

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

% *Judgment Reserved on: 21<sup>st</sup> April, 2010*  
*Judgment Pronounced on: 4<sup>th</sup> May, 2010*

+ **CRL.APPEAL No.615/2008**

MUKESH ..... Appellant  
Through: Ms.Shraddha Bhargava, Advocate

versus

STATE ..... Respondent  
Through: Ms.Richa Kapoor, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

**PRADEEP NANDRAJOG, J.**

1. Appellant Mukesh faced trial for the charge of having murdered his wife Anita (hereinafter referred to as the "Deceased") on 23.4.2004 at around 2:00 PM in the matrimonial house of the parties being Flat No.55, Pocket IV, Sector-21, Rohini, Delhi.
2. Vide impugned judgment and order dated 01.10.2007, the appellant has been held guilty of murder for which offence he has been sentenced to undergo imprisonment for life and

pay fine in sum of Rs.10,000/-; in default of payment of fine to undergo rigorous imprisonment for a period of two months.

3. Case of the prosecution against the appellant was that on 23.04.2004 at about 2.45 PM the appellant came to PS Sultanpuri and informed HC Dilbagh Singh PW-8 that along with his wife and his three children the appellant resides at flat bearing Municipal No.55, Pocket IV, Sector 21, Rohini, Delhi and that his sister Krishna and her husband Bhanu reside in the flat opposite to his house. That since last few days the deceased was having illicit relations with his brother-in-law Bhanu. That he requested the deceased to end her relationship with Bhanu but she did not pay any heed to his requests. That today i.e. 23.04.2004 at about 10.00 AM he took his three children to the terrace of his house and left them there for playing. Thereafter he came downstairs and strangulated his wife with the string of her salwar and also cut her neck with a kitchen knife. After sometime he bolted his house and took his children to his sister Krishna in NPL Colony and left them with her. Having realized that he has committed a wrong by murdering his wife he has come to the police station to confess his guilt. One Shakeel PW-16, a public person was present at the police station and heard the said confession being made by the appellant. HC Dilbagh Singh PW-8,

recorded the afore-noted information given by the appellant in DD No.20A, Ex.PW-8/A.

4. DD No.20A was assigned to SI Jagdish Rai PW-19 for inquiry who left the police station in the company of the appellant and took along with him Const.Pawan Kumar PW-18. On reaching the flat where the appellant resided the two police officers saw the deceased lying dead on a mattress with ligature marks and a cut mark on her neck and a string tied around her neck. A knife, a shirt and a pant were lying near the body of the deceased.

5. After sometime, Vipin PW-6, and Girish Kumar PW-11, the neighbours of the appellant, arrived at the house in question upon which the appellant told them that he had murdered his wife.

6. SI Jagdish Rai made an endorsement Ex.PW-19/A beneath copy of the DD entry Ex.PW-8/A, and at around 4.30 PM handed over the same to Const.Pawan Kumar PW-18 for FIR to be registered. Const.Pawan Kumar took the endorsement Ex.PW-19/A to the police station and handed over the same to HC Kulvir Singh PW-2, who recorded FIR No.452/04, Ex.PW-2/A.

7. Inspector Sukhvinder Singh PW-20 took over the investigation and reached the house where the deceased was

murdered. He seized the knife, the shirt and the pant found near the body of the deceased vide memos Ex.PW-11/A and Ex.PW-11/F respectively.

8. In view of the confession made by the appellant, Inspector Sukhvinder Singh arrested the appellant at 7.30 PM on 23.04.2004 as recorded in the arrest memo Ex.PW-6/C.

9. He seized the dead body and sent it to the mortuary along with the inquest papers and on 27.04.2004 at about 2.15 PM Dr.Ashish Jain PW-5 conducted the post-mortem and prepared the post-mortem report Ex.PW-5/A recording therein that a ligature mark and a cut injury was found on the neck of the deceased. The cause of death of the deceased was asphyxia resulting from strangulation and that it is possible that the deceased was strangulated with the string found tied around the neck of the deceased. He opined that the cut injury on the neck of the deceased was possible by the knife found lying near the body. He handed over the clothes and the blood sample of the deceased on a gauze to the investigating officer.

10. All the blood stained exhibits i.e. the ones lifted from the scene of the crime and those handed over by the doctor who conducted the post-mortem were sent for serological examination and vide FSL report Ex.PW-20/D, human blood was detected on the knife and the pant found near the body of

the deceased; group whereof could not be determined. Human blood of group A was detected on the shirt found near the body of the deceased.

11. Sonu PW-15 the sister of the deceased and her mother Shela Devi PW-10 told the investigating officer that the appellant used to beat his wife and used to demand money.

12. A charge sheet was filed against the appellant with the allegation that the motive for the crime was to get rid of his wife who was having illicit relationship with her brother-in-law as per the confession made by the appellant and could not satisfy his monetary demands through her parents and that he himself reported the crime to the police and at that time Shakeel PW-16 was present and heard the extra judicial confession. Further, the appellant made another extra judicial confession when he was brought to his house when Vipin PW-6 and Girish Kumar PW-11 who resided in the neighbourhood of the appellant were present. It is apparent that hardly any investigation needed to be done as the weapon of offence, a knife was found at the spot of the crime itself.

13. At the trial the prosecution examined 20 witnesses.

14. Vipin PW-6, a neighbour of the appellant, deposed that on 23.04.2002 at about 3.40 PM he was standing outside his

house and that the appellant along with some police officials was standing at some distance from him. At that time, the appellant told him that he had murdered his wife. The clothes worn by the appellant at that time were not stained with blood. On being questioned about the children of the appellant and the deceased, he stated (Quote): *'Mukesh was having in his family three children apart from his wife. Police had not recorded any statement of children of Mukesh in my presence.'*

15. HC Dilbagh Singh PW-8, deposed that he had prepared DD entry Ex.PW-8/A on the basis of the statement given by the appellant. He deposed that the clothes worn by the appellant at the time when he came to the police station were stained with blood.

16. Shela Devi PW-10, the mother of the deceased and her daughter Sonu PW-15 deposed that the appellant used to beat the deceased on account of money since they could not fulfil his demand for money and that they had noted beating marks on the body of the deceased. On being questioned about the children of the deceased and the appellant, the mother of the deceased stated (Quote): *'Mukesh and my daughter had three issues. The eldest daughter of my daughter is aged about 7-8 years....I tired to meet with the children of my deceased*

*daughter but was not allowed to meet them and they were beaten by the accused.'* Krishan PW-14 a neighbour of the parents of the deceased, deposed that the appellant was of quarrelsome nature and was a drunkard. On one occasion, he visited the parental home of the deceased and demanded Rs.5,000/- from the parents of the deceased. When the parents of the deceased refused to give him the money, the appellant quarrelled with them. The appellant was accompanied by the deceased and the deceased was having injuries on her person. The mother of the deceased gave a sum of Rs.2,000/- to the appellant.

17. Girish Kumar PW-11, did not support the case of the prosecution and denied that the appellant had made any confession in his presence on 23.04.2004 that he had murdered the deceased.

18. Shakeel PW-16, deposed that on 23.04.2004 at about 2.30 PM he was present in the police station when the appellant came there and made a confession to the police of having murdered his wife. That thereafter the appellant again made a confession in his house in his presence. Two public persons were present when the appellant so confessed.

19. Const.Pawan Kumar PW-18 and SI Jagdish Rai PW-19, deposed that they visited the house in question on the day of

the incident and participated in the spot investigation. On being questioned about the children of the appellant and the deceased, SI Jagdish Rai stated (Quote): *'Children of Mukesh were not present at the house. I did not take any steps to call any of the children...Children of Mukesh accused did not reach the spot during the period we remained at the spot.'*

20. Inspector Sukhvinder Singh PW-20, deposed that the present case was investigated by him. On being questioned about the children of the appellant and the deceased, he stated (Quote): *'Children of the accused were not present at his house. I tried to call children of the accused for being joined in the investigation but none came forward. I cannot tell as to how many times I tried to join the children in the investigation. This is a fact that I did not record statement of children, as they did not make any statement. Children met me but I do not remember the date of their meeting me.'*

21. When examined under Section 313 Cr.P.C. the appellant stated that on 23.04.2004 at about 8.00 AM he left his house to go to the residence of his mother in NPL colony, Rajinder Nagar, Delhi. When he returned to his house at about 12.30 PM he saw that his wife was lying murdered. He went to the house of one of his neighbours and told the lady present there about the murder of the deceased but she feigned ignorance

about the same. Thereafter he went to police station Sultanpuri and informed the police about the murder of the deceased. He denied having made any confession to any police officers or his neighbours Vipin and Girish. The appellant did not lead any evidence in support of his defence.

22. As already stated herein above, the learned Trial Judge convicted the appellant. It has been held by the learned Trial Judge that: - (i) In view of the law laid down by the Supreme Court in the decision reported as Aghnoo Nagesia v State of Bihar AIR 1966 SC 119, save and except the facts that the appellant informed the police about the murder of the deceased and that the deceased was having illicit relations with his brother-in-law, remaining statements attributed to the appellant being incriminatory and as entered in Ex.PW-8/A are not admissible in evidence; (ii) In view of the law laid down by the Supreme Court in the decisions reported as Aghnoo Nagesia v State of Bihar AIR 1966 SC 119 and State of AP v Gangula AIR 1997 SC 1588, the extra-judicial confession made by the appellant to Vipin PW-6 and Girish Kumar PW-12 is not admissible in evidence for the appellant was in "police custody" at the time he made the said confession; (iii) That the prosecution has failed to establish any motive for the appellant to murder the deceased holding that there were discrepancies

in the evidence of the witnesses Shela Devi PW-10, Krishan PW-12 and Sonu PW-15, and that the prosecution had failed to examine the children of the appellant and the deceased who could have thrown considerable light on the relationship between the appellant and the deceased; (iv) That nothing turns on the fact that a blood-stained knife, a shirt and a pant were found near the body of the deceased; (v) That since the deceased was murdered in her matrimonial house, Section 106 of the Evidence Act made it incumbent upon the appellant to furnish an explanation as to how the deceased died and (vi) That the fact that the appellant had failed to give a satisfactory explanation for the death of the deceased for he did not lead any evidence to prove his defence of alibi leads to a conclusion that the appellant is the perpetrator of the crime.

23. From the narratives stated herein above, it is apparent that the prosecution used following four circumstances to infer the guilt of the appellant:-

I The appellant made a confession to HC Dilbagh Singh PW-8, as recorded in the DD entry Ex.PW-8/A.

II The appellant made an extra-judicial confession to Vipin PW-6 and Girish Kumar PW-12.

III The appellant had a motive to murder the deceased as established by witnesses, Shela Devi PW-10, Krishan PW-12 and Sonu PW-15.

IV The deceased was strangled within the four walls of her matrimonial house and that the appellant failed to render any satisfactory explanation for the death of the deceased.

24. Whether the recordings contained in DD entry Ex.PW-8/A prepared by HC Dilbagh Singh on the basis of the alleged statement given by the appellant, which has formed the basis of the registration of the FIR in the present case can be used against the appellant?

25. In the decision reported as Nisar Ali v State of UP AIR 1957 SC 366 the question which arose before Supreme Court was whether a statement contained in an FIR lodged by an accused can be used against the co-accused. Supreme Court answered the aforesaid question in negative in following terms:-

“....An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157 of the Evidence Act or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence.” (Emphasis Supplied)

26. In the decision reported as Faddi v State of MP AIR 1964 SC 1850 the accused who was charged with the offence of murdering his step son lodged an FIR stating therein that he had seen the dead body of the deceased floating in a well, which statement was found to be incorrect. Relying upon afore-noted observations made by Supreme Court in Nisar's case (supra) it was contended that the first information report lodged by the accused is an inadmissible piece of evidence. Repelling the said contention, Supreme Court observed as under:-

“The report is not a confession of the appellant. It is not a statement made to a police officer during the course of investigation. Section 25 of the Evidence Act and Section 162 of the Code of Criminal Procedure do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court viz. how and by whom the murder of Gulab was committed, or whether the appellant's statement in Court denying the correctness of certain statements' of the prosecution witnesses is correct or not. Admissions are admissible in evidence under Section 21 of the Act. Section 17 defines an admission to be a statement, oral or documentary, 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, thereafter mentioned, in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (c), (d) and (e) to Section 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in Section 21 to the provision that admissions could not be proved by the person who makes them. It is therefore clear that admissions of an accused can be proved against him.

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It is on these observations that it has been contended for the appellant that his report was inadmissible in evidence. Ostensibly, the expression 'it cannot be used as evidence against the maker at the trial if he himself becomes an accused' supports the appellant's contention. But it appears to us that in the context in which the observation is made and in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted to be inadmissible against Nisar Ali, and that the High Court did not refer to it at all in its judgment, this observation really refers to a first information report which is in the nature of a confession by the maker thereof. Of course a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused. Further, the last sentence of the above-quoted observation is significant and indicates what the Court meant was that the first information report lodged by Qudratullah, the co-accused, was not a evidence against Nisar Ali. This Court did not mean — as it had not to determine in that case — that a first information report which is not a confession cannot be used as an admission under Section 21 of the Evidence Act or as a relevant statement under any other provisions of that Act. We find also that this observation has been understood in this way by the Rajasthan High Court in *State v. Balchand* and in *State of Rajasthan v. Shiv Singh* and by the Allahabad High Court in *Allahdia v. State.*"

27. The legal principle which emerges from *Faddi's* case (supra) is that, where the accused himself lodges the first information report, the fact of his giving information of the crime to the police is admissible against him as evidence of his

conduct under Section 8 of Evidence Act and that if the first information report is a non-confessional statement the same can be used against him as an admission under Section 21 of Evidence Act.

28. What is meant by the word “confession”?

29. The word “confession” has not been defined in the Evidence Act. For a long time, Courts in India have adopted the definition of “confession” given in Article 22 of Stephen’s Digest of Law of Evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. However, in the decisions reported as R v Jagrup ILR 7 ALL 646 and R v Santya Bandhu 4 Bom LR 633 Allahabad High Court and Bombay High Court respectively did not accept such a wider definition and gave a narrower meaning to the word “confession” holding that only a statement which is a direct acknowledgement of guilt would amount to confession and that a statement which is merely an inculpatory admission which falls short of being admission of guilt would not amount to confession. The issue as to meaning of word “confession” was ultimately settled by Privy Council in the decision reported as Pakala Narayana Swami v Emperor 66 IA 66 where Lord Atkin observed as under:-

“Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence (sic offence). An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession e.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man’s possession. Some confusion appears to have been caused by the definition of confession in Article 22 of *Stephen’s Digest of the Law of Evidence*, which defines a confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles: confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused ‘suggesting the inference that he committed’ the crime.”

30. The aforesaid observations of Lord Atkin in *Pakala’s* case (supra) received the approval of a 3-Judge Bench of Supreme Court in the decision reported as *Palvinder Kaur v State of Punjab* 1953 CriLJ 154.

31. In this regards, it is most apposite to refer to the decision of Supreme Court reported as *Aghnoo Nagesia v State of Bihar* AIR 1966 SC 119. In the said case, the accused who was charged with the offence(s) of having murdered four persons lodged an FIR with the police. The Supreme Court divided the said FIR into 18 parts for the purposes of determining its

admissibility. Parts 1, 15 and 18 contained recordings pertaining to the fact that the accused went to the police station to lodge the FIR; parts 2 and 16 contained recordings pertaining to the motive of the accused for committing the murders; parts 3, 5, 8 and 10 contained recordings pertaining to the movements of the accused before and after the commission of murders; part 8 also contained recordings pertaining to intention of the accused; parts 4, 6, 9, 11 and 12 contained recordings pertaining to admission of guilt by the accused as also his motive for committing the murders and parts 7, 13 and 17 contained recordings pertaining to concealment of dead bodies and weapon of offence by the accused and his ability to get recover the same. The Supreme Court reiterated the law laid down in Faddi's case (supra) with respect to admissibility of an FIR lodged by the accused. Thereafter, it proceeded to determine whether the afore-noted 18 parts of the FIR in question amount to a confession or not. It was held by Supreme Court that save and except parts 1, 15 and 18 which contained recordings pertaining to the fact that the accused was the maker of the FIR and the parts which came within the purview of Section 27 of Evidence Act, the entire FIR amounts to confession and should be excluded from evidence. The relevant discussion contained in the said decision is being noted herein under:-

“Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact i.e. some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.

If proof of the confession is excluded by any provision of law such as Section 24, Section 25 and Section 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 Section 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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If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27.” (Emphasis Supplied)

32. In the decision reported as Bheru Singh v State of Rajasthan (1994) 2 SCC 467 the accused was charged with the offence(s) of having murdered his wife, 2 daughters and 3 sons. The accused lodged a first information report wherein besides confessing to his guilt, the accused stated about his

motive for committing the murders and the fact that his sister-in-law was present at the time when he committed the murders. It was held by the Supreme Court that the statements contained in the FIR pertaining to motive of the accused and the presence of sister-in-law of the accused are non-confessional in nature and can be used against him.

33. A perusal of the decisions of Supreme Court in Aghnoo and Bheru's cases (supra) shows that there is an apparent conflict between the two decisions. A further perusal of Bheru's case shows that Aghnoo's case (supra) and the legal position laid down therein that the confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement was not brought to the notice of Supreme Court in Bheru's (case) supra.

34. Tested on the aforesaid anvil of law, the learned Trial Judge was perfectly justified in holding that the fact that the appellant gave information about the crime of the murder of the deceased to the police is admissible against the appellant as the same is evidence of his conduct under Section 8 of Evidence Act. However, the learned Trial Judge was not correct in holding that the recording contained in the DD entry Ex.PW-8/A that the appellant informed the police that the deceased

was having illicit relations with his brother-in-law Bhanu is admissible in evidence for the reason the said recording is an incriminating fact against the appellant and all the incriminating facts contained in a confessional statement are inadmissible in evidence as laid down by Supreme Court in Aghnoo's case (supra).

35. Whether the learned Trial Judge was justified in holding that the extra-judicial confession made by the appellant to Vipin PW-6 and Girish Kumar PW-11, is inadmissible in evidence in view of the provisions of Section 26 of the Evidence Act?

36. Section 26 of the Evidence Act 1872, reads as under:

**“26. Confession by accused while in custody of police not to be proved against him.—**No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

*[Explanation.—*In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882” (Emphasis Supplied)

37. It is the claim of the prosecution that the bar contained in Section 26 of Evidence Act does not apply to extra-judicial confession made by the appellant to Vipin PW-6 and Girish

Kumar PW-11, for the reason the appellant was not in the “custody” of the police when he made the extra-judicial confession since the appellant was arrested at 7.30 PM as recorded in the arrest memo Ex.PW-6/C whereas the said extra-judicial confession was made by the appellant at about 3.40 PM as deposed by Vipin PW-6.

38. In order to deal with the submission of the prosecution, it would be necessary to examine the concept of “custody” and “arrest” in connection with a criminal case.

39. The expression “custody” appears in number of enactments, like, Sections 438, 439, 442, 451 Cr.P.C., Section 45 of Customs Act, Sections 26 and 27 of Evidence Act etc. However, the expression “custody” has not been defined in any of the enactments. Likewise, the expression “arrest” has not been defined in the Code of Criminal Procedure or Indian Penal Code or any other enactment dealing with criminal offence. The only indication as to what would constitute “arrest” may perhaps be found in Section 46, Cr.P.C. which reads as follows:-

**“46. Arrest how made.—**(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made." (Emphasis Supplied)

40. In the decision reported as State of UP v Deoman Upadhyaya AIR 1960 SC 1125 the validity of Section 27 of Evidence Act was challenged on the ground that the said section unjustifiably discriminates between the "persons who are in police custody" and the "persons who are not in police custody" and thus offends Article 14 of Constitution of India. The majority judges were of the view that Section 27 is not violative of Article 14 of Constitution of India as the classification made between the "persons who are in police custody" and the "persons who are not in police custody" is

based upon an intelligible differentia whereas a minority judge was of the view Section 27 is violative of Article 14 of Constitution of India. While adjudicating upon the validity of Section 27, the majority judges observed as under:-

“12.....When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the “custody” of the police officer within the meaning of Section 27 of the Indian Evidence Act: *Legal Remembrancer v. Lalit Mohan Singh, Santokhi Beldar v. King-Emperor*. Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer..... A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the police officer investigating the offence has not been able to get at any evidence against him giving information to the police officer, without surrendering himself to the police which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been

invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself.....”

41. In the same decision, the minority judge observed as under:-

“38. During the course of the arguments of the learned counsel for the respondent, to the question put from the Bench whether an accused who makes a confession of his guilt to a police officer would not by the act of confession submit himself to his custody, the learned counsel answered that the finding of the High Court was in his favour, namely, that such a confession would not bring about that result. Learned Additional Solicitor-General in his reply pursued this line of thought and contended that in that event all possible cases of confession to a police officer would be covered by Section 27 of the Evidence Act. The governing section is Section 46 of the Code of Criminal Procedure, which reads:

“(1) In making the arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.”

It has been held in some decisions that “when a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and if he makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of clause (1) of this section, and is then in the custody of a police officer within the meaning of Section 27 of the Evidence Act”. But other cases took a contrary view. It is not possible to state as a proposition of law what words or what kind of action bring about submission to custody; that can only be decided on the facts of each case. It may depend upon the nature of the information, the circumstances under, the manner in, and the object for, which it is made, the attitude of the police officer concerned and such other facts. It is not, therefore, possible to predicate that every confession of guilt or statement made to a police officer automatically brings him into his custody. I find it very difficult to hold that in fact that there would not be any appreciable number of accused making confessions or statements outside the custody of a police officer....”

42. In the decision reported as *Aghnoo Nagesia v State of Bihar* AIR 1966 SC 119 the accused came to the police station and informed the police officer present there that he has committed the murder of his aunt and her daughter, son-in-law and grandson and that he can get recovered the bodies of the deceased person(s) and the tangi used by him for committing the murder(s). The police officer receiving the information registered the FIR based upon the aforesaid information given by the accused. Pursuant thereto, the accused got recovered the bodies of the deceased person(s) and a tangi. One of the questions which arose before Supreme Court was whether the accused was in “custody” of a police officer within the meaning of Section 27 of Evidence Act at the time when he gave the aforesaid information to the police. The court noted the difference of opinion between the majority and minority judges on the meaning of the expression “custody” when the accused makes a confessional statement to the police but did not express any opinion on the said point and proceeded on the basis that the accused was in “constructive custody” at the time when he made the confessional statement to the police officer. The relevant discussion contained in the said decision i.e. *Aghnoo Nagesia*’s case (supra) is as under:-

“Section 27 applies only to information received from a person accused of an offence in the custody of a

police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. Prima facie therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27, there is conflict of opinion. See the observations of Shah, J. and Subba Rao, J. in *State of U.P. v. Deoman Upadhyaya*. For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the *tangi* is admissible in evidence....." (Emphasis Supplied)

43. An impression does emerge that in *Aghnoo Nagesia's* case the Supreme Court used the expressions "custody" and "arrest" as synonyms, but such a reading of the decision would not be correct. The fact that Section 46 Cr.P.C. uses both the expressions "custody" and "arrest" indicates the legislative intent that "custody" and "arrest" are not to be treated as synonymous terms. Following observations of the Supreme Court in the decision reported as *Directorate of Enforcement v Deepak Mahajan* (1994) 3 SCC 440 make the position somewhat clear:-

"48...It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide *Roshan Beevi*"

44. After a survey of case law on the point, the meaning of the expression “custody” was succinctly stated by the Orissa High Court in the decision reported as Paramhansa Jadab v State AIR 1964 Ori 144 in the following terms:-

“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".

In Haroon v. Emperor, AIR 1932 Sind 149 and Pharho Shahwali v. Emperor, AIR 1932 Sind 201 it was pointed out that, even indirect control over the movements of sus-pects by the police would amount to 'police custody' within the meaning of that section. In Gurdial Singh v. Emperor; AIR 1932 Lah 609 and in In re Edukondalu, AIR 1957 Andh Pra 729 also the same principles were emphasised and it was observed that there may be police custody without formal arrest.....” (Emphasis Supplied)

45. In the instant case, the appellant came to the police station and made a confessional statement to HC Dilbagh Singh PW-8. From that very moment, the movements of the appellant got restricted for surely having told the police that he had murdered his wife, the appellant could not have left the police station against the wishes of the police officer(s) present there. As stated by the Orissa High Court in Paramhansa's case (supra), "police custody" for the purposes of Section 26 commences as soon as the movements of the accused get "restricted"; the appellant came into the "custody" of a police officer the moment he made a confessional statement to HC Dilbagh Singh.

46. The sum and substance of the above discussion is that the learned Trial Judge has rightly held that the extra-judicial confession made by the appellant to Vipin PW-6 and Girish Kumar PW-11, was inadmissible in evidence as the appellant was in "police custody" at the time of making of the said extra-judicial confession.

47. Whether the appellant had a motive to murder the deceased?

48. The witnesses; Shela Devi PW-10, the mother of the deceased, Krishan PW-12, the neighbour of the parents of the deceased and Sonu PW-15, the sister of the deceased, were

examined by the prosecution to prove the motive of the appellant to murder the deceased. A reading of the impugned judgement shows that the learned Trial Judge had rejected the evidence of the aforesaid witnesses on trivial grounds.

49. The gist of the evidence of the said witnesses is that the appellant used to beat and harass the deceased for money.

50. But, the fact of the matter remains that the appellant and the deceased were residing together since 10-12 years prior the date of the death of the deceased as deposed by Shela Devi PW-10, the mother of the deceased. Had the relations between the appellant and the deceased been strained to the extreme it may have been difficult for the deceased to have stayed with the appellant for so long. It appears to be a case, as is usually to be found, that the poverty of the appellant and his extended family consisting of 3 children motivated him to try and extract some money from his mother-in-law and he used his wife as an object of sympathy of his mother-in-law. Hoping that his mother-in-law would be moved by the plight of her daughter and would thus part with some money, the appellant used to beat his wife. Thus, the motive to kill his wife on said reason has appeared very weakly. As regards the other motive of the appellant suspecting his wife to be having an extramarital relationship with her brother-in-law, no

evidence has been led. In view of Aghnoo Nagesia's case the statement of the appellant to the police pertaining to the motive of the crime is inadmissible.

51. What turns on the fact that the deceased died in her matrimonial house?

52. Having examined the decisions of the Supreme Court on the point of death of a wife in her matrimonial house, we deem it appropriate to classify the said judicial decisions into undernoted 4 broad categories for the reason we are finding considerable confusion in the minds of the subordinate Judges as to the correct position of law:-

I In the first category fall the decisions where it is proved by the prosecution that the husband was present in the house when the wife suffered a homicidal death and rendered no explanation as to how his wife suffered the homicidal death. (See the decisions reported as State of Rajasthan v Parthu (2007) 12 SCC 754, Amarsingh Munnasingh Suryavanshi v State of Maharashtra AIR 2008 SC 479, Ganeshlal v State of Maharashtra (1992) 3 SCC 106, Prabhudayal v State of Maharashtra (1993) 3 SCC 573, Dyaneshwar v State of Maharashtra (2007) 10 SCC 445, Trimukh Maroti Kirkan v State of Maharashtra (2006) 10 SCC 681, Bija v State of Haryana

(2008) 11 SCC 242 and State of Tamil Nadu v Rajendran (1999) 8 SCC 679)

II In the second category are the decisions where the prosecution could not prove the presence of the husband in the house when the wife suffered a homicidal death but the circumstances were such that it could be reasonably inferred that the husband was in the house and the husband failed to render any satisfactory explanation as to how his wife suffered a homicidal death. The circumstances wherefrom it could be inferred that the husband was in the house would be proof that they lived in the house and used to cohabit there and the death took place in such hours of the night when a husband was expected to be in the house i.e. the hours between night time and early morning. (See the decisions reported as State of UP v Dr Ravindra Prakash Mittal (1992) 3 SCC 300 and Narendra v State of Karnataka (2009) 6 SCC 61).

III In the third category would be proof of a *very strong motive* for the husband to murder his wife and proof of there being a reasonable probability of the husband being in the house and having an opportunity to commit the murder. In the decision reported as Udaipal Singh v State of UP (1972) 4 SCC 142 the deceased wife died in her matrimonial home in a room where she and her husband used to reside together. The

accused-husband had a very strong motive to murder the deceased which was evident from the letter written by him to his mistress, which letter clearly brought out the feeling of disgust which the accused had towards the deceased. The accused had the opportunity to commit the murder of the deceased as there was evidence to show the presence of the accused in the village where the house in which the deceased died was situated at the time of the death of the deceased. Noting the facts that the accused had a strong enough motive and an opportunity to murder the deceased, noting that there was no evidence that the appellant was seen in his house by anybody, the Supreme Court convicted the accused.

IV In the fourth category are the decisions where the wife died in her matrimonial house but there was no evidence to show presence of the husband in the house at the time of the death of the wife and the time when the crime was committed was not of the kind contemplated by the decisions in category II and was of a kind when husbands are expected to be on their job and there was either no proof of motive or very weak motive being proved as in the decision reported as *Khatri Hemraj Amulakh v State of Gujarat* AIR 1972 SC 922 and *State of Punjab Vs. Hari Kishan* 1997 SCC Cri. 1211.

53. In the instant case, unfortunately due to delay in conduct of the post-mortem of the deceased, the autopsy surgeon has not been able to even roughly state the likely time when the deceased died.

54. The crime was reported to the police at 2:45 PM on 23.4.2004 and the appellant claims that he reported the matter to the police for he found his wife dead when he returned to his house in the afternoon. There is no evidence to prove that the appellant never left his house in the morning. There is no evidence that the deceased died either in the intervening night of 22<sup>nd</sup> and 23<sup>rd</sup> April 2004 or the morning of 23<sup>rd</sup> April 2004. Thus, there is no ground why the appellant should not be believed. As already held, the motive for the crime ostensibly proved is a very weak motive.

55. There is yet another fact which is worth noticing. The three children of the deceased and the appellant also used to reside in the house in question and that the age of the eldest child of the couple was 7-8 years old as deposed by Shela Devi PW-10. The possibility that the children of the couple were present at the house in question at the time of the murder of the deceased cannot be ruled out. It was thus incumbent upon the prosecution to examine the children of the couple, particularly their eldest child, in the present case. However,

the prosecution did not examine any of the children of the couple. In that view of the matter, this court would be entitled to draw an adverse inference against the prosecution for non-examination of the children of the couple in terms of illustration (g) appended to Section 114 of Evidence Act that had the children of the couple been examined they would not have supported the case of the prosecution.

56. The net result of the above discussion is that the appellant would be entitled to the benefit of a doubt and hence an acquittal. The appeal is allowed. The appellant is acquitted of the charge of having murdered his wife.

57. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent Central Jail Tihar to be made available to the appellant.

**(PRADEEP NANDRAJOG)  
JUDGE**

**(SURESH KAIT)  
JUDGE**

**MAY 04, 2010  
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