



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 429 OF 2020

Kakasaheb Bhanudas Ovhal

Age: 37 years, Occu: Labour / Mason,

R/o: Rosa, Tal.: Paranda,

Dist. Osmanabad

... Appellant

Versus

The State of Maharashtra

Through the Police Inspector,

Investigating Officer,

Paranda Police Station,

Taluka : Paranada, Dist. Osmanabad

... Respondent

...

Mr. A. D. Ostwal, Advocate for the Appellant [Appointed]

Mr. V. K. Kotecha, APP for Respondent – State

...

**CORAM : R. G. AVACHAT &
NEERAJ P. DHOTE, JJ.**

Reserved on : 26th June, 2024

Pronounced On : 22nd July, 2024

JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. This Appeal under Section 374 [2] of the Code of Criminal Procedure, 1973 [hereinafter referred to as 'Cr.PC' for short] is directed against the Judgment and Order dated 30/01/2019, passed by the learned Additional Sessions Judge, Bhoom, District Osmanabad, in Sessions Case No.04/2018, convicting the Appellant for the offence punishable under Sections 302 and 201 of the Indian Penal Code, 1860 [hereinafter referred to as 'IPC' for short] and sentencing him to suffer imprisonment for life and to pay fine of Rs.2000/-, in default to pay the fine, to suffer rigorous imprisonment for six months, and rigorous imprisonment for three years and to pay fine of Rs.1000/-, in

default to pay the fine, to suffer rigorous imprisonment for three months, respectively.

2. Prosecution's case as revealed from the Police Report is as under : -

2.1 The Appellant was Meson by profession. His wife - Reshma [deceased] was working in the Beauty Parlour. Both were residing at Kondhwa Budruk, Pune with their children. The Appellant was suspecting chastity of his wife. In the evening of 24/12/2017, the Appellant and deceased came to their native place at Rosa, Taluka Paranda, District Osmanabad for removing the Ration Card. They stayed in their house at the native place. In the night, quarrel took place between the Appellant and deceased on the point of deceased working in the Beauty Parlour, as she used to leave home at 10:00 am and return around 11:00 pm. The deceased was not ready to give up her job. Around 2:00 am, the Appellant throttled her neck and killed her. Thereafter, the Appellant made the body to sit on the motorcycle as the pillion rider by tying the body with his shirt and disposed the body in one agricultural field situated on Rosa to Bhotra road. On the next day, the Appellant spent time alone by sitting under the tree for whole day and thereafter, on 26/12/2017 went to the Paranda Police Station and confessed the Crime.

2.2 The Police Officer present in the Police Station visited the spot where the body was lying. Inquest and spot panchnama came to be drawn. The dead body was sent for postmortem. The clothes of deceased came to be seized. Panchnama of the Appellant's house was done. The clothes and motorcycle of the Appellant came to be seized. The statement of witnesses came

to be recorded. The call details of the mobile phones of the deceased and Appellant came to be requisitioned and the same were collected. The statement of the Appellant came to be recorded and treated as the FIR and Crime No.224/2017 came to be registered for the offences punishable under Sections 302 and 201 of IPC against him. On completion of investigation, the Appellant came to be Charge-sheeted.

2.3 On committal, the Sessions Court framed the Charge against the Appellant for the offence punishable under Sections 302 and 201 of IPC vide Exhibit - 6, to which, the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined in all fourteen [14] witnesses and brought on record certain documents. On completion of Prosecution's evidence, the statement of Appellant came to be recorded under Section 313 (1)(b) of Cr.PC. The Appellant denied the case and evidence of the Prosecution. On appreciating the evidence available on record, the learned Trial Court passed the impugned Judgment and Order.

3. It is submitted by the learned Advocate for the Appellant that the case is based on circumstantial evidence and the Prosecution failed to establish the link of circumstances and to conclusively establish that the Appellant had committed the Crime. Though the CA reports were included in the Charge-sheet, they are not brought in evidence and are not exhibited. The owner of the agricultural field where the dead body was found was not examined. Even, none of the persons who were present near the dead body are examined. The body was not discovered at the instance of the Appellant. The incriminating circumstance of injury certificate was not put to the Appellant

by the learned Trial Court and therefore, the said piece of evidence can not be relied. The evidence show that missing reports were filed by the Appellant on earlier occasions, which demonstrate the tendency of deceased leaving the company of Appellant without informing anybody and therefore, the possibility of deceased leaving the company of Appellant cannot be ruled out. One person by name Ashok Ovhal was detained by the Police in relation to the death of Appellant's wife, under suspicion that there were illicit relation between the said person and deceased. There is no proper certification in support of the electronic evidence brought on record. The Prosecution failed to establish the Charge against the Appellant. He relied on several decisions in support of his argument, which would be considered in later part of this Judgment where necessary.

4. It is submitted by the learned APP that the Appellant was suspecting the character of his wife and therefore, he committed her murder, which shows that the Appellant was having motive to commit the Crime. The evidence on record go to show that before the homicidal death, the Appellant and deceased were together in their house, therefore, the burden would shift on the Appellant pursuant to the provisions of Section 106 of the Indian Evidence Act, 1872 [hereinafter referred to as 'the Evidence Act']. The Appellant himself approached the Police and disclosed the Crime. In totality of the evidence on record, the Appeal is liable to be dismissed.

5. Admittedly, the Prosecution's case is based on circumstantial evidence. By way of catena of decisions, the Hon'ble Apex Court right from the Judgment in the case of

Sharad Birdhichand Sarda Vs. State of Maharashtra; [1984] 4 SCC 116, laid down the principles to be adhered to in the cases based on circumstantial evidence as follows:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully 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."

6. The Prosecution has relied on the following circumstances to prove the Charge:

- [1] Homicidal Death of Appellant's wife ;
- [2] Last seen together ;
- [3] Discovery of dead body at the instance of the Appellant ;
- [4] Injury on Appellant's hands ;
- [5] CA reports ;
- [6] Motive

[1] Homicidal Death of Appellant's wife

7. To establish homicidal death of Appellant's wife, the Prosecution primarily relies on the evidence of PW - 2 [Houserao Sudam Gaikwad], who acted as the panch, PW - 5 [Dr. Devadutta Ramesh Kulkarni], who performed autopsy, PW - 7 [Humayun Farid Shaikh], Photographer and PW - 14

[Prashant Bhagwat Patil], Investigating Officer.

8. The evidence of PW – 2, panch witness, show that he was working at the State Transport Department at Paranda. He was called by the Paranda Police on 26/12/2014. He, accompanied by the Gram Sevak and Police, went to on field at village Botra. They noticed one dead body of women in red saree, blouse and red petticoat and one purse, footwear, lipstick pencil lying nearby. The lip was injured. Abrasion on the leg and blood clot on one side of the neck. The said articles and mud were seized by the Police. The Inquest at Exhibit – 20 was drawn. He identified footwear [Article – A], purse – [Article – B], mud [Article – C] and got [Article – D] as the same Articles, which were seized from the said spot. Though it is brought in the cross that no letter was issued by the superior of this panch witness, it has come that he was orally directed by his Senior Officer to act as a panch. From his cross-examination, it is seen that he signed on the labels affixed on the Articles when he had gone to the Police Station after 3:00 pm of 26/12/2017.

9. The evidence of PW – 5, Medical Officer, show that on 26/12/2017, he was working as a Medical Officer at Sub-District Hospital, Paranda. The dead body of women was received for postmortem from Police Station, Paranda along with Inquest. He noticed ten [10] surface wounds, which he noted in Column No.17 of the postmortem report. There was abrasion over the neck region on the right side of size 1x1 c.m., abrasion over the neck region alongwith C-brushing, brushing below the mandula region and abrasion on the left side clavicle region and upper chest region having size 2x2 c.m., on cut-Section of neck - subutanium haemorrhaging patches were noticed. He opined

that all those injuries were possible by throttling. He opined the cause of death as "*Asphyxia due to throttling*". He identified Exhibit - 27 as the same postmortem report prepared by him.

10. Though in the cross-examination, it has come that he did not notice any signs of finger marks over the neck, there is nothing to discard the testimony of this Medical Officer regarding the injuries and cause of death.

11. The evidence of PW - 7 [Humayun Farid Shaikh] show that he was working as the Photographer at the relevant time i.e. 26/12/2017, with the office of Superintendent of Police, Osmanabad. At the instance of Paranda Police, he went to the spot, which was the agricultural field at Botra, with two police staff. The sugarcane crop was standing in the said field and one dead body of women was lying. He clicked the photographs, which were at Exhibits - 19/1 to 19/11. In the cross, it has come that the camera was digital, which recorded the date and time of the photos.

12. The evidence of PW - 14 [Prashant Bhagwat Patil], Investigating Officer, show that on 26/12/2017, he was posted as Assistant Police Inspector at Paranda Police Station. The investigation of Crime No.226/2017 was assigned to him. He visited the spot where the dead body of women was lying. He seized the Articles such as footwear, purse, soil and blood stains under the spot panchnama at Exhibit - 18. He identified the Articles - A, B, C and D as the same Articles. His evidence corroborate the evidence of Photographer regarding taking the photographs at the spot. His evidence show that he prepared the Inquest at Exhibit - 20.

13. From the cross-examination of the aforesaid witnesses and from the submissions made across the bar by the learned Advocate for the Appellant, homicidal death of Appellant's wife - Reshma is not seriously disputed. The above discussed evidence conclusively established the homicidal death of Appellant's wife.

[2] Deceased last seen together

14. For this circumstance, the Prosecution primarily relies on the evidence of PW - 8 [Manoj Kakasaheb Ovhal], son of Appellant, PW - 9 [Balika Ashok Ovhal], sister of deceased and PW - 10 [Meera Laxman Ovhal], neighbourer of Appellant at village Rosa.

15. The evidence of PW - 8, son of Appellant, show that he was residing with the Appellant and deceased at Pune. His parents used to quarrel with each other, as his father used to suspect his mother and used to assault her. The Appellant and deceased had gone to village Rosa for the work in connection with Ration Card.

16. The evidence of PW - 9, sister of deceased, show that she was resident of Rosa village and on 24/12/2017, the deceased and the Appellant had come to village Rosa. Deceased met her in the evening. On 26/12/2017, she learnt about the death of her sister - Reshma.

17. The evidence of PW - 10, neighbourer of the Appellant, show that the Appellant was her neighbourer. On 24/12/2017 at 7:00 pm, when she returned to her house from weekly Bazar, the Appellant asked for the key of his house which was kept

with her. She gave the key to the Appellant. The Appellant and his wife [deceased] were sitting at the door of their house. Thereafter, she learnt about the incident.

18. If we see the evidence of PW - 3 [Sachin Rohidas Pol], who was the brother of deceased, it shows that on earlier occasion i.e. 22/09/2016, the Appellant had lodged the missing report in respect of his wife [deceased] and son - Nikhil. To add to this, there is evidence of PW - 4 [Suman Jalindar Danane] who was the sister of deceased that in the year 2016, the Appellant had lodged missing report in respect of deceased. Her evidence further show that prior to the said missing report, deceased had left the company of Appellant on two to three occasions.

19. There is no evidence on record that the Appellant and deceased entered their house and also there is no evidence on record that the Appellant and his wife left their house together. The evidence of PW - 10, neighbourer, only show that she saw the Appellant and deceased sitting at the door of their house, nothing more. From the above evidence of PW - 3 [Sachin Rohidas Pol] and PW - 4 [Suman Jalindar Danane], it is established that deceased had left the company of the Appellant on two to four occasions. This show that the deceased had the tendency to abandon or leave the company of the Appellant. Thus, the possibility of deceased leaving the company after PW - 10 saw both of them sitting at the door of their house, cannot be ruled out.

20. The possibility of the deceased leaving the company of the Appellant in the evening of 24/12/2017 gets fortified from the other evidence available on record in respect of the spot

panchnama and panchnama of the Appellant's house. As seen earlier, while discussing the point of homicidal death, the Articles of deceased such as purse, chappels and pencil were found near the body. It is unacceptable that the perpetrator of crime will carry those articles of deceased along with the body to dispose off. Further the evidence of PW - 2, panch witness, show that the panchnama [Exhibit - 18] of the Appellant's house was done. The evidence of this panch witness and the evidence of PW - 14, Investigating Officer, nowhere show that anything, much less incriminating article, was seized from the house of the Appellant. Their evidence also do not show that anything strange or unusual was noticed in the house of the Appellant. The learned Advocate for the Appellant has rightly pointed to the panchnama at Exhibit - 18, wherein, it is mentioned that nothing suspicious was found in the house of the Appellant and no article was seized therefrom.

21. The evidence on record show that the dead body was found in the morning of 26/12/2017. The medical evidence on record nowhere show the time of death. The time gap when PW - 10 [Meera Laxman Ovhal] saw the Appellant and deceased together sitting at the door of their house i.e. evening of 24/12/2017 and the time when the dead body was found is such that it cannot be held that there was close proximity of time between last seen together and death. In **Boby Vs. State of Kerala; 2023 SCC Online SC 50**, it is observed in Paragraph No.24 as *"it could thus clearly be seen that the last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. If the gap between the time of last seen and the deceased found dead is long, then the possibility of other person coming in*

between cannot be ruled out.”

22. By examining PW - 13 [Dattaram Shantaram Angre], who was working with the service provider, Idea Cellular, CDR of mobile phones of the Appellant and deceased for the period from 20/12/2017 to 27/12/2017 are brought on record at Exhibits - 54 and 55. His cross-examination show that there was separate expert team to handle the server and it was not his job to maintain the server. The certificate under Section 65-B of the Evidence Act is brought on record at Exhibit - 57. Scrutiny of the said CDR report show that the last call on 24/12/2017 in the phone of the Appellant show the time 21:20:22 and the last call on the phone of the deceased show the time 22:10:28 and the ID/Location Area Code is identical. No wonder, they were together at their village on 24/12/2017. However, the calls on 25/12/2017 in respect of the Appellant's cell phone and cell phone of deceased show different locations. The call details further show that the phone of deceased was also in operation on 27/12/2017. There is no evidence as to whether mobile phones were seized and if yes, from where. Thus, the call details also would be of no assistance for the Prosecution.

23. In view of the above discussion, the burden under Section 106 of Evidence Act would not shift on the Appellant. The evidence on record and above discussion show that the circumstance of last seen cannot be of any help to the Prosecution, as there is long time gap between last seen together and deceased found dead. As discussed earlier, the possibility of deceased leaving the company of the Appellant and some other persons committing the crime cannot be ruled out.

[3] Discovery of dead body at the instance of Appellant

24. It is the Prosecution's case that after committing the murder of his wife, the Appellant approached the Paranda Police Station and confessed the Crime and on the statement of the Appellant, the Crime came to be registered. In support of this circumstance, the Prosecution primarily relies on the testimonies of PW - 1 [Yogesh Govind Pawar], who was posted on the Police Sub-Inspector at Paranada on 26/12/2017, PW - 2 [Houserao Sudam Gaikwad], panch witness and PW - 14 [Prashant Bhagwat Patil], Investigating Officer.

25. The evidence of PW - 1 [Yogesh Govind Pawar], Police Officer, show that on 26/12/2017 he was in the Paranda Police Station. Around 7:30 am, the Appellant came to the Police Station and made confession that he killed his wife. PW - 14 - Investigating Officer too deposed that on 26/12/2017, the Appellant on his own came to the Police Station in the morning and accordingly, Station Diary Entry No.5 was made at 7:58 am. Thereafter, he along with staff, two panchas and the Appellant went to the spot of incident by making Station Diary Entry No.10 at 9:55 am. They reached the spot which was Bhotra Shivar near the field of one Vijay Gophane and noticed the dead body of Appellant's wife. However, admittedly, the station diary entries are not brought in the evidence.

26. The evidence of PW - 14, Investigating Officer, that he left with the Appellant on the spot where dead body was lying, do not find corroboration from the evidence of PW - 2, panch witness, who accompanied the Police on the spot where dead body was found. His evidence, as discussed above while dealing

with the point of homicidal death, nowhere deposed that the Appellant accompanied him and the Police when they left the Police Station for the spot of incident. On the contrary, it has clearly come in his cross-examination that the Appellant was not present at Botra [the place where dead body was found]. Moreover, the evidence of PW - 1, Policemen, who was present at the Police Station, nowhere show that the Appellant accompanied the Police to the spot. Even the evidence of PW - 7, Photographer, who went to the spot from the Paranda Police Station to click the photographs, nowhere show that the Appellant accompanied them or the Appellant was present at the spot. It is thus clear that out of four [4] witnesses, it is only the Investigating Officer who deposed that the Appellant accompanied them from the Police Station on the spot where the dead body was found. We are conscious of the legal position that corroboration is not the rule of law but it is the rule of prudence. However, one cannot loose sight of the settled legal principles that graver the crime, stricter the proof. It is nowhere the case of Prosecution that the said witnesses i.e. PW Nos.1, 2 and 7 did not support their case. Thus, uncorroborated evidence of PW - 14, Investigating Officer that the Appellant accompanied the Police and showed dead body is not sufficient.

27. The evidence of PW - 1 [Yogesh Govind Pawar] show that the Crime was registered at 17.30 hours on 26/12/2017. In cross-examination of PW - 14, Investigating Officer, suggestion is given that due to fear, the Accused put his signature on the report lodged by him. From this, it is clear that, the Crime was registered at the instance of the Appellant. There is no

explanation in the evidence of PW - 1 - Policemen, who recorded his report as to why he took 10 hours in registering the Crime when the Appellant had reached the Police Station at 17.30 hours. It is settled position under the law, that the delayed report quite often results in embellishment which is a creature of afterthought.

28. As regards the aspect of confession by the Appellant before the Police i.e. PW - 1 is concerned, it would be inadmissible by virtue of Section 25 of the Evidence Act. On this point, useful reference can be made to the ratio laid down by the Hon'ble Apex Court of India in the case of **Aghnoo Nagesia Vs. State of Bihar; AIR 1966 SC 119**, wherein, the Appellant / Accused, who was charged for the offence of murder and the crime came to be registered on his statement at the Police Station. This judgment is referred in the judgment relied upon by the learned Advocate for the Appellant in **Perumal Raja alias Perumal Vs. State represented Inspector of Police; 2024 SCC Online SC 12**, wherein, the following observations are made in Paragraph Nos.19, 27, 28 and 29:

“19. The prosecution's case, in the absence of eye witnesses, is based upon circumstantial evidence. As per Section 25 of the Indian Evidence Act, 1872, a confession made to a police officer is prohibited and cannot be admitted in evidence. Section 26 of the Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. Section 279 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act. It makes that part of the statement which distinctly leads to discovery of a fact in consequence of the information received from a person Accused of an offence, to the extent it distinctly relates to the fact thereby discovered, admissible in evidence against the Accused. The fact which is discovered as a consequence of the information given is admissible in evidence. Further, the fact discovered must lead to recovery of a physical object and only that information which distinctly relates to that discovery can be proved. Section 27 of the Evidence Act is based on the doctrine

of confirmation by subsequent events - a fact is actually discovered in consequence of the information given, which results in recovery of a physical object. The facts discovered and the recovery is an assurance that the information given by a person Accused of the offence can be relied.

20. *In Pulukuri Kottaya v. King Emperor*¹⁰, the Privy Council held that the fact discovered embraces the place from which the physical object is produced and the knowledge of the accused as to this, and the information given, must distinctly relate to this fact.

21. *In State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*¹¹, this Court affirmed that the fact discovered within the meaning of Section 27 of the Evidence Act must be some concrete fact to which the information directly relates. Further, the fact discovered should refer to a material/physical object and not to a pure mental fact relating to a physical object disassociated from the recovery of the physical object.

22. However, we must clarify that Section 27 of the Evidence Act, as held in these judgments, does not lay down the principle that discovery of a fact is to be equated to the object produced or found. The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. In *Mohmed Inayatullah v. State of Maharashtra*¹², elucidating on Section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. A fact already known to the police will fall foul and not meet this condition. The third is that at the time of receipt of the information, the accused must be in police custody. Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. The word 'distinctly' is used to limit and define the scope of the information and means 'directly', 'indubitably', 'strictly' or 'unmistakably'. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible.

23. The facts proved by the prosecution, particularly the admissible portion of the statement of the accused, would give rise to two alternative hypotheses, namely, (i) that the accused had himself deposited the physical items which were recovered; or (ii) only the accused knew that the physical items were lying at that place. The second hypothesis is wholly compatible with the innocence of the accused, whereas the first would be a factor to show involvement of

the accused in the offence. The court has to analyse which of the hypotheses should be accepted in a particular case.

24. *Section 27 of the Evidence Act is frequently used by the police, and the courts must be vigilant about its application to ensure credibility of evidence, as the provision is vulnerable to abuse. However, this does not mean that in every case invocation of Section 27 of the Evidence Act must be seen with suspicion and is to be discarded as perfunctory and unworthy of credence.*

25. *The pre-requisite of police custody, within the meaning of Section 27 of the Evidence Act, ought to be read pragmatically and not formalistically or euphemistically. In the present case, the disclosure statement (Exhibit P-37) was made by the appellant – Perumal Raja @ Perumal on 25.04.2008, when he was detained in another case, namely, FIR No. 204/2008, registered at PS Grand Bazar, Puducherry, relating to the murder of Rajaram. He was subsequently arrested in this case, that is FIR.No.80/2008, which was registered at PS Odiansalai, Puducherry. The expression “custody” under Section 27 of the Evidence Act does not mean formal custody. It includes any kind of restriction, restraint or even surveillance by the police. Even if the accused was not formally arrested at the time of giving information, the accused ought to be deemed, for all practical purposes, in the custody of the police.*

26. *Reference is made to a recent decision of this Court in **Rajesh & Anr. v. State of Madhya Pradesh**¹³, which held that formal accusation and formal police custody are essential pre-requisites under Section 27 of the Evidence Act. In our opinion, we need not dilate on the legal proposition as we are bound by the law and ratio as laid down by the decision of a Constitution Bench of this Court in **State of U.P. v. Deoman Upadhyaya**¹⁴. The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.¹⁵ This Court in Deoman Upadhyay (supra) observed that the bar under Section 25 of the Evidence Act applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was in custody at the time of making the confession. Further, for the ban to be effective the person need not have been accused of an offence when he made the confession. The reason is that the expression “accused person” in Section 24 and the expression “a person accused of any offence” in Sections 26 and 27 have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjectival clause “accused of any offence” is, therefore, descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement.*

27. *Elaborating on this aspect, a three judge Bench of this Court in **Aghnoo Nagesia v. State of Bihar**¹⁶ has held that if the FIR is given by the Accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the*

*Evidence Act. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence, except to the extent that the ban is lifted by Section 27 of the Evidence Act. While dealing with the admission of part of confession report dealing with motive, subsequent conduct and opportunity, this Court rejected the severability test adopted by some High Courts. The statement can, however, be relied upon and admitted to identify the Accused as the maker, and the portion within the purview of Section 27 of the Evidence Act is admissible. Aghnoo Nagesia (supra) has been applied and followed by this Court in **Khatri Hemraj Amulakh v. State of Gujarat**.*

28. The words "person Accused of an offence" and the words "in the custody of a police officer" in Section 27 of the Evidence Act are separated by a comma. Thus, they have to be read distinctively. The wide and pragmatic interpretation of the term "police custody" is supported by the fact that if a narrow or technical view is taken, it will be very easy for the police to delay the time of filing the FIR and arrest, and thereby evade the contours of Sections 25 to 27 of the Evidence Act. Thus, in our considered view the correct interpretation would be that as soon as an Accused or suspected person comes into the hands of a police officer, he is no longer at liberty and is under a check, and is, therefore, in "custody" within the meaning of Sections 25 to 27 of the Evidence Act. It is for this reason that the expression "custody" has been held, as earlier observed, to include surveillance, restriction or restraint by the police.

*29. This Court in Deoman Upadhyay (supra), while rejecting the argument that the distinction between persons in custody and persons not in custody violates Article 14 of the Constitution of India, observed that the distinction is a mere theoretical possibility. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. A person giving word of mouth information to police, which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer. Reference can also be made to decision of this Court in **Vikram Singh and Ors. v. State of Punjab**¹⁸, which discusses and applies Deoman Upadhyay (supra), to hold that formal arrest is not a necessity for operation of Section 27 of the Evidence Act. This Court in **Dharam Deo Yadav v. State of Uttar Pradesh**¹⁹, has held that the expression "custody" in Section 27 of the Evidence Act does not mean formal custody, but includes any kind of surveillance, restriction or restraint by the police. Even if the Accused was not formally arrested at the time of giving information, the Accused is, for all practical purposes, in the custody of the police and the bar vide Sections 25 and 26 of the Evidence Act, and accordingly exception Under Section 27 of the Evidence Act, apply. Reliance was placed on the decisions in **State of A.P. v. Gangula Satya Murthy**²⁰ and **A.N. Venkatesh and Anr. v. State of Karnataka**²¹.*

29. Thus, in view of the above discussed evidence and settled legal position, what is proved from the evidence of the above referred police witnesses, is that the criminal law was set in motion at the instance of the Appellant and nothing more. The Prosecution has utterly failed to conclusively prove the circumstance that the dead body was discovered at the instance of the Appellant.

[4] Injury on Appellant's hands

30. Through the evidence of PW - 5, Medical Officer, the Prosecution has brought on record the injury in the nature of bite mark on the left thumb of the Appellant. The evidence show that the Appellant was examined at 9:30 pm on 26/12/2017 and certificate at Exhibit - 28 was issued in that regard. Admittedly, the nature of injury was shown as simple and the age was shown as more than 24 hours. The evidence of Medical Officer show that in the event of bleeding bite injury, the blood stains may be found on the teeth of the person who had beaten. There is no medical evidence on record to show that there was blood in the teeth of deceased. It is true that the injury no.2 mentioned in the postmortem report show cut injury on the lip of deceased, however, in view of no evidence of blood on the teeth of deceased, that will not be sufficient to link it with the bite mark on the hand of the Appellant. Moreover, the evidence of Medical Officer show that if the hands are used for throttling, signs of finger or thumb will appear on the neck and in throttling, the marks of thumb on the neck will be at one side and marks of finger will be on other side. His evidence show that he did not notice such type of marks on the dead body. He did not notice thumb or finger marks on the body. His evidence

further show that in case of throttling, there is possibility of scratches on the hands of the Accused involved in the act. Admittedly, there is no evidence to show that there were any scratches on the hands of the Appellant. With this evidence on record, the injury on the Appellant cannot be an incriminating circumstance.

[5] CA reports

31. Though the evidence of PW - 14, Investigating Officer, show that the reports of chemical analyzers were received and were filed in the Charge-sheet, which were four in numbers, admittedly, the same are not brought in the evidence by giving exhibits. It was for the concerned Prosecutor and the concerned Trial Court to exhibit the said certificate by virtue of Section 293 of Cr.PC. Thus, the Appellant had no opportunity to cross-examine PW - 14 on the said aspects. Also, the CA reports were not put to the Appellant in 313 statement.

32. Secondly, even if this Court in the Appeal admit the said report in evidence, it would not be of any assistance to the Prosecution for the reason, there is no credible evidence as to from where the clothes of the Appellant were seized. PW - 6, panch witness deposed that the clothes of the Appellant [Accused] were presented before him whereas in the cross, he deposed that the clothes were brought by the Accused in the Police Station. The evidence of PW - 14, Investigating Officer, show that the clothes which the Appellant was wearing were seized by him. Thus, the evidence of panch witness and Investigating Officer are contrary to each other. Even if, for the sake of argument it is accepted that the clothes which the Appellant was wearing at the time of his arrest were seized,

there is no substantive evidence that the clothes were blood stained. Further there is no evidence that the clothes were sealed. Further the Prosecution has not examined the carrier of the Articles to CA. Thus, the CA reports would be of no assistance for the Prosecution.

[6] **Motive**

33. According to PW – 14, Investigating Officer, it transpired in the investigation that the Appellant suspected the character of his wife and therefore, he committed the murder and tried to destroy the evidence. The evidence of PW – 3, brother of deceased, that whenever deceased used to visit his house, she used to tell him that the Appellant was suspecting her character and used to assault her, would be hearsay in nature. The evidence of PW – 12 [Ashiya Yusuf Shaikh] show that she was the owner of one Beauty Parlour at Pune where deceased was working. The Appellant used to drop her and receive the deceased. This indicate that the Appellant had no objection for the deceased – wife to work in the Beauty Parlour. The evidence of PW – 3 show that when he reached the Paranda Police Station between 12:00 noon and 1:00 pm after receiving phone call from the Police, his brother-in-law [Ashok Ovhal] was asked by the Police to sit in the Police Station. No explanation in that regard has come on record. Be that, as it may. The evidence in respect of motive is neither concrete nor cogent. It is needless to state that suspicion however strong cannot take the place of proof. The Prosecution has failed to prove the motive.

34. The other evidence in the nature of video graphed statement of the Appellant is brought on record in the evidence

of PW - 11 [Shrimant Rarao Kshirsagar] takes the case of Prosecution nowhere for the reason that the statement of Appellant, which was video graphed by the Police was copied by him on the laptop and thereafter, it was moved in DVD. His evidence show that the clip on the desktop and laptop was deleted. This show that primary electronic evidence was not brought on record. His further evidence show that in the video clip, the report was only read-over and there was no picture. In any event, the said evidence would be hit by Section 25 of the Evidence Act.

CONCLUSION:

35. The above discussion in respect of the evidence brought on record by the Prosecution do not conclusively prove that it was only the Appellant, who committed the Crime. The circumstances, upon which the Prosecution based its case, are not of conclusively nature. The Prosecution has failed to conclusively prove the Charge against the Appellant. In absence of conclusive evidence on record to establish the circumstances, the conviction recorded by the learned Trial Court cannot be allowed to sustain. In totality of the evidence on record, the chain of circumstances is neither conclusively established nor complete so as to hold that it is only and only Appellant who committed the crime. There is no necessity to burden this Judgment by discussing the other case laws relied by the learned Advocate for the Appellant. We record our appreciation for able assistance rendered by the learned Advocate Mr. A. D. Ostwal, who was appointed for the Appellant. The Appellant deserves acquitted. Hence, we proceed to pass the following order:

ORDER

- (I) Criminal Appeal is allowed.
- (II) The Judgment and Order dated 30/01/2019 passed by the learned Additional Sessions Judge, Bhoom, District Osmanabad, in Sessions Case No.04/2018 convicting and sentencing the Appellant for the offences punishable under Sections 302 and 201 of IPC, is quashed and set aside.
- (III) The Appellant stands acquitted for the offences punishable under Sections 302 and 201 of IPC.
- (IV) The Appellant be released forthwith, if not required in any other offence.
- (V) The Record and Proceedings be sent back to the learned Trial Court.

(NEERAJ P. DHOTE, J.)**(R.G. AVACHAT, J.)**

Sameer