

Dev Dass Alias Daweed Vs. the State

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Court : Kolkata

Decided On : Nov-23-1995

Reported in : (1997)1CALLT215(HC)

Judge : Nripendra Kumar Bhattacharyya and ;Ram Prakash Gupta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 304 and 324; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 164; ;[Evidence Act, 1872](#) - Section 27; ;[Constitution of India](#) - Article 21

Appeal No. : Crl. Appeal No. 8 of 1995

Appellant : Dev Dass Alias Daweed

Respondent : The State

Advocate for Def. : R. Shiv Saroop, Adv.

Advocate for Pet/Ap. : Asis Kumar Roy, Adv.

Disposition : Appeal dismissed

Judgement :

Nripendra Kumar Bhattacharyya, J.

1. By this appeal the accused appellant has challenged the judgment, conviction and sentence imposed against him for an offence under Sections 302 and 304 of

the Indian Penal Code and sentence of life imprisonment for an offence under Section 302 and rigorous imprisonment for one year and a fine of Rs. 1,000/- for an offence under Section 324 IPC and in default of payment of fine rigorous imprisonment for another three months more. The sentences were directed to run concurrently by the judgment of the learned Sessions Judge in Sessions Case No. 3 of 1992 dated 31st July, 1995 which Sessions Case culminated into Sessions Trial No. 1 of June, 1995.

2. The fact silhouetted behind the actual incident as has been given through the prosecution witnesses by the prosecution is that P.W.1 A. Punnaiah is an encroacher of the Government land and he construction his own house on that land leaving a vacant space of land about 25 sq. ft. One of the co-villager Devdas alias Daweed approached him for giving that portion of the vacant land for the purpose of construction of his own house. P.W.1 Punnaiah gave that land to the accused Devdas. The price was not settled then. The accused thereafter constructed the house on that land and used to reside with his wife and two children. That house was at a distance of 10 ft. from the house of the P.W.1. A person by the name of Kandan had a house of about 20 meters from the house of P.W.1. Kandan is P.W.4. About 8/9 months after the construction of the house by the accused the accused demanded written document from P.W.1 Punnaiah and Punnaiah demanded Rs. 6000/- from the accused as consideration for that land. That sum was paid and P.W.1 Punnaiah executed a written document on a bond paper. The signature was identified on that paper by P.W.1 which was marked as Exhibit 1. The accused also signed that paper as a second party and his signature was also identified by P.W.1 and marked as Exhibit 1/1. In this backdrop of the fact the accused approached Punnaiah on 29.11.90 with a paper and demanded that Punnaiah should sign the paper. That was a type-written paper in English and Punnaiah did not know English. So he told the accused that he would have the paper read over by some one to him and then he would sign. Leaving the paper with Punnaiah the accused left on that day. Then the incident took place on the fateful day i.e. on 30.11.90. On that day at about 8/8.30 p.m. the accused again came to the house of Punnaiah and asked him whether Punnaiah had signed that paper. Punnaiah on that day also told the accused that he could not have the paper read over to him and after it being read over to him by any person he would

sign the same. The accused then asked back the paper and Punnaiah made over the paper to him. Punnaiah was standing on the verandah of his house. After returning such paper the accused told him that he only knew how to receive money from others but he did not want to execute the document for the same and an altercation ensued between them. On hearing the altercation, the wife of Punnaiah (P.W.1) since deceased, P. Rajammal came out from the room and told the accused that when the land was given to him by her husband without any consideration at that time he did not say all those things and why he cannot wait for some more few days to get the signed paper back. She further told him that when he approached her husband at that time he was very polite but he was now adamant and had taken a different stance. At that the accused slapped her in left cheek with his right hand. During the entire incident in that house, apart from Punnaiah, his wife and others who were present were son of Punnaiah, Sandal Kumar (P.W.5) who was aged about 7 years during the relevant time, his daughter Laxmi (P.W.6) who was aged about 17 during the relevant time and one Jayaraman (P.W. 11) who was the tutor of Laxmi. During the relevant time P.W. 11 Jayaraman was imparting education to Laxmi in the room and a light was burning in the verandah. There were two rooms in the house and the doors and windows of those two rooms were open wherefrom the rays of electric light were coming on the verandah and in front of the house a street tube light was then burning. So the verandah and the facade of the house of P.W. 1 were lighted which were clearly visible.

3. The further case of the prosecution goes on to this effect that as the accused struck the wife of P.W.1, P.W.1 protested and scolded the accused by saying how he could mustered such courage to slap his wife and in course of such utterances he raised his hand. The accused was then wearing a lungi in folded position and a shirt. Immediately after the protest by P.W.1, the accused whipped out an open knife from his waist of his folded lungi and tried to stab Punnaiah (P.W.1) and actually struck him a little below the neck nearing the left chest causing bleeding injuries. Punnaiah (P.W.1) slipped on the ground and his wife P. Rajammal came to his rescue. The accused immediately caught hold of her by left hand and struck her just below the neck at the junction of the chest and neck and swiftly slit that knife across her neck from side to side. Rajammal fell on the ground and bled

profusely and at that time she had on her person a coloured red blouse, a dark coloured petty coat and a pink coloured scurf. The accused dragged Rajammal by pulling her by her hair at some distance and then after leaving her he fled away with the knife and scurf of Rajammal. Rajammal was brought inside the room of that house by P.W.1 Punnaiah, his daughter P.W.6 Laxmi and P.W. 11 Jayaraman and the injured Punnaiah tried to stop bleeding from the wounds of his wife by pressing his hand but he did not succeed and within a short time Rajammal died. The children of P.W. 1 started crying but in order to give them solace he falsely stated to them that his wife was still living and she would be removed to the hospital and asked Jayaraman to bring a taxi and a taxi was brought by Jayaraman and in that taxi Rajammal was taken to hospital and apart from P.W.1, his son Sandal Kumar, daughter Laxmi, her tutor Jayaraman and P.W.4, Kandan accompanied them to the hospital. P.W. 1 was examined in the outdoor department and then his wound was stitched in the indoor department and he was examined in the out Patient Department by Dr. Arun Kumar Mallick, P.W.8, who found one incised injury on anterior chest left side on 2nd rib extending from second costo chondral and exposed the muscle and scratch mark extended up to the first intercostal space and the dimension as given in the diagram in the report. The doctor further opined that the injury was simple and fresh caused by a sharp weapon. The instrument of offence, which has been marked as material Exhibit VIII, was shown to the doctor and the doctor opined that the injury on the person of Punnaiah could have been caused by that knife.

4. The prosecution story further goes to show that during the time immediately before the incident on 30.11. 90 P.W.7, Rani, wife of P.W.4 Kandan, was watching T.V. in the house of Punnaiah, P.W.1. Kundan, P.W.4, after returning from his duty, did not find his wife. So he came to the house of P.W. 1 and he returned to his home along with his wife. While returning to his home along with his wife, he saw the accused proceeding towards the house of Punnaiah. Sometime after reaching his house, he heard the voice of the accused and came out on the verandah of his house and in the light which was burning on the street in the verandah of Punnaiah's house and the rays of the light coming from the doors and windows of Punnaiah's house. He saw the accused there and he came on the road and heard punnaiah's wife saying to the accused why he was insisting on

signing the paper. Then the accused told her that either Punnaiah should sign the paper or return the price of the land. Thereafter, all on a sudden he slapped on the face of Punnaiah's wife Rajammal and during that time he was standing on the road in front of his own house. He further deposed that the incident took place in the space in between the house of Punnaiah and his own house. His further evidence is that seeing his wife being slapped by the accused Punnaiah raised his hand to press the neck of the accused and protested by saying how he could dare to slap his wife. Immediately the accused brought out the knife from the waist by his right hand and in that way he stabbed Punnaiah. During that time Punnaiah's son P.W.4 raised a hue and cry as he saw the accused pulling out the knife. P.W.4 started towards that space and on reaching there he saw the stabbing by the accused on the upper chest of Punnaiah and Punnaiah after receiving such injury slipped on the ground. The wife of Punnaiah, Rajammal was standing behind Punnaiah and came to the rescue of her husband and he saw the accused catching Rajammal by her hair pulling her and stabbing her with the open knife on the lower of the throat and also drew that knife in front portion of the neck thereby causing bleeding injuries. Immediately after that knife blow she bent down and even then the accused dragged her by her hair up to a distance of a few feet then leaving her he fled away taking the knife and her scurf. He further deposed that he and his wife also saw the occurrence. It was a moonlight night and tube light was burning in the room of Punnaiah. So also the electric lights were burning in his house and the house of the accused. He further deposed that during the relevant time the accused was wearing a lungi in folded condition and he had a sharp weapon. Receiving such stab injuries, Rajammal could not raise any sound. P.W. 1 Punnaiah with P.W.4 Kandan, Jayraman, P.W. 11, and his daughter Laxmi, P.W.6 accompanied her to the hospital. He further stated that the son of Punnaiah, Sandal Kumar, P.W.5 also accompanied them in the hospital and the wound of Punnaiah was stitched in the surgical ward and he remained in the hospital up to 10 P. M. P.W. 11 Jayraman and the children of Punnaiah, meaning P.W.5 Sandal and Laxmi, P.W.6 stayed back in the hospital. During the presence of P.W.4 in the hospital, the police came to Punnaiah at about 9-15 P.M. and recorded the statement in his presence and in the presence of others named above and read it over to Punnaiah and Punnaiah signed the same.

5. The next part of the prosecution case is that P.W.4 further stated that when the wife of Punnaiah was brought to the hospital her body became cold and she expired. The doctor examined her and declared her dead and her body was taken to the mortuary. The I.O. Md. Aslam (P.W.25) gave out the prosecution story further. According to him, at about 20 hours on 30.11.90 he was in charge of Chathan Out Post under Aberdeen Police Station. At about 21-25 hours in that night he was sitting in the office of the C.I. and at that time he received a telephonic information which came to C.I. office from G.B. Pant Hospital sent by police constable 990 N. Hari Das who was posted in that hospital, that the dead body of one lady in a pool of blood was brought to the G.B. Pant Hospital from Prem Nagar. That telephonic message was diarised in the G.D. book being G.D. Entry No. 9 dated 30.11.90 recorded at 21.20 hours by the G.D. writer Dharam Singh. The said G.D. Entry is marked exhibit

19. Immediately after the message the C.I. directed the said Sub-Inspector of Police Md. Aslam, P.W. 25 to accompany him to the hospital and he also directed the literate head constable 834 Kathireshan to go to the place of occurrence. In a police jeep the C.I. and P.W.25 went to the G.B. Pant hospital and reached there at 21-40 hours. The other party was sent to the place of occurrence with a direction to search for the accused and to guard the P.O. On reaching the hospital they found Hari Das, duty constable, in the Surgical ward, who showed the patient Punnaiah in the Surgical Ward. No.

1. He recorded the statement of Punnaiah at 21-45 hours which was made in Hindi and he also recorded the same in Hindi. He then read it over to Punnaiah and then Punnaiah put his signature on the paper with date. He further deposed that during the time of recording statement of Punnaiah, apart from C.I., South Andaman, one Jairaman, Kandan and one Lakshmi were present there. Subsequently he came to know that during the time of the incident the three persons were on the spot. The recorded statement which is an FIR has been marked as Exhibit 2/1. He also proved his signature on that FIR, Exhibit 2/2. After recording such statement he came to learn from Hari Das, the constable on duty, that the deadbody of the lady being the wife of Punnaiah was lying in Outdoor Patient Department and he accordingly directed the Head Constable 924 M.S. Yadav and the Police Party to

take the deadbody to the mortuary of G.B. Pant Hospital at a distance of about 100 yards from OPD. He also saw the deadbody then and took the key of the mortuary from the duty staff of the hospital and opened the mortuary where the deadbody was kept and then he locked it and handed over the key to the Head Constable M.S. Yadav with the direction to guard the mortuary. Then on the direction of the C.I., South Andaman, he proceeded to the Aberdeen Police Station in the jeep with that FIR for registering the case in the Aberdeen Bazar Police Station. The case was registered in the Aberdeen Bazar Police Station being Crime No. 1001 of 1990 against Devdas alias Daweed, the accused appellant herein, under Sections 302/307 of the Indian Penal Code and a formal FIR was drawn (Ext. 18/2) on 30.11.90 which was lodged on that date at 22-00 hours. P.W. 25 in his deposition further stated that the Head Constable Dharam Singh copied the Hindi version and the copied Hindi version of the FIR is exhibit

18. The investigating Officer, PW 25 made a G.D. Entry regarding the FIR in his own hand-writing and he signed the same and he also proved the G.D. Entry which was recorded at 22-00 hours on 30.11.90, being exhibit 19/1. At about 22-10 to 22-20 hours the accused Devdas came to the police station of Aberdeen Bazar and made some statements and he was arrested by the I.O. The witnesses identified the accused in the Dock. He, on a careful examination of the wearing apparel of the accused, found blood stain on his blue full sleeved shirt and a green and blue check lungi and also found some scratch on the right knee. He immediately summoned two independent witnesses T. Usman and T.M. Hussain (P.W.

12) by sending a police constable, and their presence at 22-20 hours he seized those wearing apparels of the accused after giving him a khaki half pant to wear. He also seized those wearing apparels viz. the full sleeved blue shirt and the cheque lungi under a seizure list for the same which was signed by him and a copy of the seizure list was given to the accused who after receiving the same put his signature and the said seizure list is exhibit is 17/2. He also proved his signature (ext. 17/3). The witnesses identified the seized lungis (ext.II) and shirt (ext. III). The C.I. South Andaman, verbally endorsed the investigation of the case to P.W.25. The factum of surrender of the accused to the police station and

making statement was recorded in the G.D. Entry and the relevant Entry dated 30.11.90 recorded at 22-10 to 22.20 hours (ext. 19/2). P.W. 25 then sealed those articles in a packed condition and kept in the Malkhana. Rabindra Nath (P.W. 13), who took photographs of the place of occurrence and the facts were mentioned in the G.D. No.

11. Then along with the C.I., South Andaman, the Deputy Superintendent of Police, Raghubir Singh and the photographer proceeded to the P.O. in that police Jeep and reached there at 22-35 hours. The location of the P.O. was available to them from the FIR on reaching the spot at 22-35 hours he found the retired Head Constable 835, Constables 982, 227 and 1068. As per direction the photographer took photographs of a piece of paper lying on the P.O. and of the building near the P.O. as also of the scruff which was lying 100 yards below the P.O. towards the south near footpath. Blood stains were also found and on his direction the photographer took photos of the same. The I.O. inspected the place of occurrence. To the north of the place of occurrence was the house of the defacto-complainant Punnaiah (P.W.1) and also on the eastern side of the place of occurrence was the house of the accused Devdas. The house of the defacto complainant was south-facing. The sea is towards the south of the place occurrence. The house of the accused was facing towards the West. He prepared a site plan (ext.

20) and put his signature and marked as exhibit 20/1. At about 23-20 hours he seized one English typed sheet of paper of a sale deed from the place of occurrence, one pair of slipper blue and white, blood stained, sample soil and grass blood stained soil and grass in presence of the witnesses Jayarman, P.W. 11 and under a seizure list on the spot and the seizure list is exhibit 13/2 and the signature put upon it is exhibit 13/3. The paper that was seized under the seizure list is marked as exhibit 12/2. He seized at 23-35 hours one scurf which was pink coloured blood stained 100 yards below the south side of the place of occurrence near one street light post in presence of the same set of witnesses Jayaraman and Rangan under a seizure memo, prepared by him at the spot. The seizure list is exhibit 14/2 and the signature on the same is exhibit 14/3. On that date he recorded the statements of P.W. 18 between 23-35 hours to 24-00 hours and also the statements of P.W. 11 and P.W.

20. He closed the case on that date and on the next date that is on 1.12.90 during 24 hours to 0030 hours he recorded the statements of P.W.4, P.W.7 and P.W.23 and thereafter he proceeded to the police station with the seized documents. The photographer left the place earlier. On reaching the police station at about 00-45 hours he handed over the seized properties to the malkhana in charge of the P.S. in the same packed and sealed condition for safe custody. At 00-45 hours he took out the accused Devdas from the lock-up and along with him the police constable Ajit Singh took the accused to the G.B. Pant Hospital for medical treatment by police jeep where he was examined by Dr. A. K. Mallick P.W.8. Then he returned to the police station along with the accused in the police jeep. He interrogated the accused and as the accused was about to make statements about the weapon and then he sent a police constable on duty to call two persons. He called two persons Krishna Bahadur (P.W.2) and Devanand Bahadur (P.W.3) and on their arrival at the police station he recorded the statements of the accused under Section 27 of the Indian Evidence Act in presence of those two witnesses. The contents of the statements were read over to the accused and the accused signed the same and his statement is exhibit 4/1 and the I.O. put his signature on that (exhibit 4/3). Then the accused in a police jeep being accompanied by police constable 525 Ajit Singh, P.W.9, P.W.2 and P.W.3 in handcuffed condition proceeded in two police jeeps towards the place of occurrence. At 02-15 hours he reached the place of occurrence and alighted from the jeep and the accused Devdas led him near a bush and asked him to flash a torch and after flashing of torch the accused brought out an open knife from the bush, which was blood-stained and also one knife cover from the same bush. This happened in presence of the accused, P.W.3 and P.W.2. The knife and cover were shown to the witnesses, the blade of the knife was about 5 inches in length and the handle was three inches in length. He seized the knife in presence of those witnesses and the accused under the seizure list (ext. 5/2) and the signature of the I.O. is exhibit 5/3. A copy of the seizure list which was prepared in carbon process was given to the accused. Thereafter, the I.O. along with the witnesses went inside the house of the accused. None of the persons was in the house. The house was searched and one sale agreement was recovered on ten rupees bond paper dated 15.10.90 (marked exhibit 1/2), an affidavit on two rupees bond paper made by the accused

dated 1.6.87 (already marked 'M' for identification) and other papers already marked 'M' series for identification and now marked as exhibit 21 series. That seizure was made at 3-15 hours. Electric light was there in both the houses of the accused and the defacto complainant. Electric bulbs were there. There was also a street light post at a distance of 30 ft. from the house of the accused and of the defacto complainant. A tube light was burning in that street light post. The seizure list is marked exhibit 6/2 and the signature of the I.O. is 6/3. At 3-15 hours the I.O. left for the police station along with the party and also with the seized materials in the police jeep and reached the police station at 4.00 hours and the accused was put inside the lock up and the seized articles excluding the seized papers were handed over to the Malkhana in charge for safe custody in original packed and sealed condition. After recording the statement of the witnesses under Section 161 of the Code of Criminal Procedure he went to the mortuary and held the inquest on the dead body of Rajammal in presence of P.W.19 and P.W.16 and P.W.17, and prepared the inquest report (ext. 9/2). His signature on the inquest report is exhibit 9/3. During the inquest three injuries were found on the body of Rajammal.

(1) one stab injury above the throat,

(2) stab injury in front of the next and

(3) incised wound at the back of the left elbow. On the person of the deceased were then a red coloured blouse blood stained, one light coloured petticoat blood stained, two pieces of mangalsutras around the next and one earring on each ear. At 08-55 hours he reached the surgical ward, and met the injured Punnaiah and seized on his production one blue check blood stained lungi in presence of S. Jayaraman (P.W.

11) and Kandan (P.W.4) under a seizure memo. prepared at the spot by him. The seizure memo. was marked as exhibit 15/1. A copy of the said seizure list was given to Punnaiah. After completion of the autopsy on the deadbody of Rajammal by Autopsy Surgeon who is P.W. 14 Dr. Jairam who handed over the wearing apparels to the I.O. He seized the articles (Ext. 10/3) and his signature on the seizure list is exhibit 10/4. Those articles are material exhibits IV, V, VIII and IX collectively. The deadbody was handed over to Punnaiah at 12-05 hours. He was

already discharged from the hospital under a delivery memo. in presence of P. Ganesh and Thatah. After the investigation was over, he submitted his chargesheet. Charges have been framed against the accused for the offence of murder under Section 302 I.P.C. for murdering Rajammal and for causing grievous injury to Punnaiah under Section 304 I.P.C. and ultimately the sessions trial as aforesaid was started. The learned session Judge found the accused guilty of offence under Section 302 I.P.C. for murdering Rajammal and under Section 324 for causing grievous hurt to Punnaiah and convicted them thereunder and sentenced them his for the offence as mentioned earlier.

6. Against this background in the appeal the learned Advocate for the accused appellant Mr. Asis Kumar Roy contended that there are discrepancies between the eyewitnesses about the incident and that those are minor discrepancies. So in view of the submissions let us examine the position of the evidence of the prosecution witnesses.

7. The injured Punnaiah gave a detailed recount of the incident. According to him, the day earlier to the fateful day, i.e. on 30.11.90 at about 11 P.M. when he was watching T.V. Programme in his house with other members of his family, meaning his wife, who is deceased, his son Sandal and his daughter Laxmi, the accused appellant came with a written document in English and asked him to sign and he told him that he would not have the paper read over to him as he does not know English and after it being read over to him by any person he would sign the same. On the next day, i.e. on the fateful day the accused came again to the house of P.W.1 Punnaiah at about 8/8.30 P.M. and asked him whether he had signed the documents and papers which he left earlier with the P.W.1 on 29.11.90, which were a type-written English document. As he could not read English he asked him that it would be read over to him and then he would sign them. The accused then asked for the papers and at that time the accused was standing on the verandah. P.W. 1 Punnaiah went inside the room and brought that paper and handed it over to the accused. Then the accused scolded him by saying that he knew how to receive the money from others and not to sign the papers. During that time the wife of Punnaiah, P. Rajammal, the deceased, P.W.6 Laxmi and P.W.5 Sandal, daughter and son of Punnaiah were in the house and P.W. 11 S. Jayaraman was

also in the house of Punnaiah and he was imparting education to Laxmi. The accused also asked for an explanation as to why he did not sign the document and whether he would sign the document. On hearing this altercation his wife, Rajammal, came out from the room and at that time one Sonai (P.W.20), a nearby neighbour, also came there. Rajammal, the wife of P.W.1, Punnaiah, told the accused that when he was given possession of the land at that time he did not pay anything and for that purpose everyday he used to come to their house and implored them to give possession of the land and she also asked him why the accused cannot wait for a few days more for getting the papers signed by her husband. At that, the accuse suddenly caught hold of her by her hair and struck her in left cheek with his right hand and the accused was stand in front of her. P.W.1 protested by saying that how could he muster such courage to slap on his wife. At that time the electric light was burning in the house of the accused and there was an electric bulb of 60 Watt burning on the verandah of Punnaiah (P.W.1) and tube light was burning inside the room. In that area every one has electricity. Just in front of the gate of the house of P.W. 1 a street tube light was also then burning. When the altercation was going on, the accused suddenly slapped the wife of P.W.1 and P.W.1 in protest and raised his hand and the accused whipped out an open knife from his waist covered by the folded lungi and attempted to stab him and there was a bleeding injury on his person. P.W. 1 fell down and his wife rushed to his side and immediately the accused caught hold of her by her hair and struck her with the blade of the knife at the lower of her throat and slit her neck. Rajammal could not raise any sound because of such injury and after such stabbing. The accused fled along with the knife and also with the scurf which was on her person and she was lying in a pool of blood and she was brought inside the room with the help of her son and daughter as also by her husband. Punnaiah tried to stop the bleeding but he could not and she ultimately succumbed to her injuries. At that time his minor son P.W.5 Sandal, daughter P.W.6 Laxmi and her tutor P.W. 11 S. Jayaraman were all present there and saw the incident. This incident was also seen by other witnesses, such as P.W.7, Rani, wife of P.W.4, B. Kandan, P.W.4 Kundan by the electric light which was burning on the verandah of P.W. 1 and also the light which was also coming from inside the room of P.W.1. There was also electric light in the house of the accused. Regarding that part of

the prosecution story as given out by P.W.1, there is no material discrepancy and so to say, there is no discrepancy at all. This evidence of P.W. 1 has been corroborated in the material particulars by P.W.4, P.W.5, P.W.6, P.W.7 and P.W.11 who witnessed the incident standing within a very short distance from the place of occurrence. So, we do not find any discrepancy regarding the incident in the evidence as adduced by the witnesses, namely, P.Ws. 4, 5, 6, 7 and 11. Not only that we have taken much caution and pain in going through the entire evidence of all the witnesses and we found that even in cross-examination of all of them they narrated the incident in its material particular. This point has also not been challenged in right earnest and an argument has been advanced by Mr. Roy very halfheartedly.

8. The second point that has been canvassed is regarding the first information. According to Mr. Roy, though the police examined Punnaiah in the hospital on 30.11.90 at about 9-15 hours but that statement was not recorded. He laid much stress for that purpose upon the evidence of P.W. 1 and P.W. 1 said that his statements were actually recorded by P.W.24 who was then the Deputy Magistrate and Tasildar and according to him, if the FIR is lodged by I.O. or by some one in course of investigation then that FIR cannot be the basis of the investigation and as such the entire investigation is vitiated and so also the trial is also vitiated. In support of his proposition Mr. Roy relied on a Supreme Court decision in the case of State of A.P. v. Punnati Ramalu reported in : 1993 CriLJ3684 . In our view, we need not go into that question because the fact galore is that the statement which was made to the police by Punnaiah was recorded by P.W.25 Md. Aslam, S.I. in the G.B. Pant Hospital on 30.11.90 at 9-45 hours i.e. 21-45 hours. P.W.4, P.W.6, P.W. 11 and P.W.5 in unison stated in their evidence that Punnaiah made a statement before the police in the G.B. Pant Hospital in their presence on 30.11.90 and the police recorded the statement and the statement was signed by Punnaiah and that has been used as an FIR P.W.25 in his deposition as I.O. stated that on 30.11.95 at 21-45 hours P.W.1 Punnaiah made a statement in Hindi before him in the G.B. Pant Hospital and he recorded the same in Hindi and that was read over by him to Punnaiah and then Punnaiah put his dated signature thereon and the statement was recorded in presence of P.W.11, P.W.4 and P.W.6. P.W.11 stated on oath that the police recorded the statement of Punnaiah in Hindi and after

recording the same the police officer read over the contents thereof to Punnaiah and Punnaiah signed the same in Tamil and they were present there. Same is the evidence of P.W.4, Kundan, P.W.5 Sandal Kumar and P.W.6 Lakxmi. That apart they are exhibited statements made before the police by Punnaiah on 30.11.90 at 21-45 hours. The statement is exhibit 2. The endorsement of the I.O. i.e. time and dated signature is exhibit 2/ 2. The statement before the police made by Punnaiah, it is illogical, has not been reduced into writing but the document itself shows that the same has been reduced into writing. That apart, as it is available from the evidence of P.W.25 that immediately thereafter he went to the police station he made a G.D. entry. The G.D. entry is exhibit 20 and this G.D. is entry No. 10 dated 30.11.90 recorded at 22.00 hours. It is found that at 22-00 hours on that date the Sub-Inspector Md. Aslam, P.W.25 who is the I.O. has recorded about the FIR which was recorded by him in the G.B. Pant Hospital. This statement was made by the injured Punnaiah (P.W.1). It appears that the formal FIR (Ext. 18/2) was drawn in the Aberdeen Bazar Police Station on 30.11.90 at 22-00 hours. So the allegation that the FIR was drawn in course of investigation and not at the earliest point of time is not sustainable at all in the facts and circumstances of the case. We, accordingly, overrule the contention of Mr. Roy that the FIR (ext.2) cannot be treated as an FIR.

9. The next contention that was advanced by Mr. Roy is regarding the confessional statement of the accused which was made on 4.12.90 before the learned Magistrate under Section 164 Cr.PC. According to him, that was a retracted statement retracted by the accused in his examination under Section 313 Cr.PC and as such the same cannot be relied on as the statement is not a voluntary one. His further contention was that on the first day of production of the accused before the learned Magistrate the accused should be rendered legal assistance according to the principle as laid down in Article 21 of the [Constitution of India](#).

10. The learned Public Prosecutor Mr. R. Shiv Saroop on the other hand contended that if the confessional statement under Section 164 Cr.PC is retracted at a later stage then it has to be presumed that the confessional statement is voluntary. In this connection he relied on a Supreme Court decision in the case of

Shankaria v. State of Rajasthan reported in AIR 1978 SC 1248. It appears from paragraph 49 at page 1258 of that decision that in particular case after the close of the evidence of the prosecution the accused was examined under Section 313 Cr.PC and it was during such examination, the appellant for the first time retracted the confession and he took up the plea that he had made it under duress of the police. In paragraph 50 of that decision their Lordships in the apex court found that the confessional statement was voluntary. Similar is the situation here and in similar circumstances following the principle of Shankaria case (supra) we have no hesitation to hold that the confessional statement of the accused is voluntary. The confessional statement of the accused in exhibit 25, wherefrom it appears that the accused voluntarily stated before the learned Magistrate on 4.12.90 that he stabbed both Punnaiah with that knife and also the wife of Punnaiah. According to the accused, in his confession statement he gave out that after stabbing the said persons he fled away, leaving the knife there and he took the scurf of the deceased and threw it near a lamp post and then he went to the police station. It is the settled law of the land that if the accused or the defence enters into a particular defence then the burden shifts upon the defence to prove the case of defence. But in this case save and except throwing some suggestions no effort was made from the side of the defence to prove the defence case. Curiously enough, even in the cross-examination of the eye-witnesses the defence has extracted prosecution case in its minute detail. Regarding the rendering of legal assistance, according to the principle of Article 21 of the [Constitution of India](#) the very first day of his production before the learned Magistrate, we are of the view that was meant for giving and/or offering opportunity to the accused as to the course he will take in the case as his defence. So that was the protective measure. Section 164 Cr.PC itself provides, as it contains, warning to the accused by the learned Magistrate before making any confessional statement offering time to him by the Magistrate for his reflection and that to ensure from the accused before making such statements whether he was under coercion of duress by the police and where there was any police person within his sight. These are the protective measures. He has to be warned by the Magistrate that even if he refuses to give any or make any confessional statement he will not be sent to the police custody and that will not affect his case. In such circumstance we are of the view that this is a special

provision made by the Legislature in its wisdom and the same does not come within the purview of Article 21 of the [Constitution of India](#) and as such there is no militancy of Article 21 of the [Constitution of India](#) and Section 164 of the Code of Criminal Procedure.

11. Mr. Roy also raised the point as to the statement of the accused under Section 27 of the Indian Evidence Act, leading to the discovery of the instrument of offence. The statement of the accused under Section 27 of the Evidence Act is exhibit 4, stated before the witnesses in presence of the police that he stabbed the wife of Punnaiah and the said bloodstained knife was seized in the bush near the place of occurrence and he could give the said knife and as for such statement recovery of the dagger was made and so also the cover of the knife as the accused led the police to the place where he hid his instrument of offence. So that part of the statement according to us, is admissible in evidence, except in inculpatary part.

12. Mr. Roy raised the objection that part containing the statement that he stabbed the wife of Punnaiah should not be admitted in evidence but the part that the said blood-stained knife was hidden by him in the bushes near the place of occurrence is admissible in evidence under Section 27 of the Indian Evidence Act. We do see eye to eye with the submission of Mr. Roy inasmuch as Section 27 of the Indian Evidence Act provides 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 related distinctly to the fact thereby discover may be proved. So from the Section it appears that even the confessional statement leading to the discovery is admissible in evidence. By that as it may, even if the statement is not relied upon and is not admissible, the materials are galore on record to show that the accused is guilty of the offence under Sections 302 and 324 of the Indian Penal Code for the reasons we have mentioned earlier. The last submission which was canvassed by Mr. Roy was that even if the confessional statement is attracted, then the defence has entered into a case of self-defence for striking Rajammal and A. Punnaiah. We have already pointed out that once the accused enters into a defence the onus shifts from the prosecution in the defence to prove

the defence case. In this case no such attempt has been made, rather the entire prosecution case which came out in examination-in-chief of the eye-witnesses has been extracted in cross examination. That apart, there are circumstances which lead us to believe that the incident did not take place on the spur of the moment, rather it was a planned one with some motive. From the evidence of P.W.5 Sandal Kumar in cross-examination we find that before leaving the place the accused declared that he had accomplished his mission and that he and Punnaiah may do whatever they liked. Apart from this piece of evidence, the other circumstantial evidence goes to show that the accused came to the house of Punnaiah with the knife hidden and it is not natural to go to the house of anybody for the purpose of taking anything from him with a knife. So that was premeditated. There is other evidence that he at first hit Punnaiah with the dagger and before that he slapped the wife of Punnaiah and after stabbing Punnaiah he did not leave the place but he caught hold of Rajammal by her hair, stabbed her once at the lower of the throat and thereafter he slit her throat with that dagger. That cannot be done on the spur of the moment. So in such circumstances, we are unable to accept the contention of Mr. Roy that the incident took place on the spur of the moment. No criticism has been made by Mr. Roy about the judgment of the learned trial judge. He could not show us any defect in the Judgment of the learned trial Judge. In such circumstance, we find no merit in this appeal and accordingly dismiss the appeal and confirm the Judgment and/or order containing conviction and sentence imposed upon the accused appellant under Section 302 and 324 of the Indian Penal Code as passed by the trial court.

Ram Prakash Gupta, J.

13. I agree.

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