

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN

THURSDAY, THE 25TH DAY OF NOVEMBER, 2021 / 04TH AGRAHAYANA, 1943

CRL.A.NO.1222 OF 2016

AGAINST THE JUDGMENT IN S.C.NO.460/2012 DATED 31.10.2016 OF THE
COURT OF THE SESSIONS JUDGE OF THRISSUR.

[C.P.NO.88/2012 OF JUDICIAL FIRST CLASS MARISTRATE COURT,
IRINJALAKUDA, THRISSUR]

[CRIME NO.1903/2011 OF IRINJALAKUDA POLICE STATION, THRISSUR]

APPELLANT/ ACCUSED:

TONY @ THOMAS, AGED 52 YEARS, S/O AUSUSTINE,
VADAKKUMCHERY HOUSE, MAVINCHUVADU DESOM,
KALLUR VILLAGE, THRISSUR DISTRICT.

BY ADVS.

SRI.P.VIJAYA BHANU (SR.)

SRI.P.M.RAFIQ

SRI.M.REVIKRISHNAN

SMT.POOJA PANKAJ.

RESPONDENT/ COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SENIOR PUBLIC PROSECUTOR SRI.ALEX M.THOMBRA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
22.11.2021, THE COURT ON 25.11.2021 DELIVERED THE FOLLOWING:

"C.R."

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

Cr1.Appeal No.1222 of 2016

Dated this the 25th November 2021

JUDGMENT

Vinod Chandran, J.

An aged agriculturist living alone, who had a predilection for gold ornaments, which he casually flaunted on his body, was murdered and robbed of those ornaments, by his own nephew. A crime for gain, is the case of the prosecution, while the defence is of mistaken identity. To the detriment of the accused, his accomplice turned approver.

2. Before Court, 29 witnesses were paraded, who marked Exts.P1 to P87 documents and 22 MOs were also marked as MO1 to MO20(a). The trial Court found the accused guilty under Ss.450, 394 and 302 of the Indian Penal Code. On sentence, considering the fact that the accused was an earlier convict under S.302, imprisonment for life was imposed with the condition that the accused shall not be released for a period of 20 years, relying on Swamy Shraddananda v. State of Karnataka [AIR 2008 SC 3040 = (2008) 13 SCC 767]. A sentence of fine of Rupees One lakh was also

imposed under S.302 with default R.I. for one year. Under Ss.450 and 394, a further sentence each of R.I. for ten years and fine of Rupees Fifty thousand each were imposed again with default sentence.

3. Sri.P.Vijayabhanu, the learned Senior Counsel, appeared for the accused assisted by Smt.Pooja Pankaj. It was argued that the approver cannot be believed and it is very clear that he was tutored. The approver obviously is not an accomplice as he does not inculcate himself in the narration. He was only a mere spectator, who cannot be called an approver and to that end the learned Senior Counsel relied on Bhiva Doulu Patil v. State of Maharashtra [AIR 1963 SC 599], Chandan v. State of Rajasthan [(1988) 1 SCC 696] and an unreported decision of this Court in Crl.Appeal No.680 of 2012 dated 13.04.2018 [Abdulla Kunji @ Nadubail Abdulla v. Central Bureau of Investigation]. It is the allegation that the accused had pre-meditation; as the accusation levelled is that he purchased a chopper, prior to the alleged murder, on the same day. It is incredulous that the accused summoned another person, who was not at all an accomplice, to witness the incident. Though the call details of the mobiles used by the accused and the approver were produced, there is no

evidence as to the location of the two persons or calls having been made between them. The accused had suffered a fracture to the right clavicle, for which he was treated as an inpatient and discharged on 15.11.2011. It was impossible that the murder could have been committed by him as spoken of by PW2, the approver, since his right hand was incapacitated. The accused, after discharge, is said to have summoned the approver and had visited many places before they retired for the night in the house of the deceased. None of these persons, who met the accused and the approver together were examined to atleast prove that they were together on that day.

4. The recoveries are seriously assailed. There is no blood detected either in the weapon or in the dress of the accused. It is alertly pointed out that the evidence of PW1 and the Inquest Report shows blood splattered all over the room, but not a drop was detected on the dress of the accused. There is absolutely no scientific evidence and the items examined at the Forensic Science Laboratory cannot at all be connected to the recovered and seized material objects. PW10, who is said to have witnessed one of the recoveries, is the driver of the son-in-law of the deceased.

There is no trustworthy evidence against the accused and he is entitled to be acquitted. The Police was pressurized and the only fact behind roping in the accused was his earlier conviction. The Police also conveniently planted evidence; which is clear from the recoveries, to some how book the accused. The learned Senior Counsel also points out that the dictum in Swamy Shraddananda (supra) insofar as avoiding death sentence by providing a specific period for life imprisonment; thus setting at naught the powers of remission, cannot be applied by a Sessions Judge as has been held in Union of India v. V.Sriharan @ Murugan [(2016) 7 SCC 1].

5. Sri. Alex M.Thombra, learned Senior Public Prosecutor, appeared for the State and pointed out that PW2 is an accomplice who made full disclosure of the facts. Even if he has not participated in the incident, on investigation his presence was also suspected and he was arrested. He had not, before his arrest, revealed the factum of a murder having been committed in his presence, which itself is an offence. Only on arrest, PW2 revealed the entire incident and to save himself from prosecution, he came forward to be an approver. There is nothing in his testimony to disbelieve him nor was he tutored, which is very evident from his consistent

stand in the searching cross-examination, which went on for thirteen days from 23.10.2013 to 11.03.2014. It is argued that the recovery of ornaments from where it was pawned and the weapon, both pointed out by the accused, corroborates PW2 and is clinching insofar as the guilt of the accused. The ornaments were identified by the son, PW7, and one of the rings had the name of the wife of the deceased engraved in it. There could be no scientific evidence obtained from MO1 chopper since it was recovered from the bed of a flowing river. As far as the FSL report is concerned, it is pointed out that the hair samples collected from the scene of occurrence have been found to be those of the deceased, the accused and the approver. The presence of the accused and approver are thus clearly established and there is no reason why any interference be caused to the impugned judgment.

6. The aged man, who was living alone, was found dead on the morning of 16.11.2011. The death was reported to the Police by PW1 and as per Ext.P1 FIS, Ext.P1(a) FIR was registered. PW1 was informed around 12.15 p.m that the door of the house of the deceased was lying open and the milk delivered was remaining outside. PW1 rushed to the house, where some locals had gathered. He pushed open the front

door, calling the deceased and hearing no response, he went inside. Inside the house when he turned right, he saw the deceased lying on the bed in the room to the right side. He called Poulouse and Saison, who were standing outside and approached the body; on which there were wounds on the neck, with blood clotted. The body was cold to the touch and it was evident that the man was murdered. The wife of the deceased was no more and he had three daughters, who are married. His only son Jiji [PW7] was staying with his family in Bombay. The deceased, staying alone, was a farmer and always wore a gold chain and three rings on his body. The dead-body did not have any ornaments on it and in the FIS, the apprehension was recorded that he would have been killed for the ornaments.

7. PW1 deposed in accordance with the FIS giving more details regarding the circumstances of the deceased and his family and elaborating on the detection of the dead-body. He admitted that he was shown the weapon and the ornaments, which he identified respectively as MO1 to MO4. The engraving on MO3 ring was the name of the wife of the deceased. As to the scene of occurrence, PW1 specifically stated, from the room in front of the visitor's room, if we look to the right, it is the bedroom of the deceased on the western side. There

is also a cot in the hall and there were lights kept on, in the front of the house, the visiting room and the room on the western side. PW1 also says that the lights used to be kept on in the night; obviously since the aged man was living alone. PW8 first came to the house for repairing the motor along with his brother. After repair, since there was no power, he just wanted to inform the residents. PW8 knocked on the door and finding no response, he peeped in and saw a leg near the bed. He immediately informed his brother who informed the neighbours, who in turn called the relatives.

8. PW2 is the approver, who was the accomplice of the accused. Initially he was also arrested, but later he turned approver. PW2 admitted to be a close acquaintance of the accused and were also working together in a stage carriage, in which the accused was the conductor and PW2 the cleaner. His statement before the Magistrate; after his arrest on his arraignment as 2nd accused, which led to he being proffered as a witness, was marked as Ext.P2. According to him, on 15.11.2011, the accused called him over telephone and asked him to come to the Little Flower Hospital, Angamaly. He reached the spot at around 1.00 p.m and the accused was standing near the gate of the hospital. The

accused wanted PW2 to take him to Thomson's Chicken Factory. PW2 had gone there in a bike owned by his friend, on which the accused also travelled. First they went to Palissery, where the accused is said to have consumed toddy from a toddy shop. Later he took the accused to a place where cards are played regularly and dropping the accused there, PW2 went home. After about an hour, again he was summoned by the accused and reached there by 3.30 p.m. Along with the accused, PW2 came back to Angamaly and on the way, the accused asked the vehicle to be stopped near a bar. The accused alighted and went towards the bar and returned with a packet. Adjacent to the bar, there is a hardware shop and accused was seen coming from the side of the hardware shop. The accused kept the packet in the bag he was carrying and told PW2 that it was liquor. The bag was dangled on the bike and they proceeded to Amballoor. At Amballoor, they had food from a mobile shop and then went to the house of a friend where they reached at about 8.10 p.m. After talking to the friend for ten minutes, they left, when the accused told his friend not to speak of having seen the accused. From there they went to Thumboor, specifically to the house of the deceased. They reached the house of the deceased at 9.30 p.m

and when the accused alighted, PW2 parked the bike in such a manner as to proceed back. PW2 knocked on the door calling out his uncle, who opened the door enquiring why the accused came at night. It was answered that, he had come to the chicken factory since there was a load coming from Coimbatore which he had to supply at a wedding site in Angamaly. The accused took the bag dangling on the bike and entered the house, upon which PW2 asked whether he can go back. Then the accused asked him to stay back, since he wanted PW2 to drop him at the chicken factory. Then the deceased also invited PW2 to stay in his house for the night. The deceased slept in the room to the west of the hall and the accused and approver in the room to the east. The accused and the deceased talked for some time sitting in the hall and then the accused joined the approver in his room. The plastic kit was kept in the room in which the accused and PW2 slept.

9. At about 3 O' clock in the morning, the accused asked the time, twice to PW2. After 3.30 a.m, PW2 saw the accused sitting on the bed. Then he washed his face, came back and at about 4.00 a.m, he took the bag and opened the cover inside, revealing a chopper. The accused took the chopper and went straight to the room in which the deceased

was sleeping. PW2 sat on the cot to see what was happening. The accused went into the room in which the deceased was sleeping and forcefully hacked on his neck, holding the chopper by both his hands. The slash was on the left side of the sleeping man. When the first slash was delivered, the deceased got up screaming and then the accused again forcefully slashed on the left side of the neck. The deceased fell on his back on the cot. Blood was splashed on the bed and walls. PW2 came to the room and looked at the scene and tried to escape through the front door. The accused, however, waylaid him and enquired as to where he was going. PW2 said that he was going to speak of what happened and he wants to go home. The accused threatened him that if he speaks out, himself and his family would be killed. The accused took him back to the room of occurrence and searched the room. He took out Rs.450/- from the draw of a table. Then he lifted the cot of the deceased and took two rings and the chain kept under the cot; which were put in the pocket of PW2. Having stepped out of the house, the accused directed PW2 to take the bike out of the compound and start it. PW2 enquired about the chopper, which was covered in the saffron dothi which was worn by the accused. PW2 clarified that the accused had come

wearing a pants and when retiring for the night he had worn the saffron dothi. The blood on the accused was also wiped off with the said dothi. They were wearing the dress in which they came to the house, when they left. Both of them went to Chalakkudy and stopping the bike on the bridge at Chalakkudy, the accused threw the chopper covered in the dothi into the river.

10. After a brief description of the house of the deceased at the time when the two reached there; PW2 continued his narration. From the bridge, both of them went towards Angamaly and at that point the accused was driving the bike. At about 5.10 a.m., they reached the KSRTC stand, Angamaly and had tea. They waited for some time and went to a bar nearby, where the accused consumed liquor. The accused wanted to see a friend who was not available and on the way back, the accused again consumed liquor. They came back to Angamaly and tried to pawn the ornaments at Muthoot Bank, who refused to take it for lack of quality. They then proceeded to New Welfare Finance, where the ring and ornaments were pawned. The accused gave Rs.30,000/- to PW2 and asked him to purchase the bike in which they were travelling. The accused then took Rs.3,000/- back and asked him to put the balance

amount in his Bank. PW2 put Rs.26,500/- in his Bank account with the Kalady Branch of the South Indian Bank. The accused left the company of PW2, telling him that he is going back to the house of the deceased. PW2, frightened out of his wits, went home and was feverish for two days. After two days, he went to one Sehiyon Koodaram, a meditation center, and talked to Sister Saleena, PW16. He requested PW16 to pray for him and confided to her that he was frightened. When she asked what happened; first he refused to speak and on being coerced, he divulged the entire incident. PW16 asked him to approach the police and two days later he was arrested, that is on 23.11.2011. He identified MO5 pants and shirt worn by the accused as also MO1 weapon and MO7 saffron dothi. MO2 chain and the two rings, MOs.3 and 4, were also identified. In MO3 ring, he specifically pointed out the engraving 'Tessy Paul'. MO8 and MO9 Mobiles owned by him were also produced and marked.

11. Ext.P3, extract of the bank account in the South Indian Bank, was marked by PW2. It shows a credit of Rs.26,500/- on 16.11.2011 and he admitted to have taken Rs.500/- for himself from the Rs.27,000/- given to him by the accused. He also stated that the entire amount was withdrawn

and handed over to the accused. He admitted to have seen the accused 2-3 times after 16.11.2011. The accused again threatened him and continued the threats even after he was released on bail by approaching the approver in jail. The accused threatened that if PW2 disclosed what he saw before the police or the Court, both his parents would be done away with. PW2 was subjected to lengthy cross-examination, as we noticed, for thirteen days. But, his evidence could not be shaken and he stuck to the version in chief-examination. The only contradiction marked as D10 from his statement was that after the crime when they stepped out of the house they did not close the door; which is not a very relevant aspect regarding the actual crime itself.

12. PW7 is the son of the deceased, who is residing in Bombay and had regular contact with his father. He had spoken to his father 3 to 4 days prior, when he was informed by his father that one of the rings, out of the three, was missing. PW7 identified MOs.2 to 4 as of his father and also specifically pointed out the engraving in MO3 ring. He stated that his father was staying alone and that to his knowledge, there was none with any animosity towards the deceased. He identified the accused as his close relative, who often

pestered his father for money. PW10 is the witness to Exts.P16 to P19 mahazars. Ext.P16 recovery was by Ext.P16(a) confession statement under Sec.27 of the Evidence Act. By Ext.P16, a receipt of New Welfare Finance, twenty two notes of Rs.1000/- denomination and a Diary were recovered from the house of the accused. Ext.P17 is the receipt so recovered and Ext.P18 is the Diary. Ext.P19 was the mahazar by which the shirt worn by the accused was recovered. PW12 is the person who recovered MO1 chopper and MO7 saffron dothi from the river, on the accused pointing out the location. He also witnessed Ext.P29 mahazar. PW13 is the owner of New Welfare Finance, who attested Ext.P23 mahazar by which the gold ornaments (MOs.2 to 4) were seized. He also identified MOs.2 to 4 in Court as seized from his firm. The ledger and the relevant page seized from his firm are marked as Ext.P30 and P30(a). PW14 accompanied the police to the firm of PW13 at the time of seizure of MOs.2 to 4. PW14 is a gold appraiser, who appraised the ornaments and certified it to have a total weight of 45.2 grams. PW15 runs a hardware business, from whose shop MO1 chopper was purchased.

13. PW3 is a Panchayat Member, who attested Ext.P4 inquest report. PW4, the Fingerprint Expert, who could not

unearth anything and PW5, the Scientific Assistant, who collected materials from the scene of occurrence and handed over the same to the Investigating Officer (I.O). PW6 marked Exts.P6 to P14 seizure memos. The relevant mahazar is Ext.P7, by which scalp and body hair as also nail clipping and blood sample of the deceased were taken. PW9 is the neighbour of the deceased, who attested Ext.P15 scene mahazar and also saw the deceased lying dead, through the window. PW17 issued the Death Certificate (Ext.P32) of the wife of the deceased. PW18 issued Ownership Certificate (Ext.P33) of the house of the deceased. PW22 Village Officer prepared the sketch Ext.P37. PW21 is a doctor who collected the body and scalp hairs of the accused and PW2 and marked Ext.P36, which contained the sample seal. PW23 is the Assistant Chemical Examiner, who marked Ext.P38, which indicates no poison in the body of the deceased. PW24 is the Police Surgeon who carried out post-mortem examination. The post-mortem certificate is marked as Ext.P39. PW25 is the Magistrate who recorded the statement (Ext.P2) of PW2. PW27 is the Scientific Assistant, who marked Ext.P42 FSL report. PW19 and PW28 are Nodal Officers of mobile service providers, who marked Customer Application forms and the IT certificate and call details.

14. PW11 is the Senior CPO, who witnessed the arrest of the accused on 21.11.2011. He was also a witness to Exts.P20 to P28. Ext.P20 is the arrest memo, Ext.P21, shows the seizure of MO5 pants, Ext.P22, the cash and mobile of the accused at the time of arrest, Ext.P23, recovery mahazar of gold ornaments MOs.2 to 4, Ext.P24 seizure mahazar of pawn register, Ext.P25, body and scalp hair of PW2 and Exts.P26 to P28, call details of the accused and PW2. PW26 recorded the FIS, Ext.P1, and registered Ext.P1(a) FIR. PW29 is the I.O., who also carried out the recoveries under Sec.27.

15. The doctor who carried out the post-mortem examination found two incised wound and an abraded contusion on the dead body. The ante-mortem injuries are as follows:

- "1. *Incised wound 13.5 cm long on left side of upper part of front of neck, obliquely placed upper right end 2 cm outer to midline and 4 cm below jaw margin. The wound had cut the subcutaneous tissues, muscles, the superficial vessel exposing left ala of thyroid cartilage. The wound had a depth of 2-3 cm. The wound had a tailing for 3 cm directed downwards and outwards. The surface was having relatively pale base.*
2. *Incised wound 10 cm long on lower part of front of neck, transverse its right end 1.5cm right to midline and 6 cm above right collarbone. The wound had cut subcutaneous tissue, trachea and strap muscles of neck and vessels including the common carotid and subclavian artery in its full*

thickness. The wound also cut the vagus and phrenic nerves. The wound had cut the body of 6th cervical vertebra 3 cm long and 0.5 cm deep on its anterior and left side. Spinal cord intact. The wound was directed backwards and slightly downwards.

3. *Abraded contusion 5x0.5 cm long on left side and back of upper part of neck, oblique, inner end 6 cm below mastoid region and 10 cm outer to midline"*

It was opined that the deceased died due to injury No.2 and that injuries 1 to 3 could be caused by MO1 chopper. The death is said to have occurred in the early morning. Injury No.2 is said to have been inflicted first and injury No.1 later, and all the injuries could be inflicted by a single person. Injury No.2 was categorically stated to be sufficient in the ordinary course of nature to cause death. The death was homicide and we are called upon to decide as to whether, on the evidence adduced, the murder is established to have been committed by the accused.

16. The learned Senior Counsel vehemently argued based on precedents that PW2, who turned approver, was a mere spectator and it is incredulous to think that the accused, who is alleged to have a prior intention to commit the murder, would call PW2 to merely witness the dastardly act,

he was intending to commit. The contention seems to be that there was no common intention or participation in the crime and in that event, there is no question of PW2 being an accomplice, who alone can be an approver under the Cr.P.C. Bhiva Doulu Patil (supra) was a case in which the approver deposed in Court that the appellant had approached the approver suggesting that the deceased should be killed, in pursuance of which the 1st accused and the approver together got a knife made by PW7. The appellant was convicted on the basis of the testimony of the approver, corroborated by PW7, and the motive of the suspicion of his wife having an illicit relationship with the deceased. The time gap between the making of the knife and the incident was found to be too long for PW7's evidence to offer any corroboration. It was also found that though the approver's evidence was sufficiently corroborated as against the 1st accused who committed the murder, it was not sufficient to convict the appellant. Noticing Sec.133 of the Evidence Act, it was held that though a conviction based on the uncorroborated testimony of an accomplice may not be illegal, the Courts cannot lose sight of the rule of prudence and practice as found in Illustration (b) to Sec.114 of the Evidence Act. The combined effect of

these provisions imposes a caution on the Courts while accepting the evidence of an accomplice, without corroboration in material particulars. Chandan (supra) was also in the same direction and found the testimony of the accomplice to be not corroborated at all from any other independent circumstance or source of evidence. In Abdulla Kunji @ Nadubail Abdulla (supra), it was held that unless there are inculpatory statements by the approvers, the Court cannot assume that they aided or abetted the crime.

17. We are not convinced that the precedents are applicable and it cannot be said that there is no inculpatory statement made by PW2 in his testimony. On a reading of PW2's evidence, it is evident that he tries to distance himself from the act of murder as also the intention to commit either murder or even a robbery. However, despite his best efforts, there are inculpatory statements in PW2's evidence. The moment he saw the accused take out the chopper and walk to the sleeping man, he becomes an accomplice, even if he does not have a prior intention. The approver raised no protest and he was a passive spectator to the murder, according to him. But, immediately after the murder, the accused is said to have searched the room and picked up MOs.2 to 4 ornaments,

which according to PW2 was put in his pocket. When the ornaments were pawned, the accused also gave Rs.30,000/- to PW2, admittedly. The further statement made by PW2 that Rs.3,000/- was immediately taken back and that the entire money was paid back by withdrawing from the ATM, again is only self serving. Ext.P3 is the Bank account of PW2, in which he had deposited Rs.26,500/- on 16.11.2011 itself. Hence, Rs.500/- was immediately appropriated by PW2, even according to his evidence, and only the balance out of the Rs.27,000/- was deposited in the Bank. Even though a nominal amount, it makes him an accomplice to the offence of robbery. He was also an active participant in the robbery committed thereafter. There are seen withdrawals between 17.11.2011 and 19.11.2011, as per Ext.P3, of various amounts, marked as DI to D9 in cross examination. Two withdrawals of Rs.500/- and Rs.5,000/-, marked as Exts.D1 and D2, were admitted by him, in cross-examination, to be amounts given to his friends. The withdrawal of Rs. 1000/- (Ext.D3); PW2 says he does not know who withdrew that amount. Exts.D4 & D5 are POS transactions, meaning a payment for purchases made. PW2 says he does not know who carried out Ext.D4 and his friend Bibin made Ext.D5 purchase. Ext.D6 withdrawal is also admitted to be made by

Bibin. PW2 also answers a specific question as to when Bibin gave back the money in the affirmative. PW2 says that if he remembers correctly the money was returned to the accused at one instance. Ext.D7 a withdrawal of Rs. 200/- was admitted to be by PW2 himself. Exts.D8 & D9 withdrawal of Rs.16000/- & Rs. 1000/-, respectively were stated to be done jointly by the accused and PW2. The money paid back to the accused does not add up to Rs.26,500/-. Further, in chief-examination itself PW2 admitted that after the incident he saw the accused only 2-3 times. It is the evidence of PW2 that he had paid back the amounts given to him in person to the accused. The withdrawals said to have been made from the Bank account are nine in number, many of which are not payments to the accused. PW2 at the time of the crime was a student and also working as a cleaner in a bus. The fact that he was student is revealed from the evidence of PW16, who says that he used to approach her airing fears about examinations. He admits to have acquaintance with the accused by reason of their joint employment in a stage carriage. The defence marked Exts.D1 to D9, to prove that the money deposited was not paid back to the accused; but it reveals a cohort and a common intention, which makes PW2 an accomplice. That, PW2 was part of the

larger design is fairly clear despite his effort to exculpate himself. There is no reason for us to disbelieve him for reason of the exculpatory statements since, our Courts do not follow the maxim of *falsus in uno falsus in omnibus*. PW2 was a part of the murder and definitely of the subsequent robbery and the appropriation of the proceeds from such robbery, which makes him an accomplice and there is absolutely no reason why we should discount his evidence, as an accomplice/approver on that count.

18. We are further fortified in taking this view, with *State of Rajasthan v. Balveer @ Balli (2013) 6 SCC 321.* There the approver along with the accused committed rape on a woman and later the other accused murdered the victim; which the approver is said to have objected to and also raised an alarm. The High Court acquitted the accused on the ground that the sole testimony of the approver cannot be the basis of the conviction, especially when he did not inculcate himself either in the statement under Section 164 or under Section 306. The Hon'ble Supreme Court reversed the High Court and held so:

"23. *This Court in Suresh Chandra Bahri v. State of Bihar [1995 Supp (1) SCC 80] explained the object*

of Section 306 CrPC in the following words: (SCC p. 106, para 42)

"42. ... The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence."

24. Thus, the High Court failed to appreciate that the extent of culpability of the accomplice in an offence is not material so long as the Magistrate tendering pardon believes that the accomplice was involved directly or indirectly in or was privy to the offence. The High Court also failed to appreciate that Section 133 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person and when the pardon is tendered to an accomplice under Section 306 CrPC, the accomplice is removed from the category of co-accused and put into the category of witness and the evidence of such a witness as an

accomplice can be the basis of conviction as provided in Section 133 of the Evidence Act".

[Underlining by us for emphasis]

19. PW2 has clearly spoken of the circumstances - the prior, the subsequent as also the crime proper - in graphic detail. There is a contention raised that none were examined to show that the accused and deceased were together from the afternoon of 15.11.2011 till the night, when they reached the house of the deceased. PW2 narrates their journey which commenced from the Little Flower Hospital and ended in the residence of the deceased. In the course of the journey, the accused had visited a toddy shop and a bar, then a hardware shop, alone and a place where regularly game of cards were held. There could be no witnesses from any of these locations. However, there is a friend of the accused whom they visited and who was warned against speaking of having seen the accused. Obviously, the prosecution did not want to field the said person as a witness since the friend would have turned hostile. We find no reason to disbelieve PW2 and since it is an approver's evidence, we have looked for corroboration, which we have find a plenty.

20. The accused was arrested on 21.11.2011 and PW2 on 23.11.2011. Immediately after the arrest of the accused on the basis of the confession statement, MOs.2 to 4 ornaments were recovered from New Welfare Finance as per Ext.P23 mahazar on 22.11.2011; a day before the arrest of PW2. The seizure was attested by PW13, the owner of New Welfare Finance and PW11 (CPO). The ornaments were identified by PW7, the son of the deceased and PW1, a close relative of the deceased. MO3 ring also had the name of the wife of the deceased engraved in it. In addition to the above recovery, Ext.P17 receipt of the New Welfare Finance dated 16.11.2011 was recovered from the house of the accused by Ext.P16 mahazar spoken of and identified by PW10. PW10 is argued to be the driver of the son-in-law of the deceased, but that cannot discredit him without something more. The recovery of the stolen ornaments is also not witnessed by that witness alone. The owner of the firm in which the pledge was made also confirmed the recovery. The receipt shows the weight as 45 grams and appraiser's certificate marked as Ext.P31 indicated the weight to be 45.2 grams. Exts.P30 and P30(a) are the ledger and ledger extracts recovered from the New Welfare Finance. The ledger extract shows the entry in tandem

with the receipt. The learned Senior Counsel has pointed out that there is a discrepancy in Ext.P24 mahazar which shows the receipt number to be 5229 of 2011. Ext.P24 is the mahazar by which the ledger of the New Welfare Finance was seized by the Police, along with the recoveries of MO2 to MO4. The Mahazar by which the pledge card was seized, Ext.P16, the pledge card itself, Ext.P17, and Ext.P30 ledger extract show the number as 5259 of 2011. We are convinced that the number recorded in Ext.P24 is only an inadvertent mistake. In addition to that, is the evidence of PW15, who identified MO1 chopper as the one purchased from his shop by the accused on 15.11.2011, just prior to the incident. The recoveries made on the confession of the accused corroborates the evidence of PW2.

21. The learned Public Prosecutor had specifically contended that reliable scientific evidence as to the presence of the accused, at the scene of occurrence is available from the report of the FSL, marked as Ext.P42. It is pointed out that the sample hairs taken from the scene of occurrence tallied with the hair samples of the accused, PW2 and the deceased, unerringly establishing the presence of the accused and PW2 at the scene of occurrence. The learned

Senior Counsel has a contention that even otherwise the accused was a frequent visitor to the house of the deceased. It is also unlikely that the hair of the approver was found in the room of occurrence, since even he does not have a case that he entered that room.

22. Ext.P50 is a property list by which PW5, Scientific Assistant, collected the various samples and handed it over to PW29, I.O. Ext.P51 is the property list of the scalp hair, body hair, nail clippings and blood handed over by the doctor who conducted post-mortem examination, PW24, and handed over to the CPO, who in turn handed it over to PW29, I.O. Ext.P71 is the property list by which the body and scalp hairs of the accused and approver were collected and sent in four different packets. Ext.P78 is the forwarding note, wherein under item No.2 are shown the scalp hair, body hair, nail clipping and blood collected from the body of the deceased and sent to the Court by Ext.P51 property list. Under item No.3 are the materials collected from the scene of occurrence as forwarded to the Court by Ext.P50. Item Nos.5 and 6 are the body and scalp hairs of the accused and item Nos.7 and 8, the body and scalp hair of the approver. Ext.P42 is the FSL report, which indicate the findings as follows:

- "(1) The hairs in items 7(a) and 9 contain human scalp hairs which were similar to the sample scalp hairs in item No.3(c).*
- (2) The hairs in items 7(d) contain human body hairs which were similar to the sample body hairs in item No.3(a).*
- (3) The hairs in item No.7(b) and 8 contain human scalp hairs which were similar to the sample scalp hairs in item No.15.*
- (4) Hair in item No.7(c) contain human scalp hairs which were similar to the sample scalp hairs in item No.13.*
- (5) Item No.12 and 14 contain sample body hairs".*

Item No.7 are the hairs found in the scene of occurrence which contained four different types of hairs, numbered as items 7(a) to (d). Item Nos.7(a) and (d) was similar to scalp hair in item No.3(c) and item No.3(a), chest hair, taken from the body of the deceased. Item No.7(d) and 8 were similar to the scalp hair contained in item No.15, which is that of the approver. Item No.7(c) are two hairs similar to that contained in item No.13, which is the scalp hair of the accused. Hence, the presence of the accused and the approver is established by scientific evidence. We cannot accept the contention of the appellant that he was a regular visitor of the deceased or that there was no possibility of the hair of the approver being found in the room where the deceased was found dead. The accused does not say whether he was in the

house of the deceased just previously and even according to the approver he entered the room, saw the dead man and the accused prowling around the room. Ext.P42 FSL report also indicates presence of human blood on the saffron dothi, MO10, but no trace on MO1 chopper. Both were recovered from a flowing river and despite that there was presence of blood on the dhoti; which was used by the accused to wipe himself and cover the chopper after the murder. However, though the call details of the mobiles were produced, there was no attempt made by the prosecution, while examining the Nodal Officers, to pin the location of the mobiles used by the accused and PW2 as also the calls between them. The Court is not expected to scan the individual details, unless there is substantial evidence regarding such call details as spoken of by the witnesses examined before Court. We do not place any reliance on the mobile call details.

23. The evidence discussed of PW2 as corroborated by the recoveries made under Sec.27 and the purchase of chopper by the accused proves the guilt of the accused beyond any reasonable doubt. PW2, even if did not have a common intention with the accused of murdering the deceased and stealing his ornaments, in the course of the crime, became an

active participant and also received stolen property, abetted the accused to pledge the same and enjoyed a portion of the proceeds of pledge. PW2's evidence is further fortified by the evidence of PW16, Saleena, who is a Christian preacher. She specifically said that the family of Martin, father of PW2, used to come to the meditation center frequently. PW2 was also a visitor, who shared his apprehensions about exams and other mental problems. On 18.11.2011, PW2 came to her at around 11.30 a.m and told her that he was frightened and also beseeched that she pray for him. She then queried as to what he was frightened of. He initially resisted disclosure, claiming it to be a secret. When PW16 persisted, PW2 said that he went to a place with a person and at that place he saw the person he was accompanying, murder another. PW2 also told her that he was frightened and the perpetrator had also threatened him with death since he was the only eye witness. This offers further corroboration for the evidence of PW2. We cannot accept the contention of the learned Senior Counsel that since the accused had suffered a fracture he was incapacitated from carrying out the act in the manner described. Ext.P35 is the Discharge Certificate of the accused, which shows that he has been cured of the fracture.

Moreover, the specific testimony of PW2 is that the accused held the chopper by both his hands, when he hacked on the deceased. There is also the testimony of PW2 that he drove the bike on their way back from Chalakudy. We find no reason to interfere with the finding of conviction entered into by the trial Court.

24. Now we come to the issue of sentence. As we noticed, the Trial Court had sentenced the accused to undergo imprisonment for life under Section 302 IPC with a rider that the accused shall not be released for a period of twenty years following the dictum in Swamy Shraddhananda (supra). We cannot but observe that the Sessions Court has no such power. On a difference of opinion expressed in a batch of references, a Full Bench of this Court has in State of Kerala v. Unni [2013 (1) KLT 695 (FB)] held so:

"(i) *The Sessions Judges have no power to impose the harsher variety of life sentence awarded in Swamy Shraddananda (2)'s case (supra).*

(ii) *The interpretation of Swamy Shraddananda (2)'s case (supra) in Navas's case (2010 (2) KLT 542) that the said power is available to all Sessions Courts is reconsidered as above".*

Later, the Hon'ble Supreme Court also, in V.Sriharan @ Murugan (supra) held that, such special category sentence can

only be imposed by the High Courts or the Supreme Court and not by the Sessions Court. We often come across such orders of sentence passed by the trial Courts where the actual period of incarceration is specified without the same being subject to remission/commutation by the executive Governments as provided for in the Cr.P.C; following Swamy Sraddhananda (supra). The Sessions Court does not have such a power and the exercise of the same by the Sessions Judge cannot be upheld. We understand that the said exercise was carried out only since the accused was an earlier convict, that too for an offence under Sec.302. But all the same, there is no such power conferred on the Sessions Court. We hence set aside the sentence and impose a sentence of life imprisonment on the accused.

The appeal stands partly allowed.

Sd/-
K.Vinod Chandran
Judge

Sd/-
C.Jayachandran
Judge

sp/vku.