Dipakbhai Jagdishchndra Patel vs The State Of Gujarat on 24 April, 2019

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Bench: K.M. Joseph, Ashok Bhushan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.714 OF 2019

(@ SLP(Criminal) No.5415 of 2017)

DIPAKBHAI JAGDISHCHANDRA PATEL ... APPELLANT(S)

VERSUS

STATE OF GUJARAT AND ANOTHER ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. This appeal by special leave granted by this Court is directed against the judgment of the High Court of Gujarat at Ahmedabad dismissing the Special Criminal Application No.1230 of 2009 filed by the appellant under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.PC' for short).

2. The petition under Section 482 Cr.PC. was filed challenging the complaint and the Order passed by the Sessions Court rejecting the request of the appellant to discharge him of the offences under Sections 489B and 489C of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC' for short).

3. The contents of the FIR dated 10.04.1996 are as follows:

> "The facts of my complaint are that today ie., on 10.04.1996 at about 13.00, we got information from the superior officer of the ATS that Mahamad Rafik Abdul Hamid Kadge of Mumbai and Salim Mahebub Shaikh of Ahmedabad Sahalam, both are selling fake currency note of Arabian country as original on the road going towards noble building located at the edge of Nehrubridge, Ashram Road, Ahmedabad on fair rate and therefore, while receiving such legal instruction, two panch persons had been called at the office of ATS and after informing them about such information and they expressed their consent to remain as panchas therefore, after completing the first part panchnama at about 14.00 to 14.15 therein, I myself, panchas and PSI Shri NB Jadeja, Shri BR Karavadra, Shri PV Rathod, Shri NV Kapiriya, Shri KK Desai and Police constable Shri Rameshkumar Sevadas Lashkari, Bhagwatsingh Madarsinh and police Constable Amirkhan Rasulkhan and Dashrathsinh Bhagubha etc reached in government and private vehicles opposite the Natraj cinema at Ashram Road, Stopping their vehicles there and taking walk reached near Noble Building as well as on the road nearby the Petrol pump and found that three persons were standing nearby the road and doing some transaction and while making talk with them, we stopped them at that place wherein we introduced ourselves as Police and panchas and informed them about personal search and I caught accused no.1 and while asking his name and address, he stated his name as Mahamad Rafik Abdul Hamid Kadge residing at Sachhvari Dagadichawl Golanji Rahil Road, Mumbai-15 and during the search, 43 notes of Saudi Arabian Riyal currency of Rs.500/-

denomination were found and PSI Shri NB Jadeja caught the accused no.2 and while asking his name before the panchas, he stated his name as Salimbhai Mahemudbhai Shaikh, residing at inside Shahalam Darwaja, Rasulibad society, Ahmedabad and during the search 43 notes of Saudi Arabian riyal currency of Rs.500/- denomination were found and police constable Shri Bhagwatsinh Madarsinh buckle No. 8927 caught the accused no.3 and while asking his name and address, he stated his name is Usmangani Mahamadbhai Malek residing at Musamiyani Chali, Rasulabad Shahalam, Ahmedabad and from his hand, 2 nos. Saudi Arabian Riyal currency notes of Rs.500/-

denomination were found and in all total 88 notes were found. While asking them one by one before the panchas regarding such notes, it was found that no.1 had taken such notes from Mumbai prior to 15 days and had stated that he talked with his friend Jagdishchandra Patel residing at D-2 Aasiyana Flat, Nawa Vadaj, Ahmedabad to sale him these fake Riyal currency to as original with fair price and today, after taking such note from the house of Dipak by the accused no.1; handed over it to the accused no.2 and 3 and after preparing the panchnama of such notes, seized it by packing it in separate packets and applying seals. Indian currency notes found from one or two out of them had been returned by way of panchnama and that panchnama was completed at about (Illegible).

Thus, the aforesaid accused no.1 Mahamad Rafik Abdul Hamid Kagde, residing at Savri Hagadi Chawl, Golanji Road, Mumbai-15, accused no.2 Salimbhai Mahemudbhai Shaikha, residing at inside Shahalam Darwaja, Rasulabad Society, Ahmedabad, accused no.3 Usmangani Mahamadbhai Malek

residing at Shahalam, Ahmedabad and accused no.4 Dipak Jagdish Patel, residing at B-2 Aashiyana Flat, Nava Wadaj, Ahmedabad in collusion with each other, showing the fake Saudi Arebiya currency Riyal of Rs.500/- denomination as original and keeping such notes in their possession to sale such fake currency notes as original with fair price, the accused have committed the offence punishable under Section 489B, C of the Indian Penal Code and this is my legal complaint against these accused persons. The panchas, police persons and whatever will be come out in the investigation are my witnesses and the accused no.1,2,3 are arrested today ie, on 10.04.1996 at 17.00 o'clock."

4. Following investigation, the chargesheet came to be filed against the appellant inter alia:

> PROCEEDINGS BEFORE THE SESSIONS JUDGE Though the appellant contended before the Sessions Judge that apart from the statement of the co-accused, there was no material to proceed against the accused/appellant and that only on the basis of the statement by co-accused, no case could be made out against the appellant, and still further, it was contended that the statement made by the co-accused was barred by Section 25 of the Indian Evidence Act, 1872, however, it was found by the Sessions Judge that the whole recovery procedure was made in the presence of panchas and, accordingly, the plea for discharge of the appellant was rejected as there was some evidence against him, and without recording evidence, it was not possible to come to the conclusion that there is no evidence against the appellant.
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> PROCEEDINGS BEFORE THE HIGH COURT In the High Court, the learned Single Judge, after referring to the allegations made against the accused/appellant, rejected the plea that the case against the appellant be not continued as it seemed that from the averments and arguments of the learned APP, statements of the co-accused were recorded by the police wherein involvement of the appellant was found particularly of fake currency notes having been found at the residence of the appellant. The Court made reference to the seizure of counterfeit currency notes from the place of offence, i.e., residence of the appellant. It is further found that it is premature to say anything at this stage in respect of the credibility of the statement made by the Officer in the complaint. It can be considered only at the trial. Currency notes were seized by the Investigating Officer in the presence of the witnesses, and therefore, their statements would also be considered by the trial court, while they would be examined by the court concerned.
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> Statements of the co-accused recorded by the Investigating Officer show prima facie involvement of the appellant in the offence. It is not only the evidence available with the prosecution to involve the appellant to the alleged offences, other evidences too prima facie point to the appellant. It was found that no case was made out to interfere under Section 482 of the Cr.PC.

5. We have heard Mr. Nakul Dewan, learned Senior Counsel appearing for the appellant and Ms. Hemantika Wahi, learned Counsel appearing for the respondents.

6. The learned Senior Counsel for the appellant emphasized that the High Court has fallen into error in holding that recovery of counterfeit currency was effected from the residence of the appellant. It was pointed out that counterfeit currency was recovered not from the residence of the appellant but from near a public road.

Therefore, the basis for continuing the case for proceeding against the appellant does not exist.

Secondly, it was contended that a person cannot be proceeded against on the basis of the statement made by the co-accused, when there is no material other than statement of the co-

accused. The High Court ought to have exercised the jurisdiction available under Section 482 of the Cr.PC and allowed the plea for discharge.

Learned Senior Counsel for the appellant would contend that the co-accused were absconding. He sought support from the judgment of this Court in Suresh Budharmal Kalani Alias Pappu Kalani v.

State of Maharashtra1. He has drawn our attention to paragraphs 6 and 7, which read as follows:

> "6. Thus said, we may turn our attention to the confession made by 1 (1998) 7 SCC 337 Dr Bansal and Jayawant Suryarao.

Under Section 30 of the Evidence Act, 1872, a confession of an accused is relevant and admissible against a co- accused if both are jointly facing trial for the same offence. Since, admittedly, Dr Bansal has been discharged from the case and would not be facing trial with Kalani, his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage, the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr Bansal for framing charges against Kalani.

7. So far as the confession of Jayawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then the question is: what would be its evidentiary value against the latter? The question was succinctly answered by this Court in Kashmira Singh v. State of M.P. [AIR 1952 SC 159 : 1952 SCR 526] with the following words:

> "The proper way to approach a case of this kind 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.
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> The view so expressed has been consistently followed by this Court. Judged in the light of the above principle, the confession of Suryarao cannot be called in aid to frame charges against Kalani in the absence of any other evidence to do so."
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> 7. It is the further case of the appellant that the ingredients of Section 489B and 489C of the IPC have not been established. In regard to Section 489C, he sought support from judgment of the Lahore High Court in Bur Singh v. The Crown2.

Still further, he sought some support from the judgment of the learned Single Judge of the Punjab and Haryana High Court, viz., Justice 2(1930) ILR 11 Lah 555 [Criminal Revision No. 1527 of 1929] M.M. Punchhi (as His Lordship then was), in Bachan Singh v. State of Punjab3. The Court held as follows:

> "10. In order to sustain the convictions of Joginder Kaur appellant, the prosecution has not only to prove that she had the possession of counterfeit note, Exhibit P. 1, ensuring it or having reason to believe it as such, but further to prove circumstances which lead clearly, indubitably and irresistibly to her intention to use the notes on the public as has been held in Bur Singh v. The Crown, (1930) ILR 11 Lah 555 : (1931) 32 Cri LJ
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> 351). It has further been held that such intention could be proved by a collateral circumstance that she had palmed off such notes before, or that she was in possession of such notes in such large numbers, that her possession for any other purpose was inexplicable. The facts as found are that she had on her person only one made-up note, that she was an illiterate lady and that anybody as Sh.

3 1981 SCC Online P&H 47 Darshan Kumar Ahluwalia, P.W. 2, would have us believe could be misled to treat it as a genuine note. She gave the note to Kundan Lal, P.W. 2 and he told her that it was not a genuine note and his belief was confirmed when he showed it to others as well. It has nowhere been asserted that the note was ever returned to her and having known fully well or having reason to believe the same to be forged for counterfeit she yet made another attempt to palm it off. Thus tendering alone such note to Kundan Lal, P.W., unless the prosecution could prove that it was with dishonest intention so as to cause wrongful loss to him and wrongful gain to herself would not make her act to fall squarely within Section 420/511, Indian Panal Code, or to have come within the mischief of Section 489-B or 489-C, Indian Penal Code. The inference sought to be drawn that she must have known or reason to believe the note, Exhibit PI, to be counterfeit because her husband

accompanying her was found to be in possession of similar notes is entirely misplaced for no common intention has been attributed to them and they have not been charged with the aid of Section 34, Indian Penal Code. For the individual act of Joginder Kaur she cannot be convicted for the above named offences and must be extended the benefit of doubt.

11. With regard to the case of Bachan Singh it is to be noted that he was found in possession of 13 counterfeit ten rupee notes. He is an iron-smith by profession and barely literate. How could he have the knowledge or reason to believe the same to be counterfeit is one part but the other important part is whether he intended to use the same as genuine or that they may be used as genuine has further to be proved by the prosecution. It was held in Bur Singh v. The Crown, ((1931) 32 Cri LJ 351) (Lah) (supra), that mere possession of a forged note is not an offence under the Indian Penal Code and in order to bring a case within the purview of Section 489-C, Indian Penal Code, it was not only necessary to prove that the accused was in possession of forged notes but it should further be established that:

> (a) at the time of his possession he - knew the notes to be forged or had the reason to believe the same to be forged or counterfeit; and
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> b) he intended to use the same as; genuine. No further collateral circumstances in the case have been brought forth such as the accused had palmed off such notes before, or that he was in possession of such and similar notes in such large numbers, that his possession for any other purpose was inexplicable."
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> 8. Finally, he also drew out attention to the judgment of this Court in Umashanker v. State of Chhatisgarh4 wherein he emphasised on paragraphs 7 and 8, which read as follows:
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> "7. Sections 489-A to 489-E deal with various economic offences in respect of forged or 4 (2001) 9 SCC 642 counterfeit currency notes or banknotes. The object of the legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency notes and banknotes. The currency notes are, in spite of growing accustomedness to the credit card system, still the backbone of the commercial transactions by the multitudes in our country. But these provisions are not meant to punish unwary possessors or users.
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> 8. A perusal of the provisions, extracted above, shows that mens rea of offences under Sections 489-B and 489-C is "knowing or having reason to believe the currency notes or banknotes are forged or counterfeit". Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or banknotes, is not enough to constitute offence under Section 489-B IPC. So also possessing or even intending to use any forged or counterfeit currency notes or banknotes is not sufficient to make out a case under Section 489-C in the absence of the mens rea, noted above. No material is brought on record by the prosecution to show that the appellant had the

> requisite mens rea. The High Court, however, completely missed this aspect. The learned trial Judge on the basis of the evidence of PW 2, PW 4 and PW 7 that they were able to make out that the currency note alleged to have been given to PW 4 was fake, "presumed" such a mens rea. On the date of the incident the appellant was said to be an eighteen-year-old student. On the facts of this case the presumption drawn by the trial court is not warranted under Section 4 of the Evidence Act.

Further it is also not shown that any specific question with regard to the currency notes being fake or counterfeit was put to the appellant in his examination under Section 313 of the Criminal Procedure Code. On these facts, we have no option but to hold that the charges framed under Sections 489-B and 489-C are not proved. We, therefore, set aside the conviction and sentence passed on the appellant under Sections 489-B and 489-C IPC and acquit him of the said charges (see: M. Mammutti v. State of Karnataka [(1979) 4 SCC 723 :

> 1980 SCC (Cri) 170 : AIR 1979 SC 1705])."

> 9. Learned Counsel for the State drew our attention to the statement made by the appellant himself wherein the appellant has stated inter alia that he was told by the co-accused that he left a bag containing the counterfeit notes at his residence.

> 10. Learned Counsel for the State submits that the Court may also bear in mind that the case is only at the stage of framing of the charge. A case has not been made out for interference under Section 482 of the Cr.PC, and hence, she supported the Order of the High Court.

> 11. Appellant would submit that as regards the extra judicial confessional statement relied upon by the State dated 11.04.1996 made by the appellant that it was not the basis on which the chargesheet had been framed. It is secondly the case of the appellant that the statement has been subsequently retracted.

> 12. Sections 489B and 489C of the IPC read as follows:

> "489B. Using as genuine, forged or counterfeit currency-notes or bank-notes.—Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

> 489C. Possession of forged or counterfeit currency-notes or bank-notes.—Whoever has in his possession any forged or counter- feit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or

> with fine, or with both." LAW RELATING TO FRAMING OF CHARGE AND DISCHARGE
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> 13. We may profitably, in this regard, refer to the judgment of this Court in State of Bihar v.

Ramesh Singh5 wherein this Court has laid down the principles relating to framing of charge and discharge as follows:

> "Reading SS. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that 5 AIR 1977 SC 2018 at the beginning and initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused.

It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under S.227 or S.228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not.

If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-

examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under S.227 or S.228, then in such a situation ordinarily and generally the order which will have to be made will be one under S.228 and not under S.227."

14. In Union of India v. Prafulla Kumar Samal and another6, after survey of case law, this is what the Court has laid down:

> "10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:
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> (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted 6 AIR 1979 SC 366 power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

15. It is the case of the State that the appellant had knowledge that the notes were counterfeit and fake notes and was in conscious possession of the fake notes for 15 days. For framing charges, what is required is prima facie satisfaction. Offence relating to counterfeit notes is a grave offence and not to be viewed lightly.

16. In the statement by the first accused, he has stated that he had come to Ahmedabad 15 days earlier. At that time, he had told the appellant that the fake notes are to be sold at cheap price and at present he may keep those notes with him. He further states that he had brought these notes from the residence of the appellant and that he had been caught while he was selling the notes at cheap price.

17. In the first statement given by the appellant dated 11.04.1996 relied upon by the State, the appellant is credited with knowledge of the fact that the bag contained counterfeit notes was left by the first accused at appellant's residence and they were to be sold at cheap price and it was kept at his residence for some days.

18. Subsequently, his statement was again recorded on 10.07.1996. Therein, he inter alia states that the first accused told him that the bag contains files relating to land deals and it contained valuables.

19. In further questioning on 30.08.1996, he inter alia states that because of his acquaintance with Ravi, he became acquainted with the first accused and that he had left the bag at his residence saying that the bag contained important documents.

20. These are the materials in short which were relied on by the State to sustain the Order framing the charge against the appellant. That is to say, the statements given by the appellant under Section 161 and the statement also given by the co-accused.

21. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused.

All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial.

A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.

22. Undoubtedly, this Court has in Suresh Budharmal Kalani Alias Pappu Kalani (supra), taken the view that confession by a co-accused containing incriminating matter against a person would not by itself suffice to frame charge against it. We may incidentally note that the Court has relied upon the judgment of this Court in Kashmira Singh v. State of Madhya Pradesh7. We notice the observations, which have been relied upon, were made in the context of an appeal which arose from the conviction of the appellant therein after a trial. The same view has been followed undoubtedly in other cases where the question arose in the context of a conviction and an appeal therefrom. However, in Suresh Budharmal Kalani Alias Pappu Kalani (supra), the Court has proceeded to take the view that only on the basis of statement of the co-accused, no case is made out, even for framing a charge.

23. The first and the foremost aspect is whether the appellant is justified in contending that the High Court fell into error in holding that the recovery was effected of the counterfeit currency from the residence of the appellant. 7 AIR 1952 SC 159 This constituted an important consideration in the court rejecting the petition filed by the appellant.

24. The learned Counsel for the State, in fact, did not seriously dispute the fact that there was no recovery of counterfeit currency effected from the residence of the appellant.

25. Section 25 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Evidence Act' for short) renders inadmissible a confession made to a Police Officer. It declares in fact that no confession made to a Police Officer shall be proved as against a person accused of any offence. Section 26 of the Evidence Act on the other hand 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. "
>
> 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 (10 of 1882)."

26. Section 27 of the Evidence Act carves out an exception.

27. In Law of Evidence by M. Monir, 17 th Edition, page 555, we notice the following discussion regarding the distinction between Section 25 on the one hand and Section 26 other hand:

> "... The section deals with confessions which are made not to Police Officers but to persons other than Police Officers, e.g., to a fellow prisoner, a doctor or a visitor, and makes such confessions inadmissible if they were made whilst the accused was in the custody of a Police Officer. In section 25 the criterion for excluding a confession is the answer to the question. "To whom was the confession made?" If the answer is that it was made to a Police Officer, the confession is absolutely excluded from evidence. On the other hand, the criterion adopted in section 26 for excluding a confession is the answer to the question. "Under what circumstances was the confession made?" if the answer is that it was made whilst the accused was in the custody of a Police Officer, the law lays down that such confession shall be excluded from evidence, unless it was made in the immediate presence of a Magistrate."

28. Section 30 of the Evidence Act read as follows:

> "30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.— When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. Explanation.—"Offence", as used in this section, includes the abetment of, or attempt to commit the offence."

29. While on confession, it is important to understand as to what will amount to a confession. The Privy Council in Pakala Narayana Swami v. Emperor8:

> "... Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which 8(1939) PC 47 (20.01.1939) constitute the 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 a 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 a admission made iafc (sic) any time by a person charged with a 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. This view of the Privy Council has gained acceptance of this Court in many decisions. They include Palvinder Kaur v. State of Punjab9 and Veera Ibrahim v. State of Maharashtra10.

31. A Full Court of this Court, in the decision in M.P. Sharma and 4 others v. Satish Chandra, Distt. Magistrate, Delhi and 4 others11, considered the scope of the expression contained in Article 20(3) of the Constitution of India which mandates that no person accused of any 9 AIR 1952 SC 354 10 AIR 1976 SC 1167 11 AIR 1954 SC 300 offence shall be compelled to be a witness against himself:

> "Broadly stated the guarantee in Art.20(3) is against "testimonial compulsion". But there is no reason to confine it to the oral evidence of a person standing his trial for an offence when called to the witness-stand. The protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled which is the normal course may result in prosecution.
>
> Considered in this light, the guarantee under Article 20(3) would be available to person against whom A First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which ae reasonable likely to support a prosecution against them." (Emphasis supplied)

> 32. In State of Bombay v. Kathi Kalu Oghad12, a Bench of 11 learned Judges of this Court had an occasion to consider the true width of the expression "person accused of an offence".

Speaking on behalf of the majority, Sinha, C.J., held as follows:

> "14. In this connection the question was raised before us that in order to bring the case within the prohibition of clause (3) of Article 20, it is not necessary that the statement should have been made by the accused person at a time when he fulfilled that character; it is enough that he should have been an accused person at the time when the statement was sought to be proved in court, even though he may not have been an accused person at the time he had made that statement. The correctness

12 AIR 1961 SC 1808 of the decision of the Constitution Bench of this Court in the case of Mohamed Dastagirv. State of Madras [(1960) 3 SCR 116] was questioned because it was said that it ran counter to the observations of the Full Court in Sharma case [(1954) SCR 1077]. In the Full Court decision of this Court this question did not directly arise; nor was it decided. On the other hand, this Court, in Sharma case [(1954) SCR 1077] held that the protection under Article 20(3) of the Constitution is available to a person against whom a formal accusation had been levelled, inasmuch as a First Information Report had been lodged against him. Sharma case [(1954) SCR 1077] therefore, did not decide anything to the contrary of what this Court said in Mohamed Dastagir v. State of Madras [(1960) 3 SCR 116]. The latter decision in our opinion lays down the law correctly.

15. In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement. ..." (Emphasis supplied)

33. The Court also laid down its conclusions in paragraph-16:

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

> (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement. (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".
>
> (3) "To be a witness" is not

equivalent to "furnishing evidence" in its widest

> significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
>
> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".
>
> (5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
>
> (6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court.

Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing. (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made." (Emphasis supplied)

34. Section 161 of the Cr.PC has the following marginal note:

> "Examination of witnesses by police"

35. Can a person, who is accused of an offence, be examined under Section 161 of the Cr.PC? As we have seen, when a person is named as an accused in First Information Report, he would stand in the shoes of an accused person. Does not the marginal note of Section 161 of the Cr.PC confine the power to the Police Officer to examine the witnesses and will it be denied to him qua a person who is already named as an accused? These questions are no longer res integra. In Nandini Satpathy v. P.L. Dani and another13, a Bench of three learned Judges was dealing with a case which arose from proceedings initiated against the appellant therein under Section 179 of the IPC. In the course of the judgment, speaking on behalf of the Bench, this is what Justice V.R. Krishna Iyer had to say:

> 13 AIR 1978 SC 1025 "32. We will now answer the questions suggested at the beginning and advert to the decisions of our Court which set the tone and temper of the "silence" clause and bind us willy-nilly. We have earlier explained why we regard Section 161(2) as a sort of parliamentary commentary on Article 20(3). So, the first point to decide is whether the police have power under Sections 160 and 161 of the CrPC to question a person who, then was or, in the future may incarnate as, an accused person.

The Privy Council and this Court have held that the scope of Section 161 does include actual accused and suspects and we deferentially agree without repeating the detailed reasons urged before us by counsel." (Emphasis supplied)

36. Thereafter, after referring to Pakala Narayana Swami (supra), regarding the scope of the word 'confession' the Court held inter alia as follows:

> "33. ... We hold that "any person supposed to be acquainted with the facts and circumstances of the case" includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. Nor does the marginal note "examination of witnesses by police" clinch the matter. A marginal note clears ambiguity but does not control meaning. Moreover, the suppositions accused figures functionally as a witness. "To be a witness", from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161 CrPC. ..."

37. Thus, quite clearly, a person who stands in the shoes of the accused being named in the First Information Report, can be examined by the Police Officer under Section 161 of the Cr.PC.

The next question however is, as to whether the statement given by a person who stands in the shoes of an accused and who gives a statement, whether the statement is admissible in law? It is here that Section 162 of the Code comes into play:

> "162. Statements to police not to be signed: Use of statements in evidence.
>
> (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872);
>
> and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872),

or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

38. A Bench of three learned Judges of this Court in Mahabir Mandal and others v. State of Bihar14, had this to say:

"39. Coming to the case of Kasim, we find that there is no reliable evidence as may show that Kasim was present at the house of Mahabir on the night of occurrence and took part in the disposal of the dead body of Indira. Reliance was placed by the prosecution upon the statement alleged to have been made by Kasim and Mahadeo accused at the police station in the presence of Baijnath PW after Baijnath had lodged report at the police station. Such statements are legally not admissible in evidence and cannot be used as substantive 14 AIR 1972 1331 evidence. According to Section 162 of the Code of Criminal Procedure, no statement made by any person to a police officer in the course of an investigation shall be signed by the person making it or used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when such statement was made. The only exception to the above rule is mentioned in the proviso to that section. According to the proviso, when any witness is called for the prosecution in the enquiry or trial, any part of his statement, if duly proved, may be used by the accused and with the permission of the court by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness for the purpose only of explaining any matter referred to in his cross-examination. The above rule is, however, not applicable to statements falling within the provisions of Clause 1 of Section 32 of the Indian Evidence Act or to affect the provisions of Section 27 of that Act. It is also well established that the bar of inadmissibility operates not only on statements of witnesses but also on those of the accused (see Narayan Swami v. Emperor [AIR 1939 PC 47]). Lord Atkin, in that case, while dealing with Section 162 of the Code of Criminal Procedure observed:

"Then follows the section in question which is drawn in the same general way relating to 'any person.' That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number or persons none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused." Reference may also be made to Section 26 of the Indian Evidence Act, according to which 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 against such person. There is nothing in the present case to show that the statements which were made by Kasim and Mahadeo accused on September 18, 1963, at the police station in the presence of Baijnath resulted in the discovery of any incriminating material as may make them admissible under Section 27 of the Indian Evidence Act. As such, the aforesaid statements must be excluded from consideration." (Emphasis supplied)

39. Therefore, the combined effect of these provisions can be summarized as follows:

> Unless a person is accused of an offence, he cannot claim the protection of Article 20(3) of the Constitution of India.

40. Such a person, viz., person who is named in the FIR, and therefore, the accused in the eyes of law, can indeed be questioned and the statement is taken by the Police Officer. A confession, which is made to a Police Officer, would be inadmissible having regard to Section 25 of the Evidence Act. A confession, which is vitiated under Section 24 of the Evidence Act would also be inadmissible. A confession unless it fulfills the test laid down in Pakala Narayana Swami (supra) and as accepted by this Court, may still be used as an admission under Section 21 of the Evidence Act. This, however, is subject to the bar of admissibility of a statement under Section 161 of the Cr.PC.

Therefore, even if a statement contains admission, the statement being one under Section 161, it would immediately attract the bar under Section 162 of the Cr.PC.

41. Bar under Section 162 Cr.PC, no doubt, operates in regard to the statement made to a Police Officer in between two points of time, viz., from the beginning of the investigation till the termination of the same. In a case where statement containing not a confession but admission, which is otherwise relevant and which is made before the investigation commences, may be admissible. We need not, however, say anything more.

42. In Central Bureau of Investigation v. V.C. Shukla and others15, a Bench of three learned Judges, after approving Pakala Narayana Swami (supra), had occasion to consider the distinction between confession and admission.

This Court went on to hold as follows:

> "45. It is thus seen that only voluntary and direct acknowledgement of guilt is a confession but when a confession falls short of actual admission of 15 AIR 1998 SC 1406 guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an "admission" under Section 21.

The law in this regard has been clearly — and in our considered view correctly — explained in Monir's Law of Evidence(New Edn. at pp. 205 and 206), on which Mr Jethmalani relied to bring home his contention that even if the entries are treated as "admission" of the Jains still they cannot be used against Shri Advani. The relevant passage reads as under:

"The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to a Police Officer, or was made at a time when the accused was in custody of a Police Officer. If a statement was made by the accused in the circumstances just mentioned its admissibility will depend upon the determination of the question whether it does not amount to a confession. If it amounts to a confession, it will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him.

Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance."" (Emphasis supplied)

43. Section 21 of the Evidence Act provides as follows:

> "21. Proof of admissions against persons making them, and by or on their behalf.—Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:— (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.
>
> (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.
>
> (3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."

44. Thus, what amounts to an admission can be used against the maker of the admission or his representative in interest. As to what constitutes an admission is to be found in Section 17 of the Evidence Act, which defines admission as follows:

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

45. In Bharat Singh and others v. Mst.

Bhagirathi16, the true nature of the evidentiary value of admission, and whether without confronting the maker of the admission, it could be used, has been referred to and this is what this Court had to say:

> "19. Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17, and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under Section 145 of the Evidence Act 16 AIR 1966 SC 405 is very much different from the purpose of proving the admission.

Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence." (Emphasis supplied)

46. From the statement of the law contained in V.C. Shukla and others (supra), it becomes clear as to what constitutes confession and how if it does not constitute confession, it may still be an admission. Being an admission, it may be admissible under the Evidence Act provided that it meets the requirements of admission as defined in Section 17 of the Evidence Act.

However, even if it is an admission, if it is made in the course of investigation under the Cr.PC to a Police Officer, then, it will not be admissible under Section 162 of the Cr.PC as it clearly prohibits the use of statement made to a Police Officer under Section 161 of the Cr.PC except for the purpose which is mentioned therein. Statement given under Section 161, even if relevant, as it contains an admission, would not be admissible, though an admission falling short of a confession which may be made otherwise, may become substantive evidence.

47. A confession made to a Police Officer is clearly inadmissible. The statement relied on by respondent is dated 11.04.1996 and the appellant was arrested on 11.04.1996. This is pursuant to the FIR registered on 10.04.1996. The statement dated 11.04.1996 is made to a Police Officer.

This is clear from the statement as also letter dated 10.08.1996 (Annexure R/6) produced by the respondent. It is clearly during the course of the investigation. Even if it does contain admissions by virtue of Section 162 and as interpreted by this Court in V.C. Shukla and others (supra), such admissions are clearly inadmissible.

48. If the statement made by the appellant on 11.04.1996 is inadmissible, then, there will only be the statement of the co-accused available to be considered in deciding whether the charge has to be

framed against the appellant or not. It is here that the law laid down by this Court in Suresh Budharmal Kalani Alias Pappu Kalani (supra)becomes applicable.

49. We also notice the following statement in judgment rendered by Bench of seven learned Judges in Haricharan Kurmi v. Sate of Bihar17:

> "As a result of the provisions contained in S.30, Evidence Act, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence;
>
> circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of S.30, the fact remains that it is not evidence as defined by S.3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is 17 AIR 1964 SC 1184 (quoted portion at page 1184) permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

Thus, the confession of a co- accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusions deducible from the said evidence. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt."

50. Proceeding on the basis that it is a confession by a co-accused and still proceeding further that there is a joint trial of the accused and that they are accused of the same offences (ignoring the fact that other accused are absconding and appellant appears to be proceeded against on his own) and having found that there is no recovery from the residence of the appellant of the counterfeit notes and that there is no other material on the basis of which even a strong suspicion could be aroused, we would find that the mandate of the law requires us to free the appellant from being proceeded against. Accordingly, we allow the appeal and the petition filed under Section 482 of the Cr.PC. The Order impugned passed by the Sessions Judge framing the charge against the appellant will stand set aside and the appellant will stand discharged.

..... [ASHOK BHUSHAN, J.] ..... [K.M. JOSEPH, J.] NEW DELHI;

APRIL 24, 2019.