

Pandi and Another Vs. the State

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Court : Chennai

Decided On : Dec-18-1996

Reported in : 1997CriLJ2964

Judge : M. Karpagavinayagam and; Rengasamy, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 380, 392 and 459; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164, 164(4), 281 and 313; Evidence Act - Sections 114 and 114A

Appeal No. : Criminal Appeal No. 455 of 1987

Appellant : Pandi and Another

Respondent : The State

Advocate for Def. : S. Anbalgan, Addl. Public Prosecutor

Advocate for Pet/Ap. : S. Prabakar, Adv. for ;K. Jagannathan

Judgement :

M. Karpagavinayagam, J.

1. This appeal is directed against the judgment in S.C. No. 129 of 1986 on the file of Principal Sessions Judge, Madurai convicting the appellants for the offences under Sections 459, 302 read with 34 and 392 read with 34, I.P.C. and sentencing

them to undergo rigorous imprisonment for five years, life sentence and five years respectively directing the sentences to run concurrently.

2. The crux of the accusation against the appellants is that on 16-11- 1985 at about 8 a.m., the appellants effected entry into the house of the deceased Vijreswari Ammal situated at door No. 25, Veeraraghavaperumal Street, Tirunagar and murdered the deceased by strangulating her by placing a pillow on her face, tying it with a saree and also tying her hands and legs with the body with the same saree and committed theft of gold jewels of which gold chain weighing about 3 1/2 sovereigns, gold bangles about 5 1/4 sovereigns, a foreign set tape recorder and Rs. 35/- cash all worth about Rs. 16,000/-.

3. The prosecution case as discerned from the evidence let in before the trial Court on behalf of the prosecution could be summarised as follows :

(a) That deceased Vajreswari Ammal, aged about 60 years was the retired Principal of a college. She was a spinster. She was staying alone in the rented house at door No. 25, Veeraraghava Perumal Street, Tirunagar for four years, P.W. 3 Sambandam is the landlord residing in the same house in the upstairs. P.W. 1. Meenakshi Sundaram is the neighbour, whose house is situated at the eastern side to the house of the deceased. P.W. 2 Chithirayee is working as servant maid both at the house of P.W. 1 Meenakshi Sundaram and the deceased. She used to work between 6 and 7 a.m. at the house of P.W. 1, thereafter she would go to the house of some other person and she would come back at 8 O' clock. Between 8 and 9 a.m. she would work in the house of the deceased. Again she would go to the house of P.W. 1 to work there between 10 and 11 a.m.

(b) Both the appellants are running a mobile laundry and they used to come to several streets in the area, collect the cloth from the various houses and iron. them and handover the same to the respective houses.

(c) P.W. 6 Kumar, the brother of the deceased is the resident of T. Nagar, Madras, working as a Director in laminated company.

(d) On 16-11-1985 at about 7-30 a.m. P.W. 3 Sambandam, the landlord came to the water tap situated in the ground floor and collected the water. At that time the deceased Vajreswari Ammal also came for taking water. P.W. 3 after collecting the water went to his house at first floor.

(e) P.W. 2 Chithrayee, the servant maid, after finishing her work in the house of P.W. 1 came to the house of the deceased to attend the work. Since the front door was found locked she went back and again came to the house at 11 a.m. Even then the front door was locked. She went to the backyard since it was opened. She entered into the house through the back door and called the deceased as 'Amma, Amma'. There was no response. So, she entered into the bedroom and saw the victim lying down tied with the saree on her legs and hands and she was also found with a pillow put on her face tied with the saree. On seeing the horrible sight P.W. 2 rushed to the house of P.W. 1 and informed him. P.W. 1 and his wife came to the house of the deceased and found the deceased was dead. On hearing the shouts, P.W. 3 who was on the upstairs also came down and saw the deceased.

(f) Thereupon at 12-45 p.m. P.W. 1 informed the police through telephone, police came to the spot and after seeing the dead body they took P.W. 1 to the station where he gave a complaint Ex. P-1 at 1-30 p.m. P.W. 15 the Inspector of Police received his complaint and registered a case in crime No. 449/85 for the offences under Ss. 302 and 380, IPC. The printed FIR is Ex. P-19. He arranged to send this FIR and the complaint to the senior officials as well as to the Court. In the meantime, intimation was sent to the finger print experts P.W. 11 and the photographer P.W. 12 At 2-30 p.m. P.W. 15 prepared the observation mahazar Ex. P2 and drew the rough sketch Ex. P-20 both attested by P.W. 4 and another. In the meantime, P.W. 11 and P.W. 12 came to the spot and arranged to take the impressions of the finger prints found on the articles kept in the house. P.W. 11 took the impressions of the finger print found on steel bureau, small bottle and the wooden box. The photographer P.W. 12 took photos of the finger prints pointed out by P.W. 11 M.O. 17 series are these prints, M.O. 19 series are the photos and M.O. 20 series are the negatives.

(g) P.W. 15 held inquest over the body of the deceased between 3-15 p.m. and 5-45 p.m. and prepared inquest report Ex. P-21. He examined P.W. 1, P.W. 2, P.W. 3 and two others. Then, he sent the dead body through P.W. 14 constable for being handed over to the doctor for conducting postmortem along with the requisition Ex. P-7. At 5-45 p.m. P.W. 15 recovered M.O. 1 series two pillows, M.O. 2 quilt cover, M.O. 3 saree, M.O. 7 series gold balls under a mahazar Ex. P-3. At 6 p.m. he recovered M.O. 8 series artificial denture under a mahazar Ex. P-4. At 6-15 p.m. he recovered M.O. 9 series chappals under Ex. P-5 and at 6-45 p.m. he recovered M.O. 11 wooden box under Ex. P-6.

(h) On 17-11-1985, P.W. 5 doctor, on receipt of the requisition Ex. P- 7 from P.W. 15 the Inspector of Police through the constable P.W. 14 commenced the post mortem at 10-15 a.m. He noticed the following injuries :

1. Multiple crescentric lacerations upto muscle deep noted in the inner mucosal surface of both lips - right side upper 3 lower 1 and left side upper 2, lower 2 - all in an oblique line - surrounding area contused (no teeth present in the gums during autopsy) artificial teeth bite marks.

2. On doing a bloodless dissection of neck : contusion neck muscles noted on right side oblique 5 X 3 cm, left side 8 X 6 cm. Fracture hyoid bone right horn with blood dots & laceration of surrounding structures are contused. Vertical fracture of two laryngial rings underlying portion noted in the front aspect.

He found peritoneal cavity empty. He found spots of haemorrhages present in pleural cavity. Then he issued the certificate Ex. P-8 giving opinion that the deceased would appear to have died of asphyxia due to manual strangulation and smothering and he found larynx and trachea with blood stained froth present.

(i) In the meantime, the appellants went to the house of P.W. 10 and informed him that they committed theft of jewels after murdering a woman at Tirunagar and that those jewels were buried in a bush and sought his guidance. Then, on receipt of this information, P.W. 16 the Inspector of police, the successor to P.W. 15 who took up investigation on 17-11-1985 from one Paramasivam, relative of P.W. 10 went to Nagamalai Pudukkottai along with a constable on 26-11-1985 and

arrested the appellants in the presence of P.W. 8 and another. First appellant gave a confession, the admissible portion of which is Ex. P- 9. Second appellant also gave a confession. Thereupon, both the appellants took P.W. 16 and P.W. 8 along with the constable and went to a place called Uchakovil Parambu near Onakkal. There was a bush. From there the appellants took out M.O. 10 taperecorder, M.O. 12 gold chain, M.O. 13 gold bangles, M.O. 14 covering bangles, M.O. 15 Karugamani malai, M.O. 16 towel and handed over to P.W. 16 which were recovered under Ex. P-10 attested by P.W. 8. Thereafter, the accused were brought to the police station where P.W. 16 took specimen finger prints from both the accused which were immediately sent to P.W. 11 for comparison.

(j) On 27-11-1985, P.W. 16 sent requisition Ex. P-11 through Chief Judicial Magistrate, Madurai to the Judicial II Class Magistrate, Tirunelveli to record the confession from the appellants. On receipt of this requisition in pursuance of the order of Chief Judicial Magistrate, P.W. 9 sent a letter to the Sub Jail Superintendent, Tirumangalam to produce both the accused at 10-30 a.m. on 2-12-1985 before his Court. Accordingly, they were produced by the jailor. In compliance with Section 164, Cr.P.C. relevant questions were put to the accused and asked the jail Superintendent to produce them again on 3-12-1985 at 10-30 a.m. On that day after giving sufficient warning he recorded the confession from both the appellants. The proceedings relating to first accused for getting confession statement is marked as Ex. P-13 and the proceedings relating to second accused for getting confession statement is marked as Ex. P-12.

(j) P.W. 16 sent all the Material Objects along with the requisition Ex. P-15 for causing the articles to be sent to the forensic laboratory for chemical examination. P.W. 13 on receipt of the requisition along with the material objects, sent the same for chemical examination with a covering letter Ex. P-16. He received Ex. P-17 chemical analyst's report and Ex. P-18 serologist's report dated 4-4-1986 and 27-5-1986. After finishing the investigation P.W. 16 filed the charge sheet against the appellants for the offences referred above on 24-12-1985 in the committal Court.

4. On committal, the Sessions Court framed the charges for the offences under Ss. 459, 302 read with 34 and 392 read with 34, IPC and questioned them. The

appellants pleaded not guilty and wanted the trial to be commenced.

5. To substantiate the charges framed against the appellants, the prosecution examined P.Ws. 1 to 16, filed Exs. P-1 to P-21 and marked M.Os. 1 to 20.

6. After conclusion of trial, the appellants were questioned under Section 313, Cr.P.C. with reference to the incriminating circumstances found in the evidence against the appellants brought on record. The appellants stated that they were innocent and they did not know anything about the case. They also stated that they were compelled by the police to give the confession statement before the Magistrate.

7. On consideration of the evidence oral and documentary adduced by the prosecution as well as the statement of the accused u/S. 313, Cr.P.C. the trial Court found the appellants guilty for the offences for which they were tried and convicted as referred earlier. Hence this present appeal.

8. Learned counsel for the appellants took us through the entire evidence and pointed out various suspicious features and lacunas in the case of prosecution contending that there is no acceptable evidence to base the conviction, that the chain is not complete as there are number of missing links and that the prosecution has miserably failed to prove its case and as such the appellants who are entitled to acquittal to be given benefit of doubt. The learned Additional Public Prosecutor appearing for the State repelled the said submissions.

9. There is not eye-witness in the case. This case entirely rests upon the circumstantial evidence. The law laid down in the case of appreciation of circumstantial evidence is clear that any case based upon circumstantial evidence where the circumstances put forth by the prosecution must form a complete chain without any missing link. The circumstance must indisputably point out that the appellants and the appellants alone are the real offenders. Those circumstances should be such that they cannot be explained away on the basis of any other reasonable hypothesis. In the light of the above legal position, we have to consider the reliability of various pieces of circumstantial evidence available in this case.

10. Before launching discussion on various pieces of evidence let in by the prosecution, let us at the outset examine the question as to whether it is the case of homicide or not and if it was so, what was the motive.

11. P.W. 3 the house owner was staying in the upstairs. The deceased Vajreswari Ammal, a retired college Principal, aged about 60 years was living alone in the ground floor of the same house as a tenant. On the fateful day at about 7-30 a.m. P.W. 3 came down from the upstairs to the ground floor and collected water from the water tap situated inside the compound. At that time the deceased also came there for collecting the water. Thereafter, P.W. 3 went back to his house at the upstairs. P.W. 2 Chithrayee is the servant maid working both in the house of P.W. 1 and in the house of the deceased. P.W. 2 in the early morning used to attend the work at the house of P.W. 1 whose house was situated in the eastern side of the house of the deceased. At 8 a.m. P.W. 2 used to come to the house of the deceased for attending the work. Thereafter she would go to other houses. On that fateful day, that is on 16-11-1985 at about 8-30 a.m. P.W. 2 came to the house of the deceased. The front door was found locked. Through the front door P.W. 2 called the deceased as Amma Amma. There was no response. She went to the backyard. It was also found locked. So, she went back to the house of P.W. 1. At about 11 a.m. P.W. 2 again came to the house of the deceased and found the front door was locked. However, the backyard was opened. So, she entered inside the house and went inside the bedroom. To her shock she found the deceased was lying down dead in the bed. Her head was rested in a pillow and another pillow was put on her face and tied up with a saree. The same saree was found to be used for tying up her entire body with both legs and hands. She cried aloud and ran to P.W. 1 and informed him. P.W. 3 who is the landlord in the upstairs, on hearing the cries came down. P.W. 1 and his wife on hearing the same from P.W. 2 came to the house of the deceased and saw the deceased lying down dead. They also found that the steel bureau was found opened, clothes found inside the steel bureau were scattered hither and thither and the entire articles kept in the hall were found heltered and skeltered. Both P.W. 1 and P.W. 3 saw that the jewels used to be worn by the deceased were found missing. Immediately thereafter P.W. 1 through telephone informed this news to P.W. 15 Inspector of Police who came to the spot. Thereafter, P.W. 15 obtained a complaint from P.W.

1 and registered a case for the offences under Ss. 302 and 380, IPC. P.W. 15 then recovered M.O. 1 series two pillows, M.O. 2 quilt cover and M.O. 3 saree which was used for tying the body of the deceased. Along with this, M.O. 8 artificial teeth which was found nearby was also recovered. All these articles were sent for chemical examination through the Court. The serologist's report Ex. P-18 would reveal that M.Os. 1 to 3 and M.O. 8 were found to contain human blood. Even the FIR mentioned about the missing of Jewels and the fact that the steel bureau was found opened. In the observation mahazar Ex. P-2 prepared by P.W. 15 at 2-30 p.m. these details have been mentioned which are as follows :

(Vernacular matter omitted)

It is relevant to point out at this stage that the FIR registered on 16-11-1985 at 12-15 p.m. has reached the Court on the same day at about 3-30 p.m. The observation mahazar also reached the Court on the same day. P.W. 5 doctor while conducting postmortem found multiple crescentric lacerations upto the muscle deep in the innermucosal surface of both lips right side upper 3 lower 1 and left side upper 2, lower 2, all in oblique line surrounding area contused and contusion neck muscles on right side oblique 5 X 3 cm, left side 8 X 6 cm and fracture hyoid bone right horn with blood clots and laceration of surrounding structures contused. He also found nose contused, fracture of nasal septum and in pleural cavity spots of haemorrhages present. He opined that the deceased should have died of asphyxia due to manual strangulation and smothering about 22 to 26 hours prior to postmortem. He also stated that the fracture of hyoid bone is possible by tightening the neck with cloth or pressing the neck with hands. The postmortem was commenced at 10-15 a.m. on 17-11-1985. So the above details would show that the death must have taken place between 8 am and 10 a.m on 16-11-1985 by some culprit or culprits and for the purpose of committing theft of the jewels these culprits must have caused the death of the deceased by manual strangulation and smothering. About these aspects there is no dispute in the cross-examination as these materials would not refer anything against the appellants.

12. The next question that creeps up for consideration is, who committed the above murder for gain. As pointed out by learned Additional Public Prosecutor,

there are various incriminating materials available against the appellants. As spoken to by P.W. 7, M.O. 9 series the chappals belonged to the second accused and they were found in the varandah of the house of the deceased which were recovered on the date of occurrence that is on 16-11-1985. Though he would identify that these M.O. 9 series belonged to the second accused, the evidence adduced by P.W. 7 does not inspire confidence in our mind because in the chappals there is no identifiable marks. Moreover, they are old chappals. So there is no acceptable reason as to how these M.O. 9 series are identified by P.W. 7 as that of the second accused. So we have no hesitation to reject the evidence of P.W. 7. One other circumstance is relating to the extra judicial confession made by the appellants to P.W. 10 who is the relative of second accused. He deposed that both the accused came and informed about the murder and commission of theft of jewels. However, while considering his evidence in the chief examination and cross-examination, it is found that his evidence is not consistent and so his evidence also cannot be acted upon with reference to the extra judicial confession. Moreover, his evidence also has been rightly rejected by the lower Court. So, de hors these pieces of evidence, the only other formidable pieces of circumstantial evidence are,

- (1) presence of finger prints of accused/appellants at the spot;
- (2) recovery of stolen jewels from the accused after arrest; and
- (3) judicial confession.

13. Regarding the first piece of evidence viz., the presence of finger prints, we have got the evidence of PW-11, PW-12 and PW-16, PW-11, the finger print expert, on receipt of the message from the sub Inspector of Police on 16-11-1985 at 2 p.m., immediately rushed to the spot at 2-30 p.m. She found impressions of finger prints on the steel bureau, a small bottle and on a small wooden box. She then took the impressions of the finger prints found on these articles. She also instructed the photographer to take photos. The chance prints are M.O. 17 series. On 26-11-1985 she received specimen impression of the accused from the Inspector of Police P.W. 16 which are M.O. 18 series. Totally six chance prints were taken. Since the chance prints marked as V2, V3, V4 do not reveal sufficient

number of clear ridge details for comparison, they were considered unfit for comparison. The remaining chance prints are V1 and V5 and they were found not identical with the finger prints of the deceased viz., Vajreswari Ammal. But on comparison of the specimen impressions of the accused M.O. 18 series, P.W. 11 found the chance print marked as V1 found on the steel bureau is identical with the left hand palm print of the first accused Pandi and V5 chance print found on the box M.O. 11 is identical with the left thumb impression of the second accused Arumugam. She gave a report Ex. P-14 in which she stated that the 11 ridge characteristics found relative positions in both the impressions marked as V1 and S1 the specimen impression of the first accused. The 11 ridge characteristics which are found in the relative position in both the impressions marked as V5 and S2 the left thumb impression of Arumugam are identical with each other. So, the evidence of P.W. 11 and P.W. 12 would make it clear that the chance prints taken from the steel bureau and wooden box kept in the house of the deceased were found identical with the specimen impressions of the accused M.O. 18 series which were collected by P.W. 16 after arrest on 26-11-1985. Admittedly, the appellants are strangers. There is no evidence to show that these people used to come to the house of the deceased and handle the articles kept there. Of course, P.W. 2 would say that both the appellants used to come to the local streets with the mobile laundry for the purpose of ironing clothes by collecting the same from each and every house of the area. But there is nothing to show that the accused used to enter into the house of the deceased and had an occasion to touch the articles found in the house. Further more, there is no cross-examination by the accused to P.W. 16 who stated that the specimen impressions have been taken from the accused on 26-11-1985 after they were arrested. There is no explanation for the presence of finger prints at the spot even at 3-30 p.m. Further more, the evidence of P.W. 13 would make it clear that M.O. 11 box which contained the finger prints of one of the accused reached the court as early as on 20-11-1985. Accused were arrested on 26-11-1985. It is not the case of the accused either through the cross-examination or by putting suggestion or in the statement given under Section 313, Cr.P.C. that they were previously arrested or they were made to touch under compulsion any of the articles kept in the house of the deceased. So, in the absence of any explanation, there is no difficulty in accepting the

evidence of P.W. 11 and P.W. 16 from whose evidence it is made clear that these appellants went to the house of the deceased on the date of occurrence and handled the articles while committing theft of the jewels and cash after committing murder. Learned counsel for the appellants would argue that mere presence of finger prints would not draw the adverse inference against the accused. In support of this argument, he cited the authority in *Golap Chandra Mahanta v. State of Assam* : 1989 CriLJ95 . In this decision it has been held as follows :

'Moreover, it would be unsafe to draw an adverse inference against the accused on the basis of the report of the finger print expert if other corroborative evidence is either absent or doubtful.'

This case is not helpful to the defence because in this case the accused gave an explanation in Section 313, Cr.P.C. statement as to how his finger prints were found in the chimney. He stated in Section 313, Cr.P.C. statement that when he was brought to the thana, the officer incharge of the police station placed a chimney in a corner of a table and when asked he lifted the chimney and handed over the same to the officer incharge of the police station. So, in view of this explanation, the Division Bench of Gauhati High Court came to the conclusion that it would be unsafe to draw an adverse inference merely because there is a report of finger prints expert. Moreover, in that case the other witnesses have been disbelieved and only a piece of evidence available in that case is the opinion of the finger print expert for which also explanation by the accused was given in Section 313, Cr.P.C. statement. In the instant case, as referred earlier there is no explanation.

14. Learned Additional Public Prosecutor brought to our notice an authority in *Jaspal Singh v. State of Punjab*, : 1979 CriLJ1386 . The following observations would be relevant :

'The science of identifying thumb impression is an exact science and does not admit of any mistake or doubt.'

15. In *Mohan Lal v. Ajit Singh*, : 1978 CriLJ1107 the Apex Court accepted the finger prints expert's opinion as an important piece of evidence since the identity

was established in this case as per the evidence of Director of the Finger Prints, which was so clear and categorical, which has been supported by adequate reasons. In this case also 11 ridge characteristics are identical with the specimen impressions of the accused. Since adequate reasons have been given in the finger prints expert's report Ex. P-14 in this case, we can act upon the finger prints expert's opinion to hold that the appellants on the relevant date came to the house of the deceased for the purpose of committing murder and theft. Since the Supreme Court says that the finger print test is exact science, we consider that the availability of the finger prints of the accused in the house of the deceased is a clinching and vital circumstance against the appellants.

16. The next piece of evidence is recovery of jewels, P.W. 1 the neighbour, even in Ex. P-1 would say that the jewels were missing. P.W. 3 would say in the evidence that he did not find any jewels on the body of the deceased on the date of occurrence. Of course, as per the evidence of P.W. 15 the Inspector of Police and Ex. P-2 observation mahazar, the nose screw and earstead were found available on the body of the deceased. But P.W. 3 the landlord of the deceased who used to always see and converse with the deceased would have definitely had an occasion to see the jewels worn by the deceased. That was how even in Ex. P-1 P.W. 1 who got the information from P.W. 2 was able to say that the jewels were found missing. P.W. 16 on information went to Nagamalai Pudukkottai and arrested the accused on 26-11-1985 at about 5 a.m. In pursuance of confession of the first accused at about 10-30 a.m. P.W. 16 recovered M.O. 10, M.O. 12 to M.O. 16 which were kept concealed under a rocky stone near Uchakovil Parambu village. M.O. 10 taperecorder, M.O. 12 gold chain, M.O. 13 gold bangles, M.O. 14 covering bangles, M.O. 15 Karugamani malai were all kept in a piece of towel which is M.O. 16. All these properties were sent to the Court and they were received by P.W. 13 on 28-11-1985 itself. P.W. 6 brother of the deceased, the resident of Madras identified these jewels as that of the deceased during the course of investigation as referred by P.W. 16. P.W. 6 also would identify the material objects in the Court, but curiously there was no cross-examination by the accused. Moreover, when the question was put under Section 313, Cr.P.C., there was no explanation from any of the accused for possession of these jewels. In fact, first accused answered question No. 8 stating that he was

taken to the police station where the jewels were shown to him. Second accused did not say anything about them. So, the evidence of P.W. 16, P.W. 6 and the statement made by the accused under Section 313, Cr.P.C. would go to show that there is no explanation given by the accused for the possession of the jewels on 26-11-1985. As referred earlier, it is not the case of the accused that they were previously arrested and illegally detained. No suggestion was put to P.W. 16 that there was no recovery from the accused on 26-11-1985 and in Section 313, Cr.P.C. statement they merely denied the recovery. Counsel for the appellant at this stage cited an authority in *Diraviam, etc. In re 1984 MLW (Cri) 163 : 1985 Cri LJ 163* to show that merely there was no explanation for the possession of the stolen jewels, it may not be sufficient to draw an adverse inference against the accused to fasten criminal liability on them for the offence under Section 302, IPC. In that decision, it is held as follows :

'Simply because the accused have not come with an explanation as to how they came into possession of the properties belonging to the deceased, no conceivable or rational conclusion could be drawn that they are the murderers. At the worst, it would show that they had been in possession of the ornaments belonging to the deceased Barring these recoveries, as we have stated supra, there is no evidence against both these accused, either with regard to their movements near the scene place before the murder or after the murder

It is pointed out in *In re, Thangaswami : AIR1963 Mad476* that in the cases of this nature, there must be some further evidence establishing the connection between the accused and the victim in relation to the time, locality of the offence and the crime itself, and that there must be some other evidence to show that the offences of murder and robbery are the integral parts of the same transaction.'

17. Yet another decision cited by the learned counsel for the appellants is *Joga Gola v. State of Gujarat, : 1982 CriLJ1579* . This is the case where the deceased went to the scene along with buffaloes and thereafter he was found murdered and the buffaloes were found missing and that subsequently these buffaloes were seized from the possession of the accused. In that context, the Apex Court held that though the accused were found in possession of the stolen property belonged

to the deceased, since there is no evidence to show that the accused murdered the deceased, he could not be convicted for murder, but he could not escape conviction u/S. 411, IPC.

18. The above decisions would not apply to the present case. In those cases except recovery there is no other evidence connecting the accused with the commission of offence. In the present case, there is not only evidence relating to recovery but also as referred earlier there is availability of the finger prints of the accused at the spot on the date of occurrence.

19. Learned Additional Public Prosecutor cited an authority in *Earabhadrapa v. State of Karnataka*, to show even denial of recovery in Section 313, Cr.P.C. statement itself is an incriminating circumstance against the accused. The relevant observation is as follows (para 13) :-

'The appellant had no satisfactory explanation to offer for his possession of the stolen property. On the contrary, he denied that the stolen property was recovered from him. The false denial by itself is an incriminating circumstance. The nature of presumption under Illustration (a) to Section 114, must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts There was no lapse of time between the date of his arrest and the recovery of the stolen property.'

20. The next decision cited by learned Additional Public Prosecutor is *Gulab Chand v. State of M.P.* : [1995]3SCR27 . The relevant observation is as follows (at p. 1600 of AIR) :

'The High Court has placed reliance on the other decision of this Court rendered in *Tulsiram Kanu v. State*, : AIR 1954 SC1 . In the said decision, this Court has indicated that the presumption permitted to be drawn u/S. 114, Illustration (a) of the Evidence Act has to be read along with the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be

drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days, the recovery of the said stolen articles was made from his house at the instance of the accused. Such close proximity of the recovery, which has been indicated by this Court as an 'important time factor', should not be lost sight of in deciding the present case. It may be indicated here that in a later decision of this Court in *Earabhadrapa v. State of Karnataka*, this Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts.

21. So, in view of the dictum laid down by the Apex Court, we are of the view that the prosecution has established the recovery of the stolen jewels as identified by P.W. 6 which would make it clear under S. 114-A of the Evidence Act the appellants only have committed murder and removed the jewels recovered from them and escaped as pointed out earlier. These two important pieces of evidence viz., presence of finger prints and the recovery of the jewels immediately ten days after the occurrence would go to show that the appellants alone have committed this crime. Further more, the important factor to be noted in this case is that the properties recovered from the accused were kept concealed near a bush under a rocky stone. So only on the confession of the accused the place where it was concealed was pointed out by the accused and the properties have been removed from the bush and handed over to P.W. 16 which were recovered in the presence of P.W. 8. If the accused were merely found in possession of the jewels at the time of arrest, then it could be said that the accused were merely found in possession. The very fact that they kept all these articles tape-recorder, jewels etc. covered in a towel M.O. 16 and kept under a stone which was not to be seen by others in a secured place would also reflect the conduct of the accused with reference to the main offence.

22. The last but (not) the least is the important circumstance viz., the judicial confession made by the accused before the Magistrate P.W. 9. It is strenuously

contended by learned counsel for the appellants that since the mandatory procedure as contemplated under Section 164, Cr.P.C. has not been complied with, the evidence relating to the judicial confession in Ex. P-12 and Ex. P-13 could not be acted upon. Of course, number of citations have been cited by both the counsel in support of their contentions. But we find much force in the contention of defence counsel in relation to the non-compliance of Section 164(4), Cr.P.C. sub-sec. (4) of Section 164 reads as follows :-

'Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession and the Magistrate shall make a memorandum at the foot of such record to the following effect :-

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed) (Signed) Magistrate'.

On going through the proceedings Exs. P-12 and P-13 and the evidence adduced by the Magistrate P.W. 9 we feel that sub-sec. (4) and Section 164, Cr.P.C. has not been complied with. Of course the required questions have been put to the accused before recording confession in order to ascertain whether he has come to Court to give a voluntary confession. He has also stated in the evidence that only after he is satisfied, the accused were produced before the court in order to give a voluntary confession. He recorded the statement. But both in the evidence and Ex. P-12 and Ex. P-13 he did not say, after the recording is over, at the foot note that he was satisfied with the said confession statement that was voluntarily made. With reference to this position, learned counsel for the appellant cited a decision in Chandran v. State of Madras, : 1978 CriLJ1693 . This position is clearly spelt out in this case (para 29) :-

'To say that the accused was 'in a position' or mood to give a voluntary statement, falls far short of vouching that upon questioning the accused, the Magistrate had

'reason to believe that the confession is being voluntarily made', which under Section 164 is a sine qua non for the exercise of jurisdiction to record the confession. But that Section does not make it obligatory for the Magistrate to append at the end of the record of the preliminary questioning, a certificate as to the anticipated voluntariness of the confession about to be recorded. But the law does peremoborily require that after recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he believes that the confession was voluntarily made.

The reason for requiring compliance with this mandatory requirement at the close of the recording of the confession, appears to be that it is only after hearing the confession and observing the demeanour of the person making it that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. If the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.'

On the strength of this decision, learned counsel for the appellants would vehemently contend that this judicial confession Ex. P-12 and Ex. P-13 could not be relied upon. We see much force in this submission in view of the decision earlier referred. Further more, P.W. 16 would admit that after the appellants were remanded on 2-12- 1995 by the Magistrate asking him to produce them the next day to give confession, they were taken to the police station. The evidence of P.W. 16 in this regard is as follows :-

(Vernacular matter omitted Ed.)

So this also would make it clear that between 2-12-1985 and 3-12-1985 the accused were admittedly in the custody of the police. This also would make it clear that the confession statement recorded on 3-12- 1995 would not be a voluntary one. So, in view of the reasons of non- compliance of Section 164(4), Cr.P.C. and the admission of P.W. 16 about the detention of these appellants in the night of 2-

12-1985, at the police station we are of the view that there is no evidentiary value for the judicial confession recorded from the appellants by the Magistrate in Ex. P-12 and Ex. P-13 from the appellants. So, we reject the said evidence as it cannot be relied upon. However, the two other important circumstances as discussed earlier viz., the presence of finger prints of the accused as proved by P.W. 11 and P.W. 16 at the spot and the recovery of the jewels from the concealed place on being pointed out by the accused would be the relevant and clinching circumstances to hold that the appellants and the appellants alone have committed this murder for the purpose of gain. Therefore, we see no infirmity in the findings arrived at by the trial Court while imposing the conviction and sentence for the offences referred above. So, the conviction and sentence are confirmed.

23. In the result, the appeal is dismissed. The conviction and sentence imposed by the trial Court are confirmed. The appellants are directed to surrender before the Court to undergo punishment.

24. Appeal dismissed.