

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ON THE 15th OF JUNE, 2023

MISC. CRIMINAL CASE No. 10886 of 2023

Between:-

**NADEEM KHAN S/O SHRI HAMEED KHAN,
AGED ABOUT 21 YEARS, OCCUPATION: DRIVER
R/O 611, BHANPUR WARD NO 72 ZONE 16,
NAGAR NIGAM BHOPAL DISTRICT BHOPAL
(NATIVE OF HAJIPUR SIRONJ DISTRICT
VIDISHA) (MADHYA PRADESH)**

....PETITIONER

(BY SHRI PADAM SINGH - ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH,
THROUGH POLICE STATION SIRONJ DISTRICT
VIDISHA (MADHYA PRADESH)**

....RESPONDENT

**(BY SHRI RAVINDRA SINGH - DY. ADVOCATE GENERAL
AND SHRI SAMEER KUMAR SHRIVASTAVA – ADVOCATE
FOR THE COMPLAINANT)**

This application coming on for admission this day, the court passed the following:

ORDER

1. The applicant has filed this first bail application u/S.439 Cr.P.C for grant of bail. Applicant has been arrested on 26-02-2022 by Police

Station Sironj District Vidisha in connection with Crime No.92/2022 registered for offence under Sections 147, 148, 149 and 302 of IPC.

2. It is the submission of learned counsel for the applicant that he is suffering confinement since 26-02-2022 on false pretext and suffers for over implication. No role of the applicant can be assigned in specific terms in commission of offence.
3. Learned counsel for the applicant raised the point that incident is dated 24-02-2022 and memo under Section 27 of the Evidence Act of applicant was taken on 26-02-2022 at 7:10 pm. Weapon (stick) was seized from the applicant same day at 8:15 pm which is reflected from the property seizure memo, whereas applicant was arrested at 8:45 pm which is clear from the arrest memo of the applicant. According to learned counsel, it is improbable to take memo under Section 27 of the Evidence Act and to seize weapon used in the crime at the instance of applicant prior to his Arrest. It appears that false case has been registered against the applicant. He relied upon the judgment of Division Bench of this Court in the matter of **Bibhacha alias Baibachha Vs. State of Orissa, 1998 CriLJ 1553**. Thus, prayed for grant of bail.
4. Learned counsel for the respondent/State opposed the prayer and submits that name of the applicant figures in FIR and statements of witnesses. During investigation, weapon has been seized from the possession of the applicant and his role is clear in commission of offence, therefore, counsel for the respondent/State prayed for dismissal of bail application.

5. Learned counsel for the complainant also opposed the prayer and submits that even if the applicant was not taken in formal custody, even then memo under Section 27 of the Evidence Act can be prepared and thereafter he can be arrested. He relied upon the judgment of Apex Court in the case of **State of A.P. Vs. Gangula Satya Murthy, (1997) 1 SCC 272** and **Dharam Deo Yadav Vs. State of Uttar Pradesh, (2014) 5 SCC 509**. He prayed for dismissal of the bail application.
6. Heard learned counsel for the parties and perused the case diary.
7. This is a case where name of applicant figures in FIR and statements of witnesses. So far as argument advanced in respect of custody is concerned, it appears from the charge-sheet that applicant was arrested on 26-02-2022 at 8:45 pm, arrest memo indicates such date and time. It is also true that prior to his formal arrest, as per arrest memo, weapon used in commission of offence was seized at 8:15 pm which is prior in time. It is also true that his memo under Section 27 of the Evidence Act has been taken at 7:10 pm. Meaning thereby, his memo was taken first and then weapon was seized, then he was arrested. There appears nothing wrong apparently in the case because custody as contemplated under Section 27 of the Evidence Act does not mean formal custody only but includes such state of affair/activities whereby accused can be under the surveillance of police officers or within the range of police officers so that they can keep an effective tab or control over him.
8. The Apex Court in the case of Gangula Satya Murthy (supra) in para

19 has discussed the import of custody in the following manner:

“19. The other reasoning based on [Section 26](#) of the Evidence Act is also fallacious. It is true any confession made to a police officer is inadmissible under [Section 25](#) of the Act and that ban is further stretched through [Section 26](#) to the confession made to any other person also if the confessor was then in police custody. Such "custody" need not necessarily be post arrest custody. The word "custody" used in [Section 26](#) is to be understood in pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the Section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in [Section 26](#) of the Evidence Act.”

9. Later on, in the case of Dharam Deo Yadav (supra), the Supreme Court again reiterated in the following manner:

21. [Section 27](#) of the Evidence Act explains how much of information received from the accused may be proved.

[Section 27](#) reads as follows:

*“27. **How much of information received from accused may be proved.**- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, 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.

22. The expression “custody” which appears in Section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police. This Court in State of Andhra Pradesh Vs. Gangula Satya Murthy (1997) 1 SCC 272 held that if the accused is within the ken of surveillance of the police during which his movements are restricted, then it can be regarded as custodial surveillance. Consequently, so much of information given by the accused in “custody”, in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Reference may also be made to the Judgment of this Court in A.N. Venkatesh Vs. State of Karnataka (2005) 7 SCC 714. In Sandeep v. State of Uttar Pradesh (2012) 6 SCC 107, this Court held that: (SCC pp. 128 -29, para 52)

52.It is quite common that based on admissible portion of the statement of the accused, whenever and wherever recoveries are made, the same are admissible in evidence

and it is for the accused in those situations to explain to the satisfaction of the Court as to nature of recoveries and as to how they came into the possession or for planting the same at the place from where they were recovered.

Reference can also be made to the Judgment of this Court in State of Maharashtra v. Suresh (2000) 1 SCC 471, in support of the principle. Assuming that the recovery of skeleton was not in terms of Section 27 of the Evidence Act, on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as “conduct” under Section 8 of the Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of Diana was concealed in his house, especially when the statement made by him to PW14 is admissible in evidence.”

10. The Division Bench of this Court in the case of **Manish Vs. State of Madhya Pradesh, 2022 SCC OnLine MP 3667** discussed in the same line.
11. It is not necessary that chronology of statement of Section 27 of the Evidence Act, recovery in pursuance thereof and arrest of accused may come in same fashion. Chronology may change also without disturbing the effect and potency of the seizure and recovery because

if an accused tries to escape from the scene of crime and throws weapon of offence midway which is recovered by the police while chasing him and thereafter he is arrested and memo is prepared then said memo and recovery would not automatically be treated a nullity because of jumbled chronology. Said memo has legal sanctity.

12. Therefore, contention of learned counsel for the applicant that his arrest at 8:45 pm after recording of statement under Section 27 of the Evidence Act at 7:10 pm and seizure of weapon at 8:15 pm is bad in law, has no legal sanctity. Thus, rejected.
13. At this juncture, learned counsel for the applicant seeks withdrawal of this application with liberty to renew the prayer after recording the evidence of material prosecution witnesses/reasonable period of custody.
14. Prayer noted.
15. Considering the submissions/prayer, application is **dismissed** as withdrawn with the aforesaid liberty.

(Anand Pathak)
Judge