A ANIL @ RAJU NAMDEV PATIL

v.

ADMINISTRATION OF DAMAN & DIU, DAMAN AND ANR.

NOVEMBER 24, 2006

B

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Criminal Trial.

C *Code of Criminal Procedure, 1973—Sections 215, 221 and 364—Misjoinder of charges—Effect—Held, accused should not suffer any prejudice by reason of misjoinder of charges—Conviction for lesser offence is permissible—Minor child kidnapped for ransom and murdered—Charge framed under section 364—Conviction under section 364A—Held, prejudice caused to accused as ingredients of higher offence not put while framing charge—*
D *In the facts, sentence modified from death sentence to rigorous imprisonment for life—Indian Penal Code, 1860—Sections 201,364 and 364A.*

Indian Evidence Act, 1872—Section 27—Statement of accused—Discovery of fact—Whether admissible in evidence—Held, information disclosed leading to discovery of fact based on mental state of affair of
E *accused is admissible in evidence.*

Indian Evidence Act, 1872—Section 32—Co-accused committing suicide leaving behind suicide note implicating other co-accused—Whether admissible in evidence—Held, suicide note implicating other co-accused is inadmissible
F *in evidence.*

Prosecution alleged that on 3.8.2000 at 6:15 P.M., a phone call was received by mother of 5 year old boy, P, informing that P was in their custody and a demand of Rs. 25 lakhs was made as ransom money for returning the child safely. A, father of P, thereafter went to the police station and lodged a
G **complaint. A was asked to come to a place near Ankleshwar with the amount of ransom. A trap was arranged at Ankleshwar but nobody turned up to claim the amount of ransom. The name of the appellant-accused was disclosed when a query was made to A as to whether he knew a person who was a resident of Ankleshwar. Appellant had worked as driver with family of A for 3 months.**

H

Appellant was arrested and on conducting search his personal diary was seized. Appellant made confession that the boy P had been murdered. Appellant made statement which led to recovery of a few bones on 7.08.2000 which along with blood samples of the parents of P were sent for DNA test to Hyderabad. Two other persons, S and C, who were also allegedly involved in commission of the crime committed suicide in a hotel. A purported suicide note written by S was found wherein they implicated not only themselves but also the appellant. Appellant was sent to judicial custody on 15.08.2000 and a request was made to the Chief Judicial Magistrate, Daman on 16.08.2000 for recording the confessional statement of appellant which was recorded on 17.08.2000 and 18.08.2000 wherein appellant admitted kidnapping P for ransom but stated that P was murdered by S and C. Trial Court *inter alia* relying upon circumstantial evidence viz discovery of remnants and articles at the instance of accused ; confession before the Magistrate ; extra judicial confession of co-accused ; motive to extort ransom, etc. convicted appellant for commission of offence under Section 364-A of the Indian Penal Code, 1860 and imposed sentence of death and also convicted him for commission of an offence punishable under Section 201 IPC. High Court affirmed the order of the Trial Court. Hence the present appeal by the accused.

Appellant *inter alia* contended that charges having only been framed under sections 364, 302 and 201 IPC, the appellant could not have been convicted under Sections 364-A and 201 thereof ; and that the purported confession made by the appellant being not voluntary could not have been relied upon.

Respondent *inter alia* contended that when the provisions of the Code of Criminal Procedure, 1973 viz., Sections 221, 251 and 364 have substantially been complied with, mere omission to frame proper charge may not be sufficient to absolve appellant therefrom only on mere technicality ; that the confession of the accused, disclosing information leading to discovery of bones proved the place where the dead body was disposed of and, thus, established his knowledge as to how P was murdered and how his dead body was disposed of and the same having been proved by two eye-witnesses, full reliance thereupon has rightly been placed by the trial Court ; that judicial confession made by the appellant having not been retracted, the same would form the best evidence to sustain the judgment of conviction ; and that suicide note written by co-accused, S, was admissible in evidence under Section 32 of the Indian Evidence Act, 1872.

A **Dismissing the appeal, the Court**

HELD: 1. The first part of the statement purported to have been made by the appellant-accused on 7.8.200 leading to recovery is not admissible in evidence. Both PW-2 and PW-3 as also PW-10 gave a vivid description as to the mode and manner in which the appellant pointed out the place whereat the B **dead body of P was burnt, the nalla wherefrom the bones were recovered and the spot where some burnt pieces of cardboard and ashes were seen. The grass area of the spot was also found to have been burnt. On the other side of the nalla, burnt Shoes and burnt trousers were found. The spot was at a distance of about 500 mtrs. form a factory known as Midley. It was an isolated place** C **and was a grassy area. The information disclosed by the evidences leading to the discovery of a fact which is based on mental state of affair of the accused is, thus, admissible in evidence. [475-H; 476-C, D, F]**

Jaipur Development Authority **v.** *Radhey Shyam,* **[1999] 4 SCC 370;** *State of Maharashtra* **v.** *Suresh,* **[2000] 1 SCC 471;** *State (NCT of Delhi)* **v.** D *Navjot Sandhu alias Afsan Guru,* **[2005] 11 SCC 600 and** *Pulukuri Kottaya and Ors.* **v.** *Emperoor,* **AIR (1947) PC 67, relied on.**

2.1. The appellant was not in police custody when a request was made to record his confessional statement. He was in judicial custody. He was produced before the Magistrate on 16.08.200. The Magistrate took the requisite E **precaution in not recording his statement on that day. The requirements of Section 164 of the Code of Criminal Procedure have, thus, fully been complied with. He was asked to come on the next day. A note of caution as envisaged in law was again administered. His statement was recorded on 17.082000. His statement was recorded after the court time was over. All persons had been** F **asked to go out of the court room except the court peon. The questions put to him on 17.08.2000 clearly go to show that the Magistrate took all the requisite precautions before recording the said statement. He was produced from the magisterial custody. He did not stop there. He gave him another opportunity to think over the matter and remanded him to the magisterial custody till the next day. On 18.08.200, the Magistrate again satisfied himself** G **about the requirements of law. He made an inquiry as to when police had arrested him. He asked other relevant questions including the question as to whether the police had led a trap to arrest in Ankleshwar to which he pleaded ignorance. It is however a case where the Magistrate did make preliminary inquiries, give warning to him, send him back to the judicial custody for a** H **few days or at least one day and then he was called back again. The magistrate**

examined himself as PW-33. The confession was not retracted during the course of the trial. It was purported to have been done only in his examination under Section 313 of the Criminal Procedure Code. A

[478-G, H; 479-A, B, C; 480-F, G; 483-A]

Hanumant v. *The State of Madhya Pradesh,* [1952] SCR 1091 *Palvinder Kaur* v. *The State of Punjab,* [1953] SCR 94; *Aher Raja Khima* v. *State of Saurashtra,* AIR (1956) SC 217, *Subramania Goundan* v. *The state of Madras,* [1958] SCR 428; *Bharat* v. *State of U.P.,* [1971] 3 SCC 950, *Bhagwan Singh Rana* v. *The State of Haryana,* AIR (1976) SC 1797 and *State (NCT of Delhi)* v. *Navjot Sandhu alias Afsan Guru,* [2005] 11 SCC 600, referred to. B

2.2. There is another reason which indicates that there is a ring of truth in the confession of the appellant. He was a driver appointed by the parents of the deceased. He worked with them for three months. He might have become greedy to earn some easy money. From the tenor of his confession, it appears that his job merely was to kidnap the boy and hand over to other co-accused. He never thought that the boy would be murdered. He did not have any animosity with the deceased. He might have developed a liking for the boy. The act of others is apparent from the statement before the Magistrate. C D

[484-D, E]

3. The other two co-accused had committed suicide. They left a suicide note which implicated the appellant also. The said suicide note is not admissible in evidence under Section 32(1) of the Indian Evidence Act. The statement of a deceased may be admissible in evidence in terms of Section 32(1) of the Indian Evidence Act, 1872 to prove the cause of the death or as to any of the circumstances of the transaction which resulted in his death. But, when a suicide is committed by a co-accused, the statements made in the suicide note implicating other co-accused, the statements made in the suicide not implicating other co-accused would not be admissible there under. E F

[484-F, H; 485-A]

Sharad Birdhi Chand Sarda v. *State of Maharashtra,* [1985] 1 SCR 88: [1984] 4 SCC 116, held inapplicable.

4. This Court has held that (i) the appellant should not suffer any prejudice by reason of misjoinder of charges ; (ii) a conviction for lesser offence is permissible ; (iii) it should not result in failure of justice ; (iv) if there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges. G

[488-F, H]

K. Prema S. Rao and Anr. v. *Yadla Srinivasa Rao and Ors.,* [2003] 1 H

A **SCC 217; *Kammari Brahmaiah and Ors.* v. *Public Prosecutor, High Court of A.P.*, [1999] 2 SCC 522; *Dalbir Singh* v. *State of U.P.*, [2004] 5 SCC 334, *Kamalanantha and Ors.* v. *State of T.N.*, [2005] 5 SCC 194 and *Harjit Singh* v. *State of Punjab*, [2006] 1 SCC 463, relied on.**

5. The ingredients for commission of offence under Sections 364 and
B **364-A of the Indian Penal Code, 1860 are different. Whereas the intention to kidnap in order thtat he may be murdered or may be so disposed of as to be put in danger as murder satisfies the requirements of Section 364 of the Indian Penal Code, for obtaining a conviction for commission of an office under Section 364-A thereof it is necessary to prove that not only such kidnapping**
C **or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt of causes hurt death to such person in order to compel the Government of any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom. It was, thus, obligatory on the**
D **part of the Sessions Judge, Daman to frame a charge which would answer the description of the offence envisaged under Section 364-A of the Indian Penal Code. It may be true that the kidnapping was done with a view to get ransom but the same should have been put to he appellant while framing a charge. The prejudice to the appellant is apparent as the ingredients of a**
E **higher offence had not been put to him while framing any charge.**

[489-A, B, C, D]

6. The appellant could not have been convicted under Section 364-A IPC. He, however, is found guilty of commission of an offence under Section 364 IPC. He deserves the highest punishment prescribed therein, i.e., the rigorous
F **imprisonment for life and it is directed accordingly. The appeal is dismissed with the modification of sentence as also quantum thereof. [489-F]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.449 of 2006.

G From the Judgment and Order dated 29-11-2005 of the High Court of Judicature at Bombay in confirmation Case No.2 of 2005 and Criminal Appeal No.182/2005.

Shivaji M. Jadhav and Himanshu Gupta for the Appellant.

H B.B. Singh, Kumar Rajesh Singh and Sunita Sharma (for D.S. Mahra), for

the Respondent No.1. A

Aniruddha P. Mayee for the Respondent No.2.

The Judgment of the Court was delivered by

S.B. SINHA, J. Appellant herein is before us having been convicted for alleged commission of an offence under Section 364-A of the Indian Penal B Code and imposed with sentence of death. He was also convicted for commission of an offence punishable under Section 201 of the Indian Penal Code and sentenced to suffer five years' rigorous imprisonment and to pay fine of Rs. 2000/- in default whereof to further suffer rigorous imprisonment for one year.

C

Paras, deceased herein was aged about 5 years. He was a student in Coast Guard School. He went to the school on 3.08.2000. His parents are owner of a factory situated in Daman. The appellant admittedly was appointed as a driver by them and worked for about three months.

At around 6.15 p.m. on the said date, a phone call was attended by D Alpa, mother of the deceased. When she heard the caller, she started weeping at which point their neighbour Khimjibhai picked up the phone and from other end he was informed that the boy was in their custody. A demand of Rs. 25 lakhs was made as ransom money for returning the child safely. Ashwin, father of Paras, thereafter went to the police station and lodged a complaint. A few calls demanding ransom were received in the next two days. Ashwin E was asked to come to a place near Ankleshwar with the amount of ransom in his Armada Car. Further instructions as to how money should be handed over were also furnished. A trap was arranged at Ankleshwar but nobody turned up to claim the amount of ransom. When a query was made as to whether he knew a person who was a resident of Ankleshwar, the name of F the appellant was disclosed. He was arrested and on conducting a search his personal diary was seized. He made a confession that the boy had been murdered. He made a statement which led to recovery of a few bones on 7.08.2000 at about 4.00 p.m. from a nalla. The bones recovered were examined by a Medical Officer who opined that they might be of a boy who would be of the same age as that of the deceased. Bones along with blood samples of G the parents were sent for DNA test to Hyderabad. The bones were found to be that of Paras. We would refer to the said statements a little later.

Two other persons Satish and Chhotu who were also allegedly involved in commission of the crime committed suicide in a hotel. A purported suicide note written by Satish was found wherein they implicated not only themselves H

A but also the appellant. On 15.08.2000, the appellant was sent to judicial custody. On 16.08.2000, a request was made to the Chief Judicial Magistrate, Daman for recording the purported confessional statement of the appellant. It was recorded on 17.08.2000 and 18.08.2000. He therein admitted to have kidnapped Paras for the purpose of demanding ransom but stated that he was murdered by Chhotu @ Dharamraj and Satish. Indisputably, the suicide note and other specimen B documents in the handwriting of Satish were sent to the government examiner for opinion.

The prosecution in support of its case examined a large number of witnesses and also proved a large number of documents.

C The learned Sessions Judge in recording the judgment of conviction and sentence opined that the prosecution case has been proved *inter alia* on the basis of :

'1. Discovery of remnants.

D 2. Inquest of bones.

3. Medical evidence.

4. DNA test report.

5. Articles and burnt clothes recovered from scene of offence.

E 6. Identification of clothes and articles by the relatives.

7. Sketches and photographs.

8. Child was missing from school.'

As regards the discovery of remnants, it was found to have been proved F by the evidences of Mr. Jallauddin Mohamed Dali (PW-2) a Block Development Officer, Mr. John Bosco Machado (PW-3) an Assistant Secretary (Personnel) in the Administration of Daman as also the evidence of one Clifford Coutinho (PW-10) a diver attached with the Coast Guard School and that of the Investigating Officer Mr. Rosario (PW-41).

G The following articles were recovered:

"1. Skull in part.

2. Lower jaw with nine teeth erupted and intact.

3. Two last teeth present in socket.

H

4. One socket of front teeth is found empty. A

5. Six pieces of bones of length as under : (i) 20' cm. (ii) 20' cm. (iii) 17½ cm. (iv) 14' cm (v) 18 cm. (vi) 13' cm.

6. Pieces of partly burnt hair.

7. Two pieces of bones which were found inside the water, one of 10' cm. (curve) and one straight of 10½' cm." B

Recovery of the said articles was also proved by the aforementioned witnesses.

As regards medical evidence, the learned Judge noticed the evidence C of Dr. Bhagirath Chand (PW-35) who opined that although it was not possible to determine the cause and time of death, the age of human skull and mandible provided showed that the same was of a boy of less than six years of age.

In regard to report of DNA test, the learned Judge relied upon the evidence of Dr. G.V. Rao (PW-39) as also the evidences of others who collected D the blood sample of the parents of the deceased and sent them to C.D.F.D. Hyderabad. Dr. Rao opined that the remnants were that of the deceased.

The learned Judge also relied upon the recovery of articles and other burnt clothes from the scene of offence which was pointed out by way of corroborative evidence by the appellant. He also relied upon the recovery of E the bones in furtherance of the disclosure/statement made by the appellant in his confession leading to the recovery of the bones.

Reliance was also placed on the confession of the accused. Noticing that there was no direct evidence, the following circumstances were held to be sufficient to prove his guilt : F

"1. Discovery of Remnants and articles at the instance of accused.

2. Confession before the Magistrate.

3. Extra judicial confession of co-accused.

G

4. Finding of telephone diary.

5. Recovery of three licenses from room No.4 of landlord Soma.

6. A chit written by deceased co-accused.

7. Phone calls.

H

A 8. Accused was seen 5-6 days prior moving around the house of complainant, and

9. Motive to extort ransom."

The circumstance No. 2 was proved by PW-33 I.B. Shaikh. The extra judicial confession of co-accused was proved by Gyaneshwar Narayan Patil B (PW-8), Ashok Shyamrao Patil (PW-38) and finding of the telephone diary from Raju which was, however, not been relied upon by the learned Trial Judge. PW-12 proved recovery of three licences from Room No. 4 of landlord Soma. The suicide note purported to have been written by the deceased co-accused Satish was not relied upon by the learned Trial Judge. No reliance C was also placed on the chart showing the phone calls made from some PCO. The fact that the appellant had been seen for 5-6 days moving round the house of the complainant was believed by the learned Trial Judge on the basis of the statement made by Alpa (PW-21) mother of the deceased. The motive on the part of the appellant in committing the crime for extorting ransom was also believed. D

The High Court affirmed the aforementioned findings of the learned Sessions Judge.

Mr. Shivaji M. Jadhav, learned counsel appearing on behalf of the E appellant would principally raise the following contentions in support of this appeal:

(i) Charges having only been framed under Sections 364, 302 and 201 of the Indian Penal Code, the appellant could not have been convicted under Sections 364-A and 201 thereof.

F (ii) Circumstances found against the appellant and in particular the discovery of bones cannot be said to be free from doubt. The purported confession made by the appellant being not voluntary; could not have been relied upon. In any event even if the same is taken to be correct in its entirety, it does not lead to an inference that the appellant has committed an offence under G Section 304A of the Indian Penal Code.

Mr. B.B. Singh, learned counsel appearing on behalf of Respondent No. 1, on the other hand, would submit:

(i) having regard to the provisions contained in Sections 221, 215

H

and 364 of the Code of Criminal Procedure, the appellant having not been prejudiced by wrong framing of a charge, the impugned judgment should not be interfered with.

(ii) The confession of the accused, disclosing information leading to discovery of bones proved the place where the dead body was disposed of and, thus, establishes his knowledge as to how he was murdered and how his dead body was disposed of, and thus established his knowledge as to how he was murdered and how his dead body was disposed of and the same having been proved by two eye-witnesses, full reliance thereupon has rightly been placed by the learned Sessions Judge.

(iii) Judicial confession made by the appellant having not been retracted, the same would form the best evidence to sustain the judgment of conviction wherefor inculpatory statements made therein can be relied upon and exculpatory statement thereof can be rejected.

(iv) Suicide note written by Satish was admissible in evidence under Section 32 of the Indian Evidence Act.

The purported statement made by the appellant on 7.08.2000 leading to recovery reads as under:

"On 3-8-2000 one Jagdish Solanki brought one boy Paras from Coast Guard School on a scooter to Mashal Chowk and I along with Jagdish and two other Satish and Chotu took the boy in a D.C.M. Toyota to Kachigam near Kabra factory and from there took him in a isolated place near a nalla and after removing his clothes threw him in the nalla, after the dead body came up we removed the dead body and hided in a pithole and covered it with plastic sheet. We then burnt the clothes and other belonging, of the boy. In the night we came back to the spot with a kerosene cane and some cardboard and removed the dead body and burnt it in the field near the nalla and left while it was burning. Next day morning I and Satish came back again to the spot and found that the upper half portion of the body was not fully burnt we picked up the remaining part of the body and threw into the nalla. I am ready to show the place where the boy was killed and the dead body hidden and thereafter thrown in the nalla come with me."

The first part of the said statement is not admissible in evidence.

A The appellant was taken to the place pointed by him with Mr. Jallauddin Mohamed Dali (PW-2) and Mr. John Bosco Machado (PW-3). They were also accompanied by the diver of the Coast Guard School Clifford Coutinho (PW-10). They were requested by the investigating officer to serve as panch witnesses in preparing the recovery panchnama of the said case. The B preparation of panchnama commenced at 1610 hrs and concluded at 1630 hrs.

The only infirmity, pointed out from their evidence was, whereas PW-2 in his evidence stated that the appellant did not enter the nalla to take out the bones; according to PW-3, he did so. However, on perusal of their evidences, we find that both of them have stated that it was one person PW-C 10 who went into the nalla and took out the bones. Both PW-2 and PW-3 as also PW-10 gave a vivid description as to the mode and manner in which the appellant pointed out the place whereat the dead body of Paras was burnt, the nalla wherefrom the bones were recovered and the spot where some burnt pieces of cardboard and ashes were seen. The grass area of that spot was also found to have been burnt. On the other side of the nalla, burnt shoes D and burnt trousers were found. That spot was at a distance of about 500 mtrs. from a factory known as Midley. It was an isolated place and was a grassy area.

Section 27 of the Indian Evidence Act reads as under:

E *"27. How much of information received from accused may be proved.* Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

F

The information disclosed by the evidences leading to the discovery of a fact which is based on mental state of affair of the accused is, thus, admissible in evidence.

Relevance of discovery of a fact in contradistinction to an object was G highlighted by the Privy Council in *Pulukuri Kottaya and others* v. *Emperor* [AIR (1947) PC 67], wherein it was stated:

"Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The

H

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

It was furthermore observed :

D

"On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships' view 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, E
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 will produce a knife concealed in the roof of my house" does not lead to the discovery F
of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a 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 admissible since they do not relate to the G
discovery of the knife in the house of the informant."

The said decision has been cited with approval in a large number of cases by this Court.

This Court in *Jaipur Development Authority* v. *Radhey Shyam* [1999] H

A 4 SCC 370, opined that when an object is discovered from an isolated place pointed out by the appellant, the same would be admissible in evidence. [See also *State of Maharashtra* v. *Suresh,* [2000] 1 SCC 471]

We may also refer to a recent decision of this Court in *State (NCT of Delhi)* v. *Navjot Sandhu alias Afsan Guru* [2005] 11 SCC 600, wherein this B Court opined:

> "The history of case law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the C accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure D statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under Section 27. The decision of the Privy Council in Kotayya's case, which has been described as a locus classicus, had set at rest much of the controversy that centered round the interpretation of Section 27. To a great extent the legal position has E got crystallized with the rendering of this decision. The authority of Privy Council's decision has not been questioned in any of the decisions of the highest Court either in the pre or post independence era. Right from 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted F and reiterated by the Judges of this apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State."

We have noticed hereinbefore the confessional statement of the appellant and the manner in which the same was recorded.

G

The appellant was not in police custody when a request was made to record his confessional statement. He was in judicial custody. He was produced before the Magistrate on 16.08.2000. The learned Magistrate took the requisite precaution in not recording his statement on that day. The requirements of Section 164 of the Code of Criminal procedure have, thus, fully been complied

H

with. He was asked to come on the next day. A note of caution as envisaged in law was again administered. His statement was recorded on 17.08.2000. A

His statement was recorded after the court time was over. All persons had been asked to go out of the court room except the court peon. The questions put to him on 17.08.2000 clearly go to show that the learned Magistrate took all the requisite precautions before recording the said statement. He was produced from the magisterial custody. He did not stop there. He gave him another opportunity to think over the matter and remanded him to the magisterial custody till the next day. On 18.08.2000, the learned Magistrate again satisfied himself about the requirements of law. He made an inquiry as to when police had arrested him. He asked other relevant questions including the question as to whether the police had led a trap to arrest in Ankleshwar to which he pleaded ignorance. B C

His confessional statement reads as under:

"My name is Anil @ Raju Namdev Patil, age 22 years, r/o Shevga Bk., Taluka Parola, District Jalgoan. D

I came to Daman in search of job in Nov. 99. My friend Dharamraj Vasantrao Patil @ Chhotu also came. The (sic) was working in village Somnath at Daman previously.

Within two days I got the job as a driver on tempo 407 belonging to priest of Somnath temple Dilipbhai. Myself and my friend Dharamraj Patil were staying in Amlia at village (Somnath). Dharamraj @ Chhotu was working elsewhere as a driver. E

My cousin uncle Satish Shyamrao Patil r/o Shevge, Taluka Parola came to Daman in March 2000 in search of a job and started staying with me. He got a temporary job as a helper in June. F

Since I got a better job I left the job at Dilipbhai on 20/4/2000 and joined in R.K. Plastic company on 20/4/2000.

Before 9/7/2000 my father had come to Somnath but I was not given leave by the owner of R.K. Plastic Ashwinbhai shah. So my father could not meet me. Again my father and mother came to see me and I went along with them. On 21/7/2000 I returned, my uncle was with me. G

I had left the job, my uncle was also jobless. So, Chhotu @ H

A Dharamraj and my uncle Satish told me to kidnap son of Ashwinbhai and for that to give me Rs. 1 Lakh and also told that after getting ransom all would go back to village.

Being greedy of money I thought for the whole night, I would get Rs.1 lakh and for that I had to look after the boy only for 2-3 days.

B

We three i.e. myself, Satish and Dharamraj as per plan on 3/8/2000, I and Satish went in a rickshaw to collect Paras from Coast Guard School. Paras knew me. I told Paras that your father has called you in factory so Paras came and sat with us in rickshaw. At 2.15 p.m. we reached our house along with Paras. We three had devide (sic) the C work to be done. My work was to bring Paras. Satish was to telephone and take ransom from Ashwinseth, Dharamraj had to look after the child and with Satish to go for collecting ransom.

On 3/8/2000 at 2.30 p.m. we went to Vapi to telephone Ashwinsheth. Ashwinseth was not available on phone. We returned. Dharamraj @ D Chhotu and Paras were not in the room. Satish went to search Chhotu. At 5.30 Chhotu and Satish came back to the room. They told that Paras is kept at the safe place. At night 8 p.m. both left the room and returned at 12 midnight.

On 4/8/00 Chhotu went for his work at 9 O'clock. Myself and E Satish went to ring up Ashwinseth. Satish took me to Kachigam. He took me near a hill in jungle, there Satish showed me a burnt body of a male child. I started to cry. They have cheated me.

We three had thrown the half burnt body into water. The body was of Paras.

F

Statement is recorded as per the say of accused and it is read over to him."

The confession was not retracted during the course of the trial. It was purported to have been done only in his examination under Section 313 of G the Criminal Procedure Code. The learned Magistrate examined himself as PW-33.

Before we embark upon the evidentiary value of alleged confession made by the appellant, we may notice some precedents of this Court on the subject.

H

In *Hanumant* v. *The State of Madhya Pradesh* (1952) SCR 1091, this Court in the fact situation obtaining therein opined : A

> "...It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. If the statement of the accused is used as whole, it completely demolishes the prosecution case and, if it is not used at all, then there remains no material on the record from which any inference could be drawn that the letter was not written on the date it bears." B

In *Palvinder Kaur* v. *The State of Punjab,* [1953] SCR 94, this Court held: C

> "Not only was the High Court in error in treating the alleged confession of Palvinder as evidence in the case but it was further in error in accepting a part of it after finding that the rest of it was false. It said that the statement that the deceased took poison by mistake should be ruled out of consideration for the simple reason that if the deceased had taken poison by mistake the conduct of the parties would have been completely different, and that she would have then run to his side and raised a hue and cry and would have sent immediately for medical aid, that it was incredible that if the deceased had taken poison by mistake, his wife would have stood idly by and allowed him to die. The court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so it contravened the well accepted rule regarding the use of confession and admission that these must either be accepted as a whole or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible...." D E F

In *Aher Raja Khima* v. *State of Saurashtra* AIR (1956) SC 217, this Court held:

> "Now the law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. It is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that G H

A anything he says may be used against him; and any attempt by a person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it if the fear was still operating on his mind at the time he makes the confession and if it would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in B reference to the proceedings against him: Section 24 of the Indian Evidence Act. That is why the recording of a confession is hedged around with so many safeguards and is the reason why Magistrates ordinarily allow a period for reflection and why an accused person is remanded to jail custody and is put out of the reach of the investigating C police before he is asked to make his confession. But the force of these precautions is destroyed when, instead of isolating the accused from the investigating police, he is for all practical purposes sent back to them for a period of ten days. It can be accepted that this was done in good faith and we also think that the police acted properly in sending the appellant up for the recording of his confession on the D 21st; they could not have anticipated this long remand to so-called jail custody. But that is hardly the point. The fact remains that the remand was made and that that opened up the very kind of opportunities which the rules and prudence say should be guarded against; and, as the police are as human as others, a reasonable E apprehension can be entertained that they would be less than human if they did not avail themselves of such a chance."

In *Subramania Goundan* v. *The State of Madras* [1958] SCR 428, this Court held:

F "The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and G voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially..." H

It is however a case where the learned Magistrate did make preliminary inquiries, gave warning to him, send him back to the judicial custody for a few days or at least one day and then he was called back again. [See *Bharat* v. *State of U.P.* [1971] 3 SCC 950]

In *Bhagwan Singh Rana* v. *The State of Haryana* [AIR (1976) SC 1797], this Court opined:

> "It has also been argued by Mr. Ramamurthy that the courts below erred in accepting those parts of the statements of the appellant in Exs. PB and PC which were inculpatory and in rejecting those parts which were ex-culpatory, and that, in doing so, the courts lost sight of the requirement of the law that such statements should either be accepted as a whole, or not at all. For this proposition our attention has been invited to Hanument v. The State of Madhya Pradesh etc. (2) and Palvinder Kaur v. The State of Punjab. (3) The law on the point has however been laid down by this Court in Nishi Kant Jha v. State of Bihar (4) in which the two cases cited by Mr. Ramamurthy have been considered. After referring to Taylor's law of Evidence and Roscoes & Criminal Evidence this Court has held that it is permissible to believe one part of a confessional statement, and to disbelieve another, and that it is enough if the whole of the confession is tendered in evidence so that it may be open to the Court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness. An examination of Exs. PB and PC shows that the appellant admitted that he was working as Sub-Post Master at Sohna Adda Post Office on March 21, 1967 when a Sikh by (Navatej Singh, (P.W. 5) came to the post office and delivered a parcel under postal certificate. The appellant also admitted that the parcel was opened by Tej Ram in his presence, and that he (Tej Ram) took out a lady's wrist Watch (Ex. P 1) and from it and gave it to him."

In *Navjot Sandhu alias Afsan Guru* (supra), this Court opined:

> "Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide Taylor's Treatise on the Law of Evidence Vol. I). However, before acting upon a confession the court must be satisfied that it was freely

A and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients B are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, C duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer."

D We are thoroughly satisfied that the confession made by the appellant was voluntary in nature and the same was free from undue influence, coercion and threat. There is another reason why we think that there is a ring of truth in the confession of the appellant. He was a driver appointed by the parents of the deceased. He worked with them for three months. He might have become greedy to earn some easy money. From the tenor of his confession, E it appears that his job merely was to kidnap the boy and handed over to other co-accused. He never thought that the boy would be murdered. He did not have any animosity with the deceased. He might have developed a liking for the boy. The act of others is apparent from the statement before the learned Magistrate.

F

Furthermore, in the meantime the other two co-accused had also committed suicide. They left a suicide note which implicated him also.

The said suicide note, in our considered opinion, is not admissible in evidence under Section 32(1) of the Indian Evidence Act as was suggested G by Mr. Singh. He relied upon a decision of this Court in *Sharad Birdhi Chand Sarda* v. *State of Maharashtra* [1985] 1 SCR 88 : [1984] 4 SCC 116, wherein the question was as to whether the death of the deceased therein was homicidal or suicidal. The said decision has no application in the instant case.

The statement of a deceased may be admissible in evidence in terms of H Section 32(1) of the Indian Evidence Act to prove the cause of the death or

as to any of the circumstances of the transaction which resulted in his death. A
But, when a suicide is committed by a co-accused, the statements made in the suicide note implicating other co-accused would not be admissible thereunder.

The only question which now arises for consideration is as to whether the appellant could have been convicted under Section 364-A of the Indian B
Penal Code. The charges framed against him are as under:

> "That you on or about the third day of August, 2000 at between 1.45 and 7 p.m. at Delwada, Nani Daman in furtherance of your common intention with deceased Satish Shamrao Patil and deceased Dharmaraj @ Chotu Vasantrao Patil kidnapped Paras Ashwin Shah, aged 5 years C
> from Coast Guard Public School in order that he may be murdered or may be so disposed of as to be put in danger of being murdered and thereby committed an offence punishable u/s 364 r/w 34 of I.P.C.
>
> That on or about 3.8.2000 after having kidnapped said Paras Ashwin Shah, aged 5 years in furtherance of your common intention D
> with deceased Satish Shamrao Patil committed murder of said Paras by throwing him in a nalla at village Namdeo in Gujarat State and thereby committed an offence punishable u/s 302 r/w 34 of I.P.C.
>
> That on or about 3-8-2000 knowing that you had committed murder of said Paras which invites capital punishment, in furtherance of your E
> common intention with deceased Satish Shamrao Patil and deceased Dharamraj @ Chotu Vasantarao Patil and absconding accused Jagdish Prasad Karanji Solanki caused the evidence of the commission of the said offence to disappear by partly burning the dead body of deceased Paras and again throwing him in water with intention of screening F
> yourself from the legal punishment and thereby committed an offence punishable u/s 201 r/w 34 of I.P.C.
>
> And, I hereby direct that you be tried by this Court on the said charge."

G

Mr. Singh would submit that the entire evidence was recorded in presence of the appellant. His attention was also drawn to the circumstances brought on records by the appellant including the demand of ransom and murder of the deceased and in that view of the matter it cannot be said that he was in any way prejudiced or there has been a failure of justice.

H

A The learned counsel would submit that when the provisions of the Code of Criminal Procedure, viz., Sections 221, 251 and 364 have substantially been complied with, mere omission to frame proper charge may not be sufficient to absolve him therefrom only on mere technicality.

Before we advert to the said contentions, we may notice the following B precedents.

In *K. Prema S. Rao and Anr* v. *Yadla Srinivasa Rao and Ors* [2003] 1 SCC 217, this Court observed:

> "Mere omission or defect in framing charge does not disable the C Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence on record. The Code of Criminal procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed under Section 304B and in the Alternative Section 498A, IPC (as quoted above) it D is clear that all facts and ingredients for framing charge for offence under Section 306, IPC existed in the case. The mere omission on the part of the trial Judge to mention of Section 306, IPC with 498A, IPC does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed under Section 498A of IPC, it has been clearly mentioned that the accused E subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of Section 221 of Cr.P.C. take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on fats found in evidence, he could have been charged for such offence." F

In *Kammari Brahmaiah and Ors* v. *Public Prosecutor, High Court of A.P.* [1999] 2 SCC 522, this Court observed:

> "3. At the time of hearing of this appeal, learned Counsel appearing on behalf of the appellant submitted that the Order passed by the G High Court convicting the appellants for the of fence punishable under Section 325 read with 149 is on the face of it illegal as no charge under Section 149 was framed against the accused. He contended that all accused were charged only for the of fence punishable under Section 302 of IPC for causing injuries to the deceased Itikala H Mogulaiah. As against this, learned Counsel for the State vehemently

submitted that even though it is an error on the part of the Additional Sessions Judge of not framing the charge under Section 302 read with 149 of IPC no prejudice is casued to the accused as relevant facts were placed before the Court and the attention of the accused also was drawn. Futher, they are punished for lesser of fence, therefore, the order passed by the High Court is justified and legal." A B

In *Dalbir Singh* v. *State of U.P.* [2004] 5 SCC 334, this Court observed:

"11. The High Court was further of the opinion that the evidence on record clearly established the charge against the accused under Section 306 IPC and he could be convicted and sentenced for the said offence. However, in view of the fact that no charge under Section 306 IPC had been framed and there was conflict of opinion in the two decisions of this Court rendered by Benches of equal strength and as in such a situation a later decision was to be followed, the High Court came to a conclusion that the accused cannot be convicted under Section 306 IPC. On this basis the conviction and sentence of accused under Section 498-A IPC alone were maintained. C D

12. The main question which requires consideration is whether in a given case is it possible to convict the accused under Section 306 IPC if a charge for the said offence has not been framed against him. In Lekhjit Singh and Anr. v. State of Punjab (supra) the accused were charged under Section 302 IPC and were convicted and sentenced for the said offence both by the trial Court and also by the High Court. This Court in appeal came to the conclusion that the charge under Section 302 IPC was not established. The Court then examined the question whether the accused could be convicted under Section 306 IPC and in that connection considered the effect of non-framing of charge for the said offence. It was held that having regard to the evidence adduced by the prosecution, the cross-examination of the witnesses as well as the answers given under Section 313 Cr.P.C. it was established that the accused had enough notice of the allegations which could form the basis for conviction under Section 306 IPC" E F G

In *Kamalanantha and Ors* v. *State of T.N.* [2005] 5 SCC 194, this Court held:

"It is clear from the aforesaid decisions that misjoinder of charges is not an illegality but an irregularity curable under Section 464 or Section H

A 465 Cr.P.C. provided no failure of justice had occasioned thereby. Whether or not the failure of justice had occasioned thereby, it is the duty of the Court to see, whether an accused had a fair trial whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

B

The question came up for consideration in *Harjit Singh* v. *State of Punjab* [2006]1 SCC 463, wherein, however, it was held :

"23. Faced with this situation, the learned counsel appearing on behalf of the State relies upon a judgment of this Court in K. Prema S. Rao v. Yadla Srinivasa Rao wherein an observation was made in the peculiar facts and circumstances of that case that even if the accused is not found guilty for commission of an offence under Sections 304 and 304-B of the Penal Code, he can still be convicted under Section 306 IPS thereof.

C

D

24. Omission to frame charges under Section 306 in terms of Section 215 of the Code of Criminal Procedure may or may not result in failure of justice, or prejudice the accused.

25. It cannot, therefore, be said that in all cases, an accused may be held guilty of commission of an offence under Section 306 of the Penal Code wherever the prosecution fails to establish the charge against him under Section 304-B thereof. Moreover, ordinarily such a plea should not be allowed to be raised for the first time before the court unless the materials on record are such which would establish the said charge against the accused."

E

F

The propositions of law which can be culled out from the aforementioned judgments are:

(i) The appellant should not suffer any prejudice by reason of misjoinder of charges.

G

(ii) A conviction for lesser offence is permissible.

(iii) It should not result in failure of justice.

(iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges.

H

The ingredients for commission of offence under Section 364 and 364-A are different. Whereas the intention to kidnap in order that he may be murdered or may be so disposed of as to be put in danger as murder satisfies the requirements of Section 364 of the Indian Penal Code, for obtaining a conviction for commission of an offence under Section 364-A thereof it is necessary to prove that not only such kidnapping or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel the government or any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom.

It was, thus, obligatory on the part of the learned Sessions Judge, Daman to frame a charge which would answer the description of the offence envisaged under Section 364-A of the Indian Penal Code. It may be true that the kidnapping was done with a view to get ransom but the same should have been put to the appellant while framing a charge. The prejudice to the appellant is apparent as the ingredients of a higher offence had not been put to him while framing any charge.

It is not a case unlike *Kammari Brahmaiah* (supra) where the offence was of a lesser gravity, as has been observed by Shah J.

We, therefore, are of the opinion that the appellant could not have been convicted under Section 364-A of the Act. We, however, find him guilty of commission of an offence under Section 364 of the Indian Penal Code. He, in our opinion, deserves the highest punishment prescribed therein, i.e., the rigorous imprisonment for life and we direct accordingly. The appeal is dismissed with the modification of sentence as also quantum thereof.

A.K.T. Apppeal dismissed.