MYSORE HIGH COURT

Saibanna Tippanna

Vs

State (Mysore)

Criminal Appeal No. 165 of 1964

(A.R. Somnath Iyer and M. Ahmed Ali Khan, JJ.)

02.03.1965

JUDGMENT

Somnath Iyer, J.

1. Accused 1, 2, 3 and 6 who were convicted by the Sessions Judge of Gulbarga of an offence of lurking house trespass punishable under Section 457, and, of an offence of murder punishable under Section 302 read with Section 34 of the Penal Code, and, who were sentenced to rigorous imprisonment for a period of four years for the first offence and to imprisonment for life for the second, are the appellants before us.

2. In the village of Naribol in the District of Gulbarga there was one Doddiah who was a rich landowner owning as large an estate as 1,200 acres of land. He died leaving behind him his minor son Sivamanappa. After the death 'Of Doddiah, Sivamanappa's mother's sister Parvathamma assumed management of the minor's estate and continued to manage it until, 'Sivamanappa attained majority. Sivamanappa gave Parvatharnma when he resumed management of his own estate, some 60 acres of land for her own maintenance and thereafter Parvathamma was living separately from Sivamanappa.

3. Parvathamma met with her death on the night of May, 7, 1963 in consequence of serious injuries inflicted on her by someone. According to the prosecution case, she was killed by accused 1 to 6 who were charged with the offence of murder and lurking house trespass before the Court of Session. The Court of Session acquitted accused 4 and 5, and convicted accused 1, 2, 3 and 6 of both those offences. So this appeal.

4. The one astonishing feature of this case is that although according to the prosecution there were at least eight eye-witnesses every one of those eight witnesses was permitted by the Court of Session to be cross-examined, presumably on the ground that the Sessions Judge was satisfied that there was no desire on their part when they appeared before the Court of Session to speak the truth. But amongst those eight witnesses, P.W. 2 Sharanamma who was Parvathamma's sister's husband's sister, did give evidence before the Court of Session that accused 1 to 6 were the persons who killed Parvathamma and that she was able to identify those accused by their voice.

The other seven witnesses gave evidence that they did not know who killed Parvathamma.
5. The Sessions Judge believed the evidence of Sharanamma that she was able to identify the persons who killed Parvathamma, and, thought that it was not unsafe to act upon the evidence of Sharanamma P.W. 2 that she was able to identify the killers by their voice. He thought that her testimony stood corroborated by other evidence in the case which gave assurance to that part of the prosecution story that at least accused 1, 2, 3 and 6 were those who killed Parvathamma. And so it was that he convicted those four persons of both the offences with which they stood charged.

6. In this appeal, Mr. Devaraj appearing for the appellants has urged that, since the prosecution story before the Court of Session had For its slender foundation no more than the un-dependable testimony given by P.W. 2 that she was able to identify the assailants by their voices, it was not possible for the Sessions Judge to think that the four appellants before us were the persons who killed Parvathamma. Mr. Devaraj urged a further argument that the Sessions Judge who did depend to some extent on the facts that accused 1, 2, 3 and 6 were absconding from the village of Naribol from May, 7, 1963 till June 17, 1963 in the case of accused 1, 2 and 3 and till July 12, 1963 in the case accused 6, was not right in placing any reliance at all upon any such abscondence, since it was just possible that those four accused, even if they had run away from the village, might have done so on account of panic and fear.

7. There cannot be the slightest doubt that Parvathamma was killed by someone on the night of May 7, 1963. The evidence of P.W. 10, the Medical Officer who conducted the post-mortem examination on her body on May 9, 1963 when the body was sent to him at 6-10 A.M. that day, establishes that Parvathamma had on her person at least eleven injuries, ten of which were lacerated wounds and one an incised wound. The description of those wounds was given by P.W. 10 in the post-mortem register Exhibit P-4. According to his evidence, there were two injuries on the head, six injuries on the face, two on the neck and one on the wrist. One of the injuries on the neck was an incised wound and all the remaining ten were lacerated wounds. There were also fractures which correspond to seven of the lacerated wounds. There was a fracture of the right parietal bone and there were also fractures of the right and left frontal bones. Likewise there was a fracture of the jaw bones on both sides.

8. Among the lacerated wounds, one was 12 inches long on the right parietal bone; another was 8 inches long on the left frontal bone; there was another 12 inches in length on the right side of the face; another lacreated wound was 9 inches long below that injury. On the right side of the face there was another lacerated wound was 8 inches long and in the same area another which was 2 inches in length, and a lacerated wound 10 inches long on the right side of the face starting from the chin and ending with the right eye. There was another lacerated wound on the collar bone and one more on the nose separating it into two halves. The remaining lacerated wound was on the left wrist.

9. P.W. 10 was clearly of the opinion that all the injuries were ante-mortern injuries and that the lacerated wounds must have been caused by blunt weapons such as the butt end of an axe or sticks, and that the incised injury might have been caused by a sharp weapon like sword or dagger. According to him the injuries which were on the face were sufficient in the ordinary course of nature to cause death. He was also of the view that the cumulative effect of the remaining injuries was sufficient to kill Parvatharnma.

10. On May 11, 1963, two days after P.W. 10 completed the post-mortem examination, P.Ws. 2, 6 and 9 were also sent to him for treatment and examination. On P.W. 2 Sharanamma he found a swelling on the right hand which he recorded in Exhibit P-5. On P.W. 6 Marmdev he found no injuries which he recorded in Exhibit P-7. On P.W. 9 Rangappa he found a simple bruise.

11. It should be recalled that Sharanamma P.W. 2 is Parvathamma's husband's sister. P.Ws. 6 and 9 were according to the prosecution evidence, the two servants of Parvatharnma who were both sleeping outside the house in which Parvatharnma was killed.

12. The prosecution case was that there was some kind of ill-will between Parvatharnma and accused 1 which was responsible for the murderous attack which was made on her on May 7, 1963. The evidence in the case establishes that Parvatharnma was an imperious and domineering woman of great competence and ability which enabled her to manage the estate of her mother's sister's son Sivamanappa P.W. 13 very successfully during his minority. It was elicited from P.W. 7 Kishtappa who is the brother of Parvatharnma that Parvathamma was also engaging herself in money-lending transactions during the course of which she was lending both money and grains to persons in other villages. Although it was suggested to him in cross-examination that she used to bring those persons who borrowed from her money and grain and subject them to cruelty, that suggestion was repudiated by P.W. 7.

13. But what according to the prosecution was responsible for the murder of Parvathamma was an incident, which, it was stated, happened about a fortnight before Parvathamma was killed. The evidence of P.W. 7 was that fifteen days before the date of the incident, he had gone to a village called Jewergi and that Parvathamma had also gone to Gulbarga then. He stated that on his return from Jewergi he was informed by his wife P.W. 8 that during his absence accused 1 had come to her and made an outrageous suggestion that she should sleep with someone whose identity was not disclosed by P.W. 8 on payment of a sum of ₹ 12 or 15. He stated that P.W. 8 informed him that when this disgusting proposal was made to her she came out with the crushing retort that she would be willing to pay a further sum of ₹ 5 if accused 1 sent his wife or sister to her own husband for the same purpose. P.W. 7 added that when Parvathamma returned from Gulbarga on the day previous to the day on which she was murdered. She was murdered on a Tuesday night and the effect of the evidence is that Parvathamma returned on Monday he imparted the information as to what had happened to Parvathamma who told him that she would make necessary enquiries about it. He proceeded to state that she did enquire but that accused 1 was not available and that Parvathamma had sent two persons by name Bheemaraya and Maraya to fetch accused 1, obviously to give him a good dressing down. It is this incident which according to the prosecution constituted the back ground for Parvathamma's murder. The evidence of P.W. 7, stands corroborated almost completely by the evidence given by his wife P.W. 8 who was able to give direct evidence about what happened in the village of Noribol. During the absence of her husband according to her testimony, when her husband had gone to Jewergi about 15 days prior to the incident, accused 1 came to her and said that he was willing to pay a sum of ₹ 15 in return for which he suggested that P.W. 8 should sleep with him. P.W. 8 rebuked, according to her evidence, accused 1 for the most revolting suggestion and made him look small by making a counter suggestion that he may send his sister to her husband so that she might sleep with him for a sum of ₹ 20. P.W. 8 added that she mentioned this incident to her husband after his return from

Jewergi and that she did not know whether her husband complained about it to the deceased or to any one.

14. Although in regard to the question whether Accused 1 suggested that P.W. 8 should sleep with Accused 1 or accused 2, the evidence of P.W. 7 is not clear and although P.W. 8 states that she suggested to Accused 1 that he might send his sister as spoken to by P.W. 7, there can be no doubt whatsoever that an incident more or less on the lines spoken to by P.W. 8 did happen about a fortnight before Parvathamma was killed in the course of which Accused 1 made a loathsome proposal to P.W. 8 and P.W. 8 made an equally undignified counter proposal which in the circumstances, accused 1 deserved and merited.

15. It should be mentioned here that both P.Ws. 7 and 8 were permitted by the Court of Session to be cross-examined by the Public Prosecutor under Section 154 of the Evidence Act. Although the Sessions Judge did not make a record that those two witnesses or any of the other witnesses who were permitted to be cross-examined had become hostile and although all that was mentioned by the Sessions Judge was that all those witnesses had been permitted to be cross-examined there can be no doubt that the Sessions Judge was satisfied that all those witnesses should be permitted to be cross-examined by the Public Prosecutor since it was presumably obvious to him that those witnesses were not desirous of giving truthful evidence about matters of which they were aware or had knowledge.

16. It should be mentioned here that I find it to be a strange feature of the way in which the trial was conducted before the Court below that when the prosecution witnesses were permitted by the Sessions Judge to be cross-examined by the Public Prosecutor, a procedure which was thoroughly irregular and impermissible was what was adopted during such cross-examination. The prosecution witnesses were asked whether they had not made certain statements before the police during the investigation or before a Magistrate who had recorded a statement under Section 164 of the Code of Criminal Procedure which had been done in the case of P.W. 2. But very strangely, when every one of those witnesses, barring P.W. 18, denied having made those statements, the Public Prosecutor did not proceed to confront those witnesses with those statements or get them marked as Exhibits as he should have done, so that the witnesses might be afforded an opportunity to explain the contradiction or denial. The procedure which the Sessions Judge allowed the Public Prosecutor to adopt was to elicit from the witnesses that they had not made the statements which were imputed to them on the earlier occasion, and, then to elicit from the Investigating Officer when he was in the box that those statements had indeed been made by those witnesses. It is surprising to my mind that notwithstanding many authoritative elucidations made in regard to the procedure to be adopted when a witness is confronted with his previous statement in cross-examination under Section 145 of the Evidence Act, the cross-examination of the prosecution witnesses was conducted in this inadequate and unsatisfactory manner.

17. In *Tahsildar Singh v. State of U.P*[1]. the Supreme Court reiterated the enunciation as to the procedure to be adopted when a witness is proposed to be contradicted under Section 145 of the Evidence Act thus :

> "Resort to Section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the

> former statement was reduced to writing, then Section 145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness I admits the former statement. In such a case all (that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

That notwithstanding this authoritative elucidation of the principle by the Supreme Court, the cross-examination of the prosecution witnesses who were permitted to be cross-examined was conducted in derogation of the elucidation is what should cause very great surprise to any one.

18. However that may be, it is now too late for any one to contend that for the mere reason P.Ws. 7 and 8 were permitted by the Sessions Judge to be cross-examined by the Public Prosecutor, it cannot be asserted that no part of the evidence given by them can be treated as truthful evidence. Mr. Devaraj appearing for the appellants did not make any such extreme submission. It is now a firmly settled principle that even in the case of a witness who has been permitted to be cross-examined under Section 145 (sic. S.154?) of the Evidence Act, the Court can depend upon that part of the testimony given by the witness which appears to be truthful evidence, there being no principle on the basis of which it can be said that a witness who is permitted to be cross-examined must be dismissed as person giving false evidence on every matter about which he speaks.

19. Whatever may be the weight to be given to the other parts of the evidence of P.Ws. 7 and 8 elicited either in the examination in chief or in the two sets of cross-examination made by the Public Prosecutor once and by the accused again, there can be no sufficient reason for us to discard that part of the evidence given by both of them in regard to the disgraceful conduct in which accused 1 indulged fifteen days before Parvathamma was killed.

20. Now Kishtappa whose wife was subjected by accused-1 to that kind of

[1] AIR 1959 SC 1012; 1021

humiliation and indignity is Parvathamma's brother. Parvathamma according to P.W. 7 was a "powerful woman". She had according to his evidence, lent some moneys to accused 5. He added that there was a quarrel between Sivamanappa P.W. 13 and accused 6 by reason of an encroachment made by accused 6 on a part of the site of P.W. 13 on which he had constructed a wall. The evidence of P.W. 7 was that about the incident mentioned to him by P.W. 8, he imparted the information to Parvathamma whereupon Parvathamma did embark upon some kind of "enquiry" and had also sent also two persons to fetch accused 1. There can be no doubt that she intended to subject accused 1 to some kind of castigation for his scandalous behavior.

21. To the extent therefore, which was necessary for the prosecution to establish some kind of motive on the part of accused 1 to murder Parvathamma, it cannot be said that the evidence of P.Ws. 7 and 8 does not afford a sufficiently satisfactory basis for coming to the conclusion that that motive has been satisfactorily proved. But, since motive by itself cannot take the case of the prosecution farther than it could and since such motive can only from the background in the light of which the other evidence produced by the prosecution could be assessed, if there was nothing else connecting the accused with the offence, the mere fact that there was a motive in the mind of accused 1 generated by the commencement of an enquiry by Parvathamma into his conduct, can

by itself scarcely form any basis for the conclusion that accused 1 or any one of his associate were responsible for the murder of Parvathamma. But at the same time the incident which preceded the murder of Parvathamma cannot altogether be discarded or forgotten in evaluating the effect of the other evidence in the case.

22. Now, although the prosecution expected as many as six witnesses to give direct tetsimony about the murder and those witnesses are P.Ws. 1, 2, 3, 4, 5 and 18 the only witness who stated that she was present when Parvathamma was killed and that accused 1 to 6 were the persons who killed her, was P.W. 2. The prosecution case was that on the night of the murder Parvathamma was sleeping in one portion of her house referred to as the Courtyard, a place which was something like a quadrangle inside the house but without a roof. It was stated that P.W. 2 Sharanamma, Parvathanima's sister's husband's sister was also sleeping in that Court-yard on the same cot on which Parvathamma was sleeping. P.Ws. 4 and 5, according to the prosecution case, were also sharing another cot in the same Court-yard, while P.W. 3 was sleeping on yet another cot. It was also the prosecution case that P.W. 18 was also sleeping in the Court-yard although he was sleeping on some kind of an elevated platform. The prosecution therefore, wished to make it appear that all these five persons, namely, P.Ws. 2, 3, 4, 5 and 18, were sleeping in the Courtyard where Parvathamma slept and therefore, saw the incident. It was stated that P.W. 1 was sleeping in an adjacent room wherefrom she could witness the incident and did witness it. Among the six persons as already pointed out, P.W. 2 is Parvathamma's sister's husband's sister and P.W. 5 is her daughter. P.W. 4 was stated to be another relation of Parvathamma and P.W. 3 was her cook. P.W. 18 was Parvathamma's brother.

23. The prosecution also depended upon P.Ws. 6 and 9 to give evidence that they saw the six accused decamping from the scene of occurrence after they had completed the murder of Parvathamma and that they saw them going in that way from the place where they were sleeping in some outer part of the house. But when these witnesses were examined, although P.W. 2 stated that she was able to identify accused 1 to 6 as the persons who killed Parvatnamma, she did so only because she was able to recognize their voices. Although 7-5-1963 according to the Hindu almanac, was a full moon day it was stated that it was a cloudy night and that therefore the night was a dark night. So it was that P.W. 2 stated that she made the identification with the assistance of the voices.

24. P.Ws. 6 and 9 who are the two servants who were sleeping outside the house gave no evidence before the Court of Session that they saw any of the accused on the night of the murder. P.Ws. 3, 4 and 5 did not support the prosecution case that they were sleeping in the Courtyard where Parvathamma was sleeping. Their evidence was that they were sleeping in another room and did not witness the murder. P.W. 1 who however stated that she was sleeping in a padasale stated that she too was unable to see the murder. P.W. 18 who did not admit that he was sleeping in the court-yard but stated that he was sleeping somewhere outside, did not also support the prosecution story. So it was that these witnesses were permitted to be cross-examined.

25. In the course of her evidence P.W. 3 stated that although Parvathamma and one Sivamma were sleeping on the same cot in the courtyard, she was sleeping inside a room and that at some part of the night she heard Sharanamma P.W. 2 weeping and that when she came out she found that Parvathamma had been killed.
This was all that she stated in examination in chief.

26. It is however clear that the reference to Shivamma as the person who was sleeping with Parvathamma on the same cot is a mistake for Sharanamma P.W. 2, as can be seen from the Canarese deposition in which Sharanamma is named as the person who was so sleeping with Parvathamma.

27. However that may be, when the Public Prosecutor was permitted to cross-examine the witnesses it was put to her that when she was interrogated by the Police during investigation on the next evening she had told that she and Bheemavva P.W. 4 were both sleeping in the court-yard along with Parvathamma. It was further put to her that she had told the Police that she saw accused 1 and 6 hitting Parvathamma with a spear and that accused 2 and 5 were giving blows with axes and that accused 3 and 4 were standing nearby and there were some others on the roof also. She was also asked whether she did not state before the police that P.W. 2 was also assaulted when she went to intervene.

28. All these suggestions were denied by P.W. 3 and by a very strange piece of omission the Public Prosecutor did not draw her attention to those parts of the statements made by P.W. 3 to the Police in the course of which it was stated that she had made those statements which were attributed to her.

29. P.W. 4 performed a similar volte-face. Although according to the prosecution she was sleeping in the Court-yard with Parvathamma, she stated that she was sleeping in a room and that sometime during the night when she heard the cry of P.W. 2 and when she went into the court-yard she found Parvathamma with injuries on her neck and face. According to her P.W. 2 Sharanamma gave the information that somebody had attacked the deceased. As in the case of P.W. 3 this witness was also asked whether she did not tell the police that when she heard the cries of Sharanamma and woke up she saw accused 1 and 6 attacking the deceased with spears and accused 2 and 5 with axes while accused 4 and 5 were standing nearby. Here again, according to the Kannada deposition what was put to her was that she told the police that accused 2 and 3 used axes and accused 4 and 5 were standing nearby.

30. It is surprising that there should be a discrepancy between the Kannada version and the English deposition. But the witness denied that she made any of those statements and she was again not confronted with her earlier statements. But one thing she stated was that she told the police what she had seen, and that part of her evidence reads :

> "I have stated before the Police what I had seen. It was accordingly taken down."

31. In the evidence of P.W. 22 who was the Sub-Inspector who conducted the investigation the following answer was elicited :

> "Bheemavva P.W. 4 stated before me that she got up after hearing the cry of Snaranavva and that she saw A. Nos. 1 and 6 assaulting the deceased with spear and A3 and A5 were assaulting with axe and A Nos. 3 and 4 were standing nearby and that Sharanavva came to be assaulted when she tried to intervene and that the accused went out through the main door."

32. This evidence given by P.W. 22 does not make any sense since, if accused 3 was assaulting with an axe, he could not also have been standing nearby doing nothing. The recording of this part of the evidence of P.W. 22 is, it is clear, inaccurate.

33. The possibility of such errors is what requires a judge who records evidence, not only to refer to the persons mentioned by the witness with reference to their ranks, either as the accused or as the witnesses, but also to refer to them by name so that, on an important and vital matter such as this, such egregious mistakes are not committed.

34. However that may be P.W. 4 stated that what she saw she told the police and that what she told the police were recorded during investigation. But it is clear that her attention was drawn to those earlier statements only for the purpose of contradiction and those statements did not have the status of substantive evidence. So those earlier statements cannot be depended upon to support the prosecution story and those statements themselves were not brought on record through the process of contradiction. So, the evidence of P.W. 22 that she did make some earlier statements in contradiction of what she stated before the Court of Session is of no use to the prosecution.

35. P.W. 5 who did not also support the prosecution story and who is the daughter of P.W. 2 stated that when she heard the cry of her mother on the night of the occurrence from a room where she was sleeping she came out and saw Parvathamma with injuries on her person. She stated that she did not know who killed Parvathamma. As in the case of the other witnesses she was asked about her previous statements before the Police whether she did not tell the Police that accused 1 and 6 were seen by her attacking Parvathamma with 'spear' accused 3 and 4 with "axe", while some others were on the roof, she denied having made those statements. She was also asked whether she did not tell the police that she was sleeping on a cot near the cot of her mother along with P.Ws. 3 and 4. She denied that she made any such statement.

36. P.W. 18 is the next witness to be considered in the present context. He gave evidence that the deceased Parvathamma was sleeping in the court-yard, but that he was sleeping outside by the side of the main door. He stated that about eight or nine hours after night-fall, he heard P.W. 2 Sharanamma weeping and that when he went in, the assailants "had cut the deceased and gone away" and that he did not see them as it was cloudy. He added that he saw the assailants going but could not identify them. He was shown the accused before court and he stated that he did not see any of them and that the night was a "moonlit night", In cross-examination by the Public Prosecutor which was permitted, he was asked about the statements made by him before the police. He stated that he told them the truth, that he was not assaulted or frightened by the Police to make a statement, that he did not state before the police that he was sleeping on the katta inside, that he stated before the Sub-Inspector that accused 1 and 2 had assaulted the deceased with 'spear' and accused 2 and 5 assaulted the deceased with axes and accused 3 and 4 were standing near the deceased, and that the accused went back through the main door.

37. One thing I should mention here is that as in the case of the other witnesses, there is a discrepancy between the English version of the evidence and the Kannada version. According to the Kannada deposition, what was stated by P.W. 18 was that he told the Police that accused 1 and 6 used a spear, that accused 2 and accused 5 used axes while accused 3 and 4 were standing

nearby. It is indeed perplexing how in the case of witness after witness there is a discrepancy between the English deposition and the Kannada deposition. It is extremely regrettable that it should be so.

38. Now, in the case of P.W. 18, whereas the persons who used the spear were according to the English deposition, accused 1 and 2 those who used the spear as stated in the Kannada deposition were accused 1 and 6. But both in the Kannada and English depositions, the persons who used the axes were accused 2 and 5 and those who were standing nearby were accused 3 and 4. Since what was read over to the witness and admitted by him to be correct was the Kannada deposition and since the witness gave his evidence in Kannada, the evidence into which we should look if there be a discrepancy between the English deposition and the Kannada deposition, would be the Kannada deposition. So we must take it that what was admitted by P.W. 18 was that he told the police that accused 1 and 6 were the persons who used the spear, accused 2 and 5 were the persons who used axes and accused 3 and 4 were the persons who were standing near the deceased and that what he told the police in that way was the truth.

39. It is surprising that it did not occur to the Sessions Judge that what he had recorded was palpably inaccurate and makes no sense. The witness could not have said that accused 1 and 2 used the spear and that accused 2 and 5 used the axes. Accused 2 could not have used a spear and axe simultaneously. It is clear from the Kannada deposition that what the witness stated was that he told the police that accused 1 and 6 used the spear and accused 2 and 5 used the axes and that makes perfectly good sense.

40. It should be observed that the Sessions Judge has not exercised that attention which was necessary on his part when he was recording the depositions of the witnesses before him. Not only did he commit a mistake of this kind in the case of P.W. 18, he also committed a similar mistake when he was recording the deposition of P.W. 22 as already demonstrated. We are astonished that such inattention should have been at all possible when the Sessions Judge was recording evidence so vital both for the prosecution and the accused.

41. The real question is whether it is at all possible for the prosecution to place any dependence upon the admission made by P.W. 18 in the course of his cross-examination. The question arises in this way. P.W. 18 told a story in his examination-in-chief before the Court of Session that he did not see the assailants and could not identify them. It is not surprising that the Public Prosecutor asked for permission to cross-examine the witness so that from such cross-examination the prosecution could establish the truth. It was permissible for the Public Prosecutor to get in the course of such cross-examination the principal purpose of which is to put leading questions to I the witness and also to confront the witness with his previous statements to get if possible answers favorable to the prosecution. It is to be observed that Section 154 of the Evidence Act which does not speak of a "hostile" witness as sometimes a witness who is permitted to be cross-examined by the party who calls him is described, confers power on the court to permit the cross-examination of a witness by the party who calls him. The fact that such cross-examination is permitted does not mean that the witness who is cross-examined is for all purposes an untrustworthy witness and that his evidence and no part of it can be regarded as representing the truth, A witness who is unwilling to speak the whole truth when he is called by the prosecution to support its case, but gives an inaccurate or incomplete version of what he is supposed to have seen may in the course of his cross-examination either feel persuaded or

compelled to complete the story and to state facts about which he gave no evidence in examination-in-chief. It may also happen that a prosecution witness contradicts himself completely in the course of his cross-examination, and, having stated nothing about the incident about which he was expected to speak, says all about it in his cross-examination. The question before the court in either event would be to decide which part of his testimony is false and which part of his evidence is true. Provided there is the required degree of conviction in the mind of the court that a particular part of the testimony of a witness whether it forms part of the examination-in-chief or cross-examination is true, there is nothing which can constitute an impediment to the court acting upon such evidence in support of its conclusion.

42. That being the true position, that the Public Prosecutor himself sought permission to cross-examine P.W. 18 could be no reason for discarding the testimony of P.W. 18 altogether. It is open to us to say even after he was permitted to be cross-examined that some part of his testimony is acceptable while others are not provided we are convinced that some part of the evidence could be so acted upon.
43. Now, the question which arises in this case is whether any part of the evidence given by P.W. 18 in the course of his cross-examination can be treated as substantive evidence and whether that evidence strikes us as acceptable evidence.

44. P.W. 18 was asked in his cross-examination by the Public Prosecutor whether he-was examined by the Police during the investigation and he admitted that his statement was recorded at that stage. He next stated that what he told then was the truth. Then, it was elicited from him as to what are those things which he told the police on that occasion. He first stated that he told the police sub-inspector then that accused 1 and 6 had attacked the deceased "with spear". He next admitted that he told the police that accused 2 and 5 similarly 'assaulted' the deceased with axes. What he next stated. was that he told the police that accused 3 and 4 were standing near the deceased. He wound up by saying that he further told the police that the accused went back through the main door.

45. All these statements which were made by P.W. 18 before the police and which were admitted by P.W. 18 as having been made by him were diametrically at variance with, what he stated in his examination-in-chief when he stated that he did not see the assailants and that he could not identify any of them and that he did not then see any of the accused who were shown to him in the court of Session. The fact that P.W. 18 contradicted himself in this way would normally be a ground for impeaching his credit as provided by the third clause of Section 155 of the Evidence Act. But the more serious question to be considered is as to the admission made by him in cross-examination that what he told the police was the truth. Whether by reason of the fact that he told the court of session that what he told the police was the truth and also by reason of the fact that what he told before the Court in his examination-in-chief was at variance with what he stated before the Police, it could be said that there was evidence given by him before the Court of Session that he did witness the occurrence and saw the assailants.

46. The case before us is one in which when after P.W. 18 was confronted with his previous statements he not only admitted that he made those previous statements in the course of the investigation but also admitted that what was mentioned by him at the investigation was the truth. In other words, the effect of his evidence is that the truth was what he told the police and not what he told the Court. His earlier statement was that he did see accused 1 and 6 using a spear on

Parvathamma, that he did see accused 1, 2 and 5 using axes on her and it was true that he saw accused 3 and 4 standing near Parvathamma.

47. The question is whether it could be said that by that process, he gave evidence before the Court of Session that it was true that he saw those six accused at the time of the occurrence and that he witnessed the acts which he attributed to them.

48. When a witness is confronted with a statement made to the Police during investigation under Section 162 of the Code of Criminal Procedure, such contradiction even by the prosecution becoming possible after the amendment of that Section, there may be more than one possibility. The first possibility is that the witness may deny that he made the previous statement; the second possibility is that he admits that he made them; and the third possibility is that he may not only admit the previous statement but he may also state that what he stated before the police was the truth. In the case of the first two possibilities, all that emerges by reason of the contradiction of the witness would be that his credit is shaken and impeached since he is demonstrated to be a person who stated something before the Police and stated something else before the Court. That being so, it would-be impossible for the prosecution to make any further use of that part of the evidence given by the prosecution witness who is cross-examined. That is the clear position emerging from the provisions of Section 162 of the Code of Criminal Procedure which incorporates a very clear embargo upon the use of any statement made by any person to a police officer in the course of an investigation for any purpose save the purpose expressly permitted. The purpose for which its use is permitted is what is explained in the proviso to Sub-Section (1) of Section 162 which states that when such statement or record has been reduced to writing and is duly proved it may be used by the accused and by the prosecution with permission to contradict the witness in manner provided by Section 145 of the Evidence Act. There is of course provision for similar use in re-examination.

49. So, in a case where a prosecution witness is permitted to be cross-examined either denies a statement made in the course of the investigation or admits it, when that statement is used in manner permitted by the proviso to Section 162(1), the use of that Police statement comes to an end and no further use can be made thereof. That is all the use for which that police statement can be employed. But, in a case where a prosecution witness when cross-examined by the prosecution, beyond admitting that he made a police statement adds that what he stated before the police is the truth, that statement which the makes about the truth of what he told the Police, can have little utility since the ascertainment of what according to him was the truth is possible only with the assistance of the statement before the police which cannot be used in that way.

50. If, however the cross-examination of P.W. 18 had been pursued, and, it had been suggested to the witness through a leading question which was permissible, that he had in truth not only witnessed the incident but that what he saw was that accused 1 and 6 stabbed Parvathamma with a spear and that accused 2 and 5 gave blows with axes when accused 3 and 4 were standing nearby, and, if P.W. 18 had admitted what was put to him in that way, then, and only then could P.W. 18 be considered to have given evidence before the Court on those matters. But that was not what was done. It was not elicited from him that he witnessed any of those acts by the accused. What, however, was done was to elicit from him that he had told the police that those were the acts which he saw. It is true that he prefaced his admission that he made his earlier statements to the police with an answer that he told the police the truth. But, he gave no evidence about what

the truth was, which he could have done by telling the Court what he had in effect seen and witnessed. So, the answer elicited from him that what he told the police was the truth, left the matter where it was. That part of his evidence had little efficacy to the prosecution which could not without depending upon what was recorded in the statements given by the witness to the police, employ that answer for any useful purpose. So, the evidence given by the witness that he gave a true version to the police being unintelligible without the aid of the record of his statements made to the police, which however can be used only for the limited purpose specified in the proviso to Section 162(1) of the Code of Criminal Procedure, no support can be available to the theory that by some process, the statements of the witness made before the police had become transformed into evidence given before the Court.

51. Applying these principles to the evidence of P.W. 18, it will be seen from his cross-examination that what he stated was that he spoke the truth when he was examined by the police and that he was not then coerced by the police to make any such statement. What he next proceeded to explain was that he told the police on that occasion. All this only means that he made certain statements before the police which are at variance with the evidence given before Court.

52. So, there is nothing which can dissuade me from the view that P.W. 18 gave no evidence before the Court of Session about his having seen Accused 1 and 6 at the scene of occurrence which become part of the evidence before the Court of Session.

53. The words "nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence" occurring in Section 162(1) of the Code of Criminal Procedure make it plain that no part of the statement of P.W. 18 which he made to the police could be used even in conjunction with the admission made by him in cross-examination that he spoke the truth when he was interrogated by the police as part of the evidence in the case.

54. Although in all cases where a witness is permitted to be cross-examined by the party calling him, an admission made by him that what he stated on a previous occasion is the truth, would of course constitute evidence, such would not be the case where the previous statement was one made to the police during investigation. Such is the effect of Section 162(1) which prohibits the use of a statement made to the police, which, even if used for contradiction is no evidence even for the purposes of corroboration. That is the true position, when, after the contradiction permitted by Section 162(1), there was no successful endeavor to bring on record what could become evidence before the court had the witness proceeded to state, without reference to his statement before the police, that it was indeed true that he had witnessed the occurrence and seen the assailants.

55. It should be observed that P.W. 18 is the only witness amongst the many prosecution witnesses who were permitted to be cross-examined who admitted that he made the previous statements to the Police during the course of which he implicated all the six accused. In the case of all the other witnesses to whose evidence have referred, the unsatisfactory method employed during the course of their cross-examination was merely to ask them whether they had not made the previous statements before the police such as those which were put to them without drawing

attention to their earlier statements.

56. But, it was urged by Mr. Government Pleader that in the case of all those other witnesses during whose cross-examination their attention was not called to their previous statements, we should say that there has been sufficient compliance with the provisions of Section 145 of the Evidence Act, since P.W. 22 the Sub-Inspector did give evidence as to what those witnesses stated before the police. I do not find it possible to accede to this view. The provisions of Section 145 are very clear that there can be no contradiction without attention being also called to those parts of the previous statements which are to be used for such contradiction. In the case of P.W. 18 the need for such attention being called became unnecessary since the relevant parts of the previous statements were admitted by him. But, in the case of the other witnesses, since their previous statements were not admitted by them, it became of course, necessary for the prosecution to call attention to their previous statements which was not done.

57. So also it is with regard to P.Ws. 6 and 9 who, according to the prosecution story, were sleeping outside the house when Parvathamma was killed. While P.W. 6 gave evidence that although he was sleeping with another servant who is obviously no other than P.W. 9 in the cattle shed outside the house, he and his companion woke up when they heard the cries of P.W. 2 Sharanamma and that by then the day had dawned. He added that Sharanamma told him that somebody had murdered the deceased; then we went and brought P.W. 7. He was asked in his cross-examination whether he had not stated before the Police that after he woke up he saw some persons standing on the road and afterwards saw accused 1 to 6 come out of the house through the main door throwing stones at him. He stated that he had made no such statement before the police. No further step was taken by the public prosecutor to establish that he indeed did make such a statement except eliciting later from the investigating Officer P.W. 22 who stated that P.W. 6 told him during the investigation that after the 'hue and cry' in the house and someone else woke up and saw some person standing in the road and accused 1 to 6 coming out of the house from the main door throwing stones at him. P.W. 9 gave similar evidence. His evidence was to the effect that about half an hour before day break, P.W. 2 Sharanamma told him and P.W. 6 that the deceased had been killed and that he did not know who was responsible for the murder. It was put to this witness that he had told the police that when he woke up he saw the accused 1 to 6 emerging from the main door and that he was himself hit with a stone. He denied that statement. All that was done was to elicit from P.W. 22 that he indeed did make such a statement.

58. It would thus be seen that though witnesses gave evidence on behalf of the prosecution about the incident, witnesses 1, 3, 4, 5, 6, 9 and 18 disown all knowledge about the identity of the assailants. Among these seven witnesses barring P.W. 18 the other six witnesses even denied that they had made any statement to the police which did not fit into the story they told before the Court of session. P.W. 18 was the only person who admitted his previous statements to the police which were imputed to him.

59. In the case of the other six witnesses who did not admit their statements before the Police when their previous statements were indeed shown for purposes of effective contradiction, it cannot even be said that there was any contradiction such as what is permitted by the proviso to Section 162(1) of the Code of Criminal Procedure. But, in the case of P.W. 18 since he did admit his previous statements which were at variance with the evidence given by him before the Court of session, the process of contradiction became complete and that is where the matter stands.

60. I have no doubt in my mind that notwithstanding the defective procedure adopted by the Public Prosecutor in the cross-examination of P.Ws. 1, 3, 4, 5, 6 and 9 these six witnesses were not speaking the truth. That the Sessions Judge had also come to think that they were not desirous of speaking the truth is clear from the fact that be permitted the public prosecutor to cross-examine them. That they are therefore, untrustworthy witnesses who were not willing to reveal what they had seen is sufficient ground for keeping aside the evidence of these six persons. In the case of P.W. 18 who however not only admitted that he had made those previous statements which were at variance with the evidence given by him before Court, it does not appear to me that his evidence could have any better use for the prosecution than the evidence of the other six witnesses. All that can be said in the case of P.W. 18 is that he has been contradicted by the prosecution and all that emerges is that he told the police a story different from the evidence which he gave before the Court. But since the statements of P.W. 18 before the Police have no evidentiary value and that would e the position notwithstanding the further tact that he stated in the course of his cross-examination that he told the police the truth, those previous police statements have no purpose to serve except to establish a variation between the two stories told by him. Whatever the evidence given by him in cross-examination his evidence must therefore, be kept aside as being of no use whatsoever to the prosecution.

61-67. It should be observed here that while P.Ws. 1, 4, 6 and 18 stated in the course of their evidence that when they went into the Court yard where Parvathamma and Sharanamma were sleeping on hearing the cries of Sharanamma she told them that somebody killed Pravathamma, P.Ws. 3, 5 and 9 gave no such evidence. It is obvious that the attempt made by P.Ws. 1, 4, 6 and 18 was to make it appear that even Sharanamma did not know who the assailants were; this part of their evidence which, in my opinion, is entirely untrustworthy and is as undependable as the other parts of their evidence.

68. One thing which is very clear from the depositions of these witnesses is that when they were examined before the Court of session, nearly nine months after the date of the incident, they had by then for some reason ceased to be witnesses of truth. On theory which has been suggested to some of these witnesses in their cross-examination was that they become pusillanimous, swayed by apprehensions about their own personal safety fearing that they would themselves court some kind of danger by adherence to the story told by them on the earliest occasion. Whatever may be the reason for what has happened, it is unfortunate that the evidence of these numerous witnesses are not of any assistance to the prosecution.

69. This case best illustrates the dangers emanating from the omission on the part of the committing magistrate to record the depositions of those persons who profess to be eye witnesses, in disobedience to Section 207-A of the Code of Criminal Procedure. If the committing Magistrate had recorded the evidence of all these eyewitnesses during the inquiry made by him, and, if they had supported the prosecution story, the prosecution would have had the benefit of Section 288 of the Code of Criminal Procedure which is not now available to the prosecution by reason of the disobedience to the provisions of Section 207-A of the Code. While the committing magistrate did not so record the evidence of those eye witnesses, why there was no insistence on the part of those who were in charge of the prosecution on obedience to the provisions of that Section is surprising.

70. It is in this situation that the Sessions Judge depended almost entirely upon the evidence of P.W. 2 Sharanamma in support of the conclusion reached by him that accused 1 to 3 and 6 were the persons who killed Parvathamma. Her evidence was that she and Parvathamma were both sleeping on the same cot in the Court yard of Parvatnamma's house on the date of the incident. She stated that she and her daughter were both living with Parvathamma for about four or five years before Parvathamma was killed. She proceeded to state that the servants of Paravatharnma, who were obviously P.Ws. 6 and 9, slept outside and that she and the deceased slept on the same cot inside the court-yard after the deceased Parvathamma had bolted the front door from inside. She stated that P.W. 1 was sleeping inside the 'Padasala (room) and P.Ws. 3, 4 and 5 were sleeping in smother room. She then gave the following evidence :

> "The deceased was assaulted and as a result of the disturbance I got up. I could identify from their voice that the assailants were accused numbers 1 to 6 as they used to often come to Parvathamma's house. (The witness gives out the names). I could not see what weapons they had. It was cloudy and hence there was no clear moon light. I cannot see properly at night. Thereafter, they went away through the main door."

71. This witness, like the other seven witnesses to whose evidence I have already referred, was cross-examined by the public prosecutor presumably on the ground that she did not tell the whole truth. She was of course asked whether she did not state before the police that P.Ws. 3 and 4 were also sleeping on a different cot inside the court-yard and by another question she was asked whether she did not tell the police that accused 1 and 6 hit the deceased on the neck with spears and that accused 2 and 5 hit the deceased on the face with axes and accused 3 and 4 were standing near the wall. She was also asked whether she did not tell the police that there were other persons standing on the roof of the house.

72. The witness denied that she made any of these statements when she was interrogated by the police during the investigation and when she was permitted to be cross-examined, the same inadequate procedure was adopted for contradicting the witness with the aid of the statements made by her to the police during the investigation. Although the witness repudiated the truth of the suggestion that she had made those statements to the police, no effort was made to confront her with those statements or to draw attention to them. What was done was as in the case of other witnesses, to elicit from P.W. 22 that she did make those statements before the police.

73. Another method adopted for contradicting this witness was to ask her about a statement recorded under Section 164 of the Code of Criminal Procedure which she had made to a magistrate. Those statements were similar to the statements which according to the prosecution had been made by her to the police. Although the witness admitted that she made a statement to the Magistrate under Section 164, those parts of the statements which were at variance with the evidence given by her before the Court of session, were not brought on record; nor were they shown to the witness.

74. But the Sessions Judge was disposed to take the view that P.W. 2 did know that accused 1 to 3 and 6 were at least four of the persons who had killed Parvathamma.
He thought that the evidence given before him by her that she had recognised them as some of the assailants was acceptable evidence. That is what he did notwithstanding the fact that the

witness stated that she was able to identify the accused 1 to 6 by their voice. The reason assigned by the sessions judge for not convicting accused 4 and 5 on the basis of the evidence given by the witness was that the names of these two accused were not to be found in Exhibit P. 3 which was the first information prepared by P.W. 7 and transmitted by him to the police. The Session Judge thought that the fact that those two names were not to be found in Exhibit P. 3 which could be used either for corroboration or for contradiction was a circumstance the benefit pf which could be claimed by accused 4 and 5, but he had no doubt that she knew that accused 1 to 3 and 6 were among those who killed Parvathamma or who attacked her whatever may be the weapons which were used by them. Mr. Devaraj, the learned Advocate appearing for the appellant sought to make this reasoning employed by the Sessions Judge the target of criticism. His first submission was that the sessions judge overlooked the very familiar principle that nothing was more unsafe than to depend upon the evidence of a witness who speaks to the commission of an offence that he was able to identify the persons who had committed the offence through their voice which he heard. Mr. Devaraj has asked us to more than one decision supporting his submission that evidence of that description is not always safe to act upon. Our attention was asked in this context to *Arshed Ali v. Emperor*[2], *Bhagtu v. Emperor*[3], and *Nga Aung Khin v. Emperor*[4], I do not understand any of these decisions as laying down any inflexible rule that in no case could the evidence of a witness who has identified the assailant through his voice form foundation of a conviction. The question whether such evidence is or is not sufficient to support the conviction must depend upon the facts and circumstances of the case. It would be seen from the three cases on which Mr. Devaraj depended that there were other features of the prosecution case and other infirmities in the evidence of the witness who depended upon the voice which was heard, which induced the conviction in the mind of the Court that the evidence was not acceptable or safe.

75. In Arshed Ali's case, (1926) 30 Cal WN 166 it was observed thus :

> "Whether the appellant before us was guilty of abetting this murder depends on the credibility of the evidence that he was recognized by his voice. Though the jury have unanimously convicted him, this being a reference under Section 374, Criminal Procedure Code we must be satisfied that their finding of fact is

[2]30 Cal WN 168
[4] AIR 1937 Ran 407
[3]29 Cri LJ 758 : AIR 1928 Lah 925

> justified by the evidence on the record. After full consideration we are compelled to hold that there are several points in the case which make It unsafe to rely on this evidence."

His Lordship then proceeded to point out that there was some kind of positive misdirection on some other piece of evidence and also non-direction. Having regard to all those various other infirmities in the case His Lordship proceeded to observe :

> "There are other reasons besides the delay in informing the authorities which make us suspect the truth of the story of recognition apart from the question as to how far such recognition can support the conviction. It is most improbable that when a murder is being committed the murderer's companion should call to him by name. This suggests that the actual words that may have been heard,
> have been altered to strengthen the case against Jabed Ali who is absconding."

The learned Judge proceeded to discuss the variations in the course of her evidence and that was the process by which the evidence of recognition was discarded.

76. In Bhagtu's case, 29 Cri LJ 758 : AIR 1928 Lahore 925 the evidence of the witness who stated that he recognised the accused by their voice was discarded on the ground that he had not mentioned the names of the assailants at the earliest point of time.

77. Then again in Khin's case, AIR 1937 Rangoon 407 what really was responsible for the rejection of the evidence of recognition by the voice was that the witness giving that evidence about that identification, when examined by the headman not long after robbery, never told him at that stage that she had recognised one of the robbers by his voice.

78. Although it is true that some of the observations in two of the cases do lend sustenance to the proposition that evidence of identification or recognition through the voice is sometimes hazardous to depend upon, no one can deduce from any of the three cases which I have discussed, a principle of universal application that such evidence even if it is otherwise acceptable should be dismissed as insufficient or unacceptable. In my opinion the weight to be attached to such evidence must depend upon a multitude of factors and circumstances, the question being whether the degree of conviction in the mind of the Court is such as to render it acceptable and trustworthy.

79. In this case although P.W. 2 stated in me course of her evidence that she had recognised accused 1 to 6 as the assailants by their voices and although she stated that she was familiar with their voices by reason of their frequent visits to the house of Parvathamma, that part of her evidence was not subjected to any kind of cross-examination whatsoever. Mr. Devaraj, the learned Advocate for the appellants had to admit that the cross-examination was not directed at all towards that part of the evidence of the witness. It is no doubt true that the witness had been permitted to be cross-examined by the public prosecutor and it is true that the cross-examination was allowed after the witness had given evidence about the recognition of accused 1 to 6 by their voices. The endeavour on the part of the public prosecutor was to prove a statement made earlier by the witness to the police and to a magistrate in which she had assigned specific and definite acts to the accused. But I do not find even in this earlier statement anything which is at variance with that part of the evidence of P.W. 2 which was given in examination in chief that she was able to recognise the assailants by their voices.

80. It is of course plain that the mere fact that P.W. 2 was permitted to be cross examined by the public prosecutor does not mean that every part of her evidence is liable to be discarded. It seems to me that there is no sufficient ground for dissenting from the view taken by file sessions judge that P.W. 2 had recognized the accused 1 to 3 and 6 by their voices. That is, we should say, particularly, since, that part of her evidence was not made the subject matter of any kind of cross-examination.

81. The infirmity on account of which the High Courts of Calcutta, Lahore and Rangoon discarded the evidence given in each of the cases before them that there was recognition by the voice does not exist in the case before us. The most serious infirmity in each of those cases was that the witness who gave evidence never mentioned anything about it at the earliest point of

time although there was opportunity to do so. On the contrary when P.W. 2 gave her earliest version about the incident she did tell P.W. 7 who prepared the first information that accused 1 to 3 and 6 along with four others were the persons who killed Parvatharnnia. This statement was made by P.W. 2 to P.W. 7 who prepared the first information Exhibit P. 3 during the early hours of the morning of May 8, 1963 after he was sent for to the scene of occurrence. This first information was transmitted at 7 A.M. to the police patil P.W. 14. p. W. 14 gave evidence that at or about 7 or 8 A.M. on that day Exhibit P. 3 was handed over to him on the basis of which he prepared his own report Exhibit P. S. He sent Exhibits P. 3 and P. 8 to the Jewergi Police Station twelve miles away, where it was received by P.W 22 the sub-inspector at 12 noon. There can thus be no doubt that what is stated in Exhibit P. 3 which is to the effect that accused to 3 and 6 were some of the assailants who killed Parvathamma constitutes a very satisfactory piece of corroboration of the evidence given by P.W. 2 that she did recognize these four persons along with accused 4 and 5 as the persons who killed Parvathamma.

82. There is one other circumstance which lends further assurance to the truth of her evidence. She stated that when Parvathamma was killed she woke up and started shouting whereupon the assailants beat her on the hands and back. This is what she stated although she did not name the assailants. Now P.W. 2 was examined by the Doctor P.W. 1.0 to whom she was sent for treatment on May, 11, 1963 and he did observe on her right hand a swelling of which he made a record in the register Ex. P. 5. What again is another piece of corroborating evidence is what is revealed by the evidence of P.W. 15 who is a witness who has attested the mahazar which was prepared at the scene of occurrence. His evidence was that there were three cots in the Court-yard where Parvathamma was killed and on one of them there were two quilts both of which were strained with blood. Exhibit P. 10 was the mahazar attested by him and in which there is a record made to that effect. This cot is obviously the one upon which both P.W. 2 and Parvathamma were sleeping when Parvathamma was attacked and killed.

83. There can thus be no doubt that Parvathamma and P.W. 2 were at least two of the persons who were sleeping in the Court-yard on the same cot when Parvathamma was attack-ad by the assailants. P.W. 2 explains that on account of her defective vision and also on account of the fact that the night was cloudy night there being no clear moonlight, she could not identify the assailants except by their voices and that she could not also state what weapons those assailants held. But whatever may be the weapons which the assailants held, that Parvathamma died in consequence of acts of violence inflicted upon her not only by a sharp instrument but also by blunt instruments such as the butt end of axes as stated by P.W. 10 is what becomes more than manifest from his evidence. His evidence was that there was one incised wound, and ten lacerated wounds on the body of Parvathamma. The incised wound was on the neck while the lacerated wounds were either on the head or on the face or on the wrist. These injuries which were noticed by P.W. 10 on May, 9, 1963, during the autopsy conducted by him, do lend further support to the evidence given by P.W. 2.

84. In my opinion we should scarcely feel justified in excluding the evidence of P.W. 2 which is of such great use to the prosecution and the truth of which has not been challenged in cross-examination. This is not a case in which her evidence can be kept aside on the mere ground that what enabled her to identify the assailants was the fact that she heard their voices. I am not prepared to discard her testimony on, that extremely slender foundation when the : numerous other features of the prosecution case] offer such great support to her story.

85. There is also the evidence of P.Ws. 7 and 8 which establishes a very powerful motive on the part of the accused 1 to commit the offence with which he and the other appellants were charged. Whatever may be the other parts of the evidence of these two witnesses who were unwilling to come out with the entire story with regard to the offence itself, what is acceptable evidence is their version of what happened a short time before the incident in the course of which accused 1 made extremely disgusting proposals to P.W. 8. P.W. 7's evidence also further establishes that Parvathamma was persuaded to embark upon some kind of investigation into that incident and that she indeed in pursuance thereof did send for accused 1. This, according to the evidence of P.W. 7, she did on a Monday which was the day previous to the day on which she was murdered.

86. Although this motive by itself cannot take the prosecution case very far, in a case like this where there is other evidence satisfactorily implicating accused 1 to 3 and 6, this motive constitutes a background from which the pro-section can surely derive sustenance for its case.

87. The sessions judge in my opinion was next right to also depending upon the fact that from May 7, 1963 till June 17, 1963 accused 1, 2 and 3 were absconding. He was also right in depending upon the further fact that accused 6 was absconding even on July 10, 1963, when the charge sheet was presented against him. P.W. 17, a head constable who was deputed to make a search for the accused made as many as six reports which are Exhibits P. 15, P. 16, P. 17, P. 18, P. 19 and P. 20 in the course of which he stated that these four accused were absconding and that all his efforts to trace them had been unsuccessful. Exhibit P. 21 is a report which he made and about which he gave evidence that he apprehended accused 1 to 3 in a jungle in a place known as Bhimaraya Gudi. Accused 6 was arrested on July 7, 1963.

88. In regard to accused 6, the sub-inspector P.W. 22 gave evidence that accused 6 was absconding even on July 10, 1963 when the charge sheet was placed and that the endeavor to secure him was continued. He added that his subordinates produced accused 6 before him on July 12, 1963. Although abscondence of this description by itself is not of very great use to the prosecution, such abscondence in this case in which there is other satisfactory evidence to implicate these four accused was rightly taken into consideration by the sessions judge for reaching the conclusion that it was established that accused 1 to 3 and 6 had committed an offence punishable under Section 302 read with Section 34 of the Penal Code. Mr. Devaraj however depended upon the evidence given in cross-examination by P.W. 6 that all the accused were in the village throughout. But it is clear that he is an untrustworthy witness as already explained and that no dependence could be placed upon the evidence given by him to that effect.

89. In the course of his examination under Section 342 of the Code of Criminal Procedure, accused 1 denied the incident about which P.Ws. 7 and 8 gave evidence. But the evidence of P.Ws. 7 and 8 fully establishes that incident. The only other thing done by the accused in the course of their examination was to deny the offences altogether.

90. In my opinion the sessions Judge was right in concluding that Parvathamma was killed by accused 1 to 3 and 6 in furtherance of the intention of all of them and that they were therefore, guilty of the offence punishable under Section 302 read with Section 34 of the Penal Code. Mr. Devaraj did not very rightly contend that although there was a charge against these four accused that they had committed an offence under Section 302 read with Section 149 of the Penal Code,

there was any impediment to the sessions judge entering a conviction under Section 302 read with 34 of the Penal Code.

91. Mr. Devaraj did not dispute that if the evidence of P.W. 2 is believed and if it is found that accused 1 to 3 along with accused 6 had committed the offence of murder in the circumstances stated by P.W. 2, the conviction for the offence under section 457 of the Penal Code, has to be confirmed. In my opinion he is right in making the submission.

92. This appeal should therefore, be dismissed and it is so ordered.

Ahmed Ali Khan, J.

93. I agree.

Appeal dismissed.