-23 did not state that he had recorded any disclosure statement on 15th May, 2006. Disclosure statement relating to purchase of knife was inadmissible under Section 25 and 27 of the

Evidence Act and Section 162 of the CrPC. For the aforesaid discrepancies, as well as the fact that PW-8 did not show any bill etc. for purchase of knife, the appellant maintains that PW-8 is a planted witness and his statement is unreliable.

(xx) Three mobile phones were found at the spot but the ownership of the said mobile phones was not established.

25. We do not find any contradiction in timings which dents or casts doubts on the prosecution version. Noting in Form No. 1 (Exhibit PW-19/A) shows that at 2.56 P.M. the dead body was brought to the chowki. The rukka was written at 2.45 P.M. The arguments with regard to timings mentioned in Exhibit PW-19/A and the other documents are based upon the assumption that everything must have been done with clock like precision. PW-19/A in column no. 4 records that the time when the police reached the spot as 1.45 P.M. However, the said time has a line across. Another time 1422 hours is mentioned with reference to presence of SI Manoj Kumar, SHO and ACP. The detailed note relating to 1422 hours states that ACP Defence Colony and SHO were at the spot. It does not state the time when they had then reached the spot. It is further recorded that they had informed that a lady had been murdered and rest of the information would be conveyed by the SHO on telephone to the command room.

26. The documentation with regard to seizure memos etc. had to be done and it takes time. Seizure memos are prepared after the seizure has taken place. In spite of best efforts, it is natural and normal that there was and should be a time gap between seizing the articles and preparation of the seizure memo especially in this case, where large

number of articles had been seized. The argument with regard to key and the fact that the house was closed at 8.15 P.M. does not impress us. The key was seized. The flat was also locked but this does not establish that the seizure was not made. It indicates that the time mentioned in the seizure memo and the time when the key was sealed may be different. A different key could have been used to lock the house. These minor “discrepancies” do not in any way affect or matter when we examine the disclosure statement in the form of Exhibit PW-1/A, i.e., DD entry No. 11A. Some variation in timing can be accepted and the difference in timing do not vitiate or negate the case or the substantial evidence relied upon by the prosecution. In fact slight and insignificant discrepancies indicate that there was a casual and unprofessional approach in preparation of papers/ documentation. The said lapse/discrepancies reflect on the investigation but do not reflect upon the substantive evidence and probative value of statements made on material and relevant aspects.

This was elucidated in **Chandrakant v. State of Maharashtra** AIR 1974 SC 220 in the following words:

“the benefit of what the High Court terms a “highly defective “investigation cannot go to the prosecution. But, if it were to appear that the story narrated by the deceased immediately after the incident was in material particulars different from the evidence of the eyewitnesses the benefit of such an infirmity would have gone to the accused, but if on a proper evaluation of the various facts and circumstances it transpires that the apparent inconsistencies in the case of the prosecution are solely the result of remissness on the part of the investigating officer and not of any improvement or prevarication on the part of the prosecution witnesses, there would be no justification for discarding the accused.”

27. In a recent Supreme Court decision of *Kalu @ Amit v. State of Haryana* 2012 (7) SCALE 40, the deceased was beaten to death by accused in a college premises, in front of two witnesses. One witness turned hostile. Thus, prosecution's case rested on one sole witness, whose credibility was questioned because of lapses by Investigating Officer. The Court noted:

“It is argued that PW-5 Ram Chander Yadav has stated that his clothes were stained with blood, but PW-8 SHO Raja Ram has stated to the contrary. We do not attach much importance to this. The Investigating Officer ought to have seized PW-5 Ram Chander Yadav's clothes. Because he has failed to do so, obviously to cover up his inefficiency, he has come out with the story that there were no blood stains on the clothes of PW-5. This Court has repeatedly observed that the court must not get influence by the remissness or inefficiency of the Investigating Agency and acquit the accused if the core of the prosecution case is undented and established. That will be putting a premium on inefficiency at the cost of cause of justice. We find that in the instant case, the core of the prosecution case or the substratum of the prosecution case has remained intact.”

(Emphasis supplied)

28. Dealing with the contention that Exhibit PW-1/A was a fabricated document, we believe that the contention has to be only stated to be rejected. In normal course, when an accused comes forward and declares that he has committed a murder, the duty officer recording the DD entry would, at the first instance, talk to the SHO and bring it to the notice of the senior officers. In the present case, as the offence fell within the jurisdiction of Police Station, Defence Colony, phone call was made to the said police station. Recording of entries can take place after some time. There will be some time gap between

the statement made and the recording of entry. An honest and true record of entry would reflect the statement made and what has transpired after the statement is made but before the entry is recorded. The entry Exhibit PW-1/A reflects the said state of affairs and is an indication that it is a true and correct entry. The entry is corroborated by Exhibit PW-2/A, which is a DD entry 9A recorded in Police Station Defence Colony, at 1.05 p.m. on 14th May, 2008. Exhibit PW-1/A was recorded at 1 p.m. The time gap and the entries being in two separate police stations indicates and affirms that the DD entries Exhibit PW-1/A and Exhibit PW-2/A are true and correct and not fabricated.

29. The facts of the case are unusual because normally a person who commits a crime does not go to the police station and admit or confess. However, the said situation cannot also be ruled out as unbelievable. Human conduct cannot be and need not be same in all cases. There have been cases where the accused soon after the crime have gone and confessed at the police station. There is evidence to show that the appellant did have a relationship or association with the deceased. PW-20 no doubt has been oscillating but was clear and categorical in his examination-in-chief as well as cross-examination on 24th January, 2008 and in re-cross-examination later on 19th September, 2009 that the appellant did have an emotional and a close relationship with the deceased. In the further cross-examination on 19th September, 2009, PW-20 did try and help and state to the contrary with regard to what was stated by him earlier on 24th January, 2008, but he accepted the position and reiterated that the appellant had a relationship with the deceased. We also note that even on 24th January,

2008, when PW-20 was cross examined by the Public Prosecutor, he did not accept that the appellant had stated that he had murdered Madam Sikha.

30. The contention of the appellant that PW-20 along with Ajit had committed the murder of the deceased and that the police had connived and acted in concert to save them, is apparently far-fetched. The name of Ajit for the first time figured in the cross-examination of PW-20 on 19th September, 2009. The name of Ajit did not figure in the earlier cross-examination of PW-20 or other witnesses. PW-20 had stated that he did not know if Ajit was working for madam Sikha, i.e., the deceased. He further stated that Ajit had expired. The murder in this case had taken place in the morning hours around 8 a.m. on 14th May, 2006. The appellant had gone to the police station at 1 P.M. It is difficult to accept appellant's contention that the police came to know about the said murder between 8.00 to 1.00 P.M. and the murder was committed by Ajit and PW-20, and further to help them out, the police fabricated the entire story, after arresting and detaining the appellant and taking him to the Police Station, Lajpat Nagar, they recorded his confession, which was conveyed to the Police Station, Defence Colony or that PW-20 was asked to make a telephone call etc. The suggestion and the story propounded by the appellant are clearly unbelievable and have to be rejected. The contention does not raise or create any doubt.

31. Learned counsel for the appellant submitted that the alleged extra judicial confession made by the appellant, to PW-20 at 1.15 P.M., is unbelievable as he was in police custody once DD entry No. 11A was registered in Police Station, Lajpat Nagar at 1 p.m. He had further

submitted that the police had not verified and examined the telephone number from which alleged telephone call was made to PW-20. It was further argued that the police had failed to place on record details of telephone calls made to mobile No.9899428313 which was allegedly used by PW-20. The different stands of PW-23 regarding the call details are unacceptable but the net effect is that we should disregard the statement of PW-20 regarding the extrajudicial confession. We need not examine the alleged extra judicial confession for the simple reason that as per the prosecution version the appellant had gone to Police Station, Lajpat Nagar on 14th May, 2006 at 1P.M.and made a confession. He remained in police custody thereafter. The extra judicial confession once the appellant was in police custody, even to a third person, is inadmissible and cannot be relied upon by the prosecution. The appellant was in police custody since 1 P.M. and, therefore, bar under Sections 25 and 26 of the Evidence Act, are applicable. Section 26 of the Evidence Act states that no confession made by any person while he is in custody of a police officer shall be proved against the said person unless it is made in the immediate presence of a Magistrate. No doubt, at 1.00 P.M., FIR was not registered against the appellant but it is not possible to hold that he was not in police custody. The term “custody” used in Sections 25 and 26 of the Evidence Act has to be interpreted in a pragmatic manner.

32. Read in this manner, we have to ignore and completely disregard the so called extra judicial confession or the confession made by the appellant to PW-20. However, in spite of this, we feel that there is

sufficient circumstantial evidence which proves beyond doubt that the offence in question was committed by the appellant and no one else.

33. The statement made by the accused and recorded in DD No. 11A, Exhibit PW-1/A to the extent it led to the recoveries is admissible under Section 27 of the Evidence Act, which is an exception to Sections 25 and 26 thereof. A confession made to the police officer is inadmissible. What is admissible and can be looked into under Section 27 is the information given to the police officer by the person in custody, which leads to discovery of a new fact, which was hitherto not known. Pursuant to the said disclosure, when recovery of physical object is made, the disclosure statement becomes admissible as it stands corroborated by the recovery. The recovery is sufficient guarantee of the truth of that information and the same can be relied upon. The discovery should be as a consequence of the information given by the accused or the person in custody. The rationale behind Section 27 is that the facts in question till the time information was given remained unknown and were within the knowledge of the accused. Once the facts or information gets corroborated by the recovery, the information furnished and the knowledge of the accused or person in custody about the said information is important and relevant. The credibility of the statement gets established. In this manner, Section 27 strikes a balance viz. Sections 25 and 26. It recognizes the presumption that when the accused alone gives information, which was hitherto not known and recovery is made pursuant to the said disclosure, the court can presume existence of the fact which is likely to have happened having regard to the common

course of natural events, human conduct and private and public witness in their relations to the facts of the particular case.

34. In the present case, the recoveries made pursuant to the disclosure statements are the corner stone and the edifice of the prosecution case. Till Exhibit PW-1/A was recorded, the prosecution/police was not aware of the murder. On the basis of appellant's statement, the prosecution found the dead body of Suman Rai. Prosecution also recovered the weapon of offence, which was a knife lying at the spot and also blood stained clothes which were worn by the appellant. The said recoveries are proved by PW-3 and PW-6, who are independent witnesses and residents/shop keepers of the said area. They are also proved by PW-4, the public videographer. That the videographer had not taken continuous videography but had taken videographs after breaks does not show or establish that the videography should be disbelieved. Several officers and the public witnesses can be seen in the said videography.

35. PW-8 alleges that appellant had purchased a knife from his shop, on 13th April 2006 noon. Learned Counsel for the Appellant, however, contends that PW-8 is a planted witness due to two reasons: a) Ex PW9/B, according to which the accused led the police to his Shop No. 72/7 Yusuf Sarai, New Delhi, does not bear signature of PW-8 and; b) no bill, to prove alleged purchase of knife, was produced. Even if statement of PW-8, is completely discarded, it will have little dent on the prosecution case, in light of numerous recoveries made from the spot. It must be again emphasised that pursuant to disclosure by the accused, under Section 27 of the Indian Evidence Act, a blood stained

knife was recovered from the spot, on which human blood was detected, in the CFSL Report (Ex. PX). The post mortem report Ex. PW17/A & B clearly prove that knife was indeed the weapon of offence.

36. The fact that PW-3, PW-4 and PW-6 were known to each other and were friends is inconsequential and does not show or establish that their statements are unbelievable and untrustworthy. They were residents or were having shops in the same area. It is natural and normal that they would be known to each other. They did not hide this fact. The presence of PW-3 and PW-6 is clearly established in the CD. The presence of PW-8 is undisputed as he was recording the video. They have also admitted their presence when the house was opened by the appellant in their presence resulting in the recovery of the dead body, the knife, the clothes of the appellant with blood stains.

37. In the present case, furnishing information and recovery of dead body, weapon of offence and the clothes worn by the appellant from the residence itself is sufficient to convict the appellant.

38. Scope of Section 27 was first clearly laid down in ***PulukuriKottayya v. King- Emperor*** (1947), Privy Council, overruling ***In re Athappa Goundan*** ILR 1937 Mad 695 and earlier judgments. It was held that only so much of the information as relates distinctly to the fact thereby discovered may be proved, and the statement “with which I stabbed A”, made by the accused, is inadmissible. It was observed:

“9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding

section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.”

39. In *State of Maharashtra v. Suresh* 2000 (1) SCC 471, the Supreme Court held:-

“26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.”

Reference in this regard can be made to *Geetha v. State of Karnataka* 2000 (10) SCC 72, where it was held:-

“8. When all these incriminating circumstances were put to the appellant in her examination under Section 313 CrPC she merely stated that they were false and failed to give any other explanation. The prosecution evidence which has been found reliable proves that the answers given by the appellant in her Section 313 statement were really false. The appellant did not explain how the dead body and articles belonging to the deceased were found from her house. She denied that they were found from her house. This being a case of circumstantial evidence, this false denial assumes importance as it would supply a missing link in the chain of circumstances.”

40. In *Krishnan @ Ramasamy and ors. versus State* CrI. A. No. 1009/2005 dated 31st March 2008, a Division Bench of the High Court of Madras held:-

“The place chosen by the accused to dump the body after commission of the offence itself speaks volumes not only about the intention of the accused to commit the murder but also about the genuinity in the prosecution's case as such a place, namely a bore well, to dump a dead body is beyond the imagination of anyone and this particular place would not have been identified by the police except with the assistance and identification by A.3. In other words, such a place cannot be identified by any other person who did not commit the offence. In Ex.P.3, the confession given by A.3, he had confessed that the dead body of Manikandan was put inside the iron bore well near Indira Nagar Alternate Quarters by him along with A.1 and A.2. Apart from this, P.Ws. 1 to 4 had also spoken to the effect that they were taken by the police to identify the dead body and accordingly they found that the decomposed body recovered from the bore well near Indira Nagar Alternate Quarters was that of Manikandan.”

(See also *MohiburRahman v. State of Assam* 2002 (6) SCC 715, *Primal Mazumdar v. State of Assam* 2006 CriLJ 2296, *Harvinder*

Singh versus The State (Govt. of NCT) CrI.A.No. 979/2010 dated 2nd June 2011, *State of Maharashtra Vs. Suresh JT 1999(9) SC*, *BabuLal @ Pappu versus State* CrI. A. No. 627/2008 dated 22nd March 2010, *Prithipal Singh Vs. State*) (*CrI.A.No.75/2004*dated 12th March 2010),*Primal Mazumdar v. State of Assam* 2006 CriLJ 2296)

41. This apart, as noticed above, motive is also established in view of the statement made by PW-20. The appellant had a close personal relationship with the deceased, who was involved in a peculiar kind of trade. This is also clear from the statement of Ajay Rai (PW-24), husband of the deceased. The deceased had taken up a place on rent away from her place of residence. It is the case of the appellant himself that the deceased was a sex worker and he was associated with her.

42. We do not agree with the counsel for the appellant that Section 293 Cr.P.C. is not applicable and the CFSL report has not been proved in accordance with law. CFSL Report (Ex.PW) was submitted by Mr. M.K. Majumdar, Senior Scientific Assistant (Biology) and it was only issued after being duly examined and counter signed by Mr. Bhattacharya, Director of CFSL, Kolkata. A senior scientific assistant is covered under Section 293 (1) of CrPC, as has been held in the case of *State of H.P. v. Mast Ram* (2004) 8 SCC 660:

“6. Secondly, the ground on which the High Court has thrown out the prosecution story is the report of the ballistic expert. The report of the ballistic expert (Ext. P-X) was signed by one Junior Scientific Officer. According to the High Court, a Junior Scientific Officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court,

in our view, is also fallacious. Firstly, the forensic science laboratory report (Ext. P-X) has been submitted under the signatures of a Junior Scientific Officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely overlooked the provision of sub-section (1) of Section 293 and arrived at a fallacious conclusion that a Junior Scientific Officer is not an officer enumerated under sub-section (4) of Section 293. What sub-section (4) of Section 293 envisages is that the court is to accept the documents issued by any of the six officers enumerated therein as valid evidence without examining the author of the documents.”

43. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is dismissed. The judgment and the order of sentence are affirmed.

**-sd-
(SANJIV KHANNA)
JUDGE**

**-sd-
(S. P. GARG)
JUDGE**

**September 27th, 2012
VKR/kkb**