

(2011) 05 BOM CK 0081

In the Bombay High Court

Case No : Criminal Appeals No's. 59 and 60 of 2008

Madhu Narayan Dessai and Others

APPELLANT

Vs

State of Goa and Another

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 151, 155, 174, 2(o), 313

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 109, 120B, 201, 220, 302

Citation : (2012) BomCR(Cri) 770

Hon'ble Judges : Reis F.M., J; Dharmadhikari S.C., J

Bench : Division Bench

Advocate : S.G. Dessai with Pavithran A.V., in Cri. A. No. 59/2008 and S.D. Lotlikar with H. Kankonkar, in Cri. A. No. 60/2008, for the Appellant; S.R. Rivonkar, S.P.P., in Cri. A. Nos. 59 and 60/2008, for State, for the Respondent

Final Decision : Allowed

Judgement

Dharmadhikari S.C., J.—These Criminal Appeals are by accused Nos. 2 and 1, both of whom have been arrayed as accused in Sessions Case No. 29/02 and convicted for the Offences punishable under sections 220, 342, and 302, read with section 120-B of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for a term of three years, for the offence punishable u/s 220 of the Indian Penal Code, for a period of six months u/s 342 of the Indian Penal Code and they have been sentenced to undergo Imprisonment for Life for the Offence punishable u/s 302 of the Indian Penal Code, so also fine of Rs. 5,000/-. The judgment and Order of conviction and sentence has been rendered by the Additional Sessions Judge, South Goa, Margao, in the above Sessions Case, on 24th/25th/26th November, 2008. The case of the prosecution, in brief, is that the accused Nos. 1 and 2 were, at the relevant time, working as Assistant Police Inspector and Police Constable respectively. They along with original accused Nos. 3 and 4, who were also Police Constables, posted at Cuncolim Police Station. At the said Police Station, they caused death of one Dattu alias Murgesh

Anant Naik Dessai ("the deceased" for short). Thus, it is a case of death of the deceased within the precincts of this Police Station. It is alleged that accused No. 1 Shripati Dessai, was Day Officer on duty at this Police Station from 08.00 hrs. of 27th June, 2001 to 08.00 hrs. of 28th June, 2001 and from 08.00 hrs. of 29th June, 2001 to 08.00 hrs. of 30th June, 2001 and had attended the duty. Accused No. 2 Madhu Dessai, Head Constable, was working as a Writer Head Constable at this Police Station and had attended the duty on 27th, 28th, and 29th June, 2001. Accused No. 3 Jeetendra Fal Dessai, was working as Duty Master and Beat Constable of Cuncolim Town Beat. Narendra Fal Dessai, accused No. 4 was working as Beat Constable of Cuncolim Beat. Both the Police Constables, namely accused No. 3 and accused No. 4 had attended the duty at the Cuncolim Police Station. On 27th June, 2001, at about 11.05 hours, in the morning, a phone call was received by accused No. 1 who was on Day Officer duty from one Miss Prashila Raut Dessai, Resident of Quitola, Fatorpa, Goa, informing that the deceased was assaulting her mother and she requested that police be sent to the spot. Accordingly, Station Diary Entry vide No. 28 at 11.05 hours was effected by accused No. 1 and accused No. 1 deputed PC- 3239 Nilu Shet and PC-3333 Shyam Dessai on a Government Motor Cycle to the spot at Quitola, Fatorpa. It is alleged that accused No. 1 was the Senior Most Police Officer present at the Cuncolim Police Station and was incharge at that point of time and as such, he was Officer incharge of the Cuncolim Police Station, as envisaged by section 2(o) of the Code of Criminal Procedure, from 11.00 hrs. on 27th June, 2001 till arrival of Shri Lawrence D'Souza, Police Inspector of the Cuncolim Police Station, at about 12.45 hours on 27th June, 2001.

2. It is alleged that the Two Police Constables deputed by accused No. 1 visited Quitola and brought the deceased on a Government Motor Cycle No. GA-01, G 0847 to the Cuncolim Police Station and produced him before accused No. 1 at about 11.50 hours on 27th June, 2001. The deceased was made to sit in the Reporting Room of Cuncolim Police Station. It is alleged that the deceased was handicapped in his right hand. However, when the deceased was brought to the Police Station, and made to sit thereat, there was no external visible injuries on his person. When the deceased was sitting in the Reporting Room of Cuncolim Police Station, he started arguing with the Police for not recording his complaint against Smt. Shobhawati alias Vijay Raut Dessai, the mother of the complainant Prasheela Dessai. The deceased also abused with filthy words, a Lady Police Constable Mrs. Swati alias Madhavi Dessai, wife of accused No. 2. This Lady Police Constable was also present in the Reporting Room and was on a day reserve duty, at Cuncolim Police Station at the relevant time. In view of this, there was exchange of words between the deceased and accused No. 2 in the Reporting Room of the Police Station. In order to protect the honour and dignity of the Lady Police Constable, accused No. 2 and accused No. 1 assaulted the deceased with slaps and dandas. Thereafter, the deceased was forcibly taken towards lock-up by accused No. 1. He was placed in a Female Lock-up of the Police Station, thereby he was illegally detained by accused No. 1. The deceased

was not formally arrested, and as such, his detention in the lock-up was illegal. As per the Station Diary at that particular point of time, no Policeman was posted on lockup guard duty. The deceased was not formally arrested and, therefore, there is no entry in the Station Diary regarding his arrest. It is alleged that the guidelines of the Hon"ble Supreme Court in the case of D.K. Basu Vs. State of West Bengal, were violated. It is alleged that there was no complaint on record of the Cuncolim Police Station, which would empower accused No. 1 to legally arrest the deceased. A complaint of the complainant Shobhawati Raut Dessai was registered subsequently, being NC Complaint No. 420/2001 u/s 504, 323 IPC. It is alleged that one Lucas Rebello was present in the Male Lock-up which is opposite the Female Lock-up at that very point of time. He had seen the deceased in the Female Lockup of Cuncolim Police Station. He had also seen the deceased crying and the tears rolling down his eyes, so also the deceased abusing accused No. 2. Thereafter, at about 12.25 hours, said Lucas Rebello was taken to the Primary Health Centre for his medical examination and the deceased remained alone in the Female Lock-up. In order to teach the deceased a lesson for abusing and insulting the honour and dignity of the Lady Police Constable Swati alias Madhavi Dessai, it is alleged that all the accused brutally assaulted the Deceased. This assault took place after Lucas Rebello was taken for medical examination. As a result of this brutal assault, the health of the weak and handicapped deceased worsened. It is alleged that after sometime of his assault, being inquisitive, original accused Nos. 3 and 4 again went to the lockup to see the deceased and at that time, at about 12.50 hrs., they saw him in bad state of health and they also saw froth coming out from the mouth of the deceased. Accused No. 4 gave water to drink and accused No. 3 went to the Reporting Room and informed accused No. 1 about the bad state of health of the deceased. Accused No. 1 came to the Female Lock-up and observed the state of health and this was disclosed by accused No. 3 and 4 to the Police Inspector, Lawrence D'Souza and Shri Thorat, Sub-Divisional Officer, Margao in the fact finding inquiry. It was also disclosed to the Sub-Divisional Magistrate Margao, who was inquiring into the matter, about his bad state of health. The deceased was not given any medical treatment, nor taken to any hospital for medical examination by accused Nos. 1, 3 or accused No. 4. He continued to be illegally detained in this condition in this Female Lock-up. Thereafter, the deceased fell unconscious. Seeing him unconscious, the accused were perturbed and thought that he was dead. Considering the deceased to be dead and in order to cover up their misdeeds, all the accused hanged the deceased to one Acacia tree which was behind the Police Station in the thick bushes and created a false scene of the deceased having committed suicide by hanging himself. Thus, they caused the death of the Deceased.

3. It is alleged that on 29th June, 2001, an inquiry was conducted by the sister and father of the deceased with the Cuncolim Police about whereabouts of the deceased and evasive replies were given to them. On 29th June, 2001, accused No. 1 even offered Rs. 50/- to Shri Anant Naik Dessai, father of the deceased

when he had personally come to the Cuncolim Police Station to inquire about whereabouts of the deceased. It has been alleged that when Lucas Rebello was brought to the Cuncolim Police Station, after medical examination and he was put back in the male lock-up, at that time he did not see the deceased in the Female Lock-up. It is also alleged that the entries were effected in the Station Diary by Mr. Lawrence D'Souza, then incharge of Cuncolim Police Station.

4. It is the case of the prosecution that on 29th June, 2001, about 17.00 hrs., an anonymous phone call was received at the Cuncolim Police Station, informing that a dead body of one person was seen hanging to a tree, behind the Cuncolim Police Station. At that time also accused No. 1 was on day officer duty. He informed about the same to the Police Inspector Mr. Lawrence D'Souza. Thereafter, U.D. Vide No. 27/2001 u/s 174 of the Criminal Procedure Code was registered by accused No. 2. The dead body of the deceased was seen hanging to a tree within the precincts of the Cuncolim Police Station, which was partly covered by barbed wire fencing and partly by compound wall. Mr. Lawrence D'Souza sent a wireless message to the Senior Police Officers and Sub-Divisional Magistrate, Margao, informing about the death of Dattu Dessai. Legs of the deceased were not touching the ground. After conducting the inquest panchanama, the dead body was removed from the hanging position and was shifted to Hospicio Hospital, Margao. The family members of the deceased were not informed by the Police before removing the dead body from the tree and also before conducting the inquest panchanama. It is alleged that on receipt of information from the S.D.P.O. Margao, Shri Sanjit Rodrigues, S.D.M. Margao visited Cuncolim Police Station and conducted an inquiry. As it was a custodial death, postmortem examination was conducted by a team of Doctors. They gave their opinion and stated that about 12 injuries were caused, which are in the nature of bruises; whereas Injury No. 13 was on account of blue check design shirt tied around the neck with knots. As per the post-mortem Report, the approximate time of death of the deceased was around 48 hours, plus - minus 6 hours, prior to preservation of dead body at Hospicio Hospital, Margao. Thus, it is alleged that the deceased died between 13.00 hrs. of 27th June, 2001 to 01.00 hrs. of 28th June, 2001. The S.D.M. submitted the inquiry report and on the basis of this Report, the offence vide CID CB Cr. No. 22/2001 under sections 302, 342, 201, read with 34 of the Indian Penal Code was registered on 16th July, 2001 and the investigation commenced. It is thereupon that the Accused were arrested. After the usual investigations, the accused were put up for trial.

5. On 26th February, 2001, charges were framed against the accused under sections 120-B, 342, 302, 220 and 201 of the Indian Penal Code. The Charges read thus:

That you on or about 13.00 hours of 2.6.2001 and 01.00 hours of 28.6.2001, at Cuncolim Police Station at Cuncolim:

Firstly, you being police officers attached to Cuncolim Police Station and having legal authority to commit persons for trial or to confinement maliciously

committed Dattu Naik Dessai in confinement in exercise of that authority knowing that in doing so you were acting contrary to the law and thereby committed an offence punishable u/s 220 read with 120-B I.P.C.

Secondly, on the said time, date and place agreed amongst yourselves to wrongfully restrain, assault and murder the said Dattu Naik Dessai and thereby committed an offence punishable u/s 120-B I.P.C.

Thirdly, on the said time, date and place you in furtherance of the said criminal conspiracy, wrongfully confined the said Dattu Naik Dessai and thereby committed an offence punishable u/s 342 read with 120-B I.P.C.

Fourthly, on the said time, date and place and in furtherance of the said conspiracy assaulted the said Dattu Naik Dessai and committed murder by intentionally or knowingly hanging him and thereby committed an offence punishable u/s 302 read with 120-B I.P.C.

Fifthly, on the said time, date and place knowing that the above offences were committed, caused the disappearance of Lock-up Sentry Guard Register and opened another Lock-up Sentry Guard Register with the intention of screening yourselves from legal punishment and thereby committed an offence punishable u/s 201 read with 120-B I.P.C., and all within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said Charge. 26th February, 2001.

Sd/- (N.A. Britto) Sessions Judge, South Goa, Margao.

6. The accused pleaded not guilty to the charges and claimed to be tried. That is how the Sessions Case proceeded.

7. The prosecution examined as many as 46 witnesses. Accused Nos. 1, 3 and 4 neither examined themselves on oath, nor led the defence evidence. Accused No. 2 did not examine himself on oath, but examined a witness, namely, Dr. Giri Kamat in his defence. Statements of the accused, as required u/s 313 Cri. P.C. were recorded. Thereafter, the arguments of the learned Public Prosecutor and the Advocates for the defence were heard. Learned Addl. Sessions Judge held that the prosecution has proved that the accused, in pursuance of the agreement, detained or kept the deceased in confinement in exercise of their legal authority, knowing that in doing so they were acting contrary to the law. Learned Judge also held that the prosecution has proved that in pursuance of the agreement, the accused have wrongly confined the deceased in the Police Station. The learned Judge held that the Prosecution has proved that the accused in pursuance of the agreement, committed murder of the deceased (Dattu). However, the learned Judge held that the Prosecution has failed to prove that the accused, in pursuance of the agreement, caused disappearance of the Lock-up Sentry Guard Register and opened another Lock-up Sentry Guard Register with an intention of screening themselves from legal punishment or with the intention gave any information respecting the offence which they knew or believed to be

false. It is pertinent to note that it is only as against accused Nos. 1 and 2 that the Charges are held to be proved and they have been convicted; whereas accused Nos. 3 and 4 have been acquitted.

8. It is the afore-referred judgment of Conviction and Sentence which is challenged in these appeals.

9. Mr. S.G. Dessai, learned Senior Counsel appearing in Criminal Appeal No. 59/2008, on behalf of accused No. 2, submitted that the Charges framed would show that the accused are charged with an offence punishable u/s 120-B of IPC. That is a substantive offence. However, in the entire judgment of the learned Addl. Sessions Judge, there is no discussion, nor has the learned Judge dealt with this charge, in any manner. He has not recorded that this charge stands proved and when he has not decided this aspect of the matter at all, yet, he has proceeded to convict the accused for the offence punishable u/s 120-B IPC. This conviction and sentence is, therefore, clearly vitiated. Inviting our attention to section 120-B of IPC., read with section 109 of the same, it is submitted that for the accused to be convicted and sentenced for this offence, it must be concluded that all ingredients of this section stand proved. Shri Dessai submits that in the entire judgment, such a conclusion has not been recorded. Therefore, the conviction and sentence not only for this offence, but as a whole, stands vitiated.

10. Mr. Dessai submits that accused No. 2 was working as a Writer at Cuncolim Police Station. He was doing more clerical work. He was not entrusted with any investigating function or duty. He submits that accused No. 2 had thus, no role in recording the complaint of Ms. Prasheela, daughter of the complainant Shakuntala. He had no role in the direction to bring the deceased to the Police Station. The only act that is attributed to him is that the deceased was brought to the Police Station and made to sit thereat. He abused the Lady Police Constable Ms. Swati alias Madhavi Desai, who is the wife of this accused No. 2. Hence, angered and enraged by the abuses hurled at his wife, the appellant accused is supposed to have told accused No. 1 Shripati Dessai to arrest the Deceased. This incident takes place after the deceased is brought to the Police Station. This is an isolated allegation. Accused No. 2 had, thus, nothing to do with the complaint against the deceased being brought to the Police Station or being allegedly detained in the lock-up. In such circumstances, there cannot be any conspiracy, because the act or the incident that took place at the Police Station allegedly of abusing the Lady Constable had nothing pre-planned or premeditated about it. There is no conspiracy, much less any agreement. In such circumstances, and when the deceased died some time between 27th to 28th June, 2001, then, all the more this conviction and sentence of accused No. 2 is completely erroneous.

11. Shri Dessai emphasized the fact that one Lucas Rebello was allegedly present at the Police Station being brought in for some other offence and detained in the Male Lockup. He is alleged to have seen the deceased in the Female Lock-up. However, although this Lucas Rebello was available, the prosecution has not

examined him. He was the only witness, present at the Police Station at the relevant time and on the relevant date. Thus, he was a material witness. His non-examination by the prosecution is fatal. There is no explanation for his non-examination. Merely because said Rebello was out of India or Abroad, is no ground not to examine him and hardly constitutes sufficient reason for his non-examination. In these circumstances, the other allegations, namely, of assault of the deceased by all the accused in the Female Lock-up; that his state of health worsening, and on account of the same, these accused hanging him to a tree behind the Police Station and thus causing his death, is not at all proved. All the persons examined have not witnessed either the deceased or the persons at the Police Station or in any event, his presence after the N.C. Complaint was not contemplated in law and the parties were directed to go and adopt appropriate proceedings. Thus, this is a case of circumstantial evidence. Once, there is no situation or circumstance, suggesting criminal conspiracy, and all acts are individually attributed to the accused, then all the more the conviction and sentence u/s 120-B IPC is vitiated.

12. Then, it is submitted by Shri Dessai that it is not a case of Prosecution that the deceased was killed by hanging him to the tree. The evidence shows that duty hours of the Appellants are entered in appropriate diaries and books. In these circumstances, and when there is no proof of detention of the deceased, beyond 13.50 hours on 27th June, 2001 and even the so called eye witness Lucas Rebello had not seen the deceased at the Female Lock-up when said Rebello returned to the Police Lock-up, after his medical check up, then, the conviction under sections 342 and 220 IPC is wholly unsustainable. In other words, section 220 speaks of confinement and that itself is not proved. Section 342 deals with a case of wrongful confinement. When there is no restraint placed on the deceased because the complaint against him was non-cognizable, then, there is no question of wrongful restraint. Even as the complainant had left the Police Station, there is no proof of the deceased remaining in the Police Station and nobody had seen him after the complainant Shakuntala had returned to the Police Station upon her medical check up. In such circumstances, the conviction under both the sections is bad in law.

13. Mr. Dessai, then submitted that as far as the conviction u/s 302 is concerned, that is also not sustainable. It is wholly erroneous and bad in law. The circumstances that are alleged do not lead to a complete chain, pointing to the guilt of the accused and negating the innocence. The chain is not at all consistent, leave alone pointing towards the guilt. The events would disclose that some overt acts are attributed to individual police officers. In these circumstances, even if the case of the prosecution is taken as true, there is no offence of murder. The incident of 26th June, 2001 was not preplanned one, but an usual incident at the Police Station. At a Police Station, several complainants who have fight or quarrels with their neighbours come and make complaints. This is a case of two ladies residing in the neighbourhood of the deceased and it was alleged that the deceased had caused injuries to one of the ladies. That her

daughter's complaint was taken seriously and the Duty Officer directed two Constables to go and bring the accused. The record indicates that there were some incidents in the past and the accused was alleged to be harassing the lady as she had refused to return his money. In such circumstances, it cannot be a case of any premeditation, much less prior agreement to bring the accused to the Police Station, and thereafter, assault him. All the powers that are exercised in this case are in accordance with law. From the records, the only allegation is that the Lady Police Constable was present at the Police Station. The deceased abused this Lady Constable, who is the wife of accused No. 2. On asking the deceased why he was abusing them, the deceased was pushed towards accused No. 1 and he was told to arrest the deceased. This is the only act attributed to accused No. 2.

14. Mr. Dessai, then submitted that if deposition of PW. 39 is seen, it is clear that the deceased was grumbling and complaining as to why he was brought to the Police Station again and again. He hurled abuses loudly. Thus, if the wife of this accused was abused by the deceased, and the accused is supposed to have said that the deceased must be arrested, that by itself is no ground to presume that thereafter this accused allegedly assaulted the deceased and caused his death. It is clear from the deposition of witnesses and particularly, of PW. 37, that the deceased was not arrested. In such circumstances, and when the Prosecution has failed to prove that the death was due to strangulation, then, the conviction u/s 302 on the basis that the accused hanged the deceased to a tree by tying a cloth around his neck, is not proved. It is also clear from the evidence that it is merely alleged that it was not possible for the deceased to climb the tree. However, that has also not been established and proved. There is a material difference in medical opinion. Injuries No. 1 to 12 are not fatal. In such circumstances, by alleging simple injuries and failing to prove the case of strangulation, the accused can never be convicted of murder and sentenced u/s 302 of I.P.C.

15. It is submitted by Shri Dessai that the entire case has been looked at only from one angle, namely, that the accused being Police Officials, and the deceased being brought to the Police Station and his body being found hanging to a tree in the backyard of the Police Station, that the case is of custodial death and that it is because by Police Officials assaulting the Deceased. This is too far-fetched a version and merely because the judgment of the Hon'ble Supreme Court in the case of State of M.P. Vs. Shyamsunder Trivedi and Others, is cited, does not mean that the conviction and sentence should have been imposed. Therefore, all the more, the impugned conviction and sentence must be set aside.

16. Inviting our attention to the depositions of certain witnesses, it is contended by Shri Dessai that the learned Judge has not relied on the deposition of PW. 8 Lawrence D'Souza. PW. 8 had categorically stated that the deceased disappeared from the Police Station before 1.10 p.m. on 27th June, 2001. This vital disclosure has been completely ignored by the learned trial Judge. This establishes that the

deceased was not detained at the Police Station. Once, such is the nature of the deposition of the Prosecution Witnesses and that too of the then Police Inspector attached to the same Police Station where the incident has allegedly taken place, then, there was no question of conviction of the appellants. This statement has not been believed by the learned Judge erroneously on the ground that there is a possibility that the disclosure has been made to save the police officials who were from the Police Department. That means, every Police Officer in case of a custodial death must necessarily be disbelieved, because he is trying to save his colleague. Such a general and sweeping remark vitiates the whole approach and, therefore, the judgment and order of conviction and sentence must be set aside.

17. The other reason given to disbelieve this witness is that there is no corresponding entry in the Station Diary to show that the deceased escaped from the Police Custody. Now, the Prosecution evidence discloses that the complaint was non-cognizable. Further, if the complainant's complaint was non-cognizable and she was told to have recourse to legal remedies, then, there is no question of the deceased being treated as an accused and detained at the Police Station. The very presumption for the conclusion, reached in para 98 of the impugned judgment, is untenable in law. There is no question of escape of an accused, in case of a non-cognizable complaint. Therefore, station diary entries will not be maintained in regard to such a person and therefore, the observation and finding that there is no clear and unshaken evidence to show that the deceased escaped from the Police Station is contrary to law. Inviting our attention to the depositions of Prosecution Witnesses PW. 26, PW. 27 and PW. 39, it is contended by Shri Dessai that there is no evidence of assault and that there is no reference to the appellant-accused No. 2 in any of these depositions.

18. Shri Dessai, therefore, strenuously urged that in this case of circumstantial evidence, there is no evidence that the deceased was at the Police Station, nor was detained at the Police Station. There is no evidence that he was in custody, either. There are fatal gaps in the Prosecution case and in such an event, it must be held that the Prosecution has failed to prove the charge beyond reasonable doubt. The Court cannot create any circumstance, so as to establish a chain and link to the guilt of the accused.

19. Mr. Dessai lastly submitted that there is no substance in the theory of suicide, as there has been no discussion on the circumstances. For all these reasons, and when as far as Point No. 4 is concerned, that part of the charge is held not proved. In other words, it has been held that the Prosecution has failed to prove that the accused in pursuance of the agreement caused disappearance of evidence of offence with an intention of screening themselves from legal punishment or with an intention gave any information respecting the offence which they knew or believed to be false. Mr. Dessai submits that the discussion at paras 106, 108, and 116 of the impugned judgment and order would show that the conclusions are based on conjectures and surmises. The appeal deserves to be allowed also on the ground of vital discrepancy in the medical evidence.

There are divergent opinions and, thus, the charge of causing the murder of the deceased in Police Custody or in Police Station has not been proved.

20. Mr. Dessai has relied upon the following decisions in support of his submissions.

- (i) In the case of Shankarlal Gyarasilal Dixit Vs. State of Maharashtra,
- (ii) In the case of (State of Kerala Vs. Anilachandran alias Madhu and others), reported in (2009) 13 S.C.C. 565;
- (iii) In the case of (Mr. Sanvlo Naik Vs. State), reported in 2003 B.C.I. 58 (P.B.) : 2004 Goa. L.R. 172;
- (iv) In the case of State of U.P. and Another Vs. Jaggo alias Jagdish and Others,
- (v) In the case of Habeeb Mohammad Vs. The State of Hyderabad,
- (vi) In the case of Sarwan Singh Vs. The State of Punjab,
- (vii) In the case of State (Delhi Administration) Vs. Shri Gulzari Lal Tandon,
- (viii) In the case of S. Arul Raja Vs. State of Tamil Nadu,
- (ix) In the case of (Sudhir Shantilal Mehta Vs. Central Bureau of Investigation), reported in 2010(1) Bom. C.R. (Cri.) 146(S.C.): Sudhir Shantilal Mehta Vs. C.B.I., and
- (x) In the case of Chaman Lal and Others Vs. State of Punjab and Another,

21. Shri Lotlikar, learned Senior Advocate appearing for the appellant in Criminal Appeal No. 60/2008, submits that accused No. 1 was on day duty on 27th June, 2001 from 08.00 hrs. to 08-00 hrs. of 28th June, 2001. He was also on day duty from 29th June, 2001 to 30th June, 2001, once again from 08.00 hrs. to 08.00 hrs. of 30th June, 2001. Accused No. 1 was on day duty from 28th June, 2001 to 29th June, 2001. Further, accused No. 1 was not incharge of the Police Station. Relying on the deposition of PW. 8 Shri Lawrence D'Souza, who was incharge at the relevant time, Shri Lotlikar submits that PW. 8 reported back for duty at 1.30 p.m. on 27th June, 2001 itself. Shri Lotlikar submits that in the entire judgment there is no finding and conclusion as far as charge of criminal conspiracy is concerned. That charge cannot be equated with the common intention which principle and concept is appearing in section 34 of IPC. Shri Lotlikar invited our attention to the Points for Determination and submitted that no agreement is proved, so as to hold the accused guilty of criminal conspiracy. In the entire Judgment, there is no finding on this crucial point. If this is the manner in which the Points for Determination have been decided, then all of them ought to have been answered in the negative. There is no criminal conspiracy and there is no common intention proved. Then what remains are the individual acts and whether they are significant and pinpoint to the guilt of the accused and rule out the possibility of their innocence is the real issue. Such an exercise has not been undertaken and the learned Sessions Judge has glossed over the relevant facts

and materials. He submits that the judgment only aims at discarding the defence version. But, the principle on which such matters should be decided is whether the Prosecution has proved the charge beyond all reasonable doubt. In these circumstances and when there is no finding that the ingredients of offences, with which the accused has been charged are established by conclusive evidence, then, the conviction and sentence cannot be sustained at all.

22. Mr. Lotlikar submits that as far as the offence u/s 302 of IPC is concerned, it is of very serious nature. There should not be any presumption and assumption merely because the case is of alleged custodial death and the accused are Police Officials. In law, the burden on the Prosecution is same as in other cases of murder. If the conclusion is worded as "in all probabilities the accused must have caused the death of the deceased", then, this is a case of acquittal, as the fundamental premise on which the conviction and the sentence is based is unsupportable in law. Shri Lotlikar has taken us through the medical evidence, and particularly of Dr. Sapeco at page 366 of the Paper Book and submits that in the cross-examination very material and relevant details and admissions have been extracted. The fundamental flaw is that the injuries disclosed in the medical evidence and particularly by this Doctor were not noticed on the dead body at the time of conducting inquest panchanama. Therefore, when did the deceased sustained injuries and at whose hands is not proved, and when no arrest or detention is proved, then, the findings are nothing but a guess work and there is substance in the criticism that the conclusion is based on conjecture and surmises. Mr. Lotlikar was at pains to point out that if the evidence of all material witnesses is taken as it is, then, the assault in custody or in detention and in the precincts of the Police Station has not been proved. Even, in the Statement of the accused u/s 313 Cri. P.C. no questions have been put to accused No. 1 with regard to the material witnesses and this vitiates the manner in which the statements are recorded and answers therein should not have been relied upon. The time of death, is also not mentioned and there is a big interval inasmuch as what has come on record is that the death might have occurred (+) (-) 6 hours on 27th June, 2001. In these circumstances and when the learned Judge does not hold that the accused hanged the deceased to the tree, such a finding is rendered without considering the location of the tree, nature of the tree and whether it is possible to climb the tree and reach the branch thereof is not correct in law. The possibility of the accused climbing the tree bearing in mind the photograph which has been produced cannot be ruled out. In these circumstances, the conviction and sentence deserves to be quashed and set aside.

23. Shri Rivonkar, learned Special Public Prosecutor appearing for the State, on the other hand, supported the impugned judgment and Order. He submits that this Court is a Court of appeal and it is empowered in law to look into the evidence independently. There is enough evidence on record and the errors and defects in the impugned judgment and order should not influence the Court. Ultimately, a case of death in Police Custody or within the Police Station premises

is a grave charge. That charge has been proved by firstly establishing that the deceased was brought to the Police Station in medically fit condition. He was not suffering from any ill-health. He was not in any pain. He was absolutely fit. Shri Rivonkar submits that no capital can be made of the finding and the conclusion about the entry in the Station Diary. There was definitely restriction on the free movements of the Deceased. He was brought to the Police Station by sending two Police Constables from his residence. That he was brought on a serious charge of assaulting a neighbour by pelting stones and causing injuries. That the deceased came to the Police Station is undisputed. He was accompanied by two Police Constables who were deputed to bring him from his residence. At the Police Station there was exchange of words, because the deceased allegedly abused the wife of accused No. 2, who is a Lady Police Constable. That is why the accused No. 2 requested accused No. 1 to take action against the deceased by arresting him. The agreement between both of them supports this motive. Subsequently, there is a arrest, because there is no material to show that the deceased left the Police Station. Therefore, there is a clear case of detention and arrest by illegal means and naturally, no entry was made in the Police Station records and Diaries. Mr. Rivonkar was at pains to point out from the deposition of PW. 22 at pages 344-345 of the Paper Book that there is always a "custody" in "arrest" and it may be that custody may not amount to arrest. However, if the case of the defence is that the deceased left the Police Station or was not there after the complainant was sent for medical check up and came back and the matter was closed as "N.C.", then, it was for the accused to explain this fact. The deceased was last seen in their company. Therefore, the onus shifts on the accused and particularly when there is news spread that the deceased escaped while he was in Police Custody and in that behalf, evidence of PW. 2 is crucial. The suggestion that the deceased could have climbed the tree itself is false, because the deceased had disability in his right hand. Shri Rivonkar relied upon the evidence of PW. 3 and in his submission, the principle laid down by section 106 of the Indian Evidence Act would apply, inasmuch as the deceased was at the Police Station and none other than the Police Officials can explain as to whether he was detained or released. All such facts are within their special knowledge. The learned Judge is right in holding that even if the arrest is not proved, it is enough that the custody is proved. Shri Rivonkar submits that conspiracy in this case is established and in any event, section 34 of IPC would come into play. Even the individual acts are with the common intention of causing death of the deceased in the Police Station. There is a clear intention to kill and merely because some of the findings and conclusions may not be happily worded, should not lead to an acquittal of the accused.

24. Shri Dessai and Shri Lotlikar, both appearing for the appellants have, in rejoinder, contended that even if this Court has full power of independent appraisal and appreciation of evidence, yet, the judgment, cannot be discarded. Ultimately, it is a judgment of the Sessions Court in a Sessions Trial and it must demonstrate appreciation and appraisal of evidence. Mr. Dessai submits that the

daughter of PW. 22 filed a complaint on telephone and there was an incident of beating and pelting of stones. The deceased was brought to the Police Station for finding out as to whether any criminality is attached to his acts. Nothing, therefore, should be read into this aspect, as it is an usual case, in which the Police look into a complaint alleging commission of offence. In these circumstances, what transpired at the Police Station and a mere statement or request of accused No. 2 to arrest the deceased is nothing but a suggestion to take action u/s 353 of IPC. This has no connection with the act of the deceased being brought at the Police Station and from this no inference or conclusion can be drawn that the deceased was in detention and custody. Only because such a request is made, does not mean that the Charge is proved. As far as entries are concerned, it is submitted that station diary entries are not made when the case is non-cognizable. Section 155 of Cri. P.C. does not contemplate any entry in such cases. There is no question of detention. In these circumstances, all theories, including last seen, has no substance and that was not even the case of prosecution before the Court below. The Police Station is a public place. There were at least 20 members of staff present and working and that is clear from the version of PW. 45. For these reasons, it is not a matter where the murder has taken place when the deceased goes in a private company of the accused. There is no evidence to show that the deceased was taken in the lock-up or that to a place within the premises of the Police Station and assaulted. Therefore, the two decisions of the Hon''ble Supreme Court relied upon by learned Special Public Prosecutor have no relevance and are distinguishable on facts. In these decisions which are in respect of death in Police Stations, both custody and death in custody has been proved. For all these reasons, section 106 of the Indian Evidence Act does not apply. Further, reliance on the evidence of PW. 2 is misplaced, because PW. 2 is an interested witness. For all these reasons, according to both, Shri Dessai and Shri Lotlikar, there is no proof in this case and the accused deserve clean acquittal.

25. With the assistance of the learned Senior Counsel appearing for the appellants, and the Special Public Prosecutor, we have perused the entire record. We have also perused the relevant statutory provisions and the decisions relied upon by the Counsel. We have carefully perused and scrutinized the evidence in this case, particularly because the charge is of death in Police Custody.

26. All Counsel agree that the judgment and Order of the learned Addl. Sessions Judge leaves much to be desired. Learned Judge lost sight of the elementary principle that he was deciding a Sessions Case in which the charge has to be proved beyond reasonable doubt. The burden is on the Prosecution to prove the charge of murder and merely because the death takes place in Police Custody, there is no exception made in law. Further, the learned Judge seems to be unaware of the principle that the whole purpose of criminal trial is establishment and vindication of the truth. In the case of *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, the Hon''ble Supreme Court, in this context, has observed as under:

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this Court"; Vice-Chancellor Knight Bruce said:

The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination... Truth, like all other good things, may be loved unwisely -- may be pursued too keenly -- may cost too much.

The Vice-Chancellor went on to refer to paying "too great a price... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

32. Restraints on the processes for determining the truth are multifaceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

It is the merit of the common law that it decides the case first and determines the principle afterwards.... It is only after a series of determination on the same subject-matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step.

27. The learned Judge should have been also careful because the judgment that he rendered in the Sessions Case must meet the requirements set out in the Code of Criminal Procedure. A judgment must reflect application of mind and the

conclusion in the judgment of the Criminal Court must reflect awareness of the charge, the version of the Prosecution, and defence, if any, and there must be proper and complete appreciation of the evidence on record. Appreciation and appraisal of the evidence must be done bearing in mind the object and purpose of a criminal trial. In this context, in the decision in the case of (Nandlal Chunilal Vs. Emperor), reported in AIR 1946 Bombay 276, it is held that the term "Judgment" is not defined in I.P.C. or Cri. P.C. It is described as, "the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments".

28. The learned Judge has referred to the version of the prosecution witnesses, but there is no discussion on the same. Some stray observations have been made about the statements made in the Examination-in-Chief and cross-examination, but whether such statements could be termed to be admissions, contradictions or omissions, whether material or not, has not been spelt out. Some disclosure, according to the learned Judge, does not mean that there is flaw in the prosecution case or that there is an improvement. That the learned Judge should have said so with reference to the version of any witness, whom he finds otherwise reliable. He does not discuss the evidence as a whole and that too of crucial witnesses. He starts with the presumption that the accused being Police Officials, they must explain as to how the deceased died. This approach, with great respect, does not commend to us.

29. Even in case of a death in Police Custody, in a recent decision, the Hon'ble Supreme Court in the case of (Sadashio Mundaji Bhalerao Vs. State of Maharashtra), reported in 2007(1) Bom. C.R. (Cri.) 39 (S.C.): (2007) 15 S.C.C. 421 has held that the charge of causing death therein or at the Police Station or within its precincts has to be proved in the same manner as any other murder charge or in a case of offence punishable u/s 302 of IPC. There is no distinct test laid down and the principle is the same. The Supreme Court in paras 31 and 32 held thus:

31. We are conscious that there is a rise in incidents of custodial deaths but we cannot completely dehor the evidence and its admissibility according to law convict the accused. We cannot act on presumption merely on a strong suspicion or assumption and presumption. We can only draw presumption which is permissible under the law and we cannot rush to the conclusion just because the deceased has died in the police custody without there being any proper link with the commission of the crime.

32. Learned Senior Counsel for the State, Mr. Shekhar Naphade very fairly submitted that despite the strong loopholes in the prosecution case the strongest circumstance which stands against the appellants is that the deceased was in the custody of the police and that he was last seen alive in the custody of the police. Thereafter, he was not seen alive. Therefore, presumption should be drawn of the guilt of the accused. Commission of crime with reference to this type of presumption is perverse. It is true that the accused involved are police personnel

but we cannot stand to condemn the whole Police Station just on the basis of only circumstantial evidence of the deceased last seen in the custody of the police and thereafter he was not reported alive.

A similar view has been taken in a latest judgment delivered by the Supreme Court reported in Haricharan and Another Vs. State of Madhya Pradesh and Others, in the case of (Haricharan and ors. Vs. State of Madhya Pradesh and ors.), (see paras 34 to 37).

30. After these preliminary observations, we proceed to discuss the prosecution case and the evidence in that behalf. We have independently appraised and appreciated the material on record and uninfluenced by the criticism of the Counsel of the judgment of the Court below. We have given our anxious consideration, because we are mindful of the fact that no one should get away with crime and escape the punishment and only because of the uniform. The men in uniform are known to be both, fallible and cruel. The men in uniform have been found to be lacking in decency while dealing with persons summoned to the Police Stations, whether as suspects or accused. Therefore, the criticism about their conduct and behaviour is now found to be justified. Since judicial notice has been taken of the same, we have taken adequate care and exercised due caution. The Prosecution case has already been referred above.

31. It is clear that the case is that the deceased and the complainant are neighbours. That the deceased was allegedly pelting stones at her and also caused injuries. That is how the daughter of the complainant made a phone call to the Police Station, in question and the Police Officer on duty-accused No. 1 deputed two Police Constables to visit the Village Quitola and particularly, the house of the complainant and bring the deceased to the Police Station. In these circumstances, Police Constable Shyam Desai and Police Constable Nilu Shet went on a motor cycle to Village Quitola, picked up the deceased from a cowshed, brought him on the motorcycle to the Police Station. He was produced before accused No. 1. It was at about 11.50 a.m. Thereafter, the complainant and her daughter came to the Police Station. It is alleged that after the complainant and the daughter came to the Police Station, the deceased raised hue and cry and abused the policemen who were on duty. It is stated that accused No. 1 and Police Hawaldar Manohar Sail took the deceased to the Female Lockup and kept him there till about 1.40 p.m. after which accused No. 3 noticed that the deceased was not in the lock-up. He gave this information to accused No. 1 who, in turn, went to the lock-up and verified the fact. On 29th June, 2001, a person by name Subhash Naik informed on phone the Police Station that a person is hung to a tree, situate at the backyard and within the compound of the Police Station. Thereafter, the further procedure was undertaken and the body was brought down from the tree and sent for postmortem.

32. Now, as far as the oral evidence is concerned, PW. 1 Prashasnt Faldessai is cousin brother of the Deceased. He deposed about his relation with the deceased and that the deceased had suffered an accident while working in MRF Factory.

The deceased was residing near the house of the complainant Shobhawati and this witness states that the relations between the deceased and the complainant were strained. The deceased was not seen after he was taken away from his residence and this witness deposes as to how he made inquiries regarding the deceased when he did not return home and he was informed by the Police Station concerned that the deceased had been brought to the Police Station and he has gone away. Thereafter, he became suspicious and he again called on phone to inquire about the deceased and this time he informed that he was a relation of the deceased. Thereafter, the policeman on duty told him on phone that the deceased had hanged himself and his body was sent to Margao. Thereafter, he gives the details as to how the dead body was brought down. This witness is stated to have given some statement to the Dy. S.P. Kudchadkar at the CID Crime Branch, at Panaji and prior thereto, he deposes about how the body was taken for post-mortem. In his cross-examination by Advocate for accused No. 1, he stated that he does not know the complainant. He states that on 27th June, 2001, in the evening time, when he came to the STD Booth that he was informed by the police about the deceased being taken away by the Police. What is material about this witness's deposition is the statement that he called up the Police Station and he was informed by the Police that the deceased was brought to the Police Station and he had gone away. This witness was asked several questions in his cross-examination and he could not give exact details as to when he contacted the Police Station on 29th June, 2001. Thus, the version of the witness is that the Police informed him that the deceased has gone away from the Police Station.

33. The other witness is PW. 2 Suresh Dessai, who is the neighbour of the deceased and he stated that at around 11.30 a.m. two Policemen came to Quitola and thereafter, the deceased went along with the two Policemen. He gave description of the clothes of the deceased and thereafter he narrates the events of 29th June, 2001. However, he states that though the deceased was handicapped, he was otherwise healthy. He deposed about the strained relations between the complainant and the Deceased. In his cross-examination by the Advocates for accused Nos. 1 and 2, all that is stated is that there were quarrels between the complainant and the Deceased.

34. The other Witness is the Police Constable Shyam Dessai (PW. 3), who accompanied by another Constable Nilu Shet went to the house of the deceased and brought him to Cuncolim Police Station. This witness narrates as to how Dattu, the deceased was brought to the Police Station from the cowshed. However, on being brought to the Police Station, it is stated that accused No. 1 asked him about what the complainant and her daughter told and he was informed by PW. 3 and other Constable that they were also coming to the Police Station and were waiting for a vehicle to come. At that time, the deceased told accused No. 1 that in the past also when he had come to the Police Station, accused No. 1 was there and even on that day he was there at the Police Station. The deceased wanted to shake hand with accused No. 1, but accused No. 1 told

him to sit. However, the deceased told him to record his complaint. At that time, accused No. 1 told him that he was recording some other complaint and after finishing that he would record the complaint of the deceased. By that time, it was 11.15 a.m.. It is stated that at that time, a Constable requested accused No. 1 to make entry in the diary about their coming to the Police Station, upon which accused No. 1 took one paper from his drawer and at Sr. No. 3, on it, made an entry. This witness states that they thought that on the basis of that entry, accused No. 1 would make further entry in the Register. He states that thereafter, the Constable proceeded to his house. He states that when he reached the gate of the Police Station, a bus came at that time and they heard the noise in the Police Station which indicated that the deceased was making noise and accused No. 1 was telling him to sit. Thereafter, this witness gives details as to how he performed the duties at the other Police Stations and he coming to know of the deceased found hanging to a tree at the backyard of the Police Station. He states that there was some inquiry by the Sub-Divisional Magistrate in which his statement came to be recorded. During the course of the said inquiry, the SDM showed him a Station diary and asked him whether the same was written by accused No. 1 and he stated that it is written by accused No. 1. He states that he identifies the handwriting of accused No. 1. He states that lock-room of Cuncolim Police Station is at a distance of 10 meters from the SHO Room.

35. In his cross-examination, when he was asked about the Entry No. 18 dated 27th June, 2001, at 08.45 a.m. and asked to identify the handwriting, he states that the said handwriting is of P.I. Lawrence. He states that it is true that PI Shri Lawrence was at the Cuncolim Police Station at 08.45 a.m. on 27th June, 2001. Thereafter, he was shown Entry No. 36 made at 12.45 p.m. dated 27th June, 2001 and asked whether the same is in the handwriting of PI Lawrence and the witness was unable to identify the handwriting. He was confronted with the portion marked "A" to "A" in the statement recorded by CID Crime Branch and he states that he does not recollect whether he stated that he identifies the handwriting of PI Lawrence in respect of Entry No. 18 and Station Diary Entry No. 21 and Entry No. 35. He states that the SDM recorded his two statements. This witness states that on the day when the other Constables had gone to bring the deceased to the Police Station, the deceased was smelling of liquor. He admits that he did not state this fact in the statement recorded by the SDM. The attention of the witness was invited to several statements made during the course of inquiry before the SDM.

36. In the cross-examination of this witness by accused No. 2, the witness could not explain some omissions about the deceased having told that the lady Shobhawati had taken a sum of Rs. 20,000/- from him. However, this witness states that the lock-up is sliding type and the sliding lock is to the gate of the lock-up and the wall of the lock-up. He could not give length of the lock-up. He also could not give details as to what the distance between the lock and the get up of the lock-up after a lock is put. To a suggestion that if there is no lock to the

sliding latch, the lock-up gate can be opened by the person inside the lock-up, he states that he cannot say anything about this. He states that he does not know who was the Lock-up Sentry on the date of the incident. To certain suggestions that he knows that the deceased had hung himself as revenge against the lady Shobhawati, he denied. He further denies the suggestion that he was aware that the deceased was not put in proper Police Custody and lock-up.

37. The other witness examined is one Ms. Amita Naik Dessai as PW. 4. She states that the deceased was her brother. She states that Shobhawati was a widow. She also states that the deceased was handicapped. She also states that the deceased informed her that he had given Rs. 40,000/- to Shobhavati. She states that the deceased had won some amount on lottery. She also states in her Examination-in-Chief that the deceased was even arrested on 3 occasions pursuant to complaints by Shobhavati. Then she gives details as to how the Policemen came to take away the deceased to the Police Station on 27th June, 2001 and further states that till 6.00 p.m. on that day, the deceased did not return. In her Examination-in-Chief, she states that on the next day, she phoned the Cuncolim Police Station asking about Dattu and the information given was that the deceased was taken to Balli and then he was released. She states once again that when the deceased did not return, his sister telephoned at the residence of their relatives' residence, but the deceased was not there. They waited till 8 p.m. On the second day and at around 8.30 p.m. again telephoned at the Cuncolim Police Station and they were informed that the deceased was immediately released on the same day. Thereafter, there is further narration by her and the version is that the father of the deceased was informed that a chapter case was filed against the deceased and he was likely to be sent to Aguada, but could be released on executing a bond. That is how her father went to Cuncolim Police Station and he met accused No. 1 and upon questioning, accused No. 1 asked the father as to who would maintain his son by keeping him at the Police Station and then accused No. 1 handed over Rs. 50/- to her father, however, her father refused to accept the said amount. This version is completely hear-say.

38. Thereafter, this witness was cross-examined and she states that she is working in the Police Department since the time of death of the Deceased. She states that her family was doing certain business. However, in her cross-examination, she admits that her father did not tell her and others in the family as to whom he met first, when he went to the Cuncolim Police Station, though he is stated to have told that he met accused No. 1. This witness was asked certain events narrated by the father of the deceased and other omissions. Thus, the version of this witness is nothing, but hear-say as she was not involved in making any complaint to the Police about the absence of the deceased from the house.

39. Thereafter, there is evidence of PW. 5 who is the panch Witness and it is not necessary to refer to it in any detail.

40. The evidence of PW. 6 who is the uncle of the deceased also is not of much consequence.

41. The deposition of PW. 7 Dr. Ulhas Nachinolkar has been referred by Shri Dessai, learned Senior Counsel, because it is stated that he was treating the deceased Dattu and had issued a disability certificate in the name of the deceased on 18th September, 1998, certifying that the deceased had 55% permanent disablement on account of deformities of the right arm and non-functioning deformities of the right hand. That is to show that this witness was taken by the Sub-Divisional Magistrate to the spot of incident at Cuncolim and shown a tree and thereafter, he is supposed to have given his statement that considering the tree, surface being smooth, the girth of the tree being thick and there being no branches upto the height of about 8 feet from the root of the tree i.e. from the ground level and considering disabilities of right arm, it appears unlikely that the deceased could climb the tree upto the spot of hanging. In his cross-examination on behalf of accused No. 1, he answers that since there was permanent disablement, there was no possibility of improvement in the right wrist and right shoulder of the Deceased. In the cross-examination by Advocate for accused No. 2, this Witness states that he does not remember how many barks the said tree had. However, he stated that the tree had one bark when he had seen it. He states that he does not remember as to whether the said tree had any other growth touching the ground from the side of the upper height. This witness states that the deceased was able to walk and crawl. It was possible for him to climb a ladder.

42. Then the evidence of PW. 8 Lawrence D'Souza has been referred by the parties and we have perused it carefully, since he was Incharge of the Cuncolim Police Station. He states that he left the Police Station on 27th June, 2001 at about 09.45 hrs. for Margao to carry out some investigation. Thereafter, he states that he returned to Cuncolim Police Station at about 13.30 hours and he narrates the events after he came back to Cuncolim Police Station and what transpired on 29th June, 2001. He states that one person told him that the deceased was brought to the Police Station on 27th June, 2001 and states the further details the said person gave. He states that he asked accused No. 1 whether the deceased was brought to Police Station, which he denied. Thereafter, this witness states that he perused the Station Diary and the Station Diary has an entry at about 11.05 hrs. stating that he had sent two Constables to bring the Deceased. This witness, in his Examination-in-Chief states that there was no further mention in the station diary to know if the deceased was brought to the Police Station or not. In his Examination-in-Chief, thereafter, he identifies certain documents. In his cross-examination by the Advocate for accused No. 1, he states that initially he was placed under suspension and he submitted a report to the S.D.P.O. Margao. He states that his inquiry revealed that the deceased was at the Police Station on 27th June, 2001 till 13.00 hours. At the same time he states that when he came to the Police Station, the deceased was nowhere at the Police Station. He also states that when he came to the Police Station, there was

no commotion such as of anybody shouting, beating or giving bad words. He gave certain details about how much staff reported for duties at the Police Station. He also gave details of how lock-up is made. He states that except a small portion in front, the compound of Cuncolim Police Station is surrounded by barbed wire. The said barbed wire fencing is quite old and broken at some places.

43. Thereafter, the depositions of other witnesses have not been perused by us in minute details, because it is not material for the case. Even the Counsel appearing for the accused and the learned Special Public Prosecutor did not refer to them. They referred to the depositions of some other witnesses. But, apart therefrom, we have also perused the deposition of some witnesses other than referred to by them. As far as medical evidence is concerned, PW. 23 Dr. Silvano Dias Sapeco who is a Professor & Head of Forensic Medicine Department states that on 30th June, 2001, the Deputy Collector and Sub-Divisional Magistrate, Margao, Goa submitted a letter, requesting for Autopsy Examination u/s 174 Cri. P.C. on the dead body of the Deceased. Thereafter, the autopsy was performed by him between 4.30 p.m. to 8.00 p.m. on 30th June, 2001. He then gives details of ante mortem injuries caused by blunt force impact by object or surface. In his opinion, he states that the death was around 48 hours (+) (-) prior to preservation of the dead body at Hospicio Hospital, Margao Morgue, namely, from 7.00 p.m. of 29th June, 2001. He states in his opinion that the death was due to extensive internal bruising for both lower limbs as a result of blunt force impact by object or surface, which were ante mortem and fresh at the time of death, associated with hanging by soft ligature material. He states in answer to one query of S.D.M. that the deceased did not die before hanging. In the cross-examination of this witness, by accused No. 1, he states as under:

... It is true that if injuries Nos. 1 to 12 were not fatal in the ordinary course of nature, the opinion expressed by me while giving statement to SDM would differ, meaning thereby deceased might have been able to climb the tree.

My post-mortem was videographed. I am not aware if Government had appointed a team of Doctor for giving second opinion on my report based on Videography.....There was no request to me from SDM to remain present at the spot of inquest done by him. As per the letter at Exbt. 68, para 1, when the body was handed over to me for PM examination, the inquest was already done. I was not present at that inquest. It is true that I have signed the inquest panchanama at Exbt. 69 colly, drawn by SDM, however, I say that the same was signed by me after I received the papers i.e. SDM report and the inquest panchanama. It is not true to suggest that SDM recorded this statement in the manner he wanted and the same was thereafter signed by both of us. In the ordinary circumstances, injuries Nos. 1 to 12 on the deceased would have been visible during inquest panchanama. It is not true to suggest that with such support, the deceased could do many other activities like climbing the tree.

As far as cross-examination by accused No. 2 is concerned, he states as under:

... On the basis of my post-mortem, I would say that deceased could crawl. His both lower limbs and left upper limb could take a grip. With these limbs he could climb staircase with difficulty. The staircase with additional support could make it easy to climb such person.

44. PW. 25 is Constable Nilu Shet who states that accused No. 1 was the Duty Officer on 27th June, 2001 and he was one of the Constables who had brought the deceased to the Police Station on the direction of accused No. 1. In his cross-examination by accused No. 1, this witness states that after the deceased was brought to his house from cowshed, he went inside to change the clothes and immediately came out after changing the clothes, which was within a minute or two. He did not observe if the deceased had injuries on his body. He does not recollect that he had stated in his statement recorded by the Dy. S.P. Shri Kudtarkar that at that time there were no injuries on the person of the deceased, specially on his legs. This witness was confronted with portion marked "A" to "A" in the Statement and he admits of having stated so. He, therefore, denies the suggestion that his earlier statement is not correct, in view of the statement before the Court. He states that his statement was recorded on 3 occasions. He states that the deceased was called to Cuncolim Police Station on various occasions on the basis of complaints lodged by various persons against him. He also states that he heard that the deceased had attempted in the past to commit suicide. The deceased had inquired with him that when he was being brought to the Police Station, Shobhavati should also be brought there. Importantly he states that the tree where the deceased was seen, had branches from the ground level itself.

45. As far as other witnesses are concerned, i.e. PW. 26 Shashikant Arondekar, is also a Constable attached to the Cuncolim Police Station at the relevant time. He states that the deceased was seen in the Reporting Room and the deceased was giving abuses to Swati Desai. In his Examination-in-Chief, he states that the accused No. 2 is the husband of Swati Dessai and he asked the deceased as to why he was abusing them. Accused No. 2 pushed the deceased near A.S.I., namely accused No. 1 and told him to arrest the deceased. It is stated by him that accused No. 1 and Police Head Constable Sail took the deceased towards lock-up. In his cross-examination on behalf of accused No. 1, he admits that he had stated before the Investigating Officer that accused No. 2 Madhu Desai pushed the deceased near accused No. 1 and told accused No. 1 to arrest the Deceased. But it is not appearing in his statement. He was asked about several contradictions and omissions. In his cross-examination by accused No. 2, this witness states that he does not know personally the Deceased, but he was told that the person brought was the deceased Dattu Dessai. This witness admits that he was told so after the incident in question. In other words, he was told that the person brought to the Police Station was the Deceased.

46. Next witness is PW. 27 Ajay Komarpant who was attached to the Police Station as Police Constable. He states that accused Nos. 2 and 3 were on duty at

that time and he was also on duty at that time, namely on 27th June, 2001. He states that he told accused No. 1 that he was going to his house for his work. However, when he was proceeding towards his house, and when he reached at the steps of the Police Station, he saw Nilu Shet and Sham Dessai bringing the deceased on a motorcycle and after parking the motorcycle all of them came in the Police Station. The deceased was heard shouting when this witness reached near the bus stop and, therefore, he came back to the Police Station. He states that the deceased was trying to come out of the Police Station and accused No. 1 and Police Havaldar Manohar Sail were trying to take the deceased inside the Police Station. He states that accused No. 1 and Police Havaldar Manohar Sail took the deceased towards the lock-up room. The deceased was giving abuses to the Police and he was shouting how he touched him. Witness then states that after he came down, he came to know that the deceased was giving abuses to accused No. 2 Madhu Desai and others. In his cross-examination, to a suggestion that after he left the Police Station on 27th June, 2001, he did not return to the Police Station, that suggestion is denied.

47. The depositions of other witnesses are not referred because most of them are the staff members reporting for work at the said Police Station.

48. We have then carefully perused the deposition of PW. 37 Mr. Sanjit Rodrigues. He had conducted an inquiry into the custodial death of the Deceased. He states that he was posted as Sub-Divisional Magistrate, South Goa, Margao in the year 2001. He gave details and stated that he recorded statements of 30 persons. He states that it transpired during the inquiry from the statements of various persons that the deceased was brought by Police Constables Nilu Shet and Shyam Desai to the Police Station at 9.50 a.m. on 27th June, 2001. The Police Station Diary indicated that the said two Police Constables were deputed to bring the deceased to the Police Station. These two Constables left the Police Station at about 9.50 a.m. to bring the deceased to the Police Station. However, no entry is made in this regard in the Station Diary. He states that when the complainant came to the Police Station at about 12.15 p.m. on 27th June, 2001, the deceased on seeing the complainant started shouting and abusing accused No. 1 and Police Head Constable Manohar Sail and therefore, they took the deceased towards lockup at about 12.20 p.m., and according to them, they made the deceased to sit outside the lockup. This witness clearly states that the Prisoner by name Lucas, who was in the lock-up provided for males stated that he had seen the deceased being detained in the Female Lock-up and that the deceased was shouting and abusing the police, and particularly accused No. 2. Then this witness states as to how the deceased was missing from the Female Lock-up. Thus, he deposed about the details of the incident as narrated to him during the course of the inquiry. In his cross-examination, he admits that he does not remember how many times he called Lucas Rebello for recording his statement. He states that he recorded his statement once. Then, he states that two Doctors simultaneously conducted post-mortem of the deceased and, therefore, their joint statement is recorded. He states that when he prepared the

inquest panchanama, Dr. Silvano Dias was not present. He signed the inquest panchanama when it was handed over to him in the Goa Medical College Hospital. This witness does not know the total strength of police staff attached to Cuncolim Police Station. Then he states that he did not notice bruises on lower limb of the dead body at the time of drawing inquest panchanama, because at that time the body was in decomposed condition. He states that he is not aware as to whether the Government had appointed a team of Doctors to have a second opinion based on video recorded post-mortem. This witness states that accused No. 1 was Station House Officer at about 12.45 p.m. on 27th June, 2001, but the Police Station Diary shows that Police Inspector Lawrence D'Souza was present in the Police Station on 27th June, 2001 at 12.45 p.m. and, therefore, it is true that by this time Police Inspector Lawrence D'Souza was incharge of the Police Station. He states that he noticed various irregularities during his visit to Cuncolim Police Station. The irregularities noticed were in Police Station Diary for the period from 27th June, 2001 to 30th June, 2001. To the suggestion that the compound is of barbed wire, he states that the compound wall is only on southern side and the remaining side is of barbed wire. He denied the suggestion that the barbed wire was broken at places. He denied the suggestion that the place where the dead body was found hanging to a tree is not within the precincts of the Police Station. He was asked about the contents of the Report at exhibit 129. He admits that at the time of the visit to the Police Station, there were shrubs and wild bushes in the compound of the Police Station and it is true that shrubs and wild bushes were also under the tree and also branch of the tree where the dead body was found hanging. He states that he questioned Lucas Rebello in the Police Station on 30th June, 2001, but he did not record the statement on that day. To a clear question about certain contradictions, he states that he has seen the locking system of the police lock up and he stated that he checked that when the door of the lock up was latched, it could not be opened from inside. However, he denies the suggestion that when the door of the lockup was only latched it could be opened from inside. He denies the suggestion that the deceased was not put in lock-up by any of the Police Officers. He states that he does not remember as to whether Arrest Register was available when he went to the Police Station. He did not receive Sentry Register at any time, but he did not make inquiry as to who was supposed to be Sentry at the Lockup between 12.00 p.m. to 1.30 p.m. on 27th June, 2001. He admits that it is mandatory to post Sentry at the lock-up. He states that he checked the duty sheet for the period from 27th June, 2001 to 30th June, 2001. There is no mention in the duty sheet regarding posting of Sentry. However, he does not remember as to whether he did inquire or did not inquire with the Police Inspector Lawrence D'Souza as to why Sentry was not posted at the relevant time.

49. In paras 43 and 44 of his Deposition, this is what he states:

43. I do not remember as to whether I did or did not check the station diary to verify how much work was done by accused No. 1 between 10.30 a.m. to 1.30

p.m. on 27-6-2001. I do not know as to whether the was totally busy during this period.

44. There is a public road near the fencing which is near the tree where the dead body was found hanging. I did not check as to whether the tree is visible from the said public road. I do not remember as to whether I did or did not ask Police Sub-Inspector Gawde regarding irregularities committed by him while drawing inquest panchanama. I did not make inquiry regarding weapon used for assault. It is not true to say that the conclusion drawn by me that the deceased was unable to climb the tree and was unable to tie ligature knot is not correct. It is not true to say that my statement in page No. 29 of report (Exhibit 123) that the distance from the branch where ligature material was tied upto the ground was around 8 feet 10 inches, is not correct. (This portion is marked by letter F). It is not true to say that if there was such distance, there would not have been distance of 6 inches between feet of the dead body and the ground level. I did not make inquiry as to how many persons are required to hang a person to a tree, in a manner in which the dead body of the deceased was found hanging.

In the cross-examination by accused No. 2 he states that his opinion that the deceased was unable to climb tree is based on findings recorded in the post-mortem report and also on the basis of other medical certificates, he has no evidence to show that the deceased could climb the tree.

50. Then there is deposition of PW. 38 Dr. E.J. Rodrigues, who is Associate Professor in Forensic Medicine Department of Goa Medical College Hospital, at Bambolim and in his Examination-in-chief, he states that the injuries on the lower limbs of the deceased were possibly not grievous in nature. Injuries Nos. 1 to 12 could not be fatal. However, the deceased could not climb the tree and hang himself. In his cross-examination, on behalf of accused Nos. 1 and 2, he states that he does not remember who brought the video tape and who displayed it. He states that near about three different sites were seen in the tape. He states that the information regarding the tree was not given to them before they received the video tape. He does not know who recorded the video tape.

51. As far as deposition of PW. 39, Mr. Manohar Sail is concerned, he states in his Examination-in-Chief that Police Constable Araundekar was writing the register of non-cognizable offence, while accused No. 1 was making entry in Station Diary. He states that the deceased had asked as to why he was being brought again and again. In paras 3 and 4 of his deposition this is what he states:

3. Police constables Nilu Shet and Shyam Dessai brought Dattu Dessai to the Police Station at about 11.50 to 11.55 a.m. and produced Dattu Dessai before the accused No. 1. By that time police Head constable Madhu Dessai and his wife were in front of accused. Dattu Dessai asked as to why "I am being brought again and again". He began to extend abuses loudly. He had a white shirt of full sleeves and blackish colour full pant on his person. He had slippers at his feet. When Police Constable Madhu Dessai asked something, Dattu Dessai abused in

bad words loudly. Dattu Dessai tried to assault the Police Head constable Madhu Dessai who in turn pushed away Dattu Dessai. Dattu Dessai again abused loudly. The accused No. 1 caught Dattu Dessai by his left hand. I told Dattu Dessai that I will accept your complaint and that you keep quiet.

4. The accused No. 1 took Dattu Dessai towards side of lockup of the Police Station. The accused No. 1 returned to the reporting room after five minutes. He told that he will take action against Dattu Dessai u/s 151 of Criminal Procedure Code. I took Lucas Rebello out of the lock up room and then I took him to medical treatment to Primary Health Centre Bali. It was about 12.30 p.m. Medical Officer after examining Lucas Rebello handed over the said Lucas Rebello in my custody at about 1.30 p.. I reached alongwith Lucas Rebello to the Police Station at 1.45 p.m. By that time Police Head constable Carlos Fernandes was on duty as Station House Officer. I told station house officer to take entry in the register showing that I brought Lucas Rebello after the medical examination to the Police Station. I took the keys of the lockup and took Lucas Rebello towards the lockup. Before putting him in the lockup he was directed to put off his clothes. Police Head constable Carlos Fernandes told me that entry showing that "you took Lucas Rebello for medical examination to Primary Health Centre at Balli" is not carried out in the Station diary. I went to my barrack.

This witness states that he was not on duty from 8.00 p.m. till 8.00 a.m. from 27th June, to 28th June, 2001. He states that he kept Lucas Rebello in the custody, but he did not see the deceased in the lock-up. He states that he does not know whether there was complaint in writing against the deceased and he also does not know whether the deceased was or was not formally arrested. This witness in cross-examination states that accused No. 1 was at his table during the entire time, except taking the deceased towards canteen. He further states that the deceased was not there when the witness returned to the Police Station at 1.45 p.m. He states that the lock up did not have its own lock or keys, in his cross-examination by accused No. 2.

52. These are material witnesses and from their depositions, we have to find out whether the circumstances are such as would satisfy the tests laid down in law. In other words, from the deposition of these witnesses and others who are referred in the impugned judgment has the prosecution proved all the charges beyond reasonable doubt is the only point for our consideration.

53. We find much substance in the contentions of Shri Dessai and Shri Lotlikar that charge u/s 120-B of IPC has not been proved. Section 120-B of IPC reads as under:

[120-B. Punishment of criminal conspiracy.

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [imprisonment for life] or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

In a decision of the Hon'ble Supreme Court, reported in *The Government of N.C.T. of Delhi Vs. Jaspal Singh*, relying on its earlier decisions, the Supreme Court in paras 10 and 11 held thus:

...10. So far as the charge u/s 120-B IPC is concerned, it stands proved by showing that two or more persons have agreed to do or cause to do an illegal act or an act which is not illegal by illegal means and that some overt act was done by one of the accused in pursuance of the same. Where their common object or design is itself to do an unlawful act, the specification of such act itself which formed their common design would suffice and it would even be unnecessary or superfluous to further substantiate the means adopted by all or any of them to achieve such object. All the more so, when their common object or design appears to be to commit a series of such serious crimes and proof of any overt act in such cases also is a mere surplusage and that mere proof that they or some of them were concerned in the overt acts alleged would, per se, go a long way to establish that there existed such agreement among them. It is well known and as observed by this Court in *Baburao Bajirao Patil Vs. State of Maharashtra*,

Indeed it is seldom -- if ever -- that direct evidence of conspiracies can be forthcoming. Conspiracy of the present type from its very nature must be conceived and hatched in complete secrecy, for otherwise the whole purpose would fail.

this Court further, after adverting to the decisions reported in *Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar*, and *Hanumant Vs. The State of Madhya Pradesh*, heavily relied upon for the accused therein, observed as hereunder: (S.C.C. p.436, para 6) "In a case of conspiracy in which only circumstantial evidence is forthcoming, when the broad features are proved by trustworthy evidence connecting all the links of a complete chain, then on isolated events the confessional statements of the co-accused lending assurance to the conclusions of the Court can be considered as relevant material and the principle laid down in the case of *Haricharan Kurmi* would not vitiate the proceedings.

11. this Court, in *Mohammad Usman Mohammad Hussain Maniyar and Others Vs. State of Maharashtra*, held at AIR p. 1067 as follows:

(S.C.C. p. 453, para 30)

30. It is true that there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence u/s 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by

necessary implication. In this case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and/or caused to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time.

54. If these principles are applied to the facts of the present case, it is clear that for the charge to be proved, an agreement between two or more persons to do or cause to do an illegal act which is not illegal by illegal means, must be established. Some overt act attributed to one of the accused must also be shown. The charge may be held to be proved because of the aforementioned broad principle, but in the facts of the present case, there is no material to so hold. Mr. Rivonkar, learned Special Public Prosecutor would urge that the agreement is proved by accused No. 2, telling accused No. 1 that the deceased should be arrested and that is the agreement that is reached and in pursuance of that, the further acts are committed by them. It is not possible to accept this contention, because, even the utterances attributed to accused No. 2 have not been proved. The depositions of material witnesses, on this point, are not at all convincing. The argument of accused No. 2 is that he was working as a Writer and performing clerical jobs. Therefore, he was not a person to whom any duty was assigned i.e. either to take note and record the complaints or hold investigations. Therefore, he was not responsible for sending the Police Constables to the residence of the deceased and securing his presence at the Police Station. This argument has much substance. Therefore, there is no pre-planned or premeditated act of accused Nos. 1 and 2 or other acts together to bring the deceased to the Police Station. That is not even the case of the Prosecution. The case of the Prosecution as now propounded is that the agreement is arrived at after the deceased abused the wife of accused No. 2. The wife of accused No. 2 was also working at the relevant time as Lady Police Constable at Cuncolim Police Station. It is agitated and angered by this that accused No. 2 told accused No. 1 to arrest the deceased and that is how the deal concluded. Thereafter, the acts of assault, resulting in the death of the deceased have taken place. We are of the view that no agreement can be inferred or implied from the statements attributed to accused No. 2. That is, if at all, a remark or a reaction, because of the abuses hurled by the deceased at the Lady Police Constable, who happens to be the wife of accused No. 2. That, thereafter, they together hit something so as to establish and prove the alleged prior agreement does not suffice for the purpose of bringing home the charge of criminal conspiracy in this case. It cannot be that the accused provoked the deceased or teased and taunted him so also forced him to sit in the Police Station and were so confident that the moment the deceased hurls such abuses or gives any opportunity of this type that they would together assault him at the Police Station or within the precincts thereof. This is too far-etched and remote a possibility. None has indicated about this and particularly because the deceased was regularly brought to the Police Station and it cannot be that the same

officers were on duty. It is common ground that the personnel and their duty timings change. None has deposed about prior design of the accused in bringing the deceased to the Police Station or upon his alleged abuses, detaining him by causing his arrest or keeping him in the custody otherwise. In these circumstances, relying upon the principle laid down and reproduced hereinabove, we are of the opinion that the Prosecution has failed to prove the charge of criminal conspiracy.

55. Criticism of the judgment of the Court below on this point is also justified, because a perusal of the entire judgment would indicate that there is absolutely no discussion of the evidence in relation to this charge, the arguments of the Prosecution and the Defence and how guilt is proved and established. If qua this charge there is absolutely no appraisal and appreciation of evidence, then, in addition to the independent conclusion reached by us, we are of the opinion that the conviction and sentence of accused Nos. 1 and 2 under this charge is wholly vitiated. It is erroneous and untenable on facts and in law, particularly when the other accused namely, accused Nos. 3 and 4 have already been acquitted of all charges. On this point, reliance on the decision of the Hon'ble Supreme Court in the case of (State of Maharashtra etc. etc. Vs. Som Nath Thapa, etc. etc.), reported in 1997 Bom. C.R. (Cri.) 279 (S.C.): 1996 Cr. L.J. 2448, is misplaced. Firstly, that is a decision rendered at the stage of framing of charge. But, that apart, the Supreme Court in clearest terms holds that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In a group action, being apparently involved, division of the performances in chain of actions also needs to be taken note of. But the prosecution must prove that all means adopted and illegal acts done and inference of the object of the conspiracy even though there may be sometime most fair or over shouting by some of the conspirators i.e. how the illustrations were referred to conclusion in para 24 have been rendered. Therefore, we are of the view that the evidence in this case is falling short of the essential ingredients of the offence. The conclusion that the charge u/s 120-B of I.P.C. is not proved is inevitable.

56. The next aspect of the case is whether the accused can be convicted under sections 220 and 342 of IPC. In this behalf, both sections in the IPC need to be noticed. Section 220 carves out an offence and it is committed by whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Therefore, the essential ingredient of the offence is the office which the person, and in this case, the accused hold, must give him legal authority to commit person like the Deceased, to confinement or to keep him in confinement and he keeps the deceased in this case, in confinement in the exercise of that authority,

knowing that in so doing he is acting contrary to law. None of these ingredients have been proved, because assuming that both the accused had the legal authority to keep the deceased in confinement, the offence punishable u/s 220 can be said to be committed only if the deceased was kept in confinement in the exercise of that authority, knowing that in so doing he is acting contrary to law. In this case, there is no evidence of such confinement. The confinement that is being alleged is at the Police Station or in the Police Lock-up. That had to be proved and established conclusively. The only aspect that can be held to be proved is that the deceased was brought to the Police Station. However, confinement at the Police station is not proved at all. The deceased was brought to the Police Station because of a complaint made against him of assault by a neighbour. Firstly, the deceased was brought to the Police Station and, thereafter, the neighbour entered. Upon the events being narrated, the neighbour was sent for medical check up and after the lady neighbour came back from the medical checkup, it was found that the complaint made by her was non-cognizable. If the case of the Prosecution is that knowing fully well that there could not be any confinement in lock-up or at the Police Station, in law, when such is the nature of the complaint and despite that the accused detained him or confined him, then, that confinement should have been proved. Merely by making an observation and passing a general remark, that it is difficult to find any employee at the Police Station who will depose against the Police Officers, a conclusion cannot be drawn and only on this basis the finding of guilt cannot be rendered. There is nothing produced, save and except an entry that the deceased was summoned to the Police Station to show confinement beyond the time of recording that the complaint against him was non-cognizable. If such is the nature of the evidence and when there are conflicting versions as to whether the death of the deceased was as a result of assault and beating at the Police Station or its precincts in the Female Lock-up, post his confinement or wrongful restraint, then, it will not be possible to hold that the charges under this head are proved beyond reasonable doubt.

57. In this behalf, Mr. Rivonkar fairly stated that there was an entry which was made about confinement of the Deceased, but that entry is not proved by the Prosecution. The evidence in that behalf is lacking. There is no explanation as to why if such an entry is stated to have been made by the accused in the Station Diary or other record of the Police Station, then, that record or the diary with such entry therein has not been brought on record and read in evidence. Further, Mr. Rivonkar argued that non-examination of Lucas Rebello is not fatal, cannot be accepted. According to the Prosecution, Lucas Rebello was at the Police Station as there was a complaint made against him. He was detained at the Police Station and stated to be in Male Lock-up. If he was in the Male Lock-up and adjacent thereto is the Female Lock-up, in which the said Lucas Rebello allegedly saw the deceased being detained and kept, then, Lucas Rebello was a vital witness. The reasons for his non-examination are not at all convincing, leave alone satisfactory. That he has gone abroad and residing there, is no ground to

hold that his summoning and production was impossible. In these circumstances, we are of the view that the charge u/s 220 IPC has not been proved at all.

58. Similarly, the charge u/s 342 IPC is also not proved, because that is a provision in the IPC for punishment for wrongful confinement. Now, the wrongful confinement is defined in section 340 IPC to mean whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said to "wrongfully confine" that person. Illustration (a) below the section, deals with a situation of a person causing another person to go within a walled space and thereafter locking him in. That is preventing him from proceeding in any direction beyond the circumscribing line of wall. That is how it is understood that a person has confined the other. As we have noticed in this case that none of the witnesses examined state clearly as to whether the deceased was at the Police Station during the working hours of accused Nos. 1 and 2 or that they confined him at the Police Station, even though the charge against him was non-cognizable and that illegal act is enough to bring home the charge of wrongful confinement. By not being able to prove that the deceased was put in Female Lock-up and not allowed to proceed beyond the lock-up or the Police Station limits. A conclusion is inevitable that this charge is also not proved as demanded by law. Confinement itself is not proved. The evidence on this point is only that of PW. 26, and PW. 27. PW. 26 Shashikant Arondekar states that accused No. 1 and P.C. Sail took the deceased towards the lock-up. However, in his cross-examination he states that he does not know that the person who was brought to the Police Station and taken to the lock-up was the deceased. He was told after the incident that the person was the deceased. He saw the deceased once in the Police Station, but did not see him thereafter. In his cross-examination by accused No. 1, he states that he does not know as to whether because of such behaviour on part of the deceased, the Police kept him sitting in corridor of the Police Station. Now, there is a vast difference between taking a person to a lockup and making a person to sit in the corridor of the Police Station. Further his admission that he did not know the deceased, but he was told by somebody about the incident that took place on the relevant date fails to inspire confidence in his testimony.

59. As far as evidence of PW. 27 Ajay Komarpant is concerned, he does not state that accused No. 1 and Manohar Sail took the deceased towards the lock-up. His version is that they were trying to take him inside the Police Station. They took him towards the lock-up, is the next sentence. However, in his cross-examination, a suggestion was given to him that on 27th June, 2001 after he left Police station for his own work and did not return to the Police Station, he denied the same. This suggestion was put, because in the Examination-in-Chief itself this witness states that he went to A.S.I. Shripati who is accused No. 1 and told him that he was going to his house for work and his narration about further incidents is after he left the Police Station and reached bus stop. It is stated that he heard the deceased shouting. Thus, it is not believable that such a person would notice somebody being taken near or inside the lock-up. In such

circumstances, charge u/s 342 is also not proved.

60. It would be of some significance to note that the learned Judge has held the Fourth Point framed by him for determination as not proved. The Fourth Point was whether the accused caused disappearance of lock-up sentry guard register with the intention of screening themselves from legal punishment. If the case is that there is no lock-up Register, but the deceased was taken to the Female Lockup and assaulted therein, then, when the acquittal of the accused qua this charge is on the ground that there is no entry of taking the deceased to the lock-up and keeping him there, then, for the selfsame reasons even this charge cannot be held to be proved. Looked at from any angle, there is no material to hold accused Nos. 1 and 2 guilty of the charge of wrongful confinement. 62. As far as the offence of murder is concerned, we are of the opinion that the charge is of assault on the deceased by the accused, allegedly at the Police Station or in the Police Custody or within the precincts Police Station. Now in para 115 of the impugned judgment and Order, the learned Judge records the admitted facts establishing the circumstances. That there is no dispute as far as the circumstances at serial Nos. 1, 2 and 3 of the para 115 are concerned. There is also no dispute about circumstances at serial Nos. 4 and 5. As far as other circumstances are concerned, whether they can be said to be arising from admitted facts or not, must now be decided. They are necessarily to be summarized because the charge of murder is sought to be proved by circumstantial evidence. The principles are well settled, but are required to be reiterated because the trial Courts are not aware of the same, or if they are aware of the same, they are often failing to apply them to the facts before them. In the case of State of Haryana Vs. Jagbir Singh and Another, the principles are summarized thus:

8. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. See *Hukam Singh Vs. State of Rajasthan*, ; *Eradu and Others Vs. State of Hyderabad*, ; (*Earabhadrapa Vs. State of Karnataka*), AIR 1983 S.C. 446; *State of U.P. Vs. Sukhbasi and Others*, ; *Balwinder Singh alias Dalbir Singh Vs. State of Punjab*, *Ashok Kumar Chatterjee Vs. State of M.P.*, The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram Vs. State of Punjab*, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

9. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Others Vs. State of Andhra Pradesh*, wherein it has been observed thus:

(S.C.C. p.p. 206-07, para 21)

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....

10. In *Padala Veera Reddy Vs. State of Andhra Pradesh and others*, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (S.C.C. p.p. 710-11 para 10.)

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

11. In *State of U.P. Vs. Ashok Kumar Srivastava*, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied upon is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

12. Sir Alfred Wills in his admirable book "Wills" Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

- (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;
- (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;
- (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;
- (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,

upon any other reasonable hypothesis than that of his guilt.

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

13. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

15. A reference may be made to a later decision in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, . Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: S.C.C. page 185, para 153.

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) 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;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) 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 show that in all human probability the act must have been done by the accused.

62. When these principles have to be applied to the present case, it must be considered whether there is evidence on record to establish the charge. The chain of events completing the link must lead one to a conclusion which is compatible with the guilt of the accused and incompatible with his innocence. Shri Rivonkar submits that the first circumstance is that the deceased was brought in good health condition to the Police Station. Secondly, there is no entry in the Station Diary, and, therefore, there is no proof of the deceased having left the Police Station. Thirdly, he submits that the deceased was brought to the Police Station from his residence and was made to wait till the complainant arrived and even after the complainant went for medical check-up and returned. According to Shri Rivonkar, this time gap was enough for the deceased to be confined or detained at the Police Station or in the lock-up or otherwise and, therefore, there was opportunity for the accused to have committed the acts attributed to them. Fourthly, coupled with the fact, is the incident where the

deceased insulted the wife of accused No. 2 and thereafter, accused No. 2 telling accused No. 1 to arrest the deceased. This establishes the motive and once there is no evidence that the deceased escaped or was released, then, he being last seen in the company of accused Nos. 1 and 2, the link is complete. Therefore, it is none other than accused Nos. 1 and 2 who are responsible for the death of the deceased. The deceased was never seen by his family members or others known to him after he came to the Police Station on 27th June, 2001 and what they discovered was his dead body hanging to a tree within the precincts of the Police Station. For all these reasons, it is the accused who alone are responsible for causing his death and when the injuries are such that they are on the lower limb of the body and caused by blunt weapon or object, then, there is clear proof of death in Police Custody. The charge of murder is, therefore, proved.

63. Mr. Rivonkar relies upon the depositions of PW. 2 and PW. 3. We have already referred to the depositions of material witnesses, with sufficient details. PW. 2's deposition has also been referred by us. PW. 2 Suresh Dessai is a neighbour of the deceased. His deposition is of assistance only to establish that the deceased was taken from his residence to the Police Station. Thereafter, he narrates that one Samir who was the son of deceased's uncle, told him that one Umanath Bhau had phoned him asking whether there was any elderly person in their house. This Umanath told Samir to call the Witness PW. 2. Therefore, he went to the house of Samir, but the phone call from Umanath did not come. At that time, one person, whose name this witness does not recollect, came to the house of Samir and told him that he had phoned Margao Police Station from where he got the number of Cuncolim Police Station and the Cuncolim Police told the person on the other side that Umanath had phoned. Immediately, thereafter, Umanath phoned and told them that the deceased had died of hanging at Cuncolim Police Station. Therefore, this witness has not stated anything except for the deceased having been brought to the Police Station.

64. Then the deposition of PW. 3 Shyam Dessai who is a Constable attached to the Police Station is referred and he also emphasizes that the deceased was brought to the Police Station. This witness then narrates as to what happened at the Police Station after the deceased was brought there. But his version stops at the point where accused No. 1 took one paper from the drawer and made an entry of the Constables reaching the Police Station with the deceased. He is a Constable who accompanied the other Constable Nilu to the house of the deceased to bring him to the Police Station. This witness has not corroborated anything, including Entry No. 18 in the Diary. Therefore, these depositions are of no assistance as they prove nothing beyond the fact that the deceased was brought at the Police Station. The chain to complete the link is necessarily proof of the deceased being confined or detained or arrested by these accused at the Police Station even though he did not commit any offence. Mr. Rivonkar's argument that even if there is no arrest, there is proof of custody or in any event of the deceased being in control of the police is enough to hold that a very important link is missing. Ultimately, the charge is of murder. True, it is that

there may not be eye witnesses to custodial death but police officials cannot be held guilty even if the Prosecution fails to adduce cogent, reliable and trustworthy evidence of they torturing, assaulting innocent persons during the course of exercising their powers as officers of a force. Police force cannot be hauled up on false or baseless charges as it is necessary to protect their morale in public interest, A delicate balance is struck by the Hon"ble Supreme Court in such matters so that the faith and trust of the common man in the system is not easily shattered or destroyed. If they have to be held guilty and punished that must be done by applying the principles known to criminal law and not by mere inferences and possibilities. The law does not permit casting of a negative burden and men in uniform are not differently than others.

65. Now, if the deposition of the witnesses referred to by the learned Sessions Judge are perused, it would reveal that he has relied on the evidence of one Shashikant Arondekar PW. 26, Ajay Komarpant PW. 27 and Manohar Sail PW. 39. We have extensively referred to these depositions. PW. 39 was serving as Traffic Police. He was attached as Police Havaladar to Cuncolim Police Station. He deposes about the complaint against Lucas Rebello. He deposes that the deceased was brought to the Police Station by Police Constables Nilu and Shyam at about 11.50 to 11.55 am. on the relevant day. It is stated by him that the deceased tried to assault the Police Head Constable Madhu Dessai accused No. 2. He states that the deceased gave abuses loudly and, therefore, accused No. 1 caught the deceased by his left hand. He deposes that accused No. 1 took the deceased towards the side of lockup of Police Station and thereafter, he returned to the Reporting Room, after five minutes. He told that he will take action against the deceased u/s 151 of Cr. P.C. This witness states that he was on night duty from 8.00 p.m. of 27th June, 2001 till 8 a.m. of 28th June, 2001 as Reserved Station House Officer. It is clear that this witness has deposed contrary to all earlier versions. In fact, he does not support the prosecution version because, in Examination-in-Chief itself he states that when he kept Lucas Rebello in the lock-up, he did not see the deceased in the Lock-up. He states that he does not know whether there was complaint in writing (FIR) on 26th June, 2001. He states that he does not know whether the deceased was or was not formally arrested. In the cross-examination by accused No. 1 he states that the deceased was taken inside the Police Station from reporting room because he was abusing and was raising hue and cry in the reporting room and also because he was causing obstruction to the police in discharging their duties. He states that the deceased was taken towards the canteen from the reporting room and it is not possible to hear, from the reporting room shouting and hue and cry raised by a person near the canteen. This witness states that when he returned, he did not see the Deceased. Further he makes an important disclosure that accused No. 1 was at his table during the entire time, except taking the deceased towards the canteen. In his cross-examination by accused No. 2, he states that the lockup had no its own lock or the keys. This is the version of PW. 39. It is clear that this witness deposes that the deceased tried to assault accused No. 2 but gives up this

version in the cross-examination. Further, he does not support the Prosecution in material particulars. There are inherent contradictions and inconsistencies, which have been overlooked by the learned Additional Sessions Judge.

66. Thereafter Shashikant Arondekar PW. 26 is examined and his evidence is relied upon. We are only repeating his version once again because it should not be said that the witnesses who have been relied upon by the Court below are not referred by us at all. PW. 26 also was attached to the same Police Station. He states that accused No. 1 and accused No. 2 took the deceased towards the lockup. He states in his Examination-in-Chief that accused No. 2 pushed the deceased near accused No. 1 and told accused No. 1 to arrest the deceased. Accused No. 1 and Police Head Constable Sail took the deceased towards lock-up. However, he admits that the portion where he states that accused No. 2 pushed the deceased near accused No. 1 and told accused No. 1 to arrest the deceased, is not appearing in his statement made to the Investigating Officer. Further the omission referred to in para 3 of his cross-examination would go to show that he is absolutely unsure as to what transpired between the deceased and the Police Official. He states that the deceased was kept sitting in the corridor of the Police Station by the Police. He admits that he went to the Crime Branch thrice to record his statement. However, we have already found that in his cross-examination by accused No. 2, he is not sure whether it was the deceased whom he saw on the relevant day, inasmuch as he does not recollect whether the person he had seen was the Deceased.

67. PW. 27 Ajay Komarpant does not state that accused No. 2, and wife of Lady Constable were abused by the Deceased. He says that the deceased was extending abuses to accused No. 2 and others. When he narrates what has been recorded in Para 4, it is clear that he had left the Police Station and reached near the bus stop, he heard shouting raised by the deceased and therefore, went back to the Police Station. But importantly he states that the deceased was trying to come out of the Police Station and accused No. 1 and Manohar Sail were trying to take the deceased inside the Police Station. Thereafter, he states that accused No. 1 and Manohar Sail took him to the lock-up. In his cross-examination by accused No. 1, he states that the deceased was found drunk most of the times. In the cross-examination by accused No. 2, to a suggestion that on 27th June, 2001, after he left Police Station for his work, he did not return to the Police Station, he denies it. Now this witness had clearly stated that he was proceeding towards his house and when he reached the bus stop near the Police Station he saw two Constables bringing the deceased on a motor cycle. Thereafter, he states that he reached the bus stop and he heard the shouting of the deceased. Therefore, he went back to the Police Station. In para 2 of his Examination-in-Chief, he states that he told Lady Police Constable Maya Kankonkar at about 11.30 a.m. that he was going to his house for his work and that in the meantime, if there was some official work he would attend the same after he returns from his house. Therefore, this witness, does not substantiate the version that the deceased was taken to lock-up or was at the Police Station. In such

circumstances, and when we have held that the deceased was not arrested and that his confinement is also not proved in what manner such conclusion has been drawn by the learned Judge is not clear to us at all. To our mind, all the conclusions drawn are nothing, but as rightly termed by Shri Lotlikar, are conjectures and surmises. In this view of the matter, the circumstances sought to be relied upon by the learned Judge from Sr. Nos. 5 at para 115 of the impugned judgment and Order have not been established and proved, so as to make a complete chain linking the accused to the crime.

68. Once we are of the opinion that there is no confinement and detention and the findings of the learned Judge that the deceased was kept in the Police Station lock up is not based on any evidence, then, the charge of murder punishable u/s 302 I.P.C. has not been proved. In this behalf, in para 108 of the impugned judgment and Order, the learned Judge holds that there is ample evidence to show that the deceased was under control of the accused Nos. 1 to 4. The argument is that there is ample evidence to show that the deceased was under control of accused Nos. 1 to 4 and that there is no evidence to show that deceased escaped from the custody of the police. The learned Judge holds that the deceased was assaulted when he was in the Police Custody. This is a conclusion drawn by relying upon the depositions of PW. 26 and PW. 39. However, how their versions are conflicting, how there are glaring inconsistencies and omissions therein, has been pointed out in great details, by us. This evidence was not at all convincing, much less reliable and trustworthy to prove the serious charges against the Appellants.

69. The conclusion drawn in para 113 is that the Prosecution did not establish that cudgels are the incriminating weapons used for making assault on lower limbs of the Deceased. The learned Judge completely disbelieved the recovery, yet, he relies on the circumstances which are narrated by him in Para 115 and holds that coupled with the fact that the deceased did not escape the chain is complete. However, while holding that the chain is complete, learned Judge observes that the irresistible conclusion that can be arrived at is that in all human probabilities the crime must have been committed by the accused Nos. 1 and 2. We are of the view that this conclusion is totally unsupportable. It is contrary to the evidence on record. In fact, the findings can safely be termed as perverse. There is much substance in the arguments of Shri Dessai and Shri Lotlikar that even if the case is of custodial death, the burden is on the Prosecution and that is the same as in other cases of murder. Mr. Dessai has emphasized that there is no evidence that the deceased was in the police custody. There is a clear evidence that the complaint made by the complainant is a non-cognizable. Therefore, the deceased was not an accused. If he was not an accused and there is fatal gap in the Prosecution case inasmuch as it is not proved that despite not being an accused, the deceased was wrongfully confined at the Police Station or detained therein, then, the judgment of conviction and sentence is vulnerable. There is substance in the complaint of Shri Dessai that PW. 8 has been disbelieved only because he was a Police Officer. In fact, he very

clearly states that the deceased was at the Police Station till 1.30 hours and when he came to the Police Station, the deceased was nowhere at the Police Station. When he came to the Police Station, there was no commotion such as of anybody shouting, beating or giving bad words. Merely because he is a Police Officer and Incharge of the Police Station, does not mean that he is trying to shield and protect the accused. As far as this statement is concerned by itself, is not enough to draw a adverse inference and particularly when he was subjected to cross-examination at the hands of both the accused and the disclosure is made during his cross-examination. There is absolutely no discussion as to why this witness was disbelieved, but if even the other evidence is considered, still it is not possible to arrive at the conclusion or draw an inference that there was detention of the deceased in the Police Custody without effecting any official arrest. Now, if this is the case of none of the witnesses, learned Judge still proceeds on the basis that the deceased was in custody.

70. In our opinion, such being the state of the evidence on record, really it is not necessary to refer to the medical evidence. However, the medical evidence is full of omissions, errors and inconsistencies. There also the injuries Nos. 1 to 12 are not stated to be fatal. There also the deposition of Dr. Sapeco which is relied upon, shows that this person was not giving truthful version. He states that when the inquest was done, injuries Nos. 1 to 12 were not noticed. In such circumstances, even the medical evidence is lacking in material particulars and cannot be said to be reliable.

71. In paragraph 93 of the impugned judgment, learned Sessions Judge holds as under:

93. Lucas Rebello who was in lock-up on 27-6-2001 is presently working abroad. It seems that therefore prosecution could not examine him. Evidence of the hotel owner Snehal Hegde and the note-book produced by his relative Pravin Kamat do not disclose that the deceased was in the lockup, and that, the deceased was provided meal. There is neither oral nor documentary evidence by the prosecution to prove that the deceased after he was brought to the Police Station was either arrested or detained in the lock-up. However it should be remembered that the deceased was brought to the Police Station in connection with information given by the witness Miss Prashila Raut Desai on phone alleging that the deceased assaulted her mother. It follows that the deceased was brought to the Police Station as an accused. Therefore, and relying upon decisions given by the Hon"ble High Court of Orissa and by the Hon"ble High Court of Madhya Pradesh and which are reproduced above. I hold that the accused after he was brought to the Police Station was in custody of the police. I agree with argument advanced by the learned Public Prosecutor. I am unable to be in agreement with the reply put forth by learned Advocates of the accused.

In our view, this, by itself, is enough to hold that the charge of murder is also not proved.

72. Once we arrive at the above conclusion, then, the Judgments relied upon by the learned Judge need not be referred.

73. This is how the chain narrated by Shri Rivonkar is incomplete. There is no proof that the deceased remained at the Police Station even after the complainant lady and her daughter left the same. The charge is of death by assault in custody or within the Police Station's precincts. If this vital fact is not proved there is no scope for further assumptions at all. There is no question of then applying the last seen theory or opportunity for the accused to assault and beat the Deceased. Shri Rivonkar relied upon the judgment in the case of Gauri Shanker Sharma etc. Vs. State of U.P. etc., There the death in police custody was proved. The evidence on record itself shows that the deceased was brought to the Police Station and placed in charge of accused No. 1 and he was given a severe beating by lathi and dandas by accused Nos. 1 and two Constables with a view to extracting a confessional statement from him. The evidence there was clinching, as is apparent by reading paras 5 and 6 of the judgment. There is a clear evidence and firm finding of arrest. There is a firm and clear evidence of excess and assault in Police Custody. Therefore, the acquittal was overturned and reversed and the appeal was allowed. The conclusion which Shri Rivonkar relies upon and arrived at in paras 14 and 16 of the judgment of the Supreme Court is based on evidence on record. Therefore, this judgment is clearly distinguishable.

74. About the judgment in the case of State of M.P. Vs. Shyamsunder Trivedi and Others, it must be immediately said that the prosecution case was proved, namely that the deceased Nathu Banjara remained in the custody at the Police Station right from the time he was brought in the evening on 13.10.1981 by the Constable till his dead body was removed from the Police Station on the next day and that respondent No. 1 and others had with view to conceal the truth, created false evidence and fabricated false clues. Once the circumstantial evidence on record as referred to in para 16 is clearly consistent only with the hypothesis of the guilt of the respondents and is inconsistent with their innocence, that the Supreme Court proceeded to allow the appeals by State and sentenced respondents Nos. 1, 3, 4, and 5. It is clear from the perusal of paras 17 and 18 of the judgment that the recommendations made by the Law Commission in its 4th Report of June, 1980 have remained on paper and the law has not been altered or changed, so also not amended in tune therewith.

75. It is unfortunate that the trial Judge convicted the accused despite the conclusion reached by him in para 93 reproduced above. Reliance on judgments of the highest Court by itself does not help unless the facts indicate that the principles therein are attracted. The learned Judge has brushed aside and rather is unaware of this basic principle. Reliance on the guidelines laid down in case of D.K. Basu Vs. State of West Bengal, will not be of any assistance to Shri Rivonkar.

76. Even the judgments of the Hon'ble Supreme Court with regard to the power of Appellate Court lays down principles which by themselves cannot assist the prosecution in this case. It is applying the very principle that we have dealt with

this case.

77. Reliance on the case of Sucha Singh Vs. State of Punjab, and section 106 of the Indian Evidence Act in support of the argument that the deceased being last seen in the company of accused Nos. 1 and 2 is once again misplaced. There is no question of onus shifting on the accused here because of the special circumstances to the alleged knowledge of the accused. The Supreme Court holds that this section is not intended to relieve the prosecution of its burden to prove the guilt, but the section would apply where the prosecution has succeeded in proving the facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless, the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the Court to draw a different inference. Therefore, this principle will apply only if the guilt is proved beyond reasonable doubt. We have held that the charges are not proved. Therefore, the principle of last seen is not applicable. When there is no proof forthcoming of the deceased being detained or confined in the Police Station and merely because he was made to sit thereat for sometime until medical check up of the complainant is, by itself, and without anything more, not proof of assault on him in the Police Custody. The prosecution case does not rest here and proceeds to allege that the deceased was taken to lockup and that too a Female Lock-up, where he was allegedly assaulted. Therefore, he was seen at the Police Station for sometime is not enough to invoke the principle of last seen. That principle applies provided other evidence is on record. In this case, the same is hopelessly lacking. As a result of the above discussion, both the criminal appeals are allowed. The judgment and Order of conviction of the appellants in both the appeals, namely accused No. 1 and accused No. 2 on the charge of having committed the offences punishable under sections 220, 342, and 302, read with section 120-B of the Indian Penal Code, is quashed and set aside. The appellants are set at liberty and shall be released, if not required in any other case.