

(1997) 03 MAD CK 0057

In the Madras High Court

Case No : Criminal A. No's. 657 of 1987 and 129 of 1990

Rajendran and etc.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 03-03-1997

Acts Referred:

Evidence Act, 1872 — Section 25

Penal Code, 1860 (IPC) — Section 201, 300, 302, 304, 323

Citation : (1997) 2 LW(Cri) 520

Hon'ble Judges : S.M. Sidickk, J; M. Karpagavinayagam, J

Bench : Division Bench

Advocate : Saravana Vel, for the Appellant; S. Anbalagan, Assistant Public Prosecutor, for the Respondent

Judgement

M. Karpagavinayagam, J.—The appellant Gopal alias Muniyandi in CrI. A. No. 129 of 1990 and the appellant Rajendran in CrI. A. No.

657 of 1987 are the first and second accused in Sessions Case No. 159 of 1986 on the file of the Sessions Judge, South Arcot at Cuddalors.

2. The first accused was convicted for the offence under Sections 302 and 201 of the Indian Penal Code and sentenced to undergo for life

imprisonment and 2 years respectively. The second accused was convicted for the offence u/s 302 read with 34 and 201 of the Indian Penal Code

and sentenced to undergo life imprisonment and rigorous imprisonment for two years respectively.

3. The appellants were tried with an allegation that on 25-7-1986 at about 11.00 p.m., both the appellants beat the deceased Kaliaperumal with

hands and while the deceased was running away, the appellants chased and caught him and the second accused Rajendran caught hold of the head

of the deceased and dashed it against the mango tree and in the meantime, the first accused ran into his house and came with an iron rod and beat

the deceased on his legs and chest as a result of which the deceased died instantaneously on the spot.

4. The facts of the case are as follows :-

(a) The scene village is Sanarapalayam situate within the jurisdiction of Neyveli police station. In Anna Nagar at Sanarapalayam village, the first

accused, the father and the second accused, the son were living together under one roof. On the western side of the house of the first accused,

P.W. 1 Chinnaponnu is residing. On the southern side, P.W. 2 Kanakayal is residing. One Kaliammal is the wife of the first accused, Muniyandi.

The deceased in this case, Kaliaperumal hailed from the neighbouring village.

The first accused was running a "salkhna" stall opposite to the arrack shop situate in the adjacent land belonging to the deceased Kaliaperumal.

Most of the time, the wife of the first accused used to attend the said "salkhna" stall. In the course of time, Kaliaperumal who used to often come

to look after his hand, developed illicit intimacy with the said Kaliammal.

(b) On several occasions prior to the occurrence, the deceased Kaliaperumal took away the said Kaliammal from the custody of the first accused

to his village and there they lived as husband and wife. On each and every occasion, the first accused complained the same to the local

panchayatdars. PW. 5 Annadurai is one of the panchayatdars.

(c) Whenever the first accused comes with such complaint, P.W. 5 and other panchayadars used to call the deceased and warn him about his

illegal affairs with Kaliammal and arrange Kaliammal to go and live with the first accused in the village. Even four months prior to the occurrence,

Kaliaperumal, the deceased went along with the wife of the first accused and lived in a separate hut specially put up for her, situate near the arrack

shop. This was reported to PW 5, who in turn, again convened a panchayat, in which the deceased was severely warned and the wife of the first

accused, Kaliammal was directed to go and live in the house of the first accused. Even on that occasion, both the first and second accused warned

the deceased stating that in future, if he come near the house of the accused, he would have to face serious consequences. Thereafter, for four

months, there was no attempt by the deceased to take her again to lead an illicit

affair with her.

(d) The ill-fated occurrence had taken place on 25-7-1986. At about 11.00 p.m. on that day, the first and the second accused, after furnishing

their supper, took bed outside their house. At that point of time, the deceased Kaliaperumal stealthily came and sat near the house of PW 1.

Thereafter, he slowly moved towards the fence near the house of the accused and sat just opposite to the house of the accused. By that time, the

first accused was sleeping, but, the second accused, the son of the first accused, on seeing the shady movements of the deceased near his house,

began to shout at the deceased by saying.

Vernacular matter is omitted.

He also woke up his father, the first accused and informed the arrival of the deceased. Thereafter, both the accused caught hold of the deceased

and beat him repeatedly with hands. Unable to bear the beating, the deceased escaped from their grip and began to run away from that place

through southern side towards mango grove. Both the accused chased him and caught the deceased again at a distance of about 100 feet. The

second accused caught hold of his head and dashed his face against the trunk of the mango tree. The deceased fell down on the ground. In the

meantime, the first accused ran to his house and took out an iron rod and came to the scene again. This occurrence was witnessed by P.W. 1

Chinnaponnu and PW. 2 Kanakayal the neighbours. P.W 1 requested the first accused not to beat the deceased anymore as he was sufficiently

beaten. However, the first accused, with the iron rod, began to beat the legs of the deceased and then, using the blunt portion of the bottom of iron

rod, hit four times on the chest of the deceased. Thereafter, both the accused ran to their house.

(e) P.Ws. 1 and 2 went near the deceased and found the deceased making some sound and within a few minutes, he died. Thereafter, both the

accused, after keeping the iron rod inside the house, came out and on seeing the deceased lying dead, both of them removed the dead body of the

deceased and dragged to the southern side and abandoned the dead near the grave yard at the village, Cheplanatham.

(f) On 26-7-1986, the next day, at 5.30 a.m., PW 1 along with her husband came to PW 3, Thandapani who is the Village Administrative Officer

of Cheplanatham village and gave a statement to him. He reduced the same into writing and obtained the thumb impression from PW 1. Ex. P-1 is

the statement given by her. Thereafter, PW 3 along with his Thalayari came to Cheplanatham village and found the dead lying near the grave yard.

He prepared a separate report Ex. P-2 and thereafter, he sent the documents to the Court as well as to the police officers through thalayari PW 4.

(g) PW. 11, the Inspector of Police attached to Neyveli police station received the report sent by PW. 3 through PW 4 thalayari at about 8.15

a.m. and registered the case in Crime No. 317 of 1986 for the offence u/s 302 of the Indian Penal Code and sent it along with the printed first

information report, Ex. P 22 to the Court. At 9.15 a.m. he left the police station and reached the scene at 9.30 a.m. He prepared observation

mahazar Ex. P 6 at the place where the dead body was lying down. At 10.30 a.m., he went to Anna Nagar, Sanarapalayam village, inspected the

scene place and prepared Ex. P 7, another observation mahazar. He also drew rough sketch Ex. P-23. He made arrangements for taking

photographs through PW 9, the photographer. M.O. 13 series are the photographs and M.O. 14 series are negatives. The photographs of the

scene of occurrence are M.O. 15 series and the negatives are M.O. 16 series.

(h) Between 11.30 a.m. and 2.30 p.m. PW 11 conducted inquest over the dead body of the deceased and examined the witnesses. PW 1, PW 2

and others. Ex P 24 is the inquest report. After these formalities were over, he entrusted the dead body to PW 8 police constable for taking the

same to the doctor for conducting autopsy.

(i) At 2.45 p.m. PW 11 recovered M.O. 2 blood stained earth, M.O. sample earth from the place where the dead body was lying down under the

mahazar Ex. P 8. At about 3.45 p.m. he recovered blood stained earth M.O. 4, sample earth M.O. 5 and blood stained bark of the mango tree

M.O. 6 under the mahazar Ex. P 9, attested by PW 5.

(j) In the mean time, PW 6 doctor attached to the Government Hospital, Vridhachalam received the requisition along with the dead body from PW

8, the police constable and commenced the post mortem examination at 3.40 p.m. on 26-7-1996. He found the following injuries :-

External injuries :-

1. An ante-mortem bone deep lacerated injury 4"" x 3"" on the front of the left

leg. Fracture of the left tibia. Fractured ends are projecting through the injury. Muscles, vessels and nerves are lacerated. Blood clots present.

2. An ante-mortem bone deep lacerated injury 4" x 2" on the front of the right leg; fracture of the right tibia. Fractured ends are projecting through the injury. Muscles, nerves, vessel are lacerated. Blood clots present.

3. An ante-mortem diffused abraded contusion 4" x 3" on the middle of the front of the left side of the chest. Red in colour.

4. Ante-mortem diffused abraded contusion 4" x 2" on the middle of the front of right side of the chest. Red in colour.

5. Ante-mortem abraded contusion 3" x 2" on the left side of the chest, 1" below the injury No. 3.

6. An ante-mortem abrasion 2" x 1" over the left shoulder region. Red in colour.

7. An ante-mortem diffused contusion 2" x 1" over the left scapular region. Red in colour.

8. Ante-mortem contusion 2" x 1" over the left side of the face. Red in colour.

Internal examination :- Opening of thorax : Fracture of the left 4th, 5th ribs and fracture of right 3rd, 4th, 5th ribs. Heart :- Weight 150 grams, pale.

Lungs : Right - 450 grams; left 400 grams, pale. Middle of the left and right Lungs are congested. Hyoid bone-normal. Stomach - empty. Liver-

weight 1200 grams, pale Spleen cut 150 grams, pale. Kidneys : Each 150 grams, pale. Intestine : Normal. Large intestine contain gas and faecal

matter. Bladder empty. Head-Bones intact. Brain : weight 1100 grams, pale.

Ex. P-10 is the post mortem examination certificate issued by him. He was of the opinion that the deceased would appear to have died of shock

and haemorrhage as a result of injuries of fracture sustained on the ribs, about 12 to 18 hours prior to autopsy.

(k) After the post-mortem examination was over, PW 8, police constable seized M.O. 12 under-wear from the body of the deceased and produced the same in the police station.

(l) On 27-7-1986, PW 11 Inspector of Police at about 3.30 p.m. arrested the first accused Muniyandi and obtained his confession, the admissible

portion of which is Ex. P-11. Thereafter, PW 11 on being taken by the first accused, went to the house of the accused and recovered the iron rod,

M.O. 1 under Ex. P-14. He as well recovered M.O. 9 series chappals, M.O. 10

dhobi and M.O. 11 towel belonging to the deceased, on being pointed out by the first accused under Ex. P-13. The clothes of the accused M.Os. 7 and 8 were also recovered by PW 11 under the mahazar Ex.

P-12.

(m) At about 9.15 p.m. on the same date, on the information given by the first accused, PW 11 arrested the second accused and at about 10.30

p.m. he took the second accused to the police station and interrogated him. Next day, that is on 28-7-1986, PW 11 sent both the accused to the

Court for remanding them to the judicial custody.

(n) On 29-7-1986, on the material objects recovered in this case being sent by PW 11, PW 10, the Court Clerk received the same along with Ex.

P 16 requisition. For chemical analysis, PW 10 sent the same with the covering letter of the Magistrate Ex. P17. Ex. P18 is the chemical analyst's

report and Ex. P19 is the Serologist's report Ex. P20 is the requisition sent by the police Officer, PW 11 for getting the sample blood of the

deceased from Vridhachalam hospital. In pursuance of the same, the Magistrate sent a letter Ex. P21 to Vridhachalam Hospital. After finishing the

investigation, PW 11 Inspector of Police filed the charge sheet against the appellants/accused for the offence u/s 302 of the Indian Penal Code on

5-9-1986 before the committal Magistrate.

5. On the case being committed, the trial Court framed charges against the appellants for the offences under Sections 302, 302 read with 34 and

201 of the Indian Penal Code. The appellants pleaded no guilty and claimed to be tried.

6. To substantiate the charges framed against the appellants, the prosecution examined PWs 1 to 11, filed Exs. P1 to P24 and marked M.Os. 1 to

16. On the side of the accused. Ex. D-1, the proceeding u/s 164 of the Code of Criminal Procedure, relating to the second accused was marked.

7. After the evidence was over, the appellants/accused were questioned u/s 313 of the Code of Criminal Procedure, with reference to the

incriminating materials found against them and the appellants chose to deny their complicity in the commission of the offence and further stated that

a false case was filed against them. The second accused would also contend in his statement that he was not available in the house on the date of

occurrence, because he had been to his mother-in-law's house to see his ailing

father-in-law and that on the next day, i.e. on 25-7-1986 police came and took him to the police station on the pretext of conducting enquiry with reference to his complaint earlier given against his father, but, subsequently, he was remanded by foisting a false case against him. He would also refer in his statement that he was compelled to give confession statement before the Magistrate u/s 164 of the Code of Criminal Procedure, but however, he gave a statement to the Magistrate that he was innocent. Ex. D-1, as referred to above, is the Magistrate's proceeding recorded u/s 164 of the Code of the Criminal Procedure.

8. On perusal of the entire materials placed before the Court, the trial Court found the appellants/accused guilty for the offences referred to above and dealt with them as pointed out earlier. Aggrieved over this judgment, present appeals have been filed by the appellants separately.

9. Mr. Saravana Vel, representing Mr. P. V. Bakthavatchalam, learned counsel appearing for the accused took us through entire evidence and

strenuously contended that the prosecution has not established the guilt of the 1st accused for the offence u/s 302 of the Indian Penal Code. He

would further submit that there is no material whatsoever, against the second accused in the alleged act of the first accused causing the death of the

deceased to show that common intention to cause the death of the deceased was shared by the second accused also. In short, the submission

made by the counsel for the appellants is that the second accused is entitled to acquittal since the evidence projected by the prosecution through

the witnesses would not establish in any way the participation of the second accused in the act of causing death of the deceased. He would further

submit that even if the evidence of PWs 1 and 2, the ocular witnesses, is accepted, the first accused could be liable to be convicted only for the

offence u/s 304 (Part I) or (Part II) and definitely not u/s 302 of the Indian Penal Code, since the materials adduced by the prosecution would

make it clear that the act of causing death attributed to the first accused was only under sustained, sudden and grave provocation.

10. Mr. Anbazhagan, learned Additional Public Prosecutor would, however, repel the above submissions.

11. At the outset, we may mention that the charge for the offence u/s 302 read with 34 of the Indian Penal Code as against the second accused

could not be sustained in view of the fact that the materials available in this case would not reveal that the second accused had shared the common intention with the first accused while causing injuries to the deceased which resulted in his death.

12. According to the ocular witnesses PWs 1 and 2, as soon as the second accused saw the stealthily movement of the deceased, he exclaimed by shouting as to why he had come to the house of the accused in spite of his repeated warnings and thereafter, his father, the first accused was woken up and the information was conveyed to him. Only then, both of them caught hold of the deceased and beat with hands. While the deceased was running away from the scene, both the accused chased him to a short distance and caught him near the mango tree on which the second accused dashed him with the result the deceased sustained injury on his face.

13. PW 6 doctor would say that the injury No. 8, viz. a contusion 2" x 1" over the left side of the face, could have been caused when the injured was pressed to the tree when his face was facing to the standing tree. Except this part, no other overt act is attributed against the second accused.

14. According to the prosecution, the first accused ran towards his house and brought the iron rod, M.O. 1 and repeatedly beat on the legs and chest of the deceased. At that point of time, the second accused did not play any part. Admittedly, he was not armed with any weapon. It is not the case of the prosecution that he assisted the other accused to beat the deceased by catching hold of the deceased at that point of time.

Moreover, there is no evidence to show that the second accused knew that the first accused went to his house for the purpose of bringing the iron rod and beating the deceased.

15. The Additional Public Prosecutor cited a decision in Rishideo Pande Vs. State of Uttar Pradesh, to show that the common intention which presupposes a prior concept, does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. There is no dispute in the said preposition.

16. The question that arises for consideration in this case with reference to the second accused is whether the any common intention was formed in the mind of the second accused and the same was shared with the first accused

at the time of causing the injury on the deceased. It is patent, as indicated earlier, that the second accused did not do anything by way of helping the first accused while he was attacking with iron rod. Moreover, from the evidence of both PWs 1 and 2, it is clear that as far as the second accused is concerned, he beat the deceased in both the places i.e. near the fence situate near the house of the accused and the mango tree. By the said act, only a contusion 2" x 1" over the left side of the face, a simple injury was caused. Though the Doctor did not mention it as simple injury, there is no evidence to show that there was any fracture, nor the Doctor would say that it was a grievous injury. Under these circumstances, the conviction and sentence for the offence u/s 302 read with Section 34 of the Indian Penal Code imposed upon the second accused is not sustainable and the same is liable to be set aside.

17. Therefore, the second accused is acquitted of the above charge. However, as indicated earlier, since he has caused simple injury on the deceased, as evident from the evidence of PWs. 1 and 2, he is liable to be convicted only u/s 323 of the Indian Penal Code. Therefore, he is convicted for the above offence u/s 323 of the Indian Penal Code. It is brought to our notice that he was in jail during the course of investigation and after conviction before bail was granted by the Appellate Court, viz. this court. Therefore, interest of justice would be met, if we hold that the sentence already undergone by the second accused is sufficient for the above offence u/s 323 of the Indian Penal Code.

18. Regarding the charge against both the accused u/s 201 of the Indian Penal Code, the counsel for the appellants would submit that according to the prosecution, both the accused committed the offence u/s 201 of the Indian Penal Code by dragging the dead body from Sanarpalayam village to cheplanatham village, near graveyard, but the act of dragging the body for some distance and leaving the same in open field cannot be termed to be causing disappearance of the evidence. We find some force in this contention.

19. According to PW 1, she along with her husband went to PW 3, the Village Administrative Officer, attached to Cheplanatham village and gave a complaint. PW 3, on receipt of the complaint straight away went to cheplanatham grave yard and found the dead body lying on the ground. On the information given by PW 3, PW 11 Inspector of Police immediately rushed to

the scene and conducted inquest over the dead body in the presence of panchayatdars. Therefore, it cannot be contended that the accused have caused any disappearance of evidence which would attract

Section 201 of the Indian Penal Code.

20. As rightly stated by the counsel, dragging the dead body from one place to another and putting the same in visible open ground would not in

any way attract any ingredient incorporated in Section 201 of the Indian Penal Code. Therefore, we have no hesitation to hold that the prosecution

has failed to prove the offence u/s 201 of the Indian Penal Code as against both the accused. In the result, both the appellants/accused are

acquitted in respect of the charge u/s 201 of the Indian Penal Code.

21. Coming to the nature of the offence committed by the first accused, learned counsel for the appellants raised an interesting question of law.

22. His contention is that the first accused is not liable to be convicted u/s 302 of the Indian Penal Code and if at all, he could at the most be

convicted for the offence u/s 304 (Part II) of the Code in view of the fact that the occurrence had taken place out of sudden and grave

provocation. He would also contend that the wife of the first accused, Kaliammal was having illicit affairs with the deceased and that on several

occasions, the deceased Kaliaperumal had taken away the said Kaliammal from the custody of the first accused and lived with her as husband and

wife in his village.

23. In these circumstances, it is the case of the prosecution that on several occasions panchayats were held at the instance of the first accused in

which PW 5 was one of the panchayatdars and in the panchayat, the deceased was severely warned on each and every occasion and

arrangements were made for the Kaliammal, the wife of the first accused to join back with the first accused.

24. According to the counsel for the appellants, on the date of occurrence since again the deceased clandestinely came to the house of accused the

first accused got provoked thinking that he had come only to abduct his wife again. So, this was being a last straw on the camel's back the

accused resorted to beating the deceased with his hands and iron rod. Therefore, according to the counsel for the appellants, this occurrence had

taken place out of sustained, sudden and grave provocation as contemplated

under Exception I of Section 300 of the Indian Penal Code which would attract the penal Section 304 (Part II) of the Code, especially when the first accused beat the deceased first on legs, and then on chest, that too, by using the blunt portion of the iron rod.

25. He cited some authorities in order to substantiate his contention. In *Suyambukkani v. State of Tamil Nadu* 1989 MLW (Crl) 86 it is held as under :-

Though there has been here and there attempts in those decisions to bring the sustained provocation under Exception 1 to Section 300, I.P.C.,

there is a cardinal difference between provocation as defined under Exception I and sustained provocation. The only word which is common is

"provocation." What Exception I contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of

acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel's back may even be a

very trifling one. We are, therefore, far from grave and sudden provocation contemplated under Exception 1 to Section 300, I.P.C. Sustained

provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code.

26. In *Sankaral Alias Sankarayee v. State* 1989 MLW (Crl) 468, a Division Bench of this Court has held as under on similar facts of the case :-

When there is positive evidence to show that there was grave and sudden provocation at or about the time of occurrence, there would be no

difficulty in applying the said principles. There are other type of cases, where there has been sustained provocation for a considerable length of time

and there would not have been a real sudden provocation immediately preceding the murder. In such cases, the Courts have given the benefit of

Exception 1 to Section 300, I.P.C. on the ground that the provocation which is the route cause for the commission of the offence need not arise at

the spur of the moment.

27. In *Chandran, In re* 1988 M LW (Crl) 113 another Division Bench of this Court, while considering the sustained, sudden and grave

provocation, would hold as follows :-

As the prosecution itself is relying on the confessional statement of the accused u/s Ex. P-13, we have no reservation in accepting the case of the

accused that he cut the deceased on account of the sudden and grave provocation caused by the deceased and also on account of the sustained

provocation the accused has been nurturing for a long period because of the conduct of the deceased in having illicit intimacy with his wife. Hence,

we hold that the accused is entitled to Exception 1 to Section 300, I.P.C.

28. In *Guruswami Pillai v. State* (1991) 1 M WN (Cri) 153 another Division Bench of this Court has held as follows :-

Therefore, though technically the exceptions to Section 300, I.P.C. appear to be limitative they can no longer be considered so, after efflux of

time. In fact, Courts have added one more exception known as "'sustained provocation" Now that it is clear that the exceptions u/s 300,

I.P.C. are not limitative, we have to examine whether Nallathangal's syndrome can be considered as one of the exceptions. Since the Code in the

structure makes the exceptions limitative. Courts have to show restraint on circumspection in adding exceptions and such additions should be

ejusdem generis.

29. In *Chinnan alias Chinnaswami v. State* (1995) 2 M WN (Cri) 178, another Division Bench of this Court, after referring to the decisions

mentioned above, has held as under :-

While we accept the suggestion that the last straw could be considered as grave and sudden in a series of provocations, we are of the opinion that

the last straw should at least be in the nature of provocation referred to in the earlier case reported in 1988 MLW (Cri) 113.

A reading of these decisions would show that the Court could add the "sustained provocation" as one of the Exceptions to Section 300 of the

Indian Penal Code.

30. In this connection, it is necessary to examine what is the true nature of exception. Exceptions are in the nature of important excusing

circumstances and they have the following characteristics :- (i) Exception I relates to grave and sudden provocation; (ii) Exception II would come

into play in the case of private defence; (iii) Exception III would deal with the discharge of public duty; (iv) Exception IV would be attracted in a

case of sudden fight; and (v) Exception V relates to consent of the victim.

30-A. Therefore, in the absence of Exception with reference to "sustained provocation", whether the Court would add one more Exception which

deals with ""sustained provocation"" ?

31. However, this Court has categorically observed in 1989 MLW (CrI) 86 (cited supra) and 1991 (1) MWN (CrI) 153 (cited supra) that

Exceptions are not limitative and one more Exception could be added by the Courts themselves as regards sustained provocation in the facts and circumstances of the case.

32. But, in our view, we doubt very much whether Courts have got powers to add one more Exception along with other five exceptions in the

absence of provision by making a new legislation. But in this case, on consideration of the peculiar facts and circumstances of the case, we could

hold that the incident which took place on the fateful day was as a result of sudden and grave provocation.

32-A. Ofcourse, Ex. P1 coupled with the testimony of P.Ws. 1 and 2 would make it clear that the first accused beat the deceased on his mere

sight and the deceased was just escaping by running away from the place of occurrence. Without satisfying with the beating both the accused

chased him and caught him and while the second accused was beating the deceased, the first accused ran into the house which is situate about 100

feet away from the spot and brought an iron rod and beat him as a result of which the deceased died. Therefore, in isolation, the act attributed to

the first accused in causing the death of the deceased would never come in the category of sudden and grave provocation.

33. However, in order to decide whether the act of the first accused could come under Exception 1, in the light of the facts and circumstances of

the case, we have to necessarily consider the past history too. If that is taken into consideration, the incidents relating to the sustained provocation

would render a helping hand to this Court to arrive at a conclusion on the question whether the last straw namely, the presence of the deceased

near the house of the accused would break the back of the camel.

34. Admittedly, the deceased was in the habit of taking away the wife of the first accused from his custody stealthily. Four or five accasions

panchayats were convened and at the intervention of the panchayatdars including P.W. 5, the wife joined back the first accused. On all these

occasions, the first accused had shown patience and he approached for the help of panchayatdars only. He never thought of going to police in

order to punish the deceased. Even on those occasions, either before panchayat or after the panchayat, the first accused never took the law into

his own hands by attacking the deceased. But, in the last panchayat, which held 4 months prior to the occurrence, the deceased was severely

warned both by panchayatdars and the accused that the deceased should not come again near the house of the accused or otherwise he would

face serious consequences.

35. In these circumstances, we have to consider the mental condition of the first accused when he happened to see the deceased near the house of

the accused, especially at about 11.00 p.m. when the 1st and 2nd accused were asleep. Even in Ex. P-1, it is stated that when the second accused

saw the deceased, he shouted at him saying that,

(Vernacular metter is omitted Ed.)

Only thereafter, the second accused woke up his father, the first accused and informed about the arrival of the deceased. Further more, it is seen

from the evidence of P.Ws. 1 and 2 that the deceased came at 11.00 p.m. to the house of P.W. 1 first and from here, he was slowly moving

towards the house of the accused and went near the fence and sat there. This was also noticed by the second accused.

36. In addition to this, we can also consider the statement of the first accused, Ex. P-11 to P.W. 11, the police officer, in pursuance of which

M.O. 1 was recovered. Ofcourse, u/s 25 of the Evidence Act, entire statement of the accused leading to the recovery will not be admissible. But,

there is no bar in using the same in favour of the accused as often held by this Court as well as Apex Court. In that context, if we go through the

statement of the first accused. Ex. P-11, it is clear that the first accused, on seeing the deceased near the house of the accused, got wild and angry

and since he lost his control, he attacked the deceased first by beating with hands and then went to his house and brought an iron rod and beat him

on the legs in order to see that he should not comeback to his house again with the same legs. That apart, even according to P.Ws 1 and 2, the first

accused used only the blunt side of the weapon and caused injury on the legs and chest. So, in these circumstances, we have to consider whether

the provocation which the first accused had at the time of attack would be considered to be a sudden and grave.

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

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

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

40. Therefore, in order to find out whether the last act of provocation upon which the accused caused the death of the deceased was sufficiently grave as to deprive him of the power of self-control. We have to take into consideration the previous acts of provocation caused by the deceased person. In this context, the Apex Court in K.M. Nanavati Vs. State of Maharashtra, has observed as follows (Para 85) :-

The Indian Law, relevant to the present enquiry may be stated thus : (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the

victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

41. In the light of the principles of law given in the above decision, we have to go into the facts and circumstances of the present case as disclosed

by the evidence of P.Ws. 1 and 2 and Ex. P-1, the complaint and Ex. P-11, the confession statement given by the first accused, in order to decide

as to whether the offence committed in this case would come under Exception-I to Section 300 of the Indian Penal Code. The following factors

would be relevant to decide the above referred question :

(i) P.W. 5 would say that the deceased abducted the wife of the first accused on four or five occasions and on all the times, panchayats were held

and the deceased was properly warned and the wife of the first accused was brought back to the house of the accused.

(ii) Ex. P-1 and the evidence of P.Ws. 1 and 2 would reflect the fact situation wherein the deceased, on the fateful night at about 11.00 p.m., after

the accused 1 and 2 took bed at the front-yard of the house, first went to the house of P.W. 1 and from there he stealthily moved to the side of the

house of the accused. When the deceased was caught by the accused and beat with hands, the deceased wriggled out of the grip of the accused

S nad ran away. Therefore, the purpose of arrival of the deceased to the house of the accused was only to abduct the wife of the first accused,

again.

(iii) In Ex. P-11, the confession given by the first accused to the police, it is made clear that the first accused lost his self-control out of provocation

and he took out an iron rod and beat the deceased on his legs only in order to make the deceased cripple so that he would not come back again to

the house of the accused.

42. It is also seen from the evidence adduced by the prosecution as well as from the statement of the accused that the first accused only beat the

deceased by using the blunt side of the weapon. So, from these factors, the following two aspects are emerged. (1) Having patiently bore the

activities of the deceased who went on taking away the wife of the first accused from his custody, in spite of the fact that on the last occasion, the

deceased was severely warned by both the panchayatdars and the accused that

he should not come again near the house of the accused, on seeing the deceased he got provoked and the presence of the deceased at the night hours give rise to sudden and grave provocation to the accused, (2)

While beating the deceased, the accused first used hands and then, he took iron rod and chose the non-vital part, the legs for beating with iron rod

in order to make him limp so that he would not come back again. When he beat the deceased on the chest, he used only the bottom of the blunt

portion of the iron rod. So, it is fairly apparent from these things, that the first accused had the intention to cause injuries on the deceased in order

to see that he would not come back to the house of the accused in order to take his wife away to continue the illegal affairs.

43. Yet, another question that we may take into consideration is whether the mere presence of the deceased on the ill-fated night would give rise to

the sudden and grave provocation. Our answer in the peculiar facts and circumstances of the case in "yes". The last straw breaking the camel's

back is the act of the deceased who came in the ill-fated night after the accused 1 and 2 went to sleep at the frontyard of the their house. If we

look into the previous history, we could see that the accused could have sustained provocation on each and every occasion whenever the wife of

the first accused eloped with the deceased.

44. Another circumstance which we shall consider is that the deceased began to live with the wife of the first accused by putting up a separate hut

as husband and wife very near to the village of the accused. So, if all these things are put together, we could see that the first accused had sustained

provocation for a long period and even then, he patiently faced all situations and then, he was satisfied with the decision of the panchayatdars who

simply warned the deceased that he should not do it again. In these circumstances, if we see the mental situation of the accused who had witnessed

and the arrival of the deceased on the fateful night, we could conclude that it would definitely give rise of sudden and grave provocation in the mind

of the first accused.

45. As indicated in the citations referred above, though the last straw may be a weak one which in isolation may not be construed to be a factor to

deprive a person of his self-control, it is to be noted that the provocation which is an external stimulus resulting in the loss of self-control is a

subjective phenomenon which is difficult to divine. The peep into the mind of the accused as it was at the relevant time is seldom possible. The

state of mind can only be inferred possible. The state of mind can only be inferred from the surrounding circumstances from the manner in which he

re-acted to the circumstances and most important of all, from his own description of the state of his mind.

46. As clearly pointed out by the Apex Court, in India, words and gestures may also, under certain circumstances, cause grave and sudden

provocation to an accused so as to bring his act within the first Exception to Section 300 of the Indian Penal Code. It is also observed in the said

decision that the mental background created by the previous act of the victim should also be taken into consideration in ascertaining whether the

subsequent acts caused grave and sudden provocation for committing the offence.

47. In the light of the above dictum, we are of the view that the first accused did the act of causing injuries on the deceased only out of sudden and

grave provocation as contemplated under Exception-I to Section 300 of the Indian Penal Code. As indicated earlier, in isolation, the arrival of the

deceased at the house of the accused on the ill-fated night may not be sufficient to hold that the first accused had the sudden and grave

provocation. But, considering the earlier incidents by which the 1st accused was humiliated by the act of the deceased who abducted the wife of

the first accused repeatedly, definitely the last incident, namely, the arrival of the deceased on the ill-fated day, to the house of accused being the

last straw, which ultimately broke the camel's back would given rise to the sudden and grave provocation attracting Exception I of Section 300,

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48. Therefore, we are of the view that the act attributed to the first accused causing the death of the deceased would definitely fall under Exception

I to Section 300 of the Indian Penal Code, which would attract Section 304 (Part II) of the Indian Penal Code, especially when the first accused

used the blunt portion of the iron rod to cause injuries on the legs and chest of the deceased.

49. Hence it could be concluded from the facts and circumstances of the case that the accused had no intention to commit murder and at the most,

it could be said that the act of the first accused would reflect his knowledge to cause injury as is likely to cause death.

50. In these circumstances, the conviction and sentence imposed on the first accused u/s 302 of the Indian Penal Code, to undergo imprisonment

for life is set aside. Instead, we convict the first accused for the offence u/s 304 (Part-II) of the Indian Penal Code and sentence him to undergo

rigorous imprisonment for five years.

51. In the result C.A. No. 657 of 1987 is allowed and the appellant in C.A. No. 657 of 1987 is directed to be set at liberty forthwith. With the

above modifications in the conviction and sentence, C.A. No. 129 of 1990 is partly allowed.

52. Order accordingly.