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Crl.A.No.226 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 29.04.2024

PRONOUNCED ON: 06.06.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

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Selvam

... Appellant/sole Accused

v.

State represented by
Inspector of Police (L & O)
E-4, Abhiramapuram Police Station,
Chennai – 600 028.
(Cr.No.3254/2015)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellant and sentence in S.C. No.240 of 2016 dated 20.12.2017, on the file of the learned Sessions Judge, Mahalir Neethimandram, Chennai and set aside the conviction and sentence imposed in judgment dated 20.12.2017 and acquit the appellant.

For Appellant : Mr.S.Panneerselvam

For Respondent : Mr.M.Babu Muthu Meeran



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Additional Public Prosecutor

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JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by the sole accused, challenging the conviction and sentence imposed upon him vide judgment dated 20.12.2017 in S.C.No.240 of 2016 on the file of the learned Sessions Judge, Mahalir Neethimandram, Chennai.

2(i). It is the case of the prosecution that the deceased was the wife of the appellant; that the appellant suspected her fidelity and harassed her both physically and mentally; that on account of the same, on 16.12.2015 at about 2.00p.m., at their residence at No.8, G-Block, Valliswaran Garden Housing Board, R.A.Puram, he attacked the deceased with a knife on her neck, face and stomach and caused her death; that when the eyewitnesses and other neighbours tried to catch hold of the appellant, he intimidated them and fled away from the scene. PW1, the mother of the deceased and an eyewitness to the occurrence, lodged a complaint [Ex.P1] to the respondent police. PW12 registered the FIR in Cr.No.3254 of 2015 at 5.00 p.m., against the appellant for the offences under Sections 341, 302 and



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506(ii) of the IPC and took up the investigation. The printed FIR was marked as Ex.P11.

(ii) Thereafter, PW12 went to the scene of the occurrence at 5.45p.m., and prepared the Observation Mahazar [Ex.P2] and Rough Sketch [Ex.P12]. He seized the bloodstained mosaic stone [M.O.1] and the stone that was not bloodstained [M.O.2], under the Seizure Mahazar [Ex.P3]. Thereafter, he examined the eyewitnesses and on 17.12.2015 at about 8.00 a.m., he arrested the accused in the presence of witnesses and recorded his confession. The admissible portion of his confession was marked as Ex.P5. At about 10.00 a.m., he seized the bloodstained shorts [M.O.3], bloodstained shirt [M.O.4] and the bloodstained knife [M.O.5] on the confession of the appellant. He conducted an inquest on the dead body on 17.12.2015 at about 10.30 a.m., and recovered the bloodstained clothes of the deceased under Form-91. The inquest report is marked as Ex.P13. He sent the body for a postmortem, which was conducted by P.W.13. The postmortem certificate is marked as Ex.P15. Thereafter, PW14 took up the investigation and examined the remaining witnesses and after obtaining the report from the Forensic Science Laboratories filed the final report before the



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learned XXIII Metropolitan Magistrate, Saidapet, Chennai, for the offences under Sections 341, 302 and 506 (ii) IPC against the appellant.

(iii) On the appearance of the appellant, the provisions of Section 207 Cr.P.C., were complied with, and the case was committed to the Court of Session in S.C.No.240 of 2016 and was made over to the learned Sessions Judge, Magalir Neethimandram, Chennai, for trial. The trial Court framed charges against the appellant, and when questioned, the appellant pleaded 'not guilty'.

(iv) To prove its case, the prosecution examined 14 witnesses as P.W.1 to P.W.14, marked 15 exhibits as Exs.P1 to P15, and marked 7 Material Objects as M.O.1 to M.O.7. When the appellant was questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. The appellant neither examined any witnesses, nor marked any documents.



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(v) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established the case beyond reasonable doubt and held the appellant guilty of offence under Section 302 of the IPC and was sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default to undergo SI for six months. Hence, the accused has preferred the appeal challenging the said conviction and sentence.

3. Heard, Mr.S.Panneerselvam, learned counsel appearing for the appellant, and Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent/State.

4 (i) Mr.S.Panneerselvam, the learned counsel for the appellant submitted that admittedly PW1, PW2 and PW3 did not witness the entire occurrence and had gone to the occurrence place after hearing about the quarrel between the deceased and the appellant. Therefore, they were not aware of the provocation given by the deceased which prompted the appellant to commit the offence, when he was deprived of his power of self control. The appellant had given a confession before the investigating officer



in which he had explained the circumstances under which he committed the offence. The inquest report [Ex.P13] also corroborates his version in the confession which would make the appellant liable only for the offence of culpable homicide.

(ii) The learned counsel for the appellant relied upon the Division Bench judgment of this Court in ***Mottai Thevan v. State***, reported in **AIR 1952 Mad 586; 1951 MWN Cr 574** and other judgments that followed the ratio in the said case, in support of his submission that the statements made in the confession can be used by the accused/appellant, in his favour.

5. Mr.M.Babu Muthu Meeran, the learned Additional Public Prosecutor *per contra* submitted that the confession was given during the investigation, and in view of the judgment of this Court in ***Sudalaimani v. State***, reported in **2014 (4) CTC 593**, the said confession cannot be used for any purpose whatsoever barring the exceptions provided in Section 162 (2) of the Cr.P.C., and therefore, in the absence of any evidence to contradict the evidence of PW1 to PW3, the appellant would only be liable for the offence



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of murder. Hence, he prayed for dismissal of the appeal.

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6. We have carefully considered the rival submissions and have perused all the relevant records.

7. As stated earlier, the prosecution has examined 14 witnesses to prove its case. PW1 to PW3 are the eyewitnesses to the occurrence. PW1 is the mother of the deceased. PW2 and PW3 are the brothers of the deceased. The above three witnesses are the primary witnesses for the prosecution. PW13 is the postmortem doctor, who issued the postmortem certificate [Ex.P15]. PW13 had noted three external ante-mortem injuries and had opined that the deceased died of shock and haemorrhage due to multiple injuries by a sharp weapon. The prosecution has thus established that the deceased suffered a homicidal death.

8. The evidence of PW1 to PW3 is also cogent and convincing, which establishes that the accused was responsible for causing bodily injuries to



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the deceased. The witnesses corroborate each other and nothing has been elicited in the cross examination to disbelieve their evidence. However, it is seen from their evidence that the deceased and the appellant were living separately and the witnesses i.e., PW1 to PW3 were living nearby. All the witnesses uniformly state that on hearing a noise from the house of the deceased and after the neighbours of the deceased called them, they went to the house of the deceased and saw the appellant attacking the deceased. In fact, PW3 would state that he did not see the appellant actually attacking the deceased, but saw him with the weapon near the deceased. The evidence of PW1 to PW3 therefore establishes the fact that it was the appellant who attacked the deceased. The witnesses however, admittedly were not aware of what transpired between the appellant and the deceased prior to the attack by the appellant on the deceased. It is in these circumstances, the learned counsel for the appellant submitted that the confession of the accused can be used in his favour to modify the conviction to the offence of culpable homicide not amounting to murder.

9. On perusal of the confession of the appellant, it is seen that the



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appellant and the deceased were closely related to each other even before marriage; that there were quarrels between the appellant and the deceased, as according to the appellant, the deceased had illicit intimacy with a neighbour, Chakravarthy; that on 15.12.2015, the deceased had spoken ill of the appellant when the appellant questioned her about the relationship; and that on 16.12.2015 when the appellant questioned the deceased as to why she came home late, she had abused the appellant. The relevant portion of the confession reads as follows:

“பிற்பகல் 2.00 மணிக்கு, வீட்டிற்கு வந்த அமுதாவிடம் எங்கே கத்திட்டு, லேட்டா வர்றே, என்று கேட்டதற்கு அவள் நான் கேட்டதை சட்டை செய்யாமல், அவள் பாத்ரூமுக்கு சென்றாள். நான் கேட்டுக்கிட்டே இருக்கேன், நீ என்ன பதில் சொல்லாம போறியேன்னு கேட்டேன். ஆமாடா, நீ கையாலாகாதவன். உனக்கு பொண்டாட்டி ஒரு கேடா, உனக்கு அசிங்கமா இருந்தா நீ வேணும்னா தூக்குப் போட்டு சாவுடான்னு திட்டினான். எனக்கு அளவுக்கதிகமான கோபம் ஏற்பட்டு, நான் இருப்பில் மறைச்சி வெச்சிருந்த கத்தியை எடுத்து, அவளை ஓட விடாமல் மடக்கி, அமுதாவின் தலைமுடியைப் பிடித்துக்கொண்டு, ஓழுங்கா இருக்கமாட்டியா, என கத்தியபடி என் கையில் வைத்திருந்த கத்தியால் அமுதாவின் கழுத்தில் குத்தினேன்.”

10. The learned counsel for the appellant relied upon the above portion and the other portions, which would suggest that the appellant had



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committed the offence under grave and sudden provocation. Column No.15 in the inquest report [Ex.P13] also show that there was a quarrel between the appellant and the deceased one day prior to the occurrence on account of her alleged relationship with her neighbour, Chakravarthy and that on the day of the occurrence, the appellant decided to do away with the deceased.

11. Thus, the fact that there was a dispute between the appellant and the deceased on account of the alleged intimacy of the deceased was revealed during the investigation. The witnesses PW1 to PW3 admittedly were not witnesses for the entire occurrence. What transpired between the appellant and the deceased prior to the attack was not known to them. They had come to the occurrence on hearing that there was a quarrel between the appellant and the deceased.

12. Though PW1 to PW3 have not spoken about the alleged intimacy, the inquest report reveals the fact that the appellant was aggrieved due to the alleged intimacy of the deceased, with a neighbour. Therefore, the confession of the accused and his explanation for committing the offence



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appear to be consistent with the other evidence on record. If this aspect of the confession of the appellant is accepted, then the appellant would only be liable for the offence of culpable homicide not amounting to murder, as his act would fall within Exception-I to Section 300 of the IPC.

13. As to what act would constitute grave and sudden provocation, within the meaning of Exception-I to Section 300 of the IPC has been settled by judicial pronouncements starting from *Nanavathi's* case [K.M.Nanavathi v. State of Maharashtra, reported in AIR 1962 SC 605].

14. (i) Before we examine that aspect, we would like to deal with the objection raised by the learned Additional Public Prosecutor that the confession cannot be used in favour of the accused in view of the judgment of this Court in *Sudalaimani's* case [cited supra].

(ii) It is seen that even after the decision in *Sudalaimani's* case [cited supra], some of the Division Benches had followed the ratio laid down in *Mottai Thevan's* case [cited supra], by using the statements in the



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confession of the accused made during investigation. In **Sarath @ Sarath**

Kumar v. State [Crl.A.No.342 of 2017 decided on 17.09.2018], the Division

Bench of this Court had held as follows:

“8. We however are of the view that punishment u/s.302 IPC is not proper. The evidence on record indicates a drunken brawl between the accused and the deceased, the occurrence proper having taken place on the spur of the moment and without premeditation. This view finds support in the confession of the accused which the decision of this Court in **Mottai Thevar vs. State, AIR 1952 Madras 586**, informs can well be looked into.”

(iii) There are a few other cases as well wherein confession made during investigation was used in favour of the accused. There are other judgments that have not used the confession in favour of the accused by following the judgment in **Sudalaimani's** case [cited supra]. In view of the different views taken by different benches after the judgment of this Court in **Sudalaimani's case**, we propose to examine as to which view has to be followed.

(iv). In **Sudalaimani's case** [cited supra], this Court as stated earlier made a distinction between confessional FIR and confession given during



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custody and it held that confessional FIR which is given before the investigation, is not barred by Section 162 of the Cr.P.C., and therefore can be used in favour of the accused; and that the confession during custody would be hit by the said provision and cannot be used for any purpose except as provided under Section 162(2) of the Cr.P.C. The relevant portion of the judgment of this Court reads as follows:

“27. We are aware that if a Division Bench dissents with the view of a Co-ordinate Division Bench, then the matter should be referred to a Full Bench for resolution. In this case, all the Division Benches have given the benefit of a Police confession obtained during the course of investigation to the Accused relying upon either *Mottai Thevar's case* [AIR 1952 Mad 586] or *Aghnoo Nagesia's case* [AIR 1966 SC 119]. We are not disagreeing with the proposition of law laid down in *Mottai Thevar's case* or *Aghnoo Nagesia's case*. We are simply following them after noting that in the said two cases the Accused surrendered to the Police immediately after committing the offence and gave a Confession Statement. This singular aspect makes an ocean of difference while determining the legal position which was inadvertently lost sight of by the subsequent Division Benches in the thicket of their noble and laudable objective to grant benefits to the Accused. With great respect to them, in our humble opinion, these Judgments are *per incuriam*.”

(v). As could be seen from the above observations, the Division Bench



held that all the other judgments that followed the view taken by a Division Bench of this Court in ***Mottai Thevan's*** case and did not make the distinction between the confessional FIR and the confession given during investigation, were *per incuriam*.

(vi). In ***Mottai Thevan's case*** [cited supra], this Court held that Section 25 of the Indian Evidence Act is no bar to the user of a confession in favour of an accused person. Both the learned judges of the Division Bench concurred on the final opinion. Hon'ble Mr. Justice Mack had held as follows:

“...We have no doubt at all that the appellant, after spearing deceased at the shandy, went straight to the police station with the blood-stained spear and there made a clean breast of the offence and that this was the first information received in the case. Even assuming that he was caught by a constable going off with the blood-stained spear and taken to the police station, the statement he made there should certainly be considered in his favour. It is obvious that the learned Sessions Judge did not peruse the case diary as he was entitled to do under Section 172 (2), Cr. P. C. The result of our perusal of the confession recorded from him at the police station is that not only do we find mitigating circumstances to justify the imposition of the lesser punishment but we also feel justified in making a recommendation to the Government for commutation



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of the sentence.”

(vii). Hon'ble Mr.Justice Somasundaram, was pleased to observe as follows:

“.... 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 there in single quotation) the word 'against'. The confession does not therefore prohibit the use of it in favour of the accused. In the majority of cases the confessions are sought to be used only against the accused. The cases in which such confessions would or can be used in favour of the accused will be very few and they will be the exceptions to the general rule. The section therefore ought not to be repealed or modified for the sake of the few or the exceptions.”

(viii). In *Mottai Thevan's case*, the prosecution case was that the accused, after committing the crime, came to the police station with a bloodstained spear and gave a statement that was registered as an FIR. The accused therein took an extreme plea, saying that the police were bribed to foist a case against him and some policemen asked him to pick up the weapon that was lying near the deceased and took him to the police station and beat him.



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(ix). In the light of the above facts, Hon'ble Mr. Justice Mack observed that on facts, the Bench was convinced that the accused went to the police station on his own to give the confession. The next observation is important. The learned Judge observed that even assuming that he was caught by a Constable and taken to a police station, the statement made by him should be considered in his favour. If the Hon'ble Judges wanted to make a distinction between confessional FIR and confession made after the commencement of investigation, there was no necessity for them to state that even assuming that the accused was caught by a Constable and taken to the police station, the confession can be used in his favour. Therefore, to start with, we are of the view that *Mottai Thevan's case* [cited supra], cannot be a precedent for the proposition that confessional FIR alone can be used in favour of the accused. In *Mottai Thevan's case* [cited supra], no distinction was sought to be made between confessional FIR and the confession given during investigation.

(x). Be that as it may, the language of Section 25 of the Indian Evidence Act, is very clear and it says no confession to a police officer can



be proved 'against' a person accused of any offence. The corollary to such a provision would be that the confession can be used in favour of the accused.

However, the Division Bench in ***Sudalaimani's case*** [cited supra] held that a confession given to the police officer during investigation would amount to a statement under Section 162 Cr.P.C., relying upon the judgment of the Hon'ble Supreme Court in ***Aghnoo Nagesia v. State of Bihar***, reported in **AIR 1966 SC 119** and therefore, it cannot be put to any use during trial except for the purposes mentioned in Section 162(2) of the Cr.P.C, which reads as follows:

“Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.”

Therefore in ***Sudalaimani's case*** [cited supra], this Court held that there has to be a distinction between the confession given before investigation and one given during the course of investigation.

(xi). Firstly in our humble view, this distinction is theoretical in the light of the observations of the Hon'ble Supreme Court in State of ***Uttar Pradesh v. Deoman Upadhyaya***, reported in **AIR 1960 SC 1125**, which



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was not brought to the notice of the Division Bench of this Court, which decided *Sudalaimani's* case [cited supra]

(xii). In *Deoman Upadhyaya's case* [cited supra] a very interesting question arose. The Allahabad High Court, had struck down Section 27 of the Indian Evidence Act, as unconstitutional, by holding that since Section 27 of the Indian Evidence Act refers to a confession given during the custody of a police officer, a confessional FIR (when the accused is not in custody) even if it leads to the discovery of fact, cannot be proved in terms of Section 27 of the Indian Evidence Act and hence, Section 27 of the Indian Evidence Act, is discriminatory and violative of Article 14 of the Constitution of India. This was challenged by the State of Uttar Pradesh before the Hon'ble Supreme Court and a larger Bench of the Hon'ble Supreme Court by a 4:1 majority held that Section 27 of the Indian Evidence Act is not unconstitutional.

(xiii). Primarily, in the judgment of the majority view authored by Hon'ble Mr.Justice J.C.Shah, it was held that a person directly giving



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information to the police officer confessing about the crime, is deemed to have submitted himself to custody. The Hon'ble Supreme Court also observed that in some cases very rarely, the accused may not submit himself to custody and still give an information by other means such as writing a letter etc. But when he appears in person before the police officer and makes a confession, he is deemed to be in police custody. The relevant observations of the Hon'ble Supreme Court are as follows:

“12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal



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Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the custody " of the police officer within the meaning of s. 27 of the Indian Evidence Act: Legal Remembrancer v. Lalit Mohan 'Singh ((1921) ILR (49) Cal 167), Santokhi Beldar v. King Emperor ((1933) ILR (12) Patna 241). Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has given equal treatment to all persons similarly circumstanced, it must be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided. A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the



police officer investigating the offence has not been able to get at any evidence against him giving information to the police officer without surrendering himself to the police, which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself. Cases like *Deonandan Dasadh v. King Emperor* ((1928) I.L.R. 7 Pat. 411), *Santokhi Beldar v. King Emperor* ((1933) I.L.R. 12 Pat. 241), *Durlav Namasudra v. Emperor* ((1932) I.L.R. 59 Cal. 1040), *In re Mottai Thevar* (A.I.R. 1952 Mad. 586), *In re Peria Guruswami* (I.L.R. 1942 Mad. 77), *Bharosa Ramdayal v. Emperor* (I.L.R. 1940 Nag. 679) and *Jalla v. Emperor* (A.I.R. 1931 Lah. 278) and others to which our attention was invited are all cases in which the accused persons who made statements leading to discovery of facts were either in the actual custody of police officers or had surrendered themselves to the police at the time of, or before making the statements attributed to them, and do not illustrate the existence of a real and substantial class of persons not in custody giving information to police officers in the course of investigation leading to discovery of facts which may be used as evidence against those persons.” *[emphasis supplied]*

(xiv). Thus, when an accused person submits himself to custody, the investigation is also deemed to have commenced. Therefore, a distinction



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cannot be made between a confessional FIR and the confession given after the registration of the FIR. The premise on which the Division Bench of this Court held that confession during investigation cannot be used for any purpose is that the confessional FIR given by the accused precedes the investigation and is not part of the investigation. We are of the view that unlike other information, which is given by the victim or by a third party about the offence to the police, the confessional FIR is deemed to be given during the course of the investigation, as the accused submits himself to custody.

(xv). Ofcourse, where an information is given by any victim / witness, then the information has to be recorded before commencing an investigation. This has been clarified by the Hon'ble Supreme Court in ***Lalita Kumari v. State of Uttar Pradesh and others***, reported in **AIR 2014 SC 187**. However, an information by a victim/witness, is always not necessary for commencing an investigation, as could be seen from the words employed in Section 157 of the Cr.P.C., which says that a police officer on 'information received or otherwise'. These words were interpreted by the Hon'ble



Supreme Court in *State of Uttar Pradesh v Bhagwant Kishore Joshi*,

reported in AIR 1964 SC 221, wherein it is held that the words 'otherwise' indicate that information is not a condition precedent for investigation. The relevant observations are as follows:

“8. The first question is whether the enquiry made by him before he obtained the permission of the Magistrate was ‘investigation’ within the meaning of the provisions of the Code of Criminal Procedure. Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognizable offence. Section 156 thereof authorizes such an officer to investigate any cognizable offence prescribed therein. Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 which prescribes the procedure in the matter of such an investigation can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise. Under Section 4(1) of the Code of Criminal Procedure, “Investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf”. [emphasis supplied]

Therefore, the moment the police officer records the confession of the accused, who submits himself to the custody of the police, the police officer



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starts collecting the evidence and the investigation is deemed to have commenced, as otherwise even if a fact is discovered pursuant to such confession, it cannot be proved in terms of Section 27 of the Indian Evidence Act. Therefore, the distinction sought to be made by referring to Section 162 of the Cr.P.C., may not be in accordance with the aforesaid judgments of the Hon'ble Supreme Court.

(xvi). Section 162 Cr.P.C., therefore cannot be a bar for use of confession made by an accused in his favour whether it was given before the registration of the FIR or after its registration. As stated earlier, in *Mottai Thevan's* case, no such distinction was made.

(xvii). Let us assume a case, where the accused attacks 'A' and 'B' in a house. 'A' dies and 'B' survives. Let us say that it is 'B's version that the accused attacked both 'A' and 'B' in a premeditated manner and the version of the accused is that he committed the act due to grave and sudden provocation given by 'A'. 'B' and the accused decide to go to the police station to give information. If 'B' goes five minutes before the accused to the



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police station, and an FIR is lodged on his information, the confession of the accused, even if it has any mitigating circumstances, cannot be used in favour of the accused. However, if the accused goes to the police station one minute before 'B' and makes a confessional FIR then his confession can be used in his favour. The Division Bench in *Mottai Thevan's* case [cited supra] never intended to make such a distinction. Of course, whether the confession of the accused in his favour or the version of 'B' relating to the occurrence has to be accepted, is a question of fact.

(xviii). That apart, an accused who is arrested after the registration of the FIR, is unlikely to make any exculpatory statement in his confession as he would be under the influence of the police. Whereas an accused who gives a confessional FIR, is likely to make statements, which would mitigate the rigour of the offence. Therefore, to give the benefit only to such an accused by making a distinction, is not only contrary to the judgment of the Division Bench in *Mottai Thevan's case* [cited supra], but also to the provisions of the Indian Evidence Act and Cr.P.C., which are intended to protect the accused.



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(xix) In fact, Section 172(2) of the Cr.P.C., empowers the criminal Court to send for the police diaries of the case under enquiry or trial and may use such diaries not as an evidence but, to aid any such enquiry or trial. In *Mukund Lal v. Union of India and others*, reported in 1989 Supp (1) SCC 622, the Hon'ble Supreme Court held that a Court has power to make use of the entries in the police diaries to the advantage of the accused. The relevant portion reads as follows:

“4. The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. This is a factor which must be accorded its due weight. There would be no prejudice or failure of justice to the accused person since the court can be trusted to look into the police diary for the purpose of protecting his interest...”

It is needless to mention that the case diary would also contain the statements of witnesses recorded under Section 161 of the Cr.P.C.

(xx) It is relevant to point out here that Section 3 of the Indian Evidence Act, which defines the word 'proved', does not employ the word



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'evidence'. It states that after considering the matters before it, the Court can either believe that a fact exists, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In our view, the confession of the accused 'in his favour' is certainly a matter before the Court for it to look into while considering the nature of the offence committed by an accused. That apart, it is well settled that while dealing with criminal statutes, if there is any ambiguity, it must be interpreted in favour of the accused, taking into consideration the practical effect of a statute. The Court cannot be hyper-technical. In the case of ***Union of India and Others Vs. Priyankan Sharan and Another*** reported in ***(2008) 9 SCC 15***, the Hon'ble Supreme Court had held that the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. Likewise, in the case of ***R.L.Arora Vs. State of Uttar Pradesh and Others*** reported in ***AIR 1964 SC 1230***, the Hon'ble Supreme Court had dealt with the manner in which the provision in statute is required to be interpreted and held in the following manner:-

“Further, a literal interpretation is not always the only



interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning, of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law-making body which may be apparent from the circumstances in which the particular provision came to be made. Therefore, a literal and mechanical interpretation is not the only interpretation which courts are bound to give to the words of a statute; and it may be possible to control the wide 'language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted.”

(xxi). Therefore, we are of the view that the ratio in *Mottai Thevan's* case and the judgments that followed the ratio in *Mottai Thevan's case* [cited supra], irrespective of whether it is a confessional FIR or a confession given after registration of FIR and used the confession of the accused in his favour, are binding on us. Since those judgments are binding on us, we see no reason to refer this issue to a larger Bench. In this regard, it would be useful to refer to the observations made by the Constitutional Bench of the Hon'ble Supreme Court in *National Insurance Company Limited v.*



Pranay Sethi and others, reported in (2017) 16 SCC 680, which are as follows:

“27. We are compelled to state here that in *Munna Lal Jain v. Vipin Kumar Sharma* ((2015) 6 SCC 347), the three-Judge Bench should have been guided by the principle stated in *Reshma Kumari v. Madan Mohan* ((2013) 9 SCC 54) which has concurred with the view expressed in *Sarla Devi v. Delhi Transport Corporation* ((2009) 6 SCC 121) or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in *Reshma Kumari* [supra] being earlier in point of time would be a binding precedent and not the decision in *Rajesh v. Rajbir Singh* ((2013) 9 SCC 54).

28. In this context, we may also refer to *Sundeep Kumar Bafna v. State of Maharashtra and another* ((2014) 16 SCC 623) which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co- equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in *Rajesh*’s case was delivered on a later date, it had not apprised itself of the law stated in *Reshma Kumari* (supra) but had been guided by *Santosh Devi v. National Insurance Co. Ltd.*, ((2012) 6 SCC 421). We have no hesitation that it is not a binding precedent on the co-equal Bench.”



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(xxii). In the light of the above observations, we are of the view that the confession of the accused at whatever stage it is made, as long as it is either consistent with the other evidence on record or is not contrary to the other evidence on record, if found in favour of the accused, can be used as a mitigating factor to hold him guilty of a lesser offence.

15. In the instant case, as we have pointed out earlier, the appellant had stated that the deceased had offered provocation. As to whether in the facts, the said provocation can be said to be 'grave and sudden' has to be examined. It is the version of the accused that on 15.12.2015 when he questioned the deceased about the relationship, she had abused him and that on 16.12.2015 when he again questioned her about the relationship and as to why she came late, she had abused him. We have extracted the confession earlier to show the nature of words used by the deceased. In ***K.M.Nanavathi's*** case [cited supra] the Hon'ble Supreme Court held that in order to fall within Exception-I to Section 300 of the IPC, the following conditions have to be satisfied.



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“Under this exception, culpable homicide is not murder if the following

conditions are complied with :

- (1) The deceased must have given provocation to the accused.
- (2) The provocation must be grave.
- (3) The provocation must be sudden.
- (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control.
- (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control.
- (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.”

16. It is well settled that the question whether an act was committed due to grave and sudden provocation, is a question of fact. While considering the said question, the Court has to take into account the past conduct of the deceased and the accused prior to the occurrence to ascertain whether the last act of provocation can be said to be grave and sudden. In this regard, the observations made in the judgment of this Court in ***Rajendran v. State of Tamilnadu [Crl.A.Nos.657 of 1987 and 129 of 1990 decided on 03.03.1997]***, would be relevant and the same are extracted hereunder.



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"37. As per Exception 1 to Section 300 of the Indian Penal Code, culpable homicide is not murder, if the offender, while depriving of the power of self-control by grave and sudden provocation, caused the death of the deceased. So, we have to assess whether the offender was out of the power of self-control and whether such deprivation was due to the grave and sudden provocation. For finding out this situation, we have to keep in our mind, earlier situations and circumstances.

38. There may be the acts of sudden provocation at to lead to loss of self-control without any previous history. There may be some acts of provocation, which, if considered in isolation would not be sufficiently grave so as to cause loss of power and self-control. Some of the circumstances even may appear as an important to some persons, but they may assume the status of gravity in view of the state of mind of the persons concerned on account of previous history.

39. The sustenance of power of self-control differs from man to man. If the offending acts are of the same nature and emanate from the same persons as in this case, these acts could have a cumulative effect and each time there is added strain on the concerned individual to keep himself controlled and his patience should not be overtaxed. Thus, we would call, in common parlance, even the last straw which may be weak could break camel's back."

17 (i) Considering the cumulative facts and circumstances leading to the occurrence, the words spoken by the deceased on the fateful day in our



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view can be termed as one giving grave and sudden provocation and the appellant had committed the offence while he was deprived of his power of self control, due to the said provocation.

(ii) Thus, we are convinced that the act of the accused would fall within Exception-I of Section 300 of the IPC, if his confession is used in his favour which is supported by the information gathered during the investigation and recorded in the inquest report. In the facts and circumstances of the case, the ends of justice would be met if the appellant is sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months simple imprisonment, for the offence under Section 304(I) of the IPC.

18. Accordingly, this Criminal Appeal stands partly allowed. The judgment of conviction and sentence imposed upon the appellant in S.C.No.240 of 2016 dated 20.12.2017 on the file of the learned Sessions Judge, Mahalir Neethimandram, Chennai, is modified as follows:

(i) Conviction of the appellant under Section 302



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of IPC is modified to one that of Section 304(I) of the IPC and he is sentenced to undergo ten years of rigorous imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months simple imprisonment;

(ii) It is directed that the period of sentence already undergone by the appellant shall be set off under Section 428 of the Cr.P.C.;

(M.S.R.,J.) (S.M.,J.)

06.06.2024

Index : Yes/No

Neutral citation : Yes/No

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To

1. The Sessions Judge,
Mahalir Neethimandram, Chennai.
2. The Inspector of Police,
E-4, Abhiramapuram Police Station,
Chennai – 600 028.
3. The Superintendent,
Central Prison-I, Puzhal, Chennai.
4. The Public Prosecutor,
High Court, Madras



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M.S.RAMESH,J.

AND

SUNDER MOHAN,J.

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Pre-delivery Judgment in
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06.06.2024