

(1995) 09 KAR CK 0026
In the Karnataka High Court
Case No : Criminal A. No. 815 of 1994

Nagaraj alias Kumar alias Anand alias Selvam

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 18-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 366

Evidence Act, 1872 — Section 122

Penal Code, 1860 (IPC) — Section 302, 34, 376

Citation : (1996) CriLJ 2901 : (1996) ILR (Kar) 2

Hon'ble Judges : S. Rajendra Babu, J; R.V. Raveendran, J

Bench : Division Bench

Advocate : Hashmath Pasha, for the Appellant; B.H. Satish, State Public Prosecutor, for the Respondent

Judgement

Rajendra Babu, J.—This appeal and the Criminal Reference Case arise out of an order made by the learned Sessions Judge, Bangalore Rural District, in S.C. No. 111/92, convicting the appellant accused for charges arising u/s 302 I.P.C. sentencing him to death, but not passing any separate sentence in respect of an offence arising u/s 404 I.P.C.

2. Since Reference has been made to us in terms of Section 366 of the Code of Criminal Procedure we proceed to refer to the parties as arrayed before the Sessions Court.

3. This case unfolds itself in the currents and cross-currents of mysteries shrouded one over another.

On 18-11-1991 at about 10-30 a.m. Kenchappa-PW-1 went to his land comprised in Sy. No. 3/8 of Addur village in Anekal Taluk to have a look at his Ragi crop raised by him in the land; that to his dismay found that dogs and crows were frantically moving about in the field; that on going closer to that activity found mortal remains of a woman, to which a saree tied to her neck, head, limbs and abdomen had been ragged and eaten away by animals; that twenty feet beyond

the dead body found one pair of blue coloured ladies chappals; that he made a report thereto on the same day at about 12-45 p.m. to the Police. The Investigating Officer PW-27 K. H. Chandrashekar registered the complaint u/s 302 I.P.C. The said mortal remains of the unknown woman were subjected to inquest when it was found that the dead body measured five feet in height, of dark complexion, the body was in decomposed State and the flesh pieces had been eaten away by crows and dogs and only skeletal portion could be seen, part of the viscera was visible and there were no identification marks available. They found a white printed saree with red coloured designs and a blue coloured pettycoat over the dead body and twenty feet away from the dead body in the northern direction they found a pair of blue coloured ladies chappals and twenty eight feet away they found a green pettycoat, yellow blouse and couple of black beads. The body was found at about 100 feet away from the Indlawadi Road to Soorjakanahalli in the footpath, 200 feet beyond the pump house built by PW-1 Kenchappa and was one furlong from Indlawadi Road towards the northern direction; on the eastern direction of the dead body a foot path leads from Indlawadi Road to Soorjakanahalli and towards west, the land of Buddanna's son Kenchappa's Ragi field and also the land belonging to Patel Muniyappa of Addur village and on the northern side Arakers Srinivasa's land and on the southern side PW-1 Kenchappa's land and Indlawadi Road. They seized for further investigation one pair of blue coloured ladies chapals, blue and green petty coats, yellow blouse and saree along with the black beads. There were no one to identify the dead body. They examined the Toti-Gullappa s/o late Buchappa, Muniyappa bin Chinnappa and they inferred that since the body is in decomposed State and crows and dogs having eaten away the skin and flesh completely and there being no marks of injuries on the body they could not infer that there were any injuries. However, on the basis of the fact that saree having been tied round the neck they suspected that she might have been killed by strangulation using the saree for the purpose. They proposed to reserve their views by sending the dead body to the medical examination requesting the Medical Officer to conduct autopsy over the body. Since the relations of the deceased were unknown the funeral of the dead body was conducted in the Government land with the help of Gullappa and Muniyappa.

4. The Doctor who conducted the post mortem examination is one Govindaraju examined as PW-11. He stated that on the request of the Anekal Police to conduct the autopsy of an unknown woman, aged about 30 years, he went to the spot on 18-11-1991 at about 3 p.m., where the dead body was found. He found that the dead body was in highly decomposed state and maggots infested. He stated that she was a Hindu woman of medium build, having dark hair, which had come off the head, he gauged the height of the dead body which was five feet. There was no skin and muscles around the head and face. The skull bones and ribs were visible. The eye balls had completely decomposed. In right arm only one bone was available and in the left hand completely absent. The chest had opened up; the ribcage, pelvic bones and viscera intestines were visible

externally, the bones below them were also visible. The lower portions of the legs were absent. He separated the head and sent the same to the Forensic Science Laboratory for examination. The spinal cord had completely decomposed. The chest had been completely smashed and ribcage was visible. Dogs and maggots had eaten away the flesh. The digestive and genital organs were also decomposed. He could not give any opinion as the body was in a highly decomposed state and large portion of the body had been eaten away by dogs and maggots, as to the cause of death. However, he reserved his final opinion to be furnished on receipt of the report from the Forensic Science Laboratory.

5. A complaint as per Ext. P-14 had been lodged by Narayana PW-19 as to the missing of Gowramma, his cousin with Kengerigate Police. The Police investigated the complaint of missing of Gowramma and on the basis of their investigation concluded that the said Gowramma had met with a homicidal death. On completion of investigation they lodged charge sheet in the Court alleging that the accused and another by name Sangota with the common intention of raping Gowramma elder sister of Honnamma, wife of accused forcibly took her along with Jayamma and Honnamma to Bannerghatta and from there made them to walk to Addur village at 10.00 or 11.00 p.m. on 13-11-1991 and raped Gowramma and thereafter killed her by tying her own saree round her neck and took away her jewels like gold thali, nose stud, silver ole and sold thali and nose stud to Gokarneshwar on 13-11-1991 and misappropriated the same and thereby committed the offences u/s 302 read with Sections 34, 376 and 404 I.P.C.

6. On the case being committed to the Sessions Court, the learned Sessions Judge heard on the charges and framed the charges and explained the same to the accused in Kannada. The accused pleaded not guilty and claimed to be tried.

7. The prosecution examined 27 witnesses and marked 30 documents and 16 material objects. The accused was questioned u/s 313 Cr.P.C., in the course of which he pleaded complete ignorance. No evidence was led by the defence.

8. The learned Sessions Judge on the basis of the material on record and pleas raised three points for consideration amongst others, which are incidental thereto and they are as follows :

1. Whether accused along with another accused Sangota with common intention deliberately took Smt. Gowramma and Jayamma and Honnamma in a auto near Bannerghatta and then took them by walk to Sy. No. 3/8 of Addur village and raped them without their consent against their will ?

2. Whether accused and another accused Sangota murdered Smt. Gowramma after raping her on 13-11-1991 between 11.00 p.m. and 1.00 p.m. in Sy. No. 3/8 by tying her saree around her neck tightly ?

3. Whether accused took away the gold thali, gold nose stud and silver ole of Gowramma after murdering her on the night of 12-11-1991 at 11.00 p.m. and morning of 13-11-1991 at 1.00 p.m. and sold it to one Gokarneshwara at Hosur

between the days 18-11-1991 and 20-2-1992 and misappropriated the amount ?

9. He answered all the points in favour of prosecution holding the accused guilty and convicted him as stated earlier.

10. In this case where the dead body could not be easily identified and the cause of death is not known but charge of murder is made against accused the crucial questions that arise for consideration are :

1. Whether the skeletal remains that were found in the land comprised in Sy. No. 3/8 of Addur village belonging to Kenchappa-PW-1 are those of Gowramma ?

2. Whether she met with a homicidal death ?

3. Whether such homicidal death was at the hands of the accused ?

11. In order to establish that the skeletal remains that were found at Sy. No. 3/8 of Addur village were that of Gowramma several persons have been examined. We are giving our careful attention to this aspect of the matter because the body found is unrecognizable due to decomposition and the postmortem report could not determine the cause of death. It is very difficult to establish that there has been a homicidal death. Even if a corpus delicti is not traced, if there are compelling circumstances pointing to the accused as the murderer of the missing person, the accused could be convicted. On this aspect of the matter, evidence of PWs 3, 17, 18, 19 and 20 are relevant.

12. PW-3 Honnaiah is father of Honnamma. PW-17 Honnamma is none other than the wife of the accused. Gowramma who was stated to be missing is the niece of Honnaiah PW-3. PW-18 Rajamma is a resident of Kanakapura and known to the families of Gowramma and Honnamma PW-17. PW-19 Narayana is brother of Honnamma and cousin of deceased Gowramma. PW-20 Chikkalingaiah is husband of Gowramma. These witnesses are categorical in their evidence in identifying the clothes M. Os. 5 to 8, the jewellery, other material objects M.Os 2 to 4 and M.O. 1 - Chappals. It is stated by them that these were on the person of Gowramma on the date on which she was last seen.

13. Though certain discrepancies are sought to be pointed out by the learned Counsel for the accused in regard to the recoveries effected in relation to M.Os 2 to 4, there cannot be much dispute in relation to finding of the Clothes M.Os 5 to 8. The only criticism levelled in relation thereto is that the same were not kept in a sealed cover with signatures of the holders of the inquest, panchayatdars or other mahazar witnesses. When the complaint had been lodged by PW-1 Kenchappa had found a saree on the dead body and that nearby the dead body there were chappals and they are in fact identified as those belonging to Gowramma. On this aspect of the matter there cannot be much cavil, as the evidence of the witnesses in this regard being unshaken. The fact that Gowramma is missing from the day she went with the accused, Honnamma and Jayamma in the autorickshaw cannot be disputed. From these facts the conclusion that follows is that the said Gowramma has been missing from that

day and M.Os 5 to 8 were on her person along with the chappals - M.O. 1. If M.Os 5 to 8 were found near the ragi field by PW-1 Kenchappa and those were the clothes worn by Gowramma on the date she left with the accused and others when she was last seen, it is reasonable to infer that the dead body is that of Gowramma. If she were alive it is unthinkable that she would not have made known of the fact of her being alive to her parents, husband or other relatives when persons who would ordinarily come to know of her being alive having not known about her she must be dead. When her personal belongings were found with the skeletal remains, no other inference could be drawn except that they belong to the said Gowramma and those belongings could not have been found in that manner at that place unless something untoward had happened to her.

In addition to these circumstances G. Raghavendra Rao PW-26, who is the Assistant Director of Forensic Science Laboratory has conducted a superimposition test of the photograph of Gowramma with that of the skull that was available and has drawn an inference that it coincides with the photograph of Gowramma and therefore the skull could be that of Gowramma.

14. The learned Counsel for the accused criticised this part of the evidence by referring to several text books such as :

(1) The Essentials of Forensic Medicine and Toxicology by Dr. K. S. Narayana Reddy, Eighth Edition.

(2) Simpson's Forensic Medicine.

(3) Parikh's Text Book of Medical Jurisprudence and Toxicology by Dr. C. K. Parikh - Fourth Edition to contend that superimposition test is only negative in nature and will only rule out that it does not belong to deceased person and is not a proper or a positive test to establish the identity of a person. At any rate even proceeding on the line on which the learned Counsel for the accused suggested that the dead body or the skeletal remains can only provide corroborative evidence and the method is of greater value negatively to exclude certain person, in this case there is enough material to indicate that skeletal remains were found on the field belonging to Kenchappa - PW-1 along with certain personal belongings of Gowramma. As stated earlier, the said belongings could not have been found in such disarrayed state unless something foul had happened to Gowramma. Gowramma was not heard of after she left the house on the day she accompanied the accused. In the circumstances, it is not unreasonable to infer that the mortal remains belonged to said Gowramma and the superimposition test conducted lends assurance to that fact. When each one of the witnesses examined referred to earlier have identified that the said Gowramma was wearing these personal belongings on the day she left the house we do not think it would be appropriate to draw an inference that skeletal remains do not belong to Gowramma. Therefore, the identify of the dead body has been established as that of Gowramma.

15. The next question that arises for consideration is whether said Gowramma

met with a homicidal death or not. The inquest report, the post mortem report and the photographs Exts. P-6 to P-11 indicate that saree had been tied round the neck of the deceased and though it was not possible for the Doctor who conducted the autopsy to give the cause of death, inferences have been drawn on the probabilities of the matter. Gowramma when she left the house in the company of the accused and certain others was hale and healthy. She is a married woman. Nothing is brought out to indicate that she had any cause for unhappiness to commit suicide. Similarly, the place where the dead body was found and the manner in which it was found cannot be inferred that she died as a result of any accident either due to collision with a motor vehicle or for other reasons like drowning. Her body was found in the field belonging to Kenchappa. It could not have been found in that State had not some violence being committed over her. In the field where her dead body was found could not have been attacked by wild animals. When we rule out the possibility of a suicide or an accidental death, the only other inference that could be drawn is homicidal death. It is only a human hand which must have dealt on her a deadly blow. In that event, we can safely draw an inference that she must have died as a result of violence upon her and we cannot agree with the contentions advanced on behalf of the defence that in this case the cause of death not having been established it would not be possible to infer that she met with a homicidal death. There cannot be serious dispute that there could have been fuller and more scientific investigation to point out the nature of cause of her death. But, we cannot throw up our hands and State that we cannot draw any inference in the matter on the state of material on record. It is not unreasonable to infer as we have now done.

16. u/s 3 of the Indian Evidence Act a fact is said to be proved when after considering the matters before it, the Court either believes it to exist, 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. The expression "fact" includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious and it is in the former sense that the word used by the legislature refers to a material and not to a mental fact. We are supported in our view by the decision in Rama Nand and Others Vs. State of Himachal Pradesh, , where the dead body of victim as such is not found other cogent proof of homicidal death of the victim must be established. Where homicidal death is sought to be established by circumstantial evidence they must be of clinching nature leading to inference that the victim has met with homicidal death. Even so, the caution should not be pushed too far as requiring absolute proof. Homicidal death, therefore, can be proved by incriminating circumstances that within all human probability that victim has been murdered.

17. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion has to be drawn has to be fully established. In this case the circumstances established point out to the fact that Gowramma being

missing, her personal belongings were found along with the skeletal remains, which are duly identified by the persons, there is no other way of her personal belongings being found near skeletal remains, unless she being dead and she died having been subjected to violence.

18. The prosecution has relied upon the evidence of PWs 1, 3 and 17 to 20 to identify the dead body, the inquest panchanama, the post mortem report, the report given by the Scientist in the Forensic Science Laboratory in regard to the superimposition of the photograph of Gowramma with that of the skeletal that was found in respect of which report has been made by PW-1, M.Os 5 to 8 said to have been worn by Gowramma at the time of her death and photographs of the dead body shown to several witnesses.

19. The learned Counsel for the defence submitted that there is no direct evidence to establish that the dead body that was found is that of Gowramma. The Medical Officer who conducted the autopsy is not in a position to categorically state as to the cause of death nor he is in a position to identify the same. He is not able to determine the age or sex with any definiteness. He further submitted that none of the relatives of the deceased had opportunity to see the dead body at the scene of offence nor even the photographs were shown to them prior to they being shown in the Court. The pettycoat, saree, blouse and chappals that were said to have been found near the dead body cannot establish the identity of Gowramma inasmuch as they were not preserved by putting them in a sealed cover. The seizure of articles must be above suspicion and in this case the same not having been put in appropriate sealed cover immediately on taking custody of the same in the presence of the mahazardars and obtaining their signatures on the cover.

20. In this case the allegation is that Gowramma was not seen alive after she is stated to have gone with the accused, PW-17 Honnamma, Jayamma and deceased Gowramma. The dead body was discovered only on 18-11-1991. There was no inkling to connect the dead body to be that of Gowramma at the stage. Therefore, if the Investigating Officer thought that if the photographs of the deceased were taken in the state in which it was found and M.Os 5 to 8 that were found near the dead body had been kept in the sealed cover, it would not have been possible later on to secure the identify of the same through the near relatives who may come up subsequently. At that stage it was not known who the relatives of the said person were. Therefore, the criticism of the learned Counsel for the defence that neither the skeletal remains nor M.Os 5 to 8 that were found there had not been sealed by itself would not affect the testimony of the witnesses in identifying the same. It is difficult to state that the pettycoat, the saree and chappals were not found near the dead body because PW-1 Kenchappa who had not known anything about the deceased and who lodged a complaint would have anything to do in planting the same or displacing the same with other things. From the sequence of events it is clear at that stage no body knew that as to whose body it was. Therefore, we do not accede to the

contentions that it is not safe to rely upon the identity of the dead body based on M.Os 5 to 8 or the skeleton found. It is not the case of the defence that skeletal remains had been replaced by another skeleton or the skeleton was not the one that was found in the field of PW-1 Kenchappa in relation to which he had lodged a complaint. It is no doubt true that considering the highly decomposed state of the body it is not possible for the Doctor who conducted the autopsy to determine the age or sex with any definiteness, but on an over all view he stated that the body belonged to a woman considering the build of the body and aged about 30 years.

21. So far as the question of relying upon the evidence relating to superimposition test is concerned, it is necessary to refer to a decision of the Supreme Court in Ram Lochan Ahir Vs. State of West Bengal, . That was a case where the superimposed photograph of a deceased over skull of the human body was taken to prove that the skull was of the deceased and the Supreme Court held that such evidence is admissible to prove the identity of the skull. The process adopted had been in detail discussed therein at paragraph 7 of the decision. In this case also the procedure adopted by the Scientists has been explained by PW-26 Raghavendra Rao. The Supreme Court noticed that u/s 9 of the Indian Evidence Act, the same is admissible because the question at issue in the case is as to the identity of the skull. The identity could be established by its physical or visual examination with reference to any peculiar features in it which would mark it out as belonging to the person whose bones or skeleton it is stated to be. The size of the bones, their angularity or curvature, the prominences or the recessions would be features on which examination and comparison may serve to establish the identity of a thing within the meaning of Section 9 of the Act. In this case the out lines of the skull which is seen in the superimposed photograph are identical to the general contours of the check bones, the position of the eye cavity and comparison of these with the contours of the deceased as seen in the photograph is stated to prove the features found in the skull and features in the bones of the deceased are identical or at any rate not dissimilar. Therefore, it cannot be said that the evidence tendered by PW-26 cannot be relied upon at all. Therefore, on an analysis of the evidence as made above would indicate that the dead body that was found in PW-1 Kenchappa's field in respect of which complaint was lodged by him is the dead body of Gowramma. Hence, we are of the view that the contentions advanced on behalf of the defence in this regard have to be rejected.

22. We have taken note of only such material as is available on record, which is not objected to or which cannot be disputed in order to arrive at the conclusion that the said Gowramma met with a homicidal death.

23. The next question that arises for consideration is :

Whether the appellant-accused is responsible for the death of the said Gowramma ?

In this regard the prosecution principally relies on the extra judicial statement made by the accused to his wife Honnamma PW-17 and from other circumstances :

- (a) The recoveries that had been effected in relation to M. Os 2 and 3 at Hosur.
- (b) The conduct of the accused in absconding for over 2 1/2 months, which is relevant u/s 8 of the Indian Evidence Act.
- (c) The accused and deceased were last seen together as is clear from the evidence of PW-17 Honnamma and PW-19 Narayana and wants to draw an inference relying upon Illustration-(a) to section 114 of the Evidence Act.
- (d) No satisfactory explanation has been given by the accused in regard to possession of jewels which atleast were traced as that of Gowramma.

24. In this case there is no direct evidence established connecting the accused with the murder of Gowramma. We have to rely entirely upon the circumstantial evidence. In this regard, the prosecution very heavily relies upon the evidence of PW-17 Honnamma, who is none other than the wife of the accused. We shall now closely examine the evidence and said Honnamma particularly in relation to the extra judicial confession said to have been made by the accused. She refers to the circumstances in which she was married to the accused, his stay with her at Kanakapura, his desire to introduce to his brothers and sisters who are well off and absence of any need for him to take up any job. She states that as he wanted to introduce them to his relations, they came to Bangalore. On arriving at Majestic circle they proceeded towards Cotton pet on foot. It is stated that the accused took them to a shop of a Sait and thereafter he took Jayamma. Gowramma and herself in an autorickshaw. He stated to others that they would be at Lakkasandra near a Beer Shop and asked the others to follow them. After proceeding from the said shop about a mile, a person stopped the autorickshaw and accused alighted from the autorickshaw and spoke to that person for about half an hour. He told her that he was his friend on being asked. Thereafter he took them in the autorickshaw towards Bannerghatta and one person followed them on a scooter. It is thereafter stated that he enquired about the jewellery worn by Jayamma and Gowramma and when they alighted at Bannerghatta Circle it was 11.00 p.m. After walking for nearly a mile, he asked her to sit down in the field to enable him to go and fetch his clothes from his aunt's house and her sisters were taken by him. After one hour it is stated that the accused returned alone. When she questioned as to where Jayamma and Gowramma were, the accused stated that one who had followed him was Sangota and he wanted to indulge in sexual pleasure with Gowramma, when he was engaged in such act Jayamma got frightened and ran away. He (probably meaning Sangota) killed Gowramma by tying the saree round her neck. Thereafter he caught hold of Jayamma was killed her also. When Gowramma was killed Jayamma started shouting and she was pulled down and her legs and hands were broken and after tying her saree round her neck she was killed. After both of them died Sangota

left. She has also stated that all these were stated to her when the accused was selling the jewels and not when he returned after one hour after taking away her sisters. She stated that accused told her that Gowramma and Jayamma were staying in his aunt's house, thereafter he took her to Hosur to a shop and it was 4.00 a.m. and they waited till the shop was opened. He pledged the "Thali" and nose stud. When she asked the accused as to how he got the jewels, he is stated to have told her that Gowramma and Jayamma were killed by Sangota. She reiterates that Sangota and he together killed them. It is further explained that Gowramma was killed by Sangota, he together with Sangota killed by Jayamma. On this statement it is sought to be contended that the same amounts to confession made by the accused and therefore this Court can place reliance upon the same as corroborating other evidence.

25. The principal objection raised on behalf of the accused is that the statement is hit by section 122 of the Indian Evidence Act, which provides for bar as to admissibility in evidence of communication made during the subsistence of the marriage and the same cannot be disclosed even, unless the person who made it or his representative in interest consents. The exception made is only in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

The principle underlying Section 122 of the Evidence Act would make it clear that though Section 120 of the Evidence Act enables a spouse to tender evidence in a case against the other spouse except in litigation between themselves either arising out of the marital relations or in a criminal prosecution and in all other cases bars the disclosure of any statements made by one spouse to another during subsistence of the marriage. The privilege u/s 122 of the Evidence Act extends to all communications made to a spouse during subsistence of marriage by the other spouse. Such communications need not be confidential and applies to all communications. The privilege is not to the witness, but to the spouse who made the communication and therefore the witness cannot waive it at his or her will nor can the Court permit disclosure even if he or she is willing to do. The protection extends only to communication, that is utterances and not acts. The Courts have taken the view that before admitting evidence u/s 122 the party against whom it has to be given must be asked by the Court his consent of evidence being given. The consent must be express and cannot be implied. It is incumbent upon the Court to ask whether he or she would consent to the evidence being given. It makes no difference that no objection was raised by the accused at the trial. In this case though no objection had been raised at the time when PW-17 Honnamma tendered her evidence in relation to the extra judicial confession said to have been made by the said witness, the learned Counsel for the prosecution is not in a position to get over this difficulty of not obtaining the consent of the accused. However, he sought to rely upon certain decisions which have no bearing on the point at all. The law being very clear that communications between husband and wife cannot be permitted to be disclosed unless the spouse other than the one in the witness box has consented to such

disclosure. In this case such consent is absent. Therefore, the evidence tendered by PW-17 Honnamma in so far as it relates to the disclosure of the statements made to her by the accused is concerned is held to be inadmissible.

26. However, the learned Public Prosecutor sought to contend that the marriage of the accused with PW-17 Honnamma is not a valid marriage, he having been married earlier and that his wife had run away with a cleaner. No attempt has been made by the prosecution to place any material in that regard except to examine one Govindaiah PW-24, who stated that accused told him that he needs to get married, as his wife had run away with a cleaner. Whether that marriage is true or false, whether his wife is alive or dead, whether such marriage has ended in a divorce or otherwise has not at all been investigated by Police or any evidence is placed by the prosecution. In the absence of such evidence, it is not safe to accept that the accused had been married and his wife is alive and his marriage with PW-17 Honnamma is an invalid marriage.

27. So far as marriage with PW-17 is concerned, it is fully established particularly by reason of the evidence tendered by the Sub-Registrar PW-12 Chikka Kempaiah, who stated that marriage had been registered under the Hindu Marriage Act after the marriage was over at a temple.

28. We may now examine the statement said to be confession even presuming that the contention raised by the defence u/s 122 of the Evidence Act for any reason is not tenable. Confession is said to have been made to PW-17 Honnamma and what is stated by her, if read as a whole, it becomes difficult to place any reliance thereon. In her deposition at one stage PW-17 Honnamma states that after accused took her sisters away leaving her behind near a field in Bannerghata Circle he returned alone to her after one hour and stated that Sangota killed Gowramma. Later she states it was at Hosur when he wanted to sell jewellery belonging to deceased-Gowramma she asked him as to how he got them, he made the confession. Even the most liberal reading of the statement made by PW-17 Honnamma would not indicate that accused has killed Gowramma in any manner. To establish that Gowramma was killed as a result of any previous concert between the accused and the said Sangota there is no material forthcoming in the said statement. No overt act is attributable to him to bring out ingredients of Section 34 I.P.C. All that is stated is that the accused's participation in the killing of Jayamma and not that of Gowramma. In regard to killing of Gowramma the accused is categorical in his statement made to his wife PW-17 Honnamma that Sangota alone killed her after having sexual intercourse with her. What would be inculpatory is that he took away the jewellery belonging to the deceased Gowramma. It is difficult to understand his statement that he was involved in the killing of Gowramma.

29. It is only in very rare cases where both inculpatory and exculpatory statements are made in a confession instead of rejecting the entire statement former is accepted rejecting the latter. Such a course is adopted if it is inherently improbable and it is contradicted by other evidence or statement of accused u/s

313 Cr.P.C. If after entire statement of accused has been given in evidence, the prosecution can contradict any part of it since the whole testimony is left to the Court for consideration precisely as in other cases where one part of evidence is contradictory to another. All parts of confession are not entitled to equal credit. The Court may believe that part which charges the appellant and reject that which is in his favour, if Court sees grounds for doing so. In the present case we cannot rely upon this proposition at all because the accused in his statement to the wife PW-17 Honnamma is categorical as to who did what in relation to the killing of Jayamma or Gowramma. Therefore, we cannot say that he has inculpated himself at any stage in regard to the killing of Gowramma. So far as the deceased Gowramma's death is concerned, his statement is totally exculpatory. If on account of spontaneous reactions Sangota himself has killed Gowramma, the same cannot be attributed to the accused. Therefore, it is not at all safe to rely upon this exculpatory statement made by the accused to his wife, even if it is admissible in evidence. Therefore, for these two reasons we reject the reliance upon the extra judicial confession said to have been made by the accused.

30. We shall now take up the next circumstance relied upon by the prosecution to support their case, which is the recovery of M. Os 2 and 3 at Hosur. The Investigating Officer who has been examined as PW-27 K. H. Chandrashekar has stated in this regard as follows :

That on 20th February, 1992 on receipt of credible information he proceeded to Kothanur village near Hosur, found the accused-Nagaraj and Honnamma PW-17 staying in a house belonging to one Murugesh, he arrested Nagaraj accused and accompanied by Honnamma PW-17 brought to the Anekal Police Station. On 21-2-1992 he recorded the voluntary statement made by the accused stating that he killed Gowramma, taken away her jewels and sold the same in Hosur and if he is taken to Hosur he would show the place. Thereafter, he examined Honnamma and took her statement. At the time when accused was arrested he had a pair of silver ear studs (ole), a H.M.T. Watch, a transistor, one ring (Kapali), receipt and guarantee card of H.M.T. watch and a bed sheet. He took possession of the same under a mahazar as per Ext. P-15. On 21-2-1992 he took the accused to custody till 25-2-1992 and thereafter he drew up a spot mahazar. On the basis of the information furnished by the accused on 28-2-1992 he proceeded to Hosur Town where from one Gokarnesh, Proprietor of Chandrachudeshwari Jewellery Shop, he seized a gold thali and a gold nose stud in the presence of Panchayatdars under Ext. P-3 and he recorded the statements of Gokarnesh and Bhismachari.

B. N. Obalesh-P.S.I. PW-9 assisted the Investigating Officer by accompanying him to Kothanur near Hosur, when the accused was arrested he states that it was 12"O" Clock in the midnight.

Gokarnesh has also been examined as PW-21.

He states that he is running a shop known as Nanjundeshwara Jewellers, which is also known as Chowdeshwari Jewellers. He states that accused sold ear studs and even prior to it had been to him and thus he knows the accused. On 28-2-1992 at about 5-15 p.m. PW27 Chandrashekar Investigating Officer accompanied by the accused came to his shop. The Investigating Officer asked him whether he knows the accused and as he had come to his shop earlier, he stated that he knows him. The Inspector stated that the accused had committed theft and he has sold certain jewellery and asked him to produce, if any. The accused also said that he had sold the same. Three months before that date the accused had sold him a thali and a nose stud for Rs. 300/-. 5 months prior to that he had sold a gold ear stud and silver anklets (Kalandige). He produced what had been given to him by the accused and he is able to identify the same. He can even identify whatever had been seized and the police drew up a panchanama as per Ext. P-3. In the cross-examination he admitted that he maintains regular books of accounts but he had not entered the transaction with accused in the books of accounts nor has he issued any bills or receipts. Except on the two occasions the accused had not visited him. To a specific question posed to him in the cross-examination in relation to identity of jewellery he stated that he was asked to produce the articles given to him by the accused and the Police stated what those items were, he made available those items. He has stated that there are several items of similar nature available in his shop and it is not possible for him to state as to who had given him when and he stated that he does not know whether after taking possession of the articles which were seized under mahazars any marks were made either on the cover containing the said items or otherwise.

Thopaiah PW-22 has been examined to prove Ext. P-15 under which a watch, a ring, a radio, one pair of silver ole, bed sheet and certain receipts were seized.

31. The learned Counsel for the accused submitted that recoveries have not been effected in accordance with law at all. In the first place when a voluntary statement had been made by the accused pursuant to which seizures have been effected as to why that statement leading to such recovery is not marked remains a mystery. Secondly, the law requires that when accused is arrested, it would be appropriate to take search of him then and there in the presence of panchayatdars and draw up a mahazar to indicate what were in possession of the accused and what were seized. Unless such method is adopted the seizure will be of no use.

32. In 1962 Mys L J 656 (Abba Abdul Karim v. State of Mysore, it has been observed that where panchanama is not drawn either at the place of seizure or at the place where the accused is apprehended is a serious infirmity. In Kehar Singh and Others Vs. State (Delhi Administration), similar law has been reiterated. In that case it was held that if the Police Officers had gone with prior information to arrest the absconding accused, they could have taken an independent witness with them and instead of searching him and performing the

formalities of arrest at the place where the accused appeared, he was taken to the office of the Electricity Board and there search and seizure took place and some articles were recovered from his possession. In those circumstances it was held that it was not appropriate to rely upon such recoveries. In the present case the Police did have prior information as to the whereabouts of the accused. Therefore, it was not impossible for them to take witnesses with them when they arrested the accused at Kothanur near Hosur. If search had taken then and there in the presence of mahazardars, it would have been safe to rely upon their statements supported by the mahazar. But, in this case the silver ear studs were seized on the next day in the police station. As to why search did not take place immediately on the arrest of the accused is not at all clear. All that was stated is it was midnight and no witnesses were available. But in the statement made by Obalesh-P.S.I. PW-9 and PW-27 I. O. Chandrashekar it is clear that Murgesh was the owner of the house, on enquiry from Nurugesh they found that accused and Honnamma PW-17 were staying in his house, pursuant to which accused was arrested. Therefore, Murugesh could have been taken as a witness and examined for purpose of search conducted on the accused at the time of his arrest. Further, Murugesh is also examined in this case. A personal search which has not taken place immediately on apprehension leads to grave doubt as to the recoveries effected on the person of the accused particularly when such recoveries are made quite sometime thereafter that too in a police station.

33. So far as recoveries effected from the shop of Gokarnesh PW-21 are concerned we may have to refer to what was observed in Earabhadrappa alias Kirshnappa v. State of Karnataka . It was held in that case that though identification of ornaments and silk sarees without prior to its identification is not inadmissible in evidence for want of prior identification test, it must also be stated that when they are articles of common use and ordinarily found everywhere they could be shown that they possess some special features. In that case the Court relied upon the statements of the ladies who were using the silk sarees, as they were expensive sarees with distinctive designs. If they are ordinary ornaments in common use and as admitted by PW-21 Gokarnesh that such ornaments were plenty in his shop unless some distinctive marks were indicated thereto either as to the shape, size or engraving the name either of the owner or the shop from which they were purchased, a bend or a twist in the same, which are familiar to the parties who wear it leading to an inference that it is possible to identify the same. Though Gokarnesh PW-21 has maintained accounts, the ornaments M.Os 2 and 3 in question did not find place in the same nor any bill or other voucher was made available muchless any mark of identity was available at the shop in the shape of any chit being tied to the goods in question as to from whom they had been purchased. No credence can be given in the absence of any relevant entry in the books of account and other attendant circumstances. In this case the voluntary statement said to have been given by the accused leading to the recovery is not established, we find it very difficult to rely upon the recoveries effected to connect the accused with the ornaments in

question - M.Os 2 and 3 or even the silver ole seized as a result of search conducted upon the accused.

34. The next circumstance relied upon by the prosecution is that the accused was absconding for 2 1/2 months and such circumstance is relevant u/s 8 of the Evidence Act. The conduct of the accused in not informing any of the relatives of the deceased coupled with the circumstance that the accused was last seen together with the deceased Gowramma and Jayamma and the evidence of PW-17 and PW-19 in that regard is stated to be clinching. Let us analyse the evidence of PW-17 Honnamma and PW-19 Narayana in that regard.

So far as evidence of PW-19 Narayana is concerned, he had accompanied the accused, PW-17 Honnamma. Gowramma and othes when the accused brought them to Bangalore. He is the cousin of deceased Gowramma. His sister Honamma PW-17 had been married to the accused about one year and three months prior to the date of his deposition. 6 or 7 days after the marriage with Honamma PW-17 the accused suggested that he would take them to Bangalore to introduce his other relations. He brought them at about 2.00 p.m. from Kanakapura to Bangalore and that there were 9 persons with him. He stated that he had a house in Banashankari and he got them alighted from the bus at Banashankari. However, he changed his mind thereafter and told them that he would take them to a pawn shop where he had pledged T.V. and tape recorder. He told that they would not part with Rs. 500/- and that he is not a thief and he is very well off. He took them to a sait and the said sait stated that it is true that the accused often visits him and showed T.V. and tape recorder, in the meanwhile, before they could make further enquiry he called an autorickshaw from the autostand. When PW-17 Honnamma, Gowramma, Jayamma and PW-3 Honnaiah his father wanted to get into the autorickshaw, he stopped, but he took the three ladies, namely, PW-17 Honamma, Jayamma and Gowramma and before going he told them that they could meet him near the Beer shop in Lakkasandra. They got into another autorickshaw and went. Thereafter, he did not see either PW-17 Honamma, Gowramma, Jayamma and the accused. For the last time he saw Gowramma, Jayamma in the company of PW-17 Honamma and the accused at Cotton pet itself.

So far as P.W. 17 Honamma is concerned she stated similarly as P.W. 19 Narayana as to coming to Bangalore, visiting the shop of the sait and thereafter proceeding in the autorickshaw towards Bannerghatta and got off near the Bannerghatta Circle at about 11.00 p.m. She states that the accused asked them to walk for a mile and the one who followed them on the scooter was not known and where he had gone. He asked her to sit down in the field, while he would go to his aunt's house to fetch clothes and he took her sisters namely Jayamma and Gowramma and thereafter she did not see either Jayamma or Gowramma. That is how it is sought to be inferred that accused was last seen in the company of Gowramma and Jayamma by Honnamma also. This part of the statement made by the witness has been subjected to very severe cross-examination. She is not

able to state the distance between the road and the field where she was made to sit down and she cannot also state what distance she walked from the road. She admits that there were no lights where she was sitting and it was not visible as to what was there on either side. In the field ragi had been grown and she cannot say what was the height of that ragi, but the size of the ragi was quite small. After getting down from the autorickshaw and walked for half an hour, the accused asked her to sit down there. She states that she was not frightened though there was nobody where she was sitting, nor any house or hut was visible. Neither she nor Jayamma or Gowramma suggested that she should not be left alone and she should accompany them to his aunt's place. When she was left alone she did not even ask which was that place and whether it was close to any town. It was not even stated by her or by others that it would not be safe to leave her at middle of the night in the field and she too should accompany them. This part of the evidence tendered by P.W. 17 is highly artificial. It is difficult to perceive that when accused suggested that he would go and fetch his clothes from his aunt's house as to why deceased Gowramma or Jayamma should accompany him and why should P.W. 17-Honnamma be kept out. After all the accused was visiting his aunt's house, if Jayamma and Gowramma could accompany him P.W. 17-Honnamma also could accompany him. No explanation is forthcoming as to why P.W. 17-Honnamma was left alone in the field in the dead of night. When two other ladies were willing to accompany the accused, atleast one or the other could have offered to stay back with P.W. 17-Honnamma. If as suggested, the accused wanted to save her from being victim to the lustful desire of Sangota, there was no difficulty in keeping her in the company of either Gowramma or Jayamma and he could have taken only either Gowramma or Jayamma with him. Therefore, it is difficult to accept the story set up by P.W. 17-Honnamma as probable and gives rise to serious doubt as to what exactly happened at that time. Further events that have taken place are not clear. It is no doubt true that accused went away with Jayamma, Gowramma and P.W. 17-Honnamma from Majestic area. Whether Honnamma-P.W. 17 was left alone thereafter or she was with him is not very clear.

35. In matters where reliance has to be placed upon the evidence of probabilities and the circumstances arising from being last seen together, it is necessary to examine several decisions in that regard. We must start from Mohinder Singh Vs. The State, ; Devi Lal and Another Vs. The State of Rajasthan, ; Hukam Singh Vs. State of Rajasthan, ; Pohalya Motya Valvi Vs. State of Maharashtra, In all these cases where more than one person was last seen together in the company of the accused. Courts have not drawn a definite inference that the accused and accused alone had committed the act with which he is charged particularly in a case of murder. In this case the charge itself is that accused and Sangota had connived together to have sexual intercourse with Jayamma or Gowramma and though there was no intention to do away with them at that time, such a situation might have arisen subsequently. As to what acts could be attributed to each one of them will have to be clearly spelt out, as otherwise it is very difficult

as to what really transpired when the accused was away with the deceased-Gowramma and was interceded by another person such as Sangota in this case. If as stated, Sangota alone was responsible for the murder of Gowramma, the accused cannot be mulcted with the charge that unless it is established that there was a pre-concert or intention to do away with her. In the circumstances, it is difficult to rely upon that part of the evidence to draw a definite inference that accused and accused alone must have done away with Gowramma. Though the conduct of the accused in going away to Hosur along with P.W. 17-Honnamma and not informing the whereabouts of Gowramma to her parents or relatives leads to grave suspicion, that by itself is not legal proof of the guilt of the accused. In the circumstances of this case it is not possible to rule out that Sangota might have committed the acts of violence on Gowramma and the accused being not in a position to explain as to how he could have placed them in such a situation and possibly on that account he might have run away in the company of his wife-Honnamma-P.W.17. Thus, his conduct is not inconsistent with his being not guilty of the charge. Therefore, the evidence on record is neither sufficient nor safe to come to a conclusion that he accused is guilty of the charge.

36. The learned Public Prosecutor stated that in this case there are certain lapses in the conduct of the case particularly in relation to admitting the evidence though hit by Section 122 of the Evidence Act while examining P.W. 17-Honnamma and not putting the following relevant circumstances to the accused while examining him u/s 313 Cr.P.C. The relevant circumstances pointed out by him are :

- (1) The superimposition test and opinion tendered thereto.
- (2) Voluntary statement of the accused leading to recoveries.
- (3) Seizure of M.O. 4 from the accused.
- (4) Absconding and apprehension thereafter.
- (5) Recoveries of M.Os. 2 and 3; and
- (6) Registration of missing complaint.

The circumstances referred to above in our view would not lead to any definite inference of incriminating the accused so as to remit the matter to the trial Court to enable it to put these questions to the accused.

Such a course will not improve the matter in any way. When any portion of evidence is admitted which is inadmissible in law, that circumstance by itself will not vitiate the trial, but, the portion of evidence will have to be excluded from consideration. We have exactly adopted that course. We have also taken the view that even if the portion of the evidence which is inadmissible on account of Section 122 of the Indian Evidence Act is taken into consideration it would not help in establishing that the accused is guilty. Hence, we find that these

infirmities need not be taken note to call for a fresh trial or further trial.

37. In the light of what we have discussed above, we cannot agree with the conclusions drawn by the learned Sessions Judge. Therefore, the order made by him cannot be sustained. We have independently examined each one of the circumstances referred to by him and have drawn conclusions on each one of the circumstances relied on by him contrary to what he has held.

38. In the circumstances, we find the accused not guilty of the charges with which he is charged. We allow the Appeal, set aside the order of conviction and sentence passed by the learned Sessions Judge and set the accused at liberty. He shall be released at once, if he is not required in any other case. Accordingly, Reference is rejected. This order will not affect the directions issued by the learned Sessions Judge regarding return or disposal of material objects.

39. Before parting with the case we wish to record our dissatisfaction over the manner in which the investigation has been conducted and the trial has taken place. The case of the prosecution is that the accused is involved in a series of murders committed after sexual assault or after having lured women to marry him. In such a case investigation should be more scientific either in identifying the deceased's dead body and appropriately follow due procedure in effecting recoveries of material objects. In this case due attention to these aspects is lacking. If accused are to be let off on account of loopholes in investigation it is a frustrating experience that even guilty cannot be proved to be so. In this case accused is said to have taken two women with him and both of them are said to have been killed one after another as part of the same incident. When two murders are alleged to have taken place arising out of the same incident two charges should have been tried together. The deceased are related to one another and witnesses are common. As to what circumstances impelled the learned Judge to conduct a separate trial in this case is not clear. When the witnesses tender evidence they are likely to speak with reference to both the deceased women and it would have been easier for them to spell out the circumstances to which they deposed. We must say in this case that separate trial has not advanced justice but on the other hand has impaired it. The learned Sessions Judge also did not put the circumstances on which he placed reliance to accused in examining him u/s 313 Cr.P.C. The necessary care with which the trial should have been conducted is not exhibited in this case. We deprecate this approach of purporting analysis of evidence and dealing with the same. We hope both the trial Judge and the Investigating Officer will improve in discharge of their duties hereafter.

40. Order accordingly.