

(2012) 11 GUJ CK 0024
In the Gujarat High Court
Case No : Criminal Appeal No. 813 of 2005

Patel Manabhai Mavjibhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 209, 313
Evidence Act, 1872 — Section 145, 157, 162, 17, 21
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) CriLJ 1213

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : P.S. Chaudhary and S.C. Oza, for the Appellant; K.P. Raval, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—This appeal is at the instance of a convict-accused for the offence punishable u/s 302 of the Indian Penal Code, and is directed against an order of conviction and sentence dated 21st September, 2004, passed by the learned Additional Sessions Judge, 4th Fast Track Court, Banaskantha at Deesa, in Sessions Case No. 51/2003. By the aforesaid order, the learned Additional Sessions Judge found the appellant guilty of the offence punishable u/s 302 of the Indian Penal Code and consequently, sentenced him to suffer life imprisonment. Case of the Prosecution:

The accused was married to the deceased and during the wedlock two daughters were born. The deceased had an illicit relationship with one Sendha, who happened to be the son of the uncle of the accused. As the deceased had developed intimacy for the said Sendha, the deceased used to frequently visit him on the pretext of going at the house of her parents. The people in the village started discussing about the illicit relations of the deceased with Sendha, due to which the accused felt bad. It is the case of the prosecution that the accused had

tried many times to explain his wife, the deceased, to live a good moral life and give up the illicit relations with Sendha. However, the deceased paid no heed to the advice of her husband, the accused. On 18th January, 2002, the accused, and his wife the deceased, were all alone at home as the parents of the accused had gone to the agricultural field, and the children of the accused had gone out to play. At around 10 O'clock in the morning, when the deceased was washing clothes, the accused once again tried to explain her to give up the illicit relations with Sendha. At that point of time, an altercation took place between the accused and the deceased, and the deceased is said to have told the accused that she would do whatever she would feel good and the accused had no right to say anything to her. The accused got enraged due to such attitude of his wife, the deceased, as a result of which, the accused picked up an axe, which was lying in one corner of the house, and inflicted injuries on the neck by hitting two blows. The deceased fell dead instantaneously.

It appears that the accused himself lodged the First Information Report on 18th January, 2003 at 18.20 hours at Vav Police Station, Camp: at Sapreda, making a clean breast of his crime.

2. On the strength of the First Information Report, which was lodged by the accused himself, the investigation had commenced. The inquest panchnama of the dead body of the deceased was drawn in the presence of two panch witnesses, being Exh. 20. The dead body of the deceased was sent to Vav Hospital for the purpose of post-mortem. The postmortem examination of the dead body of the deceased revealed that the deceased had sustained a sharp cutting wound over right side of the neck measuring 4 cm. x 3 cm. x 4 1/2 cm. There was also a sharp culling wound over posterior part of the neck situated below occipital bone, horizontally measuring 4 cm. x 2 cm. x 4 cm. There was a fracture and dislocation of 3rd and 4th cervical vertebra. The cause of death assigned in the post-mortem report was neurogenic shock due to fracture and dislocation of cervical vertebra. The statements of the witnesses were recorded. On 19th January, 2003, the accused was arrested and the arrest Panchnama was drawn in the presence of two panch witnesses being, Exh. 28. The clothes worn by the accused at the time of the incident were collected for the purpose of sending them to the Forensic Science Laboratory for chemical analysis, A discovery Panchnama of the weapon of the offence was drawn u/s 27 of the Evidence Act in the presence of two panch witnesses, being Exh. 37. The clothes of the deceased were collected by drawing a Panchnama, being Exh. 31. The scene of offence Panchnama, being Exh. 23, was drawn in the presence of two panch witnesses. As there was sufficient evidence against the accused, collected during the course of investigation, finally the charge-sheet was filed by the Investigating Officer in the Court of the learned Judicial Magistrate First Class, Vav.

3. As the case was exclusively triable by the Sessions Court, the learned Judicial Magistrate First Class, Vav committed the case to the Sessions Court u/s 209 of

the Criminal Procedure Code. The Sessions Court framed charge against the accused, being Exh. 5, and statement of the accused was recorded. The accused did not admit the charge and claimed to be tried.

4. The prosecution adduced the following oral evidence in support of its case.

5. The following pieces of documentary evidence were adduced by the prosecution:--

6. After completion of the oral as well as the documentary evidence of the prosecution, the statement of the accused u/s 313 of the Criminal Procedure Code was recorded, in which the accused stated that the complaint was a false one and he was innocent.

7. At the conclusion of the trial, the learned Trial Judge convicted the accused for the offence u/s 302 of the Indian Penal Code, and sentenced him as stated herein before.

8. Being dissatisfied, the accused-appellant has come up with the present Appeal.

9. Submissions on behalf of the accused-appellant:

Mr. P.S. Chaudhari, the learned Advocate appearing for the accused-appellant vehemently submitted that the Trial Court committed a serious error in holding the accused guilty of the offence of murder punishable u/s 302 of the Indian Penal Code by placing reliance on the letter, Exh. 44, addressed by the Sarpanch of the village Sapreda to the P.S.I. of Vav Police Station. Mr. Chaudhari also submitted that the Trial Court committed serious error in placing reliance on the evidence of the P.W. 3, father of the deceased and on the evidence of the P.W. 4, the uncle of the deceased. Mr. Chaudhari also submitted that the Trial Court committed serious error in relying on the evidence of the discovery of the weapon, more particularly when all the panch witnesses had failed to prove the contents of the panchnama and were declared as hostile witnesses. Mr. Chaudhari submitted that there is no evidence worth the name to connect the accused with the crime, more particularly when the Trial Court has not treated the complaint lodged by the accused himself as the F.I.R. Mr. Chaudhari submitted that the Trial Court considered the letter, Exh. 44, as the First Information Report and treated the F.I.R. which was lodged by the accused himself making a clean breast of his crime as a statement recorded by the Police u/s 162 of the Criminal Procedure Code, not admissible in evidence. Mr. Chaudhari, therefore, urged that the accused deserves to be acquitted of the charge of murder.

10. Submissions on behalf of the State:

Mr. K.P. Raval, the learned Additional Public Prosecutor appearing for the State, vehemently submitted that the Trial Court has rightly found the accused guilty of the offence of murder punishable u/s 302 of the Indian Penal Code and no interference is warranted in the present Appeal. Mr. Raval submitted that though

the Trial Court considered the letter, Exh. 44, as the First Information Report, and eschewed from consideration, the First Information Report which was lodged by the accused himself, this Court, in Appeal, can definitely consider the confessional First Information Report lodged by the accused himself as the FIR, and not the letter, Exh. 44, addressed by the Sarpanch to the PSI of Vav police Station. Mr. Raval submitted that this error on the part of the Trial Court by itself cannot be a ground to acquit the accused. Mr. Raval laid much emphasis on the contents of the FIR lodged by the accused himself, wherein the accused has confessed killing of his wife, the deceased, with an axe. According to Mr. Raval, the letter, Exh. 44 could be termed as very cryptic and should not be considered as an FIR. Mr. Raval also submitted that there is an extra-judicial confession of the accused before the P.W. 5, Motibhai Patel, the uncle of the deceased. According to Mr. Raval, an extra-judicial confession of accused is also a vital piece of evidence and conviction can be based solely on such extra-judicial confession. Mr. Raval, therefore, urged that there being no merit in this Appeal, the Appeal be dismissed.

11. Oral Evidence on record:

i) The P.W. 1, Mavjibhai Jakshibhai, is the father of the accused. The father of the accused failed to support the case of the prosecution and was accordingly declared as a hostile witness. The evidence of the P.W. 1 is of no significance.

ii) The P.W. 2, Chehriben Mavjibhai, is the mother of the accused. The P.W. 2 also failed to support the case of the prosecution and was, accordingly, declared as a hostile witness. The evidence of the P.W. 2, the mother of the accused, is also of no significance.

iii) The P.W. 3, Ladhabhai Mavabhai Patel, is the father of the deceased. The P.W. 3 in his evidence, being Exh. 9, has deposed that on the date of the incident he himself and his wife had gone in the morning to their agricultural field, and at about 12 O'clock in the afternoon, one Ranabhai Kanjibhai of village Sapreda came at the agricultural field and informed the P.W. 3 and his wife that their daughter Dali, the deceased, had been killed by her husband, the accused. On learning about the incident, the P.W. 3, and his wife came to their house from their agricultural field and informed other family members about the death of Dali, the deceased. Thereafter the P.W. 3, and his brothers, all together in one jeep reached at village Sapreda. On reaching the house of the accused, the P.W. 3 saw that his daughter, the deceased was lying dead in the court-yard of the house, and her neck was cut. At that point of time the accused, the father of the accused and other people of the village were also present. The P.W. 3 has deposed that at that point of time, he inquired with the father of the accused, as to why they indulged in such an act and exactly what had happened. In reply, the father of the accused informed the P.W. 3 that his son Mana, the accused had committed murder of Dali with an axe. The P.W. 3 has also deposed that the people who had gathered at the house of the accused had suggested to settle the matter, but as the P.W. 3 was unable to bear the pain of seeing dead body of

his daughter, the matter was not settled and the P.W. 3 decided to inform the Police.

iv) The P.W. 4, Ramsangbhai Mavabhai Patel is the uncle of the deceased. The P.W. 4 in his evidence, being Exh. 10, has deposed almost on the same line as deposed by the P.W. 3, the father of the deceased. The P.W. 4 in his evidence has deposed that on reaching the house of the accused, he inquired with the father of the accused as to who had killed Dali, the deceased, and in reply, the father of the accused had stated that it was his son Mana, who had killed his wife Dali. The P.W. 4 has also deposed that he, along with others, had gone to Vav Police Station, but on reaching the police station, they learnt that the accused himself had lodged the complaint about the incident.

v) The P.W. 5, Motibhai Narsinhbhai Patel is also one of the uncle of the deceased. The P.W. 5, in his evidence Exh. 11, has also deposed on the same line as deposed by the P.W. 3, and the P.W. 4. The P.W. 5, in his evidence, has deposed that he had inquired with Mavji, the father of the accused, as to who had killed Dali, and in reply, the father had stated that it was his son Mana, who had killed Dali. The P.W. 5 has also deposed that the accused also made an extra-judicial confession that he had killed Dali.

vi) The P.W. 6. Padamsing Bhimsinh Darbar, was examined by the prosecution. In his evidence, the PW. 6 has deposed that on the date of the incident he had gone to the house of one Ganpatsinh Pruthvisinh at village Sapreda. On that day, the P.W. 6 had met Rajeshwariba, the wife of Ganpatsinh Pruthvisinh. Rajeshwariba at that point of time was the Sarpanch of village Sapreda. The P.W. 6 has deposed that it was told to him by Rajeshwariba that the wife of Manabhai had been killed by someone. Thereafter, one note was handed over by Rajeshwariba to the P.W. 6 with instructions to hand-over the note at Vav Police Station. The P.W. 6, accordingly, had gone to Vav Police Station and had handed-over the note at the Police Station, which was written by Rajeshwariba, the Sarpanch of the village Sapreda.

vii) The P.W. 7, Ratnabhai Rupsinhbhai Patel, is the cousin of the accused. The PW. 7 failed to support the case of the prosecution and was accordingly, declared as a hostile witness. The evidence of the P.W. 7 is in no manner helpful to the prosecution.

viii) The P.W. 8, Ranabhai Kanjibhai, is the witness who had informed the parents of the deceased about the incident. The P.W. 8, Ranabhai, also failed to support the case of the prosecution and was accordingly, declared as a hostile witness. The evidence of the P.W. 8, Ranabhai, is also in no manner helpful to the prosecution.

ix) The P.W. 9, Dr. Azhar Wahidkhan, is the Medical Officer, who had performed the postmortem on the dead body of the deceased. The P.W. 9, in his evidence, has deposed that the post-mortem examination revealed the following external/internal injuries:

1. There is a sharp cut wound over right side of neck, measuring 4" in length, horizontally, 3" width, and 4 1/2" depth, margin is clear, extended from 3" below mastoid process to anterior line of middle of trachea;
2. There is a sharp cut wound over posterior part of neck situated 2" (two) below occipital bone, horizontally measuring, 4" in length, 2" width and 4" depth;
3. The front portion of the abdomen was found burnt;
4. The burns were superficial in nature;
5. The skin of the fingers of both the hands was found burnt;
6. The skin of toes of both the legs was found burnt;
7. There was fracture of 3rd and 4th vertebrae and was found cut;

The cause of death was neurogenic shock due to fracture and dislocation of cervical vertebrae. The P.W. 9 has also deposed that the injuries which were sustained by the deceased were possible by a weapon like axe.

x) The P.W. 10, Narmadaben Ratnabhai, is one of the panch witnesses of the Inquest panchnama. The evidence of the PW. 10, as such, is of no significance.

xi) The P.W. 11, Mavjibhai Manvar, is one of the panch witnesses of the scene of offence panchnama.

xii) The P.W. 12, Udesinh Agarsinh, is also one of the panch witnesses of the scene of offence panchnama.

xiii) The P.W. 13, Bababhai Mansangbhai, is one of the panch witnesses of the arrest Panchnama of the accused. The P.W. 13 Bababhai failed to support the case of the prosecution and accordingly, was declared as a hostile witness.

xiv) The P.W. 14, Parbhabhai Masangbhai, is one of the panch witnesses of the arrest panchnama of the accused. The P.W. 14 Parbhabhai had also failed to support the case of the prosecution and was accordingly, declared as a hostile witness.

xv) The P.W. 15, Ramsingji Rajput, is one of the panch witnesses of the panchnama of the clothes of the deceased. The P.W. 15 was also declared as a hostile witness as he failed to support the case of the prosecution.

xvi) The P.W. 16, Prabhubhai Harijan, is also one of the panch witnesses of the panchnama of the clothes of the deceased. The P.W. 16 was also declared as a hostile witness, as he had failed to support the case of the prosecution.

xvii) The P.W. 17, Jayantibhai Pitambar Bhati, is one of the panch witnesses of the discovery panchnama of the weapon of the offence i.e. axe. The P.W. 17, Jayantibhai, also failed to support the case of the prosecution and was accordingly, declared as a hostile witness.

xviii) The P.W. 18, Chhotabhai Rajput, is the second panch witness of the discovery panchnama of the weapon of offence. The P.W. 18, Chhotabhai also failed to support the case of the prosecution and was also declared as hostile.

xix) The P.W. 19, Madhavlal Laxmandas, is one of the police witnesses examined by the prosecution. The P.W. 19, Madhavlal, in his evidence, being Exh. 40, has deposed that on 18th January, 2003, he was In-charge of Vav Police Station, as a P.S.O. The P.W. 19 has deposed that at that point of time, he had received a note sent by the Sarpanch of the village Sapreda, namely, Rajeshwariba. The note which was sent by the Sarpanch was handed over by the P.W. 19 to the Police Sub-Inspector.

xx) The P.W. 20, Rajeshwariba Darbar, is the Sarpanch of village Sapreda, The P.W. 20, in her evidence has deposed that on 18th January, 2003, when she was at her house, she learnt through people of the village that a murder had taken place at Patel Vas, The P.W. 20 has also deposed that it was also being discussed in the village that Manabhai, the accused, had committed the murder of his wife, the deceased. The P.W. 20 thereafter, had informed about the same on phone to Vav Police Station as well as to Palanpur Police Station, but though informed, the police failed to turn-up at the village. The PW. 20 has also deposed that she had informed at Ahmedabad also. The P.W. 20, thereafter, addressed a note to the PSI of Vav Police Station about the murder, which had taken place in the village. The note written by the P.W. 20 and addressed to the PSI of Vav Police Station was marked Exh. 44.

xxi) The P.W. 21, Bharatsinh Vaghela, is the Investigating Officer. The P.W. 21, in his evidence, has deposed that on 18th January, 2003, he was serving as PSI at Vav Police Station, and on that date, at around 16.50 hours, one Darbar came at the police station with a note written by the Sarpanch of Sapreda village, Rajeshwariba. The P.W. 21 has further deposed that on the strength of the note, Exh. 44, an entry was made in the Station Diary, bearing No. 16. The P.W. 21, thereafter, proceeded to village Sapreda, and on reaching at the place of the incident, the P.W. 21 met Manabhai, the accused, who at that point of time was sitting outside his house. The P.W. 21 has also deposed that the dead body of the deceased was lying outside in the courtyard. The P.W. 21 has deposed that he had inquired with Manabhai, the accused as to what had happened, and the accused, in reply, had told the P.W. 21 as narrated in the complaint. The P.W. 21 has further explained as to how he proceeded with the investigation.

12. Before advertng to the rival submissions of the parties we would like to first look into the FIR, Exh. 58, which was lodged by the accused himself at Vav Police Station, Camp: Sapreda. It will be profitable to quote the entire First Information Report, Exh. 58.

My name is Manabhai Mavjibhai Patel, aged: 28, occupation agriculture, residing at: Sapreda, Ta: Vav. Upon being asked personally, I hereby state that in all we are three brothers. My two younger brothers are residing at Surat and their

wives are residing at their respective parental houses. I am residing with my parents and I have been married to one Daliben, D/o. Ladhabsai Mavabhai of village Tambha past 8 years. I have two sons and my wife was residing with me from the date of our marriage. My wife was having illicit relations with Sendhabhai, the son of my maternal uncle, a resident of village Dhema and frequently my wife used to meet Sendhabhai on the pretext of going to her parental house. In this regard, the villagers started discussing about the illicit relations and I was telling her to improve her character but there was no change in her character.

Today, in the morning my parents had gone to the agricultural field and my children had gone in the neighbourhood to play. At that time J and my wife both were alone at our house. At about 10 O'clock in the morning my wife was washing clothes and at that point of time I told her not to keep relations with Sendhabhai and also asked her to prepare lunch at the earliest as I had to go to the agricultural field. My wife started saying that "I will continue to do what I am doing and who are you to tell me." I therefore, got annoyed and picked-up an axe which was lying in one corner of the house and inflicted 2 to 3 blows on her neck and head one after another. She fell down and died. I was going to inform my parents with regard to the incident and at that time I met Ratnabhai my paternal uncle's son on the way. I narrated about the incident to him and also to several other persons of our mohalla and also called my in-laws. My in-laws came thereafter and decided to file a complaint and my family members asked me to keep sitting at my house. Thereafter on your arrival sir, I have declared the facts as stated in my complaint.

The facts of my complaint are true, proper and correct to the best of my belief and knowledge and after reading over the same I have put my signature hereinunder.

Before me Sd/, Illegible PSI, Vav.

Camp: at Sapreda

Left hand thumb of Manabhai Mavjibhai Patel.

It will also be profitable to quote the contents of the Note, Exh. 44, addressed by the Sarpanch of the village to the Police Sub-Inspector:

Respected Police Sub-Inspector, Police Station Vav,

This is to inform you that talks have spread in our village that Patel Manabhai Mavji, a resident of village Sapreda has killed his wife with an axe. I, therefore, request you to immediately arrest the offender.

Chauhan Rajeshwari Ganpatsinh Sarpanch, Sapreda Gram Panchayat Ta: Vav.

13. We have noticed that so far as the oral evidence is concerned, almost all witnesses have turned hostile. The prosecution has not been able to prove a single panchnama including the most important piece of evidence i.e. discovery

panchnama of the weapon of offence i.e. the axe. Both the panch witnesses of the discovery panchnama failed to prove the contents of the panchnama and were declared hostile. The Investigating Officer also failed to prove the contents of the discovery panchnama and, therefore, in our opinion the Court below committed an error in relying on such a piece of evidence, treating it to be an incriminating piece of evidence.

14. We fail to understand as to on what basis the Trial Court convicted the accused. The contents of the Note, Exh. 44, could also be termed as hearsay. All that has been stated in the Note, Exh. 44, written by the Sarpanch of the village is about some talks in the village that the accused had committed the murder of his wife, the deceased. In our view, and to a certain extent, Mr. Raval, the learned Additional Public Prosecutor is right in submitting that the Trial Court could not have treated the Note, Exh. 44, as the First Information Report, as the note is too cryptic to be termed as a First Information Report.

15. In *Ramsinh Bavaji Jadeja Vs. State of Gujarat*, , the Supreme Court, while dealing with the issue as to when investigation commences, observed with regard to the cryptic nature of a message as follows in para 7 of that judgment:

7. If the telephonic message is cryptic in nature and the officer-in-charge, proceeds to the place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be first information report. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer-in-charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer-in-charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said offence including about the participants, shall be deemed to be a statement made by a person to the police officer "in the course of investigation", covered by Section 162 of the Code. That statement cannot be treated as first information report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report.

However, the question is that even by treating the complaint lodged by the accused himself, being Exh. 58, as the F.I.R., whether the prosecution could have succeeded in proving the guilt of the accused. In our view, even if the complaint, Exh. 58, lodged first by the accused himself, is to be treated as a First Information Report, it would not help the prosecution in any manner. It is a settled principle of law that a First Information Report is not a substantive piece of evidence and can only be used to corroborate the state-ment of the maker u/s 157 of the Evidence Act, or to contradict it u/s 145 of that Act. It cannot be used as evidence against the maker at the trial, if he himself becomes an accused, nor

to corroborate or contradict other witnesses. In this case, therefore, it would not constitute as the evidence. The FIR in this case, as stated above, was made by the appellant himself. It was therefore, in the nature of a confession made before a Police Officer. A confession made before a Police Officer is not admissible in law. The confession includes not only the admission of the offence but all other admission of incriminating facts relating to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence, except to the extent it is permissible by Section 27 of the Indian Evidence Act. That being so, that part of the FIR, which deals with the motive for the commission of the crime, cannot be legally looked into. Such being the position of law, even if Exh. 58 is treated to be the First Information Report, as suggested by Mr. Raval, it will not help the prosecution in any manner in proving the guilt of the accused.

16. In the decision reported as Nisar Ali Vs. The State of Uttar Pradesh, the question which arose before the Supreme Court was that whether a statement contained in an FIR lodged by an accused can be used against the co-accused. Supreme Court answered the aforesaid question in negative in following terms:-

...An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s 157 of the Evidence Act or to contradict it u/s 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence.

(Emphasis supplied)

17. In the decision reported as Faddi Vs. The State of Madhya Pradesh, the accused who was charged with the offence of murdering his step son lodged an FIR stating therein that he had seen the dead body of the deceased floating in a well, which statement was found to be incorrect. Relying upon aforementioned observations made by Supreme Court in Nisar Ali Vs. The State of Uttar Pradesh, it was contended that the first information report lodged by the accused is an inadmissible piece of evidence. Repelling the said contention, Supreme Court observed as under:--

The report is not a confession of the appellant. It is not a statement made to a police officer during the course of investigation. Section 25 of the Evidence Act and Section 162 of the Code of Criminal Procedure do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court viz. how and by whom the murder of Gulab was committed, or whether the appellants statement in Court denying the correctness of certain statements of the prosecution witnesses is correct or not. Admissions are admissible in evidence u/s 21 of the Act. Section 17 defines an admission to be a statement, oral or documentary, which suggests any

inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, thereafter mentioned, in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (c), (d) and (e) to Section 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in Section 21 to the provision that admissions could not be proved by the person who makes them. It is therefore clear that admissions of an accused can be proved against him.

It is on these observations that it has been contended for the appellant that his report was inadmissible in evidence. Ostensibly, the expression "it cannot be used as evidence against the maker at the trial if he himself becomes an accused", supports the appellants contention. But it appears to us that in the context in which the observation is made and in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted to be inadmissible against Nisar Ali, and that the High Court did not refer to it at all in its judgment, this observation really refers to a first information report which is in the nature of a confession by the maker thereof. Of course a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused. Further, the last sentence of the above quoted observation is significant and indicates what the Court meant was that the first information report lodged by Qudratullah, the co-accused, was not evidence against Nisar Ali. This Court did not mean -- as it had not to determine in that case -- that a first information report which is not a confession cannot be used as an admission u/s 21 of the Evidence Act or as a relevant statement under any other provisions of that Act. We find also that this observation has been understood in this way by the Rajasthan High Court in *The State Vs. Balchand*, and in *State of Rajasthan Vs. Shiv Singh*, and by the Allahabad High Court in *Allahdia v. State*, (1959 All LJ 340) (sic)

18. It may also be noted here that in *Faddi Vs. The State of Madhya Pradesh*, Supreme Court held that the fact that the accused tried to mislead the police by giving false information is an incriminating circumstance against him.

19. The legal principle which emerges from *Faddi Vs. The State of Madhya Pradesh*, is that where the accused himself lodges the first information report, the fact of his giving information of crime to the police is admissible against him as evidence of his conduct u/s 8 of Evidence Act and that if the first information report is a non-confessional statement the same can be used against him as an admission u/s 21 of Evidence Act.

What is meant by the word "confession"?

The word "confession" has not been defined in Evidence Act. For a long time, Indian Courts have adopted the definition of "confession" given in Article 22 of Stephen's Digest of Law of Evidence. According to that definition, a confession is

an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. However, in the decisions reported as *Queen-Empress Vs. Jagrup and Another*, and *R v. Santya Bandhu*, (1902) 4 Bom LR 633 Allahabad High Court and Bombay High Court respectively did not accept such a wider definition and gave a narrower meaning to the word "confession" holding that only a statement which is direct acknowledgment of guilt would amount to confession and that a statement which is merely an inculpatory admission which falls short of being admission of guilt would not amount to confession. The issue as to meaning of word "confession" was ultimately settled by Privy Council in the decision reported as *Pakala Narayana Swami v. Emperor*, 66 IA 66 where Lord Atkin observed as under:--

Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession e.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's Digest of the Law of Evidence, which defines a confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles: confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime.

20. The aforesaid observations of Lord Atkin in *Pakala's* case (*supra*) received the approval of a 3-Judge Bench of Supreme Court in the decision reported as *Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator)*, .

21. In this regard, it is most apposite to refer to the decision of the Supreme Court reported as *Aghnoo Nagesia Vs. State of Bihar*, . In the said case, the accused who was charged with the offence (s) of having murdered four persons lodged an FIR with the police. Supreme Court divided the said FIR into 18 parts for the purposes of determining its admissibility. Parts 1, 15 and 18 contained recordings pertaining to the fact that the accused went to the police station to lodge the FIR; parts 2 and 16 contained recordings pertaining to the motive of the accused for committing the murders; parts 3, 5, 8 and 10 contained recordings pertaining to the movements of the accused before and after the commission of murders; part 8 also contained recordings pertaining to intention of the accused; parts 4, 6, 9, 11 and 12 contained recordings pertaining to

admission of guilt by the accused as also his motive for committing the murders and parts 7, 13 and 17 contained recordings pertaining to concealment of dead bodies and weapon of offence by the accused and his ability to get recover the same. Supreme Court reiterated the law laid down in Faddi Vs. The State of Madhya Pradesh, with respect to admissibility of an FIR lodged by the accused. Thereafter it proceeded to determine that whether the aforementioned 18 parts of the FIR in question amount to a confession or not. It was held by Supreme Court that save and except parts 1, 15 and 18 which contained recordings pertaining to the fact that the accused was the maker of the FIR and the parts which come within the purview of Section 27 of Evidence Act, the entire FIR amounts to confession and should be excluded from evidence. The relevant discussion contained in the said decision is being noted hereunder:-

Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact i.e. some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession. If proof of the confession is excluded by any provision of law such as Section 24, Section 25 and Section 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as Section 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement, No part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27.

(Emphasis supplied)

22. We are also not impressed by the submission of Mr. Raval that conviction of the accused could be based solely on an extrajudicial confession. In the present case, the P.W. 5, Motibhai Narsinbhai Patel, the uncle of the deceased, has deposed that when he reached at the house of the accused along with others, he first inquired with Mavjibhai, the father of the accused, as to what had happened,

and in reply, the father of the accused had informed that his son Mana, the accused had killed Dali, the deceased. The P.W. 5 has also deposed that Mana, the accused, also made a statement at that point of time that he had killed his wife, Dali. Placing reliance on this part of the evidence of P.W. 5. Mr. Raval vehemently submitted that this could be termed as an extra-judicial confession and conviction could be based on such an extrajudicial confession. We are afraid that such submission cannot be accepted for the reasons more than one. In the first place, no reliance could be placed on the evidence of the P.W. 5, Motibhai, as the P.W. 5, Motibhai, in his cross-examination, has denied the suggestion that he had not stated anything about the extra-judicial confession made by the accused before him in his Police statement, but this contradiction in the form of an omission has been proved by the defence through the evidence of the Investigating Officer. The Investigating Officer, in his evidence, has deposed that it was true that the P.W. 5, Motibhai, in his Police statement, had not stated anything about the extra-judicial confession made by the accused before him. In our view this is a very important contradiction in the form of an omission. Secondly, an extra-judicial confession is a piece of evidence. The confession of an accused person is not evidence in the ordinary sense of the term as defined in Sec. 3. It cannot be made the foundation of a conviction and can be used only in support of other evidence. The proper way is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of believe independently of confession, then of course, it is not necessary to call the confession in aid. But cases may arise where the Court is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself to believe in what without the aid of the confession he would not be prepared to accept. We are of the view, and as such it is a settled law, that the Court cannot make extra-judicial confession as the basis and then search for corroboration. The correct approach for the Court would be first to consider and marshal the evidence against the accused excluding the extra-judicial confession altogether from consideration and only if on such consideration of the evidence available, other than the extra-judicial confession, a conviction can safely be based, then only the extra-judicial confession could be used to support their belief or conclusion. The Court, while dealing with a circumstance of extra-judicial confession must keep in mind that it is a very weak type of evidence and requires appreciation with great caution. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly conveyed that the accused is the perpetrator of the crime. Such being the position, we are not impressed by the so-called extra-judicial confession said to have been made by the accused before the P.W. 5, the uncle of the deceased.

23. Thus, from the above, it is clear that but for the fact that a blood-stained axe

had been recovered at the information furnished by the accused, though not established by the evidence of any of the panch witnesses, as they were declared as hostile witnesses, the prosecution cannot base conviction, more particularly when there is no other evidence in this case which goes to show that the appellant had a hand in the commission of this crime.

24. In the decision reported as K.V. Chacko @ Kunju Vs. State of Kerala, , an axe which was found to be stained with human blood was recovered at the instance of the appellant. It was held by the Supreme Court that in the absence of any evidence to establish that the death of the deceased was caused by an axe, the said recovery does not connect the accused with the murder of the deceased.

25. In the decision reported as Narsinhbhai Haribhai Prajapati etc. Vs. Chhatrasinh and Others, , the Supreme Court had held that in the absence of any other evidence the circumstances of seizure of blood-stained shirt and dhoti from the person of an accused and dharias from the houses of the accused are wholly insufficient to sustain the charge of murder against the accused.

From the aforementioned judicial decisions, the legal principle which emerges is that mere recovery of an object at the instance of the accused is a relevant fact only when it is established by other evidence that the object recovered is connected with the accused and the offence with which he is charged. To put it pithily, the connection between the object recovered, the accused and the offence with which the accused is charged must always be established by "evidence aliunde". The decision further bring out that mere recovery of blood-stained articles at the instance of an accused is not sufficient to convict him for the offence of murder.

At best, all that can one say is that the conduct of the appellant had been very suspicious, but suspicion, howsoever strong, cannot take place of legal proof. In our opinion, it was therefore, not a case where the appellant should have been convicted.

In the result, therefore, we allow the Appeal and set aside order of conviction and sentence dated 21st September, 2004, passed by the learned Additional Sessions Judge, 4th Fast Track Court, Banaskantha at Deesa, in Sessions Case No. 51/2003. The accused-appellant be set at liberty forthwith, if not required in any other case. Fine, if paid be refunded.