KERALA HIGH COURT

State of Kerala

Vs

Ammini

Criminal Appeal No. 475 of 1982

(K.T. Padmanabhan, Thomas and Balakrishnan, JJ.)

01.04.1987

JUDGMENT

K.T. Padmanabhan Thomas, J.

1. A woman by name Merly and her two little children were found lying dead in their bed-room, when her husband (Tomy - P.W. 2) reached home at about 9.30 p.m. on 23-6-1980. The death was due to poisoning with Cyanide. The police charge-sheeted Ammini (widow of Tomy's brother) and three other accused for the murder of Merly and children. The Sessions court, after a protracted trial, acquitted the accused. This appeal has been preferred by the State against the said acquittal A Division Bench of this court, referred the case to the Full Bench "in view of the importance of the questions of law raised in this appeal......"

2. A synoptical resume of the prosecution version is this : Ammini, the first accused, was nurturing vengeance against Tomy and she longed for the extermination of the entire family of Tomy; a criminal conspiracy was hatched for the said purpose as between Ammini and the other three accused and a scheme was evolved by them to murder Tomy and his wife and their children (children are Sona - daughter aged 8 and Rana - son aged 5). In pursuance of the scheme Ammini went to Tomy's house at about 7.30 p.m. on 23-6-1980, as though it was a casual visit; she was followed by two of the other accused (third and fourth accused); those two accused caught hold of Merly and forced her to open her mouth and one of them emptied a packet containing cyanide into her mouth; in the meanwhile Ammini took Sona and Rana to the next room and with the help of one of the other two accused cyanide was forcibly stuffed into the mouth of the children also. The victims did not survive long as they died almost instantaneously. Ammini left the house, as pre-planned and the other two remained there since they were to wait till the arrival of the second accused, so that the three could forcibly administer cyanide poison to Tomy also on his returning home. But the scheme as against Tomy fizzled out on account of an were injured as Merly bit him during the course of the ravageous induction of poison into her mouth and that accused became panicky at the thought that the lethal poison might overpower him also. Hence, the third and fourth accused briskly left the house. When the second accused reached Tomy's house, he did not find his expected companions and so he did not venture to remain there. Thus Tomy accidentally escaped from the tentacles of the murderers.

3. As the prosecution story consists of a large number of events and as the evidence for prosecution is voluminous, it is necessary to state some further details of the prosecution case : Tomy and his brothers were in affluent circumstances doing business at Alwaye. Ammini's husband, Francis, and Tomy started a partnership business in piece-goods by name "Rani Silk House" and later they started another one by name "Maharani Textiles" in 1969 a third partnership was formed under the name "Rani Umbrella Mart" (which was later renamed as Rani Cut Piece Centre) in which Francis, Merly and Josephine (P.W.26 - eldest sister of P.W.2) were partners. The affluence in which Ammini and her family lived had a set back in 1975 when her husband Francis passed away. Ammini was then inducted as a partner into the first two firms in place of her husband. But she was not allowed to join the third firm on the ground that her husband had during his lifetime, overdrawn his investment from that business. This was the genesis of Ammini's grouse against Tomy. Ammini was not satisfied with the amounts given to her by Tomy and she used to express her resentment over the inadequacy of amounts given to her.

4. In June, 1979 Ammini was hospitalised (at Samaritan Hospital in. Alwaye) for hysterectomy. Karthikeyan, the second accused (a Lineman in the Telephone Department) who was residing in a room situated adjacent to the residential compound of Ammini, was a regular visitor to the hospital to see Ammini. As the scandal was that Ammini and the second accused were in liaison, Tomy questioned Ammini about the propriety of the second accused visiting her. Ammini had reasons to believe that it was Merly who conveyed this news to Tomy. The animosity germinated in Ammini's mind naturally grew wilder and Merly also became a target.

5. Ammini and the second accused wanted to do something for the annihilation of P.W.2 and his family, and first they decided to resort to occult methods. Though they approached persons who practised black magic or witchcraft for the said purpose, those methods did not yield the desired result. In the meanwhile certain other developments accelerated Ammini's determination to bring about the end of P.W.2 and his family. Once Ammini visited Maharani Textiles in May, 1980 to take a piece of polyester clothing for stitching a safari suit for her youngest child. But Tomy told her to take a cheaper variety of cloth. When Ammini insisted on getting the costly variety, Tomy angrily suggested to the Salesman to supply the entire lot of polyester cloth to her. At this Ammini felt humiliated and she left the shop in a huff. This is only one of the events which added fuel to fire.

6. By then, Ammini got one more associate (Johny - third accused) who was enticed into the circle of conspiracy with an offer of a handsome amount on successful completion of the scheme of extermination. Having failed to achieve the object through witchcraft, they wanted to resort to more effective methods and so they decided to administer poison. The third accused procured "dalf" (which is a variety of insecticide). Ammini managed to get a pair of gloves and some chloroform. Though Ammini and the third accused went to Tomy's house in the evening of 29-5-1980 to administer poison, the plan did not succeed due to the accidental arrival of P.W.38 (who is an employee in Rani Textiles) in the house.

7. At this stage, Thomas (the fourth accused) was also enlisted in the group of conspirators. He was allured into the circle with a bumper offer of a lakh of rupees from the proceeds of Rani group of textiles. The fourth accused procured insecticides such as Parataph and Eccalex which

are more effective than dalf. In the evening, on 10-6-1980, Ammini went to Tomy's house pursuant to a plan that third and fourth accused should follow her and help her in administering the said poison. But the destined end of the victims was not that date and hence the plan again got fizzled out due to the unexpected presence of P.W.26 (Josephine) in Tomy's house.

8. The conspirators chalked out a better result oriented method for the extermination of Tomy and family. The second accused told them that potassium cyanide is a sudden acting poison and that goldsmiths are likely to be in possession of that poison (potassium cyanide or sodium cyanide is used for electroplating of gold and hence goldsmiths are supposed to be in possession of that variety of cyanide). The fourth accused was entrusted with the task of procuring potassium cyanide. After some hectic efforts he succeeded in getting it from a goldsmith (P.W.27). As the conspirators were not prepared to take one more chance, they tested the potency of the poison on a cat which the third accused brought to Ammini's house, and the cat suddenly died and its dead body was secretly buried in the compound.

9. The final stage was set. In implementation of pre-arranged plan for extermination Ammini went to Tomy's house at about 7 p.m. on 23-6-1980 and engaged Merly in conversation. The third and fourth accused reached the house pretending that they wanted to see Ammini. The fourth accused requested Merly to get him some water to drink and the innocent lady, without any inkling of the drag-net cast over her, turned to take a glass of water. Suddenly she was caught hold of by the third and fourth accused from behind. When she opened her mouth as pressure was applied on her neck, the dreaded poison was stuffed into her mouth. In the scrambling Merly gave a bite and the third accused sustained two or three minor injuries on the fingers. But the poison acted immediately and Merly died on the spot. As planned, Ammini took the children to the next room and with the help of the third accused the lethal poison was administered to them also. They also died instantaneously. Ammini, before leaving the house, took away a gold chain from the almirah. The floor of the room was cleaned and the outer side of the almirah was dusted to wipe away any finger impressions. We have already narrated earner how the plan fizzled out as against P.W.2.

10. Tomy came as usual from his shop without any premonition about the most crucial tragedy brought to his life, and without any inkling about the eerie scene which he was about to see in his house. As there was no response from inside on his arrival, he went inside and saw the bizarre sight, though incredible to him at the first glimpse, but realised that what he saw was a reality. The screaming sound which instinctively came out of him invited the attention of some of the neighbours. Later the dead bodies were removed to the Government Hospital, Alwaye, where the doctor who examined the bodies confirmed that they were dead.

11. The F.I.R. was for "suspected poisoning". But a few days later police reported that it is a case of murder by poisoning. Ammini and the second accused were arrested on 29-6-1980. The third and the fourth accused were arrested on 2nd and 5th July, 1980, respectively. Some material objects were recovered pursuant to information's received from the accused. The fourth accused gave a confessional statement before the Judicial Magistrate of the First Class, Perumbavoor. On completion of the investigation, the police laid final report in court for offences under Sections 120-B, 452, 303, 201, 109 and 114 of the Indian Penal Code, besides the offence under Section 411 Indian Penal Code as against the second accused alone for having received a gold chain from Ammini which actually belonged to Merly.

12. It appears that the trial of this case covered a very long period, evidence was started on 1-9-1981 and the trial was closed only on 7-6-1982. The Sessions Judge who pronounced judgment had occasion to try the case only from the stage after the completion of recording the prosecution evidence. As many as 95 witnesses were examined and 160 documents and 54 material objects were marked for prosecution, while accused examined 5 witnesses and marked 24 documents on the defence side. The accused denied all the incriminating circumstances when they were questioned under Section 313 of the Criminal Procedure Code (for short 'the Code'). The fourth accused retracted from the confession recorded by the Judicial Magistrate of the First Class, Perumbavoor.

13. The learned Sessions Judge found that the three deceased died of cyanide poison; he ruled out the possibility of the deceased having committed suicide and also the possibility of accidental consumption of poison. The Sessions Judge, it appears, was inclined to believe the prosecution version that cyanide poison was forcibly administered to them. In other words, the Sessions Judge did not repudiate the prosecution theory of homicide. But the Sessions Judge was disinclined to rely on the rest of the prosecution evidence, including the confession recorded by the Judicial Magistrate of the First Class, Perumbavoor. As he had no occasion to see the prosecution witnesses and observe their demeanour, the Sessions Judge appears to have consoled himself with the following observations in the penultimate paragraph of his lengthy judgment :

> "To give a decision upon the various questions of fact and law raised in this case I had necessarily to wade through a heavy mass of oral and documentary evidence which I had no opportunity to hear or see at the time when the evidence was recorded during the trial of the case.....I do not claim that my appreciation of the evidence on record and the judgment I have given today are absolutely free from all possible infirmities; but I can get consolation by reminding myself of the fact that there is a court of appeal before which, the party aggrieved by the verdict I have given today, can challenge this judgment both on questions of fact as well as on questions of law".

14. One of the items of prosecution evidence is Ext.P155, the report of the Joint Director of Forensic Science Laboratory, Trivandrum (Dr.P. Madhava Kaimal). He conducted chemical examination on the material objects forwarded to him through the Magistrate's court concerned and the result of his analysis is mentioned in the aforesaid report. But Dr. Madhava Kaimal was not examined in the trial court as the prosecution, perhaps, wanted to invoke the provisions of Section 293 of the Code. But the learned Sessions Judge found that Joint Director of a Forensic Science Laboratory of the State is not one of the experts mentioned in Section 293(4) and hence his report cannot get the special advantage of the provision. To obviate any possible technical difficulty for the prosecution on account of such an interpretation placed by the Sessions Judge, the Public Prosecutor filed a petition in this court for permission to examine Dr. Kaimal as a witness at this appellate stage. The prayer was granted and Dr. Kaimal was examined as P.W.96 and he was cross-examined on behalf of the respondents. With the examination of P.W.6 there cannot be any possible contention now that Ext.P 155 is inadmissible in evidence. However, we considered the legal position whether the report of a Joint Director of Forensic Science Laboratory of the State is entitled to the special advantage envisaged in Section 293 of the Code.

The section provides that "any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis" may be used as evidence in any trial. Sub-section (4) contains a category of experts to whom the section applies. Through clause (2) of the sub-section "the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory have been brought within the ambit of the section. It is important to note that Parliament by Criminal Procedure Code (Amendment) Act 45 of 1978 inserted the words "Deputy Director or Assistant Director" in Clause (e) of the sub-section. If the Assistant Director's report is given the special advantage provided in the section, it would be preposterous to say that the report of the Joint Director cannot have the same advantage. A Joint Director is also a Director, and hence there was no need to separately mention that office in the clause, as the office of Director is specifically mentioned therein. The Sessions Judge is therefore clearly wrong in holding that a Joint Director "is still out of the picture so far as Section 293(4) of the Code is concerned." We have no doubt that Ext.P 155 should have been treated as legal evidence even without examination of the Joint Director who signed it.

15. The learned Advocate General, who argued for the State, made scathing attacks on the reasoning's made by the Sessions Judge for rejecting the evidence of the prosecution, some of which the Advocate General termed as grossly unreasonable and others he characterized as absurd or perverse. According to the Advocate General, the Sessions Judge took a pedantic approach to various items of evidence which he rejected, and no court would have adopted such reasons while dealing with the evidence in criminal cases. The Advocate General took us through the entire evidence, though voluminous, and he also took us through the relevant portions of the judgment of the lower court running into 137 paras. Principles and guidelines laid down by the Supreme court while assessing reliability or admissibility of evidence have been misunderstood, or overlooked or even ignored by the Sessions Judge, contended the Advocate General. He went further and expressed that criminal justice unfortunately became a casualty in this case on account of the unrealistic approach adopted by the Sessions Judge and consequently the accused who committed the heinous crime which includes infanticide in a diabolic manner were allowed to go scot free.

16. The prosecution relies on circumstances alone to bring home the guilt of the accused. It is well settled that the cumulative effect of circumstances must be such as to negative the innocence of the accused and the offence must be brought home beyond reasonable doubt. In other words, the chain of circumstances must be so complete as to leave no room for doubt about the guilt of the accused.

17. The following main circumstances have been relied on by the prosecution : (1) The first accused had strong embittered feelings against Tomy which developed into boiling animosity and she wished to exterminate Tomy and family. (2) The first accused and the second accused who were close neighbors approached three persons for performing some black magic or witch-craft for the destruction of Tomy etc. (3) An insecticide by name "dalf" was procured through the third accused and later other insecticides like Parataph and Eccalex were procured through the same person. (4) On two previous occasions the three accused (A1, A3 and A4) visited Tomy's house, but returned from there as other persons were found present in that house on those occasions. (5) A4 procured cyanide poison from a goldsmith, P.W.27 and that was first experimented on a cat by Ammini and A3. The dead body of the cat was buried in Ammini's compound. (6) Ammini, left her house, followed by A3 and A4 at about 6.30 p.m. on 23-6-1980 and they were found

walking to the direction of Tomy's house. (7) Ammini told some pedestrians that she was going to (or had gone to) Tharakan's Hospital to see a patient called Raju, but that statement was false. (8) Ammini was found coming out of Tomy's house at about 7.30 p.m. (9) Merly and children were found dead due to poisoning by cyanide. (10) The deceased would not, in all probabilities, have committed suicide. (11) Accidental consumption of cyanide poison is ruled out. (12) Cyanide poison in all probabilities would have been forcibly administered to them by some external agency, (13) Death would have been between 7.00 p.m. and 9 p.m. on 23-6-1980. (14) A3's finger impression was traced out on a drinking glass seized from Tomy's house. (15) A3 and A4 were seen together near the place of occurrence at about 8.30 p.m. and thereafter at another place not far away. (16) A2 was seen near that house at about 9 p.m. (17) A3 and A4 told the doctor who examined them as to how they sustained the small injuries found on their persons. (18) A gold chain (which belonged to the deceased) was recovered from a concealed place, pursuant to the information supplied by A2 to the police. (19) A mixture containing Parataph and Eccalex was recovered on information supplied by A2 to the police. (20) After arrest of A4, a small bottle containing sodium cyanide was recovered from a tank pursuant to information supplied by him to the police and the place was pointed out by A4. (21) A4 gave a confession to the Judicial Magistrate of the First Class, Perumbavoor about his role and the roles played by the other accused in the crime.

18. The above are the main circumstances, which prosecution sought to prove in this case. Certain other circumstances incidental to the above have also been pressed into service by the prosecution. If those circumstances are found proved, there is no doubt that they would be sufficient to form a complete chain, and the cumulative effect is the proof of guilt of the accused beyond reasonable doubt. So we have to see whether those circumstances have been established on evidence adduced by the prosecution.

19. There is little doubt on the following circumstances which the learned Sessions Judge found in favour of the prosecution and about which the learned counsel for the respondents did not raise any argument there. They are : (1) That the deceased died due to poisoning by cyanide; (2) they would not have committed suicide in all probabilities; (3) the death would not have been due to accidental consumption of cyanide poison; (4) the cyanide poison would in all probabilities have been forcibly administered to them by some external agency and (5) death would have been between 7.30 p.m. and 9 p.m. on 23-6-1980.

20. Ammini's feelings were strongly embittered against Tomy over some of the latter's conduct in connection with the affairs of the partnership business. After her husband's death in 1975, she found it difficult to pull on with the amounts, which Ammini found to be very meagre and which Tomy paid towards her husband's share. She noticed that Tomy was trying to form a new partnership without her and her children, for helping the son of one of the deceased brothers. Besides, P.W.2 (Tomy), another elder brother Paul (P.W.50) also gave evidence about those aspects. Ammini also admitted, during her examination under Section 313 of the Code, that the amounts given to her were too meagre for meeting the expenses of herself and children. Embitterment got escalated and the subsequent conduct of Tomy only accelerated it further. P.W.2 in his evidence mentioned about the visits of A2 in the hospital where Ammini was treated during the post hysterectomy period. When Merly visited the hospital, she found the second accused near Ammini. As a scandal was agog in the locality connecting Ammini with the second accused, Merly reported to her husband about what she saw in the hospital and the latter

questioned Ammini about it. Ammini had resentment in being so suspected. P.W.2 narrated the other episode which took place in May, 1980 when Ammini went to Maharani Textiles to buy a polyester shirting for her son. There is no reason to disbelieve P.Ws.2 and 50 on these points. Naturally Ammini's feelings would have been terribly wounded and there is nothing unnatural if she decided to settle scores with Tomy.

21. The evidence of P.Ws.41, 43 and 44, shows that Ammini and the second accused approached them for performing some black magic or witch-craft to destroy Tomy's family. Of course P.W.43 made an attempt in cross-examination to dilute it, saying that those accused wanted him to perform only such rituals as would bring in prosperity to them, and not ceremonies which might harm others. On the strength of the evidence of P.W.43 it was contended that the purpose of Ammini and A2 in approaching the sorcerers was only to get their lot improved. But testimonies of P.Ws.41 and 44 clearly show that those accused approached them and told them that something should be done for the total annihilation of Tomy's family. M.O.41 is a letter addressed by Ammini to the second accused, in which Ammini solicited the latter's help to get any "atrocious act" done for the purpose of forestalling the formation of a new partnership business for the son of another brother. There is no serious contention against the findings of the Sessions Judge that M.O.41 is in the handwriting of Ammini herself (this was found on a comparison with the standard handwriting made by Ammini in open court). M.O.41 letter was seized by the police, in a search, from A2's room. M.O.29 is the diary seized from Ammini's house, during a search, and the handwriting therein, on a comparison, was found to be that of Ammini herself. Those findings have not been challenged before us. We have also perused those documents and we too are satisfied with the findings made by the Sessions Judge on those items. Those findings need no disturbance.

22. P.W.26 (Josephine - the eldest sister of Tomy. She is the sister-in-law of Ammini as well) is permanently residing in Madras. She mentioned, in her evidence, about what Merly told her on 10-6-1980 when she paid a visit to her brother's (Tomy's) house. While Josephine was in that house, Ammini came there abruptly but on noticing the presence of P.W.26, she did not remain there long, though of course they exchanged some pleasantries. It was then that Merly told Josephine that she was scared of Ammini and that Ammini's house bustles with sorcerous activities and that Ammini had been making frequent visits to Merly during those days and that she was apprehensive that Ammini might even administer poison to Tomy. This part of evidence of P.W.26 was attacked by the learned counsel for the accused on two grounds. Firstly that the evidence is inadmissible under Section 32 of the Evidence Act and secondly that P.W.26 cannot be believed on this point as she did not mention this aspect when she was questioned by the investigating officer.

23. In support of the first contention reference was made to *Fr. Benedict v. State of Kerala*[1], A Division Bench of this court considered the admissibility of a statement made by the deceased in that case which constituted the motive for the accused to murder the deceased. Section 32 of the Evidence Act makes statement made by a person "as to any of the circumstances of the transaction which resulted in his death" a relevant fact in a case in which the cause of that person's death comes into question. The Division Bench in Fr. Benedict's case considered the two views possible on the subject, one view being that proximate transactions would fall within the ambit of the section, while the other view is that all transactions which resulted in death even if they are remote in time and space would also fall within the scope of the section. It was held, in

that decision, that circumstances which give rise to an inference as to the motive for the murder cannot be described as circumstances of the transaction which resulted in the deceased's death. "Such a circumstance cannot be said to be directly related to the occasion of the death, which is the test under the section", according to the Division Bench. The aforesaid view of the Division Bench is no longer good law in the light of the Supreme court decision in *Sharad Birdhichand Sarda v. State of Maharashtra*[2], where the majority of the judges held that "the test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context". The Supreme court adopted the interpretation that the expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". In the light of the said decision of the Supreme court, motive factor available in the statement of the deceased cannot be discarded as a remote circumstance, if it is otherwise intimately connected with the circumstances of the transaction which

[1]1967 Ker LT 466

[2] AIR 1984 SC 1622

resulted in his death.

24. However, we are inclined to accept the second contention of the defence counsel that since P.W.26 did not reveal to the investigating officer that Merly told her like that, it is not safe to rely on that part of her evidence. But, even apart from P.W.26's evidence, the prosecution has proved convincingly that Ammini in association with her henchmen had been prowling for Tomy and family to quench her revenging thirst.

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25. to 43. (Omitted being discussion of evidence)

44. Two other circumstances which the prosecution relies on are the statements given by the third and fourth accused to doctors who examined them after arrest. The third accused was arrested on 2-7-1980 and after interrogation he was taken to P.W.60 - a doctor attached to the Government Hospital, Alwaye. The doctor noticed three wounds on the right fingers of third accused. (1) A small wound on the outer aspect of the right index finger. (2) A small wound on the inner aspect of the right index finger. (3) A small wound on the outer aspect of the right middle finger. All the three wounds were found infected. P.W.60 asked A3 how he sustained the injuries and what the third accused told him then was recorded by the doctor in Ext. P22 wound certificate. "These small injuries were caused by biting when I closed Merly's mouth to silence her at 7.30 p.m. on Monday before last". Similarly when the fourth accused was arrested on 5-7-1980 he was taken to P.W.64 a lady doctor attached to the Government Hospital, Perumbavoor. The doctor noticed two healing scars, one on the back of left elbow and the other on the right wrist. A4 told the doctor that "my left elbow and the outer part of the right hand were injured while taking Merly to the kitchen, holding her from behind with left hand, inside Merly's house at about 7.30 p.m. on Monday, 26-3-1980". This statement was recorded by P.W.64 in Ext.P36 wound certificate issued by her. The said items of evidence were attacked on two grounds. Firstly that they are

inadmissible in evidence and secondly that the wound certificates have been concocted for this case. These contentions require careful scrutiny.

45. The admissibility is questioned on the ground that the statements are hit by Section 26 of the Evidence Act which prohibits confession made by a person "whilst he is in the custody of a police officer". What is prohibited is only "confession", and the embargo is not extended to the statements which do not amount to confession. Admissions can be proved as against the person who makes it, and Section 21 of the Evidence Act permits such admissions being proved. The contours of Section 21 are not bounded by limitations of the person being in the custody of a police officer. There is no doubt that if the admission amounts to "confession" it transgresses into the forbidden field designed in Section 26. What is a "confession"? Neither the Evidence Act nor other statutes on criminal law defines confession. Privy Council, way back in 1939 in *Narayana Swami v. Emperor*[3], made the endeavour to explain the word "confession" as used in the Evidence Act. Lord Atkin who delivered the famous judgment in that case stated thus :

[3] AIR 1939 PC 47

> "The word "confession" as used in Evidence Act cannot be construed as meaning a statement by an accused "suggesting the inference that he committed" the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession". Not found in the copy....Ed.

(Emphasis supplied)

The Supreme court adopted the aforesaid explanation as correct in *Palvinder Kaur v. State of Punjab*[4], In *AAhnoo Nagesia v. State of Bihar*[5], Supreme court considered the question of sever ability of the accused's confession while in custody, one exculpatory and the other inculpatory. In the context, Supreme court found it worthwhile to adopt the same line of thinking about the contours of confession and the principles followed in Palvinder Kaur's case were reaffirmed. The important decision on this subject, in view of the context in this case, is *Kanda Padayachi v. State of Tamil Nadu*[6], The subject dealt with in that decision is the admissibility of a statement made by an accused, in police custody, to a doctor regarding some minor injuries found on his person, to the effect that "it was the deceased who at about midnight on July 10, 1969 had caused the injury on his the (sic) by biting him". The Supreme court made reference to the case law on the subject including Pakala Narayana Swami's case and held that the statement in question did not amount to a confession, but only amounts to an admission of fact "no doubt of an incriminating fact, and which established the presence of the appellant in the deceased room". The dictum has been laid down in para 13 of the judgment which reads thus :

> "It is thus clear that an admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act."

(Emphasis supplied)

A Division Bench of this court in *Chandran v. State of Kerala*[7], followed the same principle. When the statements attributed to the second and third accused in Exts.P22 and 36 respectively

are judged from the above guidelines, we hold that, though incriminating the statements do not amount to confession and hence they are not hit by Section 26 of the Evidence Act.

46. But it seems that the Sessions Judge accepted the second contention that Exts. P22 and P36 could have been fabricated. The main ground is that the certificates were not written in the prescribed forms, but only on plain papers. The Sessions Judge expressed that it is strange that two hospitals, the Government Hospitals at Alwaye and Perumbavoor, did not have printed forms during the same period. A scrutiny of the facts would reveal that there is no room for any suspicion on account of that ground. Both hospitals are in the same District of Ernakulam and the District Medical Officer who is to supply the form is the same person. It is not unusual, we may even

[4] AIR 1952 SC 354
[5] AIR 1966 SC 119
[6] AIR 1972 SC 66
[7] (1987) 1 Ker LT 391

say that it is usual, that the Government hospitals run short of prescribed forms and printed registers, and in such contingencies doctors used to resort to plain papers. There is nothing illegal in it. If as a matter of fact printed forms were available in those hospitals, we find no hurdle for the doctors to have those printed forms for preparing the certificates, even if they want to fabricate certificates. In this connection it is useful to refer to two other certificates (Exts.P34 and P35) issued by another lady doctor (P.W.63) attached to the Government Hospital, Alwaye, in the same District. Those two certificates were also prepared in plain sheets on 30-6-1980 after examining Ammini and the second accused. The doctor concerned did not find any injury on their persons. As Exts.P34 and P35 were apparently innocuous materials, the Sessions Judge did not even frown at them on the ground that they were written in plain sheets. That aspect gives added weight to the genuineness of Exts.P22 and P36 also. Some words in Ext.P22 were corrected by the doctor while writing that certificate and the Sessions Judge termed those corrections as indications of want of genuineness. Why the Sessions Judge could not consider that those documents were prepared by three Government doctors in the discharge of their official duties and why was he reluctant to presume the genuineness of those certificates? We bestowed our serious consideration and we are of the opinion that Exts.P22 and P36 had been truly prepared by the doctors in the due discharge of their official duties. The admissions contained in them prove that the third and the fourth accused were inside Tomy's house during the crucial time and they handled Merly in the way they narrated to the doctors.

47. We shall now take up the evidence regarding recovery of cyanide poison stuffed in a Vicks Bottle. The recovery was pursuant to the information supplied by the fourth accused. He told P.W.95 that "the balance Potassium cyanide was wrapped in a plastic cover and stuffed in a Vicks bottle available in my house and dropped it in the pond situated on the south western side of my house and I shall point out that place". P.W.95 took the fourth accused to that place, and there he pointed out the spot. P.W.70 was employed to search it out from water in the gutter. He dived into the water and winched the bottle up (it is M.O.43 - the plastic cover in it is M.O.33). On chemical analysis the content was found to be sodium cyanide (vide Ext.P155 report). But the Sessions Judge sidelined that evidence for which he advanced a very strange reasoning. M.O.43 is seen kept in another empty Horlicks bottle when it reached court. P.W.95 owned that he put it in the Horlicks bottle because of the high potency of lethality of the poison A large number of material objects including M.O.43 were forwarded to the Forensic Science Laboratory by the Magistrate concerned. The Joint Director who made the analysis mentioned in Ext.P155 report that "all the seals are intact". Of course it was not separately mentioned in the report that the seal

on each item was intact. On account of that omission in Ext.P155 (if at all it can be termed as an omission) the Sessions Judge observed that, it is significant that there is no mention in Ext.P155 that there was any separate seal on the bottle and hence "the seal claimed to have been put by P.W.95 on the bottle, soon after it was recovered, does not appear to have been present at the time when the bottle was opened for the purpose of chemical analysis". The Sessions Judge then made his conclusion on that point that –

> "this indeed is a circumstance which throws a lot of suspicion upon the claim made by the prosecution that what was recovered from the pond was the thing that was sent to the laboratory for the purpose of analysis". The above reasoning demonstrates the supercilious manner in which the Sessions Judge dealt with this serious offence. We would be failing in our duty if we refrain from expressing our unreserved disapproval of the wayward manner in which he sidelined this vital piece of evidence. If the seal on M.O.43 was found tampered with, would it have escaped the notice of the Director of Forensic Science Laboratory? If there was no seal on M.O.43, is it not certain that the laboratory authorities would make a special mention of it in their report? We have absolutely no doubt in believing that M.O.43 contained sodium cyanide. In the absence of any explanation from the fourth accused, the inference is irresistible that it was the fourth accused who dropped that bottle in the pond.

48. M.O.9 is a gold chain which belonged to Merly. This has been proved by P.W.2. There is no dispute and also no doubt on that aspect. M.O.8 was recovered by the police on 30-6-1980 pursuant to the information received from the second accused. He told P.W.95 that "the packet with the chain and the place where they were kept can be pointed out by him". The second accused was taken to the store room of the Sub-Divisional Office, Telegraphs, Alwaye and he took out a packet from among the bundles of telephone wire coils. Ext.P15 is the mahazar prepared by P.W.95 which was attested by the Sub-Divisional Officer, Telegraphs (P.W.59). The packet contained M.O.8 gold chain. But we note that a concerted endeavor had been made by some of the colleagues of the second accused to throw a doubt that the said packet was planted by the police in the said store. On scrutinizing the evidence we believe that P.W.59 also did not lag behind in playing his part in that endeavor. P.W.59 said during cross-examination that the watchman of the store (P.W.88) gave a petition to him on 27-6-1980 (Ext.D20) alleging that some policemen accompanied by A2 came to the office by midnight and they got the store room opened and after entering into the room they later went out. P.W.88 is the watchman who proved Ext.D20. The Public Prosecutor sought permission to cross-examine P.Ws.59 and 88. From the answers given in Public Prosecutor's cross-examination, we are satisfied that Ext.D20 has been concocted for helping the second accused. P.W.59 admitted that when he was questioned by the investigating officer, he did not mention anything to him about Ext.D20. If, as a matter of fact, P.W.59 was in possession of a petition like Ext.D2, is it probable that he did not utter a word about it to the investigating officer who questioned him? He also admitted that he did not make any enquiry into the correctness of Ext.D20 petition. Is it the normal conduct of an officer of the status of P.W.59? But the strange conduct of P.W.59 appears to have gone to the extreme, when he admitted that even at the time when he was called upon to be an attestor in Ext.P15 mahazar, he did not even make a sound to the investigating officer that he got a complaint like Ex.D20. But he says that he forwarded Ext.D20 to his superior officer 10 days after 27-6-1980. Would an

officer like P.W.59 without any objection have subscribed his signature in Ext.P15 mahazar? It is interesting to note that P.W.59 had sanctioned casual leave for the second accused for five days from 27-6-1980 onwards. P.W.59 sanctioned casual leave on 28-6-1980 (vide Ext.P20). Even then it did not occur to him to make some enquiry at least about Ext.D20 petition. P.W.59 claimed that Ext.D21 file was maintained by him. A perusal of the file together with the answers given by P.Ws.59 and 88 during cross-examination will convince that a concerted effort was made to concoct materials to help the second accused by showing that the gold chain was planted by the police in the store room. Officers like P.W.59 should not have been privy to such a nefarious strategy which affects public interest. When Ext.D20 turned out to be a damp squib, the defence examined D.W.3 for a different strategy. D.W.3 is a Masdur attached to the Sub-Divisional Office, Telegraphs. He deposed that when he went to Alwaye Police Station on 28-6-1980 pursuant to a telephone message, A2 handed over a leave application to him to be presented to P.W.59. In cross-examination, D.W.3 was asked as to how he remembered the date as 28-6-80. He could not give any cogent explanation why he remembered the date. That apart, it does not stand to reason that if the second accused was actually in police custody on 28-6-1980 the police would have allowed the staff of the Sub-Divisional Office to come to know of that fact so openly. To send a leave application of A2, there is no need to go through such a circuitous route, as though the police wanted it to be known by others that A2 was already in their custody. According to us, D.W.3 was deliberately supporting his colleague the second accused.

49. We believe that M.O.8 gold chain which belonged to the deceased came to the possession of A2 who knew well that it was a stolen property and he concealed it in a place accessible to him. The second accused has no explanation for its possession.

50. Before we close discussion on this aspect, we have to deal with a contention on the mode adopted in the Sessions court for recording the evidence relating to recovery under Section 27 of the Evidence Act. It was contended that P.W.95 did not quote the words of the accused which led to the various recoveries made by him. It is true that the Sessions Judge did not record the words of the accused as deposed to by P.W.95. Eg :-The Sessions Judge recorded the evidence of P.W.95 in this way : "When I interrogated the second accused he told me as stated in Ext P58(a)". The contention of the defense counsel was that the investigating officer should have deposed as to the information received by him from the accused which led to the discovery. In strict compliance of Section 27 of the Evidence Act the investigating officer should have deposed to the words of the accused which distinctly led to the fact discovered. The words attributed to the accused must find a place in the deposition of the witness. We think that it would be useful to inform the Sessions Judges and Magistrates that when the evidence, regarding any fact deposed to as discovered in consequence of information received from the accused is recorded during trial, the admissible portion of the information supplied by the accused must find a place in the deposition of the witness concerned. However, we are not disposed to reject the evidence for recovery under Section 27 of the Evidence Act merely on the ground that the information has not been quoted in the deposition in so many words. When P.W.95 deposed to the fact that he got the information contained in Ext.P58(a), there is substantial compliance with the provisions of Section 27, although we would have appreciated if the admissible portion of the information had been recorded in the deposition in the very words of the accused as quoted by the investigating officer.

51. What remains to be considered is the confession made by the fourth accused to P.W.66, the

Judicial Magistrate of the First Class, Perumbavoor. Ext.P40 is the record of Judicial confession. It "runs into more than 20 pages covering minute details". It is not necessary to reproduce the whole confessional statement here. In the first part of it the fourth accused referred to the circumstances in which he got acquainted with Ammini and how she enlisted him into the circle of conspirators. In the next portion he mentioned about the purchase of Parataph and Eccalex and the scheme evolved for poisoning the victims, and how the scheme fizzled out on the first day of their visit to Tomy's house. Next, he narrated the events which followed the suggestion made by A2 to procure potassium cyanide, which includes the efforts made by the fourth accused to get that poison from a goldsmith working in M/s. Sankarankutty Jewellery. Then he mentioned about the plan to poison the entire family and how the plan was implemented on 23-6-1980 and also the reason why it did not succeed as against Tomy. In the last portion he mentioned about the potassium cyanide being thrown into a pond. He also said in his confession that the Vicks bottle in which the balance pottasium cyanide was stuffed was recovered by the police. A reading of the confessional statement shows that it is substantially in agreement with the prosecution story since the stage of his joining the conspiracy.

52. If the confession evidenced by Ext. P40 is found voluntary and true, it does not matter much that the fourth accused, subsequently retracted from the same. Retraction by the maker of a confession would not necessarily render it unreliable, for, it is a common phenomenon in sessions trials that makers of confessions withdraw from them. In this case the fourth accused retracted from his confession on the fourth day of his release on bail. That was considered by the Sessions Judge as a circumstance, among others, to throw suspicion on the voluntary nature of the confession. It is necessary to refer to certain materials available on record in this case having some bearing on the truth as well as voluntariness of the confession.

53. On 5-7-1980, the fourth accused was produced before P.W.66 from the Sub-Jail, Alwaye. The Magistrate put a lot of questions to that prisoner to ascertain whether the confession which he proposed to make was voluntary. Ext.P38 is the record prepared by the Magistrate containing those questions and their answers. As the fourth accused expressed his desire to make a clean breast of everything, P.W.66 wanted to give him some time for reflection. Ext.P39 is the proceeding paper which shows that the accused made a request to the Magistrate that he may not be sent to the Sub-Jail where the other three accused were detained, as he apprehended that they might exert influence on him. P.W.66 acceded to the request and remanded him to the Sub-Jail, Muvattupuzha where he was allowed time for reflection till 7-7-1980. In the remand warrant the Magistrate took particular care to direct the Superintendent of the Sub-Jail concerned not to allow police officers to meet the prisoner. It was the Sub-jail warden who produced the accused before P.W.66 on 7-7-1980. On that day also the Magistrate put a number of questions to him to as certain whether the confession which he was going to give would be voluntary and whether any pressure, inducement or any sort of influence was exerted on him. P.W.66 again informed the prisoner that he was not bound to give a confession, he even warned the prisoner that if any confession was made, the same might be used against him in the trial. The answers given by the prisoner convinced the Magistrate that the prisoner was aware of all those consequences. It was only when the Magistrate was fully satisfied that the prisoner was going to make a voluntary confession that he proceeded to record what he stated. P.W.66 made the certificate at the foot of the confession as provided in Section 164 of the Code. Thereafter the prisoner was remanded to Sub-Jail, Alwaye. This was on 7-7-1980.

54. A petition reached the Sessions court, Ernakulam, on 18-7-1980 under the signature of the fourth accused praying for bail. It was stated in the petition that he was arrested on 2-7-1980 and that the confession made by him was under duress and inducement It is apparent that the said petition was prepared by somebody outside the Sub-Jail, because the petition was type-written in Malayalam. Neither the name nor the signature of any advocate is seen in that petition. Curiously enough, the fourth accused sent another petition on the next day in which he complained that one advocate approached him on 17-7-1980 and wanted him to sign below a type-written sheet and that he initially hesitated to sign the same, but later the advocate prevailed upon him and got his signature. In the meanwhile, one advocate Sri K.G. Sankaran presented application for bail and the Sessions Judge, Ernakulam received a petition from the fourth accused in his own hand, stating that he would prefer to be released on 29-7-1980. In the light of this separate petition from the accused himself, the Sessions Judge, Ernakulam got down the fourth accused before him on 25-7-1980 and heard him in person. He did not make any complaint to that Sessions Judge that he was subjected to any duress or inducement etc., for making the confession. He stood by the petition sent by him directly. One thing is clear. The fourth accused never had any objection about his confession until 17-7-80. The developments which took place from that date indicate that some concerted attempts were made at least from 17-7-80 onwards to pursuade him to disown the confession. In this connection it is worthwhile remembering that he told P.W.66 as early as 5-7-1980 itself that he feared influence being exerted on him by the other accused who were then in Sub-Jail, Alwaye. Thus, Ext.D4 petition filed by him after release on bail, would very probably be the product of the pressure exerted on him by other accused who had an influence on him.

55. Although the learned Sessions Judge found that the evidence of P.W.66 reveals that "he had made all precautions to ensure for himself that the confession made by the accused was voluntarily made", at a later stage the Sessions Judge expressed his view that the Magistrate had not properly discharged the obligation cast on him. This is because the Magistrate did not warn him that the confession is not intended to make him an approver. Rule 50(1) of the Travancore-Cochin Criminal Rules of Practice (as were then in force) required the said warning also to be administered to the maker of the confession. In this case, P.W.66 warned the prisoner that the confession is likely to be used against him. The requirements in Section 164 of the Code and the rules are intended to ensure that the confession should be voluntary and free from any sort of inducement or pressure from any quarters. The omission to put one of the questions as provided in Section 164 or the Rules is not sufficient to throw out a judicial confession, if the court is otherwise satisfied, on a scrutiny of the whole proceedings including the confessional statement, about its voluntariness. Necessity for administering warning to the maker of the confession that the confession is not intended to make him an approver, is to make him understand that the confession is likely to be used against him in the trial. If the accused is informed about the consequences of making the confession with sufficient clarity, mere omission to tell him, that the confession is not intended to make him an approver, is not enough to treat the confession as vitiated, if the facts and circumstances surrounding the making of a confession do not appear to cast a doubt on the veracity or voluntariness of the confession, a court is not to reject the confession outright merely on the technical ground that just one of the formalities prescribed by the section or rule was overlooked by the Magistrate. (Vide *Dagdu v. State of Maharashtra*[8], and the Full Bench decision in *Shanti v. The State*[9], When the learned Sessions Judge scanned through the entire questions put by P.W.66 he felt that P.W.66 had "made all precautions to ensure for himself that the confession made by the fourth accused was voluntarily made". But the

Sessions Judge succeeded in tracing out just one omission i.e., the omission to put the question whether the accused knew that it was not intended to make him an approver. We are not inclined to reject the confession for that omission alone.

56. Another reason which appears to have persuaded the Sessions Judge to doubt the judicial confession is the length of the statement which "runs to more than 20 pages covering minute details". The Sessions Judge observes that "*prima facie* it appears to me to be quite doubtful whether a person like the fourth accused could very well have afforded to make such a statement as we find in Ext. P40". Did the Sessions Judge mean that the accused would not have stated all the minute details contained in Ext.P40? If that is what be meant, it is an aspersion cast on the Judicial Magistrate of the First Class, who recorded Ext.P40. We choose to believe that the Sessions Judge did not mean what he said in that passage and thus restrain ourselves from passing any further remark on that observation. We do not have any doubt that Ext.P40 contains the statement made by the fourth accused to the magistrate. If the statement was so lengthy and if it covered minute details, it is not a ground to entertain any suspicion, but on the contrary it is an added ground to ensure the truth of it. Vide *Henry Westmuller Roberts v. State of Assam*[10],

57. The Sessions Judge adopted another method to scrutinise the confession. He made a meticulous comparison of Ext.P40 with the statement of the fourth accused recorded by the police during investigation which is incorporated in the Case Diary file. The Sessions Judge traced out one or two minor discrepancies and blew them up out of proportion and observed that they are "significant omissions which in my view are of some material consequence". One such discrepancy is that the accused mentioned 9-6-1980 as the date of visiting Merly's house, whereas the date 10-6-1980 is shown in the statement of the police. Another omission is that he mentioned the name of Chinnappan (P.W.27) in his statement to the police whereas he did not mention that name in Ext. P40. (But it is clear that he referred to P.W.27 in that statement). The method adopted by the Sessions Judge is one forbidden by law. Section 162 of the Code imposes the inhibition that no statement made by a person to the investigating officer during investigation shall be used for any purpose except as provided in that Section. But the Sessions Judge appeared to be under the impression that he can do so by virtue of Section 172(2) of the Code. That sub-section reads as follows :

> "Any Criminal court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial".

[8] AIR 1977 SC 1579

[9] 1977 Cri LJ 2053 (Ori)

[10] AIR 1985 SC 823

Sub-section (1) enjoins on the police officer making the investigation to enter his proceedings in the investigation day by day, in a diary "setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation". The diary mentioned in Section 172(1) and the statements recorded under Section 161(3) of the Code are obviously different Statements recorded under Section 161(3) are covered by the sweep of inhibition contained in Section 162 of the Code. The prohibition imposed in Section 162 cannot be circumvented by resort to Section 172(2) of the Code. The two are different records, though the statements recorded under Section 161(3) and the diary envisaged in Section 172(1) may

together be incorporated in the same file which police call "Case Diary File", for the sake of convenience. That apart, Section 172(2) itself embodies an inhibition that the diary envisaged in that section is not to be used as evidence in the case. The only use of the diary is "to aid" the court in the trial, to ascertain the time at which the investigation was begun and closed on each day, the places visited by the officer, and the circumstances ascertained through investigation. It is not a substitute for evidence in the case for the purpose of making a comparison with the testimonies of witnesses or judicial dying declarations or judicial confessions. The Sessions Judge by adopting the above method had committed an illegality.

58. We considered Ext. P 40 from all angles and against the criticisms made by the Sessions Judge. According to us, the fourth accused made his confession to P.W. 66 voluntarily, untainted by any pressure or influence or inducement.

59. Under law a retracted confession may form the basis of conviction of the maker of the confession, if it receives some general corroboration. It is sufficient that the general trend of the confession is substantiated by some evidence which would tally with the contents of the confession. (Vide *Subramania Goundar v. State*[11], *Madi Ganga v. State of Orissa*[12], *Shrishail Nageshi Pare v. State of Maharashtra*[13]*,).* In this case, Ext. P 40 confession statement finds corroboration from a large area of evidence. The evidence of P.Ws. 20 and 21 who speak about the purchase of Parataph and Eccalex, evidence of P.W. 26 who mentions the presence of Ammini, A3 and A4 in or near Merly's house on 10-6-1980, the evidence of P.W. 27 from whom the fourth accused purchased cyanide poison, evidence of P.W. 3 who saw Ammini and two other accused leaving Ammini's house during the evening on 23rd, evidence of P.W. 26 who saw Ammini coming out of Tomy's house by about 7.30 p.m. on the fateful day and recovery of Vicks bottle from the pond etc., are the principal items of evidence which strongly corroborate Ext. P40.

60. Thus analysed we feel confident to believe that the narration of facts contained in Ext P. 40 confession is the true version of events which culminated in the murder of Merly and children.

61. The next question to be considered is how far Ext. P40 can be used against the other accused. The general rule is that confession of an accused is not evidence against anyone but himself. Section 30 of the Evidence Act is one of the exceptions to

[11] AIR 1958 SC 66
[12] AIR 1981 SC 1165
[13] AIR 1985 SC 866

that general rule. It permits a court to take into consideration the confession made by one person as against certain other persons also, but only subject to the conditions mentioned in the section. The conditions are (1) more persons than one are being jointly tried for the same offence; (2) confession should have been made by one of them; (3) the confession should affect the maker and the others who are sought to be fastened with the confession. Explanation to that section shows that the offence mentioned in the section includes abetment of that offence as well. The section seems to be based on the view that an admission made by an accused of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But Section 30 is no carte blanche for use of confession by one person as substantive evidence against another person, even if the other conditions are satisfied. The limited use of such a confession, permitted by the section against others, is that it can only be taken "into consideration". Privy Council remarked it as a weak type of evidence in *Bhuboni v. The King*[14]*,*

But their Lordships hastened to add that "Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence." In *Kashmira Singh v. State of Madhya Pradesh*[15], Supreme court pointed out the proper approach to such evidence in its application to the other accused :

> "The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept".

Not found in the copy - Ed. (emphasis supplied)

62. But in cases involving criminal conspiracy Section 10 of the Evidence Act permits the use of evidence, that one of the conspirators did, said, or wrote anything in reference to the common intention of the conspirators, as evidence against the other conspirators. Section 10 has a utility which is more effective than Section 30 in the matter of considering certain items of evidence (which pertains to one accused) as against others. But Section 10 can be invoked only where "there is reasonable ground to believe that two or more persons have conspired together to commit an offence". A conspiracy is always hatched in secret and it is normally impossible to adduce direct evidence for conspiracy. The offence of criminal conspiracy can be proved largely from inference drawn from acts committed by the conspirators in pursuance of a common desire vide *Shivanarayan v. State*[16], The

[14] AIR 1949 PC 257

[15] AIR 1952 SC 159

[16] AIR 1980 SC 439

Supreme court has pointed out in Mohd. *Hussain Umar Kochra v. Dalipsinghji*[17], that "the evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up, the conspiracy may develop in successive stages; there may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan".

63. The evidence discussed above affords reasonable grounds to believe that Ammini and the other three accused had conspired together to finish off Tomy, Merly and their children. So, what each of the accused had done or said subsequent thereto for the achievement of the common intention can also be used as evidence against others.

64. When we read the judgment rendered by the Sessions Judge, we noted therein the distressing feature that the Sessions Judge allowed himself to be persuaded by fanciful and remote

possibilities for which he advanced mostly flippant or puerile reasoning's. The consequence, unfortunately, was the unmerited acquittal of the accused in this. diabolically planned and heinously perpetrated triple murder case in which infanticide involving two innocent 'tiny children painted a bizarre colour. It was Lord Denning who administered the warning to legal men in *Miller v. Ministry of Pensions*[18], that "the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice". Supreme court quoted the said observation with approval in ***K. Gopal Reddy v. State of Andhra Pradesh, AIR 1979 Supreme Court 387.*** The Supreme court sounded a note of caution in ***Khem Karan v. State of U.P., AIR 1974 Supreme Court 1567*** that "neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony.

65. The circumstances proved in this case, and discussed above, form a complete chain to establish that the four accused had entered into a criminal conspiracy to murder Tomy, Merly and their children and pursuant to the said conspiracy A1, A3 and A4 murdered Merly and children between 7 p.m. and 9 p.m. on 23-6-1980. We, therefore, allow this appeal and set aside the order of acquittal passed by the Sessions Judge. We find A1, A2, A3 and A4 guilty of the offences under Section 120-8(1) and Section 392 read with Section 34 of the Indian Penal Code We further find A2 guilty of the offence under Section 411 of the Indian Penal Code We convict them for the said offences.

66. Now we come to the last duty in this case - passing sentence on the accused. The fiendish manner in which the murders were perpetrated does persuade us to give a sentence less than the maximum allowed by law, particularly to Ammini who acted as the linchpin of the machinations which culminated in the horrendous drama played on 23-6-1980 in Tomy's house. The other accused joined the criminal conspiracy only at the behest of Ammini. The murders were so planned as to make them appear to the outer world as a case of suicide committed by all the members of Tomy's family. But

[17] AIR 1970 SC 45
[18](1947) 2 All England Reporter 372

for the unforeseen snag which developed, perhaps the deaths would have been written
off like that. Ammini looked on like a virago to see how her henchman implemented the murderous scheme on Merly, and then she turned to the innocent children to whom she was but the senior aunt. That aunt suddenly turned into wicked demon and spouted the lethal venom into the little ones and finished them off in seconds. She had the wiliness to join the mourners next day feigning bereavement without even a semblance of any qualm. In the normal course the punishment she deserves, in the circumstances, is the maximum provided by law. But one factor dissuades us from imposing that sentence. She has two sons and a daughter who lost their father twelve years ago. Capital punishment to A1 will make those children destitute. That seems to us to be the solitary consideration dissuading us from imposing the capital punishment on her. We, therefore, sentence each of the four accused to imprisonment for life for the offences under Section 120-B(1) and Section 302 read with Section 34 of Indian Penal Code We do not propose to award any separate sentence to the second accused for the offence under Section 411 of the Indian Penal Code.
Appeal allowed.