Shanti and Another Vs The State

Court: Orissa High Court

Date of Decision: May 4, 1977

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 164, 164(3), 281, 364, 533
Evidence Act, 1872 â€" Section 29, 3, 80

Citation: AIR 1978 Ori 19 : (1977) CriLJ 2053

Hon'ble Judges: R.N. Misra, J; P.K. Mohanti, J; B.K. Ray, J

Bench: Full Bench

Advocate: B.S. Patnaik, Amicus Curiae, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

R.N. Misra, J.
The Additional Sessions Judge of Balasore by Judgment dated 7-11-1974 in Sessions Trial No. 12/ 42 of 1974 convicted

Shanti alias Satyabharna Devi u/s 302 of the Indian Penal Code and Tauli Jena u/s 302/120-B of the Indian Penal Code and sentenced ""each of

them to undergo rigorous imprisonment for life. Criminal Appeal No. 212 of 1974 is by Shanti while the other appeal is by Tauli Jena against the

common judgment of conviction and both these appeals were sent from jail

2. When these two appeals were placed before a Division Bench for hearing, notice of enhancement of sentence from rigorous imprisonment for

life to one of death was issued. After the appellants were served with such notice, the matter was placed for hearing and by order dated 2-8-1976,

a Division Bench consisting of two of us (R.N. Misra and Mohanti, JJ.) directed the appeals to be placed before a Full Bench for hearing in

consideration of the fact that certain Bench decisions of this Court took inconsistent, view; in regard to admissibility of confessional statements

which did not satisfy the requirement of Section 164(3) of the Code of Criminal Procedure. That is how these appeals have come for hearing

before us.

3. U.D. Case No. 8 dated 3-4-1971 was registered by the Officer-in-charge of Bonth Police station on the basis of the death of Lakshmi Devi

and Prafulla Kar who were wife and son respectively of one Narayan Kar. on the report of the Medical Officer of the Bonth Government

Dispensary (P. W, 10). During investigation of the said U. D. case, the Investigating Officer came to learn that at about 9 a.m. on 3-4-1971 while

Lakshmi was ill and was being nursed by appellant Shanti, the deceased was given some liquid food in which poison was suspected to have been

added. He further gathered that on the previous day i. e. 2-4-1971, the appellant Tauli Jena had made over some liquid in a bottle and had

instructed Shanti to administer the same mixed with curd to Lakshmi. The Officer-in-charge, therefore, drew up the First In-formation Report on

5-4-1971 and took up investigation,

4. Prosecution case briefly stated is that on 2-4-1971 in the evening Tauli Jena handed over a small bottle containing deadly poison to Shanti on

receiving payment of Rs. 30/-. Tauli instructed Shanti that the contents of the bottle be mixed with curd and the same be administered to Lakshmi

by way of Sarbat Tauli claimed payment of Rs. 100/- in case Lakshmi died by this process. Lakshmi was ill and was being treated by members of

the family Next day at about 9 a.m. when Lakshmi asked for water to drink, Shanti offered Sarbat and prepared the same by adding the contents

of the bottle to the Sarbat made out of curd. While Lakshmi was drinking, her young daughter Geeta insisted upon being given Sarbat. Laxshmi''s

mother (P. W. 9) thereupon gave the glass to Geeta and she took a few sips Shanti then took the glass and put it on a wooden frame near about.

Shanti''s young son Prafulla who was then running about came and drank the rest of the contents of the glass, These persons were rushed for

medical help but soon thereafter, Lakshmi, Geeta and Prafulla died. On chemical examination, poison was detected in the liquid substance in the

bottle as also in the viscera of Geeta. After investigation, accused persons were sent up for trial

5. Appellant Tauli denied all the allegations of the prosecution and pleaded that he had been falsely implicated on account of some dispute between

him and the Officer-in-charge of the Police Station in regard to price of fish taken by the Police Officer from him. Shanti denied her complicity in

the alleged offence and maintained that she was not in her proper senses when a confessional statement is said to have been recorded by the

Magistrate.

6. To prove its case, prosecution examined as many as 17 witnesses of whom some happen to be relations. To support the plea of alibi of Tauli,

D. W. 1 was examined. Several documents were exhibited in support of the prosecution case. The learned Trial Judge accepted the prosecution

story and came to hold that the appellants were guilty of the offences for which they were charged and convicted them thereunder and imposed

sentences as indicated already,

7. Counsel for appellants contends that (i) The prosecution evidence in material particulars was inconsistent and contradictory.

Endrine was found in M.O.V. while the viscera showed folidol P. W. 3 stated that P. W. 2 and herself were the only two witnesses to Shanti

giving the Sarbat to Lakshmi while P. Ws. 1, 4 and 9 claim to have also seen the act of making over Of Sarbat. According to P. W. 2, the bottle

of poison was made over inside the house of P. W. 1 while according to P W. 7, the place of making over was the front verandah of P. W. 1.

(ii) In the absence of a motive, the entire prosecution case became weak and so improbable that no court should accept it.

The prosecution case is that Lakshmi and Shanti were pulling on well. In fact, in the confessional statement Shanti had stated that Lakshmi out of

her income was maintaining her and the family When the relationship was so cordial, it is difficult to accept the prosecution case that Shanti must

have poisoned Lakshmi to death.

(iii) Adverse inference should have been drawn against the prosecution case for non-examination of the doctor, who conducted the post-mortem

and the investigating Officer who substantially conducted the investigation. Similarly, adverse inference should have been drawn for not sending

glass tumbler (M.O. VI) for chemical examination.

No explanation has also been furnished as to why the visceras of Lakshmi and Prafulla have not been sent for chemical examination. Though

vomiting material had been preserved according to P. W. 10, the same does not seem to have been subjected to examination.

(iv) The prosecution case suffers from a high degree of improbability, inasmuch as Tauli would not have made over the poisonous substance

contained in the bottle during the day particularly in presence of some witnesses and Shanti would not have put the glass with the poisonous Sarbat

that Lakshmi declined to drink any more on a wooden frame near about. In ordinary course of events, there would be anxiety to empty the glass

so that there may not be a trace of poison left in the glass.

When the two children as also Lakshmi showed abnormal symptoms, P. W. 2 in normal course was expected to disclose that she had seen a

bottle of poison being made over.

(v) The prosecution evidence does not lend assurance to the case and the confessional statement of Shanti suffered from incurable defects and

should, therefore, have been brushed aside completely.

8. We shall now proceed to examine the evidence in the light of the several factual contentions raised before us at the hearing.

Narayan was first married to Lakshmi, but they started living separately for several years and Narayan then married Shanti Later, a rapproachment

was brought about and Narayan and Lakshmi started living together and Geeta, the daughter was born to them. Narayan got a son Prafulla

through Shanti. According to the prosecution, the return of Lakshmi to Narayan was an obnoxious feature so far as Shanti was concerned. Tauli

was prosecuted for a dacoity in the house of Lakshmi''s father and Lakshmi appears to have deposed against Tauli in that case. Tauli was anxious

to take revenge and when the opportunity came, Tauli prevailed upon Shanti to take away the life of Lakshmi. Restoration of good relationship

between P. W. 1 and Lakshmi in ordinary course of events must have aroused a sense of dissatisfaction and anger in Shanti and Tauli appears to

have exploited the situation. This aspect of the story has been accepted by the trial court and we do not see any justification to discard it. The

defence argument that there was no motive for the occurrence, therefore, does not seem to be wholly true.

The event was of 1971 and the trial took place in 1974. On account of the delay of about 3 years between the occurrence and the trial, some

amount of discrepancy is bound to creep in. Therefore, it would not be appropriate to test the veracity of the evidence by giving undue emphasis

on minor discrepancies. Of the prosecution witnesses examined, P. Ws. 1, 2 and 9 are close relations of appellant Shanti. P. W. 1 is her husband

and P. W. 2 is a daughter of P. W. 1 and the appellant Shanti. P.W. 9 is P. W. 1''s mother-in law being the mother of Lakshmi. P. W. 5 is the wife

of P. W. 8 and P. W. 8 is an agnate of P. W. 1. P. Ws. 3 and 4 are two ladies from the neighbourhood. Admittedly appellant Shanti and Narayan

were pulling on well. There is, therefore, absolutely no reason as to why Narayan would say anything implicating Shanti in such a heinous crime. It

is also not expected of P. W. 2 who is a daughter to implicate her mother in the offence. It is human experience that close relations have an anxiety

to see that the true culprit is punished. Therefore, it is unnatural that P. W. 2 would falsely implicate Shanti as the author of the murders. It is true

that P. W. 2 initially denied that Shanti was her mother but later in the deposition the relationship has been accepted, P. W. 9 is an elderly lady and

is in the position of Shanti''s mother. There would also be no reason as to why Shanti would be implicated by her as offering poisonous drink to

Lakshmi particularly when the two co-wives were apparently pulling on well. P. W. 2 testified to the fact that Tauli made over the small bottle with

some white substance in it to Shanti There is no justification at all as to why P. W. 2 would perjure herself against her mother. P. W. 7 who is the

only other witness to say about the making over of the bottle has corroborated P. W. 2 in material particulars. The learned Trial Judge has

accepted the evidence of these two witnesses and we do not see any justification to take a different view. To counteract the defence stand that P.

W. 1 belonged to the higher classes and as Tauli was a member of the Scheduled Castes, it was not expected that Tauli would walk freely into the

house of P. W. 1, the prosecution has examined P. Ws. 4, 5 and 6 and these witnesses support the prosecution story that Tauli was very often

seen coming to Narayan''s house. There is thus clear evidence that Tauli had made over a bottle containing white substance on the day previous to

the occurrence to Shanti. P. W. 2 who overheard the discussion between Tauli and Shanti has stated that Shanti had made over some money and

it had been discussed that after Lakshmi died, more money would become payable to him.

9. Prosecution has relied on a judicial confession by Shanti, the co-accused under Ext. 16. The admissibility of this confessional statement has been

disputed on the footing that there has been no compliance of the requirements of Section 164(3) of the Code of Criminal Procedure and as such

the confessional statement was not available to provide the prop for conviction. Before we pointedly deal with this contention, it is appropriate that

the admissibility of the confession otherwise may be first examined. For convenience, we propose to place below a free translation of the

confessional statement in English :--

Tauli Jena, Pana by caste, is an enemy of my co-wife. He had committed dacoity in her father''s house and my co-wife had prosecuted him. Tauli

had done the dacoity by prevailing upon my husband. My co-wife did not return from her father''s house. I have come after my marriage about 13

years back. In the meantime there was a settlement and my husband was taken to my co-wife. My co-wife gave birth to a daughter. My mother-in

law died. My husband was staying with me. Gradually my co-wife started coming to our house. She also brought her daughter and stayed with me,

Tauli Jena told me on five or six occasions that my co-wife has brought home a ball of fire to the house--she (Lakshmi) would eat me up--trouble

me and my child I cannot remain unless I destroyed her. My co-wife used to show affection for me and my children. She was giving me Rs. 100/-

out of her salary. Tauli Jena told me that he would give me something which I should give to co-wife to eat, but I declined.

Then my co-wife fell ill. Gout appeared. On Friday when my husband was not at home she had severe gout. Tauli Jena came and looked at my

co-wife. Then I was giving her water. Tauil returned to his house and returned with a bottle containing coconut oil like white liquid substance, made

over the same to me and said that I should give it to her along with curd or milk so that she would die. I had no escape if she would not die. If she

died, my life would be happy and he would avenge his anger.

The bottle was made over by 6 P. M. on Friday and he had instructed me to administer it that evening. I did not give it and kept it in the thatch.

Next morning Tauli enquired and I told him that I had not given it to her. He told me that if I administered at that stage when she was ill, neither he

nor I could be found out. He told me that I should give a small quantity and after her death, the contents should be thrown.

I purchased curd, prepared Sarbat and added some quantity of the contents from the bottle and made it over to my co-wife. She drank and when

her daughter came there, she had two sips. My co-wife told me that I should keep the remaining portion so that she would drink later. I placed the

glass in a concealed position. My son was playing on the danda. When I was doing household work, he came and drank from the glass. I snatched

away the glass from his hands but by then there was nothing left in it. I cleaned the glass and kept it on the amara patta. I lifted my son on to my

waist and went to the river for bathing. When I returned, I found my husband was taking the sagu water from the oven. When my co-wife started

drinking sagu water, my son started crying for it, I asked that he may be separately given as he was crying for it. My son toppled down while

engaged in drinking. I lifted him and started nursing but I found that his body became stiff. I asked his father to see what had happened to our son.

He carried him to the hospital. My son passed away there. My head reeled. I heard that my co-wife''s daughter was also getting ill. 1 had

accompanied my son to the hospital. When I heard about the daughter, I returned home bewildered. By the time I arrived, my co-wife and her

daughter had been removed to Bonta. I was weeping at home when the Police Officer from the Thana brought me away."" The confession is clearly

inculpatory and as such can be used against the co-accused.

Appellants'' counsel has contended that P. W. 16. the Magistrate who recorded the confession (Ext. 16) did not inform the confessing accused

that she was not bound to make a confession and in the absence of this caution or warning, the confession loses its evidentiary value. Section

164(3) of the Code of Criminal Procedure provides :--

A 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 no Magistrate shall record any such confession unless, upon questioning the person making it,

he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such

record to the following effect.

I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence

against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person

making it, and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,

Magistrate".

P. W. 16 has stated in the trial court:--

On 8-4-1971, she was again produced before me. So I again cautioned her and explained to her that she is not bound to confess anything and

that I am a Magistrate of the 1st class and if she confesses before me the same may be used against her"".

In view of the certificate in Ext. 16 and the evidence of P. W. 16, learned Additional Government Advocate has contended that the confession is

admissible while appellants'' counsel has maintained that the confession is inadmissible as there is no specific mention of the administration of the

caution at the commencement of the recording of confession. Counsel for the appellants has further contended that in the absence of mention of the

various questions that might have been put to the confessor by the learned Magistrate in order to satisfy himself that the confession is voluntary, the

confessional statement loses its value and no definite reliance can be placed on it for conviction.

Gajendragadkar, J. as the learned Judge then was, spoke for the Court thus in Sarwan Singh Vs. The State of Punjab, (at pp 643, 644 of AIR

SC):--

The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not

caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian

Evidence Act.

There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer it is of utmost importance that

the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such

freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a

confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in

any given case."" The Court again said tat p. 643 of AIR SC):--

.....It is hardly necessary to emphasize that the act of recording confessions u/s 164, Criminal P. C.. is a very solemn act and, in discharging his

duties under the said section, the Magistrate must take care to see that the requirements of Sub-section (3) of Section 164 are fully satisfied.

It would of course be necessary in every case to put the questions prescribed by the High Court circulars but the questions intended to be put

under Sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should

be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in

substance voluntary.

A Division Bench of this Court in the case of Gurubaru Praja v. The King AIR 1949 Ori 67 : 51 Cri LJ 72, indicated the requirements of Section

164 of the Code of Criminal Procedure in the following way :--

.....Notwithstanding that there has been a long series of decisions of which the number is a legion, the Magistrates still proceed in their own way

of inadvertence and perfunctoriness in recording the confessional statements. They consider themselves not to have to do any judicial work as it

were in performing this part of their duties. They sometimes act in such a way that they leave an impression as if they think themselves subservient

to the investigating police though I am quite sure that they are not so. It has always been said on high judicial authority that that justice should be

done is hardly more significant than that it should appear that justice is being done. In this view of the matter I shall summarise the principles of law

in the following paragraphs :

(i) Full and adequate compliance with the provisions of Section 164, Criminal P. C., is imperative and its non-compliance goes to the root of the

Magistrate"s jurisdiction to record and reduces the statement recorded by him to a nullity.

(ii) Such compliance must not be undertaken in the spirit of being done as a matter of form but as a matter of essence.

(iii) Every enquiry must be made from the accused as to the custody from which he was produced and as to the custody to which he was to be

consigned and the treatment that he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous

influence proceeding from a source interested in the prosecution still lurking in the accused"s mind; in case the Magistrate discovers on such

enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement

and should assure himself that during this time of reflection, he is completely out of the police influence.

(iv) Besides the warning specifically provided for in the first part of Sub-section (3) of Section 164, namely, that the accused is not bound to make

a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that was to

follow, he should also, in plain terms, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as

the police or the like in case he declines to make a statement.

(v) He should particularly be asked the reason why he is going to make a statement which would surely go against his self-interest in course of the

trial and he should, further be told in order to remove any lurking suspicion in his mind that even if he contrives subsequently to retract the

confession, it will be evidence against him still.

(vi) The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must

appreciate his function in that behalf as one of a judicial officer and that he must apply his judicial mind to the task of ascertaining that the statement

he is going to make is of his own accord and not on account of any influence on him. That is what is the meaning of voluntary statement within the

provision of the section.

(vii) Lastly, he should also consider it expedient that satisfaction of his conscience as to the voluntary character of the statement is not the only act

to be achieved by him but he should leave such materials on record in proof of compliance with the imperative requirements of the section as

would satisfy the Court that sits on judgment in the case that the confessional statement was made voluntarily. In short, the provision of the statute

must be complied with both in letter and spirit.

The same question arose for consideration before another Division Bench of this Court in the case of Suka Misra and Others Vs. The State, .

After referring to the guideline indicated by the learned Chief Justice in Gurubaru Praja''s case AIR 1949 Ori 67 : 51 Cri LJ 72 as obiter, the Court

observed : ''".....The precautions that a Magistrate acting u/s 164, Criminal P. C., has to take by warning the accused before recording his

confession are prescribed in the Code itself in Section 164(3). A mere failure to record all the questions he puts to the accused does not

necessarily entail the rejection of the confession as inadmissible. For, Section 533 of the Code provides for evidence being taken that the statement

was duly made. Any further precautions prescribed by judicial decisions can have no statutory authority and are intended only to serve as rutes for

the guidance of the ''recording Magistrate. In matters of procedure, it is essential that the rules must be certain rather than wise, flexible rather than

complete. Whether a confession has been properly recorded or not must, therefore, be left to be decided by the Judge before whom it is tendered

as evidence. Whether it should be accepted or not will depend upon the wisdom and understanding of the Trial Judge who knows the essentials of

a fair trial. In the web of human affairs, it will be a futile task to attempt to reduce those conditions to a mathematical formula.....".

Within a few months after Suka Misra''s decision (supra), the self-same question was examined by a Full Bench in the case of Bala Majhi Vs. The

State of Orissa, . The learned Chief Justice and each of the two other Judges constituting the Full Bench wrote separate judgments. Ray, C. J.,

observed (at p. 170 of AIR Orissa): ".....A free and voluntary confession deserves the highest credit, because it is presumed to flow from the

strongest sense of guilt. It is, therefore, that a confession forced from the mind by flattery of hope, or torture of fear comes in so questionable

shape, when it is to be considered as an evidence of guilt, that no credit ought to be given to it; and, therefore, it is, rejected.....

Considering the scope and effect of Section 533 of the Code of Criminal Procedure, the learned Chief Justice further observed (at p. 172 of AIR

Orissa):

.....That section furnishes an exception to Section 91 (Evidence Act) in allowing oral evidence to prove that the accused person duly made the

statement recorded. The words ''duly made'' correlate to ''duly taken'' in the letter part of Section 80, Evidence Act. A confession is presumed u/s

80 to have been duly taken when it appears from the document produced in proof that it was taken in accordance with law. The statement

therefore is said to be duly made or duly taken provided the state of things insisted upon in Section 164 as conditions precedent and subsequent to

its recording was brought into existence; or, in other words, the fit state of the accused''s mind was either produced or assured by the questioning.

The oral evidence that is permissible in Section 533 is exclusively confined to the proof thereof.....

Narasimham, J., as the learned Judge then was, referring to the tests indicated in Gurubaru Praja''s case AIR 1949 Ori 67 : 51 Cri LJ 72 observed

(at pp. 174, 175 of AIR 1951 Orissa): ".....there can be no doubt that the requirements of Gurubaru Praja v. The King. ILR (1949) 1 Cut 207 :

(AIR 1949 Ori 67 : 51 Cri LJ 72) are not intended to be mandatory statutory requirements the non-observance of which would by itself without

more vitiate the admissibility of a confession. The said requirements are wholesome and valuable principles to be observed by a Magistrate

recording a confession u/s 164, Cr.P.C. and a trial court which is called upon to decide whether the confession has been voluntarily made in order

that it may be admissible may consider the omission to put any of the questions indicated in that decision as relevant either on the admissibility of

the confession or the weight to be attached to it. Moreover, the model questions suggested in that decision are only illustrative and by no means

exhaustive and it is always open to a Magistrate to put such further questions as the circumstances of each case may require so as to satisfy himself

about the voluntariness of the confession.

The learned Judge again stated AIR 1951 Ori 175:

...Ordinarily, there may not be any substantial questioning so as the strict confessional portion is concerned and therefore if the statutory obligation

u/s 364 to record every question and answer is to apply to the recording of a confession, it must apply mainly to the preliminary questioning. I am

therefore of the opinion that the Magistrate recording a confession is bound to record every question put by him to the accused and every answer

given by the accused to the same in order to satisfy himself that the confession to be made is voluntary.

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It would therefore follow from this section (533 Cr. P. C.) that if the questions have been put and answered but no record of it has been made,

evidence can be given both of the factum of the questions and answers and of the contents of the same. If the substance of the actual questions and

answers can be supplied by such evidence, that cures the defect completely. As has been repeatedly pointed out in several decisions, Section 533,

Cr. P. C. can cure errors of form and not of substance.

Jagannadhadas, J, as the learned Judge then was, observed Chamra Meher and Another Vs. State of Orissa, :

It appears to me therefore with greatest respect that to approach the subject of confessions and particularly of judicial confessions, as though

every record or evidence of confession is to be treated as ''prima facie'' suspect and as being liable to be thrown out as inadmissible in the absence

of evidence that the recording Magistrate had clear and positive proof before him of its voluntary character, would be to contravene the provisions

of the Statute in this behalf which are delicately balanced and which provide for a self-proving and admissible record of a judicial confession if duly

taken. It would also equally be contrary to the express provisions of the Statute to allow a judicial confession to go in against the accused without

substantial and adequate compliance with the provisions of Section 164 or to treat such substantial non-compliance as one affecting merely the

weight of the confession or as liable to be cured u/s 533, Cr. P. C. in all cases. As has been laid down by so eminent a Judge as Sir Barnes

Peacock as early as in ''Queen v. Nabadwip Chandra'' (1868) 1 B L.R.O. 15 : 15 W.R. Cri. 71 .

The object of the Criminal law is to punish the guilty for the purpose of deterring them and others from committing offences. The object of the law

of procedure, including the Law of Evidence, is or ought to be that the innocent shall be protected and the guilty punished.''

Referring to the tests indicated in paragraph 6 of the judgment by the learned Chief Justice, Jagannadhadas, J. observed:

.....I wish, therefore, to say nothing which will in any way weaken the application of the safeguards provided by the Legislature in Section 164,

Cr. P. C. and thereby load against an accused person ill-scrutinised confessions, irresponsibly taken, nor say anything which will unduly hamper the

functions of the recording Magistrate by insisting on his having before him what virtually amounts to preliminary and positive proof of voluntariness,

before proceeding to recording a confession which may, well-nigh, be impossible in the situation in which he would then be placed, and thereby

bring about likelihood of the initial exclusion of almost all judicial confessions to the detriment of the administration of criminal justice. I feel

therefore bound to add that, with great respect, I am not in agreement with my Lord about the proposition enunciated in para 6 of his judgment or

with his approach to the question based on English Law, but I am not to be supposed as being in total disagreement with my Lord"s exposition of

the subject in general. While I acknowledge, with respect, the learning thereof, I must own to a feeling of doubt whether it will help or hamper the

subordinate magistracy for which it is intended.

The question again came to be examined by a Division Bench in the case of Paramhansa Jadab and Another Vs. The State, . Narasimham, C. J.,

spoke for the Court thus (at p. 149 of AIR Orissa):

.....The confession was attacked on two grounds. Firstly, it was not voluntarily made and secondly, it was not true. So far as voluntariness is

concerned, the main contention of Mrs. Padhi for this appellant is that the record of confession (Exhibit 12) does not show that the Magistrate

(P.W. 21) told this appellant that he was a Magistrate. But the record clearly shows that the Magistrate told the appellant that he was not bound to

make a confession and that if he confessed that confession would be used against him. But the Magistrate has given evidence in Court and stated

that he did tell the appellant that he was a Magistrate and he also asked him as to why he was making a confession to which the appellant replied

that as he had done something wrong, he was going to confess. This oral evidence is admissible u/s 533 of the Criminal Procedure Code Bala

Majhi Vs. The State of Orissa, ...

The question again came for consideration before a Division Bench of this Court in the case of Arakhit v. State ILR (1970) Cut 649. It was

contended that the Magistrate did not give the imperative warning to both the confessing accused that if they make any confessions that might be

used as evidence against them. The Court observed:

.....We find that admittedly no such warning to that effect was given to the accused persons by P.W. 27, the Magistrate, while he recorded the

aforesaid statements. He himself admitted in his cross-examination as follows :

''I have not put any question as to why each of the accused wanted to make confession. On the 2nd day I did not give any time for reflection to the

accused Dhananjoy. Specifically I have not explained to the accused that if they do make confession it will be used as evidence against them, but I

have explained that it may be used against them.'' .....In the instant case before us, we do not find anything from the re-corded confessions, Exts. 9

and 9/1, that necessary warning and/or caution as prescribed u/s 164(3), Criminal Procedure Code, were specifically given to the accused while

recording their confessions. There is of course the printed certificate to that effect in each of the confessional statements Exts 9 and 9/1, but the

said certificate in Ext. 9 has not been signed by the Magistrate, The Magistrate in examination-in-chief stated that he explained to accused Loknath

that he is not bound to confess and if he docs so it will go against him. He does not even say the same thing with reference to the confession of

accused Dhananjoy. Such printed certificates and evidence in Court would not be of any avail in the absence of any specific record of the actual

explanation, warnings and/or the caution given to the accused in strict compliance with the mandatory provision of Section 164(3) ILR (1951) Cut

65 : 1952 Cri LJ 1743 (FB). Moreover, the above statement of P.W. 27 in examination-in-chief read along with all that he stated in cross-

examination as quoted above, and all these considered in the light of the dictum laid down by the Privy Council, the Supreme Court and in the

above Full Bench decision of our Court, we have to come to an irresistible finding that the Magistrate, in his solemn duty in recording a confession,

has failed to observe the imperative requirements and the strict direction of law on the subject.

A Bench of this Court in the case of Naidu Budhia and Others Vs. State of Orissa, , addressed itself to the self-same question again. Mohanti, J.

speaking for the Division Bench observed:

The confessional statement is attacked on the grounds that it was recorded without allowing any time for reflection and that the Magistrate did not

explain to the confessant that he was not bound to make a confession and that any confession made by him would be used as evidence against him.

There is no universal mandatory rule of law that a confession recorded without allowing time for reflection must be declared as inadmissible. The

question has to be decided, on the facts of each case. The observations of the Supreme Court in the case of Sarwan Singh Vs. The State of

Punjab, that in ordinary circumstances an interval of twenty four hours may be regarded as reasonable time for reflection is not to be taken as an

absolute rule and as laying down that, whatever the circumstances, a confession recorded without allowing time for reflection is to be rejected as a

confession that is not voluntary. Section 164, Criminal Procedure Code does not lay down any rule for giving time for reflection before recording a

confession. By Rule 14 of Chapter III, Part I of the High Court''s General Rules and Circular Orders (Criminal) Volume I this Court also does not

specify as to what minimum time should be given to the accused for reflection. All that it says is,

''whenever possible he (accused) should be allowed a few hours for reflection, free from the influence of the police, before his statement is

recorded.''

This rule has been framed for the guidance of the subordinate criminal Courts. But failure to comply with the same will not ipso facto render the

confession inadmissible if the Magistrate has complied with the requirements of Section 164, Criminal Procedure Code.

Section 164(3), Criminal Procedure Code requires that the Magistrate before recording the confession should explain to the accused that he is not

bound to make a confession and that if he does so the same will be used against him as evidence. The Magistrate (P.W. 15) has omitted to comply

with this requirement. In his evidence he admitted that he did not explain to the accused that he was not bound to confess. Failure to comply with

this rudimentary requirement of law takes away much of the value of the confessional statement. There is nothing to show that the accused knew

that he was not bound to make a confession and that if he did so, it would be used as evidence against him. In the circumstances, we hold that the

confession is not one upon which a Court can properly act.

(underlining is ours)

The decisions of this Court in Arakhit''s case ILR (1970) Cut 649 and Naidu Budhia and Others Vs. State of Orissa, were reached on the peculiar

facts thereof and no emphasis need be laid on them.

The same question again came up before another Division Bench consisting of two of us (B.K. Ray and Mohanti. JJ.) in the case of State of Orissa

v. Jayadhar ILR (1975) Cut 1557. B. K. Ray, J. stated:

.....Ext. 6 discloses that the Magistrate (P.W. 4) has given the required certificate as contemplated in Sub-section (3) of Section 164, Criminal

Procedure Code (old). But from the questions and answers recorded in Ext. 6 it does not appear that the Magistrate cautioned the respondent that

he was not bound to make any confession and that if he did make so, the said confession would be used as evidence against him. A point,

therefore, has been raised on behalf of the respondent that in the absence of anything to show from Ext. 6 that questions were put to the

respondent cautioning him that he was not bound to make a confession and that if he made so, such confession might be used as evidence against

him and answers were elicited from the respondent, it could not be said that the first part of Sub-section (3) of Section 164, Criminal Procedure

Code (old), has been complied with in spite of the fact that the Magistrate has given the required certificate at the foot of the record. The language

of Sub-section (3) of Section 164, Criminal Procedure Code (old) does not enjoin upon the Magistrate recording a confession to put questions to

the person confessing to show that he cautioned the person confessing; that he was not bound to make any confession and that if he made sp, it

would be used as evidence against him, nor does the language of the said sub-section show that the Magistrate has to record the answers to such

questions. It only requires the Magistrate to explain the position to the person confessing. Therefore, if it appears from the certificate given by the

Magistrate at the foot of the record that he did explain to the person confessing that he was not bound to make a confession and that if he made a

confession it would be used as evidence against him, the requirements of law so far as the first part of Sub-section (3) is concerned are fulfilled.

Even assuming that it is the bounden duty of the Magistrate before recording a confession to put questions to the person confessing and to elicit

answers from him to show that he (Magistrate) cautioned the person confessing that he was not bound to make any confession and that if he made

a confession it would be used as evidence against him, omission to put such questions and to elicit answers to them would not be fatal If the

Magistrate recording the confession deposes that he explained the position to the person confessing before he recorded the confession and was

satisfied that the person confessing made the confession after fully understanding the position, because the defect, if any, is curable u/s 533,

Criminal Procedure Code (old). In the case before us, P.W. 4 has clearly stated that he explained to the respondent before recording his

confession that he was not bound to confess and if he did so, the confession might be used as evidence against him. The position of law in this

respect has been clearly laid down in the decision reported in ILR (1949) Cut 207 : AIR 1949 Ori 67 (Gurubaru Praja v. The King).....

The learned Judge referred to a decision of the Travancore Cochin High Court in the case of Mathai Mathew Vs. State, which in its own turn had

relied upon the ratio of a Full Bench decision of the Bombay High Court in the case of Tukaram v. Emperor. AIR 1933 Bom 145 : 34 Cri LJ 555

(FB) and continued to say:--

In our view, therefore, the contention of the learned Counsel for respondent that P. W. 4 not having put questions to the respondent cautioning

him that he was not bound to make a confession and that if he did so it would be used as evidence against him and not having elicited answers from

the respondent to such questions has not complied with the requirements of law is not tenable in the face of the certificate he has given at the foot

of Ext. 6 and the evidence given by him in Court. The next contention of the learned counsel for respondent is that the questions put to the

respondent and the answers elicited from him as appears from Ext. 6 do not show that P. W. 4 disclosed his identity to the respondent before

recording the confession. Law is well settled that while questioning the person confessing and eliciting answers from him to the same, for the

purpose of being satisfied that the confession to be made is voluntary and is free from any threat or inducement, the Magistrate recording the

confession must disclose his identity to the person concerned because unless such identity is disclosed the person confessing may not feel secured.

In the decision reported in Sanatan Badchat Vs. The State, it has been clearly laid down that a confession that was recorded by an officer without

disclosing his identity to the accused cannot be said to comply with the strict formalities required by Section 164 and on that ground alone it should

be ruled out as inadmissible. In the decision reported in Paramhansa Jadab and Another Vs. The State, it has been held that where the record of

the confession of an accused before a Magistrate does not show that the Magistrate told the accused that he was the Magistrate does not lead to

the inference that the confession was not voluntary, if the Magistrate, deposes that he did tell the accused that he was a Magistrate and also asked

him as to why he was making a confession to which the accused replied that as he had done something wrong he was going to confess. The oral

evidence to this effect of the Magistrate is admissible u/s 533, Criminal Procedure Code, to show the voluntary nature of the confession. The same

view has also been taken in an earlier decision of this Court reported in ILR (1951) Cut 65 : 1952 Cri LJ 1743 (FB) (Bala Majhi v. State of

Orissa).....

Mohanti, J. while agreeing with the decision on merits proceeded to say :--

.....My learned brother has observed that the language of Sub-section (3) of Section 164, Criminal Procedure Code, does not enjoin upon the

Magistrate recording a confession to put questions to the person confessing to show that he cautioned the person confessing that he was not bound

to make any confession and that if he made so, it would be used as evidence against him nor does the language of the said sub-section show that

the Magistrate has to record the answers to such questions. It has also been observed that if it appears from the certificate given by the Magistrate

at the foot of the record that he did explain to the person confessing that he was not bound to make a confession and that if he made a confession it

would be used as evidence against him, the requirements of law so far as the first part of Sub-section (3) is concerned are fulfilled. Reliance has

been placed on a Bench decision of this Court reported in ILR (1949) Cut 207 : AIR 1949 Ori 67 : 51 Cri LJ 72 (Gurubaru Fraja v. The King).

The learned Judge then referred to the decision of the Privy Council in the case of AIR 1936 253 (Privy Council) ; a decision of the Supreme

Court in the case of Sarwan Singh Vs. The State of Punjab, and two decisions of this Court being Bala Majhi v. State of Orissa ILR (1951) Cut

65 : 1952 Cri LJ 1743 (FB) and Arakhit v. State ILR (1970) Cut 649, and quoted with approval a small passage from Arakhit''s case running

thus:--

.....Such printed certificates and evidence in Court would not be of any avail in the absence of any specific record of the actual explanation,

warnings and/or the caution given to the accused in strict compliance with the mandatory provision of Section 164(3).....

The learned Judge proceeded to say:--

As indicated earlier, Sub-section (3) of Section 164, Criminal Procedure Code, clearly enjoins upon the Magistrate recording a confession the

duty of warning the accused in the manner stated in the sub-section itself, and prohibits the Magistrate from proceeding with the recording of the

confession until he has questioned the person making it, and, from the answers given, has satisfied himself that the confession that is about to be

made will be a voluntary statement. In the statutory form, a space has been provided for recording of questions and answers referred to in the

second part of Section 164(3). It does not show that any question was asked to ascertain the voluntary character of the confessional statement.

The record oi confession (Ext. 6} does not also show that the Magistrate cautioned the accused that he was not bound to make a confession. The

Magistrate has only appended a certificate at the foot of the confessional statement that he had explainded to the accused that he was not bound to

make a confession and that any confession made by him might be used as evidence against him. Paragraph (7) of the form which requires the

Magistrate to record the reasons for believing that the statement was voluntarily made has been left blank. In his evidence the Magistrate (P. W. 4)

did not state that he had cautioned the accused that he was not bound to make any confession, (note the statement to the contrary in Ray, J''s

judgment). He admitted in cross-examination that ha had not put any other question except those mentioned in the record of confession (Ext. 6).

As already stated, there is nothing to show in Ext. 6 that any question was asked to ascertain the voluntary nature of the confession. In these

circumstances, it must be held that the Magistrate has failed to comply with Sub-section (3) of Section 164, Criminal Procedure Code, ...

A Division Bench of this Court consisting of two of us (R.N. Misra and Mohanti, JJ.) in the unreported decision of Death Reference No. 3 of

1976 with Criminal Appeal No. 213 of 1976 State Vs. Mitu, where Mohanti. J. spoke for the Bench examined the self-same question with

reference to the provisions of Section 29 of the Evidence Act. Therein the contention was that the Magistrate before recording the confession had

not specifically warned the accused that any confession made by him might be used as evidence against him. The Court observed (at pp. 1021,

1022 of Cri LJ) :--

...No doubt, it is a sound rule of practice to explain to the accused specifically that whatever he would say might be given in evidence against him.

Such warning is an important element in determining the voluntary nature of the confession. But In the facts and circumstances of the present case

we are inclined to hold that the requirements of Section 164(2) have been substantially complied with and the confessant had the knowledge that

any confession made by him might be used as evidence against him. The object of putting questions is to enable the Magistrate to be quite sure that

the confession was voluntary and if the same result can be had by the other questions the confession cannot be rejected merely because of a

technical breach.

Section 29 of the Evidence Act provides, inter alia, that a confession otherwise admissible does not become inadmissible, because the accused

person ""was net warned that he was not bound to make such confession and that evidence of it might be given against him"". Section 164 Cr. P. C.

does not override Section 29 of the Indian Evidence Act. In view of the specific provision of Section 29, mere absence of warnings would not

make the confession inadmissible, provided the Court is satisfied that the accused knew that he was not bound to make the confession and that if

he did so it would be used as evidence against him. In AIR 1932 Mad 431 : 33 Cri LJ 526 (Vellamoonji Goundan v. Emperor) a Division Bench

held as follows:

''Section 164, however, does not pretend to override Section 29, Evidence Act. The position would therefore seem to be this that though Section

164 of the one Act makes if imperative that the accused person should be cautioned, Section 29 of the other says that his statement is not

inadmissible in evidence merely because the prescribed caution has not been administered. And it is to the latter Act that as a rule we have to look,

when there is a question of the admissibility of a particular piece of evidence".

In Rangappa Hanamappa and Another Vs. State, a Division Bench consisting of Gajendragadkar and Chainani, JJ, held as follows :

"In our opinion, It would therefore, not be unreasonable to hold that the mere fact that the procedure provided by Section 164(3) in regard to

giving a warning to the accused has not been complied with in recording the confessions would not by itself necessarily make the said confessions

inadmissible. The decision on this question must depend upon the application of the rules of evidence laid down by the Evidence Act, and if the

confession is otherwise shown to be relevant under the earlier sections of the Evidence Act it cannot be said to be inadmissible merely for the

reason that no warning was given to the accused."

The real question therefore is whether the accused made the confessional statement voluntarily. The materials on record would show that the

questions put to the prisoner on the subject were understood by him and were of a nature which would satisfy a reasonable person that the

requirements of the law in this behalf were duly complied with.....

At this stage we think it useful to refer again to the judgment of Narasimham, J. in Bala Majhi Vs. The State of Orissa, . In paragraph 25 of the

judgment the learned Judge observed (at pp. 175, 176 of AIR Orissa) :

.....My answer, therefore, to the question would be that where the requirements of Section 164(3) have not been substantially complied with,

what purports to be the confessional statement, cannot be treated as a validly recorded confession u/s 164 which could be brought in u/s 26,

Evidence Act and that it must, therefore, be disregarded.

The difficulty, however, consists in deciding what amounts to such a substantial non-compliance as to render the record of a confession totally

invalid. Of the three requirements specified above as arising u/s 164(3) the requirement as to the certificate is essentially one of form and the non-

compliance with it is obviously one that can be cured u/s 533, Cr. P. C. if as a fact the other two requisites have been substantially complied with,

though of course the absence of such a certificate may raise serious doubts as to whether the other two requirements have been intelligently and

consciously complied with at all.

As regards (1) & (d), if the requisite explanation and questioning have in fact been done, the non-compliance with the recording thereof, is again a

defect of form that can be remedied under S, 533. It would also follow from Section 80, Evidence Act, that where any document is produced

before a Court purporting to be a statement made by a prisoner or accused person, in accordance with law and purporting to be signed by the

Magistrate the Court shall presume that any statement as to circumstances under which it was taken purporting to be made by the person signing it

is true and that the confession was duly taken. From this it would follow that if the certificate contemplated by Section 164(3) is found in a

confessional statement as recorded and if by evidence taken u/s 533 the factum of the explanation and of the questioning as required u/s 164(3) is

satisfactorily made out, a presumption would arise that the confession was duly taken, that is to say, after such sufficient explanation and such

sufficient questioning as satisfied the recording Magistrate that the confession was being voluntarily made. If therefore a trial Court finds no material

which would conflict with that presumption the statement would be admissible and the weight to be attached must depend on circumstances. The

essence of the requirements of Sub-section (3) of Section 164 is that before the Magistrate records the confession he must have reasons to believe

that confession to be made is voluntary. That emphatic language which the sub-section uses, namely, ''no Magistrate shall record any such

confession unless he has reason to believe that it was made voluntarily'' is itself sufficient to show that his power to record the confession is

conditional upon the pre-existence of his belief. It is also clear from that sub-section that belief in this behalf must be based upon his questioning the

accused after a prior explanation to him that he is not bound to make a confession and that if he does so it will be used as evidence against him. In

entertaining the belief under this subsection, the Magistrate is acting judicially and therefore the belief itself must be based upon the materials

indicated in the section. It follows therefore that where in fact there has been no adequate explanation or questioning by the Magistrate of the

nature prescribed before he starts recording the confession, his record of the confession cannot be said to be in substantial compliance with the

requirements of Sub-section (3) of Section 164 and no evidence aliunde that the confession was in fact voluntarily made would be admissible. This

is in accord with the cardinal principle laid down by Privy Council in AIR 1936 253 (Privy Council) that when power is given to do a certain thing

in a certain way, the thing must be done in that way or not at all. Such a confession vitiated by substantial non-compliance as indicated above, with

the provisions of Sub-section (3) of Section 164 is not a valid record of the confession and cannot, therefore, be made use of u/s 26, Evidence

Act. There is thus no scope for invoking the aid either of Section 29, Evidence Act or Section 533, Cr. P. C. to cure such defect.....

Jagannadhadas, J. agreed with the answers given by Narasimham, J. and observed :

I should have been content to leave the matter at that, since we are all agreed about the answers to the reference.....

It would, therefore, be not wrong to hold that the dictum laid down by Narasimham, J. which has been extracted above, reflected the opinion of

the Full Bench or at least of the majority of the learned Judges constituting the Bench.

10. We have indicated at length the judicial opinion on the topic both in this Court as also in some other High Courts and the Supreme Court. It

appears that judicial opinion on the topic is not unanimous though there is to a considerable extent consensus. We think it now appropriate to cull

out the essential principles :

(i) Under Anglo-Saxon Jurisprudence, the whole burden to establish the charge in a criminal offence lies on the prosecution. Where the

prosecution relies upon a confessional statement of the accused in proof of the charge, strict compliance with the provisions of Section 164 of the

Code of Criminal Procedure is imperative;

(ii) It is essential that the Magistrate before recording the confessional statement must explain to the confessing accused that he is not bound to

make a confession and that if he makes a confession it may be used as evidence against him. The Magistrate should also question the accused with

a view to ascertaining whether the accused is making the confession voluntarily and on such questioning ha should have reason to believe that the

confession is being made voluntarily;

(iii) Where there is substantial compliance with the requirements of Section 164(3) of the Code of Criminal Procedure, reliance can be placed on

the provisions of Sections 29 and 80 of the Evidence Act and any non-compliance with the provisions of Section 164 of the Code of Criminal

Procedure may be regularised by application of Section 533 of that Code;

(iv) The bare certificate in the prescribed form with nothing more would not satisfy the requirements of Section 164 of the Code. A mere failure,

however, to record all the questions put to the confessing accused does not necessarily entail the rejection of the confession as inadmissible. As

long as there is substantial compliance, evidence aliunde is available to cover the lacunae and the recording Magistrate may be examined in support

of the compliance of the formalities;

(v) Whether confession has been properly recorded or not must be left to be decided by the Judge before whom it is tendered as evidence and

admissibility would ordinarily depend upon several facts in a given case and it would not be appropriate to lay down any hard and fast rule

regulating admissibility.

11. In view of the aforesaid statement of the position of law, it must follow that the rule regarding admissibility of the confessional statement has not

been correctly stated in Arakhit''s case ILR (1970) Cut 649 and the observations of Mohanti, J., in the case of State of Orissa v. Jayadhar ILR

(1975) Cut 1557, in support of that view do not correctly reflect the legal principle. On the other hand, the learned Judge''s statement of the legal

position in the unreported decision in the case of State Vs. Mitu, is in accord with our conclusion.

12. We may now revert to consideration of the admissibility of the confessional statement (Ext. 16). The recording Magistrate put certain questions

to the confessing accused in order to ascertain the voluntariness of the confession. He also disclosed his identity and cautioned the confessing

accused that if she made any confession, the same might be used against her. It is true that the Magistrate has not clearly recorded a statement to

the effect that he had explained to the confessing accused that she was not bound to make a confession, but the certificate appended at the foot of

the statement categorically records that fact. As we have already noticed, the Magistrate appearing as P.W. 16 has stated that he had explained to

the accused that she was not obliged to make a confessipn before he proceeded to record the confessional statement. The learned Trial Judge

accepted the confessional statement as admissible and we see no justification to differ from his conclusion.

13. Counsel for the appellants had contended that in view of the fact that the chemical examination showed presence of folidol in the viscera while

endrine was found in the bottle (M.O.V.), the prosecution case should be disbelieved. As we have already stated, P. Ws. 2 and 7 are direct

witnesses to support the fact that Tauli made over a bottle like M.O.V. to Shanti on the day previous to the occurrence. p. Ws. 1, 2 and 9 who

are close relations of accused Shanti have categorically stated that it was Shanti who gave Sarbat to Lakshmi and the same Sarbat from the glass

was taken by the two innocent children Geeta and Prafulla in the circumstances already narrated. These three witnesses are close relations; they

had no animosity against Shanti and they would be anxious to see that the actual offender is punished. The judicial confession (Ext. 16) which is

inculpatory in nature is available to be used not only against Shanti but also against the co-accused. The confession, as we have already indicated is

voluntary in character and gives a true account of the incident and therefore is a valuable corroborative piece of evidence. The fact that Prafulla and

Geeta died in the same process as Lakshmi is a feature lending assurance to the truth of the prosecution case. We are. therefore, satisfied that the

conviction of the two appellants for the offences with which they were charged is well justified. The process of investigation has been defective and

the prosecution has failed to devote such attention as the gravity of the charges warranted. But as we are satisfied that there is sufficient evidence to

support the charges beyond reasonable doubt, notwithstanding the defects as pointed out by appellant"s counsel, the convictions are justified.

14. We shall now come to the last aspect of the matter, namely whether the punishment imposed should be sustained or the same should be

enhanced. The offence is indeed heinous. We have already noticed the fact that Lakshmi and Shanti were pulling on well. Lakshmi had been

contributing substantially to the family expenses out of her earnings as a teacher. There was absolutely no justification for Shanti to cake away her

life by offering her poison under cover of drink. Tauli, in order to avenge his previous enmity had used Shanti as a convenient agency and the entire

notorious incident was pre-planned. On account of this mischievous act, not only Lakshmi met her death but P.W. 1 lost a daughter through

Lakshmi and a son through appellant Shanti. Ordinarily, for the reasons indicated above, the sentence of death would have been warranted, but the

incident took place in 1971 and the sentence of imprisonment for life was imposed in 1974. More than two years have already elapsed. Shanti has

already suffered poetic justice. The observations of the Supreme Court in the case of Ediga Anamma Vs. State of Andhra Pradesh, , have also to

be kept in view. We are, therefore, of the opinion that the cause of justice would be appropriately served if the sentence of imprisonment for life is

sustained and the rule for enhancement of such sentence Issued by this Court is discharged.

15. The net result, therefore, is that both the appeals are dismissed.

B.K. Ray, J.

16. I agree.

Mohanti, J.

17. I had the benefit of going through the judgment prepared by my learned brother Misra, J. I agree with him that both the appeals should be

dismissed. I feel it necessary to add a few words of my own.

18. Sub-section (2) of Section 164 Cr. P. C. requires three things, namely, the two warnings that the accused is not bound to confess and that any

confession made by him would be used as evidence against him and thirdly, questioning of the accused so that the Magistrate may satisfy himself

that the accused understood the warnings and was prepared to make a confession voluntarily. Sub-section (4) requires that the confession shall be

recorded in the manner provided in Section 281 (Section 364 old) for recording the examination of an accused person and shall be signed by the

person making the confession and the Magistrate shall make a memorandum at the foot of such record to the following effect:

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as

evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the

person making it and admitted by him to be correct, and it contains a full and true account of the statement made bv him.

(Signed)

A. B. Magistrate.

19. In the case of Bala Majhi v. The State of Orissa AIR 1951 Ori 163 : 1952 Cri LJ 1743 (FB) the court held the emphatic language which Sub-

section (2) of Section 164, Cr. P. C. uses, namely, ""no Magistrate shall record any such confession unless, upon questioning the person making it,

he has reason to believe that it is being made voluntarily"" is itself sufficient to show that his power to record the confession is conditional upon the

pre-existence of his belief. It is clear from that sub-section that belief in this behalf must be based upon his questioning the accused after a prior

explanation to him that he is not bound to make a confession and if he does so it will be used as evidence against him. It follows, therefore, that

where in fact there has been no questioning of the accused by the Magistrate before recording the confession, the record of the confession cannot

be said to be in substantial compliance with the requirements of Sub-section (2) of Section 164.

20. Although there is nothing in the language of Sub-section (2) of Section 164 which would enjoin upon the Magistrate to record the questions

and answers whereby he felt satisfied i.hat the accused was prepared to make the confession voluntarily, still it has been enjoined in several

decisions that a Magistrate should record the questions and answers, as the record of those questions and answers would be the best means of

enabling the trial court and the appellate court to arrive at a reasonable conclusion that the confession was made voluntarily. The genuineness and

truth of the confession and the fact of its having been voluntarily made are matters which are within the exclusive province of the trial court and the

appellate court and they cannot blindly accept the opinion of the recording Magistrate on these points without, having before them the necessary

materials on the record. When there is nothing on the record to show that any attempt was made by the Magistrate to find out whether the

confession was voluntary or not it would be difficult to accept his certificate on the printed form at its face value. In Emperor Vs. Kommoju

Brahman, the Court had to deal with the point whether the Magistrate was entitled to take down the confessional statement before he had actually

questioned the accused in the manner provided in Section 164(2) Cr. P. C. and it was held that since no questions had been asked, the confession

as recorded was inadmissible in evidence. When no questions had been asked, the Magistrate had no jurisdiction to record the confession. The

decision was followed by the Madras High Court in In Re: Karunthambi alias Subramania Goundar, and it was held that where the Magistrate

recording a confession did not satisfy himself on the day of his recording the confession that it was being made voluntarily, this was a defect not of

form but of substance, and did vitiate the confession. In the Full Bench decision in the case of Bala Majhi v. State of Orissa 1952 Cri LJ 1743

(Orissa) (FB) referred to above, the question referred to the Full Bench was whether a Magistrate is bound to record all the questions put by him

to the accused and the answers given to satisfy himself that the confession to be made is voluntary and, if so, what is the effect of the non-recording

of the same. Their Lordships unanimously held that the Magistrate recording a confession was bound to record every question put by him to the

accused and every answer given by the accused to the same in order to satisfy himself that the confession made was voluntary. It was, however,

further observed that if the questions had been put and answered, but no record of them had been made, evidence could be given both of the

factum of the questions and answers and of the contents of the same. If the substance of the actual questions and answers can be supplied by such

evidence, that cures the defect completely, 20. Section 29 of the Evidence Act provides, inter alia, that if a confession is otherwise relevant, it does

not become irrelevant merely because the accused ""was not warned that he was not bound to make such confession, and that evidence of it might

be given against him"". This section makes an exception in the case of the two warnings, but there is nothing in this section to do away with the

necessity of questioning the accused for the purpose of finding out whether the confession was made voluntarily.

21. Section 533 of the old Criminal Procedure Code (corresponding to Section 463 of the new Code) provides that if the Court before which a

statement or confession of the accused person recorded or purporting to be recorded u/s 164 and Section 364 (Section 281, new) is tendered in

evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall

take evidence that such person duly made the statement recorded. In the case of State of Uttar Pradesh Vs. Singhara Singh and Others, the

Supreme Court laid down as follows:

.....Now a statement would not have been "duly made" unless the procedure for making it laid down in Section 164 had been followed. What

Section 533 therefore, does is to permit oral evidence to be given to prove that the procedure laid down in Section 164 had in fact been followed

when the Court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had

been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in Section 164 is not intended to

be obligatory, Section 533 really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the

procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so.

Their Lordships affirmed the dictum of the Privy Council in AIR 1936 253 (Privy Council) wherein it was held that where a power is given to do a

certain thing in a certain way the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. If as

a matter of fact the confession was duly recorded, that is to say, after the necessary warnings and the questioning, but the Magistrate has failed to

embody that fact in the record of confession such a defect would be curable. If the warning had not in fact been administered or if the questioning

had not in fact been made, the confessional statement would not be held to have been ""duly made"" and Section 533 cannot be taken recourse to.

Though the record of confession may not indicate the questions put by the Magistrate and the answers given, it is open to the Magistrate to give

oral evidence about the same, and if the oral evidence of the Magistrate that necessary questions had been put is believed by the Court the

confession will not be vitiated.

22. Section 80 of the Evidence Act provides, inter alia, that whenever any document is produced before any Court, purporting to be a confession

by any accused person, taken in accordance with law, and purporting to be signed by any Magistrate, the Court shall presume that the document is

genuine and that the confession was duly taken. Thus a presumption can be raised only when the confession has been taken in accordance with law

i.e. by observance of all the formalities prescribed by law. When a confession duly taken is tendered in evidence at the trial, it proves itself u/s 80

without calling the Magistrate who recorded it. But it may be that in recording the confession all the provisions of law were not complied with e. g.

the Magistrate may not have given the necessary warning or satisfied himself about the voluntary nature of the confession by questioning the

accused properly, or he may not have appended the memorandum and the certificate required by Sections 164 and 281 (Section 364 old) Cr. P.

C. Such a confession cannot be said to have been in accordance with law, and no presumption can be raised u/s 80. If the formalities have not

been observed the confessional statement is inadmissible unless the defects can be cured by the examination of the Magistrate, who recorded it, u/s

533 Cr. P. C. (old). This section, however, says nothing about there being any presumption regarding the voluntariness of the confession.

23. In ILR (1970) Cut 649 (Arakhit v. State) the record of confession did not show that the Magistrate (P. W. 27) had explained to both the

confessing accused that any confession made by them might be used as evidence against them. In his examination-in-chief the Magistrate stated

that he had explained to one of the confessing accused that any confession made by him would go against him. But he did not say the same thing

with regard to the other confessing accused. In cross-examination he however stated:

Specifically I have not explained to the accused that if they do make confession it will be used as evidence against them, but I have explained that

it may be used against them."" This oral evidence of the Magistrate, if believed to be true, could cure the defect in view of the specific provisions of

Section 533 Cr. P. C. But without discussing the effect of Section 29, Evidence Act or Section 533 Cr. P. C. the Court observed :

.....Such printed certificates and evidence in Court would not be of any avail in the absence of any specific record of the actual explanation,

warnings and/or the caution given to the accused in strict compliance with the mandatory provision of Section 164(3) ILR (1951) Cut 65 : 1952

Cri LJ 1743 (FB). Moreover, the above statement of P. W. 27 in examination-in chief read along with all that he stated in cross-examination as

quoted above, and all these considered in the light of the dictum laid down by the Privy Council, the Supreme Court and in the above Full Bench

decision of our Court, we have to come to an irresistible finding that the Magistrate, in his solemn duty in recording a confession, has failed to

observe the imperative requirements and the strict direction of law on the subject.

I agree with my learned brethren that the observation of their Lordships to the effect that the ""evidence in Court would not be of any avail in the

absence of any specific record of the actual ""explanation, warnings and/or the caution"" does not correctly reflect the legal principle.

24. In ILR (1975) Cut 1557 (State of Orissa v. Jayadhar) the record of confession did not show that the Magistrate cautioned the accused that he

was not bound to make a confession. But the Magistrate had signed the certificate printed on the prescribed form to the effect that the accused

was cautioned that he was not bound to make a confession and that any confession made by him might be used as evidence against him. Paragraph

(7) of the Form which requires the Magistrate to record the reasons for believing that the statement was voluntarily made had been left blank. In his

evidence, the Magistrate (P. W. 4) did not state that he had in fact cautioned the accused that he was not bound to make any confession. The

record of confession did not also show that any question was asked by the Magistrate to ascertain that the accused understood the warnings and

was prepared to make confession voluntarily. While quoting some of my observations made in ILR (1975) Cut 1557 my learned brother Misra, J.

has pointed out two contradictory statements about the evidence of the Magistrate in the judgments prepared by my learned brother B.K. Ray, J.

and my self. For the purpose of verification I called for the Paper Book of that case and found that the statement in my judgment is correct. The

Magistrate (P. W. 4) did not utter a word that he had cautioned the accused that he was not bound to make any confession. He did not also state

that he had put any question to the accused to ascertain that he was going to make the confession voluntarily. His evidence was completely silent

on these aspects. Section 533 can only apply where the Magistrate although he had not made a record of the facts that he had given the necessary

warnings and had questioned the accused, had in fact done so and deposed to those facts in Court. Where neither the record of the confession nor

the evidence of the Magistrate discloses that he had given the necessary warning and had questioned the accused with a view to know whether he

was going to confess voluntarily, the confession recorded by the Magistrate must be held to be inadmissible in evidence. The printed certificate

would not be of any avail in such a case. Accordingly I held, in disagreement with my learned brother B.K. Ray, J. that there had been a violation

of the mandatory provision of Section 164 Cr. P. C. and that this made the confession inadmissible in evidence, I adhere to my views expressed in

that case.

25. In the case of Mitu alias Narasingh Prusty v. State: Death Reference No. 3 of 1976 with Criminal Appeal No. 213 of 1976"" disposed of on

15-12-1976 (since reported in State Vs. Mitu, the Magistrate before recording the confession cautioned the accused in the following terms:

Once again I want to caution you that I am a Judicial Magistrate of the First Class and whatever statement you make before me may go in your

favour or may be used against you.

It was contended on behalf of the accused that the confessional statement was inadmissible in evidence due to non-compliance with the

requirements of Section 164 Cr. P. C. The Court considered several other questions asked by the Magistrate and the answers given by the

accused with reference to Section 29 of the Evidence Act. It also took several other factors into consideration and found that the Magistrate had

taken all possible steps with a genuine desire to know that the accused was making a voluntary statement as a result of repentance and contriteness

and held that the confessional statement was admissible, observing as follows:

.....But in the facts and circumstances of the present case we are inclined to hold that the requirements of Section 164(2) have been substantially

complied with and the confessant had the knowledge that any confession made by him might be used as evidence against him. The object of putting

questions is to enable the Magistrate to be quite sure that the confession was voluntary and if the same result can be had by the other questions the

confession cannot be rejected merely because of a technical breach.

The Court further observed:

The real question therefore is whether the accused made the confessional statement voluntarily. The materials on record would show that the

questions put to the prisoner on the subject were understood by him and were of a nature which would satisfy a reasonable person that the

requirements of the law in this behalf were duly complied with.....

26. As the confession was otherwise shown to be voluntary it was held to be admissible in evidence in view of the specific provisions of Section

29, Evidence Act.