HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Criminal Leave To Appeal No. 94 / 2017

State of Rajasthan

----Appellant

Versus

1. Mangal Singh S/o Buddha, R/o Ranisagar, P.s. Beawar Sadar, Ajmer.

2. Sunita W/o Suresh Singh, R/o Landi, P.s. Masooda, Ajmer.

3. Vijay Singh S/o Laxman Singh, R/o Shivpura, P.s. Pisangan, Distt. Ajmer.

----Respondents

Mr. H.S. Sandhu }

Mr. H.S.S. Kharlia, Sr.Advocate }

Mr. D.S. Gharsana }

Mr. Hemant Nahta }

Mr. Amit Sharma } Members of the Bar

Mr. K.L. Thakur, A.A.G. }

Mr. S.D. Purohit }

Mr. J.P.S. Choudhary, P.P. }

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS
HON'BLE MR. JUSTICE SANDEEP MEHTA
HON BLE MR. JUSTICE PANKAJ BHANDARI

(LARGER BENCH)

J U D G M E N T

PER HON'BLE SANDEEP MEHTA,J.

Pronouncement Date : 1st **March 2017**

Reportable

While considering D.B.Criminal Leave to Appeal No.94/2017, the Division Bench of this Court was persuaded to refer the

following question for consideration by a Larger Bench:

> *"Whether during interrogation of the accused at the time of recording information from him/her with regard to effecting recovery of fact, articles and weapon, the presence of two independent witnesses is necessary or not?"*

Under orders of Hon'ble the Chief Justice, the matter has been placed before this three Judges Bench for deciding the reference made to it in the above terms. Since the Bench is in seisin of a controversy arising from the conflicting views taken by the Division Benches of this Court on the issue as to whether or not, it is essential to have attestation of the information given by a person accused of an offence to an Investigating Officer under Section 27 of the Evidence Act by independent witnesses, background of the provision requires a brief reference.

Background of the Enactment.- It is common place that the Evidence Act 1872 was drafted in England. Two departures were made from the law existing in England regarding confessions and they were (i) that no statement made to a Police Officer including the confession of an accused could be proved at the trial; and (ii) that no caution was to be given to a person making a statement.

When an offence is committed and investigation commences, the Investigating Agency or the Police has two objectives in view. The first is collection of information/evidence, and the second is finding out the offender. In this process, the

police may question a number of persons, some of whom may be only witnesses and some who may later turn out to be the person or persons charged. While questioning such persons, the police need not caution them and may leave them free to make whatever statement they wish to make. There are two checks and balances available at this stage. What the witnesses or the suspects say is not to be used at trial as substantive evidence, and a person cannot be compelled to answer a question, which may tend to incriminate him. It is to be noticed that though the police may, at one stage only consider the offender as a suspect and at that point of time, there is no difference between him and other witnesses who are questioned. Those who turn out to be witnesses, and not accused are expected to give evidence at the trial and their former statements are not admissible in evidence. In so far as those ultimately charged are concerned, they cannot be witnesses, save exceptionally, and their statements are barred under Sec. 162 of the Code and their confessions, under Sections 24, 25 and 26 of the Evidence Act. Their confessions are only relevant and admissible, if they are recorded as provided in Section 164 of the Criminal Procedure Code after due caution by the Magistrate and it is ascertained that they are voluntary. These rules are based upon the maxim : *Nemo etntur prodere seipsum* (no one should be compelled to incriminate himself).

So far as the accused is concerned, he is protected from the mischief of a confession to a charge both after and before his custody unless he did so in immediate presence of a Magistrate,

or his confession was recorded by a Magistrate. In either event, the confession has to be voluntary and free from taint of threat, promise, fear, coercion etc. The law was so framed to protect a suspect against abuse of powers and use of third degree methods by the Investigating Agency. The English Law as it stood then was taken as a model for accused in custody. However, Section 27 has been framed as an exception to Sections 24, 25 and 26 of the Evidence Act.

The Celebrated author Mr.Taylor in his Treatise on the Law of Evidence made the following remarks:

> "Where in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statements as to his knowledge of the place where the property or other articles was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to enquire whether he confessed that he had concealed it there."

Principle underlying the Section:-Section 27 is an exception to the rule enacted in Sections 24, 25 and 26 of the Act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that 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 or used as against such person.

Where however, any fact is discovered in consequence of information received from a person accused of any offence in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

The law may be taken as well settled that if the accused himself is the informant of cognizable offence or gave a confession admissible to a limited extent under Section 27 of Evidence Act or made extra-judicial confession before an independent person, in such event, the statement made in the F.I.R. or extra-judicial confession or confession made to Police, can be to the extent it is favourable to accused for any purpose either for consideration of acquittal or for modifying conviction – admitted.

Two conditions are pre-requisite for the applicability of Section 27: (i) the information must be such as caused discovery of a relevant fact, (ii) the information must relate distinctly to the fact discovered. In such a situation, so much of the information which relates distinctly to a fact thereby discovered, whether it amounts to a confession or not, may be proved. It is also essential that there should be a statement followed by the discovery. If there was first discovery followed by the statement, then such statement would be inadmissible. It is also settled proposition of law that the statement of the accused must be volunteered; it should not be given by prompting, threat or in answer to any pointed question.

The Division Bench of this Court, noticed the divergence of opinion in the views taken by different Division Benches of this Court and the question quoted above was framed and referred to the Larger Bench for resolution.

Notice of hearing was issued to the members of the Bar and arguments were heard.

Sarva Shri H.S.S.Kharlia learned Sr.Counsel assisted by Shri D.S.Gharsana, Shri H.S.Sandhu, Shri Hemant Nahta and Shri Amit Sharma Advocates fervently supported the view taken by Division Benches of this Court in the cases of ***Rameshwar and Surjeet*** *(supra)*. They urged that the provisions contained in Section 27 of the Evidence Act are by way of an exception to the fundamental right against self-incrimination available to every accused under Article 20(3) of the Constitution of India and as such, strict proof is required before the statement of an accused recorded under the said provision leading to disclosure of fact is admitted in evidence. For ensuring the truthfulness and voluntary nature of the virtual confession, presence of independent witnesses is absolutely essential and mandatory. They thus urged that the view as taken by the Division Bench in these two cases should be affirmed. It was further contended that as the *ratio decidendi* of the Division Bench Judgments in the cases of ***Rameshwar and Surjeet*** *(supra)* is based on the law as laid down by the Hon'ble Supreme Court in ***Harjit Singh's Judgment***, the very competence of this Bench to answer the reference is debatable. They contended that the controversy if

any, is to be resolved, consideration has to be made by the Hon'ble Supreme Court.

Sarva Shri Shridhar Purohit, Shri K.L.Thakur, Addl.Advocate General and Shri J.P.S.Choudhary, Public Prosecutor, on the other hand, contended that the view taken by Division Bench of this Court in Rameshwar and Surjeet's cases (supra) does not lay down the correct proposition of law. There is no such requirement in the Criminal Procedure Code that a memorandum prepared under Section 27 of the Evidence Act should bear attestation of independent witnesses. They urged that this requirement, if allowed to stand, would virtually destroy the sanctity of investigation. Unscrupulous accused would get away in their endeavour of escaping punishment by tampering and winning over Panch witnesses. Situation may even arise that soon after the memo under Section 27 of the Evidence Act is prepared in the presence of the witnesses, they would leak the information and material piece of evidence would be either destroyed or removed, frustrating and setting at naught the information so recorded by the Investigating Officer. Reliance was placed on the Supreme Court judgments in the cases of ***State, Govt. of NCT of Delhi Vs. Sunil & Anr. reported in (2001)1 SCC 652; (MANU/SC/0735/2000)*** and ***Pawan Kumar @ Monu Mittal Vs. State of Uttar Pradesh & Anr. reported in (2015)7 SCC 148; (MANU/SC/0240/2015)*** and it was urged that the reference should be answered in the manner that there is no requirement of seeking attestation by independent witnesses on

the memorandum prepared under Section 27 of the Evidence Act.

We have given our thoughtful consideration to the arguments advanced at the bar and have gone through the material available on record and have carefully and respectfully perused the precedents cited by the learned members of the Bar.

At the inception, we propose to deal with the objection raised by learned counsel Sarva Shri H.S.S. Kharlia, Sr.Advocate and Shri H.S.Sandhu regarding the maintainability of the reference/competence of the Bench to answer the same.

- **COMPETENCE OF THE BENCH TO ANSWER THE REFERENCE:**

So far as the maintainability of the reference/competence of this Bench to answer the reference is concerned, at the outset we may emphasise that this Bench is not directly called upon to decide on validity of the judgment in the case of ***Harjit Singh*** *(supra)*, as is sought to be projected by learned Senior Counsel raising the objection. In fact, as the Division Bench while considering the Leave to Appeal did not concur with the opinion expressed in the case of ***Rameshwar*** and ***Surjeet*** *(supra)* delivered by a coordinate Bench, which judgments in turn had taken a particular view of the observations made in the judgment in the case of ***Harjit Singh*** *(supra)*, therefore, keeping judicial discipline, it chose to refer the issue to the Larger Bench. Hon'ble Supreme Court in ***U.P.Gram Panchayat Adhikari Sangh Vs. Daya Ram Saroj reported in (2007)2 SCC 138;***

(MANU/SC/8775/2006) observed:

> "26. Judicial Discipline is self-discipline. It is an inbuilt mechanism in the system itself. Judicial discipline demands that when the decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity."

In view of the above, there is no substance in the objection raised in this regard.

- **ISSUE OF REFERENCE:**

Having narrated these admitted aspects on interpretation of Section 27 of the Evidence Act, now we may advert to the controversy at hand.

A Division Bench of this Court in the case of ***State of Rajasthan Vs. Rama & Ors. reported in 1973(1) WLC 934; (MANU/RH/0186/1973)*** held that law does not require the presence of independent witnesses before whom the information under Section 27 of the Evidence Act may be given and recorded. The Division Bench further went on to hold that if the presence of independent witness was insisted before an accused gave information, in some cases, the information may not be forthcoming. However, the legal scenario assumed a different character with the Division Bench Judgment in the case of ***Rameshwar Vs. State of Rajasthan reported in 2015(1)***

Cr.L.R. (Raj.) 399 and the subsequent judgment in the case of ***Surjeet Vs. State of Rajasthan reported in 2016(1) Cr.L.R. 303,*** wherein the ratio of Rameshwar's judgment was followed. In Rameshwar's case, the Division Bench of this Court, relied on the Supreme Court judgment in the case of ***Harjit Singh & Ors. Vs. State of Punjab reported in AIR 2002 SC 3040; (MANU/SC/0684/2002)*** and held that it is essential for the prosecution to prove that the disclosure statement was made voluntarily without any duress or coercion. To justify voluntary character of disclosure statement, it ought to be recorded in the presence of independent witnesses.

The entire edifice of the view taken by Division Bench of this Court at Jaipur in Rameshwar's case (supra), which is first in the line of a series of judgments in which, a proposition was laid down that the memorandum under Section 27 of the Evidence Act should be attested by independent witnesses, is based on the following observation made by the Hon'ble Supreme Court at para-50 of ***Harjit Singh's judgment*** *(supra)*:-

> "50. Apart from the version of eye-witnesses discussed above, the trial court attached importance to the fact that on a disclosure statement of accused Satinderpal Singh, *pistol* alleged to have been used by Inderjit Singh was recovered under memorandum Ext. P-19. We have referred to the statement of Investigating Officer Puran Singh (PW 9). He is unable to explain the reason for not procuring the attendance and signature of independent witnesses on the disclosure statement Ext. PV and memorandum of recovery Ext. PU 1. We have noted that these memoranda have been signed only by two police officers Faqir Chand and Virsa Singh. It is unbelievable

> that all the accused persons who have alleged to use their firearms/weapons kept all the arms concealed in an open field in a gunny bag under a heap of straw. In the absence of independent witnesses and the alleged place of concealment being accessible to the public, the evidence of disclosure statement and the consequent recovery of arms and weapons do not at all inspire confidence. In any case, it is not a piece of evidence which could be relied on by the trial court to convict the accused by treating it as eye-witnesses account."
>
> [Emphasis supplied]

From a plain reading of the above quoted portion of ***Harjit Singh's judgment*** *(supra)*, it is apparent that a passing reference was made by the Hon'ble Supreme Court in the said judgment that the memorandum of information was signed by Police Officers and not attested by independent witnesses and thus, could not be accepted as being a reliable piece of evidence. In the said case, the recoveries effected by the Investigating Officer at the instance of the accused in furtherance of information recorded under Section 27 of the Evidence Act were discarded on numerous grounds; one of them being that the Investigating Officer failed to associate independent witnesses in the recovery proceedings. The Hon'ble Supreme Court was not in seisin of a controversy involving the procedure applicable to Section 27 of the Evidence Act in the said case. It is manifest that the observations made are limited to peculiar facts of that specific case and even do not amount to *obiter dicta*.

We are of the firm opinion that the insistence to keep attesting witnesses present when the Investigating Officer records the information supplied by the accused under Section 27 of the

Evidence Act is absolutely unwarranted and rather amounts to a direct infringement in confidentiality of investigation. There are strong reasons behind this conclusion. We summarize a few illustrations in order to fortify the same:-

(a) Investigation commences the moment an F.I.R. is registered for a cognizable offence. An Investigating Officer, having custody of the accused cannot predict in advance the precise moment when the accused would decide to reveal the information, which could lead to discovery of an incriminating fact. Thus, if attestation of the information by independent witness is persisted upon, as a direct corollary thereto, the Investigating Officer would be required to keep the witnesses in attendance right from the moment, the accused is arrested till the information is elicited. This would lead to an absolutely absurd situation and is likely to frustrate the investigation. The very sanctity of investigation and the privilege available to the Investigating Officer to keep the investigation secluded from prying eyes would be compromised.

(b) Another possible situation may be that the accused might divulge the information under Section 27 of the Evidence Act to the Investigating Officer at a particular point of time when independent witnesses are not available. For adhering to the procedure of seeking attestation by independent witnesses, the Investigating Officer would then be required to summon independent witnesses and request the accused to repeat the information in their presence. At this point of time, the accused

may either refuse to divulge the information given earlier or may oblige the Investigating Officer with the information which would then be taken down in writing in presence of the independent attesting witnesses. However, there is a fundamental glitch in adopting this procedure, which would certainly make the information, if any received the second time around in presence of the witnesses inadmissible in evidence. Law is well settled by a catena of decisions of the Hon'ble Supreme Court including the judgment in the case of ***Aher Raja Khima Vs. The State of Saurashtra reported in AIR 1956 SC 217; (MANU/SC/0040/1955)*** that information of a fact already known to the Investigating Officer is inadmissible in evidence. Thus, in case the Investigating Officer, while making investigation from the accused in his custody is provided an information under Section 27 of the Evidence Act and soon thereafter, calls the Panchas and records the same in their presence, then he would be recording the memorandum of information already known to him. Such information would be inadmissible at the outset and thus, the entire endeavour would become nothing short of an exercise in futility.

(c) There is yet another risk involved, which could severely prejudice the accused if the information provided by the accused under Section 27 is recorded in presence of independent witnesses. The information under Section 27 of the Evidence Act often comprises of two parts; one being confessional which has to be excluded and the other which leads to the discovery of an

incriminating fact and is admissible in evidence to the extent of the discovery made in pursuance thereof. In case, independent witnesses are kept present when the information is given by the accused, the prosecution may make an endeavour to prove even the confessional part of the information as being an extra judicial confession made in presence of independent witnesses. There may even arise a situation where, the independent witness present to attest the memorandum prepared under Section 27 of the Evidence Act is a Magistrate. In such a case, the confessional part of the information under Section 27 of the Evidence Act would almost assume the character of a confession under Section 26 of the Evidence Act thereby condemning the accused to face severe consequences. There is a high probability of this situation arising in cases involving recovery of narcotics where, the Investigating Officer gives an option to the accused that he can be searched in presence of a Magistrate or a Gazetted Officer. Contemplating that option to be searched in presence of Magistrate is given and search of the accused is conducted and during the process, he is also questioned in the presence of the Magistrate. At this time, the accused may provide an information under Section 27 of the Evidence Act to the Investigating Officer which is partly confessional in nature and is taken down in writing and got witnessed by the Magistrate by adhering to the requirement of attestation. In such a situation, the accused would be faced with severe consequences because prosecution would then, by lifting the prohibition contained in Section 26 of the Evidence Act insist to prove whole of the information as

amounting to a confession made in the presence of a Magistrate. Thus, the requirement seeking attestation of the memorandum prepared under Section 27 of the Evidence Act does not have any logic or rationale behind it.

Now we proceed to consider as to whether the view taken by the Division Bench of this Court in Rameshwar and Surjeet's cases (supra) which in turn are based on the observations made by the Hon'ble Supreme Court in **Harjit Singh's Judgment** *(supra)* lay down the correct proposition of law or not by testing them on the principles of *obiter dicta, stare decisis, per-incuriam and ratio decidendi*.

In the case of ***Himachal Pradesh Administration Vs. Om Prakash reported in AIR 1972 SC 975; (MANU/SC/0118/1971)***, the Hon'ble Supreme Court held as below:-

> "9. Further having held this it nonetheless said that there was no injunction against the same set of witnesses being present at the successive enquiries if nothing could be urged against them. In our view the evidence relating to recoveries is not similar to that contemplated under Section 103 of the Criminal Procedure Code where searches are required to be made in the presence of two or more inhabitants of the locality in which the place to be searched is situate. In an investigation under Section 157 the recoveries could be proved even by the solitary evidence of the Investigating Officer if his evidence could otherwise be believed. We cannot as a matter of law or practice lay down that where recoveries have to be effected from different places on the information furnished by the accused different sets of persons should be called in to witness them. In this case P.W. 2 and P.W, 8 who worked with the deceased were

> the proper persons 'to witness the recoveries as they could identify some of the things that were missing and also they could both speak to the information and the recovery made in consequence thereof as a continuous process. At any rate P.W. 2 who is alleged to be the most interested was not present at the time of the recovery of the dagger."
>
> [Emphasis supplied]

After adverting to the scheme of Criminal Procedure Code and the Evidence Act, the Hon'ble Supreme Court held that the recoveries made in pursuance of informations recorded by the Investigating Officer during investigation cannot be equated to those effected under Section 103 of the Cr.P.C. and such recoveries made during investigation under Section 157 of the Cr.P.C. are provable even by the solitary evidence of the Investigating Officer. The above quoted portion of the judgment is *ratio decidendi* on the issue as it lays down a proposition of law.

In the case of ***State Govt. of NCT of Delhi Vs. Sunil & Anr.*** (*supra*) it was clearly laid down by a two Judges Bench of Hon'ble Supreme court that the absence of independent witnesses at the time of recording of information under Section 27 of the Evidence Act is not a ground to discard the evidence of recovery made in pursuance to such information. The Supreme Court conclusively held in the following terms that it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused, the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses:

> "19. In this context we may point out that there is no

requirement either under Section 27 of the Evidence Act or under Section 161 of the CrPC, to obtain signature of independent witnesses on the record in which statement of an accused in written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that search is made to find out a thing or document which the searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the Transport Commissioner, Andhra Pradesh, Hyderabad and Anr. v. S. Sardar Ali. Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p.254, para 8)

> "Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of Sub-section (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure [under the Motor Vehicles Act], there is no provision for preparing a list of

> the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself."

20. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth."

The Hon'ble Supreme Court, in the Constitution Bench Judgment rendered in the case of ***State of U.P. Vs. Deoman Upadhyaya reported in AIR 1960 SC 1125; (MANU/SC/0060/1960)*** was in seisin of a challenge given to validity of Section 27 of the Evidence Act in reference to Article 14 of the Constitution of India and it was observed:-

> "10. A confession made by a person not in custody is therefore admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in S.24, or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered is made provable, by S.162 of the Code of Criminal Procedure,

such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. It is manifest that the class of persons who needed protection most were those in the custody of the police and persons not in the custody of police did not need the same degree of protection. But by the combined operation of S.27 of the Evidence Act and S.162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person in sufficient. A person directly giving to a police officer by word of mouth information which may be used as

evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of s. 27 of the Indian Evidence Act : Legal Remembrancer v. Lalit Mohan Singh I.L.R. (1921) Cal.167 Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241 Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has given equal treatment to all persons similarly circumstanced, it must be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided. A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the police officer investigating the offence has not been able to get at any evidence against him giving information to the police officer without surrendering himself to the police, which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself. Cases like Deonandan Dusadh v. King Emperor I.L.R. (1928) Pat.411 Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241 Durlav Namasudra v. Emperor I.L.R. (1932) Cal. 1040 in re Mottai Thevar AIR 1952 Mad 586, In re Peria Guruswami

I.L.R. 1942 Mad. 77 Bharosa Ramdayal v. Emperor I.L.R. 1940 Nag. 679 and Jalla v. Emperor A.I.R. 1931 Lah. 278 and others to which our attention was invited are all cases in which the accused persons who made statements leading to discovery of facts were either in the actual custody of police officers or had surrendered themselves to the police at the time of, or before making the statements attributed to them, and do not illustrate the existence of a real and substantial class of persons not in custody giving information to police officers in the course of investigation leading to discovery of facts which may be used as evidence against those persons."

In the case of ***The State of Bombay Vs. Kathi Kalu Oghad & Ors. reported in AIR 1961 SC 1808; (MANU/SC/0134/1961)***, the Constitution Bench of Hon'ble Supreme Court was called upon to examine the validity of Section 27 of the Evidence Act vis-a-vis Article 20(3) of the Constitution of India. In para 36 of the judgment, the Hon'ble Supreme Court expounded as below:-

"36. The question then is : Is an accused person furnishing evidence when he is giving his specimen handwriting or impressions of his fingers, or palm or foot ? It appears to us that he is : For, these are relevant facts, within the meaning of section 9 and section 11 of the Evidence Act. Just as an accused person is furnishing evidence and by doing so, is being a witness, when he makes a statement that he did something, or saw something, so also he is giving evidence and so is being a "witness", when he produces a letter the contents of which are relevant under section 10, or is producing the plan of a house where a burglary has been committed or is giving his specimen handwriting or impressions of his finger, palm or foot. It has to be noticed however that Article 20(3) does not say that an accused person shall not be compelled to be a witness. It says that such a person shall not be compelled to be a witness against himself. The question that arises therefore is : Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or

> impressions of his fingers, palm or foot ? The answer to this must, in our opinion, be in the negative."

Thus, in both these Constitution Bench Judgments (supra), a theory was propounded that when the accused gives information under Section 27 of the Evidence Act, he is virtually acting in the capacity of a witness. Needless to say that the statements of witnesses recorded under Section 161 Cr.P.C. are not required to be signed even by the witness himself. It may be mentioned here that neither of these two Constitution Bench judgments were noticed or referred to in the case of ***Harjit Singh*** *(supra).*

Law is well settled by a catena of decisions rendered by the Hon'ble Supreme Court that where the Hon'ble Supreme Court passes a judgment laying down *ratio decidendi* on a particular issue of law, any other judgment wherein, reference to the same issue is made by way of *obiter dicta*, the latter would be having no persuasive value as compared to the judgment laying down the *ratio decidendi*. In other words, what is required to be followed is the *ratio decidendi* as opposed to *obiter dicta* when the same prevail on the very same sphere. The concept of *stare decisis* and *per-incuriam* was explained in detail by Hon'ble Supreme Court in the case of ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra & Ors. reported in AIR 2011 SC 312; (MANU/SC/1021/2010)***, observing as below :

> "149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller

> strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 36 are by two or three judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Code of Criminal Procedure Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.
>
> 150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.
>
> 151. In the instant case there is a direct judgment of the Constitution Bench of this Court in Sibbia's case (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under Section 438 Code of Criminal Procedure The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit."

As per the rules of statutory interpretation, in case a Bench headed by equal number of Judges of the Hon'ble Supreme Court delivers a judgment on a particular issue without considering the earlier judgment already existing on the very same issue having been delivered by a similar number of Judges, the subsequent judgment would be *per-incuriam*.

Since the earlier judgments rendered by Two Judge Benches of Hon'ble Supreme Court in the cases of ***Himachal Pradesh Administration Vs. Om Prakash*** and ***State, Govt. of NCT of***

Delhi Vs. Sunil & Anr. *(supra)* which dealt with the very same controversy, were not brought to the notice and considered by Hon'ble Two Judges Bench of Supreme Court in ***Harjit Singh's*** *case (supra)*, the earlier judgments have binding precedential value and are to be followed on the doctrine of *stare decisis*. Moreover, as has been held above, the observations made in ***Harjit Singh's*** case *(supra)* can at best be termed as *obiter dicta* whereas, the concept propounded in the cases of ***Om Prakash*** and ***Sunil*** *(supra)* is *ratio decidendi* on the issue and thus, the same would have binding value in preference to the observations made in ***Harjit Singh's judgment*** *(supra).* Furthermore, the ratio of the Constitution Bench Judgments rendered by the Supreme Court in the cases of ***Deoman Upadhyay*** and ***Kathi Kalu Oghad*** was also not considered in ***Harjit Singh's Judgment*** and thus, the observations made in the said judgment cannot be accepted as having binding precedential value.

- **MISUSE OF POWERS BY THE INVESTIGATING OFFICER:**

The edifice of the argument that information under Section 27 of the Evidence Act should be recorded in presence of independent witnesses is founded on the perception that the Investigating Officer might misuse his powers and forcibly extract the information from the accused in custody. The said apprehension has no basis whatsoever. Hon'ble the Supreme Court in the cases of ***Deoman Upadhyaya*** *(supra)* as well as in the case of ***State of Maharashtra Vs. Damu reported in***

(2000)6 SCC 269; (MANU/SC/0299/2000) held that admissibility of the information given by an accused in custody under Section 27 of the Evidence Act is based on the doctrine of "***confirmation by subsequent events***". The Section was given an expansive meaning in ***Damu's case*** in the following words:

> "37. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of 'confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculcator in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well-settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of Privy Council in Pullukurn Kottayya v. Emperor AIR 1947 PC 67 as the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the Section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In view of the fact that the information becomes admissible only to the extent of the part leading to the discovery of a fact, the subsequent confirmation gives a guarantee about the sanctity of such information. The facts discovered should be such which are in exclusive knowledge of the accused and none else. If the Investigating Officer, after recording information under Section 27 of the Evidence Act from an accused in his custody, recovers some incriminating article from an open place accessible to all

and sundry, the information and the discovery would loose significance. Likewise, if the fact discovered is known to the Investigating Officer in advance, then the discovery made in furtherance of the subsequent information recorded under Section 27 at the instance of the accused would be inconsequential. The only logical conclusion in these circumstances is that there is no legal requirement of seeking attestation of the information received from the accused under Section 27 of the Evidence Act by independent witnesses. Attestation if any would be required when discovery of the fact is made and memo thereof prepared.

The Hon'ble Supreme Court in the case of ***D.K.Basu Vs. State of West Bengal reported in (1997)1 SCC 416; (MANU/SC/0157/1997)***, gave numerous directions to be followed as preventive measures in all cases of arrest and or detention. The direction at Sr.No.10 of the said judgment is that the arrestee may be permitted to meet his lawyer during investigation though not throughout the investigation.

The entire endeavour of the learned counsel, who argued in favour of the proposition that witnesses should be kept present to attest the information memo prepared under Section 27 of the Evidence Act, was based on the perception that the Investigating Officer may indulge into use of force and third degree methods for extracting the confession. The directions given by the Hon'ble Supreme Court in D.K.Basu's Judgment (supra) and the consequent amendments brought around in the Cr.P.C. particularly Sections 41-A, 41-B, 41-D, 50, 50-A, 53 and 54 are

sufficient to alleviate these perceptions and apprehensions. Furthermore, the accused, by leading appropriate evidence can always challenge the sanctity of information recorded under Section 27 of the Evidence Act if such information is recorded under threat, duress or by coercion. It is essential to note that in the entire framework of Code of Criminal Procedure, which governs the process of investigation, there is no requirement of keeping witnesses present at the time of recording information of the accused under Section 27 of the Evidence Act.

In the case of ***A.R.Antulay Vs. Ramdas Sriniwas Nayak reported in AIR 1984 SC 718; (MANU/SC/0082/1984)***, the Constitution Bench of the Hon'ble Supreme Court held that in the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Criminal Procedure Code.

In other words, Criminal Procedure Code is the parent statute which provides for investigation, inquiry and trial of cases by Criminal Courts of various designations and there is no provision in the Cr.P.C. requiring attestation of the information recorded under Section 27 of the Evidence Act by independent witnesses.

- **SANCTITY OF INVESTIGATION:**

There is yet another angle of looking at the issue. The

sanctity attached to confidentiality of investigation is imperative and the same cannot be allowed to be brought into public domain because the very purpose of investigation would then be compromised. The conversation which takes place between the Investigating Officer and the accused is privileged and classified and cannot be allowed to become common place. In a recent decision in the case of ***Senior Intelligence Officer Vs. Jugal Kishore Samra reported in (2011)12 SCC 362; (MANU/SC/0731/2011)***, the Hon'ble Supreme Court considered the controversy as to whether the person, who is arrested, has a right to insist for presence of an Advocate at the stage of Police interrogation. The purpose behind seeking presence of an Advocate during investigation or requiring presence of witnesses during proceedings under Section 27 of the Evidence Act is virtually the same. Both are insisted upon so as to ensure that the Investigating Officer does not misuse his position; by using third degree methods, force, threat, coercion or duress upon the accused during interrogation. After examining the entire controversy, the Hon'ble Supreme Court in the above referred case went on to hold that the judgment rendered by the Hon'ble Supreme Court in the case of ***Nandini Satpathy Vs. P.L.Dani reported in (1978)2 SCC 424; (MANU/SC/0139/1978)*** ran contrary to the ratio of two earlier Constitution Bench decisions in the cases of ***Illias Vs. Collector of Customs, Madras reported in 1969 (2) SCR 613; (MANU/SC/0297/1968) and Romesh Chandra Mehta Vs. State of West Bengal reported in 1969(2) SCR 461; (MANU/SC/0282/1968)***. The relevant

quotes made by the Hon'ble Supreme Court in the above judgment are extracted below:-

> "In *Poolpandi and Ors. v. Superintendent, Central Excise and Ors.*: (1992) 3 SCC 259, the question before a three judge bench of this Court was directly whether a person called for interrogation is entitled to the presence of his lawyer when he is questioned during the investigation under the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. On behalf of the persons summoned for interrogation, strong reliance was placed on Nandini Satpathy. The Court rejected the submission tersely observing in paragraph of 4 of the judgment as follows:
>
> > "4. Both Mr. Salve and Mr. Lalit strongly relied on the observations in *Nandini Satpathy v. P.L. Dani*: (1978) 2 SCC 424. We are afraid, in view of two judgments of the Constitution Bench of this Court in *Ramesh Chandra Mehta v. State of W.B.*: (1969) 2 SCR 461, and *Illias v. Collector of Customs, Madras*: (1969) 2 SCR 613, the stand of the Appellant cannot be accepted. The learned Counsel urged that since Nandini Satpathy case was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument."
>
> 28. …….. Taking a cue, therefore, from the direction made in DK Basu and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the Respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the Respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the Respondent to have consultations with him in course of the interrogation."

The ratio of the above judgment was based on the Three Judges Bench Judgment rendered by the Supreme Court in the

case of ***Poolpandi Vs. Supdt., Central Excise reported in (1992)3 SCC 259; (MANU/SC/0339/1992),*** wherein it was held that the person called for interrogation is not entitled to insist for presence of a lawyer during interrogation.

As observed above, there is a strong sanction for following such a procedure because presence of a third person during investigation would directly infringe in the privilege available to the Investigating Officer to investigate the case without any external interference and would adversely affect the confidentiality attached to investigation. The steps taken by the Investigating Officer during investigation are classified and are recorded in the case diary which is a privileged document. The Hon'ble Supreme Court has time and again held that no-one can have access to the case diary except the Court or the Investigating Officer. Reference may be had to judgments rendered by Hon'ble Supreme Court in the cases of ***Sidharth Vs. State of Bihar reported in AIR 2005 SC 4352; (MANU/SC/0949/2005) and State of NCT of Delhi Vs. Ravi Kant Sharma & Ors. reported in AIR 2007 SC 1135; (MANU/SC/7098/2007)***. Thus, allowing presence of a witness during confidential investigation would directly run contrary to this proposition of law.

As an upshot of the discussion made hereinabove, we are of the firm view that the ratio of the Judgments rendered by Division Benches of this Court in the cases of ***Rameshwar and Surjeet*** *(supra)* propounding that the information given by the accused to

the Investigating Officer under Section 27 of the Evidence Act should be recorded in presence of and attested by independent witnesses do not lay down the correct proposition of law. Furthermore, in view of decision of Three Judge Bench of Supreme Court in the case of ***Poolpandi*** *(supra)* followed in the case of ***Sr.Intelligence Officer, Directorate of Revenue Intelligence Vs. Jugal Kishore Samra*** *(supra)*, the presence of a witness at the time of investigation is absolutely impermissible as it would breach the confidentiality of investigation. For the sake of repetition, it may be noted here that the earlier decisions of a three Judges Bench of the Hon'ble Supreme Court in the case of ***Poolpandi*** *(supra)* and the Two Judges Bench decisions in the cases of ***Himachal Pradesh Administration Vs. Om Prakash*** *(supra)* and ***State, Govt. of NCT of Delhi Vs. Sunil & Anr.*** *(supra)* were also not noticed and considered in ***Harjit Singh's*** case.

In view of the discussion made hereinabove, we answer the reference in the following terms:

> ***"In the entire scheme of Code of Criminal Procedure and the Evidence Act, there is no requirement that the information given by an accused to the Investigating Officer under Section 27 of the Evidence Act leading to the discovery of a relevant fact should bear attestation by independent witnesses and the Division Bench Judgments in the cases of***

Rameshwar and Surjeet (supra) do not lay down correct proposition of law on this aspect."

The Application for grant of Leave to Appeal be now placed before the concerned Division Bench for consideration.

(PANKAJ BHANDARI),J. (SANDEEP MEHTA),J. (GOPAL KRISHAN VYAS),J.

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Sr.P.A