Ganesan vs State Through on 2 August, 2024

Author: M.S.Ramesh

Bench: M.S.Ramesh

Crl

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.06.2024 / 11.07.2024

PRONOUNCED ON : 02.08.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH
AND
THE HON'BLE MR.JUSTICE SUNDER MOHAN

Crl.A.No.118 of 2019

1.Ganesan
2.Pothum Ponnu ...Appellants/Accused No.1 and 2

Vs.

State through
The Inspector of Police,
Alangiyam Police Station,
Tiruppur District.
[In Crime No.99 of 2015] ...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure, 1973, to call for the records and set aside the judgment and conviction imposed by II Additional Sessions Court cum Mahila Court (Fast Track Mahila Court), (Full in-charge), Tiruppur District, in S.C. 2015 dated 06.04.2017 against the appellants/accused no.1 and 2.

For Appellants : Mr.S.Mohamed Ansar
For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor

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https://www.mhc.tn.gov.in/judis

Amici Curiae : Mr.N.R.Elango, Sr. Counsel

Mr.Sharath Chandran

JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.) This Criminal Appeal has been filed by Accused No.1 and 2, challenging the conviction and sentence imposed upon them vide judgment dated 06.04.2017 in S.C.No.204 of 2015 on the file of the learned II Additional District and Sessions Judge cum Mahila Court (Fast Track Mahila Court), Tiruppur District.

2 (i). It is the case of the prosecution that the first appellant is the husband of the deceased whose marriage took place five years before the occurrence; that they had a daughter who was aged four years; that one year before the occurrence, the first appellant suspecting that the deceased had illegal relationship with a neighbour by name Arun Kumar, quarrelled with the deceased; that thereafter, the first appellant and the deceased shifted their residence to Coimbatore; that at that time, the first appellant developed intimacy with the second appellant; that on 17.02.2015, the first appellant took the https://www.mhc.tn.gov.in/judis deceased, their daughter and the second appellant and started living together; that the deceased quarrelled with the first appellant and objected to his having the second appellant in the house; that on 18.02.2015 at about 9.30 p.m., the deceased quarrelled with the first appellant as she found both the appellants sharing the bed; that she attacked the second appellant; that the second appellant in turn attacked the deceased with hands; that the deceased attacked the first appellant also; and that the first appellant thereafter took a wooden log and attacked the deceased on the head and other parts of the body, strangulated her neck and thereby caused her death.

(ii) It is further the case of the prosecution that after causing the death of the deceased, in order to screen the offence, the appellants buried the body of the deceased in one of the rooms in the house and thereafter placed hollow blocks and closed it with cement. P.W.1/the Village Administrative Officer, on information from P.W.2/brother-in-law of the first appellant that a foul smell emanated from the house of the appellants went to the house and found that a construction was made in the house that looked like a tomb (rkhjp). Suspecting foul play, he lodged a complaint [Ex.P1] to the respondent on 23.02.2015 at https://www.mhc.tn.gov.in/judis about 6.30 p.m. The FIR [Ex.P19] was registered by P.W.13/Special Sub Inspector of Police for suspicious death under Section 174 of the Criminal Procedure Code, 1973, in Crime No. 99 of 2015.

(iii) P.W.14/Deputy Superintendent of Police, took up the investigation. On 24.02.2015, he went to the scene of the occurrence and prepared Rough Sketch [M.O.20] and Observation Mahazar [M.O.7] in the presence of the witnesses. He made a requisition for the conduct of post-mortem, informed the finger-print expert, dog squad and photographer and requested their presence. The doctor came to the scene of the occurrence and conducted a post-mortem at the scene of the occurrence. Since it was a case of suspicious death, initially the learned Executive Magistrate-cum-Tahsildar conducted an inquest. P.W.14 seized the sand from the place where the deceased was buried [M.O.8], the sand next to the place where she was buried [M.O.9] and the hollow block [M.O.12] in the presence of witnesses. He seized the dress materials of the deceased [M.Os.1 to 3]. On 25.02.2015, he examined the parents of the deceased and other witnesses. On 27.02.2015, P.W.1/the Village Administrative

Officer, came to the police station along with the first appellant with a special report, which was marked as Ex.P2. P.W.1, in his special report, stated that the first appellant https://www.mhc.tn.gov.in/judis confessed to the crime. It is seen that the first appellant has also signed the said special report. Thereafter, P.W.14 altered the offences from Section 174 of the Criminal Procedure Code to Sections 302 and 201 of the Indian Penal Code. He arrested the first accused at 11.45 a.m., recorded his confession and on his confession, seized a triangular shaped wooden log. Thereafter, he arrested the second accused at 2.15 p.m., recorded her confession and on her confession seized the spade [kz;btl;o] and iron basket [fhiur;rl;o]. Thereafter, both the appellants were sent for treatment as they had suffered injuries on account of the scuffle between them and the deceased. P.W.14 examined the other witnesses and filed the final report for the offences under Sections 302 and 201 r/w 34 of the IPC.

(iv) On the appearance of the appellants/accused, 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.204 of 2015 and was made over to the learned Sessions Judge, Mahalir Neethimandram [Fast Track Mahila Court], Tiruppur, for trial. The trial Court framed charges under Sections 302 and 201 of the IPC as against the appellants, and when questioned, the appellants pleaded 'not guilty'. https://www.mhc.tn.gov.in/judis

(v) To prove its case, the prosecution examined 14 witnesses as P.W.1 to P.W.14 and marked 21 exhibits as Exs.P1 to P21, and 12 material objects as M.O.1 to M.O.12. When the appellants were questioned u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The appellants/accused did not examine any witnesses or mark any documents on their side.

(vi) The Trial Court, on appreciation and evaluation of oral and documentary evidence, convicted the accused, viz., the appellants, and sentenced them as follows:

Accused No.	Offences under Section	Sentence imposed
A1	302 of the IPC	To undergo life imprisonment of Rs.2000/- in default to un year.
	201 of the IPC	To undergo RI for 10 years an Rs.1000/- in default to under

The sentences imposed were directed to run concurrently.

Accused No.	Offences under Section	Sentence imposed
A2	201 of the IPC	To undergo RI for 10 years an Rs.1000/- in default to under

Hence, the accused/appellants have preferred the appeal challenging the above https://www.mhc.tn.gov.in/judis conviction and sentence.

3. Heard Mr.S.Mohamed Ansar, the learned counsel for the appellants, and Mr.A.Gokulakrishnan, the learned Additional Public Prosecutor for the respondent/State.

4. The learned counsel for the appellants submitted that the case, which is based on circumstantial evidence has not been fully established by the prosecution; that the extra judicial confession said to have been given by the first appellant cannot be relied upon as there was no reason for the first appellant to give a confession to a stranger; that no incriminating articles were seized from the appellants; and that the evidence of last seen cannot be believed and prayed for acquittal of the appellants.

5. Mr.A.Gokulakrishnan, the learned Additional Public Prosecutor, per contra, submitted that the prosecution has proved the circumstances of motive, last seen together and the conduct of the accused, which would offer an additional link in the chain of circumstances to prove the guilt of the appellants, https://www.mhc.tn.gov.in/judis and hence, he prayed for dismissal of the appeal. The learned Additional Public Prosecutor also brought to our notice that the second appellant was released on 28.01.2023 prematurely on occasion of the 75th anniversary of India's Independence Day celebrations as per G.O (2D) No.64, Home, (Prison – IV) Department dated 26.01.2023.

6. We have carefully considered the rival submissions on either side and perused the evidence on record.

7. As stated earlier, the prosecution had examined 14 witnesses to prove its case. P.W.1 is a Village Administrative Officer who lodged the complaint and before whom the first appellant appeared and gave an extra judicial confession who thereafter produced the accused before the Investigating Officer. P.W.2 is the brother-in-law of the first appellant, who speaks about the confession said to have been made by the first appellant/A1 and about the foul smell that emanated from the house of the first appellant and his informing P.W.1 about the same. P.W.3 is the witness to the Observation Mahazar and Rough Sketch. P.W.4 is the father of the deceased, who came to know of the occurrence and is an hearsay witness. P.W.5 and P.W.6 speak about the circumstances of the https://www.mhc.tn.gov.in/judis appellants bringing construction materials such as hollow blocks, cement sand, etc., into the house. P.W.7 sold five kilograms of cement to the accused. P.W.8 who was working as a sanitary worker in Dalavaipattinam Panchayat speaks about his exhuming the body of the deceased, which was buried in the first appellant's house. P.W.9 is a photographer who marked Ex.P4, CDs containing the photographs. P.W.10 is a doctor who conducted the post-mortem of the deceased and had issued a post-mortem certificate [Ex.P11] and a final opinion [Ex.P13]. He had also marked the chemical analysis report [Ex.P12]. P.W.11 is a forensic science expert who issued Ex.P16 - report. P.W.12, who was working as a Special Tahsildar, at the relevant point in time, conducted an inquest and gave the inquest report [Ex.P17]. P.W.13 is the Special Sub- Inspector who registered the FIR under Section 174 of the Cr.P.C., on information given by P.W.1. P.W.14 is the Investigating Officer, who filed the final report.

8. The case rests on circumstantial evidence. The primary circumstance relied upon by the prosecution is the extra judicial confession said to have been given by the first appellant to P.W.1. Admittedly, P.W.1 is a total stranger to the https://www.mhc.tn.gov.in/judis appellants. P.W.1 had

lodged a complaint and had assisted the investigation since 24.02.2015. It is the case of the prosecution that on 27.02.2015, the first appellant appeared before him and gave an extra judicial confession. Considering the fact that P.W.1 is a total stranger to the first appellant and he had already participated in the investigation from 24.02.2015, we are of the view that the extra judicial confession given by the first appellant on 27.02.2015 to P.W.1 is doubtful. Therefore, we are not inclined to rely upon P.W.1 on this aspect.

9. It is the prosecution case that P.W.2/brother-in-law of the first appellant went to the Village Administrative Officer [P.W.1] on 23.02.2015 at about 5.00 p.m., and stated that a foul smell emanated from the house of the first appellant and that the sister of the first appellant, namely Murugeswari, informed him that the first appellant confessed about the crime and about concealing the body in the house of the first appellant. Though the first appellant did not directly confess to P.W.2, the fact that the Murugeswari (A1's sister) told P.W.2 about what she heard and P.W.2 in-turn gave a representation to P.W.1 is corroborated by P.W.1 and the complaint [Ex.P1]. In our view, this would be a circumstance against the accused.

10. P.W.5 is the neighbour of the appellants who speaks about a quarrel between the appellants and the deceased at 9.30 p.m., on 18.02.2015 and that on the next day, he saw the appellants carrying hollow block stones into the house and thereafter, after the arrest, he came to know that the appellants used hollow blocks for building a tomb. P.W.6 is another important witness who speaks about witnessing the quarrel between the appellants and the deceased at 9.30 p.m., on 18.02.2015. He further saw the appellants taking sand, which was stored in front of the house, into their house on 22.02.2015 at about 8.30 a.m. We find that, apart from making a few suggestions, there is nothing in the cross examination of these two witnesses to discredit their version. Thus, in our view, the prosecution has established the circumstance of the accused taking construction materials such as hollow blocks and sand into the house of the appellants. P.W.7 is running a store and speaks to the fact that he sold five kilograms of cement to the first appellant.

11. The fact that the body was buried in the house of the appellant is confirmed by the evidence of P.W.8 who was working as a sanitary worker and https://www.mhc.tn.gov.in/judis had broken the hollow block structure and taken the body of the deceased from the house of the appellants. P.W.1 and P.W.2 also confirmed the fact that the body was taken from the house of the appellants, besides the evidence of the post-mortem doctor who conducted the post-mortem at the appellants' house. The appellants have not come up with any plausible explanation as to how the body was found in the house. The post-mortem doctor, P.W.10 in his report [Ex.P11] found the following injuries on the deceased.

“A transversely faint ligature pressure abrasion mark measuring 20x3 to 4 cm noted on upper most part of the neck.” He had opined that the death was due to “violent compression of the neck associated with head injury.” Thus, the prosecution has established that the deceased suffered a homicidal death.

12. The facts narrated above would show that the prosecution had established its case by circumstantial evidence. The circumstances being:

(a) Quarrel between the appellants and the deceased on the night of 18.02.2015.

(b) The appellants were taking construction materials inside the house on 19.02.2015 and thereafter.

(c) The appellants confessed about the crime to the first appellant's sister, namely Murugeswari, who in turn informed P.W.2. Though this cannot be treated as an extra judicial confession to P.W.2, the fact that Murugeswari told P.W.2 about the confession and P.W.2 in turn informed the Village Administrative Officer/P.W.1 that the body was exhumed on such information would be a circumstance against the appellants.

(d) The recovery of the concealed dead body of the deceased from the house of the appellants is another strong circumstance. The circumstances that have been established, according to us, unerringly point out only the guilt of the appellants.

13. However, the exact manner in which the murder took place cannot be established by the prosecution, as there were no eye witnesses. It is the admitted case for the Investigating Officer that both appellants had injuries at the time of arrest. It is P.W.14's version that injuries were sustained due to the scuffle between them and the deceased. The relevant observation made by the Investigating Officer reads as follows:

“nkw;go 2 vjphpfSk; ,we;J nghd btz;zpyht[ld;

 Vw;gl;l iffyg;gpd; nghJ nkw;go vjphp fnzrDf;Fk; vjphp nghJk; bgz;Ztpw;Fk; Vw;gl;l fha';fSf;F kUj;Jt rpfpr;ir mspf;f kUj;Jt eK:dh 136. 137d; go muR kUj;Jtkidapy;

fhz;gpf;f ntz;o eK:dh bfhLj;J nkw;fz;l vjphpfis ePjpkd;wj;jpy; xg;gilf;f milg;g[f;fhty; mwpf;ifa[ld; ePjpkd;wf; fhtYf;F mDg;gp itj;njd;/”

14 (i) When we wanted to examine if there were any circumstances in the confession to bring the conduct of the accused, within any of the exceptions by relying upon our judgment in Selvam v. State, reported in 2024 SCC Online (Mad) 1804, we came to understand that in the said judgment, we had not noticed certain decisions of this Court. Therefore, considering the importance of the issue involved in the case, we appointed Mr.N.R.Elango, learned Senior Counsel and Mr.Sharath Chandran as Amici Curiae to assist us in this matter.

(ii). Mr.N.R.Elango, learned Senior Counsel and Mr.Sharath Chandran, learned counsel made submissions, for and against the use of confession, recorded during the course of the investigation to

be used in favour of the accused.

(iii) (a) Mr.N.R.Elango, learned Senior Counsel submitted that there cannot be any distinction between a confessional FIR and a confession given during the course of the investigation. The bar under Section 162 of the Cr.P.C., would not bar the use of confession in favour of the accused, as the Indian Evidence Act, is a special law and by virtue of Section 5 of Code of Criminal Procedure, 1973 which is equivalent to 1(2) of Code of Criminal Procedure, 1898, the provisions of Cr.P.C., would not affect any special or local law, which includes the Indian Evidence Act.

(b) The learned Senior Counsel submitted that the language of Section 25 of the Indian Evidence Act, is very clear and that it only states that a confession cannot be used against an accused person, thereby suggesting that it could be used in favour of the accused.

(c) The learned Senior Counsel also pointed out to the provisions of the Code of Criminal Procedure, 1861, and also to the judgments of the Hon'ble Supreme Court in Aghnoo Nagesia's case [Aghnoo Nagesia v. State of Bihar, reported in (1965 SCC OnLine SC 109] in support of the submission that these provisions are intended to protect the accused and cannot be used against the accused.

(d) Mr.N.R.Elango, further relied upon the judgment in Manoj v. State of M.P., reported in (2023) 2 SCC 323, wherein the Hon'ble Supreme Court had held that the prosecution cannot withhold any material collected during investigation and the Courts can look into such records for the purpose of arriving at the truth. Therefore, the learned Senior Counsel submitted that pursuant to the judgment of the Hon'ble Supreme Court in Manoj's case [cited supra], any material collected during the course of the investigation, can be called for by the Court and used in favour of the accused and no objection can be taken on the ground that it is inadmissible under Section 162 of the Cr.P.C., and it is not a relied upon document by the prosecution.

(e) The learned Senior Counsel submitted that in certain cases, the accused has a burden to explain the circumstances bringing his case within the general exception or within any special exception and he, therefore, can rely upon his confession to establish the existence of those circumstances bringing his case within any of the exceptions.

(iv) (a) Mr.Sharath Chandran, learned counsel submitted that Section 162 of the Cr.P.C., refers to a statement given during the course of the investigation and it is a bar of admissibility and therefore, such a bar to use the statement for any purpose, cannot be lifted even for the limited purpose of using it in favour of the accused. The learned counsel relied upon the judgment of this Court in Re.Shiek Kalesha's case, reported in 1931 LW 388 in support of the submission that the statement under Section 162 of the Cr.P.C., of any person, including an accused, cannot be used except for the limited purpose indicated in the proviso and the statement is otherwise statutorily worthless.

(b) The learned counsel further submitted that the view in Re.Shiek Kalesha's case was affirmed by the Full Bench of this Court in Re.Syamo Maha Patro and another, reported in 1932 LV ILR 903. This view of the Full Bench was further tested before the Privy Council in Pakala Narayana Swami vs. The King-Emperor, reported in 1939 (1) MLJ 59 and the Privy Council approved the decision of the Full Bench and held that Section 162 of the Cr.P.C., is wide enough to include a statement of the accused. The learned counsel further https://www.mhc.tn.gov.in/judis submitted that if the statement is shut out by Section 162, the question of applying Section 25 does not arise.

(c) The learned counsel further submitted that the learned Judges who decided Mottai Thevan's case had passed another judgment in Vokkaligara Yengtappa v State, reported in 1952 MWN Cr. 286, wherein Their Lordships held that the statement given in the course of investigation was hit by Section 162 of the Cr.P.C., and the accused cannot make use of it even if it is favourable to him.

(d) The learned counsel also relied upon the Constitutional Bench judgment in Tahsildar Singh v. State of U.P., reported in AIR 1959 SC 1012 :

> 1959 Supp (2) SCR 875, wherein the Hon'ble Supreme Court had laid down certain propositions with regard to the use of statements made during investigation and as to whether the statement referred to in Section 162 of the Cr.P.C., would only include a statement in writing.
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> (e) The learned counsel further submitted that in Faddi v. State of Madhya Pradesh, [AIR 1964 SC 1850] the Hon'ble Supreme Court had elaborated the meaning of the expression 'course of investigation' which was confirmed by the Hon'ble Supreme Court in Dipakbhai Jagdishchandra Patel v. State of Gujarat and Another, reported in (2019) 16 SC 547.
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> (f) The learned counsel also submitted that in State of Kerala v. Babu reported in (1999) 4 SCC 621 and in Mahabir Singh v. State of Haryana, reported in (2001) 7 SCC 148, it was held that the use of case diary by the Court cannot be used to lift the statements recorded under Section 162 Cr.P.C., https://www.mhc.tn.gov.in/judis and convert them to legal evidence.
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> (g) The Learned counsel further submitted that the decision of this Court in Sudalai Mani v. State, reported in (2014) 3 MLJ (Cri) 385, wherein this Court had held that there has to be a distinction between the confessional FIR and confession given during the course of investigation, was challenged before the Hon'ble Supreme Court in SLP (Crl.) Diary No.30988 of 2021 and the same was dismissed on 04.03.2022 and that the judgment of this Court in Sudalai Mani's case was followed by subsequent Division Benches in cases reported in Sathiyaraj vs. State rep. by the Inspector of Police, reported in 2019 (2) MWN (Cri) 121 (DB) and State rep. by the Deputy Superintendent of Police Vs. Kamaraj & Elangovan, reported in 2017 SCC

OnLine (Mad) 33010.

(h) The learned counsel finally submitted that under Criminal Rules of Practice, 2019, the confession cannot be marked in entirety and only the admissible portion has to be extracted or marked and therefore, the Courts cannot look into any material that is not part of the record.

(v). We have carefully considered the submissions and have perused and https://www.mhc.tn.gov.in/judis gone through the judgments cited by both the learned Amici Curiae.

(vi). We place on record our appreciation for the tremendous efforts taken by both Mr.N.R.Elango, learned Senior Counsel and Mr.Sharath Chandran, learned counsel, in placing all the points of view and also the judgments on the issue over a period of 100 years. Both of them had meticulously prepared and presented the legal position to enable us, to decide the legal issue involved in this case.

(vii). In Selvam's case [cited supra], we had considered this very issue and made the following observations.

"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 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 https://www.mhc.tn.gov.in/judis 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 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 https://www.mhc.tn.gov.in/judis 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 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.

(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 https://www.mhc.tn.gov.in/judis 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.
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> (xi). Firstly in our humble view, this distinction is theoretical in the light of https://www.mhc.tn.gov.in/judis the observations of the Hon'ble Supreme Court in State of Uttar Pradesh v.

Deoman Upadhyaya, reported in AIR 1960 SC 1125, which 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 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 https://www.mhc.tn.gov.in/judis 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 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 in 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
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> 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. https://www.mhc.tn.gov.in/judis

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 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:

> https://www.mhc.tn.gov.in/judis “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”.
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> [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 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 police station, and an FIR is lodged on his https://www.mhc.tn.gov.in/judis 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.

(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 https://www.mhc.tn.gov.in/judis 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 '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 https://www.mhc.tn.gov.in/judis 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:
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> “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).
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> 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 https://www.mhc.tn.gov.in/judis 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." (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.

(viii). In the above judgment, we have held that Section 162 of the Cr.P.C., would not be a bar for use of confession in favour of the accused, even if it is during the course of investigation and no such distinction was ever contemplated in any of the judgments before Sudalaimani's case.

(ix). However, from the submissions made by the learned Amici Curiae, we find that we had not noticed certain other judgments on this aspect. We may now examine, those judgments to see if the view taken earlier, has to be changed.

(x). The first Code of Criminal Procedure was enacted in the year 1861. Some of the provisions in the said Code were incorporated in the Indian Evidence Act, which was enacted later in the year 1872. Sections 148 to 150 of the 1861 Code were equivalent to Sections 25 to 27 of Indian Evidence Act, 1872. Section https://www.mhc.tn.gov.in/judis 145 of the 1861 Code was equivalent to Section 161 of the Code. Section 150 of Cr.P.C. 1861 deals with discovery of a fact pursuant to information received from a person accused of an offence. The second Code was enacted in the year 1882. This Code had thus removed the provisions relating to confession, which were incorporated in the Indian Evidence Act. Section 162 of the 1882 Code reads as follows:

> "162. Statements to Police not to be signed or admitted in evidence:- No Statement, other than a dying declaration, made by any person to a Police-Officer in the course of an investigation under this Chapter shall if reduced to writing, be signed by the

person making it, or shall (Act X of 1886, section 6) be used as evidence against the accused.

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

(xi). In the 1898 Code, however, for some reasons, the proviso relating to Section 27 of the Indian Evidence Act, was removed and Section 162 read as follows:

"162. Statements to police not to be signed; use of such statements in evidence:

(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence:

https://www.mhc.tn.gov.in/judis Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872."

(xii). However, the said bar under Section 162 Cr.P.C., was not applicable to a statement falling under Section 32(2) of the Indian Evidence Act. The proviso relating to the applicability of Section 27 of the Indian Evidence Act, to a statement falling under Section 162 Cr.P.C., was incorporated only in the year 1941 by the Code of Criminal Procedure (Second Amendment) Act, 1941. The said amendment reads as follows:

"2. Amendment of Section 162. Act V of 1898.-- In sub-section (2) of section 162 of the Code of Criminal Procedure, 1898 (V of 1898), after the figures "1872" the following words and figures shall be added, namely:-

"or to affect the provisions of section 27 of the Act"." Therefore, before 1941, the question as to whether Section 162 of Cr.P.C., applies to statements of accused persons was engaging the attention of the Courts.

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(xiii). In Re.Shiek Kalesha's case, reported in 1931 LW 388: 1931 SCC Online Mad 91, the Division Bench of this Court held that the bar under Section 162 of the Cr.P.C., is

> applicable even to a statement given by the accused. It is pertinent to point out here that in the said judgment, the Division Bench was not dealing with a confession statement. In the case, the accused took the police where the jewels were hidden. At the time of the discovery of jewels, he made a statement to certain neighbours marked as Ex.K. When the defence sought to use the said statement, as it aided the accused, the Court held that Section 162 would be a bar. The Court further held that the words, “any purpose” in Section 161 must include the purpose of prosecution or defence and any person would include an accused.

(xiv) A Full Bench of this Court in Re.Syamo Maha Patro's case also held that Section 162 includes statements made by a person accused of an offence. Justice Anantakrishna Ayyar, a member of the Bench, held that if the statements of a, accused to the police are totally shut out, it is possible that some parts in favour of the accused may also be shut out, but, it is for the https://www.mhc.tn.gov.in/judis legislature to resolve those issues and not for the Court to do so, when the language of the Act, is clear. Here again, the Full Bench did not specifically deal with the confessional statement of an accused. The Court also held that though the proviso relating to applicability of Section 27 was removed, Section 27 remains unaffected and cannot be taken to have been impliedly abrogated by Section 162 of the Code.

(xv) This decision of the Full Bench was considered by the Privy Council in Pakala Narayana Swami's case [cited supra]. The primary question decided in the said case was as to when an admission would amount to a confession. Their Lordships did not go into the question as to whether the provisions of Section 27 of the Indian Evidence Act would override the bar under Section 162 of the Code. The relevant observations are as follows:

> “Whether to give to Section 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by Section 27 it does not seem necessary to decide. In the present case the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of Section 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police- officer in course of investigation whether a discovery is made or not. They may therefore pro tanto repeal the provisions of the section which would otherwise https://www.mhc.tn.gov.in/judis apply. If they do not, presumably it would be on the ground that Section 27 of the Indian Evidence Act is a "special law" within the meaning of Section 1(2) of the Code of Criminal Procedure, and that Section 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to Section 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on Section 162 can in nearly every case be avoided by securing that statements and confessions are recorded under Section

> 164." (xvi) However, the question that was troubling the Courts as to whether a statement under Section 162 Cr.P.C., would include statements made by an accused, had been clarified by the amendment in the year 1941, by which the proviso to Section 162 of the Cr.P.C., was added, which states that the provisions of Section 162 of the Cr.P.C., would not affect the provisions of Section 27 of the Indian Evidence Act. By virtue of this proviso, the legislature made it very clear that the statement made by an accused, including the confession, would be a statement under Section 162 of the Cr.P.C. There cannot be any quarrel with the said proposition, as it was further made clear by the judgment in Aghnoo Nagesia's case [cited supra], wherein the Hon'ble Supreme Court had held that Section 162 was wide enough to include confessional https://www.mhc.tn.gov.in/judis statements made to a police, during the course of the investigation.

(xvii) But the real question is whether the confession of the accused would form a separate class by itself. This has been answered by the judgment of the Division Bench of this Court in Mottai Thevan's case and reiterated by the very same learned Judges in Vokkaligara Yengtappa's case [cited supra].

(xviii) Before we deal with the judgment of the Division Bench of this Court in Vokkaligara Yengtappa's case, we may note that Section 162 of the Cr.P.C., takes within its fold the following types of statements.

(a) Statements of the witnesses examined during the investigation.

(b) Statements of the accused that are exculpatory in nature.

(c) Admissions made by the accused to the police during the investigation.

(d) Confessions of the accused.

https://www.mhc.tn.gov.in/judis (xix) As regards the first three types of statements, there is no difficulty in holding that Section 162 of the Cr.P.C., would be a bar to their admissibility. So far as confessions are concerned, they are covered by the special provisions in the Indian Evidence Act viz., Section 24 to Section 27 of the Indian Evidence Act, 1872. Section 25 of the Indian Evidence Act, employs the words 'against an accused'. In Vokkaligara Yengtappa's case, the Division Bench of this Court was dealing with an exculpatory statement made by the accused, during the course of the investigation when a material object was seized from his possession. In that context, the learned Judges held that such a statement, even if found in favour of the accused, cannot be used as an explanation for the recovery made from his possession. The relevant observations read as follows:

> "... According to the Inspector, when A-2 produced M.O.4, the statement she made before the Panchayatdar embodied in the Pachayatnama Ext.P-6 is that A-1 took it from the right pocket of his trousers and asked her to keep it to safe custody on the morning of 1st August 1949. This is a statement made by an accused person to the

police during investigation and is strictly and unfortunately inadmissible in evidence although it explains the production of property.

.. This statement by A-2 when she produced M.O.4 is of course not a confession and can in no sense be admissible as information leading to discovery under S.27 of the Evidence Act." [emphasis supplied] https://www.mhc.tn.gov.in/judis The above observations would make it amply clear that the learned Judges were not dealing with the confession of the accused while making the above observations and were referring to the statement of an accused made under Section 162 of the Cr.P.C., and held that it cannot be used even in favour of the accused.

(xx). However, as regards confession, Their Lordships felt that it has to be treated differently and His Lordship, Somasundaram, J., in his separate and concurring opinion, which clinches the issue, held as follows:

"I agree with the judgment of my learned brother. So far as Ss.25 to 27 of the Indian Evidence Act are concerned, I have already stated in another case, that they only prohibit the use of the confession against the accused and that there is no prohibition of that use in favour of the accused. But as regards S.162, Criminal Procedure Code, it prohibits the use of the statement made by any person (which includes the statement of the accused) for any purpose. There is therefore a prohibition to use the statement of the accused in made in the course of investigation even if it is in favour of the accused. This section needs to be amended so as to enable the statements of the accused to be used if they are in their favour, particularly if they happen to be in explanation of the recovery of incriminating articles from their possession." https://www.mhc.tn.gov.in/judis (xxi). Therefore, the Hon'ble Judges had reiterated their view taken in Mottai Thevan's case, as regards confession. The above observations of His Lordship, Somasundaram, J., would make it clear that a clear distinction was made between confessions and other statements under Section 162 of the Cr.P.C.

Therefore, even as regards the other statements under Section 162 of the Cr.P.C., Their Lordships had suggested that the legislature has to amend the provision, so as to enable the accused to use the statements in his favour. Their Lordships reiterated that Section 25 of the Indian Evidence Act, only prohibits the use of the confession of the accused and there is no prohibition of their use in favour of the accused. No distinction was made by the Hon'ble Judges with regard to the confessions made before the commencement of the investigation and during the course of the investigation.

(xxii) Further, in Selvam's case [cited supra], we had given reasons as to why we had not referred the issue to a larger Bench. One of the reasons is that the judgments in Mottai Thevan's case [cited supra] and the other judgments, are binding on us. For the very same reasons, we are of the view that the issue in https://www.mhc.tn.gov.in/judis this case need not be referred to a larger Bench, though there is another judgment of this Court in Kamaraj's case [cited supra], which affirms the view taken in Sudalaimani's case.

(xxiii) (a) We may also note here that confession of the accused during investigation, though would also be a statement under Section 162 of the Cr.P.C., forms a separate class and is governed by Sections 24 to 27 of the Indian Evidence Act, which is a special law and Section 5 of the Cr.P.C., which contains the saving clause, reads as follows:

> "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."
>
> (b) In Pakala Narayana Swami's case [cited supra], the Privy Council had made an observation, which is extracted above, that the Evidence Act would be a Special Law and Section 162 of the Cr.P.C., is not a specific provision to the contrary. Therefore, confessions of an accused have to be treated as a separate class of 162 statements, which can be used in favour of the accused.

https://www.mhc.tn.gov.in/judis (xxiv) As regards the submission made by Mr.Sharath Chandran, learned counsel that the SLP filed against the judgment of this Court in Sudalaimani's case, was dismissed, we find that the said SLP was dismissed in limine.

(xxv) In Dipakbhai Jagdishchandra Patel's case [cited supra], the Hon'ble Supreme Court was dealing with the admissions made by the accused and in that context, held that an admission made between two points of time, viz., from the beginning of the investigation and till the termination of the same, would be inadmissible.

(xxvi) In Manoj's case [cited supra], the Hon'ble Supreme Court had held that the prosecution, in the interest of fairness, should, as a matter of rule, in all criminal trials, comply with Rule 21 found in the draft guidelines approved by the Hon'ble Supreme Court [Criminal Trials Guidelines Regarding Inadequacies & Deficiencies, In re v. State of A.P. (2021) 10 SCC 598], which required furnishing the list of statements, documents, material objects and exhibits that are otherwise not relied upon by the investigating officer. https://www.mhc.tn.gov.in/judis (xxvii). However, in our view, the statement under Section 161 Cr.P.C., cannot be relied upon by the accused, if it falls within the first three categories that we have mentioned above. If a statement of a particular witness, is in favour, it is only open to the defence to examine him/her as a witness in Court. However, we reiterate that the case diary can be looked into for the limited purpose of ascertaining whether there is any material in the confession of the accused in his favour to mitigate the rigour of the offence, provided that it is either consistent with the other evidence on record or not contrary to the other reliable evidence on record. Thus,

(a) We reiterate the observations made by us in paragraph No.14 in Selvam's case [cited supra].

(b) We make it clear that all statements under Section 161 Cr.P.C., which fall under the first three categories that we referred to in sub-paragraph No.xviii, (i.e.,) (a) Statements of the witnesses examined during the investigation; (b) Statements of the accused that are exculpatory in nature; and

(c) Admissions made by the accused to the police during the investigation, cannot be used in favour of the accused.

(c) The confession, forms a separate class and it is governed by Section 24 to Section 27 of the Indian Evidence Act, which is a Special Law. Section 25 of the Indian Evidence Act, which prohibits the use of a confession only 'against an accused', would therefore prevail over the general rule in Section 162 of the Cr.P.C.

15. On a perusal of the confession of the accused, it is seen that the first appellant attacked the deceased due to a scuffle. The appellants had stated that the deceased had attacked the second appellant by dragging and pulling her hands and when the first appellant tried to prevent the deceased, she had attacked him as well and therefore, he picked up a wooden log that was nearby and attacked the deceased and thereafter strangulated her neck. The act of the appellants, in our view, had been committed without premeditation in a sudden fight in the heat of passion and the nature of the weapon used suggests that they have not taken undue advantage or acted in a cruel or unusual manner. The fact that the appellants were also injured in the occurrence would show that the confession explaining the circumstances under which the attack was made, cannot be ignored.

16. Therefore, in the absence of any other evidence suggesting the exact manner of the occurrence, the evidence of the investigating officer and the other evidence on record, to show that the accused also had sustained injuries, we are inclined to rely upon the portion of the confession of the appellants/accused, which suggests that their acts would fall within Exception IV to Section 300 of the Cr.P.C.

17. Therefore, we find both the appellants are guilty of the offences under Sections 304 (I) of the IPC and also for the offence of screening under Section 201 of the IPC. We are now informed that the first appellant is in custody since 2015. Hence, we are of the view that the interest of justice would be met if the first appellant is sentenced to period already undergone for the offences under Sections 304 (I) of the IPC and 201 of the IPC. Since second appellant is already been released prematurely, no further direction is required and her premature release is hereby recorded.

18. Accordingly, this Criminal Appeal is partly allowed. The first https://www.mhc.tn.gov.in/judis appellant is directed to be released forthwith, unless his presence is required in connection with any other case.

(M.S.R.,J.) (S
02.08.2024

Index : Yes/No
Neutral citation : Yes/No
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Copy to:

1. The II Additional Sessions Judge,
   Mahila Court (Fast Track Mahila Court),
   Tiruppur District.

2.The Inspector of Police,
  Alangiyam Police Station,
  Tiruppur District.

3. The Superintendent of Prisons,
   Central Prison, Coimbatore.

4.The Public Prosecutor,
  High Court of Madras,
  Chennai – 600 104.

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M.S.RAMESH,J.
AND
SUNDER MOHAN,J.

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Pre-delivery judgment in

Dated : 02.08.2024

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