PETITIONER:
STATE OF U. P.

Vs.

RESPONDENT:
DEOMAN UPADHYAYA

DATE OF JUDGMENT:
06/05/1960

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
DAS, S.K.
KAPUR, J.L.
SUBBARAO, K.
HIDAYATULLAH, M.

CITATION:
1960 AIR 1125
CITATOR INFO :

RF	1961 SC1808	(13)
F	1963 SC 222	(50)
E	1963 SC1074	(11)
D	1963 SC1113	(11)
RF	1966 SC 119	(11,21)
R	1972 SC 66	(13)
RF	1973 SC1461	(1197)
RF	1976 SC1750	(4)
RF	1980 SC1382	(51)
RF	1980 SC1632	(19)

ACT:
Criminal Law--Evidence--Statement made to Police officer leading to discovery--Statute making statement admissible when made by person in custody and inadmissible when made by person not in custody--Whether offends equality before the law--" Persons in custody "--" Person accused of an offence "--Connotation of--Circumstantial evidence--Indian Evidence Act, 1872 (1 of 1872), s. 27--Code of Criminal Procedure, 1898 (Act 5 of 1898), s. 162(2)--Constitution of India, Art. 14.

HEADNOTE:
The respondent was tried for the murder of one Sukhdei early on the morning of June 19, 1958. The evidence against him was entirely circumstantial and consisted of the following facts : (i) on the 18th evening there was an altercation between the respondent and Sukhdei during which he slapped her and threatened that he would smash her face; (ii) on the 18th evening the respondent borrowed a gandasa from one Mahesh ; (iii) before day break on the 19th he was seen going towards and taking a bath in the village tank; (iv) the respondent absconded immediately thereafter; (v) he was arrested on the 20th and on 21st he offered to hand over the gandasa which he said he had thrown in the tank and thereafter he took the gandasa out of the tank, and (vi) the gandasa was found to be stained with human blood. The Sessions judge accepted this evidence, found that the irresistible conclusion was that the respondent had commit-

ted the murder and sentenced him to death. On appeal the High Court held that S. 27 of the Indian Evidence Act offended Art. 14 of the Constitution and was void as it created an unjustifiable discrimination between persons in custody whose statement leading to discovery was made admissible and persons not in custody whose statement was not made admissible even if it led to a discovery ; and consequently they held sub-s. (2) of s. 162 of the Code of Criminal Procedure in so far as it related to S. 27 of the Indian Evidence Act also to be void. As a result, the High Court ruled out the statement of the respondent that he had thrown the gandasa in the tank as inadmissible. They further held that the story that the appellant had borrowed the gandasa from Mahesh was unreliable. The rest of the evidence in the view of the High Court was not sufficient to prove the guilt of the respondent and accordingly they acquitted him.

Held, (per S. K. Das, J. L. Kapur, Hidayatullah and Shah, JJ., Subba Rao, J., dissenting), that S. 27 of the Indian Evidence Act and sub-s. (2) of s. 162 of the Code of Criminal

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Procedure did not offend Art. 14 of the Constitution and were not void.

Article 14 does not provide that all laws must be uniform and universally applicable; it merely forbids improper or invidious distinctions by conferring rights or privileges upon a class of persons arbitrarily selected from out of a larger group who ,are similarly circumstanced, and between whom and others not so favoured, no distinction reasonably justifying different treatment exists. Between persons in custody and persons not in custody the legislature has made a real distinction by enacting distinct rules regarding admissibility of statements confessional or otherwise made by them.

In considering the constitutionality of a statute on the ground whether it has given equal treatment to all persons similarly circumstanced it has to be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but has not applied. A doctrinaire approach is to be avoided. Persons not in custody making statements to the police leading to discovery of facts were a possible but rare class. A person who approaches a police officer investigating an offence and offers to give information leading to the discovery of an incriminating fact must be deemed to have surrendered himself to the police and to be in custody within the meaning of S. 27 of the Indian Evidence Act. A law which makes provision for cases where the need is most felt cannot be struck down because there are other instances to which it might have been applied. The object of the legislation being both to punish offenders proved to be guilty and to protect persons who may be compelled to make confessional statements, the provisions of S. 27 are reasonable as they make information admissible on the ground that the discovery of a fact pursuant to the statement made by a person in custody is a guarantee of the truth of that statement.

Legal Remembrancer v. Lalit Mohan Singh Roy, (1921) I.L.R. 49 Cal. 167 and Santokhi Beldar v. King Emperor, (1933) I.L.R. 12 Pat. 241, referred to.

West Coast Hotel Company v. Parrish, (1937) 300 U. S. 379: 81 L. Ed. 703, Weaver v. Palmer Bros. Co., (1926) 270 U. S. 402: 70 L. Ed. 654 and Miller v. Wilson, (1915) 236 U. S.

373: 59 L. Ed. 628, relied on.
The expression " a person accused of any offence " in s. 27 is merely descriptive of the persons against whom evidence is sought to be led in a criminal proceeding. It is not necessary that the person should have been accused of an offence at the time when he made the statement leading to the discovery of a fact.
The statement made by the respondent that he will recover
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the gandasa which he has thrown in the tank is admissible in evidence and may be used against him. This statement together with the other facts proved, even if the fact of the respondent borrowing gandasa from Mahesh Were excluded, established a chain which was consistent only with his guilt and inconsistent with his innocence.
Pakala Narayan Swami v. Emperor, (1939) L. R. 66 I.A. 66, applied.
Per Subba Rao, J.-Section 27 of the Indian Evidence Act was void as it violated Art. 14 of the Constitution. The classification of accused persons for the purpose of making their confessions admissible into those in custody and those not in custody was not based upon any intelligible differentia nor was it reasonable. It was a pure surmise that the legislature may have thought that the confession of an accused in custody leading to a recovery was a substitute for an extra-judicial confession that he might have made if he was not in custody. It was not correct that the number of accused not in custody making statements or confessions leading to a discovery was not appreciable and that they need not be provided for. Till the year 1872 the legislature treated accused in custody and those not in custody in a similar manner but in that year by an accidental omission of the word " or " it made a distinction between them. It was, therefore, not right to speculate and hold that the legislature consciously excluded from the operation of S. 27 accused not in custody on the ground that they were few in number. Besides, the authorities did not justify classification on the basis of numbers or enable the legislature to include the many and exclude the few from the operation of law without there being an intelligible differentia between them. The taking into custody did not amount to the giving of the statutory or implied caution and did not provide any intelligible differentia for the classification.
In re Mottai Thevar, A.I.R. 1952 Mad. 586, Durlav Namasudra v. King Emperor, (1932) I.L.R. 59 Cal. 1040, Deonandan Dusadh v. King Emperor, (1928) I.L.R. 7 Pat. 411, Santokhi Beldar v. King Emperor, (1933) I.L.R. 12 Pat. 241, Bharosa Ramdayal v. Emperor, A.I.R. 1941 Nag. 86 and jalla v. Emperor, A.I.R. 1931 Lah. 278, referred to.
Sakhawat Ali V. The State of Orissa, [1955] 1 S.C.R. 1004, distinguished.
John A. Watson v. State of Maryland, (1910) 218 U. S. 173: 54 L. Ed. 987, Jeffrey Manufacturing Co. v. Harry 0. Blagg, (1915) 235 U. S. 571: 59 L. Ed. 364, St. Louis, Iron Mountain & Southern Railway Co. v. State of Arkansas, (1916) 240 U. S. 518: 60 L. Ed. 776, Weaver v. Palmer Bros. Co., (1926) 270 U. S. 402: 70 L. Ed. 654 and West Coast Hotel Company v. Parrish, (1937) 300 U. S. 379: 81 L. Ed. 703, considered.
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Per Hidayatullah, J.-There was always a clear distinction between a person not accused of an offence nor in the custody of a police officer and one who was. Section 27 has been bodily taken from the English law. In both the laws

there was greater solicitude for a person who made a statement when the danger in which he stood had not been brought home to him than for one who knew of the danger. In English law, the caution gave him the warning, and in India the fact of his being in custody took the place of the caution. The law thus classified accused persons into two: (i) those who had the danger brought home to them by detention on a charge and (ii) those who were free. The protection given to these two classes was different. The law was concerned with seeing fairplay, and this was achieved by insisting that an unguarded statement was not admissible. The need for the caution was there, and this caution was forcefully brought home to an accused when he was in police custody. There was ample protection to the accused in custody as only that portion of his statement was made admissible which resulted in the discovery of a material fact otherwise unknown to the police.
Case law discussed.

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION Criminal Appeal No. 1 of 1960.
Appeal from the judgment and order dated September 11, 1959, of the Allahabad High Court in Criminal Appeal No. 325/1959.
H. N. Sanyal, Additional Solicitor-General of India, G. C. Mathur and C. P. Lal, for the appellant.
H. J. Umrigar, O. P. Rana and D. Goburdhan, for the respondent.
C. K. Daphtary, Solicitor-General of India, H. N. Sanyal, Additional Solicitor-General of India, B. R. L. Iyengar and T. M. Sen, for the Intervener (The Attorney-General for India).
1960. May 6. The Judgment of S. K. Das, J. L. Kapur and J. C. Shah, JJ., was delivered by Shah, J. K. Subba Rao, J., and M. Hidayatullah, J., delivered separate Judgments.
SHAH J.-The Civil and Sessions Judge, Gyanpur, convicted Deoman Upadhyaya-respondent to this appeal-of intentionally causing the death of one Sukhdei in the early hours of June 19, 1958, at
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village Anandadih, District Varanasi, and sentenced him to death subject to confirmation by the High Court. The order of conviction and sentence was set aside by the High Court of Judicature at Allahabad. Against that order of acquittal, the State of Uttar Pradesh has appealed to this court with a certificate granted by the High Court.
Deoman was married to one Dulari. Dulari's parents had died in her infancy and she was brought up by Sukhdei, her cousin. Sukhdei gifted certain agricultural lands inherited by her from her father to Dulari. The lands gifted to Dulari and the lands of Sukhdei were cultivated by Mahabir, uncle of Deoman. Mahabir and Deoman entered into negotiations for the sale of some of these lands situated at village Anandadih, but Sukhdei refused to agree to the proposed sale. According to the case of the prosecution, in the evening of June 18, 1958, there was an altercation between Deoman and Sukhdei. Deoman slapped Sukhdei on her face and threatened that he would smash her face. Early in the morning of June 19, Deoman made a murderous assault with a gandasa (which was borrowed by him from one Mahesh) upon Sukhdei who was sleeping in the courtyard near her house and killed her on the spot and thereafter, he threw the gandasa

into the village tank, washed himself and absconded from the village. He was arrested in the afternoon of the 20th near the village Manapur. On June 21, he offered to hand over the gandasa which he said, he had thrown in the village tank, and in the presence of the investigating officer and certain witnesses, he waded into the tank and took out a gandasa, which, on examination by the Serologist, was found to be stained with human blood.

Deoman was tried for the murder of Sukhdei before the Court of session at Gyanpur. The trial Judge, on a consideration of the evidence led by the prosecution, held the following facts proved:-

(a) In the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman over the proposed transfer of lands in village Anandadih and

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and in the course of the altercation, Deoman slapped Sukhdei and threatened her that he would smash her mouth " (face).

(b) -In the evening of June 18, 1958, Deoman borrowed a gandasa (Ex. 1) from one Mahesh.

(c) Before daybreak on June 19, 1958, Deoman was seen by a witness for the prosecution hurrying towards the tank and shortly thereafter fie was seen by another witness taking his bath in the tank.

(d) Deomap absconded immediately thereafter and was not to be found at Anandadih on June 19, 1958.

(e) That on June 21, 1958, Deoman, in the presence of the investigating officer and two witnesses, offered to hand over the gandasa which he said he had thrown into a tank, and thereafter he led the officer and the witnesses to the tank at Anandadih and in their presence waded into the tank and fetched the gandasa (Ex. 1) out of the water. This gandasa was found by the Chemical Examiner and Serologist to be stained with human blood.

In the view of the Sessions Judge, on the facts found, the ' only irresistible conclusion' was that Deoman had committed the murder of Sukhdei early in the morning of June 19, 1958, at Anandadih. He observed, " The conduct of the accused (Deoman) as appearing from the movements disclosed by him, when taken in conjunction with the recovery at his instance of the gandasa stained with human blood, which gandasa had been borrowed only in the evening preceding the brutal hacking of Sukhdei, leaves no room for doubt that Deoman and no other person was responsible for this calculated and cold-blooded murder". At the hearing' of the reference made by the court of Session for confirmation of sentence and the appeal filed by Deoman before the High Court at Allahabad, it was contended that the evidence that Deoman made a statement before the police and two witnesses on June 21, 1958, that he had thrown the gandasa into the tank and that he would take it out and hand it over, was inadmissible in evidence, because s. 27 of the Indian Evidence Act which

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rendered such a statement admissible, discriminated between persons in custody and persons not in custody and was therefore void as violative of Art. 14 of the Constitution.

The Division Bench hearing the appeal referred the following two questions for opinion of a Full Bench of the court:-

1. Whether s. 27 of the Indian Evidence Act is void because it offends against the provisions of Art. 14 of the Constitution ? and

2. Whether sub-s. (2) of s. 162 of the Code of Criminal Procedure in so far as it relates to s. 27 of the Indian Evidence Act is void ?

The reference was heard by M. C. Desai, B. Mukherjee and A.

P. Srivastava, JJ. Mukherjee, J., and Srivastava, J., opined on the first question, that " s. 27 of the Indian Evidence Act creates an unjustifiable discrimination between " persons in custody " and " persons out of custody ", and in that it offends against Art. 14 of the Constitution and is unenforceable in its present form ", and on the second question, they held that sub-s. (2) of s. 162 of the Code of Criminal Procedure " in so far as it relates to s. 27 of the Indian Evidence Act is void ". Desai, J., answered the two questions in the negative.

The reference for confirmation of the death sentence and the appeal filed by Deoman were then heared by another Division Bench. In the light of the opinion of the Full Bench, the learned Judges excluded from consideration the statement made by Deoman in the presence of the police officer and the witnesses offering to point out the gandasa which he had thrown in the village tank. They held that the story that Deoman had borrowed a gandasa in the evening of June 18, 1958, from Mahesh was unreliable. They accepted the conclusions of the Sessions Judge on points (a), (c) and (d) and also on point (e) in so far as it related to the production by Deoman in the presence of the police officer and search witnesses of the gandasa after wading into the tank, but as in their view, the evidence was insufficient to prove the guilt of Deoman beyond reasonable doubt, they acquitted him of the offence of murder. At the instance of the

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State of Uttar Pradesh, the High Court granted a certificate that " having regard to the general importance of the question as to the constitutional validity of s. 27 of the Indian Evidence Act", the case was fit for appeal to this court.

Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By s. 24, in a criminal proceeding against a person, a confession made by him is in-admissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By s. 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under s. 24 and complete under s. 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, " accused person " in s. 24 and the expression " a person accused of any offence " have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Pakala Narayan Swamy v. Emperor(1), by the Judicial Committee of the Privy Council, " s. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation ". The adjectival clause " accused of any offence " is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person ,at the time of making the statement for the applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides "

No confession
(1) (1939) L.R. 66 I.A. 66.
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made by any person whilst he is in the custody of a police officer, unless it be made in the immediate prosence of a Magistrate, shall be proved as against a per. son accused of any offence." By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas s. 25 prohibits proof .of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, s. 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in form of a proviso states " Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." The expression, " accused of any offence " in s. 27, as in s. 25, is also descriptive of the person concerned, i.e., against a person who is accused of an offence, s. 27 renders provable certain statements made by him while be was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though s. 27 is in the form of a proviso to s. 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by s. 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By s. 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered.
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By s. 26, a confession made in the presence of a Magistrate is made provable in its entirety.
Section 162 of the Code of Criminal Procedure also enacts a rule of evidence. This section in so far as it is material for purposes of this case, prohibits, but not so as to affect the admissibility of information to the extent permissible under s. 27 of the Evidence Act, use of statements by any person to a police officer in the course of an investigation under Ch. XIV of the Code, in any enquiry or trial in which such person is charged for any offence, under investigation at the time when the statement was made.
On an analysis of ss. 24 to 27 of the Indian Evidence Act, and s. 162 of the Code of Criminal Procedure, the following material propositions emerge:-
(a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.
(b) A confession made by a person whilst he is in the

custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate. (c) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement whether it amounts to a confession or not made by a person when he is not in custody, to another person such latter person not being a .police officer may be proved if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an investigation of an offence under Ch. XIV of the Code of Criminal Procedure, cannot except to the extent permitted by s. 27 of the

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Indian Evidence Act, be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.

A confession made by a person not in custody is therefore admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in s. 24, or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered, is made provable, by s. 162 of the Code of Criminal Procedure, such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. 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. It is manifest that the class of persons who needed protection most where those in the custody of the police and persons not in the custody of police did not need the same degree of protection. But by the combined operation of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

Are persons in custody, by this distinction deprived of " equality before the law, or the equal protection of the laws " within the meaning of Art. 14 of the

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Constitution ? By the equal protection of the laws guaranteed by Art. 14 'of the Constitution, it is not predicated that all laws must be uniform and universally applicable; the guarantee merely forbids improper or invidious distinctions by conferring rights or privileges upon a class of persons arbitrarily selected from out of a larger group who are similarly circumstanced, and between whom and others not so favoured, no distinction reasonably

justifying different treatment exists: it does not give a guarantee of the same or similar treatment to all persons without reference to the relevant differences. The State has a wide discretion in the selection of classes amongst persons, things or transactions for purposes of legislation. Between persons in custody and persons not in custody, distinction has evidently been made by the Evidence Act in some matters and they are differently treated. Persons who were, at the time when the statements sought to be proved were made, in custody have been given in some matters greater protection compared to persons not in custody. Confessional or other statements made by persons not in custody may be admitted in evidence, unless such statements fall within ss. 24 and 25 whereas all confessional statements made by persons in custody except those in the presence of a Magistrate are not provable. This distinction between persons in custody and persons not in custody, in the context of admissibility of statements made by them concerning the offence charged cannot be called arbitrary, artificial or evasive: the legislature has made a real distinction between these two classes, and has enacted distinct rules about admissibility of statements con-fessional or otherwise made by them.

There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police

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custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the. Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person in sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the custody " of the police officer within the meaning of s. 27 of the Indian Evidence Act: Legal Remembrancer v. Lalit Mohan 'Singh (1), Santokhi Beldar v. King Emperor (2). Exceptional cases may certainly be ima-gined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has given equal treatment to all persons similarly circumstanced, it must be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible

situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided. A person who has committed an offence, but who is not in

(1) (1921) I.L.R. 49 Cal, 167.
(2) (1933) I.L.R. 12 Pat. 241.

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custody. normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the police officer investigating the offence has not been able to get at any evidence against him giving information to the police officer without surrendering himself to the police, which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself Cases like Deonandan Dasadh v. King Emperor (1), Santokhi Beldar v. King Emperor (2), Durlav Namasudra v. Emperor (3), In re Mottai Thevar (4), In re Peria Guruswami (5), Bharosa Ramdayal v. Emperor (6) and Jalla v. Emperor (7) and others to which our attention was invited are all cases in which the accused persons who made statements leading to discovery of facts were either in the actual custody of police officers or had surrendered themselves to the police at the time of, or before making the statements attributed to them, and do not illustrate the existence of a real and substantial class of persons not in custody giving information to police officers in the course of investigation leading to discovery of facts which may be used as evidence against those persons.

In that premise and considered in the background that persons in custody " and " persons not in custody do not stand on the same footing nor require

(1) (1928) I.L.R. 7 Pat. 411.
(3) (1932) I.L.R. 59 Cal. 1040.
(5) I.L.R. 1942 Mad. 77.
(2) (1933) I.L.R. 12 Pat. 241.
(4) A.I.R. 1952 Mad. 586.
(6) I.L.R. 1940 Nag. 679.
(7) A.I.R. 1931 Lah. 278.

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identical protection, is the mere theoretical possibility of some degree of inequality of the protection of the laws relating to the admissibility of evidence between persons in custody and persons not in custody by itself a ground of striking down a salutary provision of the law of evidence ? Article 14 of the Constitution of India is adopted from the last clause of s. 1 of the 14th Amendment of the Constitution of the United States of America, and it may reasonably be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior courts in the United States, we would not therefore be incorporating

principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differs from ours. In West Coast Hotel Company v. Parrish (1), in dealing with the content of the guarantee of the equal protection of the laws, Hughes, C. J., observed at p. 400:-

" This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognise degree of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest ". If " the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied ". There is no " doctrinaire requirement " that the legislation should be couched in all embracing terms ".

Holmes, J., in Weaver v. Palmer Bros. Co. (2), in his dissenting judgment observed :-

" A classification is not to be pronounced arbitrary

(1) (1937) 300 U.S. 379: 81 L. Ed. 703.

(2) (1926) 270 U.S. 402 : 70 L. Ed. 654.

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because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. " if the law presumably hits the evil, where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." Miller v. Wilson(1).

McKenna, J., in Health and Milligan Mfg. Co. v. Worst (2), observed:

" Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'illadvised, unequal, and oppressive legislation..... Exact wisdom and nice adaption of remedies are not required by the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

Sections 25 and 26 are manifestly intended to hit at an evil, viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing offences as it is concerned with protecting persons who may be compelled to give confessional statements. If s. 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting

(1) (1915) 236 U.S. 373; 59 L. Ed. 628.

(2) (1907) 207 U.S. 338; 52 L. Ed. 236.

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

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

In that view, the High Court was in error in holding that s. 27 of the Indian Evidence Act and s. 162, sub-s. (2), of the Code of Criminal Procedure in so far as ' that section relates to s. 27 of the Indian Evidence Act' are void as offending Art. 14 of the Constitution.

The High Court acquitted Deoran on the ground that his statement which led to the discovery of the gandasa is inadmissible. As we differ from the High Court on that question, we must proceed to review the evidence in the light of that statement in so far as it distinctly relates to the fact thereby discovered being admissible.

The evidence discloses that Deoman and his uncle, Mahabir, were anxious to dispose of the property of Sukhdei and of Dulari and Sukhdei obstructed such disposal. In the evening of June 18,1958, there was an altercation between Sukhdei and Deoman over the proposed disposal of the property, in the presence of witnesses, Shobhnath and Mahesh, and Deoman slapped Sukhdei and threatened that he would " smash her

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mouth ". In the morning of June 19, 1958, the dead body of Sukhdei with several incised injuries caused by a gandasa was found lying in her court-yard. Deoman was seen in the village on that day early in the morning hurrying towards the village tank and I taking a bath ', but thereafter he absconded from the village and was not found till sometime in the afternoon of the 20th. In his examination by the court, be has stated that he had left Anandadih early in the morning of June 19, on business and that he was not absconding, but there is no evidence in support of that plea. The evidence discloses that in the presence of witnesses, Shobbnath and Raj Balladur Singh, Deoman waded into the village tank and " fetched the gandasa " which was lying hidden in the mud at the bottom of the tank and that gandasa was found by the Serologist on examination to be stained with human blood. The High Court has agreed with the findings of the Trial Court on this evidence. The evidence that Deoman had in the presence of the witnesses, Shobhnath and Raj Bahadur Singh offered to point out the gandasa which he said he had thrown into the tank was accepted by the Trial Court and the High Court has not disagreed with that view of the Trial Court, though it differed from the Trial Court as to its admissibility. The evidence relating to the borrowing of the gandasa from witness, Mahesh, in the evening of June 18, 1958, by Deoman

has not been accepted by the High Court and according to the settled practice of this Court, that evidence may be discarded. It was urged that Deoman would not have murdered Sukhdei, because by murdering her, he stood to gain nothing as the properties which belonged to Sukhdei could not devolve upon his wife Dulari in the normal course of inheritance. But the quarrels between Deoman and Sukhdei arose not because the former was claiming that Dulari was heir presumptive to Sukhdei's estate, but because Sukhdei resisted attempts on Deoman's part to dispose of the property belonging to her and to Dulari. The evidence that Deoman slapped Sukhdei and threatened her that he would " smash her face " coupled with the circumstances that on the morning of the murder of

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Sukhdei, Deoman absconded from the village after washing himself in the village tank and after his arrest made a statement in the presence of witnesses that he had thrown the gandasa in the village tank and produced the same, establishes a strong chain of circumstances leading to the irresistible inference that Deoman killed Sukhdei early in the morning of June 19, 1958. The learned trial Judge held on the evidence that Deoman was proved to be the offender. That conclusion is, in our view, not weakened because the evidence relating to the borrowing of the gandasa from witness Mahesh in the evening of June 18, 1958, may not be used against him. The High, Court was of the view that the mere fetching of the gandasa from its hiding place did not establish that Deoman himself had put it in the tank, and an inference could legitimately be raised that somebody else had placed it in the tank, or that Deoman had seen someone placing that gandasa in the tank or that someone had told him about the gandasa lying in the tank. But for reasons already set out the information given by Deoman is provable in so far as it distinctly relates to the fact thereby discovered: and his statement that he had thrown the gandasa in the tank is information which distinctly relates to the discovery of the gandasa. Discovery from its place of hiding, at the instance of Deoman of the gandasa stained with human blood in the light of the admission by him that he had thrown it in the tank in which it was found therefore acquires significance, and destroys the theories suggested by the High Court.

The quarrel between Deoman and Sukhdei and the threat uttered by him that he would smash Sukhdei's " mouth " (face) and his absconding immediately after the death of Sukhdei by violence, lend very strong support to the case for the prosecution. The evidence, it is true, is purely circumstantial but the facts proved establish a chain which is consistent only with his guilt and not with his innocence. In our opinion therefore the Sessions Judge was right in his view that Deoman had caused the death of Sukhdei by striking her with the gandasa produced before the court.

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On the evidence of the medical officer who examined the dead body of Sukhdei, there can be no doubt that the offence committed by accused Deoman is one of murder. The Trial Judge convicted the accused of the offence of murder and in our view, he was right in so doing. Counsel for Deoman has contended that in any event, the sentence of death should not be imposed upon his client. But the offence appears to have been brutal, conceived and executed with deliberation and not in a moment of passion, upon a defenseless old woman who was the benefactress of his wife. The assault with a

dangerous weapon was made only because the unfortunate victim did not agree to the sale of property belonging to her and to her foster child. Having carefully considered the circumstances in which the offence is proved to have been committed, we do not think that any case is made out for not restoring the order imposing the death sentence. We accordingly set aside the order passed by the High Court and restore the order passed by the Court of Session.

It may be observed that the sentence of death cannot be executed unless it is confirmed by the High Court. The High Court has not confirmed the sentence, but in exercise of our powers under Art. 136 of the Constitution, we may pass the same order of confirmation of sentence as the High Court is, by the Code of Criminal Procedure, competent to pass. 'We accordingly confirm the sentence of death.

SUBBA RAO J.-I have had the advantage of, perusing the judgment of my learned brother, Shah, J. I regret my inability to agree with his reasoning or conclusion in respect of the application of Art. 14 of the Constitution to the facts of the case. The facts have been fully stated in the judgment of my learned brother and they need not be restated here.

Article 14 of the Constitution reads:

" The State shall not deny to any person equality before the law or equal protection of the laws within the territories of India."

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Das, C. J., in Basheshar Nath v. The Commissioner of Income-tax(1) explains the scope of the equality clause in the following terms:

"The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall " deny to any person within its jurisdiction the equal protection of the laws ". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States..... The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy."

This subject has been so frequently and recently before this Court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows: All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land ; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress.

But such a classification cannot be arbitrary but must be based
(1) [1959] Supp. (1) S.C.R. 528.
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upon differences pertinent to the subject in respect of and the purpose for which it is made.
Das, C. J., in Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar (1) culled out the rules of construction of the equality clause in the context of the principle of classification from the various decisions of this Court and those of the Supreme Court of the United States of America and restated the settled law in the form of the following propositions at pp. 297298:
" (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always
(1) [1959] S.C.R. 279.
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holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation:"
In view of this clear statement of law, it would be unnecessary to cover the ground over again except to add the following caution administered by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis (1):
" While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must 'be some undisclosed and unknown reason for subjecting certain individuals or Corporations to hostile and discriminating Legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."
It will be seen from the said rules that a weightage is given to the State as against an individual and a heavy burden is thrown on the latter to establish his fundamental right. If the caution administered by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis (1) and restated by

Das, C. J., in Shri Ram Krishna Dalmia's case (2) were to be ignored, the burden upon a citizen would be an impossible one, the rules intended to elucidate the doctrine of equality would tend to exhaust the right itself, and, in the words of Brewer, J., the said concept becomes " a mere rope of sand, in no manner restraining state action ". While the Court may be justified to assume certain facts to sustain a reasonable classification, it is not permissible to rest its decision on some undisclosed and unknown reasons; in that event, a Court would not be enforcing a fundamental right but would be finding out some excuse to support the infringement of that right.

It will be convenient at the outset to refer to the relevant sections. Under s. 25 of the Evidence Act, no confession made to a police-officer shall be proved as against a person accused of an offence. Section 26 says that no confession made by any person while he is in the custody of a police-officer, unless it is made in the immediate presence of a 'Magistrate, shall be

(1) [1897] 165 U.S. 150; 41 L. Ed. 666.

(2) [1959] S.C.R. 279.

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proved as against such person. Section 27, which is in the form of a proviso, enacts that " when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Section 162 of the Code of Criminal Procedure lays down that no statement made by any person to a police-officer in the course of an investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such' statement was made. Sub-s. (2) of s. 162 of the said Code which was amended by s. 2 of the Code of Criminal Procedure (Second Amendment) Act, 1941 (Act XV of 1941), provides that the said section shall not affect the provisions of s. 27 of the Indian Evidence Act.

A combined effect of the said provisions relevant to the present enquiry may be stated thus: (1) No confession made to a police-officer by an accused can be proved against him; (2) no statement made by any person to a police-officer during investigation can be used for any purpose at any inquiry or trial; (3) a confession made by any person while he is in the police custody to whomsoever made, such as a fellow-prisoner, a doctor or a visitor, can be proved against him if it is made in the presence of a Magistrate; and (4) if a person accused of an offence is in the custody of a police-officer, any information given by him, whether it is a statement or a confession, so much of it as relates distinctly to the fact thereby discovered may be proved. Shortly stated, the section divided the accused making confessions or statements before the police into two groups: (i) accused not in custody of the police, and (ii) accused who are in the custody of the police. In the case of the former there is a general bar against the admissibility of any confessions or statements made by them from being used as evidence against them; in the case of the latter, so much of such statements or confessions as relates distinctly to the fact thereby discovered is made admissible.

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Shorn of the verbiage, let us look at the result brought about by the combined application of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure. A and B stabbed C with knives and hid them in a specified place.

The evidence against both of them is circumstantial. One of the pieces of circumstantial evidence is that both of them gave information to the police that each of them stabbed C with a knife and hid it in the said place. They showed to the police the place where they had hidden the knives and brought them out and handed them over to the police; and both the knives were stained with human blood. Excluding this piece of evidence, other pieces of circumstantial evidence do not form a complete chain. If it was excluded, both the accused would be acquitted; if included, both of them would be convicted for murder. But A, when he gave the information was in the custody of police, but B was not so. The result is that on the same evidence A would be convicted for murder but B would be acquitted : one would lose his life or liberty and the other would be set free. This illustration establishes that prima facie the provisions of s. 27 of the Evidence Act accord unequal and uneven treatment to persons under like circumstances.

Learned Additional Solicitor General tries to efface this apparent vice in the sections by attempting to forge a reasonable basis to sustain the different treatment given to the two groups of accused. His argument may be summarized thus: Accused are put in two categories, namely, (1) accused in custody ; and (2) accused not in custody. There are intelligible differentia between these two categories which have reasonable relation to the objects sought to be achie-ved by the legislature in enacting the said provisions. The legislature has two objects, viz., (i) to make available to the Court important evidence in the nature of confessions to enable it to ascertain the truth ; and (ii) to protect the accused in the interest of justice against coercive methods that may be adopted by the police. The differences between the two categories relating to the objects sought to be achieved are the following:

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(a)while extra-judicial confessions in the case of an accused not in custody are admissible in evidence, they are excluded from evidence in the case of accused in custody; (b) compared with the number of accused in the custody of the police who make confessions or give information to them, the number of accused not in custody giving such information or making confessions would be insignificant; (c) in the case of confession to a police-officer by an accused not in custody, no caution is given to him before the confession is recorded, whereas in the case of an accused in custody, the factum of custody itself amounts to a caution to the accused and puts him on his guard; and (d) protection by the imposition of a condition for the admissibility of confessions is necessary in the case of accused in custody ; whereas no such protection for accused not in custody is called for. Because of these differences between the two categories, the argument proceeds, the classification made by the legislature is justified and takes the present case out of the operation of Art. 14 the Constitution.

I shall now analyse each of the alleged differences between the two categories of accused to ascertain whether they afford a reasonable and factual basis for the classification.

Re. (a): Whether the accused is in custody or not in custody, the prosecution is not prevented from collecting the necessary evidence to bring home the guilt to the accused. Indeed, as it often happens, if the accused is not in custody and if he happens to be an influential person there is a greater likelihood of his retarding and obstructing the progress of investigation and the collection

of evidence. Nor all the extra-judicial confessions are excluded during the trial after a person is put in custody. The extra-judicial confession made by an accused before he is arrested or after he is released on bail is certainly relevant evidence to the case. Even after a person is taken into custody by a police-officer, nothing prevents that person from making a confession to a third-party and the only limitation imposed by s. 26 of the Evidence Act is that he shall make it only in the presence of a
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Magistrate. The confession made before a Magistrate after compliance with all the formalities prescribed has certainly greater probative force than that made before outsiders. On the other hand, though extra. judicial confessions are relevant evidence, they are received by Courts with great caution. That apart, it is a pure surmise that the legislature should have thought that the confession of an accused in custody to a police-officer with a condition attached would be a substitute for an extra-judicial confession that he might have made if he was free. Broadly speaking, therefore, there is no justification for the suggestion that the prosecution is in a better position in the matter of establishing its case when the accused is out of custody than when he is in custody. Moreover, this circumstance has not been relied upon by the State in the High Court but is relied upon for the first time by learned counsel during his arguments. In my view, there is no practical difference at all in the matter of collecting evidence between the two categories of persons and that the alleged difference cannot reasonably
sustain a classification.
Re. (b): The second circumstance relied upon by the learned counsel leads us to realms of fancy and imagination. It is said that the number of persons not in custody making confessions to the police is insignificant compared with those in custody and, therefore, the legislature may have left that category out of consideration. We are asked to draw from our experience and accept the said argument. No such basis was suggested in the High Court. The constitutional validity has to be tested on the facts existing at the time the section or its predecessor was enacted but not on the consequences flowing from its operation. When a statement made by accused not in the custody of police is statutorily made inadmissible in evidence, how can it be expected that many such instances will fall within the ken of Courts. If the ban be removed for a short time it will be realized how many such instances will be pouring in in the same way as confessions of admissible type have become the common feature of almost every criminal case involving grave
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offence. That apart, it is also not correct to state that such confessions are not brought to the notice of Courts.
In re Mottai Thevar (1) deals with a ease where the accused immediately after killing the deceased goes to the police station and makes a clear breast of the offence. In Durlav Namasudra v. King Emperor (2) the information received from an accused not in the custody of a police-officer which led to the discovery of the dead-body was sought to be put in evidence. Before a division bench of the Patna High Court in Deonandan Dusadh v. King Emperor (3) the information given to the Sub-Inspector of Police by a husband who had fatally assaulted his wife which led to the discovery of the corpse of the woman was sought to be admitted in evidence. In Santokhi Beldar v. King Emperor (4) a full bench of the

Patna High Court was considering whether one of the pieces of evidence which led to the discovery of blood-stained knife and other articles by the Sub-Inspector of Police at the instance of the accused was admissible against the informant. A statement made by an accused to a responsible police-officer voluntarily confessing that he had committed an act of crime was considered by a division bench of the Nagpur High Court in Bharosa Ramdayal v. Emperor (5). The Lahore High Court in Jalla v. Emperor (6) had before it a statement made by an accused to the police which led to the discovery of the dead-body. In re Peria Guruswamy and Another (7) is a decision of a division bench of the Madras High Court wherein the question of admissibility of a confession made by a person to a police officer before he came into his custody was considered.

I have cited the cases not for considering the validity of the questions decided therein, namely, when a person can be described as an accused and when he can be considered to have come into the custody of

(1) A.I.R. 1952 Mad. 586.
(3) (1928) I.L.R. 7 Pat. 411.
(5) A.I.R. 1941 Nag. 86.
(2) (1932) I.L.R- 59 Cal. 1040.
(4) (1933) I.L.R. 12 Pat. 241.
(6) A.I.R. 1931 Lah. 278.
(7) A.I.R. 1941 Mad. 765.

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the police, but only to controvert the argument that such confessions are in practice non-existent. I have given only the representative decisions of various High Courts and I am sure if a research is made further instances will be forthcoming.

The historical background of s. 27 also does not warrant any assumption that the legislature thought that cases of persons not in custody of a police-officer making confessions before him would be very few and, therefore, need not be provided for. Sections 25, 26 and 27 of the Indian Evidence Act correspond to ss. 148, 149 and 150 of the Code of Criminal Procedure of 1861. Section 148 of the Code prohibited the use as evidence of confessions or admissions of guilt made to a police-officer. Section 149 provided:

" No confession or admission of guilt made by any person while he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate shall be used as evidence against such person."

Section 150 stated

" When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

Section 150 of the Code of 1861 was amended by Act VIII of 1869 and the amended section read as follows:

" Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or ad. mission of guilt, or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

It would be seen from the foregoing sections that there was an absolute bar against the admissibility of confessions or admissions made by any person to a polioe-officer and that

the said bar was partially
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lifted in a case where such information, whether it amounted to a confession or admission of guilt, related distinctly to the fact discovered. The proviso introduced by Act VIII of 1869 was in pari materia with the provisions of s. 27 of the Evidence Act with the difference that in the earlier section the phrase a person accused of any offence and the phrase in the custody of a police officer were connected by the disjunctive ',or". The result was that no discrimination was made between a person in custody or out of custody making a confession to a police-officer. Section 150 of the Code before amendment also, though it was couched in different terms, was similar in effect. It follows that, at any rate till the year 1872, the intention of the legislature was to provide for all confessions made by persons to the police whether in custody of the police or not. Can it be said that in 1872 the legislature excluded confessions or admissions made by a person not in custody to a police-officer from the operation of s. 27 of the Evidence Act on the ground that such cases would be rare ? Nothing has been placed before us to indicate the reasons for the omission of the word " or " in s. 27 of the Evidence Act. If that be the intention of the legislature, why did it enact s. 25 of the Evidence Act imposing a general ban on the admissibility of all confessions made by accused to a police-officer ? Section 27 alone would have served its purpose. On the other hand, s. 25 in express terms provides for the genus, i.e., accused in general, and s. 27 provides for the species out of the genus, namely, accused who are in custody. A general ban is imposed by one section and it is lifted only in favour of a section of accused of the same class. The omission appears to be rather by accident than by design. In the circumstances it is not right to speculate and hold that the legislature consciously excluded from the operation of s. 27 of the Act accused not in custody on the ground that they were a few in number.
During the course of the arguments of the learned counsel for the respondent, to the question put from the Bench whether an accused who makes a confession
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of his guilt to a police-officer would not by the act of confession submit himself to his custody, the learned counsel answered that the finding of the High Court was in his favour, namely, that such a confession would not bring about that result. Learned Additional Solicitor-General in his reply pursued this line of thought and contended that in that event all possible cases of confession to a police-officer would be covered by s. 27 of the Indian Evidence Act. The governing section is s. 46 of the Code of Criminal Procedure, which reads:
" (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
"..... .
It has been held in some decisions that " when a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and if he makes the statement to a police-officer, as such, he submits to the custody of the officer within the meaning of cl. (1) of this section, and is then in the custody of a police-officer within the meaning of s. 27 of the Indian Evidence Act ". But other cases took a contrary view. It is not possible to state as a proposition of law what words or

what kind of action bring about submission to custody ; that can only be decided on the facts of each case. It may depend upon the nature of the information, the circumstances under, the manner in, and the object for, which it is made, the attitude of the police-officer concerned and such other facts. It is not, therefore, possible to predicate that every confession of guilt or statement made to a police-officer automatically brings him into his custody. I find it very difficult to hold that in fact that there would not be any appreciable number of accused making confessions or statements outside the custody of a police-officer. Giving full credit to all the suggestions thrown out during the argument, the hard core of the matter remains, namely, that the same class, i.e., accused making confessions
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to a police-officer, is divided into two groups-one may be larger than the other-on the basis of a distinction without difference.

Let me now consider whether there is any textual or decided authority in support of the contention that the legislature can exclude from the operation of s. 27 accused not in custody on the ground that they are a few in number.

In support of this contention learned counsel for the appellant cited a decision of this Court and some decisions of the Supreme Court of the United States of America. The decision of this Court relied upon is that in Sakhawat Ali v. The State of Orissa (1). In that case, Bhagwati, J., observed at p. 1010 thus:

"The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by article 14 of the Constitution."

These observations, though at' first sight appear to support the appellant, if understood in the context of the facts and the points decided in that case, would not in any way help him. By the provisions of s. 16(1)(x) of the Orissa Municipal Act, 1950, a paid legal practitioner on behalf of or against the Municipality is disqualified for election to a seat in such Municipality. One of the questions raised was that the said section violates the fundamental right of the appellant under Art. 14 of the Constitution. The basis of that argument was that the classification made between legal practitioners who are employed on payment on behalf of the Municipality or who act against the Municipality and those legal practitioners who are not so employed was not reasonable. Bhagwati, J., speaking for the Court, stated the well-settled

(1) [1955] 1 S.C.R. 1004.
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principles of classification and gave reasons justifying the classification in the contex of the object sought to be achieved thereby. But it was further argued in that case that the legislature should have also disqualified other persons, like clients, as even in their case there would be conflict between interest and duty. Repelling that contention the learned Judge made the aforesaid observations. The said observations could only mean that, if there was intelligible differentia between the species carved out of the genus for the purpose of legislation, in

the context of the object sought to be achieved, the mere fact that the legislation could have been extended to some other persons would not make the legislation constitutionally void. On the other hand, if the passage be construed in the manner suggested by learned counsel for the appellant, it would be destructive of not only the principle of classification but also of the doctrine of equality.

Nor do the American decisions lay down any such wide proposition. In John A. Watson v. State of Maryland (1) the constitutional validity of Maryland Code of 1904 which made it a misdemeanor for any doctor to practise medicine without registration, was challenged. The said Code exempted from its operation physicians who were then practising in that State and had so practised prior to January 1, 1898, and could prove that within one year of the said date they had treated at least twelve persons in their professional capacity. The Supreme Court of America affirmed the validity of the provision. The reason for the classification is stated at p. 989 thus:

" Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties."

Then the learned Judge proceeded to state

" Such exceptions proceeds upon the theory that those who have acceptably followed the profession in

(1) (1910) 218 U.S. 173; 54 L. Ed. 987.

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the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts."

The classification is, therefore, not sustained upon any mathematical calculation but upon the circumstance that the groups excluded were experienced doctors whereas those included were not. In Jeffrey Manufacturing Company v. Harry O. Blagg (1) the Supreme Court of America justified a classification under Ohio Workmen's Compensation Act which made a distinction between employers of shops with five or more employees and employers of shops having a lesser number of employees. Employers of the former class had to pay certain premiums for the purpose of establishing a fund to provide for compensation payable under the said Act. If an employer did not pay the premium, he would be deprived of certain defences in a suit filed by his employee for compensation. It was contended that this discrimination offended the provisions of the 14th Amendment of the Constitution. Day, J., sustained the classification on the ground that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, than in smaller ones. It was also conceded that the State legislature was not guilty of arbitrary classification. It is, therefore, manifest that the classification was not based upon numerical strength but on the circumstance that the negligence of a fellow servant is more likely to happen in the case of larger establishments. The passage at p. 369 must be understood in the light of the facts and the concession made in that case. The passage runs thus:

"..... having regard to local conditions, of which they (State legislature) must be presumed to have better knowledge than we can have, such regulation covered

practically the whole field which needed it, and embraced all the establishments of the state of any size, and that those so small as to employ only four or less might be regarded as a negligible

(1) (1915) 235 U.S. 571: 59 L. Ed. 364.

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quantity, and need not be assessed to make up the guaranty fund, or covered by the methods of compensation which are provided by this legislation."

The passage presupposes the existence of a classification and cannot, in my view, support the argument that an arbitrary classification shall be sustained on the ground that the legislature in its wisdom covered the field where the protection, in its view, was needed. Nor the observations of McKenna, J., in St. Louis, Iron Mountain & Southern Railway Company v. State of Arkansas (1) advance the case of the appellant. The learned Judge says at p. 779 thus:

" We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."

In that case the State legislature made an exemption in favour of railways less than 100 miles in length from the operation of the statute forbidding railway companies with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers. McKenna, J., sustained its constitutional validity holding that the classification was not arbitrary. The observations cited do not in any way detract from the well-established doctrine of classification, but only lay down that the validity of a classification must be judged not on abstract theories but on practical considerations. Where the legislature prohibited the use of shoddy, new or old, even when sterilized, in the manufacture of comfortables for beds, the Supreme Court of America held in Weaver v. Palmer Brothers Co. (2) that the prohibition was not reasonable. It was held that constitutional guaranties may not be made to yield to mere convenience. Holmes, J., in his dissenting judgment observed at p. 659 thus:

(1) (1916) 240 U. S. 518; 60 L. Ed. 776.

(2) (1926) 270 U. S. 402 ; 70L. Ed. 654.

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"A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm."

Even this dissenting opinion says nothing more than that, in ascertaining the reasonableness of a classification, it shall be tested on practical grounds and not on theoretical considerations. In West Coast Hotel Company v. Parrish (1) a state statute authorized the fixing of reasonable minimum wages for women and minors by state authority, but did not extend it to men. In that context, Hughes, C. J., observed at p. 713 thus:

" This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach."

These observations assume a valid classification and on that basis state that a legislation is not bound to cover all

which it might possibly reach.
A neat summary of the American law on the subject is given in " The Constitution of the United States of America ", prepared by the Legislative Reference Service, Library of Congress (1952 Edn.) at p. 1146 thus:
" The legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied. The State may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rules laid down were made mathematically exact. Exceptions of specified classes will not render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted classes."
(1) (1937) 300 U. S. 379; 81 L. Ed. 703.
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These observations do not out across the doctrine of classification, but only afford a practical basis to sustain it. The prevalence of an evil in one field loudly calling for urgent mitigation may distinguish it from other field where the evil is incipient. So too, the deleterious effect of a law on the public, if it is extended to the excluded group, marks it off from the included group. Different combination of facts with other. wise apparently indentical groups may so accentuate the difference as to sustain a classification. But if the argument of the learned counsel, namely, that the legislature can in its discretion exclude some and include others from the operation of the Act in spite of their identical characteristics on the ground only of numbers be accepted, it will be destructive of the doctrine of equality itself.
Therefore, the said and similar decisions do not justify classification on the basis of numbers or enable the legislature to include the many in and exclude the few from the operation of law without there being an intelligible differentia between them. Nor do they support the broad contention that a legislature in its absolute discretion may exclude some instances of identical characteristics from an Act on alleged practical considerations. Even to exclude one arbitrarily out of a class is to offend against Art. 14 of the Constitution.
Let us now apply the said principles to the facts of the present case. Assuming for a moment that the ratio between the accused in the context of confessions is 1000 in custody and 5 out of custody, how could that be conceivably an intelligible ground for classification ? Assuming again that the legislature thought such an exemption is unwarranted-that such cases would not arise at all and need not be provided for, could that be a reasonable assumption having regard to the historical background of S. 27 of the Evidence Act and factual existence of such instances disclosed by decisions cited supra ? As I have already stated that such an exemption is an unwarranted flight into the realms of imagination in the teeth of expressed caution administered by Das, C. J., in Shri Ram
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Krishna Dalmia's Case (1) and by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis (2).
Re. (c): Nor can I find any intelligible differentia in the caution alleged to be implied by accused being taken into custody. The argument is-that under s. 163 of the Code of

Criminal Procedure " no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will," and as an accused is allowed to make any statement he chooses without his being placed on guard by timely caution, no statement made by him is permitted to be proved; whereas by the accused being taken into custody, the argument proceeds, by the said act itself the accused gets sufficient warning that his statement may be used in evidence and that this difference affords a sufficient basis for the classification. I am not satisfied that taking into custody amounts to a statutory or implied caution. If that be the basis for the distinction, there is no justification that an accused once taken into custody but later released on bail should not be brought in within the meaning of s. 27 of the Indian Evidence Act.

Re. (d): The fourth item of differentia furnishes an ironical commentary on the argument advanced. The contention is that an accused in custody needs protection in the matter of his confession and therefore a condition is imposed before the confession is made admissible. There is an obvious fallacy underlying this argument. The classification is made between accused not in custody making a confession and accused in custody making a confession to a police-officer: the former is inadmissible and the latter is admissible subject to a condition. The point raised is why should there be this discrimination between these two categories of accused ? It is no answer to this question to point out that in the case of an accused in custody a condition has been imposed on the admissibility of his confession. The condition imposed may be to some extent affording a guarantee for the truth

(1) [1959] S.C.R. 279.

(2) [1897] 165 U. S. 150; 41 Ed. 666.

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of the statement, but it does not efface the clear distinction made between the same class of confessions. The vice lies not in the condition imposed, but in the distinction made between these two in the matter of admissibility of a confession. The distinction can be wiped out only when confessions made by all accused are made admissible subject to the protective condition imposed.

Not only the alleged differentia are not intelligible or germane to the object sought to be achieved, the basis for the distinction is also extremely arbitrary. There is no acceptable reason why a confession made by an accused in custody to a police-officer is to be admitted when that made by an accused not in custody has to be rejected. The condition imposed in the case of the former may, to some extent, soften the rigour of the rule, but it is irrelevant in considering the question of reasonableness of the classification. Rankin, J., in Durlav Namasudra v. Emperor (1) in a strongly worded passage criticised the anomaly underlying s. 27 thus at p. 1045:

"..... in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it..... It cannot be admitted in evidence, because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that, if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is inadmissible in evidence against him because he

is not in custody."
In the present case, the self-same paradox is sought to be supported as affording a reasonable basis for the classification.
The only solution is for the legislature to amend the section suitably and not for this Court to discover some imaginary ground and sustain the classification. 1, therefore, hold that s. 27 of the Indian Evidence Act is void as violative of Art. 14 of the Constitution.
(1) (1932) 59 Cal. 1040,
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If so, the question is whether there is any scope for interference with the finding of the High Court. The High Court considered the entire evidence and found the following circumstances to have been proved in the case:
(a) " that in the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman, accused, over the proposed transfer of property in Anandadih, in the presence of Shobh Nath (P. W. 5) and Mahesh (P. W. 7), and that in the course of this altercation Deoman slapped her and threatened that he would smash her mouth";
(b) " that at about dawn on June 19, 1958, the accused was seen by Khusai (P. W. 8) hurrying to wards a tank, and shortly afterwards was seen by Mata Dihal (P. W. 11) actually bathing in that tank, before it was fully light " ;
(c) " that the accused absconded immediately afterwards and was not to be found at Anandadih on June 19, 1958 "; and
(d) " that on June 21, 1958, the accused in the presence of the investigating officer (P. W. 14), Shobh Nath (P. W. 5) and Raj Bahadur Singh (P. W. 6) stated that he could hand over the " gandasa " which he had thrown into a tank; that he was then taken to that tank and in the presence of the same witnesses waded in and fetched the " gandasa " Ex. I out of the water; and that this " gandasa " was found by the Chemical Examiner and Serologist to be stained with human blood ".
The High Court held that the said circumstances are by no means sufficient to prove the guilt of the accused-appellant beyond reasonable doubt. On that finding, the High Court gave the benefit of doubt to the accused and acquitted him of the offence. The finding is purely one of fact and there are no exceptional circumstances in the case to disturb the same.
In the result, the appeal fails and is dismissed.
HIDAYATULLAH J.-The facts of the case have been stated in full by Shah, J., in the judgment which he has delivered, and which I had the advantage of
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reading. I have also had the advantage of reading the judgment of Subba Rao, J. I respectfully agree generally with the conclusions and the reasons, therefor, of Shah, J. I wish, however, to make a few observations.
Section 27 of the Indian Evidence Act is in the Chapter on admissions, and forms part of a group of sections which are numbered 24 to 30, and these sections deal with confessions of persons accused of an offence. They have to be read with ss. 46 and 161164 of the Code of Criminal Procedure.
Section 24 makes a confession irrelevant if the making of it appears to the Court to have been caused by inducement, threat or promise having reference to the charge against the accused person, from a person in authority and by which the accused person hopes that he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. Section 25 makes a confession to a police officer inadmissible against a person accused of any

offence. Section 26 says that no confession made by a person whilst he is in the custody of a police officer shall be proved unless it be made in the immediate presence of a Magistrate. Section 27 then provides:

" Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Section 161 of the Code of Criminal Procedure empowers a police officer of stated rank to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person is bound to answer all questions relating to the case but not questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police officer may make a written record of the statement. Section 163 of the Code then lays down the rule that no police officer or other person in

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authority shall offer or make, or cause to be offered or made, any inducement, threat or promise as is mentioned in the Indian Evidence Act, s. 24 and further that no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation any statement which he may be disposed to make of his own free will. Section 162 of the Code then makes statements reduced into writing inadmissible for any purpose except those indicated, but leaves the door open for the operation of s. 27 of the Indian Evidence Act. Section 164 confers the power to record confessions, on Magistrates of stated rank during investigation or at any time afterwards before the commencement of the enquiry or trial. Such confessions are to be recorded after due caution to the person making the confession and only if there is reason to believe that they are voluntary. Section 46 of the Code provides that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

When an offence is committed and investigation starts, the police have two objects in view. The first is the collection of information, and the second is the finding of the offender. In this process, the police question a number of persons, some of whom may be only witnesses and some who may later figure as the person or persons charged. While questioning such persons, the police may not caution them and the police must leave the persons free to make whatever statements they wish to make. There are two checks at this stage. What the witnesses or the suspects say is not be used at the trial, and a person cannot be compelled to answer a question, which answer may incriminate him. It is to be noticed that at that stage though the police may have suspicion against the offender, there is no difference between him and other witnesses, who are questioned. Those who turn out to be witnesses and not accused are expected to give evidence at the trial and their former statements are not evidence. In so far as those ultimately charged

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are concerned, they cannot be witnesses, save exceptionally, and their statements are barred under s. 162 of the Code and their confessions, under s. 24 of the Indian Evidence Act. Their confessions are only relevant and admissible, if they are recorded as laid down in s. 164 of the Code of Criminal Procedure after due caution by the Magistrate and it is made

clear that they are voluntary. These rules are based upon the maxim: Nemo tenetur prodere seipsum (no one should be compelled to incriminate himself): In an address to Police Constables on their duties, Hawkins, J., (later, Lord Brampton), observed:

" Neither Judge, magistrate nor juryman, can interrogate an accused person..... or require him to answer the questions tending to incriminate himself. Much less, then ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody."

In English law, the statement of an accused person can be tendered in evidence, provided he has been cautioned and the exact words of the accused are deposed to. Says Lord Brampton:

" There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence, nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him, that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim with respect to an accused person is 'Keep your ears and eyes open, and your mouth shut ' ".

See Sir Howard Vincent's " Police Code

In Ibrahim v. Emperor (1), Lord Sumner gave the history of rules of common law relating to confessions, and pointed out that they were " as old as Lord Hale ". Lord Sumner observed that in Reg. v. Thompson(2)

(1) [1914] A.C. 599.

(2) (1893) 2 Q.B. 12.

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and earlier in The King v Jane Warrickshall (1) it was ruled (to quote from the second case):

" A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it."

Lord Sumner added:

" It is not that the law presumes such statements to be untrue but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice: Reg. v. Baldry (2). Accordingly when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance, and subject to strong warnings as to their weight."

Even so, in the judgment referred to by Lord Sumner, Parke, B., bewailed that the rule had been carried too far out of " too much tenderness towards prisoners in this matter ", and observed :

" I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence Justice and commonsense have too frequently been sacrificed at the shrine of mercy."

Whatever the views of Parke, B., Lord Sumner points out that " when Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law."

Lord Sumner has then traced the history of the law in subsequent years. In 1905, Channel, J., in Beg v. Knight and Thavre (3) referred to the position of an accused in

custody thus:
" When he has taken any one into custody he ought not to question the prisoner I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the
(1) (1783) 1 Leach 263 ; 168 E.R. 234.
(2) (1852) 5 Cox C.C. 523.
(3) (1905) 20 Cox C.C. 711
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Judge at the trial may in his discretion refuse to allow the answers to be given in evidence."
Five years later, the same learned Judge in Rex v. Booth and Jones (1) observed:
" The moment you have decided to charge him and practically got him into custody, then, inasmuch as a Judge cannot ask a question or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet, that if a policeman does ask a question it is inadmissible; what happens is that the Judge says it is not advisable to press the matter."
it is to be noticed that Lord Sumner noted the difference of approach to the question by different Judges, and observed that:
"Logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight..... Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope in authority, is a rule of policy."
The Judicial Committee did not express any opinion as to what the law should be. The state of English law in 1861 when these rules became a part of the Indian law in a statutory form was thus that the police could question any person including a suspect. The statements of persons who turned out to be mere witnesses were entirely inadmissible, they being supposed to say what they could, on oath, in Court. Statements of suspects after caution were admissible but not before the caution was administered or they were taken in custody; but confessions were, as a rule, excluded if they were induced by hope, fear, threat, etc.
When the Indian law was enacted in 1861, it is commonplace that the statute was drafted in England. Two departures were made, and they were (1) that no statement made to a police officer by any
(1) (1910) 5 Cr. App. Rep. 177.
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person was provable at the trial which included the accused person, and (2) that no caution was to be given to a person making a statement.
In so far as the accused was concerned, he was protected from his own folly in confessing to a charge both after and before his custody unless he respectively did so in the immediate presence of a Magistrate, or his confession was recorded by a Magistrate. In either event, the confession had to be voluntary and free from taint of threat, promise, fear, etc. The law was framed to protect a suspect against too much garrulity before he know that he was in danger which sense would dawn on him when arrested and yet left the door open to voluntary statements which might clear him if made but which might not be made if a caution was

administered. Without the caution an innocent suspect is not in a position to know his danger, while a person arrested knows his position only too well. Without the caution, the line of distinction ceased, and the law very sensibly left out the statements altogether. Thus, before arrest all suspects, whether rightly suspected or wrongly, were on par. Neither the statements of the one nor of the other were provable, and there was no caution at all.

The English law then was taken as a model for accused in custody. Section 27 which is framed as an exception has rightly been hold as an exception to ss. 24-26 and not only to s. 26. The words of the section were taken bodily from The King v. Lockhart where it was said:

" But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true."

That case followed immediately after Warrickshall's case (2), and summarised the law laid down in the earlier case. The accused in that case had made a

(1) (1785) 1 Leach 386: 168 E.R. 295 and footnote to (1783) Leach 263.

(2) (1783) 1 Leach 263: 168 E. R. 234.

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confession which was not receivable, as it was due to promise of favour. As a result of the confession, the goods stolen were found concealed in a mattress. It was contended that the evidence of the finding of the articles should not be admitted. Nares, J., with Mr. Baron Eyre observed:

"It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit ..... This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source ; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false."

Another case is noted in the footnote in the English Report Series. In February Session, 1784, Dorothy Mosey was tried for shop-lifting and a confession had been made by her and goods found in consequence of it, as in the above case. Buller, J., (present Mr. Baron Perryn, who agreed), said:

" A prisoner was tried before me (Buller, J.) where the evidence was just as it is here. I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any facts arising afterwards may be given in evidence, though they were done in consequence of the confession. This point, though it did not affect the prisoner at the bar, was stated to all the Judges: and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done after-

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wards may be given in evidence, though they were done in consequence of the confession."
Where, however, no fact was discovered, the statement was not held admissible. See Rex v. Richard Griffin (1) and Rex v. Francis Jones (2).
In Rex v. David Jenkins(1), the prisoner was con victed before Bayley, J., (present Park, J.), of stealing certain gowns and other articles. He was induced by a promise from the prosecutor to confess his guilt, and after that confession, he carried the officer to a particular house, but the property was not found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as abovementioned was. But Bayley, J., referred the point for consideration of the Judges. The Judges were of opinion that,
" the evidence was not admissible and the conviction was therefore wrong. The confession was excluded, being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce a groundless conduct."
It would appear from this that s. 27 of the Indian Evidence Act has been taken bodily from the English law. In both the laws there is greater solicitude for a person who makes a statement at a stage when the danger in which he stands has not been brought home to him than for one who knows of the danger. In English law, the caution gives him the necessary warning, and in India the fact of his being in custody takes the place of caution which is not to be given. There is, thus, a clear distinction made between a person not accused of an offence nor in the custody of a police officer and one who is.
It remains to point out that in 1912 the Judges of the King's Bench Division framed rules for the guidance of the police. These rules, though they had no
(1) (1809) Russ. & Ry. 151 : 168 E.R. 732.
(2) (1809) Russ. & Ry. 152.
(3) (1822) Russ. & Ry 492: 168 E.R. 914.
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force of law, laid down the procedure to be followed. At first, four rules were framed, but later, five more were added. They are reproduced in Halsbury's Laws of England, 3rd Edn., Vol. 10, p. 470, para. 865. These rules also clearly divide persons suspected of crime into those who are in police custody and those who are not. It is assumed that a person in the former category knows his danger while the person in the latter may not. The law is tender towards the person who may not know of his danger, because in his case there is less chance of fairplay than in the case of one who has been warned.
It is to be noticed that in the Royal Commission on Police Powers and Procedure (1928-29) CMD 3297, nothing is said to show that there is anything invidious in making statements leading to the discovery of a relevant fact admissible in evidence, when such statements are made by persons in custody. The suggestions and recommendations of the Commission are only designed to protect questioning of persons not yet taken in custody or taken in custody on a minor charge and the use of statements obtained in those circumstances.
The law has thus made a classification of accused persons into two: (1) those who have the danger brought home to them

by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the second category the law has ruled that their statements are not admissible, and in the case of the first category, only that portion of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says ; "I pushed him down such and such mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft.

It is argued that there is denial of equal protection

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of the law, because if the statement were made before custody began, it would be inadmissible. of course, the making of the statement as also the stage at which it is made, depends upon the person making it. The law is concerned in seeing fairplay and this is achieved by insisting that an unguarded statement should not be receivable. The need for caution is there, and this caution is very forcefully brought home to an accused, when he is accused of an offence and is in the custody of the police. There is thus a classification which is reasonable as well as intelligible, and it subserves a purpose recognised now for over two centuries. When such an old and time-worn rule is challenged by modern notions, the basis of the rule must be found. When this is done, as I have attempted to do, there is no doubt left that the rule is for advancement of justice with protection both to a suspect not yet arrested and to an accused in custody. There is ample protection to an accused, because only that portion of the statement is made admissible against him which has resulted in the discovery of a material fact otherwise unknown to the police. I do not, therefore, regard this as evidence of unequal treatment.

Before leaving the subject, I may point out that the recommendation of the Royal Commission was:

" (xlviii) A rigid instruction should be issued to the Police that no questioning of a prisoner, or a ' person in custody', about any crime or offence with which he is, or may be charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements, under No. (7) of the Judges' Rules but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial."

This is a matter for the legislature to consider.

In view of what I have said above and the reasons given by Shah, J., I agree that the appeal be allowed, as proposed by him.

BY COURT: In accordance with the opinion of the majority the appeal is allowed. Section 27 of the Indian Evidence Act and s. 162, sub-s. (2), of the Code

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of Criminal Procedure in so far as "that section relates to s. 27 of the Indian Evidence Act", are intra vires and do not offend Art. 14 of the Constitution. The order of the High Court acquitting the respondent is also set aside and the order of the Court of Sessions convicting the accused (respondent) under s. 302 of the Indian Penal ("ode and sentencing him to death is restored.

Appeal allowed.