

[f] furnish latest address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

8. The Authorities will release the applicant only if he is not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be executed before the learned Lower Court having jurisdiction to try the case. It will be open for the concerned Court to delete, modify and/or relax any of the above conditions, in accordance with law. At the trial, learned Trial Court shall not be influenced by the observations of preliminary nature, qua the evidence at this stage, made by this Court while enlarging the applicant on bail. Rule is made absolute to the aforesaid extent. Direct service is permitted.

**Result:-** Bail granted.

ABC 2016 (II) 237 GUJ  
ACQUITTAL & BAIL CASES  
HIGH COURT OF GUJARAT

(G.B. Shah, J.)

Criminal Misc. Application (For Regular Bail) In Criminal Appeal No. 514 of 2016

Decided on 5 July, 2016

HASINABEN HILAL USMAN MULLA - Appellant(s).

*Versus*

STATE OF GUJARAT - Respondent(s).

**Law Covered:-** (A) *Code of Criminal Procedure, 1973 – Section 389 – Suspension of sentence pending the appeal; release of appellant on bail – Indian Penal Code, 1860 – Section 489-B – Sentence under – Possession of 15 fake currency notes of 1000 rupee denomination – Charge of – Statement recorded by the investigating officer while accused was in custody – Held, cannot be considered as a confession – Sentence suspended – Bail granted. (Para 7)*

(B) *Criminal Jurisprudence – Indian Evidence Act, 1872 – Section 10 – Things said or done by conspirator in reference to common design – Statement of accused after his arrest – cannot fall*

*within the ambit of section 10 – State of Gujarat Vs. Mohammed Atik and Ors – relied. (Para 4.1)*

(C) *Indian Evidence Act, 1872 – Sections 24 to 30 – Code of Criminal Procedure, 1973 – Section 164 – Confession or admission – Evidentiary value of – is evidence against the maker of it so long as its admissibility is not excluded by some provision of law – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

(D) *Indian Evidence Act, 1872 – Section 25 – Confession to police officer not to be proved – Scope – Confession – made to a police officer – under no circumstances is admissible in evidence against an accused – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

(E) *Indian Evidence Act, 1872 – Section 25 – Confession to police officer not to be proved – Ambit – The section deals with confessions made 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 – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

(F) *Interpretation of Statute – Indian Evidence Act, 1872 – Section 25 – Confession to police officer not to be proved – Expression "accused of any offence" – Interpretation of – 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 – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

(G) *Indian Evidence Act, 1872 – Section 25 – Confession to police officer not to be proved – Scope of – Admission – by an accused to a police officer – or made while in the custody of a police officer – & admission contained in the confessional statement of all incriminating facts relating to the commission of an offence – are barred as proof by section 25 – Standard of proof – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

(H) *Indian Evidence Act, 1872 – Section 27 – How much of information received from accused may be proved – Scope of – Statement or confession – made by a person accused of an offence while in police custody – the section partially lifts the ban imposed by Sections 25 & 26 – & makes admissible so much of such information – as relates to the Act thereby discovered – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

a (I) *Code of Criminal Procedure, 1973 – Section 164 – statement or confession under – Standard of proof – the statement or confession may be recorded by a Magistrate, subject to the safeguards imposed by the section itself – can be relied upon at the trial – Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan. (Para 4.2)*

b *Law of relief:-* *Statement recorded by the IO in custody cannot be considered as a confession.*

*Held:-* He put reliance on para 17 of the decision of State of Gujarat Vs. Mohammed Atik and Ors (1998) 4 SCC 351, which reads as under :

c "17. Thus, the principle is no longer res integra that any statement made by an accused after his arrest, whether as confession or otherwise, cannot fall within the ambit of section 10 of the Evidence Act. The corollary of its I that the confessional statement of 4 th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use." (Para 4.1)

He has also placed reliance on para 16 of decision of Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan (1994) 2 SCC 467 which reads as under :

e "16. A confession or an admission is evidence against the maker of it so long as its admissibility is not excluded by some provision of law. Provisions of Sections 24 to 30 of the Evidence Act and of Section 164 of the Code of Criminal Procedure deal with confessions. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstances 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 Act thereby discovered, when made by a person accused of an offence while in police custody. Under Section 164 Cr. P. C. 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." (Para 4.2)

I have considered the above referred rival submissions made by learned advocates for the parties. In light of the above referred decision in Mohammed Atik and Ors (supra), prima facie, I am of the view that the statement of the applicant- accused, recorded by the investigating officer while she was in custody, cannot be considered as a confession or otherwise as observed by the Apex Court. (Para 7)

**Counsel:-** For Appellant(s): HCLS Committee & Mr. Rahul R Dholakia, Adv.

For Respondent(s): Mr. K.L. Pandya, Advocate.

**Cases Referred:-**

1. State of Gujarat Vs. Mohammed Atik and Ors. (1998) 4 SCC 351. (Para 4.1)
2. Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan (1994) 2 SCC 467. (Para 4.2)

### **ORDER**

**G.B. SHAH, J.:** - Rule. Mr. K.L. Pandya, learned Additional Public Prosecutor, waives service of notice of Rule on behalf of the respondents.

2. Heard the learned advocate Mr. Rahul R. Dholakia, for the applicant-original accused as well as learned Additional Public Prosecutor Mr. K.L. Pandya, for the respondent-State.

3. The applicant-original accused namely, Hasina Hilal Usman Mulla who is presently undergoing sentence at, Lajpore Central Jail,

August 2016

a Surat since 6.10.2012, has preferred this application under section 389 of the Code of Criminal Procedure, 1973, seeking prayer for suspension of sentence in connection with the impugned judgment and order dated 18.2.2015, passed by learned 5th Additional Sessions Judge, Surat, in sessions case No. 5/13 pending the present Criminal Appeal.

b 3.1 Mr. Rahul Dholakia learned advocate for the applicant-original accused has submitted that the impugned judgment and order of conviction is contrary to law and evidence on record. He further submitted that the applicant is innocent and has not committed any offence. He further submitted that the convict has undergone about 4 years of imprisonment against the period of 10 years of imprisonment imposed on the applicant. He further submitted that the prosecution has failed to prove the ingredients of offence punishable under Section 489-B of the Indian Penal Code.

c 4. Moreover, he has drawn the attention of this Court on paragraph 37 of the impugned judgment and order and submitted that the learned Trial Judge has observed that it was asked to the accused by the police that from where she had received said fake currency and from whom and she allegedly stated that she had received the fake currency notes from one Akram. The name of this Akram has been shown in column No. II of the chargesheet, as absconding accused and after considering the said facts, the trial court has considered Section 10 of the Indian Evidence Act, 1872 and come to the conclusion that whatever the accused had disclosed before the police after her arrest can be considered in light of section 10 of the Indian Evidence Act, and accordingly the trial court has convicted the accused for a period of 10 years for the offence punishable under section 489 B of the Indian Penal Code. He has then submitted that said finding of learned Trial Judge is contrary to the provision of section 10 as well as Section 27 of the Indian Evidence Act because the said statement of accused on which the learned trial judge had placed reliance, referred herein above, was as such recorded when she was in police custody.

d 4.1 He put reliance on para 17 of the decision of *State of Gujarat Vs. Mohammed Atik and Ors (1998) 4 SCC 351*, which reads as under :

e "17. Thus, the principle is no longer res integra that any statement made by an accused after his arrest, whether as

confession or otherwise, cannot fall within the ambit of section 10 of the Evidence Act. The corollary of its I that the confessional statement of 4 th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use." a

4.2 He has also placed reliance on para 16 of decision of *Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan (1994) 2 SCC 467* b which reads as under :

"16. A confession or an admission is evidence against the maker of it so long as its admissibility is not excluded by some provision of law. Provisions of Sections 24 to 30 of the Evidence Act and of Section 164 of the Code of Criminal Procedure deal with confessions. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstances 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 Act thereby discovered, when made by a person accused of an offence while in police custody. Under Section 164 Cr. P. C. a statement or confession made in the c  
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a 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."

b 5. Referring to the jail report dated 18.4.2016, it appears that the present applicant-original accused had remained as an under trial -prisoner for more than 3 years, 6 months and 13 days and considering the said aspect, Mr. Dholakia for the applicant has requested to allow the present application by suspending the sentence imposed by the trial court.

c 5.1 In view of above, it is submitted that the applicant may be released on bail on any stringent conditions as may be imposed by this Court.

d 6. Learned Additional Public Prosecutor, Mr.Pandya, has opposed the present application and submitted that as such, the absconding accused Akram is yet to be arrested and when his name has been shown in column no.II of the charge sheet then, the ingredients of section 10 are specifically attracted as has been rightly observed by the trial court in para 37 of the impugned judgment and order.

e 7. I have considered the above referred rival submissions made by learned advocates for the parties. In light of the above referred decision in Mohammed Atik and Ors (supra), prima facie, I am of the view that the statement of the applicant- accused, recorded by the investigating officer while she was in custody, cannot be considered as a confession or otherwise as observed by the Apex Court.

f 8. Under the circumstances, even though serious charge of possessing 15 fake currency notes of 1000 rupee denomination has been prima facie proved against the applicant-accused, for which she has been convicted for a period of 3 years under Section 489 of IPC considering the period of sentence undergone by her, as referred g above, in my opinion, the present application deserves to be allowed.

h 9. Considering the overall facts and circumstances of the case and sentence imposed by the Court below for the offence punishable under section 489-B of IPC, the present application requires consideration and prayer in terms of bail is allowed. The sentence imposed by judgment and order dated 18.2.2015, passed by learned 5th Additional Sessions Judge, Surat, in sessions case No. 5/13, is

hereby suspended pending hearing and final disposal of the Criminal Appeal. The applicant shall be released on bail on executing personal bond of Rs.10,000/- (Rupees Ten Thousand only) and one surety of like amount to the satisfaction of the Trial Court and subject to the conditions that she shall;

(a) not leave the State of Gujarat without prior permission of the Trial Court;

(b) furnish the present address of residence with proof of the same to the I.O. and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

(c) surrender passport, if any, to the lower court within a week;

10. This Application is allowed in above terms. Rule is made absolute to the aforesaid extent. Direct Service is permitted.

**Result:-** Sentence suspended, bail granted.

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