

(2011) 01 BOM CK 0058
In the Bombay High Court
Case No : Criminal Appeal No. 358 of 2009

Hanuman Jadhav and Bhagwan Jadhav	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 150, 164
Evidence Act, 1872 — Section 24, 25, 26, 27, 30
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2011) 01 BOM CK 0058

Hon'ble Judges : P.V. Hardas, J; A.V. Potdar, J

Bench : Division Bench

Advocate : Swapnil S. Rathi, for the Appellant; K.G. Patil, learned , Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.V. Potdar, J.—The Appellants have questioned the correctness and legality of their conviction u/s 302 r/w. 34 of The IPC, for which they were sentenced to suffer life imprisonment and for the offence punishable u/s 201 r/w. 34 of The IPC, they were sentenced to suffer rigorous imprisonment for 3 years in Sessions Case No. 10/2008 vide judgment and order dated 05/06/2009 by The Additional Sessions Judge, Gangakhed.

2. Such of the facts as are necessary for the decision in this appeal can be summarized as follows:

a) On 09/01/2008, on receipt of telephone message from one Vishwanath Manikrao Jadhav (P.W. No. 15) of village Pohandul that one Tulshiram and his two sons, the Appellants before the Court, have assaulted one Haribhau Jadhav and Haribhau is missing in Sonpeth Police Station, A.P.I. Dipak Dnyanoba Shinde (P.W. No. 17) proceeded to village Pohandul at 12.30 noon after effecting necessary entries in the station diary. At Pohandul, he visited field of one Ankush Jadhav. Then he drew spot panchnama Exh.25 and collected blood mixed mud

and plain mud from the spot. Thereafter for inquiry, he brought complainant Shripati Dattarao Jadhav, Appellants, Tulshiram and his wife. During the inquiry, Appellant Hanuman made disclosure statement and shown the spot where dead body of Haribhau was concealed. As it was the night hours, P.W. No. 17 returned back to police station. He deputed 2 police constables on the spot for vigilance. Thereafter, Shripati lodged the report (Exh.41) in Sonpeth Police Station. On the basis of this report, an offence was registered vide CR No. 4/2008 u/s 302, 201 r/w. 34 of IPC against the Appellant Tulshiram and his wife Mahanandabai. Thereafter, the Appellants and their parents were arrested under panchnama (Exh.72 to Exh.75) at about 11.35 p.m. or so.

b) On 10/01/2008, Tahsildar, Medical Officer Dr. Siddheshwar Shivrajan Halge were called at the spot. From the spot, one dead body of male was excavated in the presence of witnesses. At that time, photographs were also taken. The dead body was recovered under the recovery panchnama (Exh.22). On the spot, in the presence of panch witnesses, inquest panchnama (Exh.23) was drawn. At the same time, clothes on the person of the deceased (Article 3 to 6) were removed and seized under the panchnama (Exh.32).

c) Dr. Siddheshwar Shivrajan Halge conducted autopsy on the body of deceased and prepared post mortem report (Exh.63).

During the post mortem, Dr. Siddheshwar Shivrajan noted following external injuries on the dead body.

1. Abrasion with swelling over frontal bone near hair border of size 2 1/2" x 2 x 1/2" x 1", irregular size.
2. Fracture (Lt) humerus at lower 1/3 end on palpation.
3. Fracture below left knee on palpation (both bones).
4. Incised wound over shin of left leg 2" x 1/2" x 1" deep at lower 1/3. Muscle protruding outside.
5. Incised wound above No. 4 injury 1" x 1/2" x 1/2" muscles protruding.
6. Incised wound curved just below (lt) knee 1/2" x 1/2" x 1" deep; on left shin.
7. Contusion and lacerated wound behind left ear over occipital bone 1" x 1" x 1" deep.

On internal examination, he noticed that the brain was congested and internal hemorrhage is present on frontal lobe. He opined that probable cause of death was due to "hemorrhagic shock due to head injury associated with multiple injuries including fracture below (left knee and left humerus." He has further opined that all these injuries can be caused by beating with sticks. He has also opined that the dead body might have buried 48 hours prior to the post mortem. He has also opined that injury No. 4,5 and 6 mentioned in coloumn No. 17 are incised wounds. The time of probable death was within 24 to 48 hours before the

post mortem was conducted. The death was homicidal death.

d) Thereafter, P.W. No. 17 recorded statement of certain witnesses and further investigation was handed over to S.D.P.O. Shri. Patil. During the further investigation, he assisted to S.D.P.O. Shri. Patil from time to time.

e) Laxmikant Tukaram Patil (P.W. No. 19) S.D.P.O. Purna, in whose jurisdiction, Sonpeth Police Station comes, conducted the further investigation in this CR. On 10/01/2008, he had recorded statements of Limbabai (P.W. No. 12) and Ankush Jadhav (P.W. No. 13). On that day, on the disclosure of Appellant Hanuman, he prepared memorandum panchnama at Exh.27 which resulted in the recovery of 2 sticks, 1 spade and 1 pickaxe. These articles were recovered under the recovery panchnama Exh.28. On the same day, he had recorded statement of certain witnesses. In the further investigation, he had recorded disclosure statement of certain witnesses. In the further investigation, he had recorded disclosure statement of Appellant Bhagwan (Exh.54), which resulted in the recovery of pair of chappal concealed in his house, below the sack used for storage of grain. This pair of chappal was seized under recovery panchnama Exh.55. During the house search of the Appellants, certain clothes were produced as the clothes on the person of the Appellants under the recovery panchnama Exh.35. During the investigation, statement of witness Rambhau, witness Bhagwan, witness Ankush and witness Limbabai were recovered u/s 164 of The Code of Criminal Procedure by J.M.F.C. Gangakhed. During further investigation, seized property during investigation was sent for chemical analysis to the C.A. Aurangabad alongwith covering letter Exh.79. After receipt of CA reports Exh.66 and 67 and after completion of investigation, charge sheet was filed against the Appellants and others in the Court of J.M.F.C. Gangakhed, who in turn, after passing necessary committal order, committed the trial to the Court of Additional Sessions Judge, Gangakhed.

f) Learned Additional Sessions Judge, Gangakhed framed the charge against the Appellants and their parents vide Exh.10 for an offence punishable u/s 302, 201 r/w. 34 of The IPC, to which Appellants and others pleaded not guilty and claimed to be tried.

g) To substantiate the charge levelled against the Appellants and others, prosecution has examined total 19 witnesses including 7 panch witnesses, 3 eye witnesses, complainant and 2 other witnesses, medical officer who conducted autopsy on the dead body and 3 police witnesses including the carrier and two investigation officers who have participated and completed the investigation in the said CR. On appreciation of the evidence of 3 eye witnesses, the evidence of recovery and the C.A. Reports, learned Trial Court pleased to convict these Appellants for the offence punishable u/s 302, 201 r/w. 34 of The IPC, while pleased to acquit their parents from all the charges levelled against them. The conviction and sentence of these Appellants is impugned in this appeal. Admittedly, State has not challenged the judgment of acquittal of Tulshiram and Mahanandabai.

3. For the proper appreciation of the submissions of learned Counsel for the Appellants and of learned A.P.P. it is necessary to advert to the evidence of material witnesses examined by the prosecution before the Trial Court.

4. It is in the evidence of Shripati Dattatraya Jadhav (P.W. No. 8) who is the complainant and also one of the brother of deceased Haribhau that Haribhau (deceased) was unmarried and residing separately. Their ancestral properties were partitioned 12 years back. On 08/01/2008, i.e. on the date of incident, he was in his field till 5.00 p.m. Thereafter, he proceeded to his another field. On his way, Bhagwan Rambhau Jadhav (P.W. No. 11) and Ankush Prabhakar Jadhav (P.W. No. 13) met him and informed that Appellants and their father assaulted Haribhau in the field of Ankush. Thereafter, he went to his house. On the next day, he questioned Tulshiram, acquitted accused and his sons, the Appellants, as to why they have assaulted Haribhau, to which they informed him that Haribhau is still lying in the field below the neem tree. He went to the field in search of Haribhau, where he saw that Ankush and Bhagwan were present. On his asking, Ankush shown the place where the incident of the previous date was occurred. He also noticed some blood at that spot. He tried to search Haribhau but was unable to trace him. Thereafter, he went to the police Station and narrated the incident to police. Thereafter, Appellants and their parents were also called in the police station. He has stated that in his presence in the police station Appellant Hanuman informed police that they have assaulted Haribhau and concealed the body in the bank of river Godawari. Thereafter, Hanuman took them to the spot where the dead body was concealed. Thereafter, he lodged the report (Exh.41) in the police station. Thereafter Appellants and acquitted accused were put

He has stated in his cross examination that after partition of the ancestral properties 12 years back, amongst the brothers, one of their brother Narayan expired. After demise of Narayan, his wife Sunanda sold the land came to the share of her husband Narayan to Appellant Hanuman by executing registered sale deed. Deceased was insisting that after demise of Narayan, his property to be partitioned amongst the surviving brothers. On that count, there was dispute between the deceased and the family of Tulshiram as well as other brothers. He has further stated in his cross examination that the field came to his share is not adjacent to the field came to the share of Tulshiram. He has admitted that after he came to know about the assault on Haribhau (the deceased) from Ankush, he did not went to the field of Ankush to see Haribhau as there was dark. He has further admitted that in the same night, he has not informed about the information received to him to the Village Police Patil as well as he has not made any inquiry about the whereabouts of Haribhau in that night. He has further stated that on the next day, in the afternoon, police came in the village and took him as well as Appellants and parents of Appellants to the Police Station. They remained in the Police Station till 10.00 p.m. At that time, no villagers were present in the police station other than himself, Appellant and the acquitted accused. According to him, alongwith Hanuman, they came to the village around 9.00 p.m. and after the spot was shown by Hanuman, they returned back to the

9 Criminal police station. He has further stated that till this time, he has not lodged any report in the police station against anybody. His complaint was recorded around 11.00 p.m. or so. He has admitted that he met Bhagwan and Ankush in the field, which has come to his share.

5. It is in the evidence of Bhagwan Rambhau Jadhav (P.W. No. 11) that on 08/01/2008, at about 4.00 p.m. to 4.30 p.m., he was proceeding to Godawari river to start electric motor. On his way, he saw that Appellants were assaulting Haribhau, the deceased with the sticks in the field of Ankush Jadhav. Parents of Appellants were also present there. He requested Appellants not to beat deceased otherwise he will die. He tried to separate them. Appellant told him that it was none of his business and he may proceed on his way. Appellants were mercilessly assaulting deceased on his head and legs. Deceased was crying and shouting for help. Ankush (P.W. No. 13 and Limbabai (P.W. No. 12) also came there. Ankush tried to separate them, but he was not listened. Deceased was asking for water. Then he left the spot. He had not then seen the deceased. During the trial, he had identified the clothes of the deceased as well as the sticks, the weapon of assault produced in the Court. He has stated in his cross examination that he had not stated in his statement before police that he had seen the incident of assault in the field of Appellants. He has further stated that ploughing work was in progress in the field of Ankush. Limbabai came at the spot after 45 minutes after he reached at the spot of incident. He had further stated that on that day, he returned to village around 7.00 p.m. After about 1/2 hour, he met Shripati. He do not remember, whether he informed about the incident to Shripati or not. On the next day morning, he informed Shripati about the incident witnessed by him on the previous day, but not to anybody else, even to the Police Patil. He has further stated that he, Ankush and Laxman tried to bring the deceased to village, but they were not allowed by the Appellants. His field is situated at the distance of 1 km. from the village. He has further stated that when he had informed about the incident to Shripati on the next day morning, Ankush was not with him.

6. Evidence of Limbabai (P.W. No. 12) is on the similar line and identical with the evidence that of Bhagwan. She has further stated that deceased was asking for water and she gave water to the deceased. She noticed bleeding injuries on head and legs of victim Haribhau. Haribhau was unable to stand and move from the place where he was lying. She has further stated that after assaulting deceased, Appellants ran away from the spot. Thereafter, she returned to her work in the field of Balu Jadhav and from there, she returned to her house. She has further stated that on the 3rd day, body of the deceased was excavated from the river bed, at that time, Appellant Hanuman was present at the spot. She has also identified clothes of the deceased and the sticks used by the assailants during the trial. She has stated in her cross examination that on 08/01/2008, she was working in the field of Balu Jadhav alongwith 10 other ladies, which field is situated at the distance of about 200 ft. from the place of incident. She has further stated that on hearing the shouts, she alone went to the spot. She

remained at the spot for about 1 1/2 hour. She has specifically stated in her cross examination that during the assault, other than sticks, no other weapons were used by the assailants. She has further stated that after the incident, she returned back to the field of Balu Jadhav, and not narrated the incidence witnessed by her to the coworkers. She has further stated that after she returned to her home, she has not disclosed the incident even to her husband or to the villagers. She has further stated that on the next day, police came in the village, but she had not disclosed the incident to them also or to the brother of the deceased. She has stated that she had not disclosed the incident to the police even after the arrest of the Appellants and others. According to her, she was threatened by the Appellants, hence she preferred to keep mum. According to her, after the incident was over, Ankush and Bhagwan went to their respective fields. In her further cross examination, omissions were proved that she had not stated in her statement before police that when she went to the field of Tulshiram, Ankush and Bhagwan were already present there. She has also not stated in her statement before police that Hanuman was present at the time of excavation of dead body of Haribhau from river bed. She has also not stated before Police that during the incident, Appellants twisted her hands and beat her on her shoulders.

7. It is in the evidence of Ankush (P.W. No. 13) that on 08/01/2008, he was ploughing his field, which is adjacent to the field of Appellants. Around 4 to 4.30 p.m., Haribhau came running in his field. Haribhau was shouting for help. Appellants followed him in his field and assaulted him with sticks in their hand on his head and legs. He tried to separate them, but they did not listen. Haribhau (deceased) sustained bleeding injuries on his head and legs. After some time, Bhagwan (P.W. No. 11) and Limbabai (P.W. No. 12) came there. He has further stated that at that time, parents of Appellants were also present. Due to the injuries sustained by Haribhau, Haribhau was unable to stand and move. Haribhau was asking for water. Limbabai gave water to him. He told Appellants not to beat Haribhau in his field. Thereafter, Appellants lifted Haribhau and taken to the field of Tulshiram. He had further stated that Shriпти, another brother of Haribhau came to his field to inquire about Haribhau to whom he narrated about the incident. During the trial, he also identified the sticks before the Court as the weapons used by the assailants to assault Haribhau. He has stated in his cross examination that the assault was continued for about 2025 minutes. During the said assault, no other weapons were used by the assailants other than the sticks. He had further stated that after Haribhau was taken to the field of Tulshiram, he had not followed them. He had further stated that Shripati came in his field some time before there was dark. He had not accompanied Shripati to the field of Tulshiram. He had further stated that he had not informed about the incident to the Village Police Patil or to village Kotwal. He had further stated that on the next day, police came near his field around 10 to 11.00 a.m. and drew panchnama. In his further cross examination, omissions were proved that he had not stated in his statement before police that Bhagwan and Limbabai took Haribhau to the

field of Tulshiram as well as on asking by Haribhau, Limbabai gave water to Haribhau.

8. In the light of evidence of these witnesses and the other evidence on record, heard learned Counsel for Appellants followed by the submissions of learned A.P.P. for State.

9. During the course of submissions, it is urged on behalf of Appellants that the evidence of P.W. No. 11, 12 and 13 is not reliable as they have witnessed the incident of the previous day, allegedly took place on 08/01/2008. According to him, the evidence of the eye witnesses is not shakened on the point that the assailants assaulted deceased Haribhau with the sticks and no other weapons were used by them. He has drawn our attention towards the evidence of P.W. No. 16 Dr. Siddheshwar Shivrajan Halge and the post mortem notes at Exh.63. He has drawn our attention towards the injuries mentioned against coloumn No. 17 and specifically towards the injuries No. 4,5 and 6 which are in the nature of incised wounds. It is urged that if the assailants have used sticks to assault deceased, then injury No. 4,5 and 6 are not possible and for this purpose, our attention is drawn towards the cross examination of P.W. No. 16 Dr. Siddheshwar. Apart from it, it is also urged that in absence of use of sharp object, injuries in the nature of incised wounds are not possible. It is further urged that apart from the evidence of these 3 witnesses from which it can not be inferred that the assailants have killed Haribhau on the spot, as evidence of P.W. No. 11, 12 and 13 speaks to the effect that during the incident in the evening of 08/01/2008, Haribhau was seriously injured, but he was alive. There is also variance as to the exact place of incident, as the spot panchnama Exh.25 was prepared in the field of Ankush, but at that time, the offence was not registered and as per the story of prosecution, that was not the place from where the body of Haribhau was dragged or removed. It is further urged that conduct of these 3 eye witnesses as well as the complainant is very material. According to the complainant Shripati, he came to know about the incident allegedly occurred in the evening of 08/01/2008, from P.W. No. 11 Bhagwan and P.W. No. 13 Ankush. As against this, evidence of Bhagwan and Ankush do not corroborate this evidence given by Shripati. It is also urged before us that the conduct of all these 4 witnesses appeared to be unnatural. Initially, learned Counsel for Appellant attacked on the conduct of Shripati, the complainant, as according to him, even though he came to know about the incident of assault on Haribhau at the hands of Appellants from Ankush and Bhagwan, whether it is supported by the evidence of Ankush or Bhagwan or not, the fact remains that he had not gone to the field to verify the fact whether in fact Haribhau was assaulted and got seriously injured and lying on the spot or not. On the contrary, he has admitted in his cross examination that during that night, he had not made any inquiry about the whereabouts of Haribhau which appears to be unnatural and improbable. It is also urged across the bar that in the morning, according to Shripati, he inquired with Tulshiram and Appellants about the incident for which he learnt in the previous evening. But, even thereafter ,he has not lodged the report with the police nor reported the

incident to Village Police Patil or Village Kotwal, so also it is also brought to our notice by the counsel for Appellant that the 3 eye witnesses to the incident on the previous night, have not disclosed this incident to the Police Patil, to the Village Kotwal or to any other villager, which also appeared to be an unnatural conduct on their part. It is also urged across the bar that apart from the evidence of these 3 witnesses, case of the prosecution rests on circumstances. It transpired from the evidence of P.W. No. 8 Shripati and P.W. No. 17 D.T. Shinde, who had carried out the initial investigation in CR No. 4/2008, had stated that after complaint, Appellants and the acquitted accused were brought in the police station, and during the inquiry, Appellant Hanuman made disclosure statement. This fact is not supported by any contemporary record. It is further urged that at the time of this alleged disclosure statement, none of the Appellants were taken in the custody of the police as an accused arrested in connection with CR No. 4/2008. In the premise, it is urged that the so called disclosure statement of Appellant Hanuman will not cover under the ambit of Section 27 of The Indian Evidence Act. To support the submissions, learned Counsel for Appellants has placed reliance in the matter of *Anter Singh v. State of Rajasthan* AIR 2004 Supreme Court 2865. It is also urged that apart from this recovery, there are 2 more recoveries at the instance of these Appellants. Those recoveries were tried to be proved from the evidence of P.W. No. 3 Balasaheb Bhalerao, in whose statement, Exh.27 memorandum/statement of Appellant Hanuman was proved, which resulted in the recovery of two sticks, one pickaxe and one spade under the recovery panchnama Exh.28. These panchnamas to the memorandum statement and recovery memorandum were not proved, as the witnesses have not identified these articles in their evidence before the Trial Court. Further prosecution relied on the evidence of Ashok Kale (P.W. No. 14) through whom prosecution tried to prove memorandum statement of Appellant Bhagwan at Exh.54 leading to the recovery of pair of chappal Article 11 from the residence of Appellant. This pair of chappal is not identified by Shripati, complainant, the brother of the deceased as well as the 3 eye witnesses, who have witnessed the assault on the previous night. In the premise, in absence of identification of recovered articles, their relevancy is not established. In substance, according to him, the evidence led before the Trial Court by the prosecution is not sufficient to establish the charge for which the Appellants were convicted. In the premise, it is urged that appeal be allowed and the Appellants be acquitted.

10. In his submissions, learned A.P.P. supported the reasoning and findings given by the Trial Court while convicting the Appellants. It is also urged that the case of the prosecution is rests on the recovery of the dead body of deceased Haribhau at the instance of these Appellants coupled with the evidence of 3 eye witnesses, was not shakened before the Trial Court about the assault on Haribhau, on previous day, at the hands of Appellants. It is also urged that the medical evidence supports that the death of Haribhau is a homicidal death and it is supported by the circumstantial evidence.

11. Considering the submissions of learned Counsel for Appellants and that of

learned A.P.P. for State, we are of the considered view that the case of the prosecution is rests on the circumstantial evidence. These circumstances can be formulated as follows:

- a) On 08/01/2008, deceased was assaulted by the Appellants at about 4.00 to 4.30 p.m.,
- b) The dead body was recovered at the instance of Appellants.
- c) Recovery of the articles at the instance of the Appellants i.e. the weapon of assault as well as the pair of chappal of the deceased at the instance of Appellants from their house.

12. Perusal of the evidence of Shripati (P.W. No. 8) the complainant and the evidence of P.W. No. 11 to 13, we are of the considered view that their evidence on the point of assault to the deceased at the hands of Appellants is not trustworthy. According to P.W. No. 11 to P.W. No. 13, during the assault on the deceased, in the field of Ankush or in the field of Tulshiram, the assailants assaulted deceased with the sticks is not supported by the medical evidence as it is opined by P.W. No. 16 Dr. Siddheshwar Halge that out of the 7 injuries found on the person of the deceased, injury No. 4,5 and 6 are incised wounds. Considering the nature of these 3 injuries, which is described as incised wounds by the Medical Officer, the weapon to cause these injuries must be a sharp object. Evidence of P.W. No. 11 to P.W. No. 13 nowhere speaks that during the assault, any sharp object was used by the assailants while assaulting the deceased. Another aspect, the conduct of these 3 eye witnesses is unnatural and improbable. Likewise the conduct of complainant Shripati is also appeared to be unnatural and improbable as it is clearly established from the evidence of Shripati that even though he was informed by Ankush and Bhagwan that deceased was assaulted by the Appellants, he has not taken any pain to trace out Haribhau soon after receipt of this information, as he has clearly admitted in his cross examination that, during that night, he has not tried to trace the whereabouts of deceased Haribhau. Likewise the evidence of P.W. No. 11 to P.W. No. 13, that they have not disclosed this incident to Police Patil or Village Kotwal or to the villagers. P.W. No. 12 Limbabai has gone to the extent that even she has not disclosed this incident to the other ladies who were working with her in the field of Balu Jadhav. She has also stated in her cross examination that she has not disclosed this incident even to her husband or to the brother of the deceased after her return to her residence. She has also admitted that she has not disclosed the incident even to the Police who came in the village in the morning of next day. Her evidence that Appellant Hanuman was present when the dead body of deceased Haribhau was excavated in the morning of 10/01/2008 and it is supported by the panchnama of excavation of dead body at Exh.22. It is also admitted by the Investigation Officer also. In the premise, we are of the considered view that P.W. No. 11 to P.W. No. 13 are got up witnesses who have deposed in their evidence before the Lower Court that they have seen the Appellants assaulting deceased in the evening of 08/01/2008. Hence on this

count, their evidence needs to be discarded.

13. The next circumstance is about the recovery of the dead body at the instance of the Appellants. On this count, it is urged on behalf of Appellants that when this disclosure was allegedly made by the Appellant Hanuman before P.W. No. 17, he was not an accused in CR No. 04/2008. In the premise, his disclosure can not be treated as the disclosure u/s 27 of The Indian Evidence Act. At this juncture, it is useful to give the reference of the judgment of the Division Bench of this Court in the matter of State Vs. Memon Mohamad Husain Ismail and Another, , wherein it is observed that:

(4) So far as the further requirement of being in the custody of the police is concerned the words of the section are there. The object and reason of the rule, which excludes confessions and statements as inadmissible in evidence if they are made in the presence of or to police officers or where investigation is going on, is that there is likelihood of their having been obtained by unjustifiable means. The reason of the exception contained in Section 27 would appear to be that though they might have been improperly obtained, if a discovery of facts is made then there is great likelihood of the statements being true and if this is so, it is difficult to see the reason or the sense of the rule requiring that when the statement is made the person who makes that statements should and ought to be in custody before it could be received in evidence. If the reason of admitting this statement is what I have stated before, it would be much more likely to be true when made by a person who is not in custody as it would be without any pressure at all and being voluntary can not offend any rules of moral Justice. One way out of the difficulty of the words in the statute would be to disregard those words as being superfluous and not intended by the legislature, in the sense in which they appear and that is the justifiable procedure. The other way is to read the words "even if" before the words "in the custody of police" which is also permissible to give sensible meaning to the section. James Stephen the draftsman of the Indian Evidence Act in his Introduction to the Indian Evidence Act while discussing confessions at page 165 of the 1892 edition (which is a reprint of the 1872 edition) says:

Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that Ss.25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861." Section 150 of the Code of Criminal Procedure Act 25 of 1861 reads as under:

Where any fact is deposed to be 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 relates distinctly to the fact discovered by it, may be received in evidence.

It appears in 1869 in Act VIII of 1869 this section was modified by the addition

of the words "or in the custody of a police officer" after the words "a person accused of any offence." If the intention was to reproduce the provisions contained in S. 150 of the Code of Criminal Procedure 1861 it is apparent that the intention was to make the statements admissible even if a person was in custody. It appears therefore that it would be the better way of reading the provisions of the section which course is permissible in order to make the meaning of the section sensible. See Maxwell on Statutes pages 236, 237 (9th edition). If that is the correct view, then all these statements were made, as a result of which facts mentioned were discovered and would therefore be admissible in evidence.

(5) Even assuming however that it will not be permissible to disregard the words of the section or read "even if" as suggested then, we are clearly of the view that the case falls within the authority of cases *Santokhi Beldar and Another Vs. Emperor*, and *The Superintendent and Remembrancer of Legal Affairs Vs. Lalit Mohan Singha Roy*, with the conclusions of which we agree. The ratio of those cases is that where a person goes to a police officer and makes a statement which shows that an offence has been committed, the accused himself and though he is formally not arrested since he is not free to move wherever he likes after disclosure of the information to the Police he must be deemed to be in custody of the Police.

14. In this context, it is further useful to give the reference of the observations of the Apex Court in the matter of *State of U.P. Vs. Deoman Upadhyaya*, .

(7) Section 27 of The Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 - 30 of The Act deal with admissibility of confessions i.e. of statements made by a person stating or suggesting that he has committed a crime. By S. 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the Court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By S. 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial u/s 24 and complete u/s 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in S. 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in *Narayan Swami v. Emperor* 66 Ind App 66 : AIR 1989 PC 47, by the Judicial Committee of the Privy Council, "S. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. "The adjectival clause " accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is

declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides "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 a person accused of any offence". By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas S. 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, S. 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states "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." The expression, "accused of any offence" in S. 27, as in S. 25 is also descriptive of the person concerned, i.e., against a person who is accused of an offence, S. 27 renders provable certain statements made by him while he was in custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though S. 27 is in the form of a proviso to S. 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by S.

26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By S. 26, a confession made in the presence of a Magistrate is made provable in its entirety.

(17) Sections 25 and 26 are manifestly intended to hit at an evil viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing of offences as it is concerned with protecting persons who may be compelled to give confessional statements. If S. 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is

not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases.

(18) Counsel for the defence contended that in any event Deoman was not at the time when he made the statement attributed to him, accused of any offence and on that account also apart from the constitutional plea, the statement was not provable. This contention is unsound. As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by S. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

15. On perusal of the observations of the two judgments cited in above paragraphs, it is not the requirement of Law that when the disclosure statement was made by the person, while in the custody of the police, even though not arrested in any offence, the disclosure statement made by the said person is admissible in law subject to the conditions which require to be satisfied as observed in the two rulings cited supra. In the premise, we are not in agreement with the submissions of learned Counsel for the Appellants as at the material time, the Appellants were not arrested in connection with CR No. 4/2008, the disclosure statement made by the Appellants is inadmissible in Law.

16. At this juncture, it is also useful to give the reference of the observations of the Apex Court in the matter of *Anter Singh v. State of Rajasthan* AIR 2004 SC 2865, wherein it is observed that

The expression "provided that" together with the phrase "whether it amounts to a confession or not" in Section 27 show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. The first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The words has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information

supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. The various requirements of the section can be summed up as follows: (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision 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. (2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by accused's own act. (4) The persons giving the information must be accused of any offence. (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

17. The requirement of Law to establish the relevancy of the disclosure statement made by the person in the custody of the police subject to discovery of certain facts or objects. In the light of this, if the evidence of prosecution led about the recovery of dead body at the instance of Appellants, if considered, first there is no contemporaneous record made available for this Court about the disclosure of statement about the burial of the dead body of Haribhau nor any document was prepared or produced before the Court. Secondly, from perusal of evidence of Shripati (P.W. No. 8) and the Investigation Officer (P.W. No. 17) the spot was shown by the Appellant Hanuman where the dead body was buried. Admittedly, the available record is unable to establish that any mark was put up at the spot which was allegedly shown by the Appellant Hanuman. It is in the evidence of Investigation Officer P.W. No. 17 that two constables were deputed at the spot shown by Appellant Hanuman. Admittedly, at the time of excavation of the dead body, as transpired from the evidence of P.W. No. 1 Vishnu and the contemporaneous record, memorandum of excavation of dead body at Exh.22, nowhere discloses that at the time of excavation of the dead body, those two constables were present at the spot and they pointed out the spot, from where the dead body was recovered. Secondly on clear perusal of Exh.22, the memorandum of excavation of the dead body nowhere discloses that from the spot shown by Appellant Hanuman in the night of 09/01/2008, in the morning of 10/01/2008 the spot was excavated from where the dead body was recovered. In the premise, the record produced is not sufficient to show that in fact the dead body was recovered from the spot pointed out or shown by Appellant Hanuman.

In the premise, this circumstance was also not established by the prosecution as contemplated in Law.

18. Now coming to the last circumstance about the relevancy of the recovered articles at the instance of Appellant Hanuman and the Appellant Bhagwan. As already discussed, through prosecution witness (P.W. No. 3) Balasaheb Bhalerao, prosecution tried to prove memorandum of disclosure statement of Appellant Hanuman at Exh. 27 on 11/01/2008, leading to the recovery of the 2 sticks, one pickaxe and one spade, which were recovered under the recovery panchnama (Exh.28). Unfortunately, even though this witness have deposed before the Lower Court that he is able to identify the articles recovered at the instance of Appellant Hanuman, those articles were not referred to him in his evidence and he identified those articles as the articles recovered at the instance of Appellant Hanuman. Likewise, even though through P.W. No. 14, Ashok Kale, prosecution tried to prove the memorandum of disclosure statement of Bhagwan at Exh.54, leading to the recovery of pair of chappal and their clothes from his house under the recovery panchnama Exh.55, drawn on 12/01/2008, but unfortunately the pair of chappal was not identified either by Shripati, brother of the deceased or by the eye witnesses to the incident dated 08/01/2008 P.W. No. 11 to P.W. No. 13. The witnesses have also not identified the clothes on the person of Appellant which were recovered under the recovery memorandum at Exh.55. In the premise, even though the disclosure memorandum was proved, but the recovered articles under the memorandum of recovery, respectively at Exh.28 and 55 were not identified at the hands of the relevant material witnesses. In the premise, prosecution also failed to establish the relevancy of these recovered articles at the instance of Appellants. 32 Criminal Appeal No. 358 of 2009

19. Once prosecution failed to establish the relevancy of the recovered articles at the instance of these Appellants, then the report of Chemical Analyser is of no consequence.

20. In substance, on reappraisal of the evidence of prosecution led before the Trial Court, as discussed in all the paragraphs supra, we are of the considered view that neither the chain was established through the circumstances formulated against the Appellants nor the circumstances were established at the hands of prosecution. If it is so, then the Appellants are entitled to get benefit of doubt, which is given to the other accused.

21. In the substance, the appeal succeeds. We hereby quash and set aside the conviction and sentence against the Appellants, and the Appellants are acquitted from all the charges levelled against them. The Appellants are in jail, they be released forthwith, if not required in any other case. Appeal stands disposed of accordingly.