

Balu Vs. State

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Court : Chennai

Decided On : Feb-04-2013

Judge : K.N.Basha

Appellant : Balu

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

04. 02.2013 CORAM: THE HONOURABLE MR.JUSTICE K.N. BASHA and THE HONOURABLE MR. JUSTICE P. DEVADASS Criminal Appeal No.361 of 2012 Balu @ Balamurugan .. Appellant/Accused Vs. State : Inspector of Police, Kai Kalathur, Perambalur District. .. Respondent/Complainant Prayer : Appeal filed under Section 374 (2) of the Code of Criminal Procedure against his conviction and sentence made in S.C.No.77/2010 by the Additional Sessions Judge, Mahila Court, Perambalur by Judgment dated 18.5.2012. For Appellants : Mr.A.Padmanabhan For Respondent : Mr. V.M.R.Rajendran Additional Public Prosecutor JUDGMENT P. DEVADASS, J.

The appellant is accused in the Court of Additional Sessions Judge, Mahila Court, Perambalur in the sessions case in S.C.No.77/2010.

2. On 18.5.2012, the learned Additional Sessions Judge found the accused guilty under Sections 302 and 392 IPC and sentenced him to life under Section 302 IPC

and also sentenced him to 10 years rigorous imprisonment with a fine of Rs.5,000/- with default sentence under Section 392 IPC and directed both the sentences to run concurrently.

3. The prosecution version of the case may briefly be stated as under: (i) P.W.2 Ramalingam and deceased Thangammal are spouses. P.Ws.3 and 4, Rajaram and Rajasekar are their sons. They were residing in Gandhi Nagar in Kai-kalathur in Veppanthattai Taluk in Perambalur District. (ii) On 15.4.2008, at about 8 a.m., Thangammal left for her brother P.W.5 Nallthambi's house in Pillankulam. At about 5 p.m., she was found hanging in a Neem tree in the land of one Periyasamy along the Pillankulam - Kai-kalathur Road. P.W.1 Subramanian, Village Administrative Officer, Pillankulam, P.Ws.3 and 4 and the villagers seen the dead body. Her golden ear-rings and screw (M.Os.7 and 11), golden nose-screw(M.O.8), golden thali and balls(M.Os.9 and

10) were found missing. (iii) At about 8 p.m., at the Kai-kalathur Police Station, P.W.1 gave Ex.P.1, complaint to P.W.17 Chandrahasan, Sub-Inspector of Police. He registered this case under Section 302 and 379 IPC (Ex.P.9 FIR). He send the original FIR to the Court and a copy of the same to P.W.18 Ayyanar, Inspector, Arumbavur Circle. (iv) P.W.18 took up his investigation. He visited the scene place. P.W.12 Munavar Khan photographed the dead body. In the presence of P.Ws.8 and 9 Thangarasu and Subramanian, P.W.18 prepared Ex.P.2 Observation Mahazar. Drew Ex.P.10, Rough Sketch of the scene place. Seized wire-bag(M.O.1) and chappals(M.O.2) under Ex.P.11 Mahazar. P.W.18 examined the witnesses and recorded their statement. In the presence of panchayatdars, he held inquest over the dead body [Ex.P.12 inquest report]. Send the dead body through constable Jothivel to the Government Hospital, Perambalur for conducting post-mortem. (v) On 16.4.2008, at about 12.30 a.m., at the said hospital, P.W.11 Dr.Saravanan conducted autopsy on the dead body of Thangammal and noticed laceration of = x = x = cm with blood stains on both her ear lobes and ligature mark of 27 cm length x 1 cm width on the front side of her neck. (vi) After post-mortem, the dead body and the cloths (M.Os.3 to 5 Saree, Jacket and inskirt) were handed over to P.W.2. (vii) P.W.11 opined that she died of asphyxia due to strangulation between 12 to 24 hours prior to autopsy. (viii) On 19.4.2008, at about 8 a.m., near

Sirunila bus-stop, in the presence of P.W.10 Thangaraj, Village Administrative Officer, Kai-kalathur and his Assistant, P.W.13 Sivakumar, P.W.18 arrested the accused. He recorded Ex.P.3 confessional statement of the accused. In pursuance of it, at about 10.30 a.m., from near an electrical main box, in his house, the accused produced Thangammal's ornaments (M.Os.7 to 11). In the presence of said witnesses, P.W.18 seized them under Ex.P.4 Mahazar. The accused also produced M.O.12 bi-cycle. P.W.18 seized it under Ex.P.5-Mahazar. P.W.18 produced the accused to the Court for judicial remand and the case-properties for being sent to chemical lab for analysis. After P.W.18, P.W.19 Elangovan, Inspector perused the investigation. Concluding it, he filed Final Report for offences under Section 302 and 392 IPC as against the accused in the committal court.

4. The Trial Court framed charges under Sections 302 and 392 IPC against the accused. When questioned, he denied the charges.

5. To substantiate the said charges, prosecution examined P.Ws.1 to 19, marked Ex.Ps.1 to 12 and exhibited M.Os.1 to 13.

6. The learned Additional Sessions Judge examined the accused under Section 313 Cr.P.C on the incriminating aspects appearing in the prosecution evidence. He denied his complicity in this case. He did not examine any witness nor mark any document on his side.

7. During the trial, before the Trial Court, P.Ws.14 and 15 Palanisamy and Thangadurai, who were examined as eye witnesses and P.W.16 Ganesan, who has been examined to speak about an incriminating circumstance have turned hostile. The remaining evidence was Section 27 Evidence Act recovery of M.Os.7 to 11 ornaments of the deceased recovered from the possession of the accused based on his confessional statement Ex.P3.

8. With reference to the said recovery, the Trial Court raised presumption under Section 114 of the Indian Evidence Act,1872 and referring to SANGIAH VS. STATE [2007 (2) MLJ (CrI) 1852] and GANESHAN VS. STATE [2011 (2) MLJ (CrI) 624], the Trial Court also held that for deciding the nature of the offence

committed, the confessional statement of the accused can be referred to and accepting the recovery evidence, the Trial Court held that the two charges are proved and found the accused guilty under Section 302 and 392 IPC and sentenced him as stated already in paragraph 2, supra.

9. Mr.A.Padmanabhan, the learned counsel for the appellant would contend that the recovery of ornaments of the deceased from the possession of the accused on 19.04.2008 has not been established. The evidence of P.W.3, a son of the deceased is that those ornaments were handed over to his father(P.W.2) on 16.4.2008 at the hospital itself. So, the recovery is false. The learned counsel would also contend that in the absence of any evidence to connect the accused with the murder merely based on presumption under Section 114 of Evidence Act, the appellant cannot be convicted. The Section 27 Evidence Act recovery apart from being not established is not sufficient to convict the appellant for murder and robbery.

10. On the other hand, Mr.V.M.R.Rajendran, the learned Additional Public Prosecutor would contend that the evidence of P.Ws.10, 13 and 18 clearly establishes recovery of M.Os.7 to 11 ornaments of the deceased from the possession of the accused on the basis of Ex.P3 confessional statement. The learned Additional Public Prosecutor would also contend that since the ornaments were recovered shortly after the occurrence, in pursuance of Section 114 of Evidence Act and its illustration (a), presumption of guilt as against the accused can very well be drawn. In this respect, the learned Additional Public Prosecutor would also cite LIMBAJI AND OTHERS VS. STATE OF MAHARASHTRA [2001(10) SCC 340].

11. We have anxiously considered the arguments of both sides, perused the entire materials on record, the impugned judgment of the Trial Court and the decision cited.

12. On 15.04.2008, at about 5 p.m., in a Neem tree, in the land of one Periyasamy, near Pillangkulam - Kai-Kalathur Road, Thangammal, wife of P.W.2 Ramalingam and mother of P.Ws. 3 and 4 Rajaram and Rajasekar, was found hanging. Her jewellery consisting of golden ear rings (M.O.7), golden nose stud

and screw (M.Os.8 and 11), golden thali and kundus (M.Os. 9 and 10) were found missing.

13. The medical evidence of autopsy Doctor P.W.11 Saravanan disclosed that there were injuries on her ear lobes suggesting sustaining of such injuries on forcible snatching away of her golden ear rings from her. P.W.11 opined that she died of asphyxia due to strangulation.

14. P.Ws.14 and 15 Palanisamy and Thangadurai, who have been examined as eye witnesses and P.W.16 Ganesan, who has been examined to speak about an incriminating circumstance that at about that time the accused was seen in the vicinity of scene place have turned hostile. What was finally left in the evidence adduced before the Trial Court was certain Section 27 Evidence Act recovery spoken to through the evidence of P.W.10 Thangarasu, V.A.O. and his Assistant P.W.13 Sivakumar and P.W.18 Ayyanar, Inspector, who investigated this case . Through their evidence, it was projected that on 19.04.2008, at about 10.30 a.m., based on Ex.P3 confessional statement of the accused M.Os.7 to 11, ornaments of the deceased were recovered from the possession of the accused.

15. The learned Additional Sessions Judge relied on the said piece of circumstantial evidence and recorded the conviction on the premises that i) the recovery evidence is established, ii) for deciding the nature of the offence committed, the statement of the accused relating to the commission of the offence in his confessional statement can be referred to, and iii) based on the said recovery, as per section 114 of Evidence Act and its illustration (a), the presumption that the accused had murdered the deceased for gain can be raised. And thus convicted the accused for murder under Section 302 IPC and for robbery under Section 392 IPC and sentenced him as stated already.

16. A close scrutiny of the entire evidence on record and the relevant legal provisions, namely, section 24 to 27 and 114 of the Evidence Act, and the decisions of this Court in SANGIAH VS. STATE [2007 (2) MLJ (CrI) 1852] and in GANESHAN VS. STATE [2011 (2) MLJ (CrI) 624], which were relied on by the Trial Court for the purpose of referring to the incriminating aspects in the

confessional statement of the accused to decide the nature of the offence committed exposes the fallacy of these premises upon which the findings of the Trial Court are based.

17. In short, the findings of the Trial Court is entirely based on Section 27 Evidence Act recovery pressed into service in this case by the prosecution.

18. Now, we shall proceed to analyse the said premises upon which the Trial Court based its conclusion one by one.

19. The Trial Court in its judgment held that for finding out the nature of the offence committed, the statement of the accused in his confessional statement recorded for the purpose of Section 27 Evidence Act can be referred to and relied on. According to the Trial Court a portion containing details of commission of offence stated in the confessional statement of the accused can be referred to, to find out the nature of the offence committed by him.

20. Indian Criminal Law is modelled on the British Anglo - Saxon Criminal Jurisprudence. The basic foundation of criminal law/ responsibility is that 'a person accused of an offence is presumed to be innocent till the guilt alleged as against him is proved beyond all reasonable doubts'. (See WOOLMINGTON VS. DIRECTOR OF PUBLIC PROSECUTIONS (1935 AC 462). Thus, 'one's presumption of innocence itself is his basic human right' (See KAILASH GOUR Vs. STATE OF ASSAM [2012 (1) MLJ (CrI) 807] and CHINNAPILLAI AND ANOTHER Vs. INSPECTOR, TALUK POLICE STATION, KRISHNAGIRI [2012 (2) L.W. (CrI) 499).

21. As a necessary corollary, suspicion, however, strong or probable, may not take the place of legal proof and when graver the charge, greater should be the standard of proof. The distance between 'may be true' and 'must be true' is too long. (See ASHISH BATHAM Vs. STATE OF M.P. [AIR 200.SC 3206.and RETHINAM Vs. STATE OF TAMILNADU [2011 (11) SCC 140].

22. However, law recognises reception of admission of certain aspects of the case, made by the accused, to some extent, under certain circumstances. As per

Section 17 of the Evidence Act, 'Admission' of a fact or statement is relevant. Admission is a good form of evidence because it emanates from the very maker.

23. 'Admission' (See Section 17, supra) is generic and 'confession' is its species. When the admission contains something towards the blameworthiness of its maker it becomes confession. But, in tune with the basic principle of criminal law, to ensure genuineness and voluntariness in such form of admissions, namely, confession, many safeguards are provided in the Evidence Act itself (See Section 24 to 27).

24. The principle that "no confession made to a police officer is admissible" is firmly ingrained in Section 25 of the Evidence Act. But, there are certain exceptions to it. If it is made in the presence of a Magistrate, it can be relied on (See Section 26 of the Evidence Act). Further, a limited exception to this aspect is also made in Section 27 of the Evidence Act. By way of a proviso to the preceeding sections prohibiting the admissibility of confession made to police, Section 27 provides limited exception to the embargo in Section 25 of the Evidence Act. What is permitted in Section 27 is 'so much of information' in the confessional statement of the accused 'leading to the discovery or recovery of a fact' and nothing more than that (See PULLUKURI KOTTAIYA Vs. KING-EMPEROR (AIR 194.PC 67)). Such recovery consequent upon such information is commonly known as 'Section 27 Evidence Act Recovery' or 'Recovery Evidence'. So much of information that led to the discovery of a fact although it was made to police while the accused was in their custody is admissible. It can be relied on to convict the maker.

25. Practically speaking, when an accused is arrested by a Police Officer, some times, the Police Officer says that the accused had voluntarily gave him confession and this was recorded by him. It is commonly known as 'confessional statement' or 'disclosure statement' of the accused. It is recorded for the said limited purpose provided in Section 27 of the Evidence Act. Usually, it will be complete narration of the entire family history of the accused running to pages also containing many vital clues, details, information with regard to the commission of the offence and also concealment of crime objects, such as weapon, booty, etc.,

This statement will be of two types. One is, the part containing 'incriminating information' about him, such as how he arranged the killing, how he carried it out or about robbery etc, why he killed the victim and under what circumstances he had killed the victim, whether it was under grave and sudden or sustained provocation, such as killing of his wife by the husband due to her complete waywardness. The other one is the part containing 'non-incriminating information'. It will contain a statement of fact leading to the recovery or discovery of such fact, such as hide-out of the weapon or booty or spoils of the crime (see CHINNASAMY REDDY Vs. STATE OF A.P. [AIR 196.SC 1788.and LIMBAJI AND OTHERS Vs. STATE OF MAHARASHTRA [2001 (10) SCC 340.usually recorded at the tail end of the confessional statement of the accused.

26. But, as we have already seen, the limited exception to the prohibition of admissibility of confession made to police provided in Section 27 of the Evidence Act is so much of information leading to the discovery of a fact alone, to put it in simple terms, only non-incriminating part alone. That part alone is admissible in evidence. That part alone can be used against the accused because law permits it (See Section 27, Evidence Act).

27. As regards the incriminating aspects contained in a confessional statement there is total embargo to use it against the accused(See Section 25 Evidence Act). It cannot be used to record a finding of guilty against the accused. Such usage will also militate against certain basic postulates of penal law, namely, 'presumption of innocence of the accused' and 'Rule against self-incrimination'. But, this embargo is only for using the incriminating aspects in a confessional statement as against the accused. There is no embargo or prohibition in using such incriminating part in the confessional statement in favour of the accused. It can be referred to, to find out under what circumstances, the offence has been committed.

28. 'All culpable homicides are murders'. But, 'all murders are not culpable homicides'. (See Section 299 and 300 IPC. and also see R. VS. GOVINDA [1876 (1) Bom. 342]. 'Culpable homicide' is murder/amounting to murder, if the conditions laid down in clause 1,2,3,4 in Section 300 IPC are satisfied. Higher punishment is provided for such offence under Section 302 IPC. If the killing

comes under the exceptions provided in Section 300 IPC then it will not be murder. It will be culpable homicide not amounting to murder. It is punishable not under Section 302 IPC but under Section 304 part (i) or part (ii) IPC. which provides for imposition of lesser sentence.

29. To find out what is the nature of the offence the accused has committed, whether it was culpable homicide not amounting to murder, whether there exists any mitigating circumstances under which the killing was committed by the accused, whether the accused has committed the offence under grave and sudden provocation or due to sustained provocation even the incriminating information contained in the confessional statement can be referred to, in order to dilute the rigour of punishment, namely, from Section 302 IPC to Section 304 part (i) or part (ii) IPC, as the case may be. It is to the benefit of the accused. Thus, for the benefit of the accused, even the incriminating part containing in a confessional statement of the accused can be referred to. In this connection, let us also see some of the decided cases in which this aspect has been highlighted.

30. In *HASIL v. EMPEROR* [AIR 194.Lahore 37], the learned Sessions Judge refused to rely on the confessional statement made by the accused before the Police, which the accused wanted to use in his favour for showing what offence had been committed. The Lahore High Court held that such confessional statement could be taken into consideration for the accused and the prohibition contained in Section 25 of the Evidence Act would not apply to such use of confessional statement in favour of the accused.

31. In *LALKHAN v. EMPEROR* [AIR 194.Lahore 43], the confessional statement of the accused was taken into consideration for ascertaining the version of the accused and based on that, the offence committed by him was held to be culpable homicide not amounting to murder.

32. In *re MOTTAI THEVAR* [AIR 195.Madras 586], Somasundaram.J., while agreeing with the conclusions arrived at by Mack.J.

in his separate judgment, observed as follows:- (10). Section 25, Indian Evidence Act says that no confession made to a police officer shall be proved as 'against ' a

person accused, of any offence. I underline the word 'against'. The confession does not therefore prohibit the use of it in favour of the accused.

33. In MOTTAI THEVAR [supra], the Division Bench referred to a part of the information in the confessional statement of the accused that due to grave and sudden provocation, he had killed his wife, and reduced his life sentence to 7 years Rigorous Imprisonment.

34. In re RAYAPPA ASARI [1972 CRL.L.J.

1226], MOTTAI THEVAR [supra] has been followed by another Division Bench of this Court. Such a view also has been taken in re GANESAN [1972 L.W. (Crl.) 42].

35. Subsequently, in re THANDAVAN [1973 CRL.LJ.1041], a Division Bench of this Court referred to the statement of the accused in his confessional statement to police that his wife told him that it is not possible for him to check her from indulging in adultery thus he had killed her and the Division Bench commuted his death sentence to life sentence.

36. In MANICKAM Vs. STATE [2011(3)Crimes 509(Mad.)], in Ex.P10 confessional statement recorded by the Investigation Officer, the accused had stated that the deceased was having illegal intimacy with his wife and under these circumstances, he had killed him. The Court noted this and held that the accused cannot be held to have committed murder and brought the offence under Section 304-I IPC and reduced his life sentence to 7 years rigorous imprisonment.

37. Recently, in ROHIDAS MANIK KASRALE v STATE OF MAHARASHTRA [2012 CRL L.J.917], a Division Bench of the Bombay High Court referred to MOTTAI THEVAR (supra) and held that Section 25 of the Evidence Act is not a bar to use a statement in the confession of the accused in his favour and noting from the confession that the accused had killed his wife because of her wayward behavior the Division Bench held that the offence would not be murder but culpable homicide not amounting to murder and set aside the life sentence and awarded 10 years imprisonment to the accused.

38. As stated already, referring to SANGIAH VS. STATE [2007 (2) MLJ (Cri) 1852] and GANESHAN VS. STATE [2011 (2) MLJ (Cri) 624], the Trial Court formed the view that to record a finding of guilty as against the accused, the confessional statement of the accused can be referred to and also relied on it.

39. The Trial Court has thoroughly mistaken the ratio decidendi in the said decided cases. In the circumstances, it becomes necessary to see the details of the said decided cases and set out what exactly was the ratios of the said decisions.

40. In SANGIAH(supra), the deceased owed some money to the accused. On the occurrence day, in front of a shop, the accused demanded his money from the deceased. Sudden fight erupted between them. The accused stabbed the deceased on his neck with M.O.1 knife. The deceased died. On the basis of complaint of the mother-in-law of the deceased, a case for an offence under Section 302 IPC was registered. P.W.14, the Investigation Officer, in the course of his investigation, arrested the accused. Recorded his confessional statement Ex.P3. In pursuance of it, he recovered M.O.1 knife. The Trial Court found the accused guilty under Section 302 IPC and sentenced him to life. He appealed. A Division Bench of this Court consisting of two learned Judges, to which one of us, my respected brother Mr.K.N.Basha, is a party and who had also authored the judgment, heard the appeal.

41. The Division Bench concluded that the deceased died due to homicidal violence at the hands of the appellant and proceeded further stating that "we are now left with the consideration of the nature of the offence said to have been committed by the accused" and analysed the issue as under:- "12. A perusal of the confession of the accused recorded by the police under Section 27 of the Indian Evidence Act for the purpose of recovery of M.O. 1, knife, shows that there were frequent quarrels between the accused and the deceased for the last more than a year as the accused went on demanding the deceased to return the amount, but the deceased evading to settle the dues. It is also seen from the perusal of the confession of the accused that even on the fateful day of occurrence, the accused demanded the deceased to settle the dues which resulted in a wordy quarrel and thereafter the deceased pushed down the accused and due to that he has taken

the knife from his waist and gave a single stab on the deceased. It is well settled by a number of decisions that in the interest of justice, it is permissible to look into confession recorded under Section 25 or Section 27 of the Indian Evidence Act in order to decide the nature of offence said to have been committed by the accused. [emphasis supplied by us] 13. The above said principle was laid down in the following decisions:

1. Thandavan, In re reported in 1972 LW (Crl) 244 :

1973. Cri LJ 1041.

2. Ganesan, In re reported in 1973 LW (Crl) 42 :

1974. Cri LJ 381.

14. This Court further taken a similar view in the following decisions:

1. Inre Chandran, In re reported in 1988 LW (Crl) 113; 2. Muthuswamy v. State reported in 1994 (1) LW (Crl) 44; 3. Vairamuthu v. State reported in 1996 (1) LW (Crl)9.

15. As already stated, as per the version of P. Ws. 1 to 5, that there were frequent quarrels between the accused and the deceased in respect of money transaction. Even in Ex. P.1, it is clearly stated that a wordy quarrel preceded the actual occurrence. Apart from the above said materials available on record, the perusal of the confession of the accused recorded by the police under Section 25 of the Indian Evidence Act for the purpose of recovery of M.O.I. knife, clearly shows that even at the time of fateful occurrence, there was a wordy quarrel between the accused and the deceased and further the deceased pushed down the accused and only thereafter the accused is said to have taken the knife from his waist and gave a single stab on the deceased. P.W. 2, one of the eye witnesses, has categorically stated that the accused cut the deceased only once on his neck. Though the other eyewitnesses stated that the accused cut twice, the doctor P.W. 8 has found only one stab injury on the left neck of the deceased and the second injury is only an abrasion and the doctor, P.W. 8, has stated that that injury could have been caused while the deceased came into the contact of a rough surface.

Therefore, it is crystal clear that the accused has given only a single stab on the deceased.

16. A perusal of the evidence of the eyewitnesses P. Ws. 1 to 5, confession of the accused leading to the recovery of M.O.I. knife, and the medical evidence clearly shows that the misunderstanding and wordy quarrel between the accused and the deceased added fuel to the fire by the conduct of the deceased pushing down the accused resulting grave and sudden provocation for the accused to stab the deceased.

17. In *Sankarlal alias Sankarayee v. State* reported in 1989 L.W. (Cri.) 468 a Division Bench of this Court has held that the term 'self control' in Section 300 I. P.C. is a subjective phenomenon and it can be inferred from the surrounding circumstances of a given case. In order to find out whether the last act of provocation upon which the offender caused the death was sufficiently grave as to deprive him of the power of self control, we have to take into consideration the previous act of provocation caused by the deceased person. This principle of sustained provocation has been considered by this Court in a number of decisions following the observations of the Supreme Court in *K. M. Nanvati v. State of Maharashtra* .

18. The theory of sustained provocation was upheld by this Court in *Suyambukani v. State* reported in 1989 L. W. (Cri.) 86. This decision was followed by this Court in a number of later decisions including a decision in *Ganesan v. State* reported in 2006-2-L. W. (Cri.) 656 :

2007. Cri LJ 10.

19. In a landmark decision in *K.M. Nanavati v. State of Maharashtra* . the Hon'ble Supreme Court of India has laid down the following principles regarding the Exception 1 to Section 300 I. P.C.:

1. The test of grave sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in situation in which the accused was placed would be provoked as to lose his self-control.

2. In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception of Section 300 I. P.C.

3. The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

4. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion has cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation. In the above said decision, the Apex Court has held that the mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. As far as the instant case is concerned, as already pointed out, regarding the sequence of events took place prior to the actual commission of the offence by the accused, as spoken by P. Ws. 1 to 5, which culminated into the appellant doing away with the deceased is tell-tale of the grave and sudden provocation.

20. Therefore, in view of the above said reason and in view of the settled principle of law laid down by the Apex Court and this Court, we have no hesitation to hold that the accused has stabbed the deceased on account of the grave and sudden provocation caused by the deceased by pushing down the accused after the wordy quarrel as the accused was already nurturing sustained provocation. We, accordingly, hold that the appellant is entitled to Exception 1 to Section 300 I. P.C." 42. On the above premises, the Division Bench set aside the conviction under Section 302 IPC., instead convicted him under Section 304 part(I) IPC and sentenced him to seven years rigorous imprisonment.

43. In the next case, namely, GANESHAN(supra), the accused suspected the fidelity of his wife. He advised her to mend her behavior. But, she did not. On the night of the occurrence day, the accused assaulted her indiscriminately with an aruval. She died. On the complaint of the niece of the deceased, a case for an offence under Section 302 IPC was registered. In the course of his investigation, P.W.17, the Investigation Officer arrested the accused. In the presence of a

Village Administrative Officer, P.W.17 recorded Ex.P7 confessional statement of the accused. In pursuance of that, he recovered M.O.1 aruval. The Trial Court accepted the prosecution version of the case. Convicted him under Section 302 I.P.C. And sentenced him to life. A Division Bench of this Court heard his appeal. It found him to have attacked the deceased with M.O.1 aruval and caused her death. Thereafter, the Division Bench proceeded as under:- "12. The only question that remains for us to consider is as to whether the circumstance spoken to herein would point out to the commission of offence punishable under Section 302 I.P.C. at all or not. A reading of the admissible portion of the confession statement of the accused in Ex.P.7 pointed out that the deceased had relationship with one Raja, co-brother of the accused, six months prior to the occurrence and on seeing them in a compromising position, the accused warned the deceased, to which the deceased promised that she would not behave like that in future. However, the deceased continued her relationship with the said Raja. A day prior to the date of occurrence, when the accused returned home, he found Raja coming out of the home and when he enquired the deceased, she merely stated that Raja came and just went away. However, the children told the accused that Raja was there for some time. Realizing that the deceased had not reformed herself to lead a good life and so too in future, and on the night once again when there was a quarrel between the deceased and the accused, thus enraged by the conduct of the deceased, and upset by the conduct of the deceased, the accused attacked her with the aruval, thereby caused her death.

13. Learned counsel for the appellant pointed out that the facts herein reveal that this is a case of sustained provocation. In the background of the above said facts, the conviction and sentence recorded are wholly unsustainable. Thus, learned counsel placed reliance on the decisions reported in AIYYASAMY ..VS.. STATE OF TAMIL NADU REP. BY THE INSPECTOR OF POLICE, PODANUR POLICE STATION (2005 (1) L.W. (CRL)

299) and CHANDRAN, IN RE (1988 L.W. (CRL) 113).

14. The question is as to whether the confession statement thus given by the accused to the police officer could be looked into for the purpose of charging the

accused with an offence under Section 302 I.P.C. came up for consideration in the decision reported in 1995 S.C.C. (CRI) 57 (MURLI ALIAS DENNY ..VS.. STATE OF RAJASTHAN).

15. The Hon'ble Apex Court in the decision reported in 1995 S.C.C. (CRI) 57 (MURLI ALIAS DENNY ..VS.. STATE OF RAJASTHAN), pointed out that when the accused acted on a sudden provocation, Exception 1 to Section 300 I.P.C stood attracted. Referring to the admission found in the statement in favour of the accused, the Apex Court pointed out that when there is no evidence disclosing as to how the quarrel ensued and attack took place, the relevancy of the confessional statement could be taken into account to find out whether the case falls under Exception 1 to Section 300 I.P.C. The sum and substance is that Section 25 of the Indian Evidence Act would assume relevance in a situation like this that a confession given by the accused to the police officer could be referred to for the purposes of finding out the real cause or as to how the quarrel ensued so as to benefit the accused regarding conviction and sentence. In similar line to the decision of the Hon'ble Apex Court, this Court, in the decision SANGIAH ..VS.. STATE REP. BY THE INSPECTOR OF POLICE (CRL.A.No.1004 of 2003 dated 07.12.2006) observed as to the permissibility of looking into the confession statement recorded under Section 25 or 27 of the Indian Evidence Act in order to decide the nature of offence said to have been committed by the accused. This Court pointed out to the materials available as well as to the confession of the accused recorded by the police under Section 25 of the Indian Evidence Act, apart from the recovery of a material weapon used to hold that the mental background created by the previous act of the victim could be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. This Court further pointed out that the term "self control" in Section 300 I.P.C. is a subjective phenomenon and it can be inferred from the surrounding circumstances of a given case. This Court referred to the principle of sustained provocation to find out whether the last act of provocation upon which the accused caused the death was sufficiently grave so as to deprive him of the power of self control. This Court referred to the decision of the Apex Court reported in AIR 196.SC 60.(K.M.NANAVATI ..VS.. STATE OF MAHARASHTRA) as to the principles laid down therein regarding Exception (1) to

Section 300 I.P.C. and on facts, held that apart from the evidence available, the confession statement of the accused recorded by the police under Section 25 of the Indian Evidence Act for the purpose of recovery of M.O.1 knife clearly pointed out that even on the date of occurrence, there was a quarrel between the accused and the deceased resulting in the fatal stab on the deceased.

16. The facts in the present appeal is no different from the decided case as referred to above. Thus, applying the law declared by this Court as to whether there was nurturing or sustained provocation so as to result in the subsequent act of the accused using self-control, as already pointed out, that on the very same day the deceased had a chance to see Raja coming out of the house and that the accused's children, on enquiry, informed the accused that the said Raja was inside the house for quite some time. Irked by the conduct of the deceased betraying him, there was a quarrel between the deceased and the accused during night time when the accused attacked the deceased with an aruval. The quarrel between the accused and the deceased, as spoken to in the evidence of P.W.1 and P.W.2 and P.W.3 referring to the quarrel in the night, the confession statement made by the accused herein Ex.P.7, clearly point out that the accused had a sustained provocation nurtured for a long period that the frustration reached the end of the breaking point when the accused caused the murder of the deceased.

17. Thus going by the above facts and the law declared on the aspect of the permissibility of looking into the confession recorded under Section 25 of the Indian Evidence Act to decide on the nature of the offence committed by the accused, we have no hesitation in accepting the plea of the accused that the case herein falls under Section 304(I) I.P.C., by applying Exception 1 to Section 300 I.P.C, thus inviting a sentence of seven years rigorous imprisonment." 44. On the basis of its above dissertation, the Division Bench set aside the conviction of the appellant under Section 302 IPC., instead convicted him under Section 304 part(I) IPC and sentenced him to seven years rigorous imprisonment and fined him Rs.1,000/- with a default sentence.

45. Thus, from the above, it is seen that what the law prohibits is using of the confessional statement given by the accused to a police officer as against the

accused, except to the extent provided, namely, so much of information leading to the discovery of a fact(see Sections 25,26 and 27 Evidence Act). There is no bar to use the confessional statement of the accused in his favour. This is what the ratio of this Court in SANGIAH VS. STATE [2007 (2) MLJ (CrI) 1852] and GANESAN VS. STATE [2011 (2) MLJ (CrI) 624].

46. But, the Trial Court took it in other way. It had really misunderstood the scope of Section 27 of the Evidence Act. It is the result of misunderstanding of the said decisions of this Court. What the Trial Court did was it had referred to the incriminating aspects in the confessional statement of the accused and relied on it to convict him. Thus, it had used it as against the accused. As stated already such usage of the confession made to a police officer is prohibited under Section 25 of the Evidence Act.

47. In several judgments of the learned Sessions Judges, we have come across this kind of their usage of confessional statement, that is to say, recording of a finding of guilty based on the incriminating aspects in the confessional statement of the accused misunderstanding the said decisions of this Court that for deciding the nature of the offence committed, the confessional statement of the accused can be referred to, thus, used the confessional statement as against the accused instead of using it in his favour.

48. Thus, in the case before us, one of the premises upon which the finding of the guilt recorded by the Trial Court, namely, incriminating information in Ex.P3 confessional statement of the accused relied on by the Trial Court is legally wrong.

49. In the case before us, on the premises that the Ornaments of deceased Thangammal were recovered from the possession of the accused based on his information in the admissible portion of Ex.P3 confessional statement, the Trial Court raised presumption under Section 114 of the Evidence Act to convict the accused for the offence of murder under Section 302 IPC and for the offence of robbery under Section 392 IPC. There is fallacy in this, both on law and on facts.

50. Section 114 of the Evidence Act provides for the Court to presume existence of any fact which it thinks likely to have happened, considering the common

course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. But, this presumption is rebuttable. To illustrate the presumption several examples were given in the section itself. Among them, illustration (a) which weighed with the mind of the Trial Court to convict the accused is relevant here. It runs as under:- "(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." 51. In the case before us, Thangammal was seen in the morning leaving her house with her jewellery, namely, M.Os.7 to 11, by her sons P.Ws.3 and 4 and in the evening at about 5 p.m., she was found dead. But, then her jewels were found missing from her body. Prosecution version is that based on Ex.P3 confessional statement of the accused, those jewels were recovered from him from his house on 19.04.2008. The Trial Court held that through the evidence of P.Ws.10,13 and 18, the said recovery has been established and referring to Section 114 of the Evidence Act and its illustration (a) the Trial Court also raised the presumption that the accused had murdered her and robbed her ornaments.

52. In the circumstances, first we shall see whether on the basis of 'recovery evidence', the Trial Court was right in raising a presumption under Section 114 of Evidence Act to record a finding of guilty as against the accused under Section 302 IPC and then we shall see whether the very factum of recording of confessional statement and the recovery of jewels of the deceased consequent upon the information in the confessional statement has been established by the prosecution.

53. In *SUNWAT KHAN VS. STATE OF RAJASTHAN* [AIR 195.SC 54], a three-Judge Bench of the Hon'ble Apex Court held that from the solitary circumstance of unexplained recovery of the articles belonging to the deceased from the house of the accused, the presumption of commission of offence of murder cannot be raised.

54. In *SUNWAT KHAN* (supra), the High Court upheld the conviction by relying on the solitary circumstance of the recovery of articles at the instance of the accused and the absence of explanation about their possession. On further appeal, the

Hon'ble Supreme Court set aside the conviction under Section 302 IPC and found the appellants guilty under Section 380 IPC. and the Hon'ble Apex Court held as under:- In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the temple or received them from the person or persons who had committed the murder. The Court, after having referred to the possibility of someone else murdering the deceased observed thus: (AIR p. 55, para

5) Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of Illustration (a) to Section 114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time. The accused produced these articles about a fortnight after the theft and the maximum that can be said against them is that they received these goods knowing them to be stolen or that they themselves stole them; but in the absence of any other evidence, it is not possible to hold that they are guilty of murder as well. Having referred to the decisions of various High Courts, the Court concluded as follows: (AIR p. 56, para

6) In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.

55. In SURJIT SINGH VS. STATE OF PUNJAB [AIR 199.SC 110], the Hon'ble Apex Court held that recovery of watch belonging to the deceased from a pawnbroker after 15 days of the date of occurrence on the basis of the information

furnished by the accused was held to be insufficient to connect him with murder by invoking Section 114 of the Evidence Act.

56. In GULAB CHAND VS. STATE OF M.P. [1995 (3) SCC 574], in a case of murder for gain under Sections 302, 394 and 397 IPC, while dealing with the question of raising presumption under Section 114 of the Evidence Act, the Hon'ble Apex Court held as under:- It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced.

57. In TULSIRAM KANU VS. STATE [AIR 195.SC 1.also dealing with the question of presumption under Section 114 of Evidence Act, when the ornaments of the deceased were found from the possession of the accused, soon after the murder, the Hon'ble Apex Court held as under:- In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 of the Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments.

58. In MUKUND VS. STATE OF M.P.[1997(10)SCC 130], the Hon'ble Apex Court observed as under:- If in a given case as the present one the prosecution can successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. In drawing the above conclusion we have drawn sustenance from the judgment of this Court in Gulab Chand v. State of M.P.¹⁰ 59. In LIMBAJI AND OTHERS VS. STATE OF MAHARASHTRA [2001(10) SCC 340], referring to MUKUND(supra), the Hon'ble Apex Court observed that the Court was cautious enough to say that other incriminating circumstances detailed reinforce the ultimate conclusion.

60. In *EARABHADRAPPA VS. STATE OF KARNATAKA*[1983 (2) SCC 330], presumption was raised that the accused who pointed out the place from where the ornaments were seized has committed robbery and murder. The Hon'ble Apex Court came to such a conclusion since apart from the recovery evidence quite a number of additional circumstances were established.

61. Recovery of the articles of the victim soon after the crime at the instance of the accused and the explanation given by the accused for possession of the articles were held to be sufficient to raise the presumption for having committed robbery and murder, if they were otherwise part of a same transaction.

62. Thus, a survey of the above cases and the scope of Section 114 of the Evidence Act as illustrated by Illustration (a) to it, so far as the charge of murder and theft or robbery or dacoity is concerned based on the only incriminating circumstance, namely, recovery of articles of the deceased from the possession of the accused based on his confessional statement a conviction for murder under Section 302 IPC cannot be recorded unless there were additional incriminating circumstances pointing out to the fact that the accused is concerned with the murder of the victim.

63. Thus, in the case before us, the Trial Court is not right in raising presumption under Section 114 of the Evidence Act to convict the appellant under Section 302 IPC., solely on the basis of recovery of the gold ornaments of the deceased from the possession of the accused based on his Ex.P3 confessional statement, in the absence of additional incriminating circumstances.

64. But, on the basis of recovery of gold ornaments of the deceased from the possession of the accused on the basis of his confessional statement, an accused can be convicted for an offence under Section 379, 392, 397, 380, 411 IPC., as it was held by the Hon'ble Apex Court in *SUNWAT KHAN* (supra), *SURJITSING*(supra) and *LIMBAJI*(supra).

65. In this connection, Mr.V.M.R.Rajendran, the learned Additional Public Prosecutor would contend that in the facts and circumstances of the case, if the charge under Section 302 IPC fails for want of required legal evidence, the

appellant can be very well convicted under Section 411 IPC, since the gold ornaments of the deceased were recovered from his possession based on his confessional statement.

66. Going by the position of law, which we have already seen, the learned Additional Public Prosecutor would be right in saying so provided the recovery is established.

67. The prosecution has to establish the recovery effected based on the disclosure statement of the accused like any other fact. It must prove the recording of the information and it must also prove the recovery of the articles of the victim consequent upon such information.

68. In this case, no doubt, M.Os.7 to 11 gold ornaments belongs to the deceased and she was seen with those articles when she left her house on the morning of 15.04.2008 and according to the prosecution on the evening they were found missing from her body when she was found dead.

69. To establish the fact that in pursuance of Ex.P3 confessional statement her ornaments were recovered from the possession of the accused on 19.04.2008, prosecution examined P.Ws.10 and 13 Thangarasu and Shivakumar as recovery witnesses and P.W.18 Ayyanar, Inspector, who had effected the recovery.

70. P.W.10 Thangarasu is Village Administrative Officer of Kai-Kalathur. According to him, on 19.04.2008, at about 8.15 a.m., in Sirunila bus-stop, the appellant was arrested by P.W.18, he(P.W.10) and his Assistant (P.W.13) Shivakumar have witnessed this and P.W.18 recorded Ex.P3 confessional statement from the accused that if he is taken to his house, he will show him the jewels concealed by him and Ex.P3 was attested to by P.Ws.10 and 13.

71. In his cross examination P.W.10 admits that at that time, 20 to 30 persons were present. So, there were many independent witnesses. But, none of them were examined. P.W.18 did not request any one of them to witness and attest the recording of Ex.P3 confessional statement.

72. In Ex.P3 confessional statement it is stated that the accused had concealed the jewels in a part of his house. But, the evidence of P.Ws.10 and 13 is to the effect that they were recovered from an open place. It is also evident from Ex.P4 recovery mahazar wherein it is stated that they were recovered from the verandah in the house of the accused. Thus, the fact that they were found concealed in his house as stated in Ex.P3 confessional statement is not reflected in the recovery mahazar and the evidence adduced for this purpose.

73. There is yet another disturbing feature in the Section 27 Evidence Act recovery pressed into service by the prosecution in this case.

74. Thangammal was found dead on 15.04.2008 at about 5 p.m. Then her husband P.W.2 Ramalingam was in Bangalore. Her dead body was sent to Government Hospital, Perambalur. On 16.04.2008, at the said hospital, post-mortem was conducted. On message, on 16.04.2008, P.W.2 visited the hospital. In his cross examination, P.W.3 Rajaram, son of P.W.2 had stated that police handed over his mother's ornaments, namely, M.Os.7 to 11 to his father at the hospital. So, it must be on 16.04.2008.

75. Thus, the prosecution version that her jewels were recovered on 19.04.2008 from the house of the accused based on his Ex.P3 confessional statement recorded from him on 19.04.2008 is far from truth.

76. In these circumstances, the arguments of Mr.A.Padmanaban, the learned counsel for the appellant that the recovery of jewells of the deceased from the possession of the appellant is stage-managed, it is farce, it is false cannot be said to be meaningless.

77. Thus, the very recovery of the ornaments of the deceased from the possession of the accused based on Ex.P3 confessional statement itself is not established. So, we have no occasion here to consider the arguments of the learned Additional Public Prosecutor made in the light of the Apex decision in LIMBAJI(supra).

78. Thus, as we have already stated at the outset, the three premises upon which the conviction of the appellant under Section 302 and 392 IPC of the Trial Court,

namely, i) the incriminating aspects in Ex.P3 confessional statement can be referred to decide the nature of the offence committed. ii) based on the recovery evidence, presumption under Section 114 of the Evidence Act raised and iii) the recovery of jewels from the possession of the appellant has been established are fallacious.

79. Dehors the so called Section 27 of Evidence Act Recovery, about which we have seen elaborately, there is no evidence to link the appellant either with murder or robbery or theft or receiving of stolen property. Thus, we have to conclude that suspicion, however, strong may not be a substitute for legal proof.

80. Thus, the finding of the Trial Court that the accused is guilty under Section 302 and 392 IPC and the sentences imposed upon him must go away.

81. In the result, this Criminal Appeal is allowed. The conviction recorded and the sentences awarded to the appellant in Sessions Case No.77 of 2010 by the learned Additional Sessions Judge, Mahila Court, Perambalur are set aside. The appellant is acquitted from both the charges. The Superintendent, Central Prison, Tiruchirapalli is directed to release the appellant forthwith, if his further custody is no longer required in connection with any other case. Fine amount, if paid shall be refunded. rrg Note: As this judgment deals with some important aspects of Section 17, 25, 27, 114 of the Indian Evidence Act and Section 299, 300, 302, 304 of IPC., this judgment may be placed before My Lord, the Hon'ble Acting Chief Justice for obtaining orders to circulate the copies of the same to the Judicial Officers in the Subordinate Courts. To 1.The Principal Sessions Judge, Perambalur. 2.The Additional Sessions Judge, Mahila Court, Perambalur. 3.The Chief Judicial Magistrate, Perambalur. 4.The District Collector, Perambalur. 5.The Superintendent of Police, Perambalur. 6.The Superintendent, Central Prison, Tiruchy. 7.The Additional Public Prosecutor, High Court, Madras. 8.The Inspector, Kai-Kalathur Police Station, Permpalur District. 9.The Section Officer, Criminal Section, High Court Madras