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STATE OF PUNJAB
v.
HARJAGDEV SINGH
(Criminal Appeal No. 817 of 2009)

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APRIL 22, 2009

**[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]**

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Code of Criminal Procedure, 1973:

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s.164 – Confession u/s.164 – Conviction – Acquittal by High Court on ground that requisite procedure relating to recording statement u/s. 164 was not followed – Held: Perusal of evidence of the Magistrate shows that necessary questions were asked and due care was taken before recording the statement of accused – It was specifically told to him that the statement could be used in evidence against him – Time was given to the accused to ensure that he was making the statement voluntarily without any pressure and it was specifically indicated to him that the statement could be used against him – Therefore, High Court not justified in holding that requisite procedure for recording statement under s.164 was not followed.

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s.218 – Conviction by trial Court – Set aside by High Court on the ground that charge was defective – HELD: Finding of trial court cannot be set aside merely on ground that no charge was framed or on the ground of any error in relation to the charge.

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Prosecution case was that the respondent-accused killed his parents. He was arrested and on his disclosure statement, the crime weapon was found. Thereafter he made a statement under Section 164 Cr.P.C. before the Judicial Magistrate admitting the fact that he killed his

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parents. Trial Court convicted respondent under Section 302 IPC. High Court ordered acquittal holding that PW3 before whom purportedly extra judicial confession was made did not support the prosecution and the requisite procedure for recording confession under Section 164 Cr.P.C. admissible in evidence was not followed and that the charge was defective as requirement of Section 218 Cr.P.C. was not followed. State filed present appeal. A B

Disposing of the appeal, the Court

HELD: 1. The Magistrate, P.W.9, categorically stated that he observed the requisite procedure relating to recording the statement under section 164 Cr.P.C. He referred to the questions that were put to the accused and the warning given to him clearly stating that the confession could be used as evidence against him. Nowhere in the cross-examination of this witness even a suggestion was made that there was no statement recorded under Section 164 before him. [Para 6] [61-C] C D

2. Confessions may be divided into two classes i.e. judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. [Para 6] [61-E, F] E F

3. A confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceedings from a person in authority, and (3) sufficient, G H

A in the opinion of the court to give the accused person grounds which 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 reference to the proceedings against him. Whether or not

B the confession is voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Evidence Act, 1872. 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

C arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which

D the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The

E question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or

F promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed

G to flow from the highest sense of guilt. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender

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and accused, such statement must be regarded as involuntary. Every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused." [Para 6] [61-H; 62-A-H; 63-A-H; 64-A-C]

4. The act of recording confessions under Section 164 Cr.P.C. is a very solemn act and in discharging his duties in the said Section, the Magistrate is required to take care to see that the requirements of sub-section (3) of Section 164 are fully satisfied. It is necessary in every case to put questions as intended to be asked under Section 164(3). A bare perusal of the evidence of PW.9 shows that necessary questions were asked and due care was taken before recording the statement of the accused. It was specifically told to him that the statement could be used in evidence against him. Time was given to the accused to ensure that he was making the statement voluntarily without any pressure and it was specifically indicated to him that the statement could be used against him. Therefore, the High Court was not justified in holding that the requisite procedure for recording statement under Section 164 has not been followed. [Paras 8 and 9] [65-D-F]

A 5. Coming to Section 218 of the Code, the High Court
obviously was not justified to say that the charge was
defective. Section 463 of the Code deals with non-
B compliance with provisions of Section 164. The
provisions make it clear that it has to be established that
because of the non-compliance an injury was
occasioned to the accused in his defence on merits. No
finding by Court of competent jurisdiction shall be
deemed to be invalid merely on the ground that no
charge was framed or on the ground of any error in
C relation to the charge, including any misjoinder of charge,
since in the opinion of the Court of appeal confirmation
of relative failure of justice has in fact been occasioned
thereby. It is not the case of the respondent that any
mitigating factor existed. Judgment of the High Court is
D set aside. [Paras 10 and 11] [65-G-H; 66-A; 67-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 817 of 2009.

E From the Judgment & Order dated 07.10.2005 of the High
Court of Punjab & Haryana at Chandigarh in Criminal Appeal
No. 219-DB of 2004.

M.K. Vinayagam (A.C.) for the Appellant.

F H.M. Singh, Jasneet Kaur, Kaushal Yadav, Durgesh Yadav,
Parveen Kr. Singh and Kuldip Singh (A.C.) for the
Respondent.

The Judgment of the Court was delivered by

G **DR. ARIJIT PASAYAT, J.** 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division
Bench of Punjab and Haryana High Court directing acquittal of
the respondent who faced trial for alleged commission of
offence punishable under Section 302 of the Indian Penal

Code, 1860 (in short 'IPC'). Learned Additional Sessions Judge, Gurdaspur found the accused guilty and directed his conviction.

3. According to the prosecution case, which was registered on the statement made by Jaswinder Singh, the maternal uncle of the accused on 6.7.1994 is that when he had gone to village Mann Sandwal to see his sister he had found the house locked from outside. He was informed by some neighbours that his sister Parkash Kaur and her husband Man Singh had shifted their residence to their farm house about a month earlier. He had then gone to the farm house, which was at a distance of 1-1/2 kilometers and on reaching there he found that the door of the Kotha of the tube well was locked from outside and foul smell was coming from the tube well. He returned to the village and after collecting some residents returned to the tube well. On reaching the tube well and breaking open the door of the Kotha, he found the dead bodies of his sister and brother in law lying inside with sharp edged injuries on the head and face. On the basis of the statement of Jaswinder Singh formal F.I.R. Ex.PA/2 was recorded. Inspector Harjinder Singh PW.5 the Investigating Officer after recording the statement of Jaswinder Singh went to the spot, prepared inquest reports and forwarded the dead bodies for post mortem. The accused was arrested in the case and during interrogation he made a disclosure statement Ex.PC that he had kept concealed a Kassi by the side of the canal minor and could get the same recovered. Subsequent there to he had led the police party to the specified place and got discovered the Kassi.

Thereafter he had made a statement under Section 164 of the Code of Criminal Procedure, 1973 (in short 'the Code') before the Judicial Magistrate 1st Class, Batala admitting the fact that he had been responsible for killing his parents. On the completion of the investigation, a challan was put in the Court of the Illaqa Magistrate, who after going through the papers committed the case to the Court of Session. The trial Court was of the view that prima facie case under Section 302 IPC was

A made out against the accused. It accordingly, framed the charge. When the accused pleaded not guilty to the charge, the prosecution was called up to examine its witnesses.

B 4. Primarily prosecution relied on several factors to contend that the accused was guilty of the offence. They are (1) on extra judicial confession made by the writ petitioner; (2) judicial confession in terms of Section 164 of the Code made before the learned Judicial Magistrate. The trial Court accepting the prosecution version observed that both the extra judicial confession in terms of Section 24 and 26 of the Indian Evidence C Act, 1872 (in short 'the Act') as well as the judicial confession before the Magistrate under Section 164 of the Code clearly established the guilt of the accused. An appeal was preferred by the respondent herein questioning the correctness of the judgment of the trial Court. Primarily two stands were taken D before the High Court. It was first submitted that no statement was given under Section 164 of the Code as envisaged and also there was no extra judicial confession. The High court recorded a finding that PW.3 before whom purportedly the extra judicial confession was made did not support the prosecution. E Additionally, it was held that the requisite procedure which was to be observed for recording confession under Section 164 admissible in evidence was not followed. Further it was held that the charge is defective as the requirements of Section 218 of the Code were not followed. Accordingly, acquittal was F directed.

5. Learned counsel for the appellant State submitted that all the conclusions of the High Court are erroneous in law as well as in fact. Firstly, PW.3 clearly supported the prosecution version. It is true as observed by the High Court that PW.2 did G not support the prosecution version but that was not the case so far as PW.3 is concerned. Reference is made to the conclusions of the trial Court which recorded that Mohinder Singh PW.3 in deposition stated that on 2.7.1994 accused confessed that he had killed his father and mother and the H accused wanted his help in order to produce him before the

SHO as the then SHO of the police station was friendly with him. The stand taken by the accused before the trial Court was that PW.3 was a resident of another village and there was no occasion for making extra judicial confession. That is not the same as saying that PW.3 did not support the prosecution version.

6. Coming to the observance of necessary procedure relating to recording the statement under Section 16LL of the Code, the Magistrate, P.W.9, has categorically stated that he has observed the requisite procedure. He has referred to the questions that were put to the accused and the warning given to him clearly stating that the confession could be used as evidence against him. Nowhere in the cross-examination of this witness even a suggestion was made that there was no statement recorded under Section 164 before him. It is not that, as has been observed by the High Court that statement under Section 164 of the Code has not been recorded in the requisite manner.

Confessions may be divided into two classes i.e. judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the 'Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal

A proceedings, if the making of the confession appears to
the court to have been caused by any inducement, threat
or promise, (1) having reference to the charge against the
accused person, (2) proceedings from a person in
B authority, and (3) sufficient, in the opinion of the court to
give the accused person grounds which 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 reference to the proceedings against him. It follows that
a confession would be voluntary if it is made by the
C accused in a fit state of mind, and if it is not caused by
any inducement, threat or promise which has reference to
the charge against him, proceeding from a person in
authority. It would not be involuntary, if the inducement, (a)
D does not have reference to the charge against the accused
person or (b) it does not proceed from a person in
authority; or) it is not sufficient, in the opinion of the court
to give the accused-person grounds which would appear
to him reasonable for supposing that, by making it he
would gain any advantage or avoid any evil of temporal
nature in reference to the proceedings against him.
E Whether or not the confession was voluntary would depend
upon the facts and circumstances of each case, judged
in the light of Section 24 of the Indian Evidence Act, 1872
(in short 'Evidence Act'). The law is clear that a confession
cannot be used against an accused person unless the
F court is satisfied that it was voluntary and at that stage the
question whether it is true or false does not arise. If the
facts and circumstances surrounding the making of a
confession appear to cast a doubt on the veracity or
voluntariness of the confession, the court may refuse to act
G upon the confession, even if it is admissible in evidence.
One important question, in regard to which the court has
to be satisfied with is, whether when the accused made
the confession, he was a free man or his movements were
controlled by the police either by themselves or through
H some other agency employed by them for the purpose of

securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See R.V. Warickshall) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's Evidence, 9th Edn. ,p. 284). A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object

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A of the rule is to exclude only those confessions which are
testimonially untrustworthy, the inducement, threat or
promise must be such as is calculated to lead to an untrue
confession. On the aforesaid analysis the court is to
B determine the absence or presence of an inducement,
promise etc. or its sufficiency and how or in what measure
it worked on the mind of the accused. If the inducement,
promise or threat is sufficient in the opinion of the court,
to give the accused person grounds which would appear
to him reasonable for supposing that by making it he would
C gain any advantage or avoid any evil, it is enough to
exclude the confession. the words "appear to him" in the
last part of the section refer to the mentality of the accused.

7. So far as the recording of statements and observance
of the norms relating to recording a statement, this Court in JT
D (2007) SC 287 observed as follows:

"19. Sub-section (2) of Section 164 Cr.P.C. requires
that the magistrate before recording confession shall
explain to its maker that he s not bound to make a
E confession and if he does so it may be used as evidence
against him and upon questioning the person if the
magistrate has reasons to believe that it is being made
voluntarily then the confession shall be recorded by the
magistrate. Sub-section(4) of Section 164 provides that
F the confession so recorded shall be in the manner
provided in Section 281 and it shall be signed by its maker
and the recording magistrate shall make a memorandum
at the foot of such record to the following effect:

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

made by him.”

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20. Sub-section (1) of Section 463 provides that in case the Court before whom the confession so recorded is tendered in evidence finds that any of the provisions of either of such sections have not been complied with by the recording magistrate, it may, notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.”

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8. It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code is a very solemn act and in discharging his duties in the said Section, the Magistrate is required to take care to see that the requirements of sub-section (3) of Section 164 of the Code are fully satisfied. It is necessary in every case to put questions as intended to be asked under Section 164(3).

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9. A bare perusal of the evidence of PW.9 shows that necessary questions were asked and due care was taken before recording the statement of the accused. It was specifically told to him that the statement could be used in evidence against him. Time was given to the accused to ensure that he was making the statement voluntarily without any pressure and it was specifically indicated to him that the statement could be used against him. Therefore, the High Court was not justified in holding that the requisite procedure for recording statement under Section 164 has not been followed.

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10. Coming to Section 218 of the Code, the High Court obviously is not justified to say that the charge is defective. Section 463 of the Code deals with non-compliance with provisions of Section 164. The provisions make it clear that it has to be established that because of the non-compliance an injury has been occasioned to the accused in his defence

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A on merits. So far as Section 164 is concerned the same reads as follows:

“164. Recording of confessions and statements:

B (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

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D Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

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

F (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

G (4) any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-
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"I have explained to (name) that he is not bound to make a confession and that, if he does so, nay confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

11. The above position makes it clear that if there is any error or irregularity in the charge which had its relevance on the case it shall be clear from the bare perusal thereof that no finding by Court of competent jurisdiction shall be deemed to be invalid merely on the ground that no charge was framed or on the ground of any error in relation to the charge, including any misjoinder of charge, since in the opinion of the Court of appeal confirmation of relative failure of justice has in fact been occasioned thereby. It is not the case of the respondent that any mitigating factor existed. Judgment of the High Court is in default and is set aside. Accused surrender to custody forthwith to serve out the remainder of sentence.

12. The appeal is disposed of accordingly.

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Appeal disposed of.