
(2007) 08 GAU CK 0058
In the Gauhati High Court

State of Assam

APPELLANT

Vs

Anupam Das

RESPONDENT

Date of Decision : 03-08-2007

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 107, 108, 109, 110, 12
Evidence Act, 1872 — Section 21, 25, 26, 27, 30
Penal Code, 1860 (IPC) — Section 201, 302, 377

Citation : (2008) CriLJ 1276 : (2007) 3 GLT 697

Hon'ble Judges : Jasti Chelameswar, C.J;H. Baruah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Jasti Chelameswar, C.J.—The sole accused in Sessions Case No. 71(K)/2000 is found guilty of offence u/s 302 and 201 IPC and convicted by the learned Sessions Judge, Kamrup, Guwahati by judgment dated 14.11.2006. The learned Sessions Judge thought it fit to award capital punishment to the accused obviously for the offence u/s 302 IPC. It is to be mentioned here that the learned Sessions Judge did not record to have awarded any punishment insofar as the charge u/s 201 IPC is concerned, though the accused is also found guilty of the said offence. For the sake of completion of the narration of facts, it is to be mentioned here that though the accused was also charged and tried u/s 377 IPC, the learned Sessions Judge did not record a finding of guilt.

2. In view of the fact that the learned Sessions Judge chose to award the capital punishment, the matter is placed before this Court for confirmation of the punishment as required u/s 366 CrPC which is numbered as Criminal Death Reference No.4 of 2006. Aggrieved by the conviction and sentence, the accused also preferred (sic) appeal being Crl. Appeal No. 127(J)/20000 Both the matters were clubbed together and heard.

3. Facts of the case are as follows:

The unfortunate victim was a boy named "Barun Shandillya", aged about 10 years. PW-1 is the father of the deceased, who owns a residential house and a commercial complex located in the same piece of land in Guwahati city, both the complex and house being separated only by a distance of 15" ft. The commercial complex is named after the mother of PW-1 as "Renuka Commercial Complex". There are 9 (nine) rooms in the ground floor, which were taken on lease by different tenants for running their respective business. Shops were established. Some of them also took some rooms in the first floor of the complex and remaining rooms in the first floor of the complex were taken on lease by others. The accused is also one of the tenants in one of the rooms located in the first floor. It appears from the evidence that the accused was earning his livelihood as an Electrician. He was a tenant of the PW-1 approximately for a period of 4 (four) years and had enough intimacy with the family of the deceased.

4. On 22.01.2000 at about 7.30 AM the deceased got ready to go to school by wearing the school uniform but thereafter he was found missing. As the school time was drawing closer, the PW-1 started searching for the boy around all possible places. As the boy was not found, he made enquiries to his neighbours and close relatives, who live within the vicinity of his house. Unable to trace out, the PW-1 went to the school. On coming to know that the boy did not even reach the school, he returned home. By then the people of the locality came to know about the incident and gathered in the house of PW-1. The accused was also present there. Around 10/10.30AM the PW-1 finally went to Gitanagar Police Station, Guwahati and lodged a report Ext-1 of boy missing. The police initially suspected it to be a case of kidnapping for ransom. Therefore (it appears from the evidence of PW-19, the Investigating Police Officer) the accused was instructed by PW-19 to purchase a caller identification device and fix the same to the telephone of PW-1. While the accused was fixing the Caller Identification Device, PW-1 and PW-19 noticed some injuries on the hands of the accused and on suspicion the accused was taken by PW-19 to Gitanagar Police Station around 12 noon on the same date. Though the evidence is not very clear as to what transpired between 12 noon to 5 30 PM, admittedly around 5.30 PM, PW-19 took the accused to Renuka complex from Gitanagar Police Station. After reaching the complex the accused opened his room, which was by then locked. The PW-19 entered the room and noticed some blood marks on the floor. On search the PW-19 recovered a "plastic bundle wrapped by polythene paper". The accused himself opened the bundle exposing the "headless body of a small boy". On coming to know of the same, the crowd which gathered by then became infuriated. The PW-19 found it difficult to control the crowd and therefore took the accused away to another police station called Chandmari Police Station. In the Chandmari Police Station the accused is alleged to have made a statement Ext-17 between 8.15 PM to 8.45 PM on the same day before PW-12, an Executive Magistrate. In the meanwhile, at around 8 PM on the written complaint made by PW-1 (which the police treat to be an FIR) a case was registered as Gitanagar Police Station Case No. 11/2000 u/s 302/201 IPC.

5. According to the prosecution, the accused made confession of his guilt to PW-12 and in the said statement (Ext-17), referred to above, also stated that the head of the deceased and the weapon, which was used to kill the boy, were concealed by him in the same room where he stays and that he would show the place where the head of the deceased and the weapon were hidden. Again, the PW-19 along with certain other Superior Police Officers went to the room of the accused accompanied by the accused. It is in the evidence of the PW-19 and others that upon reaching the place, the accused opened a trunk and took out the head of the deceased wrapped in a polythene bag and the accused also produced a "Dao" (the weapon used to kill the boy) and blood stained clothes of the accused. All of them were seized under Exts. 6, 7 and 8.

6. Thereafter, inquest was held and Exts. 3, 4 and 5 are the inquest reports. The body and head of the deceased was identified by PW-10, the maternal uncle of the deceased. Thereafter the body was sent to the Guwahati Medical College Hospital for postmortem under forwarding report Ext-10.

7. PW-19 claims to have arrested the accused on 23.01.2000, though as a matter of fact undisputedly the accused was in custody of the police at least from 12 noon of 22.01.2000. The accused was produced before the Chief Judicial Magistrate, Kamrup and remanded to police custody for some time and again produced before the Magistrate on 02.02.2000. The police requested the Magistrate (PW-18) to record the statement of the accused (Ext-27) u/s 164 CrPC, which was recorded on 03.02.2000, while he was in police custody. In the said statement the accused admitted to have killed the deceased boy. On completion of the investigation PW-19 filed charge sheet.

8. The prosecution examined as many as 19 witnesses exhibited as many as 32 documents and produced 34 Material Exhibits to establish the guilt of the accused. The accused, though given opportunity to produce witness, if any in his defence, did not chose to examine anybody. The accused was also given an opportunity, as contemplated u/s 313 CrPC, to explain the circumstances sought to be proved by the prosecution to establish the guilt of the accused. His statement was recorded. After the argument was concluded, the learned Sessions Judge on consideration of the entire materials recorded his findings on 14.11.2006, as noticed above, and after giving opportunity to the accused to make submission on the punishment, awarded punishment.

9. There is no eyewitness to the occurrence. The entire prosecution case rests on circumstantial evidence and the three confessions made by the accused vide Exts-15, 17 and 27. Ext-15 is the statement of the accused recorded by PW-8, a Doctor working in the Guwahati Medical College Hospital, who examined the accused on 24.01.2000 on the requisition of police.

10. PW-2 is an employee of one of the shops located in "Renuka Commercial Complex", who was examined to establish the fact that at around 7.30 AM the deceased was seen going towards the room of the accused. PW-4 is one of the

tenants in "Renuka Commercial Complex" who also stated that he saw the deceased going towards the room of the accused around 7.15 AM.

11. PW-3 is the servant of PW-1 and is one of the punch witnesses for the inquest under Exts-3, 4 and 5.

12. PWs-5 and 6 are the brothers-in-law of PW-1. PW-6 one of the punch witnesses for Exts-6, 7, 8 and 9, the panchnamas under which various material objects were seized by the police. PW-7 is the Doctor, who conducted postmortem on the deceased. PW-9 is the superior of PW-7. PW-10 is one of the punch witness for seizure of various material objects.

13. PW-12 is the Executive Magistrate, who recorded the statement of the accused (Ext-17). PW-13 is a punch witness for Ext-18 under which the witness took custody of the dead body from the police after postmortem examination.

14. PW-14 is the Serologist, who conducted chemical examination on various material objects. PWs-15 and 16 are the finger print experts. PW-17 is the photographer who took photos on the scene of occurrence. PW-18 is the Additional Chief Judicial Magistrate, Kamrup, Guwahati, who recorded the statement (Ext-27) of the accused u/s 164 CrPC. PW-19 is the investigating police officer who filed the charge sheet.

15. The prosecution relied upon the following circumstances to establish the guilt of the accused:

i) That the deceased was seen going towards the room of the accused between 7.00 to 7.30 A.M. on 22.1.2000. That was the last time he was ever seen alive by anybody.

ii) That except the accused nobody else lives in the first" floor of the Renuka Complex where the accused lives in one of the rooms of the first floor.

iii) That PWs-1 and 19 noticed injuries at the hands of the accused around 10.30 to 11.00 A.M. on the same day.

iv) That at about 5.30 P.M. on the same day when the room of the accused was searched by PW-19 and his party, PW-19 noticed blood stains on the floor of the room of the accused and on further search they found a packet under the bed of the accused in which the body without head of the deceased was found.

v) On the information furnished by the accused under Exts-17 Police (PW-19) recovered the head of the deceased from the trunk kept under the bed of the accused in his room in the Renuka Complex and also recovered the weapon of offence and blood stained cloths of the accused from the same place.

vi) That the room of the accused was locked and the key was with the accused only. When PW-19 went to search the room of the accused at about 5.30 P.M. leading to an inference that the accused alone had access to the room.

Coupled with the abovementioned circumstances, prosecution relied upon three

statements under Exts-15, 17 and 27 made by the accused to PWs-8, 12 and 18 respectively purporting to confess the fact that he had killed the deceased Barun.

16. The learned Public Prosecutor argued that the evidence on record establishes beyond reasonable doubt the guilt of the accused and the various circumstances mentioned above can only lead to one inference that only the accused committed the offences u/s 302 and 201 IPC. The learned Public Prosecutor also submitted that the confessions made by the accused under Exts-15, 17 and 27 before PWs-8, 12 and 18 leave no scope for any doubt coupled with circumstantial evidence that the accused is guilty of offences as held by the learned Sessions Judge.

17. On the other hand, learned Counsel for the accused argued that the circumstances relied upon by the prosecution, even if are held to have been established beyond all reasonable doubt, do not conclusively establish the guilt of the accused. He further submitted that insofar as the statements made by the accused purporting to be the confessions of guilt under Exts-15 and 17 are hit by Section 26 of the Evidence Act and therefore, cannot be proved against the accused.

18. Coming to Ext-27, the learned Counsel submitted that the plea of the accused before the Sessions Court being one of "not guilty", a conviction cannot be based on an earlier confession made and recorded u/s 164 CrPC apart from the fact that it is not safe to rely upon Ext-27's statement as the learned Magistrate did not faithfully comply with the requirements of law while recording such a statement.

19. Exts-15 and 17 are the statements of the accused recorded by PWs-8 and 12 respectively, who are the doctor, who examined the accused on 24-1-2000 and the Executive Magistrate respectively who recorded the statement at about 8.15 PM on 22-1-2000 at the instance of the police. One indisputable fact emerging from the evidence is that from at least 12 noon of 22-1-2000, the accused was in the custody of police. Therefore, in view of Section 26 of the Evidence Act the statements purporting to be the confessions are inadmissible in evidence, as the said cannot be proved against the accused. The prosecution seeks to classify these confessions as extrajudicial confessions. Irrespective of the tag sought to be given by the prosecution the fact remains that these confessions were made while the accused was in custody of the police, therefore, hit by Section 26 of the Evidence Act. Section 26 of the Evidence Act reads as follows:

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.

20. It can be seen from the language of Section 26 that the only exception to the Rule contained u/s 26 is that any such confession, which is otherwise hit by Section 26, can be proved against the accused if such a confession is made in

the immediate presence of a Magistrate. It is not the case of the prosecution that the alleged confession before PW-8 was made in the immediate presence of a Magistrate, therefore, the same is clearly hit by Section 26 and cannot be looked into.

21. Coming to Ext-17, learned Public Prosecutor argued that it being a confession made in the immediate presence of a Magistrate, the same could be proved against the accused as falling within the exception to the Rule contained u/s 26 of the Evidence Act. Admittedly, PW-12, who recorded Ext-17, is an Executive Magistrate, therefore, it becomes necessary to examine whether the expression "Magistrate" occurring u/s 26 of the Evidence Act takes within its sweep an "Executive Magistrate". "Magistrate" is not a defined expression under the Evidence Act.

22. Section 3 Sub-section (32) of the General Clauses Act, 1897 defines the expression "Magistrate" as follows:

(32) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force;

Therefore, necessarily we need to examine the provisions of the Code of Criminal Procedure.

23. Section 3 of the CrPC provides for rule of construction of references. Sub-section (1) of Section 3 stipulates as to how the expression "Magistrate" shall be construed whenever reference is made under the Code, without any qualifying words. Sub-sections (2) and (3) are not relevant for our purpose. Sub-section (4), which is relevant for the present purpose reads as follows:

(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-

(a) Which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) Which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

The scheme of Sub-section 4 will be examined slightly later in this judgment.

24. Section 6 of the CrPC contemplates the establishment of various kinds of criminal courts. They are--(i) Courts of Session; (ii) Judicial Magistrate of the first class and, in any metropolitan area, Metropolitan Magistrate; (iii) Judicial Magistrate of the second class; and (iv) Executive Magistrates. Therefore, Section 6 draws a clear distinction between Judicial Magistrates and the

Executive Magistrates. The powers of the Judicial Magistrates and the Executive Magistrates are expressly dealt with under various provisions of the CrPC. Sections 12 to 19 deal with the various categories of Judicial Magistrates referred to u/s 6. Section 20 deals with the Executive Magistrates. Relevant to the context of this case is Section 20(1) which reads as follows:

20. Executive Magistrates--(1) In every district and in every metropolitan area the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

25. Section 21 of the CrPC empowers the State Government to appoint Special Executive Magistrates; the details of which are not necessary in the present case. Section 22 of the CrPC deals with the local jurisdiction of the Executive Magistrates. Section 23 of the CrPC deals with the hierarchy of the Executive Magistrates and the limits and powers of the various Executive Magistrates. Wherever the CrPC confers powers on the Executive Magistrates, the provisions of the Code are specific, for example, under Sections 107, 108, 109 and 110 the legislature expressly employed the expression "Executive Magistrate". We do not propose to make an exhaustive survey of the provisions of the Code for the present purpose. The above provisions are noted only for understanding the scheme of the Code with regard to the powers, functions and limitations of the Judicial and Executive Magistrates.

26. It is in the context of such separation of powers among the two categories of Magistrates Section 3(1) stipulates that in the Code of Criminal Procedure any reference, without any qualifying words, to a Magistrate shall be construed a Judicial Magistrate which term includes a Judicial Magistrate in contra-distinction to an Executive Magistrate. The Parliament was also conscious of the fact that under various enactments made by the Parliament, powers are required to be exercised by the Magistrates without specifying whether such powers are to be exercised by Judicial or Executive Magistrates in a given situation. The Parliament, therefore, thought it fit to make a declaration Under Sub-section (4) of Section 3 that whenever such a question arises (in the context of any law made by the Parliament other than the Code of Criminal Procedure whether such a reference is to a Judicial Magistrate or the Executive Magistrate) depending upon the nature of the power that is to be exercised such reference is to be construed to be either to a Judicial or an Executive Magistrate. From the scheme of Sub-section (4) it appears that where the powers are purely administrative in nature such powers are required to be exercised by an Executive Magistrate. Whereas, where the power to be exercised is such that it involves appreciation of evidence or the formulation of a decision which exposes any person to any punishment, penalty or detention etc then such functions are required to be exercised by the Judicial Magistrates.

27. In the light of the above we are of the opinion that the expression "Magistrate" occurring u/s 26 of the Indian Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in

police custody is likely to expose the person making the confession to a punishment. This conclusion of ours gains further support from the very scheme of the provisions of Sections 25 to 27 of the Evidence Act. Section 25 of the Evidence Act makes a declaration in no uncertain terms that a confession made to a police officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of decisions to the effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to Section 25. While Section 25 prohibits the proof of a confession made to a police officer, Section 26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provision is made in order to prevent the police from extracting confession from the accused while he is under custody and ingeniously circumventing the prohibition of law contained u/s 25 by making it appear that the confession was not in fact made to a police officer but somebody else. The scheme of the provisions of Sections 25 to 27 was examined by the Supreme Court in *Bheru Singh Vs. State of Rajasthan*, wherein at para 16 the Supreme Court held:

16...By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. Inadmissibility of a confessional statement made to a police officer u/s 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. u/s 164 CrPC a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.

28. The Legislature was obviously of the view that any kind of confession by an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of

mankind. However, the Legislature recognized an exception to the rule contained u/s 26, i.e. a confession made by an accused, who is in the custody of the police, to some person other than a police officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a police officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods. Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of Article 20 Sub Article 3 of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties u/s 164(2) CrPC on the Judicial Magistrate recording statement u/s 164 CrPC. It would be strange logic that while a statement recorded by a Judicial Magistrate u/s 164 CrPC would be vitiated for non-compliance of the conditions stipulated u/s 164(2) & (4) of the CrPC and cannot, therefore, be used against the maker of the statement, but the Magistrate contemplated u/s 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, is under no obligation to comply with the requirements of Section 164(2) & (4) of the CrPC, but the confession recorded by such a magistrate can be proved against the accused for establishing his guilt.

29. From the foregoing discussion we have no alternative but to reach an irresistible conclusion that the expression "Magistrate" occurring in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate.

30. In the light of the foregoing discussions and the conclusions, in our view, Exts-15 and 17, insofar as they purport to contain a confession on the part of the accused, cannot be proved against the accused. Insofar as Ext-15 is concerned, admittedly, the accused was in the custody of the police when he made the confession to the doctor (PW-8) and nothing is available on record that such a confession was made in the immediate presence of a Judicial Magistrate. Coming to Ext-17, insofar as it pertains to the confession of the accused, it cannot be proved against the accused for the same reasons assigned for rejecting the

confession made under Ext-15.

31. We are left with/only the statement recorded by PW-18, the Judicial Magistrate, in exercise of the powers u/s 164 CrPC. The relevant portion of Ext-27 reads as follows:

Barun gave me two videogames for repairing it. I repaired one of them and returned it early. But, since I could not repair the other one, I could not return it. For the videogame Barun used to visit me often. Even he visited me 3/4 days prior to the occurrence. But as I failed to deliver, he called my parents names and also told me badly. That day I persuaded and sent him back. On 22.1.2000 Barun came to my house around 7.30/8.00 a.m. At that moment I was not at my room. I was in the latrine of the 1st floor. On my return from the latrine I found him near the room. He entered my room with me. He asked for the videogame. As I had not prepared it, I could not deliver it to him. Then Barun called my parents names and scolded me using bad expression. Getting angry, I dealt a slap. I was feeling depressed as I could not pay the house rent for want of money. Barun also raised his hand to slap on me. I became angry and dealt him slaps and fist blows and then felled him on the bed. As he tried to shout I pressed his mouth. In that state I continued dealing him slaps and fist blows and then dragged him onto the floor from the bed. I held him pressing his neck and remained in that position for a long time. Thereafter I did not notice whether he has dead or senseless. Then I took the dao from under the bed and sawed the back of his neck to cut. I also sawed the front of the neck. I dealt cut blows on the head and went on dealing fist blows. As Barun ceased to show any movements I sawed his neck, thereby making two pieces.

32. No doubt, it is a categorical confession of the guilt of the accused but the accused went back on the confession at the time of the trial by pleading not guilty in his examination both u/s 228 CrPC and also in his statement recorded u/s 313 CrPC. Therefore, the conviction cannot be based straightway on the confession contained in Ext-27. Whether the same can be legally used for any other purpose or not is to be examined.

33. The submission made by the learned Counsel for the accused is that PW-18 did not faithfully follow the procedure established by law for recording the confession u/s 164 CrPC and, therefore, the same should be totally ignored.

34. Section 164(2) of the CrPC prescribes the procedure that is required to be followed by the Magistrate recording a confession. It reads as follows:

164(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it maybe used as evidence against him and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

Under Sub-section (4) of Section 164 CrPC the Magistrate is required to make

the memorandum at the foot of the statement, the content of which is stated in the said Sub-section. Sub-section (4) of Section 164 CrPC reads as follows:

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

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

Sub-section (2) of Section 164 CrPC mandates the Magistrate before whom an accused is brought for recording of confession to explain to the accused that the accused is not bound to make any confession and that any confession, if made, may be used as evidence against the accused. Secondly, the Magistrate is also required to satisfy himself that the accused proposes to make a confession voluntarily. Such a conclusion is required to be reached after appropriately questioning the accused.

35. The Supreme Court in *Kehar Singh and Others Vs. State (Delhi Administration)*, at paragraph 117 examined the purport of Section 164 CrPC and also the effect of non-compliance with any one of the requirements of Section 164(2) and held as follows:

117. On a consideration of the above decisions it is manifest that if the provisions of Section 164(2) which require that the Magistrate before recording confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. The compliance of the Sub-section (2) of Section 164 is therefore, mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of Sub-section (2) of Section 164 read with Section 281 have been complied with. If the Court comes to a finding, that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured u/s 463 (Section 533 of the Old Criminal Procedure Code) but when there is non-compliance of the mandatory requirement of Section 164(2) Criminal Procedure Code and it comes out in evidence that no such explanation as envisaged in the aforesaid Sub-section has been given to the accused by the Magistrate this substantial defect

cannot be cured u/s 463 Criminal Procedure Code.

(emphasis supplied).

36. The learned Counsel for the accused relied heavily on a judgment of the Supreme Court reported in Shivappa Vs. State of Karnataka, . In paragraphs 6 and 7 of the said judgment the Supreme Court held as follows regarding the scheme of Section 164 CrPC and the obligations of the Magistrate recording the confession u/s 164 CrPC:

6. From the plain language of Section 164 CrPC and the Rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused u/s 164 CrPC, is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and important part of the duty of the Magistrate recording the confessional statement of an accused u/s 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the Rules framed by the High Court is imperative and its noncompliance goes to the root of the Magistrates jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for non supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution warning specifically provided for in the first part of Sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it maybe used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to

ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a "voluntary" statement within the meaning of the provisions of Section 164 CrPC and the Rules framed by the High Court for the guidance of the subordinate Courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the Court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

It is to be noted here that in the said case the Supreme Court eventually reversed the concurrent findings of the courts below of the guilt of the accused only on the basis of an alleged confession recorded u/s 164 of the CrPC. The Supreme Court did so because it came to the conclusion that the Magistrate who recorded the confession did not comply with the mandatory requirements of Section 164(2) CrPC.

37. In the back ground of the above mentioned legal position we now examine the procedure followed by the PW-18 while recording the statement of the accused u/s 164 CrPC.

The accused was produced before PW-18 on 2-2-2000 at about 11 AM. PW-18 directed that the accused be produced on the next day, i.e. 3-2-2000 to give enough time to the accused to reflect before making any confession. Accordingly the accused was produced again on 3-2-2000 at 11 AM before PW-18. Then the Magistrate kept the accused in his chamber under the observation of the court Peon and gave further time for reflection. Eventually at 2 PM on that day the confession of the accused was recorded. P W-18 explained to the accused that he was not a police officer but a Magistrate. He also cautioned the accused that the accused was not bound to make a confession and if he made any confession it might be used in evidence against him. PW-18 also tried to ascertain from the accused as to why the accused was making a confession. In reply he was told by the accused "as I have committed the offence". In the circumstances we are of the opinion that the contents of Section 164 CrPC is complied with in essence by the Magistrate.

However, the learned Counsel for the accused argued that the memoranda of the Magistrate appended to the confession is not in the same form as prescribed under the Section.

The Magistrate made three memoranda after recording the confession of the accused. The memoranda are marked as Ext-27(14), (15) and (16) which read as follows:

Ext-27(14)

I believe that this confession has voluntarily made. It was taken in my presence

and hearing and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him.

Ext-27(15)

The accused has not complained of any ill treatment. No injury is noticed on his person. He was given sufficient time for reflection and was examined on 3-2-2000 at 2 PM.

Ext-27(16)

I am of the opinion that the accused has confessed voluntarily and made his confession out of repentance. It was taken in my presence and hearing and was read over to the accused and admitted by him to be correct and it contains a full and true account of the statement made by him.

A combined reading of the three memoranda shows that the Magistrate has complied with all the statutory requirements prescribed u/s 164(2) & (4) CrPC. Therefore, we are of the opinion that the defect, if any, in the memoranda is one of form but not of substance. Hence, we reject the submission made by the learned Counsel for the accused that the confession Ext-27 is inadmissible in evidence.

The next question is as to what is the evidentiary value of such a confession which was subsequently retracted; whether such a confession can form the basis of a conviction?

38. The Supreme Court in *Kashmira Singh Vs. State of Madhya Pradesh*, held as follows:

The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

The said judgment is quoted with approval again in *Chandrakant Chimanlal Desai Vs. State of Gujarat*, at paragraph 5.

However, the said two judgments were explained by the Supreme Court in a later judgment reported in 2004 (3) GLT 1 : *Paramananda Pegu v. State of Assam*. In paragraphs 22 and 23 of the judgment the Supreme Court held as follows:

22. In view of the error in comprehending the scope of the decision in Kashmira Singh's case, the decision in Chimanlal's case falls close to the category of the decisions rendered per incuriam. If followed, it would run counter to a catena of coordinate Bench decisions and the larger Bench decision in Pyare Lal v. State of Rajasthan (supra).

23. We may point out that in the State of Maharashtra Vs. Damu Shinde and Others, this Court noticed the apparent error in Chirnanlal's case and observed thus:

We may make it clear that in Kashmira Singh, this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of Section 30 of the Evidence Act. Hence, the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker.

So, the legal position emerging there from is that even a retracted confession can form basis of conviction, but as a rule of prudence, the Supreme Court insisted that such a confession is required to be corroborated. A Constitution Bench of the Supreme Court in 1963 I SCR 689 : Pyare Lal v. State of Rajasthan, in this regard held as follows:

?A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only, a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars?.

39. PWs-2 and 4 categorically deposed to the effect that they saw the deceased going to wards the room of the accused around 7.30 AM on the fateful day. That was the time Barun was last seen alive by anybody. PW-2 is an employee in one of the shops of the Renuka Complex and PW-4 is one of the tenants carrying on business in the Renuka Complex. From the evidence it appears that their presence at the Renuka Complex at that point of time was natural. Their evidence is consistent and remains unimpeached. Therefore, the fact that the deceased was last seen around 7.30 AM on the fateful day going towards the room of the accused, in our view, is established beyond all reasonable doubt.

40. The fact that except the accused nobody else, lived in the first floor of the Renuka Complex is clearly spoken to by PW-2. Not even a suggestion is made to PW-2 in the cross-examination that apart from the accused some other person lived in the first floor of the Renuka Complex.

41. Coming to the third circumstance of injuries on the body of the accused both P Ws-1 and 19 categorically deposed to the fact of the noticing the existence of injuries on the body of the accused at about 10.30 AM. The factum of existence of injuries on the body of the accused is corroborated by the evidence of PW-8, the doctor who examined the accused on 24-1-2000. The doctor in his report (Ext-15) noted as many as thirteen injuries on the body of the accused, which are mostly teeth bite marks, which according to the doctor were caused 2/3 days prior to the date of the examination. It is worthwhile mentioning that according to PW-8's evidence the accused was examined at 2.00 PM on 24-1-2000 i.e. approximately after 54 hours from the time the deceased was last seen proceeding towards the accused's room.

42. The fact that a search of the room of the accused at about 5.30 PM on 22-1-2000 is spoken to by PWs-1, 3, 6, 10, 11, 12, 13 and 19. All these witnesses also categorically deposed that during the course of the said search the dead body of deceased without head was recovered by police from the room of the accused wrapped in a polythene cover and kept concealed under the bed of the accused. All the witnesses consistently stated that when the police came to search the room of the accused along with the accused, the room was locked and the key was with the accused who opened the lock to enable the search.

43. The other circumstance relied upon by the prosecution is that the accused made a statement (Ext-17) before PW-12 informing that the severed head of deceased Barun, the weapon of offence and some blood stained cloths were in the same room, where he lived and consequent upon such statement, the police did in fact recover the abovementioned items from the room of the accused. Therefore, the fact that the accused had the knowledge of the place, where the abovementioned items were hidden is also established by cogent evidence.

44. We have already discussed the various circumstances relied upon by the prosecution and the evidences produced by the prosecution to establish those circumstances. The only circumstance which requires a further examination is that the recovery of the separated head of the deceased and the weapon of offence along with blood stained clothes of the accused from the room of the accused is made pursuant to a statement of the accused under Ext-17. Though we have held that part of Ext-17, insofar as it pertains to the confession of the accused, is inadmissible in evidence the remaining part of Ext-17, which contains the statement of the accused regarding the concealment of the weapon of offence, head etc is admissible u/s 27 of the Evidence Act as evidence against the accused. That statement establishes the fact that the accused had the knowledge as to the place where the separated head of the deceased, weapon etc were hidden, as pursuant to such statement those items were in fact recovered by the police from the room of the accused. The relevant portion of Ext-17 is quoted below:

?put his head in a plastic bag?and kept?concealed separately in a box of mine, under the bed. The dao?was kept concealed atop the ceiling. As there was

profuse bleeding on the floor.... I put the wearing too in yet another plastic bag and kept it concealed under bed in the room.

?there was a tussle between both of us in the room as a result of which I sustained injuries in both the hands and legs too. I can show the places where I have kept the body, the head and the wearing clad of Barun Shandilya concealed.

As indicated in the above extracted portion of the statement of the accused under Ext-17, the police had recovered the various items mentioned by the accused from the room of the accused.

45. In AIR 1947 PC 67 : Pulakuri Kottaya and Ors. v. Emperor, the Privy Council very lucidly explained the purport of Section 27 of the Evidence Act. At paragraph 10 of the judgment the Privy Council held as follows:

It is fallacious to treat the "fact discovered" within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that the knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

(emphasis supplied).

In the light of the above judgment the statement of the accused under Ext-17 which led to the discovery of the fact that the various items referred to therein were hidden in the room of the accused is admissible.

The fact that the accused had knowledge of such hiding becomes a relevant fact in deciding the guilt of the accused.

46. The very fact that the dead body of Barun, cut into two pieces, was recovered from the room of the accused which was kept locked by the accused, coupled with the fact that the deceased was last seen going towards the room of the accused, would point to the guilt of the accused. The accused never offered any explanation either by way of adducing any evidence in his defence or in his statement recorded u/s 313 CrPC, as to how the dead body of Barun could be found in his room, which was locked by him.

The teeth bite marks on the body of the accused corroborate the statement of the accused contained in the admissible portion of Ext-17 which is already extracted earlier that the deceased did go to the room of the accused as alleged

by the prosecution and there was tussle between them. ?There was a tussle between both of us in the room as a result of which I sustained injuries in both the hands and legs too" can be proved against the accused as an admission u/s 21 of the Evidence Act.

The Supreme Court in Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu, held at para 11 as follows:

As held by the Privy Council, a confession has to be a direct acknowledgement of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgement of guilt it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove his guilt. Such a statement is admission but not confession. Such a definition was brought out by Chandawarkar, J., in R. v. Santya Bandhu 1909 11 Bom LR 633 by distinguishing a statement giving rise to an inference of guilt and a statement directly admitting the crime in question.

and on the facts of that case the Supreme Court held at para 14 as follows:

It is clear that the statement in question did not amount to a confession. It was an admission of a fact, no doubt of an incriminating fact, and which established the presence of the appellant in the deceased's room but which clearly was not barred u/s 26.

In the light of our foregoing discussion, we are of the opinion that the guilt of the accused is established by circumstantial evidence beyond all reasonable doubt. Apart from that the confession of the accused under Ext. P27 is amply corroborated by various circumstances discussed above leading to an irresistible conclusion that the accused is guilty of the offence of murder of Barun. The statements of the accused under P 17 & P27 establish the missing link in the chains of the circumstantial evidence that the deceased was not only last seen proceeding towards the room of the accused, but also went to the room of the accused from which place the dead body was ultimately recovered.

We, therefore, are of the opinion that there is no reason for interfering with the conclusion of the trial court that the accused is guilty of the offences u/s 302 and 201 of the IPC.

47. We next proceed to examine the question whether the award of extreme penalty of death is warranted in the present case.

It is well settled that the penalty of death is an exception and the rule is imprisonment for life, in the case of a person found guilty of an offence u/s 302 IPC. The Supreme Court time and again cautioned that only in the rarest of rare cases the penalty of death could be awarded. The Supreme Court also indicated various aggravating factors which justify imposition of death penalty and also indicated various mitigating factors which demand imposition of only life imprisonment even in a case where the penalty of death is otherwise justified.

48. At the outset we must examine the judgment of the Supreme Court reported in Bishnu Prasad Sinha and Another Vs. State of Assam, which was relied upon by the learned Counsel for the accused in support of his submission, that in a case which rest purely on circumstantial evidence for convicting an accused u/s 302 IPC death penalty should not be awarded. In the said judgment at paragraph 57 the Supreme Court held as follows:

57. but it must be born in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded.

We do not find any absolute rule laid down by the Supreme Court in the said judgment that under no circumstance death penalty would be awarded in a case where the guilt is established on circumstantial evidence. The Supreme Court said "ordinarily death penalty would not be awarded". Therefore, we have still to examine whether this is an extraordinary case warranting the imposition of death penalty.

49. The Supreme Court in Bachan Singh Vs. State of Punjab, at paragraphs 202 and 203 indicated the various circumstances which are aggravating and calls for imposition of death penalty. Paragraphs 202 and 203 of the said judgment reads as follows:

202. Drawing upon the penal statutes of the State in U.S. A. framed after Furman v. Georgia, in general, and Clauses 2(a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr Chitale has suggested these "aggravating circumstances":

Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if a murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty u/s 434 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his

assistance u/s 37 and Section 129 of the said Code.

203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

It may be noted that the Supreme Court did not state that the circumstances indicated there are exhaustive but are only indicative.

50. The very fact that the victim was a helpless child of 10 years, in our view, is an aggravating factor. However, the Supreme Court also indicated at paragraphs 206 and 207 of the above judgment as follows:

206. Dr. Chitle has suggested these mitigating factors:

Mitigating circumstances: In the exercise of its discretion in the above case, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

51. The relevant for the purpose of the present case is the 3rd circumstance mentioned above, i.e. the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. Admittedly the offence took place seven years back. The accused escaped from the judicial custody during the course of investigation and it is after long lapse of about four years he was brought to trial again. The very fact that during the said period the accused is not established to have resorted to any further crime, in our view, is a mitigating circumstance. The accused, on the date of offence, was a young man of 27 years and on overall assessment of various factors we are of the view that it is not a rarest of the rare case, which warrants imposition of capital punishment. In the circumstances, we modify the punishment awarded to the accused to imprisonment for life.

The reference is ordered accordingly and the appeal of the accused is dismissed.