

Deoman Upadhyaya Vs. State

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Court : Allahabad

Decided On : Aug-24-1959

Reported in : AIR1960All1; 1960CriLJ1

Judge : M.C. Desai, ;B. Mukerji and ;A.P. Srivastava, JJ.

Acts : [Constitution of India](#) - Articles 13, 14 and 20(3); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 27, 161, 162 and 162(2); [Evidence Act, 1872](#) - Sections 25, 26 and 27

Appeal No. : Criminal Appeal No. 325 of 1959

Appellant : Deoman Upadhyaya

Respondent : State

Advocate for Def. : K.L. Misra, Adv. General and ;H.N. Seth, Asst. Govt. Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Judgement :

Desai, J.

1. I respectfully dissent from the view taken by my learned brothers that Section 27, Evidence Act, and Section 162(2), Cr. P. C. are void on account of denying equality before the law guaranteed by the Article 14 of the Constitution.

2. Admission is defined in Section 17 of the Evidence Act to mean a statement suggesting any inference as to any act in issue of relevant fact made by a party to a proceeding, such as an accused. Admissions are relevant and may be proved as against the person making them, vide Section 21. A confession is a specie of an admission of an accused; it is an acknowledgment in express words of the truth of the guilty fact charged; Wigmore on Evidence, Volume III, third edition, paragraph 821. In other words it is admission of all the facts in issue and Consists expressly or impliedly of as many admissions as there are facts in issue. In *Pakala Naravana Swami v. King Emperor* Lord Atkin observed at page 81 (of Ind App): fat p. 52 of AIR)

'A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession'.

No confession made to a police officer can be proved; this is Section 25 of the Evidence Act. This provision is narrow inasmuch as it bars proof of a confession, and not of an admission, by an accused to a police officer and is wide inasmuch as proof of a confession made to a police officer is barred regardless of whether the accused was in custody or not and whether the confession was made during investigation or not Section 26 lays down that no confession made by any person while he is in the custody of a police officer shall be proved as against him unless it be made in the immediate presence of a Magistrate.

While Section 25 deals generally with all accused, Section 26 deals specifically with those in the custody of a police officer (referred to, for the sake of brevity, as those in custody). These two provisions are based upon the principle of unreliability of the police. Section 27 lays down 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 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.'

Whether the section is an exception to only Section 26, which immediately precedes it, or to Sections 25 and 26, or to Sections 24, 25 and 26 was once a matter in controversy. It is more than a mere exception to all or any of the preceding sections; it deals with 'information' whereas the preceding section or sections deal with only confessions; Sections 25 and 26 overlap to some extent; a confession by a person in custody to a police officer is hit by both of them. Section 27 deals with any information confirmed by subsequent facts received from a person in custody; information received by a police officer is as much within its scope as information received by someone else.

In practice it is the information received by a police officer that is sought to be proved under the section. Had the legislature intended to exclude this information from the scope of Section, 27 it should have added appropriate words in the section. Once it is conceded that it deals with information received by a police officer one would have no difficulty in holding that it is an exception to Sections 25 and 26 both. It was held by the Supreme Court in *Ram Kishan v. State of Bombay* : 1955 CriLJ196 and by this Court in *Queen-Empress v. Babu La'l*, ILR 6 All 509 that it is a proviso to Sections 25 and 26 both and that consequently so much of a confession made by an accused in custody as relates distinctly to the discovery of any fact can be proved against him even if the confession was made to a police officer.

The section is based on the doctrine of Confirmation by subsequent facts e.g. that so much of the confession as relates distinctly to the fact discovered by it may be given in evidence because this part at least of the confession cannot have been False. Sections 25 and 26 bar the proof of a confession but Section 27 makes an exception in favour of that part of a confession made by an accused person in custody which is confirmed to be true by subsequent discovery. It was pointed out by Straight C. J. in the case of *Babu Lal*, ILR 6 All 509 at p. 546 that

'Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he give's evidence.'

The provisions of the section have been explained by the Judicial Committee of the Privy Council in *Pulukuri Kotayya v. Emperor* 74 Ind App 65: (AIR1947 PC 67). Sir John Beaumont observed at page 76 (of Ind App): (at p 70 of AIR) that

'normally the Section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.'

His Lordship emphasised that Section 27 did not mean to let in the evidence that the body produced was that of the person murdered by the accused or that the weapon produced was the one used by him in murdering him. The word 'it' in the expression 'whether it amounts to a confession or not' means 'information' and not 'so much of'; see *Woodroffe and Ameer Ali's Evidence*, 10th Edition, Vol. I, page 414.

3. Evidence can be given only about the existence or non-existence of a fact in issue and of a relevant fact and of no other matter, vide Section 5 of the Evidence Act. Section 27 does not make the evidence of discovery of a fact admissible; if it is admissible it must be under Section 5. What it makes admissible is the evidence of a statement of the accused leading to the discovery of the fact. Though Section 27 is worded as if it was only an exception to the preceding sections i.e. Sections 25 and 26 and probably 24 also), it really is more than that and contains something not within the scope of the preceding sections.

It deals with part of 'information' which is a wider term than 'confession', which is all that is dealt with in the preceding sections. Ignoring irrelevant matter, information must consist of a confession or an admission of a fact in issue or a relevant fact. The part of it that is confirmed by subsequent facts and is made receivable in evidence by Section 27 must be a confession or an admission of a fact in issue or a relevant fact. If the whole confession is confirmed by subsequent

facts, the whole is receivable in evidence under Section 27 notwithstanding the bans imposed by the preceding sections.

If the information is a confession and the part of it that is confirmed by subsequent facts is an admission of a fact in issue, it may be barred from evidence by the preceding sections but is made receivable in evidence by Section 27. If the information is a confession and the part of it confirmed by subsequent facts is an admission of a relevant fact, its admissibility is governed by Section 21 and not by Section 24 to 26 and would be receivable in evidence even in the absence of Section 27. If the information is an admission of a fact or facts in issue, the part of it that is confirmed by subsequent facts must be an admission of a fact in issue or of a relevant fact; in either case its admissibility is governed by Section 21 and not by Sections 24, 25 and 26 and it would be receivable in evidence even if Section 27 did not exist.

If the information is an admission of a relevant fact, or relevant facts the part of it confirmed by subsequent fact can only be an admission of a relevant fact, the admissibility of which is governed by Section 21 and not by Sections 24, 25 and 26 and which would be receivable in evidence even if Section 27 did not exist. Some of these statements need explanation. Irrelevant matter contained in an information is inadmissible even though confirmed by subsequent facts. No evidence that is irrelevant and, therefore cannot be received in evidence, vide Section 5, is made admissible by Section 27.

If an irrelevant matter contained in an information is confirmed by subsequent facts, the evidence about the subsequent facts itself would be irrelevant and if it cannot be received in evidence no question will arise of receiving in evidence the part of the information. Sections 24, 25 and 26 bar a confession, that is an admission of all the facts in issue, but not an admission of only some fact or facts in issue or of a relevant fact. A confession cannot be split up into two or more admissions of facts in issue and one of them cannot be received in evidence as an admission if the whole confession is barred.

When some authorities lay down that an admission is receivable in evidence though the confession is, or would be, barred, it is either an admission of a

relevant fact and, therefore, not forming part of the confession or an admission of some fact or facts in issue standing alone. If an accused admits only some fact or facts in issue and not all the facts in issue, his statement is an admission and not a confession and its admissibility is not governed by the provisions dealing with confessions. If a statement of an accused contains not only a confession but also an admission, which can only be of a relevant fact, the latter would be receivable in evidence under Section 21 even though the confession is barred by Section 24 etc., the reason being that an admission of a relevant fact receivable in evidence under Section 21 is not made non-receivable merely because it accompanies a confession hit by Sections 24 etc.

4. The useful purpose really served by Section 27 is thus shown to be less than what appears from a reading of it. So far as it applies to admissions receivable under Section 21 and confessions not hit by the preceding sections it involves duplication and is redundant. The only useful purpose served by it is to render admissible in evidence what has been declared inadmissible, e. g. a confession hit by the preceding sections, or an admission of a fact in issue forming part of such a confession. This is in theory.

5. In practice the section serves a still less useful purpose because, as pointed out by Sir John Beaumont in the case of Pulukuri Kotayya, 74 Ind App 65: (AIR 1947 PC 67), what is made admissible is a part of information relating to the existence of corpus delicti or an incriminating article in a certain place; it is this part that relates distinctly to the fact discovered, namely that the corpus delicti or the incriminating article was in a certain place. Now this part of information is generally an admission of only a relevant fact and not of a fact in issue.

Unless the offence consists wholly or partly of keeping an article in a certain place or of knowing that an article exists in a certain place, the mere statement that an article is kept by the accused, or is known by him to be, in a certain place will not amount to a confession or an admission of a fact in issue. If there exists such an offence one does not meet it in practice. In practice, therefore, Section 27 lets in evidence of an admission which has already been made admissible under Section 21. Rarely does one come across a case in which the aid of Section 27 may have

to be invoked in order to let in evidence of an admission of a fact in issue contained in a confession barred by Sections 24 etc.

6. Section 27 applies only when the information is received from an accused in custody. A statement made by an accused not in custody even though confirmed by subsequent facts is not made admissible by Section 27. It was contended, therefore, that the legislature has made an invidious distinction between a person in custody and a person not in custody in the matter of making a part of his information receivable in evidence. Another way of looking at the alleged invidious distinction is that a statement confirmed by subsequent facts is admissible under Section 27 if made after the arrest while the person is in custody but not if made prior to it.

So it was argued vehemently that the section contravenes the guarantee of Article 14 and consequently has become void by the operation of Article 13. On paper or in theory the legislature has certainly distinguished between persons in custody and those not in custody in spite of their being said to be similarly situated in respect of the law regarding admissibility of statements of accused persons confirmed by subsequent facts. Accused persons' confessions not hit by the preceding sections, admissions of relevant facts and admissions of facts in issue not included in such confessions are always admissible in evidence; therefore, in respect of them the legislature has made no distinction between accused persons not in custody and accused persons in custody.

Accused persons in custody can have no grievance against the legislature in respect of them because if they are not admissible in evidence under Section 27 they are admissible in evidence under Section 21 and so long as evidence of them can be received, it does not matter whether it is received under one section or another. A grievance against Section 27 can be made by an accused person in custody only in respect of a confession hit by the preceding sections but confirmed by subsequent facts, or an admission of a fact in issue confirmed by subsequent facts and included in such a confession. Such cases are very rare, as pointed out above. The case one usually comes across is of an admission of a relevant fact confirmed by subsequent facts; here the law allows evidence of it to be received

by courts without making any distinction between an accused in custody and an accused not in custody.

7. Further, all that Section 27 does is to make certain evidence admissible; it does not thereby seal the fate of the accused against whom it is admitted. The fate of the accused does not always depend entirely upon the evidence admitted under Section 27; he may be acquitted notwithstanding the evidence and he may be convicted even if the evidence was not admitted. The value of the evidence in most cases is very limited; it only goes to show that the accused had knowledge regarding the whereabouts of an incriminating article, and no further. It is only a piece of circumstantial evidence and is by itself insufficient to prove that the accused committed the offence.

8. The Evidence Act was enacted in 1872; previously the law contained in Sections 25, 26, and 27 of it was contained in Sections 148, 149 and 150 of the Code of Criminal Procedure of 1861. A history of the legislation concerning Section 27 has been given in the judgment of my learned brother and need not be repeated. Section 150 of the Code, as amended by Act No. VIII of 1869, allowed evidence of information confirmed by subsequent facts received by a police officer in the course of an investigation from 'a person accused of any offence, or in the custody of a police officer' notwithstanding the general rule that no evidence could be given of a statement made to a police officer in the course of an investigation. Section 27 of the Evidence Act reproduced Section 150 of the Code but with the omission of the word 'or' from the above quoted words.

The effect of the omission, was, as stated in the case of Babu Lal ILR 6 All 509 that the operation of the section is restricted to information received from an accused person in police custody and it does not apply to information received from an accused person not in police custody. Section 162 of the present Cr. P.C. at the time of its enactment in 1898 contained the general prohibition against the use of a statement made to a police officer in the course of an investigation. The legislature might have thought that a statement made by an accused person to a police officer in the course of an investigation was not within the general prohibition contained in the section and, therefore, did not think of making any

exception in favour of an information received from an accused person in the course of an investigation and confirmed by subsequent facts.

It might have also thought that Section 162 of the Code did not have the effect of overriding the provisions of Section 27 of the Evidence Act. In the case of *Pakala Narayana Swami* the Judicial Committee of the Privy Council held in 1939 that the general prohibition in Section 162 was wide enough to cover a statement which would otherwise have been admissible in evidence under Section 27 of the Evidence Act. Thereupon the legislature added Sub-section (2) to Section 162 excepting such a statement from the scope of the general prohibition.

The effect, of Section 162 (2) Cr. P. C. is that evidence of information received from an accused person in custody by a police officer in the course of an investigation and confirmed by subsequent facts is admissible though a similar statement made in similar circumstances by a person not in custody is not admissible, being hit by the general prohibition. It was contended that in respect of the admissibility of such a statement the legislature should not have made any distinction between a person in custody and a person not in custody because whether the statement should be admitted or not did not logically depend upon whether it was made by a person in custody or not.

The credibility of the statement, the weight to be attached to it and the effect to be given to it did not at all depend upon whether the person was in custody or not. Consequently Sub-section (2) of Section 162 was attacked as infringing the guarantee of equality before the law. As I explained earlier, an admission of an accused person confirmed by subsequent facts would be admissible in evidence not only under Section 27 but also under Section 21; but the advantage of its being admissible under Section 27, Evidence Act. is that it remains immune from the general prohibition contained in Section 162, Cr. P. C. Evidence of an admission confirmed by subsequent facts, made by an accused person in custody can be given notwithstanding the general prohibition but evidence of an admission made by a person not in custody cannot be given. This is the way in which Sub-section (2) makes a discrimination between a person in custody and a person not in custody.

9. Article 14 of the Constitution enjoins that no State shall deny the equality before the law. The State is prohibited from doing a certain act; prohibition is not against the act being done in any circumstance and at all cost. The emphatic language used in the Article laying the obligation directly on the State suggests that what was intended is that the State shall not deliberately or intentionally do the prohibited act. It must not deny equality before the law; if equality before the law is denied to a person the State must not be a party to the denial.

Some kind of mens rea on the part of the legislature would, therefore, be necessary before the impugned sections are held to infringe the guarantee of Article 14. I am not at all impressed by the argument that Article 14 does not use the word 'intentionally' or 'deliberately' or 'arbitrarily'. Nobody interprets the mandate that the State shall not deny equality before the law to mean that there shall be no classification or no discrimination between one person or another in respect of any matter. The guarantee has been interpreted to mean that there should be no discrimination between one member and another of a class of persons situated similarly in respect of the subject-matter of the particular law under consideration.

Article 14 does not speak of any inequality between persons situated similarly; yet if it is interpreted to forbid discrimination between only persons situated similarly, there is no reason why it should not be interpreted to forbid intentional or deliberate discrimination. The reply of Shri P. C. Chaturvedi that there could be no question of the legislature's intending to discriminate between persons in custody and persons not in custody because the guarantee of equality before the law did not exist when Section 27, Evidence Act, was enacted confounds existence of intention with necessity for intention and attributes to the legislature a kind of perversity usually to be associated with children. Surely it cannot be said that because the legislature was not prohibited in 1872 from denying equality before the law it could not possibly have any intention of denying equality before the law in 1872 or that the question whether it had such an intention then or not does not arise.

Even though it was not prohibited in 1872 from denying equality before the law, it could have intended to do so by enacting Section 27. It is neither wise nor in conformity with the facts to say that unless it was prohibited from doing an act it could not harbour an intention to do the act. On the contrary the presumption of regularity of official acts compels us to assume that an intention to do an act exists when it is lawful to do it and not when it is unlawful. The legislature had certainly the power to make any kind of discrimination, but the question can still arise whether the discrimination was intentional or accidental and fortuitous.

Whether the discrimination is reasonable or not and whether there exists reasonable differences or not are questions that can arise only in respect of a reasoned act i.e. an intentional act and cannot arise in respect of an accidental act. The history of the law contained in Section 27, Evidence Act, and Section 162, Cr. P. C., shows that the discrimination that is made between information given by a person in custody and information given by a person not in custody is accidental.

Nobody has offered any explanation, why the legislature should have decided to legislate against persons in custody by making information given by them admissible in evidence and by excepting such an information from the general rule that no evidence can be given in respect of a statement made during the investigation. It is not suggested that the legislature wanted to favour persons not in custody or had a special animus against persons in custody on account of which it legislated that evidence of the information given by the latter can be given against them while no evidence of the information given by the former can be given against them.

I have no doubt that the discrimination between persons in custody and persons not in custody made by Section 27 is the result of an accidental clerical error committed by the draftsman when he transferred Section 150 of the then Code of Criminal Procedure to the Evidence Act in the form of Section 27. When he copied Section 150 as Section 27 of the Evidence Act he accidentally omitted the word 'or' with the result that the phrase 'a person accused of any offence, or in the custody of a police officer' occurring in Section 150 of the Code reads as 'a person accused of any offence, in the custody of a police officer' in Section 27.

If 'or' had been deleted deliberately, the mark of punctuation just before it also should have been deleted. No other material change was made in the language of Section 150 and there was no reason for deleting the word 'or'. The original Section 150, as it stood in 1862, made admissible evidence of information received from 'a person accused of any offence'; this language was quite wide. By the amendment of 1869 it was made wider by the addition of the words 'or in the custody of a police officer,' but the effect of the omission of the word 'or' in Section 27 is to make it less wide than even the original section.

Such a retrograde step could not have been taken by the legislature in 1872 without some good reason. When no light is thrown on the reason and when it has not been shown what reason there could have been it must be held that the omission was not intentional but the result of a slip of pen. My learned brothers think that the omission was deliberate because it has existed for nearly 75 years. It is true that the omission has existed for such a long time but that it was deliberate is not the only explanation for it.

No step has been taken to remove the accidental error all this time because it did not have any adverse effect. The information, evidence of which is made admissible by Section 27, is generally received from an accused person in the custody of a police officer and, therefore, Section 27 ordinarily serves the purpose for which it was enacted and the legislature did not feel the necessity of removing the accidental error even if it had noticed it. It is now after the Constitution came into force that the omission has assumed importance but so far Section 27 has not been held to deny equality before the law and the omission has not been held to be responsible for the denial and, therefore the legislature has not taken steps to remove the error.

'The classification of the law based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose'

does not contravene the guarantee of equality before the law, as pointed out by Mckenna J. in *St. John v. New York* (1905) 201 US 633: 50 LawEd 896, In *Heath and Milligan Mfg. Co. v Worst* (1907) 207 US 338: 52 Law Ed 236, Mckenna

J. stated the law as follows at page 354 :--

'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 results in ill-advised, unequal and oppressive legislation'.... Exact wisdom and nice adaptation 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.'

According to *Frank Walters v. City of St. Louis* (1953) 98 Law Ed 680 the classification must rest on real and not feigned differences and the distinction must have some relevance to the purpose for which the classification is made. In the article 'Justice, Power and Law' in 55 *Yale Law Journal*: (1946), 336, E. N. Cairns says that some discernible distinction must be found bearing an intelligible relation to the difference in result, that inequality must make sense and that the sense of justice revolts against whatever is unequal by caprice. What Article 14 hits is classification involving 'an element of intentional or purposeful discrimination,' (per Frankfurter J. in *Snowden v. Hughes*, (1943) 88 Law Ed. 497 (503): 321 US 1), or 'obviously exercised in a spirit of prejudice and favouritism' or amounting to clear and hostile discriminations between particular persons and classes' (per McKenna J. in *Citizens' Teleph. Co. v. Fuller*, (1912) 229 US 322 (331): 57 Law Ed. 1206) or classification that is 'palpably arbitrary,' (*Toyota v. Territory of Hawaii*, (1912) 226 U.S. 184: 57 Law Ed. 180, per Hughes J-) or is a selection which is 'arbitrary and unreasonable; not merely possibly, but clearly and actually so' (per Brewer J. in *Bachtel v. Wilson* (1906) 51 Law Ed. 357: 204 U. S. 36), or is so unreasonable and extravagant as to be a mere arbitrary mandate, *Chicago v. Stages*, (1911) 222 U. S. 313: 56 Law Ed. 215.

'Delusive exactness is a source of fallacy throughout the law'; so observed Holmes J. in his dissenting judgment in *Truax v. Corrigan*, (1921) 66 Law Ed, 254: 257 U. S. 312. McKenna J. pointed out in *International Harvester Co. v. Missouri Ex. Rel. Atty. Gen.*, (1913) 234 US 199: 58 Law Ed 1276 that 'a classification is not invalid because of simple inequality' and that the fact of inequality in no manner

determines the matter of constitutionality. The equal protection clause does not restrain the normal exercise of governmental power but only abuse in the exercise of such authority and the clause is not offended again-fit simply because as the result of the exercise of the power to classify some inequality may be occasioned; per White J. in *Louisville and Neshville Railroad Co. v. Spencer Melton*, (1909) 218 U. S. 36; 54 Law Ed 921, In *Lindsley v. Natural Carbonic Gas Co.*, (1910) 220 US 61: 55 Law Ed 369, Van Devanter J. observed that

'a classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.'

'A statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear' ; *Keokec Consolidated Coke Go. v. Taylor*, (1913) 234 US 224 (227): 58 Law Ed 1288, Per Holmes J.

10. It was held in *Sioux City Bridge Co. v. Dakota County*, (1922) 67 Law Ed 340 (343): 260 US 441, that

'Mere errors of judgment do not support a claim of discrimination, but.....there must be something more, -- something which, in effect, amounts toan intentional violation of the essential principleof practical uniformity'.

The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships; see *Ohio Bell and Telephone Co. v. Public Utilities Commission*, (1936) 301 US 292: 81 Law Ed 1093.

'It may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so nonetheless that the forbidden act does not differ in kind from those that are allowed,.....'

so observed Holmes J. in *Central Lumber Co. v. South Dakota*, (1912) 226 US 157 (160-161): 57 Law Ed 164. In the case of *Keokee Consolidated Coke Co.*,

(1913) 234 US 224: 58 Law Ed 1288, Holmes J. refused to overthrow a law prohibiting persons engaged in mining coal or manufacturing iron or steel from paying their employees in kind on the ground that others besides mining and manufacturing companies may keep shops and pay their employees in cash; he said that the law actually passed must be presumed to be deemed by the legislature co-extensive with the practical need. In *Weaver v. Palmer Brothers Co.* (1925) 70 Law Ed 654 (659): 270 US 402, he said that 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 and is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. In *Selected Essays on Constitutional Law*, Vol. 1, 613, edited by Maggs, it is said that

'the Court will not adjudicate the validity of legislation solely because counsel for the complainant ingeniously unite with an argument of inseparability the suggestion that in unusual hypothetical situations the statute may encroach upon constitutional rights.'

11. The legislature possesses a wide range of discretion in classifying objects of legislation. In *Carroll v. Greenwich Insurance Co.*, (1905) 199 US 401: 50 Law Ed 246, Holmes J. stated at page 411:

'If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation.'

In the case of *Central Lumber Co.*, (1912) 226 US 157: 57 Law Ed 164, he observed at pp. 160-161:

'If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law.'

Mekemia J. in the case of *Armour and Co. v. North Dakota*, (1915) 240 US 510 (517): 60 Law Ed 771, relying upon these observations said: 'The power may be determined by degrees of evil, or exercised in cases where detriment is specially experienced.' As pointed out in *Price v. Illinois*, (1914) 238 US 446: 59 Law Ed 1400, the legislature can adjust its legislation according to the exigency found to exist and it does not exceed the bounds of reasonable discretion in classification when it legislates in respect of a part.

The court must grant the legislature the right to select the difference upon which the classification shall be based and they need not be great or conspicuous; see the case of *Citizens' Teleph. Co.*, (1912) 229 US 322: 57 Law Ed 1206. In *Rosenthal v. People of New York*, (1912) 226 US 360: 57' Law Ed 212, the failure of the legislature to extend the protection of an Act to other classes was held to afford no field for an attack upon its constitutionality. Pitney J. rejected the argument that the Act was beneficial as far as it went but did not go far enough, remarking that the Constitution does not require that all State laws shall be perfect or that the entire field of proper legislation shall be covered by single enactment.

The whole law regarding the legislature's power to classify was restated by the Supreme Court of America in *Morey v. Doud*, 354 US 457: 1 Law Ed 2d 1485. It was pointed out that a classification having some reasonable basis is not unconstitutional merely because it is not made with mathematical nicety or because in practice it results in some inequality and that reform may take one step at a time, the legislature addressing itself to the phase of the problem which seems more acute to its mind.

Frankfurter J., who dissented from the majority, observed that statutes are directed to less than universal situations and that the law reflects distinctions that exist in fact or at least appear to exist in the judgment of the legislators. Our Supreme Court in *Sakhawat Ali v. State of Orissa* : [1955]1SCR1004 , agrees that a legislation to achieve a certain object need not be all embracing & that merely because certain categories which stand on the same footing as those covered by the enactment are left out will not render the enactment void under Article 14. For similar observations reference may be made to *Radice v. New York*, (1923) 264

US 292: 68 Law Ed 690, *Railway Express Agency v. New York*, (1948) 336 US 106: 93 Law Ed 533.

('It is no requirement of equal protection that all evils of the same genus be eradicated or none at all'), *Miller v. Wilson*, (1914) 236 US 373: 59 Law Ed 628; ('The legislature is not bound.....to extend it to all cases which it might possibly reach' per Hughes J. at page 632 of the Lawyers' Edition), and *Jeffrey Manufacturing Co. v. Slagg*, (1914) 235 US 571 : 59 Law Ed 364, ('The legislature must be allowed a wide field of choice in determining the subject matter of its laws what shall come within them, and what shall be excluded', per Day J., at p. 577).

12. The guarantee of equality before the law is borrowed from the American Constitution and must be interpreted as it has been interpreted by the American Supreme Court. When our Constitution makers borrowed a phrase from America where it had acquired a certain meaning, they must be presumed to give it the same meaning in the Constitution. The pronouncements of Judges of the American Supreme Court cannot, therefore, be brushed aside on the ground that they relate to the law in the United States. That a law .that infringes the. guarantee of Article 14 is rendered void by Article 13 has no bearing on the question what kind of inequality is forbidden. Article 13 will render Section 27. Evidence Act, void only if it denied equality before the law, but if it is correct that equality before the law is not denied unless it is denied intentionally, wantonly, arbitrarily or with some mala fides. Section 27 will not be rendered void unless the legislature is found to have acted intentionally, wantonly, arbitrarily or with mala fides.

13. In the light of the above observations explaining what is hit, and what is not hit, by the guarantee of equality before the law I find that not only does Section 27 not deny in practice equality before the law but also whatever denial there is, whether in theory or in practice, was not at all intentional and does not contravene Article 14. The pertinent questions that arise are: Is there in the law contained in Section 27 an element of intentional or purposeful discrimination? Has the law been enacted in a spirit of prejudice and favouritism? Is there a clear and hostile discrimination between accused in custody and accused not in custody? Is there a clearly and actually arbitrary and unreasonable discrimination? Is the

discrimination the result of caprice or so unreasonable and extravagant as to be a mere arbitrary mandate? Is there any intentional violation of the essential principle of practical uniformity?

The answer to all these Questions is undoubtedly 'no'. What the Court is doing by declaring the section unconstitutional is acting mechanically and considering only the fact that some inequality results which has no connection with the subject-matter of the law.

Simple inequality is being held to invalidate the law, no regard is being paid either to the intention of the legislature or to the object behind the enactment of Section 27 or to the circumstances in which the legislature selected the words to be used in it and the legislature is denied the right to direct its law against what it deems to be an evil as it actually exists. One cannot find any element of hostility towards accused persons in custody on the part of the legislature. There is no abuse of the power of classification which undoubtedly vests in it. There is no apparent denial of equality before the law in the provisions of the section.

It has stood for nine years without being held to be unconstitutional on the ground of infringing Article 14. It is based on the wholesome principle of law recognized by the Anglo-American system of Criminal Jurisprudence. An incriminating statement by an accused may not be fit to be received in evidence on account of its being made to a police officer, or under duress actual or presumed, or threat, or inducement from a person or authority, or while he is in custody because on account of duress etc. he would be obliged to make any statement, true or false and the statement made in such circumstances is valueless; since it is not made simply because it is true, it is not fit to be acted upon at all.

But when it is confirmed by subsequent facts, it is *prima facie* established to be True and can now be acted upon. On account of its confirmation by subsequent facts there is some guarantee of its truth and it must be received in evidence despite the duress, threat or inducement. It may be against public policy to resort to duress, threat or inducement, but as far as administration of justice is concerned true evidence should not be shut out merely because it is obtained through measures which are against public policy.

Section 27 is thus intended to advance the cause of justice and should not be struck down as unconstitutional on the ground of mere inequality. Most of the information made admissible by Section 27 is given by accused persons in custody; therefore when the legislature after having laid down that confessions obtained by duress etc. or by a police officer or by a person other than a Magistrate from an accused person in custody should be excluded from evidence, decided in the interests of justice to make an exception in favour of the parts of such confessions, which are confirmed by subsequent facts, it enacted Section 27.

Parts of such confessions obtained from accused persons not in custody confirmed by subsequent facts should also be similarly received in evidence, but since hardly ever one comes across a case of a part of a confession made by an accused person not in custody to a police officer, or to a person in authority on account of duress, threat or inducement being confirmed by subsequent facts, the legislature could justifiably not provide for such a case. If the legislature enacted Section 27 to meet cases that occur commonly and did not go further to include other cases which can be imagined to occur but do not occur or which occur only rarely, it cannot be said to deny equality before the law.

For practical purpose the law contained in the section was all the law that was required to be enacted. It must be conceded that an irrational classification does not cease to be irrational just because one class consists of a small minority; if the legislature deliberately makes an unjustifiable exception in respect of even one person it can be knocked down as unconstitutional. But the constitution is practical and if a legislature provides for cases that arise in practice it cannot be said to make an irrational classification by not providing for other cases.

If a law is directed in a hostile manner against even an individual, it is unconstitutional. The magnitude of the class discriminated against is immaterial, but the question that arises here is different. If one who is favoured by the legislature is not likely to come into existence the legislature cannot be accused of favouritism. A clear case of infringement of the guarantee of equality before the law should be made out. In the case of *Ram-kishan* : 1955 CriLJ196 the Supreme Court enforced the provisions of Section 27.

It is true that the constitutionality of it was not challenged before the Supreme Court, but had there been any glaring injustice, or clear arbitrariness, or obvious abuse of legislative power in its provisions it would have refused to enforce them even in the absence of a challenge.

14. If the view expressed by Mahmood J. in the case of Babu Lal ILR 6 All. 509 that Section 27 is an exception only to Section 26 be correct (I have already shown that it is not correct), no inequality is created by the section at all; since Section 26 deals with only accused persons in custody, the exception to it could deal only with them and could not deal with accused persons not in custody. The legislature could not be said to be bound to make an exception to Section 25 similar to the exception to Section 26; an inequality arising out of the legislature's failure to embrace in the legislation all possible objects or persons is not unconstitutional.

15. In 1872 the legislature had the power to make any distinction between one person and another even though similarly situated with regard to the subject-matter of the law enacted by it; it was not required to make the distinction rationally or reasonably. The legislature might have had actually no reason whatsoever for distinguishing between an accused person in custody and an accused person not in custody, but that would not justify our striking down the section as unconstitutional; if any rational connection between the admissibility of the evidence received from an accused person and the question whether he was then in custody or not can be imagined, the section must be upheld.

A rational basis for the division of accused persons into two classes, (1) of those in custody and (2) of those not in custody for the purpose of deciding whether statements made by them and confirmed by subsequent facts should be received in evidence or not can be found. There is a material difference between a statement made by an accused in custody and that made by an accused not in custody and it is that the confirmation of a statement made by the former is of greater value than the confirmation of that made by the latter.

An accused in custody has, after making the statement, no opportunity of manipulating its confirmation by subsequent facts, but the same cannot be said of

a statement made by an accused not in custody. An accused not in custody may first be made to manufacture evidence required for confirmation of a fact and then to make a statement about it; in such a case the confirmation of, his statement is useless. Hence a statement made by him should not have the same value as would be attached to a statement made by an accused in custody, who cannot be made to manufacture evidence leading to its confirmation,

This difference between the two statements cannot be said to be so irrational or unreasonable as not to justify the differential treatment meted out to them in the matter of their admissibility in evidence. So long as it is not possible to say that this difference in the values of the two statements has no existence at all, or that it has no rational connection whatsoever with the question of their admissibility in evidence, it is not possible to strike down Section 27 as unconstitutional.

If there is a rational explanation for the difference it is not for a court to sit in judgment over the legislature and hold that in spite of the rational connection no difference should have been made or that arguments could be advanced against such differentiation. It is not for this Court to say that Section 27 is ill-advised or results in inequality. 'Court should be very cautious in condemning what legislatures have approved'; this was the warning given by Holmes J. in the case of *Carrell* (1905) 199 U. S. 401: 50 Law Ed 246. In *Salsburg v. State of Maryland* (1953) 346 US 545: 98 Law Ed 281 Burton J. observed at p. 288 of L. E.:--

'We do not sit as a super-legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.' '

I do not find the provisions of Section 27 so palpably in violation of the constitutional rights of accused in custody as to require striking them down as unconstitutional. The discrimination complained of by Shri P. C. Chaturvedi is not dissimilar to the one ignored in *Mobile, J. and K. C. R Co. v. Turnipseed* (1910) 219 U. S., 35; 55 Law Ed 78.

15a. I agree with my learned brothers that the contention of the learned Advocate-General that the moment an accused gives information, such as is referred to in Section 27, to a police officer he must be deemed to have come in his custody cannot be accepted. Section 27 contemplates that the person must be in the custody of a police officer before he gives the information; even if on account of his giving the information he is deemed to have come in the custody of the police officer, he cannot be said to have come in his custody with retrospective effect. He cannot be deemed to have come in his custody merely because he is prepared to give information. The words 'in the custody of a police officer' in Section 27 would be rendered superfluous if the very act of giving the information amounted to his being in custody with retrospective effect.

16. The plain language of Section 27 is that the person giving the information must be an accused and that he must be in the custody of a police officer. Monir on the Principles and Digest of the Law of Evidence, fourth edition, Volume I, 183., expresses a doubt about the correctness of this interpretation; he sees no reason why a statement of an accused person not in the custody of a police officer, contained in a confession made to a police officer, should not be receivable in evidence on the same ground on which such a statement made by an accused person in custody is receivable.

He referred to the observation of Rankin C. J., in *Durlav Namas-udra v. Emperor* : AIR1932 Cal297 that the section is paradoxical and thought that the legislature might have used the expression 'person accused of any offence in the custody of a Police Officer' as a compendious mode of describing the persons whose confessions are excluded under Sections 24, 25 and 26 and that the object of the section was to declare that parts of the confessions which are excluded under any of these three sections become admissible if they are confirmed by subsequent facts.

Then he proceeded to observe that since Sections 24, 25 and 26 are themselves an exception to Section 27, Section 27 cannot possibly mean that the statement of an accused person confirmed by subsequent facts cannot be proved unless he was in custody at the time of making it. If this interpretation of the section by Monir

is correct, there is no classification of accused persons into two classes, (1) of those in custody of a police officer and (2) of those not in custody of a police officer and no question arises of infringement of Article 14.

17. No authority dealing with the questions referred to us has been cited except *Brijesh Kumar v. State* : AIR1958 All514 , decided by my brothers Roy and Chowdhry. Sri P. C. Chaturvedi had contended before our brothers Roy and Chowdhry that Section 27 offended against Article 14 by distinguishing between accused persons in custody and those not in custody. My learned brothers repelled the argument by observing that it applies to all accused persons in custody. Though I agree with the decision of my learned brothers, I respectfully disagree with the reason given by them. The reason really begs the question. The question before them was why this distinction between 'accused persons in custody' and 'accused persons not in custody' and that has not been answered.

The question why class A is distinguished from class B is certainly not answered by saying that there is no distinction inter se among members of class A or of class B. The complaint is not that the law applicable to class A does not apply to all members of it but is why they are distinguished from members of class B. This reply that the impugned law applies to all persons of the class and, therefore, does not offend against the principle of equality before the law has been given by several Judges in the past, but I confess my inability to appreciate it. I also do not accept the argument of the State Counsel that the classification obnoxious to Article 14 is classification of men and not of situations and that classification made in Section 27 is of situations and not of men.

The law always deals with men; in its very nature it cannot deal with inanimate things, such as a situation or a position. There cannot be classification of situations without reference to men placed in the situations. What the learned State Counsel calls a classification of situations is really a classification of men in different situations. If a law makes such a classification in denial of equality before the law, it is certainly unconstitutional.

18. So far I have considered Section 27 of the Evidence Act. If it is constitutional, there is nothing unconstitutional in Section 162(2) except in regard to admissions

of accused persons not in custody to a -police officer in the course of investigation and confirmed by subsequent facts. The legislature excepted only the statements governed by Section 27 from the general prohibition contained in Section 162 not with any idea of hostility towards accused persons in custody or with any idea of favouring accused persons not in custody.

It has already been explained how the exception in respect of Section 27 was made. The legislature made the exception simply to restore the old law. When this was done, the accidental error committed by the omission of the word 'or' while enacting Section 27 was not noticed; otherwise either Section 27 would have been amended or some more exception would have been made in Section 162(2). The legislature seems to have thought that by making an exception in respect of Section 27 it was restoring the old law. As the information made admissible by Section 27 is generally given to a police officer in the course of investigation, Section 27 would fail to serve the useful purpose for which it was intended if the general prohibition of Section 162 were to prevail.

When after the decision by the Privy Council the legislature found that the general prohibition prevailed over the provisions of Section 27 with the result that Section 27 was rendered practically useless, it had to intervene and made an exception in its favour, It should have made a similar exception in respect of admissions of accused persons not in custody confirmed by subsequent facts. They were excluded from the general prohibition contained in the pre-1872 law. Section 162(2) was enacted because of the decision of the Privy Council in the case of *Pakala Narayana Swami* , which related to Section 27, and, therefore, the legislature made only statements governed by Section 27 an exception. The problem that it was faced with was of Section 27 becoming useless on account of the general prohibition; so only that problem was solved.

It was not faced with any problem in respect of admissions of accused persons not in custody and confirmed by subsequent facts; therefore, it did not consider the question of making an exception in respect of them also. There was thus no intention to discriminate unreasonably between accused persons in custody and those not in custody and whatever inequality results by the enactment of Section

162(2) is purely accidental and unintended, Section 162(2) cannot be declared void because the legislature did not act with exact wisdom and did not make meticulous adjustments when incorporating Section 27 in the exception. Just as Section 27 is beneficial so is Section 162(2) and we must be slow in striking down the latter as unconstitutional.

18a. Section 162, Cr. P. C., empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and every person so examined is bound to answer all relevant questions other than questions the answers to which would have a tendency to expose him to a criminal charge. Any person, whether supposed to be an offender or to be a witness, can be examined under Section 161 and is bound to answer all questions. Section 162 deals with a statement made by any person to a police officer in the course of an investigation.

The learned Advocate-General argued that the section should be so interpreted as not to deal with a statement made by an accused. The reason given by him is that in order to prevent violation of the guarantee against self-incrimination conferred by Article 20(3) of the Constitution, the word 'person' used in Section 162 should not be deemed to include an accused person. The argument is unsustainable. Section 161(2) gives a sufficient protection to an accused person by excusing him from the obligation to answer a question, the answer to which would have a tendency to expose him to a criminal charge. Moreover though every person interrogated is bound to answer all questions, he is not bound to answer them truly and no person can be prosecuted for giving a false answer.

The words 'any person supposed to be acquainted with the facts and circumstances of the case' include all persons whether they themselves commit the offence or not; they include not only witnesses but also those responsible for the offence. A person who commits an offence is as much acquainted with the facts and circumstances of the case as, if not more than, an eye-witness. It is because the words include persons responsible for the offence also that Sub-section (2) of Section 161 has been enacted. The words 'any person' in Section 162 include, therefore, persons who have committed the offence. This

interpretation is confirmed by the enactment of its Sub-section (2); there would have been no necessity of it if a statement made by a person who had committed the offence were not within the scope of Section 162.

Finally in order to sustain the constitutionality of a law our jurisdiction extends to selecting that meaning of it which is consistent with its constitutionality but does not go further to authorise our imposing upon it a meaning which it is not capable of bearing. We have the jurisdiction to select one of the two or more meanings which a law is capable of bearing but we have no jurisdiction to impose a meaning which it is not capable of bearing; that would be legislating the law in the guise of interpreting it. Our duty is not to avoid the unconstitutionality of a law at all cost.

19. The learned Advocate General next argued that there is no necessity to declare that Section 27 is void and that it would be enough to hold that the statement made by Deoman appellant is not admissible. The statement is admissible under Section 27; what Deoman contends is that the section itself is void and, therefore, the statement cannot be received in evidence. We must, therefore, go into the question whether the section is void or not. Unless we hold that it is void the statement must be received in evidence. We are undoubtedly concerned with the question whether the statement should be received in evidence or not but the question cannot be answered in the negative without finding that Section 27 is void.

If we hold that the statement cannot be received in evidence we must give the reason for it. One of the questions that have been referred to us is directly about the section being void.

20. The statement of Deoman confirmed by subsequent facts does not amount to a confession or even to an admission of a fact in issue. It is, therefore, at the most an admission which would have been receivable in evidence as such even if Section 27 did not exist. So it can be contended that he is not aggrieved by the enactment of Section 27 and has no right to demand that it be declared void. Article 13 simply makes a law void and though its effect is automatic, in practice the law would remain in operation until it is declared by a court to be void. It is well established that a court does not declare a law to be void except at the instance of

a person aggrieved by it.

The matter, however, does not end with considering the constitutionality of Section 27; we have also to consider the constitutionality of Section 162(2). The statement of Deoman though admissible in evidence under both Sections 21 and 27, Evidence Act, is actually received in evidence simply because it is admissible under Section 27; any admission admissible under Section 21 is hit by the general prohibition contained in Section 162 and would not be received in evidence though admissible. A statement admissible in evidence under Section 27 is removed from the scope of the general prohibition and can be received in evidence. Since the statement of Deornan, if it can be received in evidence can be received in evidence only because it is admissible under Section 27; the question of constitutionality of that section has to be considered at his instance.

21. My answer, therefore, to the each of the two questions is in the negative.

22. I agree with my learned brothers that if Sections 27 and 162(2) deny equality before the law they would become void in toto. The whole Section 27 contains one law and not several laws which can be severed from one another. It is the law contained in the whole section that would have offended against Article 14 and the whole would have become void. It permits certain evidence in certain circumstances; the circumstances are cumulative and all must exist in order to make the evidence receivable. One of the circumstances is that the person giving the information must be in the custody of a police officer. Because the question whether the evidence of information received from a person should be received or not does not depend upon whether he is in custody or not, the receipt of evidence of the information had from a person who is in custody, whereas evidence of the information given by a person not in custody would not be received, is held to be denial of equality before the law.

It is the use of the words 'in the custody of a police officer' that brings about the invidious discrimination, but the law that can be said to deny equality before the law is not those words but the provision contained in the whole section. The words standing by themselves make no sense at all. One cannot have a law without an operative part; there must be at least a subject and a verb otherwise there would

be no sentence. The words may be the cause of the invidious discrimination but the power that is given to courts under Article 13 is to declare the law void and not to reform it by removing the cause which makes it void. Consequently the words cannot be excised from the section. There are two ways of removing an invidious discrimination in a law, one by excising the offending words and thereby making the law more extensive in its scope and the other by not having the law at all.

It is for the legislature to choose either of the ways if the court holds the discrimination offensive; the Court cannot make this choice by declaring that only the offending words are 'void.' and should be treated as non-existent and cannot compel the legislature to do so. When there is only one law, the question of severability simply does not arise. It is only when there are two or more laws that the question of severing the void law from the rest can arise. There is no question of severability if the legislature itself makes a provision of law not severable from the rest of the provision, as for instance by making it dependent on the rest of the law. In the present instance the offending words and the rest of the section are interdependent on each other and, therefore, neither can be severed from the other by the Court. If the offending words are to be removed it can be done only by the legislature.

Mukerji, J.

23. I have read with care the opinion of my brother Srivastava and I am in general agreement with the reasons which he has given for his opinion with which I concur. I do not consider it necessary, therefore, to state my reasons separately except saying that my answer to the questions formulated for our answer is as follows:

(1) That Section 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 Article 14 of the Constitution and is unenforceable in its present form.

(2) That Sub-section (2) of Section 162 of the Code of Criminal Procedure in so far as it relates to Section 27 of the Indian Evidence Act is void in terms in which Section 27 itself is void.

Vastava, J.

24. Deoman Upadhyaya was convicted by the Sessions Judge of Gyanpur, district Yaranasi, under Section 302 i. P. C. for the murder of Smt. Sukhdei, and was sentenced to death. He was alleged to have killed the lady in the night between the 18th and 19th of June 1958 while she was sleeping in front of her house in village Anand Dih. No direct evidence was available to prove that the appellant had committed the murder. Only certain circumstances were relied upon, the principal among them being that in course of the investigation while the appellant was in police custody he had given some information leading to the discovery of a blood-stained gandasa lying in a tank of the village. The statement was sought to be proved under Section 27 of the Indian Evidence Act. In the appeal against his conviction by the appellant one of the points raised by his learned counsel was that as Section 27 of the Indian Evidence Act was ultra vires, the prosecution could not take advantage of it for proving the alleged statement of the appellant against him. The Division Bench before which the point was raised felt that it was a point important enough to merit consideration by a Full Bench. It therefore referred to a Full Bench the question

'Whether Section 27 of the Indian Evidence Act is void because, it offends against the provisions of Article 14 of the Constitution?'

25. The question was argued before a Full Bench consisting of Hon'ble Mootham, C. J., Hon'ble Dayal and Hon'ble Mukherji, JJ. on the basis that as the statement in question amounted to a confession it would have been inadmissible but for Section 27 and if that section was invalid the appellant was entitled to have that piece of evidence excluded. The learned Judges, however, took the view that the statement did not in fact amount to a confession and could therefore be proved without the aid of Section 27. They therefore returned the reference with the remark that the question referred to them did not arise in the circumstances of the

case and it was not necessary to answer it. On the ground that he had not raised the point before the Division Bench the learned counsel for the appellant was not permitted to argue that the question would arise even if the statement did not amount to a confession because but for Section 27 of the Indian Evidence Act, whose application has been saved by its second sub-section the provisions of Section 162(1), Cr. P. C. would have prohibited its being used against the appellant.

26. When the case went back to the Division Bench the learned counsel for the appellant raised the point which he had not been allowed to raise before the Full Bench and succeeded in persuading it to refer again to a Full Bench the two questions which are now before us for consideration. They are :

'(1) Whether Section 27 of the Indian Evidence Act is void because it offends against the provisions of Article 14 of the Constitution; and

(2) Whether Sub-section (2) of Section 162 in so far as it relates to Section 27 of the Act is void?'

27. For correctly appreciating the contentions which have been raised in connection with these impugned provisions it is necessary to bear in mind not only their exact import but also their legislative background and the setting in which they appear in the Codes of which they form part.

28. Till the enactment of the Indian Evidence Act in 1872, the rules which were enacted as sections 25, 26 and 27 of the Act were not considered to be rules of evidence but were treated as rules relating to the behaviour of police officers while investigating cases. Repealing earlier rules on the point rules relating to the guidance of police-officers were consolidated first, in Regulation XX of 1817. When the Criminal Procedure Code of 1861 was enacted the earlier Regulation was not expressly repealed but the rules which were intended to check the malpractices of police-officers in extorting confessions were enacted in Sections 148, 149 and 150 of the Code of 1861. Subsequently the provisions of Regulation XX of 1817 were expressly repealed by Act 17 of 1862. Section 148 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 whilst 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 then laid down:

'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.'

By Act VII of 1869 Section 150 of the Code of 1861 was substantially amended and became:

'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 admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence.'

Then came the Evidence Act of 1872 and Sections 148,149 and 150 Cr. P. C. of 1861 were lifted from that Code and enacted as Sections 25, 26 and 27 of the Evidence Act. In their new form the sections stood like this and that is how they stand today:

'25. No confession made to a police-officer shall be proved as against, a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

27. 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.'

29. These sections form part of the second Chapter of the Evidence Act which deals with relevancy of facts. Admissions which are also relevant facts are dealt with in Sections 17 to 23 of the Chapter. Confessions which are admissions of guilt are dealt with in Sections 24 to 30 of the Chapter. Section 24 excludes from admissibility of a confession to whomsoever made provided it is caused by inducement, threat or promise, while Section 25 is wider inasmuch as it deals with confessions made to any one, Section 26 deals with the limited class of confessions which are made to police-officers and prohibits their being proved against a person accused of any offence. The section does not cover confessions not made to a police officer even if they are made while the maker is in the custody of a police-officer or are made in the presence of such an officer. It also does not prohibit their use, if relevant, in proceedings other than proceedings against a 'person accused of any offence. In some respects the next Section 27 is wider than Section 26 but in other respects it is narrower than it, Its application is limited to confessions made by persons while in the custody of a police-officer. Whether the confession is made to a police officer or to any one else and whether it is made in the absence of a police-officer or in his presence are immaterial. If it is made while the person is in the custody of a police-officer it cannot be used against the person making it unless it is made in the immediate presence of a Magistrate. The section does not deal at all with confessions made while a person is not in the custody of a police-officer.

30. The rules enacted in these sections depart substantially from the English practice where confessional statements made before police-officers are not necessarily excluded from evidence. The departure was necessitated by the fact that police-officers in India often abused their powers for the purposes of extorting confessions. The provisions were inserted, as was observed by Stephen in his 'Introduction to Indian Evidence Act' at page 165:

'In order to prevent the practice of torture by the police for the purpose of extorting confessions from persons in their custody, in the hope of professional

advancement.'

31. The same is the opinion of Markby who remarks in his book on Evidence at p. 27;

'The ground of exclusion in these sections is not irrelevancy. It is, that it is necessary to protect persons charged with crimes from being exposed to ill treatment by the police, who in their zeal to procure a conviction would be tempted to endeavour to extort a confession. The idea is that by rendering the confession inadmissible in evidence, the temptation is taken away.'

32. As a general rule confessions made to police-officers or while a person was in police custody were looked upon with suspicion and were not to be proved. It was, however, felt that the exclusion of statements made before police-officers may in certain cases lead to injustice and make investigation of crimes unnecessarily difficult. Information given by an accused person to a police-officer may sometimes lead to the discovery of facts, e. g. dead body, the clothes of the deceased, the stolen goods, instruments of crimes, etc. In such cases if a discovery was made in consequence of the information at least the portion of the information which was corroborated by the discovery could not be said to be wholly false and could therefore be allowed to be proved without any danger of injustice being done to the accused. The Legislature therefore enacted the succeeding Section 27 as an enabling provision for permitting the use of such statements as actually led to such discoveries. The purpose of enacting Section 27 as stated by Sir John Beaumont in AIR 1947 PC 67 is:

'The section (S. 27 Indian Evidence Act) seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence;.....'

33. An analysis of the section will make its following features clear:

(1) The opening words 'Provided that' show that it was being enacted as an exception to the previous rule or rules.

(2) It permits the proof of all kinds of information whether amounting to a confession or not. In this respect the section covers a field not included in Sections 25 and 26. Those sections are confined to confessions. Informations not amounting to confessions are not dealt with in those sections. Such informations not amounting to confessions are, however, clearly admissions and can therefore be proved as such under Section 21, whether they lead to the discovery of any fact or not. The portion of the section which declares such information admissible thus only reiterates what has been already provided under Section 21.

(3) The person giving the information contemplated by Section 27 must, however, he

(a) a person accused of any offence and

(b) in the custody of a police-officer and not in the custody of any one else. If these two features are not present the statement of the person cannot be used with the help of Section 27. Whether it can be used under any other provision of the Evidence Act, e. g. Section 21, is a different question.

(4) Some fact must in fact be discovered in consequence of the information received and some one must depose that the fact was discovered in consequence of the information.

(5) With the help of Section 27 the whole of the information given cannot be used. The section permits the use of only so much of the information as relates distinctly to the fact thereby discovered. What portion of the statement relates distinctly to the discovery will necessarily be a question of fact to be decided in each case.

34. As the section had been enacted as an exception to the earlier rule or rules the question arose whether it was an exception to Section 26 only or to Section 25 also. A confession if made to a police-officer while the person making it was in the custody of the police was hit by both Sections 25 and 26 and if Section 27 was an exception only to the latter section and not to the former even if the confession had led to the discovery of any fact it could not be proved with the help of Section 27 because the bar of Section 25 would still remain. The question was considered by

a Full Bench of this Court in the case of ILR 6 All 509. Mahmood, I. was of opinion that Section 27 was an exception to Section 26 alone but the majority of Judges who constituted the Full Bench were of the contrary opinion and laid down that the section was an exception both to Sections 25 and 26. In 74 Tnd App. 65: (ATR 1947 PC 67) (supra) their Lordships of the Privy Council held that Section 27 was an exception to Section 26 but did not consider whether it was an exception to Section 25 also or not. But since then the Supreme Court has settled the controversy by accepting in : 1955 CriLJ196 the position that Section 27 is an exception to Sections 25 and 26 both. It is therefore no longer open to any one to say that Section 27 is not an exception to Section 25 also. On the basis of Sections 25, 26 and 27 of the Indian Evidence Act therefore the position which emerges in connection with statements distinctly leading to the discovery of facts, is that if such a statement is made by an accused person in the custody of the police and amounts to a confession it escapes both the bars provided by Sections 25 and 26 and can be proved in evidence against the person making it. If, however, that Very statement is made by the same person while not in such custody the help of Section 27 is not available, and the bar of Section 25 remains with the result that it cannot be used in evidence against him. If the statement does not amount to a confession the prohibitions in Sections 25 and 26 do not apply to it and it can be proved as an admission without recourse to Section 27. That section does not affect its admissibility in any manner.

35. All statements whether amounting to con-fessioiis or not made to a police-officer by any person in course of an investigation under Ch. XIV Cr. P, C. are, however, hit by Sub-section (1) of Section 162 Cr. P. C. as under the provisions of that sub-section such statement cannot be used for any purpose at any enquiry or trial in respect of the offence under investigation. The object with which Section 162 Cr. P. C. was enacted appears to be similar to that which led to the enactment of Sections 25 and 26 of the Indian Evidence Act. It was to ensure that the accused are not prejudiced in any way by the improper use of statements recorded loosely or inaccurately by the police during investigation As was observed in Emperor v. Aftab Mohd. Khan : AIR1940 All291 , the object is to protect the accused both from overzeal-ous and untruthful witnesses. Statements recorded during investigation are not expected to be accurate or complete. They

are not allowed to be signed by the persons making them. The tendency of investigating officers of creating evidence to support the charges which they intend to bring against accused persons had to be checked and guarded against. It was therefore provided that statements recorded during investigations could be used only for 'very limited purposes mentioned in Section 162 itself. On account of the desirability of statements leading to discovery of facts being allowed to be proved against accused persons however, the exception enacted in Section 27 of the Indian Evidence Act was engrafted on Section 162 Cr. P. C. also and in the Code of 1882 it was expressly stated at the end of the section that:

Nothing in this section shall be deemed to affect the provisions of Section 27 of the Indian Evidence Act 1872.'

When, however, the Code was re-enacted in 1898 this provision was somehow dropped. No question of any conflict between Section 27 of the Indian Evidence Act and Section 162 Cr. P. C., however, arose for some time because it was thought that Section 162 did not apply to statements made by accused persons at all. The view taken was that the words 'any person' used in Sub-section (1) of Section 162 did not include an accused person. This view was, however declared to be incorrect by their Lordships of the Privy Council in , where they held that the words 'any person' included a person whether he was an accused when he made the statement or become an accused later. The question then arose whether Section 27 of the Indian Evidence Act overrode Section 162 Cr. P. C. or whether the latter was to be followed in preference to the former. If Section 162 was to prevail statements of accused persons made during investigation to a police-officer distinctly leading to discovery of facts could not be proved but if Section 27 was to be followed the proof of such statements becomes permissible. The question was considered by a Full Bench of this Court in Baldeo v. Emperor : AIR1940 All263 and it was held that Section 162 Overrode the provisions of Section 27 of the Indian Evidence Act. The Lahore and the Calcutta High Courts were of the same view; vide Hakam Khuda Yar v. Emperor, AIR 1940 Lah 129 and Naresh Chandra Das v. Emperor : AIR1942 Cal593 .

The Legislature then stepped in to set at rest this conflict and amended the second clause of Section 162 by introducing at its end the words 'or to affect the provisions of Section 27 of that Act.' The result of the amendment was that statements which came both under Section 162 Cr. P. C. and Section 27 of the Indian Evidence Act became admissible against the maker subject to the limitations prescribed by the latter section, and the help of Section 27 of the Evidence Act became available to the prosecution for proving such statements against accused persons in spite of the bar of Section 162.

As Section 162 Cr. P. C. applied to confessional as well as non-confessional statements in view of it even statements not amounting to confessions could not be proved in spite of the fact that they were admissible as admissions. With the aid of Section 27 of the Evidence Act, however, portions of such non-confessional statements which were of the nature contemplated by the section could be proved. Without that help even these portions could not be used.

36. In the case before us the appellant while he was in police custody is alleged to have given information leading to the discovery of a bloodstained gandasa lying in a tank of the Village. The statement is sought to be proved with the help of Section 27 of the Indian Evidence Act as all the essentials required by that section are fulfilled by it. The appellant, however, objects to the statement being proved against him. It is contended on his behalf that the statement is alleged to have been made by him to a police-officer in course of investigation while he was in police custody. It is said to have led to the discovery of the gandasa. The statement either amounted to a confession or did not amount to one.

If it amounted to a confession its use was prohibited by Sections 25 and 26 of the Evidence Act and it could be proved only with the help of Section 27. Even if it did not amount to a confession its use was prohibited by Section 162 Cr. P. C. and to escape that bar the prosecution would again have to seek the aid of Section 27. But for section 27 therefore it will not be possible for the prosecution to prove the statement against the appellant. The contention is that Section 27 is void as it offends Article 14 of the Constitution and if that section goes and its aid is not available the statement will have to be excluded from evidence altogether.

37. It is not denied that Section 27 enacts a very salutary rule and that there is nothing inherently wrong with the principle on which it is based. Keeping in view the conditions prevailing in this country and particularly the behaviour of police-officers while investigating offences the Legislature enacted in Section. 25 and 26 of the Evidence Act and Section 162 Cr. P. C. the general rule that confessions made before police-officers or statements made during investigation to such officers, should not be allowed to be proved against the accused persons. Section 27 of the Evidence Act was, however, enacted as an exception to the rule and statements which led to the discovery of facts afforded a guarantee of their correctness.

So far no reasonable exception can be taken to the provision. A condition was, however, attached to the admissibility provided for in the section by the introduction of the words 'in the custody of a police-officer.' On account of this stipulation statements contemplated by the section made by persons in custody can be proved but statements of persons not in custody cannot be proved though both may be statements made by accused persons and both may satisfy the test of having led to the discovery of facts. The argument is that this is an unreasonable classification which has no connection whatsoever with the object of the enactment.

According to the learned counsel for the appellant on account of this unjustified discrimination between persons in custody and persons out of custody while making statements the whole section becomes void as it infringes the guarantee of equal protection before the law contained in Article 14 of the Constitution, It is therefore urged that Section 27 of the Evidence Act must be struck down as in conflict with the fundamental right guaranteed by the Constitution and with it must go the provision in the second sub-section of Section 162 Cr. P. C. according to which nothing in that section is to affect the provisions of Section 27 of the Evidence Act.

38. It is unnecessary to refer to the cases of Other countries because the principles which have to be borne in mind while testing the validity of a legislation on the touch-stone of Article 14 of the Constitution have now become well

established by the decisions of the Supreme Court. As it observed in *Kedar Nath v. State of West Bengal* : 1953 CriLJ1621

'The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purpose of legislation.'

39. In *Budhan Choudhry v. State of Bihar* : 1955 CriLJ374 , the tests of permissible classification were laid down in these words:

'In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes

persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act) *Tinder consideration*.'

In order to answer the question whether Section 27 of the Indian Evidence Act contravenes Article 14 of the Constitution therefore we have to see in the first place whether it envisages any classification at all and secondly if it does whether the classification has any reasonable nexus with the object of the enactment.

40. That the section divides accused persons giving information leading to discovery of facts into two classes appears to be obvious. In the first class fall those persons who are in custody when they give the information and the other class includes those who are not in the custody of the police at the time. It is the statement of a person belonging to the former class alone that can be proved. The statement of a person belonging to the latter class cannot be proved even though it may have led to the discovery of more important facts of a much more far-reaching character.

The law relating to the admissibility of statements leading to discovery of facts is therefore different in the case of accused persons in custody from what it is in the case of accused persons not in custody. Simply because he happened to be in custody when he made a statement leading to the discovery of the corpse of the deceased, A may be hanged on the basis of the statement, B, a co-accused of his who made a similar statement leading to the discovery of the instrument of murder, will, however, be allowed to escape because he was a free agent when he made the statement. It does not need much argument to show that a differentia has been introduced between accused persons on the basis of their being in or out of custody.

41. The object of the enactment of Section 27 has already been pointed out. The purpose was to relax to a certain extent the prohibitions contained in Sections 25 and 20 of the Indian Evidence Act and Section 162 Cr. P. C. and to permit the prosecution to prove against an accused person that limited part of his statement made to a police-officer while in custody in respect of which there was some guarantee of truth because it had led to the discovery of facts.

42. The question is whether the differentia, which distinguishes the two classes of persons contemplated by Section 27, viz. whether they were or were not in custody, when they made the statement leading to the discovery of facts, is an intelligible differentia and whether it had any rational relation to the object with which Section 27 was enacted. I have given anxious consideration to this question. To me the ground of distinction does not appear to be intelligible at all. In spite of my best efforts I have not been able to discover any nexus between that differentia and the object of the section.

Whether at the time of the making of the statement which leads to the discovery of facts the accused was in custody of the police or was a free agent appears to be entirely immaterial so far as the degree of truth or reliability which is to be attached to the statement: is concerned. The guarantee of correctness is furnished not by the fact that the accused was in custody when he made the statement but by the fact that some facts were actually discovered as a result of the information given.

In fact the information given by a person who is a free agent is more likely to be genuine than that given by one who is under arrest and in respect of whom there is a possibility of his being subjected to police influence and third degree methods. The basis of distinction thus appears to be purely arbitrary and does not in any way help in attainment of the object for which the section was enacted. The absurdity created by this distinction was noticed by Rankin, J. in : AIR1932 Cal297 , when he observed :

'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 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.'

No reasonable basis can therefore be assigned to the distinction created between the two classes contemplated by Section 27 and the distinction has no nexus at all with the object with which the section was enacted.

43. The learned Advocate General, who appeared on behalf of the State to support the legislation, did not try to suggest that the distinction was based on any reasonable ground. He also did not attempt to support it on the ground on which the validity of the section had been upheld in : AIR1958 All514 . The consideration which appears to have weighed with the learned Judges in that case was to quote their own words:

'The law contained in Section 27 deals equally with all those who are placed in the circumstance envisaged by that section. It does not make any distinction between them. It would not be open to the charge of denial of equal protection on the ground that it has no application to other persons.'

With due deference it may be pointed out that the real point was being missed. Whenever there is classification in legislation and a law is enacted for a particular class it will naturally apply to all the persons falling in that class. To that extent

there will certainly be no discrimination. The inequality and discrimination will really arise because the same law will not be made applicable to persons falling outside the class without there being any reasonable ground for distinguishing them from the persons belonging to that class.

44. The learned Advocate General would have very much liked to support the validity of Section 27 of the Evidence Act on the ground that it contained no classification at all as it had been enacted only as an exception to Section 26 which preceded it in the Act and both the sections dealt only with cases of persons in custody. In view of the pronouncement of the Supreme Court in the case of : 1955 CriLJ196 , however, he conceded that it was not open to him to take that course, Accepting therefore the position that Section 27 was an exception to Sections 25 and 26 both so far as confessions were concerned, he laid emphasis on the presumption of constitutionality which Was there in favour of every legislation and urged the following two contentions in support of the validity of Section 27 :

(1) For all practical purposes Section 27 did not create any classification. Any person who was accused of any offence and who gave information leading to the discovery of any fact was bound in almost all cases to be in the custody of a police-officer. It could not therefore be said that there were two classes of persons making statements contemplated by the section -- one class consisting of persons in the custody of police-officers and the other class consisting of persons not in such custody. When there was no classification at all the question whether the classification was reasonable and was In any way connected with the object of the section did not arise. He laid stress in this connection on the word 'custody' and urged that it had a very wide meaning.

(2) That in case it was held that the section did make a distinction between persons in custody and persons not in custody, in view of the form in which the section stood at the time when it was lifted out of the Criminal Procedure Code of 1861 as amended in 1869 and introduced in the Evidence Act of 1872 the section should be interpreted as if the expressions 'a person accused of any offence' and 'in the custody of a police-officer' were separated by the conjunction 'or'. He

contended that if so interpreted it will be found that whether a person was in custody of a police-officer or not if he was accused of any offence and gave the information of the nature contemplated by Section 27 the information could be used against him. In this connection he stressed that the word 'accused' had a wide meaning and did not necessarily connote a person who was standing his trial.

45. So far as non-confessional statements leading to the discovery of facts were concerned, his contention was that they could be proved as admissions even without the aid of Section 27, and he pointed out that that portion of the section only restated the law which was to be found in some of the other sections of the Act and therefore there was no question of that part of the section being void on any account.

46. The presumption of constitutionality is certainly there but as was observed by Das, C. J. in *Ram Krishna Dalmia v. S. R. Tendolkar* : [1959]1SCR279

'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 holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.'

In the present case there is nothing on the face of the enactment itself (Section 27 of the Indian Evidence Act) to show that there is any reasonable basis for the distinction made in that section between persons in custody and not in custody; nor has anything been brought to our notice on which the classification can be reasonably regarded to be based. True as well as false information can be given both by persons in custody and not in custody. The test of the reliability of the statement will depend not on whether the person is in custody or a free agent but on whether a fact is actually discovered as a result of the information. Much advantage cannot therefore be derived in the present case from the presumption of constitutionality.

47. Whether a person is in police custody or not is essentially a question of fact. It is true that police custody does not necessarily mean custody after a formal arrest; nor does it necessarily imply physical control. Submission in some form by the person concerned is, however, necessary and the intention to submit must be there. The police-officer to whose custody the submission is made must be capable of and also be in a position to accept the submission and to exercise some form of surveillance or control on the movements of the person.

But even after giving the widest possible connotation to the word 'custody' it will have to be conceded that the distinction between a person in custody and a person out of custody will remain and cannot be altogether obliterated. It is therefore impossible to accept the proposition advanced by the learned Advocate General that in every case where a person makes a statement before a police-officer leading to the discovery of some facts the person must necessarily be held to be in the custody of that officer at the time when the statement is made.

It is not at all difficult to think of cases where such a statement can be made by persons not in custody or persons who cannot be deemed to be or even taken in custody. For instance, such a statement can be made by a person through a letter sent from a distance. It can also be made by a person accused of a non-cognizable offence which has been ordered to be investigated but in connection with which the police-officer has no power to arrest.

The two conditions mentioned in Section 27, viz. that the person making the statement must be accused of some offence and that he must be in police custody, have therefore always been considered to be necessary for the application of the section. The presumption is that no word in an enactment is unnecessary or redundant. If every person making a confessional statement leading to the discovery of a fact was to be deemed to be in custody why should the words 'in the custody of police-officer' have been put in the section at all

Reliance was placed in this connection on certain observations made in the case of *Santokhi. Bel-dar v. Emperor*, JLR 13 Pat 241 : (AIR 1933 Pat 149). The learned Judges gave a wide interpretation to the word 'custody' in that case and in the circumstances of that particular case they held that the accused while making

the statement which was sought to be proved against him could be held to have been in custody at the time. The question was, however, not considered from the other possible aspects. In any case if the learned Judges meant to lay down that confessional statements leading to discovery of facts cannot be made while the maker is in custody, with all respects to them I find it difficult to agree.

48. It may be that in the large majority of cases statements of the kind contemplated by Section 27 will be made by persons in custody only. But on that account it cannot be contended that no differentiation is made between the two categories of persons, one in custody and the other not in custody. If it is possible to conceive of a single case in which a person out of custody can make a statement referred to in the section it follows that a classification has been made between persons in custody and persons out of custody and a rule has been laid down which applies to the one class of persons and not to the other.

It is not required that if an unreasonable discrimination has been made between two classes, each class must contain a large number of or even more than one person. The benefit of Article 14 of the Constitution has been given by their Lordships of the Supreme Court even in those cases where the persons discriminated against were one or two. For instances, reference may be made to the case of *Ameerunnissa Begum v. Mahboob Begum* : [1953]4SCR404 and *Ram Prasad Narayan Sahi v. State of Bihar* : [1953]4SCR1129 .

49. It is also not possible to interpret Section 27, by reading the word 'or' in between the expressions 'a person accused of an offence' and 'in the custody of a police officer.' The word 'or' was certainly there between these expressions in Section 150 Cr. P. C. as it stood amended by Act VIII of 1869. But when Section 27 of the Indian Evidence Act was enacted the word was dropped. The omission must be held to be deliberate. The very fact that the section has been allowed to stand in its present form ever since it was enacted in 1872 and that the Legislature has not till now considered it necessary to introduce the word again shows clearly that the omission was not due to accident or inadvertence. While interpreting a provision it is not possible to read a word into it which the Legislature deliberately omitted to put in. It, therefore, does not appear to be possible to save the section

by interpreting it in the manner suggested by the learned Advocate General.

50. It was also suggested at one stage during arguments that the discrimination emphasised on behalf of the appellant could not be considered to have been deliberately or intentionally introduced by the Legislature and could very well be held to be accidental. The argument was that unless it was deliberate it could not be hit by Art. 14 of the Constitution. Reference was made to the opening words of the Article 'The State shall not' and it was suggested that they showed that the denial of an equality must be deliberate and intentional before it can be complained of.

Whatever may be the position under the Constitution of the United States, it appears to me that reading Articles, 14 and 13 of the Constitution together in India it cannot be said that a discriminatory legislation can be hit by Article 14 and become void under Article 13 only if the discrimination is deliberately introduced. The words 'The State shall not' in Article 14 only emphasises the duty that is enjoined on the State to see that every person is treated equally and as soon as the provisions of the Article are infringed Article 13 declares that the infringed portion becomes void. No question of intention arises. It is the effect of the legislation that is to be seen and if that is unreasonably discriminatory Article 13 comes into operation and makes it void.

51. Moreover, every enactment which the Legislature passes must be presumed to have been passed intentionally and deliberately. It cannot be open to the Legislature to contravene and flout the provisions of Ch. III of the Constitution by taking shelter behind the plea that the infringement was accidental and not deliberate.

52. The conclusion, therefore, appears to be inevitable that Section 27, as it stands at present, creates a classification which is not based on any reasonable differentia and the basis of distinction which it contains cannot be connected in any reasonable manner with the object of the enactment. It is, therefore, hit by Article 14 of the Constitution.

53. The argument that non-confessional statements leading to the discovery of facts may be proved as admissions without the help of Section 27 of the Evidence Act cannot be of much avail to the State in the present case because if the statements are made to police officers during investigation (as the statement in the present case was made) the prohibition contained in Section 162 Cr. P. C. is there and without the help of Section 27 of the Evidence Act it will not be possible for the State to avoid that prohibition. If Section 27 is invalid its help will not be available and the ban of Section 162 Cr. P. C. will in that case remain in operation. If Section 27 is invalid the saving clause added to Section 162 (2) Cr. P. C. will have to be struck down along with it and will not save the statement from inadmissibility.

54. In this connection two contentions are put forward by the learned Advocate General. The first is that the appellant's argument proceeds on the assumption that Section 162 Cr. P. C. constitutes a bar to the admissibility of statements like the one in question. The assumption is not justified as that section does not really contemplate therecording by a police-officer of any confessional or incriminatory statements. Sections 161, 162 and 4-64 Cr. P. C. have in this connection to be read together.

Under Section 162 Cr. P. C. the investigating officer is to record the replies made to the questions he is authorised to put by Section 161 of the Code and in view of Section 161 (2) of the Code no one is bound to make any statement which has even a tendency to incriminate him. Section 164 of the Code provides that a confession cannot be recorded even by a Magistrate if he is invested with the powers of a police-officer. The bar created by Section 162 of the Code can apply only to statements that can be recorded under it.

If incriminatory statements cannot be recorded under it at all how can that section be interpreted as prohibiting their use? Alternatively, it was argued that if Section 162 of the Code was held to authorise recording of confessional or incriminatory statements by accused persons Section 161(2) of the Code being a compelling section would be hit by Article 20(3) of the Constitution according to which no one could be compelled to be a witness against himself. In either case it is urged that incriminatory statements of accused persons do not fall under Section 162(2) of

the Code and that section cannot therefore prohibit their use.

55. The second contention is that the Evidence Act only enacts the general rules of evidence to be observed at the trial. It does not deal with the investigations of crimes. Ch. IV of the Cr. P. C. and Section 162 which occurs in it deal with investigations of crimes. The two therefore deal with two different situations. It is open to a Legislature to enact two different rules to be applicable to two different situations. So even if the distinction made by Section 27 of the Evidence Act between 'persons in custody' and 'persons not in custody' be considered unjustified with reference to the provisions of the Evidence Act it does not follow that it is unreasonable when applied to investigations of crimes.

56. After the decision of the Privy Council in it is no longer possible to accept the argument that Sections 161 and 162 Criminal Procedure Code do not cover statements made by accused persons and that under those sections an investigating officer is not authorised to record the statements of such persons. Nor is there anything in the section to show that only non-confessional or non-incriminatory statements of such accused persons can be recorded. The words used are wide enough to include all kinds of statements provided of course they throw some light on the offences under investigation.

There is nothing to prevent a police-officer from recording a confession. Only such a statement is of no value as a confession and cannot be used as such against the person making it. If, however, the law permits its use for any other purpose it can certainly be utilised for that purpose. That is why Section 27 of the Evidence Act was enacted. The opening words of Section 161(2) Cr. P. C. do make it a compelling Provision but the exception provided in it sufficiently safeguards the position of persons answering questions put to them by the investigating officers. No person is bound to give any answer which may have a tendency to expose him to criminal charges or to a penalty or forfeiture. No investigating officer can therefore compel any accused person to be a witness against himself.

57. There is thus no conflict between Sections 161 and 162 Cr. P.C. and Article 20(3) of the Constitution. The two are in fact quite in accord with each other. It is therefore not correct to say that Section 162 Cr. P. C. does not apply to and does

not bar the use of statements like those in question here.

58. But even if it be held that the statement which is being sought to be used against the appellant could not have been obtained in view of Article 20(3) of the Constitution the position of the appellant instead of becoming weaker becomes stronger because in that case if the bar of Section 162 Cr. P. C. is removed the bar of Article 20(3) of the Constitution will take its place. The prohibition against the use of the statement will therefore be still there.

59. The second contention appears to be equally untenable. It is true that the Indian Evi-deuce Act does not deal with investigations as the Cr. P. C. does, but the application of Section 162 Cr. P, C. is not limited to the stage of investiga-tion. It lays down that statements recorded du-ring investigations shall not be used for any pur-pose except to the limited extent mentioned in the section itself. This means that the use of such statements is prohibited at the trial too. It was to reduce the rigour of this prohibition that it was provided in sub-sec. (2) of Section 162 Cr. P. C. that Section 27 of the Evidence Act would remain unaffected by the provisions of the section.

As the help of Section 27 of the Evidence Act will be needed for avoiding the bars provided by Section 25 of the Evidence Act as well as under Section 162 Cr. P. C. it is not possible to uphold the contention that the section may be invalid in its setting in the Evidence Act but need not be so with reference to Section 162 Cr. P. C. It is not a case of different rules being provided for different situations. There is really only one situation for which the rule has been enacted. That situation arises at the trial when the statement contemplated by Section 27 of the Evidence Act is sought to be used against an accused person.

If the discrimination enacted in the section is invalid it must be held to be invalid whether the section is utilised to avoid the bar of Section 25 of the Evidence Act or the bar of Section 162 Cr. P. C. The words added to the second sub-section of Section 162 of the Amending Act of 1941. will therefore lose the effect they were intended to have and the prohibition in the section will continue.

60. A question also arose as to whether the whole of Section 27 of the Evidence Act was to be struck down as unconstitutional or only the words 'in the custody of a police-officer' used in it. The question of severability was discussed at length and reference was made to the decision of the Supreme Court in *R.D. Chamarbaugwalla v. Union of India* : [1957]1SCR930 . The doctrine of eclipse was also referred to.

It was conceded on behalf of the appellant that Section 27 of the Evidence Act came into conflict with Article 14 of the Constitution only on account of the words 'in the custody of a police-officer' used in it and but for those words no reasonable exception could be taken to the rest of the section. It was, however, urged that it was not permissible for this Court to re-write the section and to enlarge its scope by deleting from it the offending words and declaring only those words to be void. It was contended that the whole section stood as one provision of law. The words 'in the custody of a police-officer' were not severable and made the entire provision unconstitutional. The whole section must therefore be struck down.

61. The learned Advocate General, however, replied and in my opinion correctly that strictly speaking the question of severability or of striking down any particular words of Section 27 of the Evidence Act or of Sub-section (2) of Section 162 Cr. P. C. did not really arise. The legislation in question was a pre-Constitution legislation. It was valid when it was enacted. It remained valid till the coming into force of the Constitution. It is only on account of the enactment of Article 14 of the Constitution that as it is found to be in conflict with the fundamental right guaranteed in that Article it has to be held void under Article 13 of the Constitution.

That Article, however, expressly provides that the law shall be void "only to the extent of its inconsistency" with the provisions of Part III of the Constitution. The only thing that this Court can do if it holds Section 27 of the Evidence Act or Sub-section (2) of Section 162 Cr. P, C. to be inconsistent with the provisions of Article 14 is to declare those provisions void to the extent of the inconsistency. The extent of the inconsistency in the present case being co-extensive with its ground, viz the unjustified discrimination between persons in custody and persons not in custody as long as the discrimination is there the law cannot be upheld.

62. The question of the application of the doctrine of eclipse does not arise at this stage. It will arise only when an attempt is made to validate the legislation. It will then have to be seen whether on account of its invalidity it stood wiped off the statute book or had only been eclipsed so that it could be revived after the removal of the shadow.

63. I would therefore answer both the questions referred to us by saying that inasmuch as Section 27 of the Evidence Act creates an unjustifiable discrimination between 'persons in custody' and 'persons out of custody' and in that way offends Article 14 of the Constitution it and subjection (2) of Section 162, Cr. P. C. in so far as it relates to Section 27 of the Evidence Act are void to the extent of that inconsistency. In their present form they are and must remain ineffective as long as that discrimination is there.

BY THE COURT

64. The answer to both the questions referred to this Bench is that inasmuch as Section 27 of the Evidence Act creates an unjustifiable discrimination between 'persons in custody' and 'persons out of custody' and in that way offends Article 14 of the Constitution it and Sub-section (2) of Section 162 Cr. P. C. in so far as it relates to Section 27 of the Evidence Act are void to the extent of that inconsistency. In their present form they are and must remain ineffective as long as that discrimination is there.

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