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(2018) 1 KLT (SN 48) 36 (FB) : 2018 Cri LJ 1253 (FB) : (2018) 2 RCR (Cri) 958
(FB)

In the High Court of Gauhati
(BEFORE UJJAL BHUYAN, SUMAN SHYAM AND PARAN KUMAR PHUKAN, JJ.)

Kartik Chakraborty and Ors. ... Appellants;
versus

State of Assam ... Respondent.

Crl. Appeal Nos. 7 and 8 of 2008

Decided on October 26, 2017

Evidence Act, 1872, S. 26 — Whether the expression ‘Magistrate’ appearing in section 26 of the Act would mean a Judicial Magistrate — Held : Yes -Expression ‘Magistrate’ appearing in section 26 of the Act would mean only a Judicial Magistrate and not an Executive Magistrate — *State of Assam v. Anupam Das*, (2008) 1 GLR 681 approved)

[Paras 30 to 34]

Advocates who appeared in the case:

Mr. B.K. Mahajan, Mr. A. Choudhury, Mr. R. Ali, Mr. N.J. Dutta and Mr. N. Dutta for the appellants.

Mr. P.P. Baruah for the respondent.

Cases referred : Chronological

Palanisamy alias Kunjupaiyan v. State, Crl. Appeal No. 541/2005 decided on 22.03.2013.

Ratan Singh v. State of Assam, 2012 (6) GLJ (NOC) 123.

Kalam v. Inspector of Police, 2011 SCC OnLine Mad 371.

State of Assam v. Anupam Das, (2008) 1 GLR 681 : 2007 (3) GLT 697.


JUDGMENT AND ORDER

UJJAL BHUYAN, J.:— The two appeals are before us on a reference made by a Division Bench of this court to examine and decide the following question of law:

“Whether the expression “Magistrate” appearing in section 26 of the Evidence Act would mean Judicial Magistrate or an Executive Magistrate?”

2. Before we deal with the referral order and answer the question referred, it would be apposite to make a brief reference to the two appeals out of which the reference has arisen.

3. Both the appeals have been preferred against the judgment and order

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dated 13.11.2007 passed by the Additional Sessions Judge (FTC), Bongaigaon in Sessions Case No.25(D)/2001 convicting the appellants under section 120B/460/302/34, IPC and sentencing them to rigorous imprisonment for 10 years with fine of Rs.5,000 each with a default clause for the offence under section 460, IPC; imprisonment for life with fine of Rs.5,000 each with a default clause for the offence under section 120B/ 302, IPC; imprisonment for life with fine of Rs.5,000 each with a

default clause for the offence under section 302/34, IPC.

4. Shri Kartik Chakraborty, Javed AM and Ali Akbar are the appellants in Criminal Appeal No.7/2008 whereas Shri Ajay Chakraborty is the appellant in Criminal Appeal No.8/2008.

5. Appellant Shri Ajay Chakraborty is the husband of the deceased Anita Chakraborty whereas appellant Shri Kartik Chakraborty is the brother of Shri Ajay Chakraborty. Javed Ali and Ali Akbar were stated to be hired killers engaged by Shri Kartik Chakraborty at the instance of Shri Ajay Chakraborty to cause murder of Anita Chakraborty.

6. The referral order dated 12.12.2013 indicates that there were matrimonial disputes between accused No.1-Shri Ajay Chakraborty and deceased Anita Chakraborty. Accused No.1 had requested accused No.2 Shri Kartik Chakraborty, his brother, to make arrangement for causing murder of the deceased. Accused No.2 in turn engaged accused Nos.3 and 4, Javed Ali and Ali Akbar, to cause the murder. On 9.10.1999, accused No.1 went to Cooch Bihar stating that he was going there to bring ornaments for his wife Anita leaving behind Anita in the house of her sister Smt. Gita Das. On the fateful night, Anita was sleeping in the same bed with Smt. Gita Das and her minor daughter. Husband of Smt. Gita Das, Shri Prabir Das, had gone to the residence of Shri Ajay Chakraborty to guard the house during night time in the absence of Shri Ajay Chakraborty. At around midnight, one miscreant entered into the house of Smt. Gita Das by digging a small tunnel whereafter he opened the door. Hearing the noise, Smt. Gita Das woke up and saw one person inside the room. She tried to wake her sister Anita. In the meanwhile, another person entered into the room and came near the bed where they were sleeping. With the help of torchlight, they identified Anita whereafter they dealt repeated dagger blows on the person of Anita. They dragged her to the floor and continued to deal dagger blows on her. When Smt. Gita Das tried to raise hue and cry, the two miscreants threatened her in Bengali language to remain silent. After she died, the two miscreants left the room.

7. On the next date, i.e., on 10.10.1999, Smt. Gita Das lodged ejarah before the Dhaligaon Police Station on the basis of which Dhaligaon Police Station Case No.57/1999 under section 460/302, IPC was registered.



8. In the course of investigation, police apprehended accused Nos.3 and 4 on 25.10.1999 and made a requisition to the Additional District Magistrate, Bongaigaon for magisterial assistance in carrying out the investigation. Additional District Magistrate deputed PW 25 Md. Mitta Uddin Ahmed, Executive Magistrate, who was then serving as Extra-Assistant Commissioner, Dhubri, to assist in the investigation. Accused Nos.3 and 4 were interrogated by the police in the presence of PW 25 and in the face of sustained interrogation, they confessed that they were engaged by accused Nos.1 and 2 to cause the murder for which they were paid Rs.8,000. Accused Nos.3 and 4 thereafter led the police to the place where they had concealed the dagger used for commission of the offence and the blood-stained clothes. Following the same, Investigating Officer arrested accused Nos.1 and 2 on 25.10.1999 itself. While in custody, accused Nos.1 and 2 were produced before a Judicial Magistrate for recording confessional statement under section 164, Cr.PC. Accordingly, confessional statement of accused Nos.1 and 2 were recorded on 29.10.1999.

9. On the next day, i.e., on 30.10.2009, accused Nos.3 and 4 also made their confessional statements which were recorded by a Judicial Magistrate under section 164, Cr.PC.

10. Upon completion of investigation, Investigating Officer filed charge-sheet against the accused-persons charging the accused-persons for committing offences under section 120B/460/302/34, IPC.

11. The offence being exclusively triable by a Court of Sessions, Chief Judicial Magistrate, Bongaigaon passed necessary order for commitment of the case to be tried by a Court of Sessions whereafter the case was registered as Sessions Case No.25 (D)/2001 and was assigned to the Additional Sessions Judge (FTC), Bongaigaon for trial.

12. During trial, prosecution examined 27 witnesses and exhibited a number of documents and materials to prove the case against the accused-persons. Prosecution witnesses were thoroughly cross-examined by the defence. After closure of the prosecution evidence, statement of the accused-persons were recorded under section 313, Cr.PC. The defence case was of total denial. The accused-appellants deposed as defence witnesses. In addition, they also adduced another witness who deposed on their behalf.

13. After hearing the matter, learned court below convicted the accused-appellants under the charged sections and sentenced them as above.

14. In the course of hearing of the appeals, learned counsel for the appellants contended that the circumstances under which accused Nos.3 and 4 made confession to PW 25 while in police custody would not be an admissible confession in law. Such confession cannot be used as an effective piece of evidence to prove the guilt of accused Nos.3 and 4 and also to avail the



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same as a corroboration to prove the guilt of accused Nos.1 and 2. It was contended that PW 25 was an Executive Magistrate and, therefore, extraction of confession by the police in front of an Executive Magistrate would not be admissible in evidence. Learned counsel referred to a Division Bench decision of this court in the case of *State of Assam v. Anupam Das*, (2008) 1 GLR 681/2007 (3) GLT 697, to contend that the expression "Magistrate" appearing in section 26 of the Evidence Act, 1882 would mean a Judicial Magistrate and not an Executive Magistrate.

15. The referral Bench examined the Coordinate Bench decision of this court in *Anupam Das* (supra) and extracted paragraphs 28 and 29 thereof. Thereafter, the referral Bench observed that there was some confusion in the observations made in paragraphs 28 and 29 of *Anupam Das* (supra); while in paragraph 28, it was held that Magistrate under section 26 need not even be a Judicial Magistrate but in paragraph 29, it was held that Magistrate under section 26 of the Evidence Act would only mean a Judicial Magistrate but not an Executive Magistrate. After referring to section 26, the referral Bench held as under:

"15. The scheme of the Code of Criminal Procedure does not envisage participation of a Judicial Magistrate along with the police in the course of investigation. The role of the Magistrate during the course of investigation is specifically defined. Firstly, he has to receive the FIR submitted and make a note of the date and time of submission of the FIR. Secondly, the accused after arrest have to be produced before a Magistrate within 24 hours and the Magistrate has to deal with the accused so produced either by giving police remand or judicial custody or

bail. Thirdly, the Magistrate has to deal with the extension of the period of judicial remand under section 167, Cr.PC. Further, in case of summons trials, if investigation is not completed within a period of six months, the Magistrate can direct stoppage of the investigation. Fourthly, the Magistrate can record the confessional statement of the accused under section 164 and statement of any witness under section 164(5). After completion of investigation, when final report is filed, judicial trial has to take place.

16. The role of an Executive Magistrate in the Code of Criminal Procedure is also envisaged under sections 174 and 176. In a case of suicide or unnatural death, the Executive Magistrate can conduct inquest and in specific cases, inquest have to be conducted mandatorily by the Executive Magistrate. An Executive Magistrate, under section 174, can enquire into the cases of death under such circumstances as envisaged in the proviso. The Magistrate shall also have to conduct exhumation proceedings.

17. In the scheme of the Code of Criminal Procedure, an Executive Magistrate do co-ordinate with the police effectively in conducting investigation. However, the Judicial Magistrates only pass judicial orders like remand, bail, recording confession under section 164 but, while doing so, they would



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not associate with the police in any manner in the course of investigation. While recording confessional statement under section 164, the Magistrate has to take precaution to keep away the presence of police. In the context of. said legal settings, the expression Magistrate used in section 26 of the Evidence Act cannot be construed and understood as a Judicial Magistrate because Judicial Magistrate can never co-ordinate with the police in the course of interrogation or investigation for collecting evidence.

18. The *Explanation* in section 26 helps in a way to understand the expression Magistrate appearing in section 26. In the *Explanation*, there is a reference to village Head discharging Magisterial functions in the Presidency town or village Headman exercising powers of Magistrate under the Code of Criminal Procedure, 1882, is not deemed a Magistrate within the meaning of section 26. Be that as it may, the Code of Criminal Procedure, 1882, is repealed. The *Explanation* part of section 26 has become obsolete and irrelevant. Nonetheless, the intention of the Legislature could be gathered from the said *Explanation* to mean that the expression Magistrate would mean an Executive Magistrate and not a Judicial Magistrate. That apart, under the Coroners Act, 1871, Coroners are appointed to conduct inquest with regard to the cause of death of a person and should draw up inquest reports. The Coroners appointed are not Judicial Magistrates under the Act. However, section 20 of the Coroners Act declares that the Coroner appointed is deemed to be a Magistrate within the meaning of section 26 of the Evidence Act, 1872. When a non-judicial person appointed as a Coroner is deemed to be a Magistrate within the meaning of section 26 of the Evidence Act, it would not stand to reason that why an Executive Magistrate cannot be a Magistrate within the meaning of the expression Magistrate under section 20 of the Evidence Act. On the other hand, the reasons stated above amply establish that Judicial Magistrate has to be excluded from the expression Magistrate appearing in section 26."

16. After discussing as above, the reference was made which we have already noted in the beginning.

17. In the course of hearing of the appeals, elaborate arguments were made by Mr. N. Dutta, learned senior counsel, who was earlier appointed as amicus curiae, Mr. B.K. Mahajan, learned counsel for the appellants and Mr. P.P. Baruah, learned Public Prosecutor, Assam. On request of the court, Mr. D.K. Mishra, learned senior counsel, who was also present in the court during the hearing, made a short submission towards the end of the hearing. In the course of the hearing, a number of decisions, provisions of the Code of Criminal Procedure and Evidence Act were referred to by the learned counsel.

18. Submissions made by learned counsel at the Bar have received the due consideration of the court.

19. Code of Criminal Procedure was first enacted in 1861. Section 148 of



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the Code of Criminal Procedure, 1861 provided that no confession or admission of guilt made to a Police Officer shall be used as evidence against a person accused of any offence.

20. As per section 149, no confession or admission of guilt 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 used as evidence against such person. Section 150 provided that when any fact was deposed to by a Police Officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as related distinctly to the fact discovered by it may be received in evidence.

21. This was Code of Criminal Procedure, 1861. At that point of time, concept of separation of powers between judiciary and executive or distinction between Judicial Magistrate and Executive Magistrate was non-existent.

22. The Indian Evidence Act was enacted in 1872. Section 25 of the Indian Evidence Act, 1872 ('Evidence Act') is virtually the same as section 148 of the Code of Criminal Procedure, 1861 with slight modification of language. Section 25 of the Evidence Act says that no confession made to a Police Officer shall be proved as against a person accused of any offence.

23. Likewise, section 149 of the Code of Criminal Procedure, 1861 finds place in the Evidence Act as section 26. Heading of this section is "Confession by accused while in custody of police not to be proved against him". The text of section 26 says 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 as against such person.

24. Similarly, section 150 of the Code of Criminal Procedure, 1861 finds its expression in section 27 of the Evidence Act, albeit, with certain modification of language. Section 27 of the Evidence Act says that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, who is in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

25. Sections 148, 149 and 150 of the Code of Criminal Procedure, 1861 having been incorporated in the Evidence Act, these provisions do not find place in the subsequent Codes of Criminal Procedure, 1882, 1898 and 1973. These provisions are now available in the Evidence Act as



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sections 25, 26 and 27. Be it stated that as noticed above, the Evidence Act was enacted in the year 1872 when the concept of separation of powers between judiciary and executive was virtually non-existent or at the most in a nebulous state. Be that as it may, since section 26 of the Evidence Act is central to the deliberation, it would be apposite to extract the same in its entirety for ready reference:

*"26. Confession by accused while in custody of police not to be proved against him.—*No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.— In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882."

26. Section 26 appears in the Evidence Act immediately after section 25. Section 25 is specific. It says that no confession made to a Police Officer shall be proved as against a person accused of any offence. Section 26 appears to be in continuation of section 25 with an exception carved out, the exception being that confession made by a person while in the custody of a Police Officer may be proved against him if it is made in the immediate presence of a Magistrate. Therefore, a conjoint reading of sections 25 and 26 of the Evidence Act would go to show that no confession made by a person to a Police Officer while in custody shall be proved against him unless it is made in the immediate presence of a Magistrate. We have already discussed that when this provision was initially provided in the Code of Criminal Procedure, 1861 and thereafter incorporated in the Evidence Act, 1872, the concept of separation of powers between the executive and the judiciary was either non-existent or was in a nebulous state. Therefore, it is quite but natural that the reference in section 26 of the Evidence Act is only to a Magistrate.

27. Now, we may look at the Code of Criminal Procedure, 1973, which was enacted 23 years after adoption of the Constitution and by which time separation of judicial powers from the executive was achieved in the country barring a few hill States or some other tribal areas. In this context, section 3 of the Code of Criminal Procedure, 1973 clearly mentions that any reference in the said Code to a Magistrate without any qualifying words would mean a Judicial Magistrate in relation to an area outside a metropolitan area or to a Metropolitan Magistrate in relation to a metropolitan area.

28. Section 164 of the Code of Criminal Procedure, 1973 provides for recording of confession and statement by a Metropolitan Magistrate or



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Judicial Magistrate, as the case may be, subject to compliance of the conditions mentioned therein. As per proviso to sub-section (1) of section 164, no confession shall be recorded by a Police Officer on whom any power of a Magistrate has been conferred under any law for the time-being in force. Before recording such confessional statement, Judicial Magistrate has to ensure that the person making such statement is completely free of police influence or there is no fear of any duress or coercion in the making of such a confession. Moreover, as per sub-section (3), if at any time before the confession is recorded, the person appearing before the Magistrate states that he

is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody. Therefore, if we look at the scheme of the Code of Criminal Procedure, 1973, it is evident that it is only when a confession or a statement is made by a person before a Judicial Magistrate or Metropolitan Magistrate, as the case may be, that the same would have evidentiary value. It is in this context that we have to examine whether the expression "Magistrate" appearing in section 26 of the Evidence Act would mean a Judicial Magistrate or Executive Magistrate.

29. This issue was gone into in great detail by a Division Bench of this court in *Anupam Das* (supra). In *Anupam Das* (supra), the Division Bench examined the definition of expression "Magistrate" as appearing in section 3(32) of the General Clauses Act, 1897, the provisions of sections 3, 6 and 21 of the Code of Criminal Procedure, 1973 as well as the distinction between making of confession under section 26 of the Evidence Act visa-vis under section 164 of the Code of Criminal Procedure, 1973. After a detailed analysis, Division Bench expressed the view in unequivocal terms that it would be a strange logic if a statement recorded by a Judicial Magistrate under section 164, Cr.PC would be vitiated for non-compliance of the conditions mentioned therein rendering it inadmissible in evidence but on the other hand to hold that the expression "Magistrate" contemplated under section 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, under no obligation to comply with the requirements of section 164, Cr.PC and yet such confession would be admissible in evidence. Thereafter, the Division Bench held in clear terms that the expression "Magistrate" occurring in section 26 of the Evidence Act would only mean a Judicial Magistrate and not an Executive Magistrate. Relevant portion of the Division Bench judgment in *Anupam Das* (supra) is extracted hereunder:

"20. It can be seen from the language of section 26 that the only exception to the rule contained under section 26 is that any such confession, which is otherwise hit by section 26, can be proved against the accused if such a confession is made in the immediate presence of a Magistrate. It is not the



case of the prosecution that the alleged confession before PW-8 was made in the immediate presence of a Magistrate, therefore, the same is clearly hit by section 26 and cannot be looked into.

21. Coming to Ext-17, learned Public Prosecutor argued that it being a confession made in the immediate presence of a Magistrate, the same could be proved against the accused as falling within the exception to the Rule contained under section 26 of the Evidence Act. Admittedly, PW-12, who recorded Ext-17, is an Executive Magistrate, therefore, it becomes necessary to examine whether the expression "Magistrate" occurring under section 26 of the Evidence Act takes within its sweep an "Executive Magistrate". "Magistrate" is not a defined expression under the Evidence Act.

22. Section 3, sub-section (32) of the General Clauses Act, 1897 defines the expression "Magistrate" as follows:

"(32) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force;"

Therefore, necessarily we need to examine the provisions of the Code of Criminal Procedure.

23. Section 3 of the Cr.PC provides for rule of construction of references. Sub section (1) of section 3 stipulates as to how the expression "Magistrate" shall be construed whenever reference is made under the Code, without any qualifying words. Sub-sections (2) and (3) are not relevant for our purpose. Sub-section (4), which is relevant for the present purpose reads as follows:

"(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters —

- (a) Which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or
- (b) Which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate."

The scheme of sub-section (4) will be examined slightly later in this judgment.

24. Section 6 of the Cr.PC contemplates the establishment of various kinds of criminal courts. They are - (i) Courts of Sessions; (ii) Judicial Magistrate of the first class and, in any metropolitan area, Metropolitan Magistrate; (iii) Judicial Magistrate of the second class; and (iv) Executive Magistrates. Therefore, section 6 draws a clear distinction between Judicial Magistrates



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and the Executive Magistrates. The powers of the Judicial Magistrates and the Executive Magistrates are expressly dealt with under various provisions of the Cr.PC sections 12 to 19 deal with the various categories of Judicial Magistrates referred to under section 6. Section 20 deals with the Executive Magistrates. Relevant to the context of this case is section 20(1) which reads as follows:

"20. *Executive Magistrates*— (1) In every district and in every metropolitan area the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate."

25. Section 21 of the Cr.PC empowers the State Government to appoint Special Executive Magistrates; the details of which are not necessary in the present case. Section 22 of the Cr.PC deals with the local jurisdiction of the Executive Magistrates. Section 23 of the Cr.PC deals with the hierarchy of the Executive Magistrates and the limits and powers of the various Executive Magistrates. Wherever the Cr.PC confers powers on the Executive Magistrates, the provisions of the Code are specific, for example, under sections 107,108,109 and 110 the Legislature expressly employed the expression "Executive Magistrate". We do not propose to make an exhaustive survey of the provisions of the Code for the present purpose. The above provisions are noted only for understanding the scheme of the Code with regard to the powers, functions and limitations of the Judicial and Executive Magistrates.

26. It is in the context of such separation of powers among the two categories of Magistrates section 3(1) stipulates that in the Code of Criminal Procedure any reference, without any qualifying words, to a Magistrate shall be construed a Judicial Magistrate which term includes a Judicial Magistrate in contra-distinction to

an Executive Magistrate. The Parliament was also conscious of the fact that under various enactments made by the Parliament, powers are required to be exercised by the Magistrates without specifying whether such powers are to be exercised by Judicial or Executive Magistrates in a given situation. The Parliament, therefore, thought it fit to make a declaration under sub-section (4) of section 3 that whenever such a question arises (in the context of any law made by the Parliament other than the Code of Criminal Procedure whether such a reference is to a Judicial Magistrate or the Executive Magistrate) depending upon the nature of the power that is to be exercised such reference is to be construed to be either to a Judicial or an Executive Magistrate. From the scheme of sub-section (4) it appears that where the powers are purely administrative in nature such powers are required to be exercised by an Executive Magistrate. Whereas, where the power to be exercised is such that it involves appreciation of evidence or the formulation of a decision which exposes any person to any punishment, penalty or detention, etc., then such functions are required to be exercised by the Judicial Magistrates.

27. In the light of the above we are of the opinion that the expression



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“Magistrate” occurring under section 26 of the Indian Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in police custody is likely to expose the person making the confession to a punishment. This conclusion of ours gains further support from the very scheme of the provisions of sections 25 to 27 of the Evidence Act. Section 25 of the Evidence Act makes a declaration in no uncertain terms that a confession made to a Police Officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of decisions to the effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to section 25. While section 25 prohibits the proof of a confession made to a Police Officer, section 26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provision is made in order to prevent the police from extracting confession from the accused while he is under custody and ingeniously circumventing the prohibition of law contained under section 25 by making it appear that the confession was not in fact made to a Police Officer but somebody else. The scheme of the provisions of sections 25 to 27 was examined by the Supreme Court in *Bheru Singh v. State of Rajasthan*, (1994) 2 SCC 467 wherein at para 16 the Supreme Court held:

“16... By virtue of the provisions of section 25 of the Evidence Act, a confession made to a Police Officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression “accused of any offence” in section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. Inadmissibility of a confessional statement made to a Police Officer under section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a Police Officer or made by him while in the custody of a Police Officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence.

Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a Police Officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. Under section 164, Cr.PC a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.”

28. The Legislature was obviously of the view that any kind of confession by



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an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of mankind. However, the Legislature recognized an exception to the rule contained under section 26, i.e., a confession made by an accused, who is in the custody of the police, to some person other than a Police Officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a Police Officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods. Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of article 20, sub-article (3) of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties under section 164(2), Cr.PC on the Judicial Magistrate recording statement under section 164, Cr.PC. It would be strange logic that while a statement recorded by a Judicial Magistrate under section 164, Cr.PC would be vitiated for non-compliance of the conditions stipulated under section 164 (2) and (4) of the Cr.PC and cannot, therefore, be used against the maker of the statement, but the Magistrate contemplated under section 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, is under no obligation to comply with the requirements of section 164(2) and (4) of the Cr.PC, but the confession recorded by such a Magistrate can be proved against the accused for establishing his guilt.

29. From the foregoing discussion we have no alternative but to reach an irresistible conclusion that the expression “Magistrate” occurring in section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate.”

30. In the referral order, we find that the later Division Bench observed that there

appears to be some confusion in the finding of the previous Division Bench in paragraphs 28 and 29 of *Anupam Das* (supra) by pointing out that in paragraph 28, it was held that Magistrate under section 26



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need not even be a Judicial Magistrate but in paragraph 29, it was held that Magistrate under section 26 would only mean a Judicial Magistrate and not an Executive Magistrate.

31. We are afraid; we can accept such reasoning in the referral order. Paragraphs 28 and 29 of *Anupam Das* (supra) have been extracted above. A plain and simple reading of paragraph 28 would go to show that the previous Division Bench had observed that it would be a strange logic if a statement recorded by a Judicial Magistrate under section 164, Cr.PC would not be admissible in evidence if the conditions stipulated therein are not complied with whereas a statement made before an Executive Magistrate under section 26 of the Evidence Act where there is no procedural safeguards as provided under section 164 of the Code of Criminal Procedure, 1973, would be admissible in evidence. Following such analysis, conclusion was reached in paragraph 29 that the expression "Magistrate" appearing in section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate. There is no confusion here. The exposition of the legal position in *Anupam Das* (supra) is clear and unequivocal. Therefore, the observation made in the referral order that there appears to be some confusion in paragraphs 28 and 29 of *Anupam Das* (supra), perhaps, was not justified. Reference to the Coroner's Act, 1871 whereunder Coroners appointed were deemed to be Magistrates within the meaning of section 26 of the Evidence Act is misplaced for the same reason as alluded to herein above that when the Coroner's Act was enacted, there was no distinction between Judicial Magistrate and Executive Magistrate.

32. The view taken in *Anupam Das* (supra) was followed by another Division Bench of this court in *Ratan Singh v. State of Assam*, 2012 (6) GLJ (NOC) 123, wherein it was held that in view of the provision prescribed by section 3 of the Code of Criminal Procedure, 1973, a reference to a Magistrate unless the context otherwise requires, is to be construed as a reference to a Judicial Magistrate. It was further held that making of a confessional statement in the presence of an Extra Assistant Commissioner cannot be treated as a statement made in the immediate presence of a Magistrate, while in police custody; it would be hit by sections 25 and 26 of the Evidence Act and, therefore, such statement cannot be used as legal evidence against the maker of the statement.

33. This has also been the view of the Madras High Court and it finds its expression in several decisions. In *Palanisamy alias Kunjupaiyan v. State*, Criminal Appeal No.541 /2005, decided on 22.03.2013, Madras High Court has held that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973. In view of section 3(3) of the Code of Criminal Procedure, 1973, the term "Magistrate" referred to in



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section 26 of the Evidence Act does not refer to Executive Magistrate. Consequently, the expression "Magistrate" as appearing in section 26 of the Evidence Act would

mean only a Judicial Magistrate. Therefore, confession recorded or video-graphed by police in the presence of Executive Magistrate would be hit by sections 25 and 26 of the Evidence Act. Again, in the case of *Kalam @ Abdul Kalam v. Inspector of Police*, 2011 SCC OnLine Mad 371, the Madras High Court examined the provisions of section 26 of the Evidence Act vis-a-vis section 3(3) of the Code of Criminal Procedure, 1973 and after observing that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973, held that the term "Magistrate" as referred to in section 26 of the Evidence Act will mean only a Judicial Magistrate.

34. Therefore, we have no hesitation in our mind in coming to the conclusion that the views expressed by the Division Bench in *Anupam Das* (supra) lays down the correct legal position and strictly speaking, the reference so made was really not necessary.

35. Beyond this, we would not like to say anything more.

36. Consequently, we hold that the decision in *Anupam Das* (supra) lays down the correct legal proposition and accordingly, we answer the reference by holding that the expression "Magistrate" appearing in section 26 of the Evidence Act would mean only a Judicial Magistrate and not an Executive Magistrate.

37. Since we have answered the reference as above, Registry to place the two appeals for final disposal before the competent Bench as per roster.

38. Reference is answered accordingly.

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