IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE G.GIRISH

MONDAY, THE 4TH DAY OF NOVEMBER 2024 / 13TH KARTHIKA, 1946

CRL.A NO. 449 OF 2018

AGAINST CONVICTION AND SENTENCE VIDE JUDGMENT DATED 31.01.2018 IN S.C.NO.714/2016 PASSED BY THE ADDL.SESSIONS JUDGE-II, N.PARAVUR

APPELLANT/ACCUSED:

C.V. VARKEY
AGED 74 YEARS, S/O.VAREEDU,CHIRACKAL HOUSE,
KARAMALA KARA,MANJAPRA VILLAGE.

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.D.FEROZE
SRI.V.VINAY

RESPONDENT/STATE:

STATE OF KERALA
REP. BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM - 682 031,(CRIME NO.148/2017 OF KALADY POLICE STATION,ERNAKULAM DISTRICT).

ADV.NEEMA.T.V, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.10.2024, THE COURT ON 04.11.2024 DELIVERED THE FOLLOWING:

"CR"

JUDGMENT

G.Girish, J.

Warring over water is not new to our world with flare-ups going back to Mesopotamia in 2500 B.C, Assyria in 720 B.C, China in 101 B.C and Egypt in 48 B.C. It is said that water could be the main cause of World War III. Here is a case where the fight between two septuagenarian men over water resulted in the loss of life of one, and life imprisonment for the other.

2. The appeal arise out of the judgment dated 31.01.2018 in S.C.No.714/2016 of the Additional Sessions Court-II, North Paravur which convicted and sentenced the appellant/accused under section 302 I.P.C to undergo life imprisonment and fine Rs.1,00,000/-. A default clause for rigorous imprisonment for one year for non-payment of fine was also provided thereunder.

3. The appellant and the deceased were neighbours who had garden lands cultivated with nutmegs. The Chalakkudy Irrigation Canal existed in the east-west direction at the further north of the bund road on the north of their properties. From the aforesaid irrigation canal, a drainage (aqueduct) was constructed beneath the bund road towards

the south which culminated in a water channel existing in the east-west direction on the southern side of the bund road, parallel to the aforesaid irrigation canal. At the point where the above aqueduct joined the water channel on the south, there existed a pit arranged for the diversion of water (which is referred to as 'spout' in the case records), surrounded by a concrete construction. The above said portion of the drainage, referred as spout, is the place of occurrence in this case.

4. The spout was being used by the accused as well as the deceased for irrigating their cultivations. Since there had been disputes between the accused and the deceased in connection with the diversion of water, an arrangement was said to have been made at the intervention of the police, fixing the time frame for each of them for extracting the water, making use of the spout.

5. On 14.01.2016, a quarrel arose between the accused and the deceased in connection with an issue of the use of the spout by the deceased in violation of the terms of understanding between them. It is stated that, right from 11:00 a.m onwards there had been skirmishes between them, and the accused had threatened that in the event of further violations of the understanding, he would chop-off the head of the deceased and place it as a barrier for the diversion of water. The aforesaid brawl between the accused and the deceased is said to have

escalated by evening leading to the physical assault of the latter by the former, at the spout mentioned above. It is alleged that, at about 5:30 p.m of that day (14.01.2016), the accused inflicted a blow upon the dorsal portion of the head of the deceased with the handle of a spade, leading to his collapse into that portion of the drainage channel where the spout was set up. The deceased is said to have sustained serious skull fracture with profuse bleeding as a result of the aforesaid assault alleged to have been committed by the accused. It is stated that the accused thereafter got the spade rinsed at the water channel, and went back to his house leaving behind the deceased who lay head-down at the spout with the fatal injury sustained on his skull.

6. PW3, a neighbour who had the occasion to notice the quarrel between the accused and the deceased at the place of occurrence close to her house, got suspicious when she found that the voice of the deceased had subsided. Seeing the percolation of blood through the water channel, she alerted the neighbours including PW4, PW5, PW6 and one Joice, who rushed to that place and managed to pull up the deceased from the spout. The deceased was immediately rushed to Little Flower Hospital, Angamaly where PW8, the Doctor who attended him, declared that he was brought dead.

7. PW1, the brother of the deceased, upon getting information about the incident, rushed to the hospital and found that the deceased had lost his life. He came to the Kalady Police Station and tendered Ext.P1 first information statement to PW16, the Sub Inspector, Kalady, who registered Ext.P8 F.I.R under section 304 I.P.C. Soon the procedures were set in motion, and PW17, the Circle Inspector of Police, Kalady took over the investigation on 15.01.2016. The Investigating Officer proceeded with the routine measures of inquest, preparation of mahazars, collection of specimen items for scientific analysis and arrangement for conducting autopsy. The accused was arrested on 15.01.2016 at 2:00 p.m. On the basis of the information received upon custodial interrogation of the accused, the Investigating Officer is said to have recovered MO1 spade as well as MO2 shirt and MO3 lungi, allegedly worn by the accused at the time of commission of the crime. Those material objects were sent for chemical analysis for ascertaining traces of blood of the deceased. After the completion of the investigation, the Circle Inspector of Police, Kalady laid the final report before the jurisdictional Magistrate, indicting the accused for the commission of offence punishable under section 302 IPC.

8. The learned Additional Sessions Judge, to whom the case was made over after commitment, proceeded with the preliminary

hearing, and framed charges against the accused under Section 302 IPC. Since the accused denied the charge, the court proceeded with the trial with the examination of 17 witnesses as PW1 to PW17. 18 documents were marked as Ext.P1 to P18, and 10 material objects were identified as MO1 to MO10. After the close of the prosecution evidence, the statement of the accused was recorded under Section 313(1)(b) of the Code of Criminal Procedure. The accused denied the allegation of hitting the deceased with the handle of spade, and stated that consequent to a scuffle which arose between him and the deceased, the deceased happened to fall into the pit at the spout portion of the water channel. He further stated that he had informed the neighbors about it.

9. Finding that there is no scope for an acquittal of the accused under Section 232 Cr.P.C., the trial court called upon the accused to enter on his defence, and posted the case for defence evidence. Though summons were issued to the defence witnesses, the learned counsel for the accused did not opt for the examination of those witnesses. The contradictions in the prior statements of PW2, PW3, PW4 and PW5 were marked as Exts.D1 to D4, from the part of the accused.

10. After hearing both sides, and evaluating the evidence on record, the trial court arrived at the finding that the accused inflicted a blow upon the head of the deceased with the handle of MO1 spade with

the intention of causing death, leading to the collapse of the deceased to the water channel with the fatal head injury which took away his life, and hence the accused is guilty of murder. Accordingly, the accused was awarded the punishment of life imprisonment and fine as stated above. Aggrieved by the aforesaid findings of conviction and sentence, the appellant is here before us with this appeal.

11. Heard Adv.Mr. S. Rajeev, the learned counsel for the appellant, and Adv.Mrs. Neema.T.V., the learned Senior Public Prosecutor.

12. The only issue to be resolved in this appeal is whether the fall of the deceased into the spout portion of the water channel mentioned above at about 5:30 p.m. on 14.01.2016, was the result of a blow inflicted by the accused with the handle of MO1 spade upon the head of the deceased, or, whether it was the intended consequence of the act of the accused pushing down the deceased while he engaged in a scuffle with him consequent to verbal altercations. The point of adjudication has narrowed down to the above limited aspect in view of the stand taken by the accused in his statement under Section 313(1)(b) of the Code of Criminal Procedure, admitting the fact that a scuffle ensued between him and the deceased at the place of occurrence in the evening of 14.01.2016 in connection with the diversion of water at the

spout portion of the water channel, as a result of which the deceased happened to fall into the ditch there.

13. It is to be noted that the alleged assault of the accused upon the deceased with MO1 spade had not been witnessed by anybody. PW3 and PW4 are the only witnesses who stated before the trial court that they had seen the accused with a spade in and around the time when he picked up a quarrel with the deceased in the evening of 14.01.2016. However, both the above witnesses did not see the exact incident which resulted in the fall of the deceased to the pit portion of the water channel. According to PW3, she had seen the accused with the spade shortly after the quarrel between the accused and deceased subsided. She claims to have earlier heard the accused threatening the deceased that if he diverted water he would be finished off. She also stated that she saw the accused standing with MO1 spade above the spout at the time when the voice of the deceased subsided. In cross examination she stated that the accused was found going with the spade. PW4 would contend that she had seen the accused rinsing the spade in the water channel and going back. The above statements of PW3 and PW4 are of no help for the prosecution in establishing the charge that the accused had hit the deceased with the handle of MO1 spade. This is especially so, in view of the fact that PW3 confided

during cross-examination that the time slot 5:00 pm to 10:00 p.m was in fact the time allotted to the accused for diverting water from the spout as per the terms of agreement in the dispute between the accused and the deceased. Therefore, the presence of the accused at the spout with the spade at 5:00 p.m can only be expected to be for the arrangements of water diversion to his cultivation. It is pertinent to note in connection with this aspect that, both PW3 and PW4 have stated before the Trial Court that the accused used to come to the spout and walk from there by propping to the ground the spade held in his hand. Hence the evidence tendered by PW3 and PW4 about the wielding of MO1 spade by the accused cannot be interpreted as a prelude or his preparations to assault the deceased with that spade.

14. The allegation of the prosecution about the act of the accused hitting the deceased upon his head with MO1 spade and causing severe fracture of skull is not supported by the scientific evidence gathered by the investigating agency. Though it is stated in Ext.P7 mahazar that the collar portion of MO1 spade contained dried blood, Ext.P18 chemical analysis report would categorically reveal that the above said spade (mentioned as 'hoe' under item No.3 of that report) did not contain any traces of blood. Having regard to the contention of the prosecution that the injury inflicted upon the deceased

resulted in profuse bleeding, MO1 spade would have certainly contained traces of blood if it was actually used by the accused for hitting the deceased upon his head. It is true that PW4 testified before the Trial Court that she saw the accused rinsing MO1 spade in the water channel. But there is no such statement made by PW3. At any rate, it is not possible to conclude that the accused might have managed to wash away the blood stains in MO1 spade by rinsing it in the water channel since it is not a simple task which could be done within a few minutes, in view of the evidence pertaining to the splash of blood spilled out from the head of the deceased, which even turned the colour of running water to red. Furthermore, it is not possible for the prosecution to set up such a case since they have no allegation pertaining to the act of the accused causing disappearance of the evidence.

15. The evidence adduced by the prosecution in connection with the recovery of MO1 spade, and MO2 and MO3, the shirt and lungi worn by the accused at the time of incident, is having no significance at all. Ext.P7 is the mahazar prepared by PW17 in connection with the recovery of MO1 spade on the basis of the disclosure statement of the accused, from the rear side of the latrine behind his house. The said mahazar was marked through PW15 who had signed as an attester to it. It could be seen from the deposition of PW15 that the marking of the

said document was objected by the defence counsel stating the reason that it contained inadmissible confession pertaining to the commission of the crime by the accused, and that the learned Trial Judge permitted the marking of the said mahazar as Ext.P7 after getting the inadmissible confessional portion of it struck off by the Public Prosecutor. The only aspect which could be established through Ext.P7 mahazar, and the act of the accused pointing out the place behind the latrine of his house where the said spade was kept, and the hand over of the same to the Investigating Officer, is the knowledge of the accused about the place where MO1 spade was kept, after his return from the scene of crime, in the evening of 14.01.2016. The recovery of MO1 from the premises of the house of the accused on the basis of the information received by the Investigating Officer during custodial interrogation of the accused, even if it is presumed to have been done in strict conformity with the prescribed procedures, could no way link the accused with the crime, in the absence of any other evidence which would show that the deceased suffered injuries out of the use of the said spade. There is absolutely nothing unusual in the act of the accused reaching the spout of the water channel with MO1 spade in his hand as per his routine course as could be discerned from the testimonies of PW3 and PW4. So also, the act of the accused returning to his house with the spade, in the evening

of 14.01.2016 and placing it behind his latrine, cannot be termed as dubious or suspicious. The statement of the accused, that he had placed MO1 spade behind the latrine on the rear side of his house, contains nothing capable of inculpating him in this crime. Thus, the much acclaimed point canvassed by the prosecution about the recovery of MO1 spade from the premises of the house of the accused, is of no consequence in the facts and circumstances of this case. Same is the case in respect of the recovery of MO2 shirt and MO3 lungi worn by the accused at the time of the incident, on the basis of the Ext.P6 mahazar. The aforesaid wearing apparel, when subjected to chemical analysis at the Regional Chemical Examiner's Laboratory, Ernakulam, did not reveal the presence of blood stains or any other biological particles of the deceased. This aspect could be seen from Ext.P18 report of analysis wherein it is stated in unequivocal terms that the aforesaid shirt and lungi mentioned as item Nos.8 and 9 thereunder did not contain any blood stains. Thus the whole task performed by PW17 in connection with the recovery of MO1 to MO3 was nothing but a futile exercise having no significance in garnering evidence against the accused.

16. It seems that many of the Investigating Officers are ignorant of the exact purport and scope of Section 27 of the Indian Evidence Act (now the proviso to Section 23 of the Bharatiya Sakshya

Adhiniyam, 2023). They are under the false notion that once the weapon of offence is recovered from the place of concealment on the basis of the information received during custodial interrogation of that accused, it would invariably establish the commission of the crime by the accused as revealed from his confession statement. In other words, there is a mistaken belief that the confession made by the accused to the police officer about the commission of the crime would become admissible in its entirety, once the weapon of offence is recovered on the basis of the disclosure statement of the accused about his act of keeping or concealing the weapon at a particular place. This notion and belief of some of the Investigating Officers about the legal consequences of recovery of weapons, according to us, are totally erroneous and misplaced. It is high time that the Investigating Officers of our police force are given proper sensitization classes so that they could get a clear insight of the ambit and scope of the proviso to Section 23 of the Bharatiya Sakshya Adhiniyam, 2023 (Section 27 of the Indian Evidence Act, 1872).

17. Section 27 of the Indian Evidence Act, 1872 reads as a proviso to the proscription under Section 25 of the said Act on the confession made by an accused to a police officer about the commission

of an offence. For the applicability of Section 27 of the Indian Evidence Act, the following requirements are to be fulfilled:

(i) An information should have been received from an accused in the custody of a police officer.

(ii) The above information should have led to the discovery of a fact.

(iii) The fact so discovered should have been deposed by the competent witness.

If the above three pre-conditions are fulfilled, then so much of such information as it relates distinctly to the fact thereby discovered will become admissible in evidence, notwithstanding the fact that it came out of a confession to the police officer.

18. If an accused makes a confession to the police officer that he had concealed the knife used by him for stabbing the victim, at the roof of his house, and consequently on the basis of the above information, the police officer, in due compliance with the procedures prescribed by law, effects the recovery of that weapon, the only aspect which could be established from the evidence adduced by the Investigating Officer in respect of the above recovery is the discovery of the place of concealment of the knife and the knowledge of the accused about it. True that in appropriate cases it would cast a burden upon the

accused to explain the facts especially within his knowledge as to how that weapon happened to be in a place remaining under his dominion. But the evidence relating to the recovery of the said knife will not ipso facto prove the commission of the crime by the accused with the said weapon. However, if the prosecution succeeds in establishing through the scientific evidence that the knife so recovered contained the blood stains, hair follicles, particles of the skin or flesh of the deceased, then it would create a formidable link connecting the accused with the commission of the crime. So also, if the prosecution could bring-forth evidence of witnesses pointing to the act of accused moving away with a blood stained knife shortly after the time of occurrence, and the accused washing away the blood stains in the knife at his house, then those link evidence when taken along with the evidence pertaining to recovery of the knife, may establish the involvement of the accused in the crime, even if the knife recovered did not contain blood stain or other biological particles of the body of deceased. Therefore, the Investigating Officers should be remindful of their responsibility to garner the other link evidence pertaining to the use of the weapon so recovered for the commission of the crime, in addition to the evidence adduced through recovery about the act of the accused concealing or disposing of the weapon. In other words, the mere recovery of the

weapon of offence on the basis of the information received from the accused, is of no use if there is no other evidence which could be taken as a connecting link about the use of the said weapon for the commission of the crime.

19. The term *'so much of such information, whether it amounts to a confession or not'* contained in section 27 of Evidence Act, is often misunderstood even by many Trial Judges as one effacing the legal embargo in accepting the confessional aspect in the statement of the accused about the commission of that crime. In fact the word 'confession' envisaged thereunder is not in respect of the confession of the commission of the substantial offence in that crime. On the other hand, it only refers to certain exceptional situations where the act of keeping that material object itself amounts to an offence, like that of the possession of a weapon prohibited by the Arms Act, possession of stolen property etc. The applicability of section 27 of Evidence Act in enabling the limited acceptability of the statement given by an accused in police custody is in respect of that portion of the information received from the accused which is distinctly related to the fact discovered. The fact discovered is not the material object recovered, but it is the place of concealment of that object, and the knowledge of the accused about it.

20. Emulating the principles of the doctrine of confirmation by subsequent events, right from the celebrated precedents in **Pulukury Kottaya v. Emperor (AIR 1947 PC 67),** the Apex Court in ***Bodhraj v. State of J&K*, [(2002) 8 SCC 45]** held as follows:

> **"** *Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short "the Evidence Act") is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in Delhi Admn. v. Bal Krishan [(1972) 4 SCC 659 : AIR 1972 SC 3] and Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828 : 1976 SCC (Cri) 199 : AIR 1976 SC 483] . The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the*

confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the

accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See State of Maharashtra v. Damu Gopinath Shinde [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301] .) No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible.

The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."

21. The procedural safeguards to be fulfilled while moving ahead with the course of recovery of material objects on the basis of disclosure statements given by the accused in police custody, are of paramount importance for ensuring the acceptability of the evidence in that regard. In this context, the law laid down by a three judge bench of the Apex Court in **Ramanand @ Nandlal Bharti.v. State of Bihar [(2023)16 SCC 510]**, deserves scrupulous compliance if the prosecution proposes to rely on the evidence pertaining to discovery of fact on the basis of the information received from the accused in police custody. Paragraph 53 of the aforesaid judgment of the Supreme Court is extracted as follows :

"*If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may*

desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

22. Going by the requirements of procedure laid down by the Apex Court in the aforesaid decision, the following method shall be adopted for a successful course of bringing in evidence resorting to

section 27 Evidence Act. The presence of two independent witnesses shall be ensured right from the very beginning when the accused makes the confession statement, till the material objects are handed over by the accused to the investigating officer. The disclosure statements made by the accused in respect of the disposal, or place of concealment of the material objects, shall be recorded, as much as possible, in the exact words spoken by the accused. The statements so made by the accused shall be recorded by the Investigating Officer in the presence of those independent witnesses. A panchnama (mahazar) shall be drawn by the Investigating Officer with its first part containing the aforesaid disclosure statements made by the accused in the presence of the independent witnesses. Thereafter, the Investigating Officer shall proceed, along with the accused, to the place of concealment of the material objects. The independent witnesses should be present all along when the accused and the Investigating Officer proceed to the place of concealment, and the accused retrieves the material object, and hands it over to the Investigating Officer. At that time, the Investigating Officer has to complete the second part of the panchnama (mahazar) stating the process of recovery of the material objects from the place of concealment or disposal. Furthermore, the Investigating Officer or the independent witnesses have to depose before the Court during trial

about the whole course followed, right from the making of disclosures, till the retrieval and hand over of the material objects by the accused. The proposition of law in this regard has been followed by a two Judge Bench of the Hon'ble Supreme Court in **Subramanya v. State of Karnataka [(2023) 11 SCC 255]**. Though section 27 of Evidence Act does not contain any mandate to prepare panchnama or to insist the presence of independent witnesses before recording the disclosure statement of the accused, the law declared by the Apex Court in **Ramanand** and **Subramanya (supra)** is binding on all courts within the territory of India, in view of the mandate of Article 141 of the Constitution of India.

23. Applying the above principles of law relating to the scope and ambit of Section 27 of the Indian Evidence Act, 1872 (proviso to Section 23 of the Bharatiya Sakshya Adhiniyam, 2023), it has to be stated that the evidence pertaining to the recovery of MO1 spade is of no help for the prosecution in establishing that the accused had inflicted a fatal blow on the head of the deceased with that object leading to the injuries which resulted in his death. As the ocular evidence relied on by the prosecution through the testimonies of PW3 to PW6, also does not contain any indication about the act of the accused hitting the deceased with MO1 spade, the only conclusion which could be drawn is that the

prosecution failed to establish the accusation that the accused hit the deceased upon his head with MO1 spade.

24. As already stated above, the fact that the deceased fell into the ditch at the spout portion of the aqueduct on the north of his property consequent to a fight with the accused in the evening of 14.01.2016, is not disputed by the accused. It is pertinent to note that even Ext.P1 first information statement is to the effect that the accused pushed down the deceased leading to his fall with his head striking heavily at the concrete construction of the water channel resulting in death due to the fatal fracture of skull. PW8, the doctor who first attended the deceased at Little Flower Hospital, Angamali, had also given evidence by referring to Ext.P3 Wound Certificate wherein it is stated that the alleged cause of injury was a fall into a canal slit. Now the question to be looked into is whether the offence of murder punishable under Section 302 I.P.C would be attracted from the aforesaid act of the accused; and if not, what exactly is the offence committed by the accused.

25. Going by the provisions contained in Section 299 of the Indian Penal Code, the offence of culpable homicide is attracted if the following three conditions are fulfilled:

i) There should be an act committed by the assailant causing the death of another.

ii) The act so done shall be:

(a) With the intention of causing death or
(b) With the intention of causing such bodily injury as is likely to cause death or
(c) With the knowledge that he is likely by such an act to cause death.

26. As far as the present case is concerned, the medical evidence adduced by the prosecution through Ext.P3 wound certificate, Ext.P5 postmortem certificate and testimonies of the doctors who were examined as PW8 and PW13 would lead to the irresistible conclusion that the fracture sustained by the deceased on the dorsal portion of his skull was of such a nature that it was sufficient in the ordinary course of nature to cause death. Deceased suffered the above injury consequent to an act committed by the accused, though there is no evidence pertaining to the infliction of a blow with MO1 spade. If the version of the accused in the statement tendered by him under Section 313 Cr.P.C. is accepted, the deceased suffered the above injury as a result of a fall into the pit portion of the canal during the course of a scuffle with him. However, the evidence tendered by PW3 who had the occasion to notice the quarrel between the accused and the deceased at the relevant time

of commission of this crime, would show that she did not see any act of fisticuffs between the accused and the deceased. On the other hand, what has been stated by PW3 is that the prolonged verbal altercations between the accused and the deceased subsided by the time she returned from her neighboring house after taking the clothes spread there for drying. She would further add that, at that time she could find the accused standing above the spout, and blood percolating through the water channel. It is the further statement of PW3 that the deceased was found lying supine with his head inside the pit portion and legs above the water level. The version of the PW3 in the above regard is reiterated by PW5 also in his testimony before the trial court. The above evidence would give the indication that the fall of the deceased into the pit portion of the spout was not an accidental consequence of a prolonged scuffle between the accused and the deceased, but an event which happened as a result of the sudden attack of the accused purposefully intended to put the deceased into that pit.

27. It could be seen from Ext.P9 scene mahazar that there was concrete construction around the pit portion of the spout of the water channel, and a construction with the rubble on the immediate south of that portion. Ext.P9 scene mahazar also reveals the presence of blood in the concrete portion. The above indications about the place of

occurrence would go to show that there was a concerted act on the part of the accused in pushing the deceased to the pit portion of the spout head down. That being so, the accused cannot be heard to say that he was not having the knowledge that he was likely to cause the death of the deceased by his act of causing the fall of the deceased to that pit portion of the spout. Obviously, the accused had resorted to an act leading to the fall of the deceased into that pit with the knowledge that the said act is so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. It is also evident that the accused committed the aforesaid act without any excuse for incurring the risk of causing such injury to the deceased. Thus, it is apparent that the act of culpable homicide so committed by the accused would come under the definition of murder, unless protected by any of the five exceptions envisaged under Section 300 IPC, in the facts and circumstances of the case.

28. The first exception envisaged under Section 300 IPC would come into play in a case where the offender, while deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation. The explanation to that section makes it clear that the question whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is one

of fact. The parameters to be looked into for deciding whether the provocation was grave and sudden enough to exclude the offence from the definition of murder, are dealt with by the Apex Court in ***Budhi Singh v. State of H.P.*, (2012)13 SCC 663** as follows:-

> *" The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.*
>
> *Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of*

mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder. When we consider the facts of the case in hand, it is obvious and, as already noticed, tobru (small axe) is a commonly available weapon in the houses in the hills which is used for cutting and collecting the firewood. It is also a matter of common knowledge that the cooking gas was not available in interior parts of hills 12 years back. The provocation was sudden and apparently of grave nature. It is the case of prosecution itself that the deceased was abusing and even assaulting his father and the father had shouted for help and called the accused who was already in the house. The deceased was in a drunken state. As it appears that tobru was easily available which the accused picked up and went straight out and assaulted his brother, the deceased. The injuries proved fatal. There is no prosecution evidence to show that there was animosity between the deceased and the accused or there was any other motive much less a premeditation to kill the accused. They had been living in the same house for years. No unpleasant incident or physical fight was stated to have been reported to the police in the past. If one examines the cumulative effect of the prosecution evidence while keeping the relationship of the parties in mind and the factum of the deceased being in a drunken state abusing and assaulting his father, it can reasonably be inferred that there was

sudden and grave provocation to the accused. In our society, a son normally would not tolerate that his father is insulted, much less assaulted. Of course, the weapon used in crime was used with the knowledge that it could cause a grievous hurt endangering the life or even cause death of the deceased but, as indicated supra, such weapon is most easily available in houses.

In light of the circumstances which would help the court to gather the intention of the accused, the court also has to take into consideration the attendant circumstances. One of the very vital factors is premeditation and intention to kill. These are the important factors which will weigh in the mind of the court while determining such an issue in light of the attendant circumstances.

As we have discussed above, premeditation and intention to kill are two vital circumstances amongst others which are to be considered by the court before holding the accused guilty of an offence under Section 302 or Section 304 IPC. At the cost of repetition, we may notice that from the prosecution evidence, it is not established that the accused had the intention to kill the deceased or it was a premeditated crime. The learned counsel appearing for the State has contended that the very fact that the accused had come out with a tobru completely establishes the intention to kill and, thus, the offence would fall under Section 302 IPC. It cannot be disputed that the accused came out with a tobru but, at the same time, it is also clear that this is the most easily available weapon in that part of the hills and is used

regularly by the communities. Beyond this factor, there is no evidence of animosity, premeditation or intention to kill. The accused did give a blow by tobru on the head of the deceased which proved fatal. This was the result of the grave and sudden provocation where the father of both the deceased and the accused was being abused, assaulted and ill-treated by the deceased, who was in a drunken state."

29. In the instant case, it is important to look into the question whether there was grave and sudden provocation imparted by the deceased compelling the accused to do the act which resulted in the fall of the deceased head down to the pit at the spout portion of the canal. In that context, it is pertinent to note the statement of PW3, a person who resides close to the scene of crime, in cross-examination that the time slot allotted to the accused to divert water from the spout was from 5:00 p.m to 10:00 p.m. PW2, another neighbour of accused and deceased, testified before the Trial Court that the accused was heard threatening the deceased at 11:00 a.m on 14.01.2016 that he would chop off the head of the deceased and place it as a barrier to divert water if the deceased arrives for diverting water at 5:00 p.m. The above versions of PW2 and PW3 would reveal that the accused was annoyed by the attempt on the part of the deceased to violate the terms of the agreement about the diversion of the water from the spout, and

to cause interference with his right to have the water diverted from the spout from 5:00 p.m onwards. It could also be seen from the above evidence that the accused had warned the deceased in the morning of 14.01.2016 itself against coming to the spout at 5:00 p.m and trying to divert water in violation of the terms of the agreement. However, the deceased paid no heed to the above warnings and arrived at the scene of crime in his scooter at 5:00 p.m on 14.01.2016 as evident from the testimonies of the witnesses. Obviously the quarrel arose between the accused and the deceased in the evening of 14.01.2016 when the deceased attempted to interfere with the diversion of water of the spout by the accused at the time slot allotted to the accused, ignoring the warnings given by the accused right from the morning. It is the above act of the deceased which provoked the accused in committing the act leading to the fall of the deceased into the pit head down and sustaining the fatal injuries. Having regard to the aforesaid facts and circumstances, it is clear that the provocation which prompted the accused in committing the act leading to the fall of the deceased to the pit, would come under the category of grave and sudden provocation envisaged under Exception (1) to Section 300 I.P.C. The above provocation cannot be said to be one sought or voluntarily provoked by the accused as an excuse for doing harm to the deceased. So also, the

said provocation cannot be said to be one done by the deceased in exercise of his right of private defence. It is true that the evidence of PW2 would give the indication that the accused proclaimed an open threat that he would chop off the head of the deceased if he came to the spout at 5pm, the time allotted for the accused to operate the spout. But the above words uttered by the accused can only be considered as his intemperate outburst when he was annoyed and exasperated by the recalcitrance on the part of the deceased in abiding by the terms of agreement pertaining to the use of spout for the diversion of water. The fact that the accused had not carried any weapon of assault at the time of incident, itself would reveal that he had not arrived at the scene of crime with premeditation to perpetrate the act which he threatened in the morning; and that those words were only intended to deter the deceased from interfering with his right to operate the spout at the allocated time. Thus, it could be safely concluded that the act of the accused which caused the fall of the deceased into the pit surrounded by concrete construction at the spout portion of the water channel would come under Exception (1) to Section 300 I.P.C which would bring it under the category of culpable homicide not amounting to murder.

30. As a corollary to the discussions aforesaid, it could be deduced without any room for doubt that the accused had committed

the imminently dangerous act leading to the fall of the deceased into the pit portion of the spout of the water channel with the knowledge that the aforesaid act must, in all probability, cause such bodily injury as is likely to cause death of the deceased. It is also evident that the aforesaid act was committed by the accused without any excuse for incurring the risk of causing such injuries to the deceased. Needless to say that the case would come within the second part of Section 304 I.P.C which would warrant a punishment with imprisonment of either description of a term which may extend to ten years or with fine or with both. Having regard to the fact that the accused/appellant is a person now aged 78 years with no criminal background other than the present crime, we deem it appropriate to fix the sentence to rigorous imprisonment for five years and fine Rs.1,00000/- with a default clause of rigorous imprisonment for one year. Thus, the punishment imposed by the Trial Court will stand modified to that effect.

31. In the result, the appeal stands allowed in part as follows:

(i) The conviction of the appellant/accused for the commission of offence punishable under section 302 I.P.C and the sentence imposed thereunder by the Trial Court, are hereby set aside.

(ii) The appellant/accused is found guilty of commission of offence punishable under Part II of Section 304 I.P.C, and he is convicted thereunder.

(iii) The appellant/accused is sentenced to rigorous imprisonment for five years and a fine of Rs.1,00000/- (Rupees one lakh only) under section 304 I.P.C.

(iv) In default of payment of fine, the appellant/accused will undergo rigorous imprisonment for a further term of one year.

(v) The fine amount, if realized, shall be paid as compensation under section 357(1)(b) of the Code of Criminal Procedure, to the legal heirs of deceased Augustine @ Augustikutty.

(vi) The appellant/accused will be entitled for set off for the period of detention undergone in judicial custody.

32. Before parting with this matter, we deem it appropriate to remind the State Police Chief on the need to impart immediate sensitization classes to the Investigating Officers, preferably by availing the services of retired judges who are actively involved in scholastic academic discussions, on the nuances of procedural requirements to be followed while resorting to recovery of material

objects on the basis of the information received on custodial interrogation of the accused. Otherwise, the fate of prosecutions of many cases based on recovery and circumstantial evidence would be in peril, enabling the culprits to go scot-free, which would certainly impair the administration of criminal justice.

Registry is directed to forward a copy of this judgment to the State Police Chief for taking serious notice of the aforesaid observations, in the context of the discussions in paragraph Nos.16 to 22 of this judgment.

(sd/-)
RAJA VIJAYARAGHAVAN V,
JUDGE

(sd/-)
G.GIRISH,
JUDGE

jsr/SCB