

DHANANJAYA REDDY ETC.

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v.

STATE OF KARNATAKA

MARCH 14, 2001

[K.T. THOMAS AND R.P. SETHI, JJ.]

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Criminal Law :

Penal Code, 1860—Sections 34 and 302—Murder of husband—Wife accused along with other co-accused—Life imprisonment awarded by High Court to all the accused—On appeal, wife acquitted giving her the benefit of doubt—Conviction of other accused upheld on basis of Circumstantial evidence.

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Cr. P.C.—Ss. 164, 281, 313 and 463.

Unsigned confessional statement of a co-accused—Admissibility of—Held, unsigned confessional statement inadmissible in evidence.

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According to the Prosecution, deceased's wife A1 was having extra-marital relations with A2. A2 along with co-accused A3 and 4A murdered the deceased and the wife (A1) handed over her gold jewellery to the accused and played the role of a victim of armed robbery-cum-murder. Trial Court convicted A1 and A2 under Section 302 I.P.C. and sentenced them to life imprisonment and acquitted A3 and A4 by giving them the benefit of doubt. High Court dismissed the appeal of A1 and A2 upholding their conviction and sentence and allowed the appeal of the State. It also held A3 and A4 guilty of offence under Section 302/34 I.P.C. and sentenced them to life imprisonment. Hence this appeal.

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The Appellant-accused contended that the conviction and sentence was against law and facts; that the circumstantial evidence were insufficient to connect the accused with the commission of the crime; that important links in the chain of circumstances were missing; and that the confessional statement made by A4 was not signed by him and so it is not legally admissible in evidence.

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Disposing the appeals, the Court

HELD : 1. A1 has been convicted mainly on the ground of her being

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A last seen with the deceased and her involvement in the commission of the crime on the basis of the confessional statement made by A4. The circumstance of, A1 being last seen with the deceased, though proved, cannot lead to the irresistible inference of her being guilty of the crime, because being legally wedded wife of the deceased, she was supposed to be with him in his house where the crime was committed. This circumstance can be used against her only if there is any other circumstantial evidence linking her with the ghastly action committed in murdering the deceased. In the absence of the confessional statement it could be inferred that she was also subjected to the crime of robbery and her husband was murdered. It cannot be totally excluded that A2, after realising that his concubine has started living with her husband, got enraged and resolved to finish her husband to facilitate his enjoying the extra-marital relations with A1. The prosecution itself was not sure about the involvement of A1 in the commission of the crime for which they got herself medically examined to ascertain the possibility of any sexual offence having been committed upon her. It is unfortunate that the investigating agency did not even think it proper to allege the existence of a criminal conspiracy which, if proved against the other accused, would have proved the commission of offence of murder by A1 also. [408-C-G]

E 2.1. The function of the Magistrate in recording confession under Section 164 Cr. P.C. is a very solemn act which he is obliged to perform by taking due care to ensure that all the requirements of the Section are fully satisfied. The Magistrate recording such a statement should not adopt a casual approach as appears to have been shown in this case. Besides ensuring that the confessional statement being made before him is voluntary and without pressure, the Magistrate must record the confession in the manner laid down by the Section. Omission to comply the mandatory provisions is likely to render the confessional statement inadmissible. The words "shall be signed by the person making the confession" are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal. [409-H; 410-A-C]

H 2.2. Compliance of sub-section (4) of Section 165 Cr. P.C. is mandatory and its non-compliance renders the confession not admissible or reli-

able. It is settled position of law that if a part of confession is excluded under any provision of law, the entire confessional statement in all its parts, including the admission of minor incriminating facts must be excluded unless proof of it is permitted by some other section, such as Section 27 of the Evidence Act. Had the Magistrate taken due care and applied his mind by referring to the bare provisions of Section 164 Cr.P.C., such a glaring illegality in recording the confessional statement would have been avoided. In view of this finding, no reliance can be placed upon the judicial confession allegedly made by A4, particularly against A1. [410-E-F; 411-F]

Kehar Singh & Ors. v. State (Delhi Admn.), AIR (1988) SC 1883 and *State of Uttar Pradesh v. Singara Singh*, AIR (1964) SC 358, relied on.

Neharoo Mangtu Satnami v. Emperor, AIR (1937) Nagpur 220; *Abdul Razak Shaikh v. State of Maharashtra*, (1988) CrI. Law Journal 382; *Shamla Hardeo Teli v. Emperor*, AIR (1941) Nagpur 17 and *Nazir Ahmad v. Emperor*, AIR (1936) PC 253, referred to.

Taylor v. Taylor, (1876) 1 Ch.D 426, referred to.

3.1. In the absence of legal proof of the confessional statement of A4, inadmissibility of the statement of A4 before the Magistrate to prove the contents of that document as extra-judicial confession and the circumstance of A1 being last seen with the deceased not being incriminatory, there is no evidence to hold that she has been proved to be guilty beyond any reasonable doubt. Doubt and suspicion of her involvement in the ghastly crime cannot be ruled out but suspicion, however, strong it may be cannot take the place of proof. Lapses in investigation, failure of the Judicial official to record the confessional statement in accordance with law and absence of corroborative evidence leaves this Court with no option but to give A1 the benefit of doubt. Moral conviction regarding the involvement of an accused in the commission of crime cannot be a substitute for a legal verdict based upon facts and law. Though with regret but bound by law, this Court has no option but to set aside the judgments of the Trial Court and the High Court to the extent by which A1 has been convicted and sentenced for the commission of the offence of murder of her husband. [413-A-C]

4.1. In a case based upon circumstantial evidence, the prosecution is under a legal obligation to prove, firstly on facts the existence of such

A circumstances and secondly that the circumstances form a complete chain which lead to the irresistible conclusion that the accused are guilty and such circumstances are inconsistent with their innocence. On proof of the aforesaid conditions, the Court can convict the accused of the charges framed against them. [418-D]

B 4.2. In the instant case, the evidence on record has fully established the circumstances against A2 and A3. It has also further come in evidence that A2, A3 and A4 were on friendly terms. This friendship is shown to have prompted them to commit the crime for which they have been charged, convicted and sentenced. [418-E]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1000 of 1999.

From the Judgment and Order dated 18.12.98 of the Karnataka High Court in CrI. A. No. 159 of 1998.

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WITH

Criminal Appeal No. 1001 of 1999.

WITH

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Criminal Appeal No. 1146 of 1999.

Kushal Pal Singh, (A.C.) and Ramesh Chand Pandey for the Appellant in CrI.A. No. 1000 and 1001/99.

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R. Sundravardan and R.N. Keshwani for the Appellant in CrI. A. No. 1146/99.

Sudhir Walia, Satya Mitra and Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

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SETHI, J. This case speaks of the story of a despicable betrayal of connubial trust by a wife against her husband. Sexual lust and extramarital relations between the unfaithful wife and her paramour, put an end to the blooming life of an unfortunate and innocent young husband, who at the relevant time was serving the nation being in the employment of the Armed Forces. In this process of committing the crime, the wife became a

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marionette of her paramour. She and three killers, in order to liquidate her husband, displayed a drama in her bedroom on the fateful night. After her husband was heinously murdered she played the role of a victim of armed robbery and murder in her house and allowed herself to be gagged and tethered down. What the outsiders saw on the next morning was her being in the above condition and next to her was lying the beheaded body of her husband.

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The prosecution case, as unfolded during the trial, is that the deceased Amar Nath who was in the Army service was married to Ms. Vanaja (hereinafter referred to as "A1") on 11.3.1992 at Naganakotai in Chittoor District of Andhra Pradesh. To the misfortune of the deceased, A1 prior to her marriage with the deceased was having illicit marital relations with Dhanajaya Reddy (hereinafter referred to as "A2"). Both were serving together as teachers at Gnanodaya English School at Madanappalli. Nagaraj (hereinafter referred to as "A3") and Subramani (hereinafter referred to as "A4") were the associates of A2 in the commission of crime of murder of Amar Nath. After her marriage A1 stayed with the deceased for about four days. She declined to go with him to Delhi where the deceased was serving. In the absence of the deceased A1 and A2 not only continued to be serving as teachers in the school but also freely indulged in quenching the sexual lust of each other. A1 had written letters to the deceased on his Delhi address acknowledging therein the factum of her having illicit relations with A2 and abusing the deceased in a filthy language. To resolve the controversy of marital relations between the deceased and A1, a Panchayat was held in the parents house of the wife in which besides others, Rajanna (PW3), the father of the deceased, Krishna Reddy (PW7), another relative of the deceased and Vama Reddy, (PW33), paternal uncle of A1 were present. It was resolved in the Panchayat that A1 should abandon her job and join the deceased. Thereafter, on his transfer, the deceased came down from Delhi to Bangalore in the month of March, 1993 to work as Technician in the Madras Engineering Group Centre, a Military establishment at Marutisevanagar, Bangalore. His place of work was at a distance of about 2 kilometers from the house which he took on rent in Bangalore bearing No.655, at Subbaiahnapalya Extension, Banaswadi. PWs 3 and 7 brought A1 to Bangalore whereafter she started living with the deceased. It is alleged that before coming to Bangalore A1 wrote three incriminating inland letters dated 5.4.1993, 9.4.1993 and 19.4.1993 marked as M.O.s 21, 22 and 23 to her husband. In those letters she not only used filthy language but even went to the extent of disowning

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A the deceased as her husband calling him as impotent. In one of the letters she even threatened the deceased stating that she would be joining his company only to take revenge.

B Though the accused No.1 apparently started living with the deceased at Banswadi at Bangalore, yet she was in constant contact with A2 at Madanapalli. A1 and A2 are stated to have planned together to murder the deceased and for that purpose, as already noticed, A2 procured the assistance and services of A3 and A4. In furtherance of his plan, A2 had sent A3 in advance to Bangalore on 28.8.1993 and thereafter A2 and A4 engaged a car bearing Registration No. AP:03 B/2349, which was driven by Narayan C (PW20) along with his cleaner Shabir Basha (PW38). Both A2 and A4 along with PWs 20 and 38 left Madanapalli at about 5.30 or 6.00 p.m. on 28.8.1993. They reached Mukunda Theatre at Banswadi, Bangalore at about 9.30 or 10.00 p.m. where A3 joined them as per pre-planned. A2 and A4 along with D PW20, driver of the car had their drinks and meals at Sambaram Bar located near Banswadi, the place where the deceased, along with his wife, A1 were living. During that period PW38, Cleaner of the car, stayed back in the car. PW15 Chennappa served food and drinks to A2, A3 and A4. After taking E their drinks and meals, the trio visited the nearby Beetle-leaf shop of Vinayaka, PW45 wherefrom they purchased beetles and cigarettes. Later the aforesaid accused persons joined PW38 in the car. A2 to A4 told the driver of the Car PW20 and Cleaner PW38 that they were going to attend a marriage F function and would be joining the aforesaid witnesses later. From Mukunda Theatre all the three accused persons went towards the house of A1 wherefrom A2 fetched from A1 a key of the newly constructed house of Nagaraja (PW5) where they are alleged to have stayed till the commission of the crime. It may G be noticed that PW5 who had constructed the house opposite the apartment where A1 and the deceased were living had handed-over the key to the A1 on the presentation to her that if any prospective tenant desired to see the house to take on lease in his absence, A1 might show the house to such person. During all this period, the deceased was away on his duty on a night H shift which was to end at 2.00 a.m. After leaving A3 and A4 in the house of PW5, A2 stayed with A1 in her house. He returned to A3 and A4 in the house of PW5 at about 1.30 a.m.

The deceased returned from his duty on a cycle at about 2.30 a.m. After half an hour or so A1 came out of her house and alerted the other accused H persons that her husband, the deceased, had gone into sleep. After her

intimation all the three accused persons entered the house of the deceased and committed his murder in a most heinous and barbarous manner. A1 flashed torch-light on the deceased while he was asleep on the cot, upon which A2 closed his mouth. A3 held the legs of deceased Amar Nath. A2 then stabbed the neck of the deceased. Exhibiting their brutality A3 cut off the penis of the deceased into pieces and threw it away in the room. A3 stabbed the back and all over the body of the deceased. The neck part of the body of the deceased was pierced with a knife. Amamath, the unfortunate husband of A1 immediate died on the spot. After accomplishing the intended crime, the accused persons, with leisure, attempted to create evidence for their safety. A1 handed-over her all gold jewellery including Mangalsutra to A2 and sat on the floor of the kitchen facilitating A3 to tie her hands and legs with a rope. The jewellery was distributed by A2 to A4 and A1 was tied down to show that the occurrence was that of murder and robbery committed by some unknown persons. All the accused persons kept the door of the house ajar and left the place of occurrence.

After washing their hands and destroying other incriminating evidence they came back to the car at about 3.30 a.m., where PWs20 and 38 were asked by them to wait, apparently by assuring them that the accused persons had gone to attend some marriage party. They left Banswadi where the car was parked and reached back Madanapalli at about 6 a.m. or 6.30 a.m. on 29.8.1993. After reaching Madanapalli all the three accused dispersed. A2 and A3 went to their houses and A4 returned to his room in Hotel Picnic at Madanapalli.

On 29.8.1993 at about 8 a.m. PW1 Nanjundappa, ASI received a phone message from the Police Control Room with regard to the incident of murder where he reached along with police constable No.3172 and found a number of people collected in front of the house of the deceased. On entering the house, they found the neck of the deceased cut which was lying with his face downward in the mid of pool of blood. They also found his legs tied with the rope and a towel. A1 was found tied in the kitchen. When her legs and hands were untied and towel removed from the mouth she did not give any of the reply to the queries made by PW1.

On the complaint lodged by PW1 FIR Exhibit P-61 was registered and investigation commenced by PW48, the Investigating Officer. The IO visited the spot together with dog squad and photographer. He conducted the inquest Panchanama Exhibit P2 and recorded the statements of PWs 3, 4, 6, 29, 30

A and other witnesses. On the spot, the IO collected Mos 1 to 20 which were seized vide mahzar Exhibit P-62. On 31.8.1993 the relatives of the deceased including PWs 3 and 7 reached Bangalore after knowing about the death of Amarnath through news item which was published in the local newspaper at Madanapalli. During investigation, the extra-marital relations of A1 and A2 came to light. A2 was apprehended on 5.9.1993. During his interrogation A2 made a voluntary statement Exhibit P-64 in consequence of which the police seized gold Thali and Thali Gundus and his blood stained clothes besides inland letters M.O.s 42 to 48 vide Panchanama Exhibit P-17. A2 led the police party to Picnic Hotel where A4 was arrested. In the course of his interrogation A4 made his voluntary statement Exhibit P- 65 and produced gold ring, M.O.50, his blood stained clothes M.O.s 52 and 53 and Cigarette M.O.51. A pair of shoes M.O.49 belonging to A4 were also seized. Both the accused thereafter led the police to Katirangana Kotai to the house of A3 where he was also arrested. A3 too made a voluntary statement Exhibit P-66 and produced M.O.54, a gold chain. He further led the police party to his brother's house at Madanapalli where he produced his blood stained clothes M.O.s 55 and 56 and a torch M.O.54 which was seized vide Panchanama Exhibit P-20. Immediately thereafter A1 was also taken into custody. She also gave a voluntary statement Exhibit P-67 but no incriminating article connecting the accused with the commission of the crime was recovered in consequence thereof.

E When the investigation was pending, A4 volunteered to make a confessional statement which was recorded by Shambulingappa (PW50), a Judicial Magistrate on 20.9.1993 after ensuring that A4 was free from any influence and that he was produced before him from judicial custody where he was sent by the Magistrate on 16.9.1993.

F On completion of the detailed investigation, the police filed a charge-sheet against all the accused persons for the commission of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. On committal, the Sessions Judge, after examining 50 witnesses, convicted G A1 and A2 under Section 302 IPC and taking their age into consideration, awarded them life imprisonment. A3 and A4 were acquitted by giving them the benefit of doubt.

H Not satisfied with the conviction and sentence awarded to them, A1 and A2 filed Criminal Appeal No.159 of 1998 in the High Court of Karnataka. Being aggrieved by the order of acquittal relating to A3 and A4, the State

of Karnataka filed Criminal Appeal No.430 of 1998. Both the appeals were heard together and disposed of by a common judgment which is impugned in these appeals. The High Court upheld the conviction and sentence awarded to A1 and A2 and dismissed their appeal. However, the appeal filed by the State was allowed and A3 and A4 were held guilty of offence punishable under Section 302 read with Section 34 IPC. As the principal accused being A1 and A2 were awarded imprisonment for life by the trial court, the High Court in its discretion sentenced A3 and A4 also to life imprisonment.

The present appeals have been preferred by A1 to A3 only. A4 Subramani, who was convicted under Section 302 IPC and sentenced to life imprisonment has opted not to file any appeal.

The conviction and sentences awarded to A1 to A3 have been assailed on various grounds canvassed before us by learned counsel who appeared for them. It was contended that the judgment of conviction and sentence was against law and facts. As the case of the prosecution is based upon circumstantial evidence, it was argued that the circumstances were insufficient to connect the accused with the commission of the crime. The circumstances alleged against the appellants are stated to have not been proved on facts and even if proved, did not connect them with the commission of crime as, according to the learned counsel for the accused, important links in the chain of circumstances are missing.

The substance of the circumstances relied upon by the prosecution against all or some of the accused persons can be summarised as under:

(1) Existence of illicit sexual relations between A1 and A2.

(2) After her marriage A1 wanted to get rid of her deceased husband as she did not acknowledge the factum of marriage with him and considered herself to be the wife of A2.

(3) On the date of occurrence A2 and A4 left Madanapalli for Bangalore in a car which was driven by PW20 in the company of PW38, who was the cleaner. A-3 joined them at Bangalore as per their plan.

(4) On the date of occurrence A2, A3 and A4 were seen in Bangalore near the house of the deceased.

(5) The deceased was killed on the intervening night of 28th and 29th August, 1993 between 2 a.m. and 2.30 a.m.

A (6) A2, A3 and A4 altogether reached the car parked at some distance from the house of the deceased, at about 3.30 a.m. on 29.8.1993 and left Bangalore for Madanapalli where they reached at about 5.30 or 6.30 a.m..

(7) Confessional statement Exhibit P-77 made by A4.

B (8) A1 was last seen with the deceased in their house when he was alive.

(9) Voluntary disclosure statements made by A2, A3 and A4 and consequent recoveries of the incriminating articles thereafter.

C A1, the betrayer wife of the deceased has been convicted mainly on the ground of her being last seen with the deceased and her involvement in the commission of the crime on the basis of the confessional statement made by A4. The circumstance of A1 being last seen with the deceased, though proved, yet cannot lead to the irresistible inference of her being guilty of the crime, because being legally wedded wife of the deceased, she was supposed to be with him in his house where the crime was committed. This circumstance can be used against her only if there is any other circumstantial evidence linking her with the ghastly action committed in murdering the deceased.

E In the absence of the confessional statement it could be inferred that she was also subjected to the crime of robbery and her husband was murdered. It cannot be totally excluded that A2, after realising that his concubine has started living with her husband, got enraged and resolved to finish her husband to facilitate his enjoying the extra-marital relations with A1. It appears that the prosecution itself was not sure about the involvement of A1 in the commission of the crime for which they got herself medically examined to ascertain the possibility of any sexual offence having been committed upon her. It is unfortunate that in a case like this, the investigating agency did not even think it proper to allege the existence of a criminal conspiracy which, if proved against the other accused, would have proved the commission of offence of murder by A1 also. In the absence of a charge for criminal conspiracy we are left only with the confessional statement Exhibit P-77 made by A4. If the aforesaid confessional statement is held not made properly or legally admissible in evidence, A1 has to be given the benefit of the legal flaws and investigational lapses.

H Before ascertaining the legality and admissibility of Exhibit P- 77 it has

to be borne in mind that the confessional statement of A4 which was recorded by Shambulingappa (PW50), the then CJM, Bangalore has not been signed by the said accused. The High Court also found that: "we do hold that the same was not recorded by him in strict compliance of Section 164". It has further to be noticed that the confessional statement was made by A4 in Tamil language which was recorded in Kannada script by PW50 with the assistance of his Stenographer who knew both Tamil and Kannada languages. The aforesaid Stenographer, however, has not been examined as a witness. Before recording his statement, the Magistrate appears to have put some questions to him to satisfy as to whether the statement being made was voluntary or not. After being satisfied about the voluntary nature of the confessional statement, PW50 recorded the statement which was admittedly not got signed by A4. Learned counsel, appearing for the accused persons, have admitted the compliance of all the provisions of Section 164 of the Cr.P.C. except the alleged violation of not getting the signature of the accused on his confessional statement. It is worth noticing that in the statement recorded under Section 313 of the Cr.P.C., A4 denied of having made the confessional statement Exhibit P- 77.

Sub-section (4) of Section 164 of the Cr.P.C. mandates:

"Section 164(4): Any such confessional shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

Section 281 of the said Code prescribes the mode of the examination of accused. Sub-section (5) thereof provides "....it shall thereafter be signed by the accused and by the Magistrate or Presiding Judge.....".

The function of the Magistrate in recording confession under Section 164 of the Code is a very solemn act which he is obliged to perform by taking

A due care to ensure that all the requirements of Section 164 are fully satisfied. The Magistrate recording such a statement should not adopt a casual approach as appears to have been shown by Shambulingappa (PW50) in this case. Besides ensuring that the confessional statement being made before him is voluntary and without pressure, the Magistrate must record the confession in the manner laid down by the section. Omission to comply the mandatory provisions, one of such being as incorporated in sub-section (4) of Section 164 is likely to render the confessional statement inadmissible. The words “shall be signed by the person making the confession”, are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal.

D Dealing with a case where the Magistrate was found to have not complied with the mandate of sub-section (2) of Section 164 of the Code, this Court in *Kehar Singh & Ors. v. State (Delhi Admn.)*, AIR (1988) SC 1883, held that the compliance of the sub-section being mandatory and imperative, its non compliance renders the confession inadmissible in evidence. Such a defect cannot be cured under Section 463 of the Cr.P.C. We have no hesitation to hold that compliance of sub-section (4) of Section 164 of the Code is mandatory and its non-compliance renders the confession not admissible or reliable. It is settled position of law that if a part of confession is excluded under any provision of law, the entire confessional statement in all its parts, including the admission of minor incriminating facts must be excluded unless proof of it is permitted by some other section, such as Section 27 of the Evidence Act. After referring to a judgment in *Neharoo Mangtu Satnami v. Emperor*, AIR (1937) Nag. 220, a Division Bench of the Bombay High Court in *Abdul Razak Shaikh v. State of Maharashtra*, (1988) CrL. Law Journal 382 held:

G “It is to be considered whether non-obtaining of signature of the accused on the confessional statement recorded by the Magistrate under S.164, Cr.P.C. is an irregularity which can be cured by invoking the provisions of S.463, Cr.P.C. reproduced above. The language used in sub-clause (4) of S.164 and sub-sec. (5) of S.281, Cr.P.C. reproduced above indicates that it is mandatory on the part of the Magistrate recording confession to obtain signature of the person whose confession he has recorded. The omission in that behalf cannot

be cured by examining the Magistrate under S.463 Cr.P.C. The Magistrate when examined touching the confession he has recorded the confession, but by such examination the omission to obtain his signature cannot be supplied. It appears to us that the provision that the Magistrate after recording confession should obtain the signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory.”

To the same effect is the judgment in *Shamla Hardeo Teli v. Emperor*, AIR (1941) Nagpur 17 with a rider that mere inadvertent omission to obtain signature of the accused to statement under Section 164 would not vitiate confession where the accused himself has admitted that he made that particular statement.

It is settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. This Court in *State of Uttar Pradesh v. Singhara Singh*, AIR (1964) SC 358 held “a Magistrate, therefore, cannot, in the course of investigation, record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down”.

Looking to the facts of the case we are at pains to note that Shambulingappa (PW50) failed in the performance of his statutory obligations which has resulted in excluding the otherwise voluntary confessional statement Exhibit P-77 made by A4. Had the said Magistrate taken due care and applied his mind by referring to the bare provisions of Section 164 of the Code, such a glaring illegality in recording the confessional statement would have been avoided. In view of this finding, no reliance can be placed upon the judicial confession Exhibit P-77, allegedly made by A4, particularly against A1.

We examined the matter with a different angle as well by considering to see the admissibility of said confessional statement not as a judicial confession but as extra judicial confession made to PW50. We found it difficult to treat Exhibit P-77 as extra-judicial confession of A4 made to PW50. Confessions in criminal law have been categorised to be either judicial or extra-judicial. The prosecution is obliged to refer and rely on the alleged confession of the accused in any one of the aforesaid categories. As extra-

A judicial confession cannot be treated as judicial confession, similarly an alleged judicial confession proved to have not been legally recorded cannot be used as extra-judicial confession. Otherwise also such an approach would result in dragging the judicial officers into uncalled for and unnecessary controversies. In *Nazir Ahmad v. Emperor*, AIR (1936) PC 253 it was observed, which we approve, that:

“...it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under S.162 of the Code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under S.164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever.”

Relying upon *Nazir Ahmad's* case and applying the principles laid down in *Taylor v. Taylor* [1876] 1 Ch.D 426, this Court in *Singhara Singh's* case (supra) held:

“The rule adopted in *Taylor v. Taylor*, [1876] 1 Ch.D 426, is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in S.164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of S.164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confession made to him.”

In the absence of the legal proof of Exhibit P-77, inadmissibility of the statement of A4 before Shambulingappa (PW50) to prove the contents of that document as extra-judicial confession and the circumstance of A1 being last seen with the deceased not being incriminatory, there is no evidence to hold that she has been proved to be guilty beyond any reasonable doubt. Doubt and suspicion of her involvement in the ghastly crime cannot be ruled out but suspicion, however, strong it may be, cannot take the place of proof. Lapses in investigation, failure of the judicial officer to record the confessional statement in accordance with law and absence of corroborative evidence leaves us with no option but to give A1 the benefit of doubt. Moral conviction regarding the involvement of an accused in the commission of crime cannot be a substitute for a legal verdict based upon facts and law. Though with regret, but bound by law, we have no option but to set aside the judgments of the trial as well as High Court to the extent by which A1 has been convicted and sentenced for the commission of the offence of murder of Arnarnath, her husband.

Upon critical analysis of the evidence led in the case we find that the prosecution has succeeded in establishing the circumstances Nos.1,2,3,4,5,6 and 9, noted by us in the earlier part of this judgment. Those circumstances form a complete chain to connect the other accused with the commission of the crime and are inconsistent with their innocence.

Learned counsel appearing for Accused Nos.2 and 3 have, however, vehemently submitted that the aforesaid circumstances; firstly are not proved on facts and secondly, even if held proved, are not sufficient to entail conviction and sentence for their clients.

So far as Circumstance No.1 is concerned, it has come in evidence that A1 and A2 were teachers, working as such in Ganaondaya School during the year 1992-93. Subsequently A2 left that school and went to Vidhya Bharti School in Madanapalli. It is in the evidence of PWs 23, 33 and 34 that A1 was working as a teacher at Madanapalli. PW9 Ramakrishna Reddy deposed in the trial court that while A1 and A2 were working as teachers at Madanapalli, he had seen them going together to Cinema Theatre and other places. He informed of their illegal relations to PW3, the father of the deceased. There was a Panchyat between their relatives which was attended by the said witness wherein A1 declined to go to Delhi to live with deceased. PW9 had seen the aforesaid two accused persons together even after the marriage of A1. Evidence of PW9 corroborates the testimony of PWs 3 and

A 7 regarding holding of the Panchayat for settlement of the matrimonial disputes between A1 and Amarnath. Despite her marriage on 11.3.1992, A1 continued to work as Assistant Teacher at Madanapalli from 9.8.1992 till April, 1993 as deposed by PW14. The prosecution has successfully proved the writing of three letters M.O.s 21, 22 and 23 by A1. In those letters A1
B intimated the deceased that she was breaking her relations with him. She also described him as impotent and threatened that if he wrote any letter in future to her, he will have to face its consequences. In those letters A1 has even admitted her extra-marital relationship with A2. The authenticity of the letters having been written by A1 has been established by the prosecution with the report of the hand-writing expert PW54. On the basis of the evidence
C produced before it regarding this circumstance, the trial court held:

“The above contents of the letters goes to show that at no point of time she had loved her husband Amarnath. She wanted divorce from him. She thought that Amarnath is impotent and she felt ashamed to
D address him as her husband and she has challenged saying if time comes she want to see his end in the life. She has stated that name Reddy annexed to her name is of a person whom she loves and given her heart. These words of challenge and hatredness towards her husband Amarnath goes to show her mental attitude towards said Amarnath.”

E The court further observed that “all these circumstances unequivocally go to show that A1 Vanaja had developed hatredness towards her husband Amarnath and was having revengeful attitude towards him. She joined said Amarnath not because of her love towards him”. Circumstance of love and hate relationship of A1 with A2 and the deceased respectively has also not been
F very seriously contested by the learned counsel appearing for the appellants.

So far as Circumstance No.2 is concerned, the same stands proved from M.O.s 22A and 23A. In M.O.22A she wrote to the deceased “.....why are you still destroying my peace of mind?....My parents have written a letter that I
G have changed but it is their madness. For them....Good Bye Good Bye. Do not remember me even in your dreams. Try to give me divorce at the earliest”. In M.O.23A she has proved to have written to the deceased: “....why are you still playing in my life. I know all your drama. If you want, you marry again. If this is also not possible you divorce me and you be there only.I have removed and thrown the thali tied by you 15 days back itself. ...To tell you
H the fact I have a doubt whether you are a human being. I have taken divorce

as I hesitated to accept you as my husband.... Do you know why I was removed from school? Because I was with someone-else.... I will not believe in your female like petence.... If such situation arises I will see your end and I will achieve that.This name Reddy is not yours, it is of that person to whom I have given my heart." It may be remembered that Reddy is none else than A2. There is no doubt in our mind that A1 and A2 had extra-marital relations even after the marriage of A1 and that they wanted to get rid of the deceased in case he did not divorce A1. This circumstance may not be relevant so far as A1 is concerned, particularly when she started living with the deceased in April, 1993 but is an important link in the chain of the circumstances to connect A2 and his associates with the commission of the crime suggesting a cause, occasion and motive.

So far as Circumstance No.3 is concerned, there is preponderance of evidence produced by the prosecution to show that A1 and A4 left Madanapalli for Bangalore on the date of occurrence for which they hired a car which was driven by PW20. PW38 who was the Cleaner of the car accompanied them. Learned counsel for the appellants could not assign any reason to disbelieve the testimony of PWs 20 and 38. PW21 stated that he is a taxi car driver at Madanapalli. On 28.8.1993 at about 5.00 p.m. A2 and A4 came to him, sought for a car on rent to go to Bangalore. As his vehicle was under repairs, he took them to PW20 and settled the car for Rs.400. A2 and A4 were known to him as he has been plying his taxi in Madanapalli for about 10 years. The testimony of PWs 20, 21 and 38 inspires the confidence of the court to hold the Circumstance No.3 to have been proved by the prosecution.

Similarly Circumstance No.4 stands proved by the prosecution, beyond doubt by the evidence of various witnesses including PWs 20 and 38. PW26, who is a hotelier at Chintamani Bus Stand has stated that on the date of occurrence A2 and A4 had come to his hotel at about 6 or 6.30 p.m. and took tiffin. Chennappa (PW15), who is a supplier in Sambrama Bar at Banswadi has stated that all the three accused A2, A3 and A4 had come to his bar along with another person on that day. They had taken meals and drinks and A2 paid the bill. Similarly Vinayaka (PW45) who is a Bidi Shopkeeper stated that A2, A3 and A4 had come to his shop which is located near the house of the deceased and took beetle-leaves and cigarettes for which A2 paid the amount. Krishnappa (PW4) who is the owner of the house in which Amarnath, deceased along with his wife A1 were residing, has stated that on 28.8.1993 at about 11 to 11.30 p.m. he had seen a car from the State

A of Andhra Pradesh in front of Kodaramma Temple near his house. He identified the car when shown to him. The testimony of PWs 4, 15, 20, 21, 38 and 45 leave no doubt in our mind to come to the conclusion that the prosecution has successfully proved the aforesaid circumstance.

B So far as Circumstance No.5 is concerned, it is not seriously disputed that the deceased was killed on the intervening night of 28th and 29th August, 1993 between 2 a.m. to 2.30 a.m. The time of homicidal death of the deceased stands established by the testimony of Dr.L.Thirunavkarasu (PW17) who has deposed that while conducting the post-mortem on the body of the deceased he found 20 injuries on his person. Many of the injuries were chopped and deep cut injuries. The throat was found cut in front of the neck. Injury No.10 showed that penis scrotum and testis on both sides were found with clean cut.

C From the evidence of Chinnappan (PW41) and Prabhu (PW43) it is established that the deceased left his place of work at about 2 a.m. for his home on a cycle. It has also come in evidence that the deceased could reach his rented house from the place of his duty within 15 minutes on cycle. Any of the accused, particularly A1 who was concededly with the deceased has not disputed the factum of the death of her husband on the intervening night of 28th and 29th August, 1993.

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E Circumstance No.6 stands fully established by the evidence of PWs 20 and 38. Narayana (PW20) had deposed that after taking drinks and meals, all the three accused directed him to stop the vehicle there itself, i.e. Banswadi, Mukunda Theatre and told that if anybody asked about them, to say that they had gone to a marriage. A2, A3 and A4 thereafter went away informing the witnesses that if they returned earlier to the car they will go to Madanapalli. The witness PW20 along with cleaner slept in the car and at about 3.30 a.m. all the aforesaid three accused came to the car and asked him to drive them back to Madanapalli. After they had travelled about 5 kilometers, the accused told the driver that they wanted to go to urinal for which the car was directed to be stopped. They reached Madanapalli at about 5.30 or 6.30 a.m. To the same effect is the statement of Shabir Basha (PW38).

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G Learned counsel appearing for the accused have canvassed before us that the aforesaid witnesses should not be believed because they had allegedly been detained by the police for some time on suspicion of being involved in the commission of the crime. The submission cannot be accepted for two

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reasons, firstly it is not established that any one of the accused had been arrested by the police in connection with the commission of the crime and secondly, even if they were subjected to interrogation by the police, the reasons are obvious as the investigating agency on facts might have reasonably suspected them also to be involved in the crime. PW20 has only stated that immediately after receiving the documents from the owner, the police took him to Chintamani "on the next day I was taken near the Mukunda Theatre. On the next day I was asked to be in the police station itself". The mere fact that he was told to be in the police station does not suggest, much less prove that the witness was an accused person involved in the crime. In reply to a question in cross-examination, the witness has specifically stated: "it is false to say that I was detained in police station for 15 days saying that I am connected to the said crime". Similarly PW38 has stated that he, along with PW20, was taken by the IO to the police station along with the car from Madanapalli. In cross-examination he too categorically stated "It is false to say that I was kept in police custody for 15 days on suspicion on my involvement in this case. It is false to say that my uncle got me released from police". The defence miserably failed to show any enmity of the aforesaid witnesses with the accused or suggest any other reason for their allegedly making false statements. After minutely and critically examining their depositions we have come to the conclusion that both the trial as well as the High Court were justified in relying upon their testimony. Acceptance of their evidence would prove Circumstances 3, 4, 5 and 6.

So far as Circumstance No.9 is concerned, the prosecution has successfully proved the making of voluntary statement Exhibit P-64 by A2 and consequent recoveries of incriminating articles seized vide Panchanama Exhibit P-17. Similarly A4 is proved to have made voluntary statement Exhibit-65. It is also proved that he produced gold ring M.O.50, his blood stained clothes M.Os. 52 and 53 and Cigarettes M.O.51 along with a pair of shoes M.O.49 which were seized vide Panchnama. The disclosure statement Exhibit P-55 by A3 is also proved along with Panchanama Exhibit P-20 by which the incriminating articles including his blood stained clothes were seized. The disclosure statements and the Panchanamas stand duly proved by the testimony of the investigating officer and other Panch witnesses.

Consequent to the disclosure statement and during investigation, the jewellery produced by the accused persons has been proved to be belonging to A1. None of the accused has given any explanation regarding their possession over the jewellery of A1. It has also come in evidence that clothes

A produced by the accused persons which they were wearing on the date of
occurrence were stained with blood. The serilogist report Exhibit 87 proves
that the stains found on the clothes of the deceased and the accused were of
human blood. It has also come in the report that the blood group of the
deceased was "B" and the origin of the blood group found on the clothes of
B the accused was also "B". The accused have not given any explanation as
to how their clothes were stained with human blood of "B" group which was
the blood group of the deceased. Learned counsel appearing for the appellants
made vain attempt to impress upon us that the serologist report was not
produced at the trial court, which we do not accept in view of the fact that
C the said report is shown to have been admitted in evidence and marked
Exhibit 87. Otherwise also the report of the Serologist can be used as
evidence without any formal proof under Section 293 of the Cr.P.C.

In a case based upon circumstantial evidence, the prosecution is under
a legal obligation to prove, firstly on facts the existence of such circumstances
and secondly that the circumstances form a complete chain which lead to the
D irresistible conclusion that the accused are guilty and such circumstances are
inconsistent with their innocence. On proof of the aforesaid conditions, the
court can convict the accused of the charges framed against them. It is rightly
said that witnesses may lie but the circumstances cannot.

E The evidence on record in this case has fully established the Circum-
stances Nos.1,2, 3,4,5,6 and 9 against A2 and Circumstance Nos.3,4,5,6 and
9 against A3. It has also further come in evidence that A2, A3 and A4 were
on friendly terms. This friendship is shown to have prompted them to commit
the crime for which they have been charged, convicted and sentenced.

F Under the circumstances, giving her the benefit of doubt, the appeal
filed by A1 is allowed and the conviction and sentence, in so far as they relate
to her, are set aside. She is directed to set at liberty forthwith, if not required
in any other case. There is no merit in the appeals filed by A2 and A3 which
are accordingly dismissed by confirming that part of the judgment of the High
G Court by which they have been convicted under Section 302/34 IPC and
sentenced to life imprisonment.

B.S.

Appeals disposed of.