

**(2010) 05 BOM CK 0047**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 260 of 2008**

Dinesh

APPELLANT

Vs

The State of Maharashtra (Copy to be served on Public  
Prosecutor)

RESPONDENT

**Date of Decision :** 05-05-2010

**Acts Referred:**

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 302, 34, 363, 406

**Citation :** (2010) 05 BOM CK 0047

**Hon'ble Judges :** S.S. Shinde, J; S.B. Deshmukh, J

**Bench :** Division Bench

**Advocate :** Monika Purnapatre, for the Appellant; N.R. Shaikh, Assistant Public  
Prosecutor, for the Respondent

**Final Decision :** Allowed

## Judgement

S.S. Shinde, J.—By way of this criminal Appeal, the appellant (original accused) has challenged judgment and order dated 10.5.2007, passed by the learned Additional Sessions Judge, Shahada in Sessions Case No. 24 of 2004, thereby convicting him for the offences punishable under Sections 302, 201 and 406 of I.P.C. and sentencing him to suffer R.I. for life and to pay fine of Rs. 10,000/- i/d to suffer R.I. for one year in respect of offence punishable u/s 302 of I.P.C. He was also directed to pay fine of Rs. 5,000/- each for the offences punishable under Sections 201 and 406 of I.P.C. i/d to suffer R.I. for six months in respect of said offences. It was directed that the substantive sentences shall run concurrently while the sentences awarded in default of the payment of fine amount, shall run separately.

2. The prosecution case, in a nutshell, is that the P.W.1 Lakhaji Bhuraji Marathe is the owner of Marshal Jeep bearing registration No. MH-15 AH 6440 (for short "the jeep"). One Akhtar Hussain Gulam Hussain (deceased) was working as a driver on the jeep, as employee of P.W.1 Lakhaji. On 7.3.2004, the appellant

obtained the jeep from P.W.1 Lakhaji on hire for two days for visiting Bhavnagar to see his ailing father. Accordingly, P.W.1 Lakhaji gave jeep to the appellant with said Akhtar Hussain, as jeep driver over it. P.W.1 Lakhaji has instructed said Akhtar Hussain to make phone calls in the morning and in the evening time.

On 8.3.2004, P.W.1 Lakhaji received phone message from said Akhtar Hussain about his reaching to Bhavnagar safely. On 9.3.2004, in the evening time, said Akhtar Hussain informed P.W.1 Lakhaji on telephone that there was some religious function at the house of appellant and after the said function is over, he is about to start proceeding for Akkalkuwa. Accordingly P.W.1 Lakhaji waited for arrival of jeep with said Akhtar Hussain till 12.3.2004 at 4.00 p.m. But they did not return. It is therefore, P.W.1 Lakhaji sent his son Rajendra, nephew Vishwas Ukhaji Marathe, Raja Bharwad, Yogendra Rana and P.W.3 Noor Hussain Gulam Hussain (i.e. the brother of said Akhtar Hussain) in search of the jeep and jeep driver i.e. Akhtar Hussain.

On 13.4.2004, at about 3.00 p.m. P.W.1 Lakhaji was told by the aforesaid persons on phone that they reached to the house of the appellant at Vartej But they could not find that the father of the appellant was ill, the appellant told them that he has paid fare charges of Rs. 6500/- to the jeep driver on 11.3.2004 and then the jeep driver had gone away with the jeep. Thereafter the son and nephew of P.W.1 viz. Rajendra, Vishwas and others continued to make inquiries about the jeep and its driver Akhtar Hussain from relatives of appellant and they learnt that something terrible wrong has happened in the evening time of 9.3.2004 but since they were not getting proper response and information, they approached Vartej Police Station for lodging a complaint but it was not accepted by police and so also the appellant was also giving evasive answers. In the meanwhile, on 14.3.2004, at about 10.00 a.m. The jeep was found parked in Vartej Police Station and when the son and nephew of P.W.1 inquired from the police as to how and where from the jeep has been traced out. The police told them that the jeep was found on road in start condition. The son and nephew of P.W.1 again tried to lodge complaint with Vartej police station but the police declined to accept their complaint. It is therefore, on 19.3.2004 P.W.1 Lakhaji lodged complaint (Exh.33) with Akkalkuwa police station.

3. Upon the complaint (Exh.33) P.S.O. Akkalkuwa has registered crime No. 20 of 2004, initially for offences under Sections 363, 406 of I.P.C. The investigation conducted by P.W.6 Popatrao Shripatrao Thorat (P.W.6). On 22.3.2004, P.W.6 P.S. Thorat recorded confessional statement of the appellant and in consequence traced the place of incident i.e. "Mati Shivar" where the appellant allegedly has committed murder of said Akhtar Hussain, with the help of accused No. 2 Tulshi and accused No. 3 Bharat. P.W.6 then brought accused Nos. 2 from Vartej and arrested him on 23.3.2004 by preparing arrest panchnama in Akkalkuwa police station (Exh.35). On 28.3.2004, P.W.6 made recovery of muddamal "rope" (Article 8) which was allegedly utilized by the present appellant in asphyxiating said Akhtar Hussain, in consequence to disclosure statement made

by appellant in presence of panchas. In the meanwhile, P.W.6 has secured possession of jeep from Vartej police station and prepared seizure panchnama on 29.3.2004 (Exh.36). On 30.4.2004, P.W.6 has arrested accused 3 by preparing arrest panchnama in Akkalkuwa police station (Exh.37). P.W.6 has collected autopsy report in respect of skeleton remains and unknown person dated 15.3.2004, issued by P.W.5 Dr. Satish Dinkar Kalele (P.W.5 Dr. S.D. Kalele) and Dr. K.J. Nandolia, Medical College Bhavnagar (Exh.64). In the meanwhile, on 7.4.2004, P.W.6 has produced the accused Nos. 1 and 2 before P.W.7 Shashikant Eknath Bangar (P.W.7), the J.M.F.C. Taloda for recording of their confessional statements. P.W.7 has recorded confessional statement of the appellant on 8.4.2004. In the meanwhile, P.W.6 has collected one skull with mandible with coloured photographs and report of Shri K.P. Nanavati, Scientific Officer, regional Forensic Science Laboratory, Government Officer Gujarat, Janagadh (Exh.30). P.W.6 has also secured age estimation report dated 26.5.2004 from P.W.5 Dr. S.D. Kalele (Exh.74). P.W.6 has secured Chemical Analyzer's report in respect of the muddemal rope (Exh.75). After the completion of investigation in usual manner, P.W.6 Thorat has filed charge sheet against the accused persons. Initially, the charge sheet (Regular Criminal Case No. 53 of 2004) was filed before the learned Judicial Magistrate (First class), Taloda, who in turn vide order dated 21.6.2004, committed the case to the Sessions Court at Shahada for trial.

The learned Sessions Judge framed charge (Exh.8) against the accused persons for offences punishable under Sections 302, 201, 406 r.w. 34 of I.P.C. and after explaining the contents thereof, to them in common, recorded their statements. The accused No. 1 to 3 pleaded not guilty and claimed to be tried. The accused persons took the defence of total denial and false implication in prosecution case.

After full fledged trial, the learned Additional Sessions Judge, Shahada, convicted the present appellant and has acquitted accused Nos. 2 and 3, in the said offence. Hence, this appeal.

4. We heard Ms. Purnapatre, learned Counsel for the appellant (appointed) and Mr. Shaikh, learned A.P.P. for the respondent-State.

5. The case in hand is based upon circumstantial evidence. In dealing with the circumstantial evidence, the Apex Court since 1952 till date has consistently held that the following conditions must be fulfilled before the case against an accused can be said to be fully established on circumstantial evidence:

- i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely ?may be? fully established,
- ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
- iii) the circumstances should be of a conclusive nature and tendency,
- iv) they should exclude every possible hypothesis except the one to be proved,

and

v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must that in all human probability the act must have been done by the accused.

In the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 SCC 166, the Apex Court has held that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

It is also to be born in mind that the case in hand is a case of circumstantial evidence and if two views are possible on the evidence of record, one pointing to the guilt of the accused and other his innocence, the accused is entitled to have the benefit of one which is favourable to him.

6. On perusal of the impugned judgment and more particularly para 33, shows that the trial court has recorded that the prosecution has proved three incriminating circumstances beyond reasonable doubt against the appellant herein. They are oral evidence of P.W.1 Lakhaji that on 7.3.2004 appellant-accused No. 1 obtained jeep from him on hire with jeep driver for visiting his village at Vartej. Secondly, the medical evidence of P.W.5 Dr. S.D. Kalele r/w. Admitted document i.e. inquest panchnama, autopsy report, property report, skull report and photographs to prove homicidal death of deceased Akhtar Hussain. Thirdly, the incriminating evidence is of discovery of place of incident where the accused had disclosed the dead body of the deceased Akhtar Hussain in consequence of the discovery statement made by the accused No. 1 appellant.

7. On perusal of the impugned judgment and original record made available to us, it appears that one Mr. Lakhaji Bhuraji Marathe, P.W.1 filed the complaint. The said complaint is at Exh.33. P.W.1 complainant is the owner of jeep, which was hired by the appellant herein.

The evidence of P.W.1 recorded by the trial court reveals that the jeep of the complainant was hired by the appellant on 7.3.2004, for two days. In his examined in chief, P.W.1 has stated that he instructed the jeep driver viz. Akhtar Hussain i.e. deceased to make phone call twice a day to the complainant. On 8.3.2004, at about 9.30 a.m. The complainant received phone call from Akhtar Hussain that he reached Bhavnagar safely. On 9.3.2004, at about 6.00 p.m. again a phone call was received by the complainant from deceased Akhtar Hussain. The driver Akhtar Hussain told the complainant that after performing the religious function at the house of the appellant, he came to Bhavnagar and further told that he is proceeding to visit Akkalkuwa on 10.3.2004. However, Akhtar Hussain did not reach at Akkalkuwa till 12.3.2004.

Thus, on going through the chief examination of P.W.1 complainant it clearly seen

that the jeep was hired by the appellant on 7.3.2004 at about 4.00 p.m. It means that the deceased was last seen in the company of appellant on 7.3.2004. However, phone calls by deceased Akhtar Hussain to the complainant, as referred in his chief examination, clearly show that deceased Akhtar Hussain left the place of the appellant on 9.3.2004 at about 6.00 p.m. It has come in the deposition of the complainant that Akhtar Hussain told him that after religious function at the house of the appellant is over, he came at Bhavnagar and further proceeding to Akkalkuwa on 10.3.2004.

The statement made in chief examination by P.W.1 complainant further shows that since the complainant suspected that appellant might have committed murder of jeep driver, therefore, the complainant lodged the complaint with Akkalkuwa police station, which is at Exh.33.

On careful reading of the statement of P.W.1, it clearly emerges that deceased was last seen in the company of the accused on 7.3.2004 at 4.00 p.m. when the appellant took the jeep owned by the complainant on hire basis for two days. It further appears that Akhtar Hussain, was instructed by the complainant to make phone calls to the complainant on 8.3.2004 and on 9.3.2004 and communicate his whereabouts. The last conversation of the driver with the complainant took place on 9.3.2004 at about 6.00 p.m. The Chief examination of the complainant clearly shows that said Akhtar Hussain told the complainant that after performing religious function at the house of the appellant, he had come to Bhavnagar and further he is proceeding for visiting Akkalkuwa on 10.3.2004. Therefore, it clearly appears that jeep was hired for two days and after the work in the house of the appellant is over, as stated by driver on 9.3.2004 at about 6.00 p.m. to P.W.1 that he left the house of the appellant and he will proceed for Akkalkuwa on 10.3.2004. Secondly, on perusal of the statement of the complainant, it clearly emerges that the complaint filed by P.W.1 complainant was on suspicion so also the same is without having concrete and definite information about the fact that the appellant is instrumental or he is involved in the commission of offence. It is also relevant to mention that said complaint is at Exh.33, filed on 19.3.2004. The alleged offence, even according to the complainant, took place in between 7.3.2004 to 14.3.2004.

8. The trial court after taking into consideration the evidence of P.W.1 complainant, has recorded a finding that the oral evidence of P.W.1 Lakhaji is that, on 7.3.2004 the appellant obtained the jeep from him on hire basis with jeep driver for visiting his village at Vartej, has been used as incriminating circumstance, in the chain of the circumstance, which is believed by the trial court. Perusal of the chief examination of the complainant makes it clear that the said complaint is lodged on the basis of suspicion. The Hon'ble Supreme Court in the case of Hanumant Vs. The State of Madhya Pradesh, , held that in dealing with the circumstantial evidence, the Rules specially applicable to such evidence must be borne in mind. In such cases is always the danger that conjecture or suspicion may take the place of legal proof. In cases where the evidence is of a

circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn, should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature of tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In the instant case, admittedly, the complainant has filed the complaint on the basis of suspicion and the case is based upon circumstantial evidence. The statement of P.W.1 before the court itself shows that deceased was alive till 6.00 p.m. on 9.3.2004. Deceased driver has clearly stated to P.W.1 complainant that after religious function in the house of the appellant is over, he left the house of the appellant and he is proceeding to Akkalkuwa on 10.3.2004. Akkalkuwa is the place of the complainant. Taking into consideration the chief examination of the complainant, it clearly appears that the complaint was filed on the basis of suspicion. The Apex Court in the case of Ashish Batham Vs. State of Madhya Pradesh, , held that mere suspicion, however, strong or probable it has no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true".

9. The trial court has examined P.W.2 Jaiprakash Vishwanathsing Pardeshi on the point of recovery and spot panchnama and also discovery panchnama of dead body at Exh.39, 40, 41 and 42. This witness in his deposition has stated that memorandum of accused in respect of discovery of dead body was given on 22.3.2004. But as per the deposition of P.W.6 (I.O.) skeleton of deceased was found on 14.3.2004 by Vedawadar police station and post mortem was admittedly performed on 15.3.2004. On careful perusal of said statement of P.W.2, it appears that memorandum of accused was recorded on 22.3.2004 at Vartej police station. In fact, as stated herein above, skeleton of deceased was found on 14.3.2004 itself and post mortem was performed on 15.3.2004. This discovery was already prior to memorandum of accused.

Fact discovered from the statement of appellant that dead body is thrown at a particular place loses the significance. P.W.6 i.e. investigating Officer in his chief examination has stated that on 19.3.2004 he was working as P.S.I. at Akkalkuwa police station, with which crime No. 20 of 2004 was registered upon the complaint lodged by P.W.1 Lakhaji Bhuraji Marathe. In pursuant to that, investigation was carried out by him. He further states in his examination in chief that on 20.3.2004 he made phone calls to Vartej police station in Gujarat and inquired from them as to whether they arrested the present appellant. He learnt that the appellant has been arrested alongwith jeep and he is in magisterial custody and then he secured transfer warrant from Taloda Court and obtained the custody of appellant Dinesh. He further states in his examination in chief that accused Dinesh was interrogated in Vartej police station and the applicant made a confessional statement in presence of Assistant Police Sub Inspector, Bhoir and

two panchas and in pursuance to the said statement, new fact was discovered i.e. the place where the dead body was thrown by the appellant. In fact, when the information was already received by P.W.6 (I.O.) that skeleton of deceased was found on 14.3.2004 and post mortem was performed on 15.3.2004, the subsequent recording of memorandum statement of accused loses its importance. In fact, everything was known to P.W.6 about dead body and post mortem report on the said date. Therefore, the case of the prosecution that at the instance of the accused appellant, the new fact was discovered i.e. place where the dead body was thrown by the accused loses its significance and the said information cannot be said to be incriminating circumstance so as to use it against the appellant.

10. P.W.7 Shashikant Eknath Bangar, J.M.F.C. Taloda, who recorded the confessional statement of appellant Dinesh but the said statement was discarded by the court as it was exculpatory in nature. The evidence of P.W.7 is at Exh.84.

11. It is deposed by P.W.2 that he is panch witness to recovery of rope. On careful perusal of deposition of P.W.2, it appears that the recovery of rope was made from open space, which is easily accessible to everybody. It is also relevant to mention that rope was lying in the middle of dry river and neither blood or tissue matter is detected on the said rope as per C.A. report Exh.75. P.W.2 further admits in his deposition that said rope was kept in an open plastic bag and was not sealed and it did not contain signature of I.O. nor himself. Hence, no weightage can be given to the said recovery. The Hon'ble Supreme Court in the case of Salim Akhtar @ Mota Vs. State of Uttar Pradesh, , held that the recovery made from open place which was accessible to all and everyone cannot be believed. Yet in another judgment the Supreme Court in the case Aslam Parwez etc. Vs. Govt. of NCT of Delhi, , held that the possession of arms, revolver and cartridges recovered on the basis of disclosure statement made by accused, recovery made after 8 months and from open place accessible to all and everyone, accused could not be said to be in possession of the revolver and cartridges which were recovered and therefore, his conviction is liable to be set aside.

The sum and substance is that the place from which the rope is recovered by the prosecution is accessible to everyone and the rope was lying in the middle of a dry river and neither blood or tissue matter is detected on the said rope as per the CA report Exh.75. In addition to this, even open plastic bag in which the rope was kept was not properly sealed and it did not bear the signature of Investigating Officer or panchas. Therefore, in the instant case, the said recovery could not have been believed and the said circumstance could not have been used in the chain of circumstance so as to convict the appellant-accused.

12. So far as evidence of P.W.3 is concerned, the same is disbelieved by the trial Court itself.

13. P.W.4 Jagdish Ukabhai Aher, in his chief in para 2 has deposed that accused

No. 2 Tulshi offered to sale jeep to him and he has shown his willingness to purchase the said jeep for Rs. 1,80,000/- on the condition that all the papers and documentation should be up to the mark. However, when he found that the documentation and papers were not upto the mark, he left the said jeep near the Kodial Mata Mandir and accused No. 2 took the said jeep. The learned trial court has recorded the finding on point No. 6 that the present appellant abandoned the said jeep on road. However, in the light of the chief examination of P.W.4 the finding recorded by the trial court is without proper appreciation of evidence and the said finding is perverse.

14. The evidence of P.W.5 Dr. Satish Dinkar Kalele, who carried out the post mortem on the dead body of deceased opined that there was no fracture to vertebra of neck or thyroid cartilage or thyroid bone. Evidence of P.W.5 is at Exh.6 and post mortem report is at Exh.64. In this regard, it would be relevant to refer to the reported judgment of the Hon'ble Apex Court in the case of State of U.P. v. Ram Bahadur Singh and Ors. reported in AIR 2004 SC 753. It is held in the facts of that case that, it is evident that oral evidence given by eye witness is inconsistent with the medical evidence, therefore, the High Court found that there were serious infirmities in the prosecution case and ultimately the High Court has taken plausible view by acquitting the accused in that case. In the instant case also the evidence of P.W.5 Doctor is inconsistent with the evidence of other prosecution witnesses. The evidence of P.W.5 is not consistent with prosecution story that death is caused by strangulation.

15. Investigating Officer Popatrao Shripatrao Thorat, P.W.6 was examined. The said witness in his chief examination in para 4 has admitted that it was Vedawadar police station, who found the skeleton of deceased on 14.3.2004. Therefore, memorandum statement of accused dated 22.3.2004 and subsequent discovery is meaningless.

16. Therefore, taking over all view of the matter, it clearly reveals that there is no chain of circumstance so as to sustain the conviction of the appellant. The Hon'ble Supreme Court in the case of Toran Singh Vs. State of Madhya Pradesh, held that the case of the prosecution should rest on its own strength and not on the absence of explanation or plausible defence by the accused. If the evidence of P.W.1 is seen carefully, it clearly appears that P.W.1 filed complaint on the basis of suspicion. As discussed herein above, suspicion cannot take place of the legal proof. It also seen from the evidence of P.W.1 that deceased was last seen in the company of the appellant on 7.3.2004 at 4.00 p.m. when the jeep of the complainant was hired by the appellant. However, on 9.3.2004, at about 6.00 p.m. driver i.e. deceased told the complainant P.W.1 that religious work in the house of the appellant is over and he has left his house and proceeding to Akkalkuwa, which is the place of the complainant. The Hon'ble supreme Court in the case of Bodh Raj (supra) has held that last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that

possibility of any person other than the accused being the author of crime becomes impossible.

17. In the light of the discussion made herein above, the evidence of P.W.1 is not helpful to the prosecution. The evidence of P.W.2 that the place where the dead body was thrown has been shown in pursuance to the memorandum statement of accused, loses its significance in view of the fact that the dead body was recovered on 14.3.2004 and post mortem was also carried out on 15.3.2004. The Investigating Officer in the present case came to know about recovery of skeleton of body and post mortem report from the concerned police station in Gujarat and therefore, the memorandum statement of appellant recorded on 22.3.2004, cannot be said to be in accordance with provisions of Section 27 of the Indian Evidence Act. Another circumstance, which is used against the appellant is recovery of rope (Article 8). Admittedly, the recovery of rope is from open place accessible to all. The said rope was kept in a plastic bag, which was not properly sealed or no signatures of Investigating Officer or panch witness was obtained on the said recovery. Therefore, the recovery of rope loses its significance, since it was not in accordance with the Law. The C.A. report does not support the prosecution story.

18. The evidence of P.W.3 is to the extent that he narrated to the complainant the conversation took place between himself and the appellant, however, it does not find place in the complaint and his evidence is disbelieved by the trial Court. According to the prosecution, P.W.4 agreed to purchase the jeep. The entire evidence of P.W.4 does not show that the abandoned jeep was left by appellant at the place where it was found. On the contrary, P.W.4 in his deposition stated that accused No. 2 told him that he has obtained the jeep and kept at a particular place. P.W.4 further deposed that accused No. 2 came to him with vehicle and possession of the said vehicle alongwith papers were handed over to him. However, after scrutiny of papers, P.W.4 found that there was loan against the said vehicle and there was no document showing no objection for purchasing the vehicle. Therefore, he told accused No. 2 by telephonic message that he is not interested to purchase the vehicle and accused No. 2 can collect the same. P.W.4 left the said vehicle near Khodiyal Mata Mandir and same was collected by accused No. 2. The evidence of P.W.5 and his information is not consistent with the evidence of prosecution witnesses. The evidence of Investigating Officer clearly demonstrate that he came to know about recovery of dead body from the concerned police station in Gujarat. The skeleton of body was recovered on 14.3.2004 and the post mortem was performed on 15.3.2004. Therefore, the memorandum of accused recorded by the Investigating Officer on 22.3.2004 and in pursuance to it discovery of the place at which the dead body was thrown etc. loses its importance.

19. It is not in dispute that three accused persons were tried and out of those three, two are acquitted by the trial court and the present appellant is convicted. On careful perusal of the entire evidence brought on record, it clearly reveals

that remaining two accused were tried on same set of evidence and facts. Once they are acquitted, the conviction of the appellant on the strength of same evidence is not sustainable in the facts of this case. In the instant case, on careful perusal of the entire evidence on record and other material brought on record, it is not possible to sustain the conviction of the appellant.

20. Therefore, the impugned judgment and order dated 10.5.2007, passed by the learned Additional Sessions Judge, Shahada in Sessions Case No. 24 of 2004, is not sustainable. Even if the prosecution story is taken as it is, that the jeep was hired by the appellant and further death of Akhtar Hussain is homicidal, still question remains that who is author of the said crime. The incriminating evidence of discovery, which is used against the appellant by the trial court cannot be said to be circumstance in the chain of circumstance so as to sustain the conviction of the appellant.

21. As stated in foregoing paragraphs, the skeleton of body was recovered on 14.3.2004 and post mortem was carried out on 15.3.2004 and Investigating Officer already came to know from the concerned police station of Gujarat State about the same. The subsequent recording of memorandum statement of the accused and recovery or discovery, as the case may be, in pursuance to the said statement, loses its significance and it cannot be said that the said recovery/discovery is in accordance with the provisions of the Indian Evidence Act. The Trial court has used third circumstance i.e. incriminating evidence of discovery of place of incident where accused had thrown the dead body. In the light of discussion made herein above, said circumstance is required to be discarded.

22. The Supreme Court in the case of *Amitsingh Bhikamsing Thakur Vs. State of Maharashtra*, , has summed up various requirements of Section, which are reproduced as follows:

- i) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provisions has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
- ii) The fact must have been discovered.
- iii) The discovery must have been in consequence of some information received from the accused and not by accused's own act.
- iv) The persons giving the information must be accused for any offence.
- v) He must be in the custody of a police Officer.
- vi) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
- vii) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

23. In the aforesaid circumstances, we find that the entire evidence and other documents placed on record clearly indicate that, the circumstantial evidence brought on record by the prosecution is too short to sustain the conviction of the appellant. It is also relevant to mention that if two views are possible on the evidence of record, one pointing to the guilt of the accused and other his innocence, the accused is entitled to have the benefit of one which is favourable to him.

24. In the result, the appeal is allowed. Judgment of conviction and sentence imposed on 10.5.2007 upon the appellant in Sessions Case No. 24/2004 by the Learned Additional Sessions Judge, Shahada is quashed and set aside. The appellant is acquitted for the offence of Sections 302, 201 and 406 of Indian Penal Code. His Bail Bonds stands cancelled. Fine, if paid, by the appellant be refunded to him. The appellant Dinesh s/o Bhagwan Bharwad is set at liberty/set free, if does not require in any other offence.

25. We appreciate the able assistance given by learned Counsel Ms. Monica Purnapatre (*amicus curiae*) to represent the cause of the appellant. We quantify her professional fees at Rs. 3000/- (Rupees Three thousand only).

26. We further direct Registrar (Judicial) of this Court to transmit copy of this judgment and order to the appellant today itself, through the authority concerned.