

K.N. Vijayan Vs. the State

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Court : Kerala

Decided On : Apr-01-1953

Reported in : 1953CriLJ1613

Judge : Koshi, C.J. and; Menon, J.

Appellant : K.N. Vijayan

Respondent : The State

Judgement :

Koshi, C.J.

1. This case has come before us in appeal & under Section 374, Criminal P.C. for confirmation of the capital sentence passed on the appellant Vijayan, son of Chandraseri Narayanan Vaidan of Mattancherry for the murder of a boy Swaminathan, aged about 14 who was a student of Form III in the T.D. High School, Mattancherry. Besides murder the appellant also stood charged with the commission of offences punishable under Sections 392 and 201, Indian Penal Code viz., robbery and causing disappearance of the evidence of murder. The learned Sessions Judge of Anjikaimal who held the trial with the aid of four assessors found the accused guilty both of murder and robbery and passed the sentence of death in respect of the former offence. In view of the imposition of the death penalty no separate sentence was awarded with respect to robbery. As for the charge under Section 201, the learned Judge took the view that as the

appellant was found guilty of murder the consideration of the question whether he was guilty of the offence of causing disappearance of the evidence of murder did not arise. Of the four assessors three of them opined that the appellant was guilty of all the three offences he stood charged with, while the fourth was of the view that at best a conviction for theft alone was warranted by the evidence.

2. The occurrence forming the subject of the charge is alleged to have taken place in the afternoon of 1.8.1952. The appellant was then 18 years of age and at that time he was without employment. He was formerly a student of the T.D. High School and the deceased Swaminathan and himself were friends. After leaving the school, the appellant got himself apprenticed for some time to a tailor but he left that off a fortnight or so before the date of the occurrence. The prosecution case is that on 1.8.1952 the appellant met Swaminathan at about 10-30 A.M. and that they were practically together till about 2-30 P.M. when the appellant enticed Swaminathan to an unused latrine in the T.D. High School compound and there murdered him by hitting him on the back of his head with a heavy piece of concrete. Other injuries are said to have been inflicted on the deceased's forehead with a knife and the prosecution also charged the appellant with having helped himself with the ornaments Swaminathan was wearing at that time viz., a gold (neck) chain, a gold ring and two earrings. It would appear the earrings were removed by cutting the lobes of the ears. According to the prosecution these incidents must have taken place round about 3 P.M. Their further case against the appellant is that after 8 P.M. on that day with a view to screen himself from punishment by concealing evidence of the commission of murder and robbery he had committed, the appellant dragged the dead body into a canal to the west of the latrine and there buried it deep in the mud of the canal and placed a big piece of granite over it.

3. The 1st day of August, 1952 was a working day for the School and Swaminathan attended his class for the first period. His class teacher was on casual leave that day and when the first period was over himself and two companions of his, P.Ws. 13 and 14, skulked away from the class. While they were so out idling their time the appellant joined their company and all the four were together till noon. At noon they returned to their respective homes for meals.

The evidence of Swaminathan's mother (P.W. 4) is to the effect that Swaminathan did not return to his house after he left it soon after his mid-day meal on 1.8.1952. His absence from the house was noticed in the evening when his tuition master went there to give him and the other children of the house tuition. Vigorous search was made for the missing boy that night and the next, day, but there was no trace of him until the morning of the 3rd of August when P.W. 5 by chance saw one human leg over the surface of the water in the canal opposite the T.D. High School premises. On getting down into the canal he found that a piece of granite was placed over a dead body. When the granite was removed Swaminathan's body floated in the canal with the face downwards. Soon the relations of the boy appeared on the scene and P.W. 11, an uncle, forthwith gave information to the Mattancherry Town Police station. At the instance of the Sub-Inspector the Circle Inspector also came to the spot. They recovered the body, held the inquest and sent the body for post-mortem examination.

4. Police investigation held on the 3rd and the 4th tended to show that the appellant was the culprit. On the morning of the 5th a warrant was issued for his arrest. He was apprehended in the evening of that day. It would appear that he expressed a desire to confess and was accordingly taken before the Second Class Magistrate of Mattancherry who recorded a detailed confessional statement from him.

5. The next day (6th August) on the strength of the information received from the appellant the police recovered several incriminating articles. As many as four searches were held that day and under the first they recovered three gold ornaments, viz., a gold chain, a gold ring and a pair of ear-rings each set with seven white stones. According to the evidence Swaminathan habitually wore these ornaments as also a silver thread round his waist with a gold case attached enclosing some talisman. All these ornaments were on his person when he left his house on the 1st after the mid-day, meal. The silver thread and the attached gold case alone were however on the body then it was recovered from the canal. The other three ornaments were found buried in the front court-yard of the appellant's house tied up in a handkerchief. Their recovery was at 10-45 A.M.

6. The second search was at 12 noon and the articles recovered were (1) an exercise book which admittedly belonged to Swaminathan, (2) a pair of shorts subsequently identified in the evidence as having belonged to Swaminathan and having been worn by him when he was last seen alive, (3) a 'mundu', (4) a tie, (5) a knife and (6) its cloth sheath. Items 3 to 6 are alleged to belong to the appellant. These articles were tied up into a bundle the tie binding them together. They were recovered from the asbestos roof of one Vamana Anantha Gora's bath-room in Mattancherry. The evidence is that the appellant took the police to the place stating that he had thrown away some articles into that compound.

7. The third search was at 1-15 P.M. The appellant is alleged to have taken the police then to the scene of offence, i.e., the unused latrine in the T.D.H. School compound and the recoveries made therefrom consisted of the lobes of both the ears, a gold clasp of the gold chain recovered earlier and the piece of concrete with which the appellant is alleged to have killed Swaminathan. Blood marks were noticed on the concrete floor of the latrine as also on its walls. According to the prosecution, the accused picked out the ear-lobes and the clasp and also pointed out the concrete piece.

8. The fourth and the last search was at 2-45 P.M. As per information received from the appellant the police recovered a shirt which belonged to him from a tank attached to a cremation ground not far away from the T.D. High School premises. The shirt had both the sleeves torn off.

9. After further investigation, the case was duly charge-sheeted and after the usual preliminary enquiry the appellant was committed to the Sessions Court of Anjikaimal to stand his trial for the commission of the offences aforesaid. It has already been mentioned what the result of the trial has been, and we are now concerned with the question whether the appellant has been proved to have killed Swaminathan and also robbed him.

10. Except for what is contained in Ex. D the confessional statement, the appellant made before P.W. 17, the Second Class Magistrate of Mattanchery, there is no direct evidence regarding the appellant's complicity in the commission of the offences he stood charged with. The confession was retracted from even in the

committing Magistrate's Court but the learned Judge thought it proper to act upon it as in her opinion the confession stood corroborated by overwhelming circumstantial evidence. We may even at this stage state that we are atone with the learned trial Judge in thinking that the offence of murder and robbery have been brought home to the appellant by the evidence in the case. We would however make a different approach than what the learned trial Judge adopted.

11. The pride of place among the items of evidence in the case to establish the appellant's complicity in the commission of the crime arraigned against him has been given by the learned Judges to the confession and the attempt made was to ascertain whether, even though retracted, it was corroborated in material particulars. The admissibility of the confession, its voluntary character and its truthfulness were all severely criticised by the learned Counsel appearing for the appellant. Indeed he left no stone unturned to have the confession virtually removed off the records of the case. While we feel unable to pay heed to his criticisms and propose ultimately to hold that the confession is not open to exception on any of the grounds mentioned by the learned Counsel or for that matter for any other reason, we venture to think that apart from it there is ample evidence to sustain the conviction even independent of it.

12. (After discussion of the evidence, His Lordship proceeded:) So far we have these facts. The-deceased was last seen alive in the company of the appellant at about 2-30 P.M. in the premises of the T.D. High School. Swaminathan has not thereafter been seen alive. Nearly two hours-after they were seen together the appellant is seen alone without his shirt and 'mundu' and with, injuries on his person. That was also near the premises of the T.D. High School. Swaminathan's dead body is recovered from a canal adjoining the T.D. High School premises on the 3rd day after he was last seen alive. The body bore unmistakable marks of violence. The body had not on it most of the valuable ornaments Swaminathan used to wear and which according to the evidence were on his person when he left his house at about 12-30 P.M. on 1.8.1952.

13. The place wherefrom the body was recovered adjoins the T.D. High School premises and the distance between the canal and the latrine which, is alleged to

be the scene of the offence is only 5 ft. The yadast prepared regarding the latrine showed clear signs that Swaminathan met with his death and that he was robbed of his valuable ornaments while he was inside the latrine. It is unnecessary to repeat what those signs are.

14. Next we go to the recoveries of the incriminating materials. The recoveries made from the scene, of the offence speak their own tale. All that we need add here is it was the appellant himself who picked out the ear lobes and the clasp of the chain. A piece of concrete was also recovered as pointed out by the appellant. Earlier in this judgment it has been mentioned that under the first search conducted pursuant to information received from the appellant the police recovered the gold chain, the gold ear-rings, and the gold ring which it had indubitably been proved belonged to Swaminathan and wore on his person on the day he was last seen alive. The parents, as also P.Ws. 13 & 14 swear to the fact that he usually wore them and the evidence of the mother & P.Ws. 13 and 14 is also to the effect that they were on his person when they last saw him on 1.8.1952. P.Ws. 13 and 14 took leave of him at 12 noon and the mother saw him last when he left the house after the noon-meal. The defence did not cross-examine these witnesses when they spoke about these ornaments. Ex. P is the search list under which the three ornaments referred to above were recovered and the-evidence of P.Ws. 35 and 39 - which the lower court fully believed and with which view we see no reason to differ - clearly shows that the place where they were hidden was pointed out to P.W. 39 by the appellant himself. P.W. 39 it was who investigated the case and he has of course given evidence that the recovery was pursuant to the information received from the appellant. Right from the committing Magistrate's court the appellant denied having given any such information to P.W. 39 but we have no reason to disbelieve P.W. 39. That means the appellant in whose company Swaminathan was last seen alive had in his possession the ornaments which Swaminathan wore at that time. That Swaminathan died as a result of violence and that force was used even in removing the ornaments from the person have been noticed earlier in this judgment. We have also mentioned that the circumstances of the case have no room to doubt that the murder and the robbery in this case formed parts of one and the same transaction.

15. It has come to be recognised as a settled rule that in cases in which murder and robbery have been shown to form parts of one transaction, recent and unexplained possession of stolen property in the absence of circumstances tending to show that the accused was only the receiver of the property would not only be presumptive evidence against the prisoner on the charge of robbery but also on the charge of murder. See - *Queen Empress v. Sami* 13 Mad 426 (A); - *Public Prosecutor v. Chiareddi Munayya* 21 Mad LJ 1071 (B); - *Narayana v. Emperor* AIR 1933 Mad 233 (C); - *In re, Ramudu* AIR 1943 Mad 69 (D); - *Emperor v. Neamatulla* 14 Cri LJ 556 (Cal)(E); - *Emperor v. Chintamoni Shahu* AIR 1930 Cal 379 (2) (P); - *Ramprashad Makundram v. The Crown* AIR 1949 Nag 277 (G); - *Sadashiva Daulat v. State* AIR 1950 Madh B 104 (H). A recent case which reviews most of these authorities is - *State v. Shankar Prasad* : AIR1952 All776 . In - *Sirkar v. Viswanatha Panicker* 29 Coch LR 120 (J) and in - *Madhavan Pillai v. Sirkar* 1944 Trav LR 647 (K), we find the same view as that held in the group of cases mentioned above entertained by the Cochin and the Travancore High Courts respectively. We are not unaware that some Courts, for instance the Bombay High Court, has not shown the inclination to draw any presumption as to the commission of an aggravated offence like murder from the mere fact of the possession of the property belonging to a murdered person with -the accused on trial.

The decision in - *Bhikha Gober v. Emperor* AIR 1943 Bom 458 (L), may be cited as an instance. The question whether in a given case a presumption in the sense referred to in the cases mentioned above can be drawn must depend upon the facts of the particular case and in the Bombay case cited the facts were not so strong as in the present case or in the cases above mentioned. Moreover, in this case, we have several other circumstances which are irreconcilable with any reasonable hypothesis of innocence on the part of the appellant. A passage from *Wills on Circumstantial Evidence* bearing on the point under discussion may usefully be quoted here. At pages 104 to 105 (Seventh Edn.) the learned author has said thus:

The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of

any other more aggravated crime which has been connected with theft.... This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised.

16. Recoveries made under two other lists still remain to be referred to in dealing with this aspect of the case. We have said that under the second search made on 6.8.1952 the police recovered a bundle in which were some clothes, an exercise book, a knife and its cloth sheath. Except for the confession there is no evidence as to the ownership of the mundu, the tie, the knife or the sheath included in that bundle and it is not our purpose to refer to the confession now. There is clear proof that the note-book which was in this bundle belonged to Swaminathan. The appellant himself admitted it in the committing Magistrate's Court and it is therefore unnecessary to refer to the evidence bearing on it. It is proved that the shorts included in that bundle belonged to Swaminathan. His parents swear to it. The appellant had said in the Committing Magistrate's Court that Swaminathan was wearing a bush coat and shorts when he saw him last. He had also said that the same bush coat was on Swaminathan's body when he saw it in the canal on the morning of the 3rd of August, but he is not sure whether the shorts was the one recovered under the list Ex. C. The significant thing to be noted here is both the note-book and the shorts showed traces of blood when chemically examined. It is also significant that the tie and the mundu has also blood marks. Ex. C shows that the knife and the sheath had also blood stains but they do not appear to have been sent for chemical examination.

17. The next recovery was under Ex. H and what was recovered thereunder was a shirt admittedly belonging to the accused. It had no sleeves and the appellant admitted that he had pointed it out to the police. Chemical examination showed that there were traces of blood on the shirt.

18. It may here be recalled that the appellant who round about 2-30 p.m. was seen dressed in a shirt and mundu was seen two hours after that without them but only with his underwear on. A blood-stained mundu is recovered from a bundle in which articles admitted or proved to be Swaminathan's were found. The appellant's shirt

is recovered from another place not far away from the alleged scene of offence also blood-stained. At 2-30 p.m. Swaminathan was with the appellant but at 4-30 he was not. At the latter hour when P.Ws. 6 to 8 saw him, the appellant had some injuries on his person. As noticed already and as referred to in greater detail in the lower Court's judgment the appellant had conflicting and contradictory explanations as to when, where and how he happened to discard his clothes and as to the cause of the injuries on his person. In the circumstances of the case in our opinion it will not be a violent inference to draw that it was the appellant's mundu that was seen together with Swaminathan's shorts and note-books in the bundle recovered under Ex. C. As for the tie, the knife and the sheath we say nothing now. If our inference is correct it needs no persuasion to hold that the appellant both murdered and robbed Swaminathan.

19. One more circumstance to be noticed is that when he was arrested on the evening of the 5th August the appellant had on his person several abrasions. His right thumb, both knees, left elbow, the dorsum of the left hand as also the back had several abrasions which according to the medical evidence was 3 or 4 days old. Except the encounter he is alleged to have had with a cyclist or a pedestrian in Port Cochin there is no explanation whatever for these injuries. We have already indicated that we do not for a moment believe the incident in Port Cochin. If there was such an incident as observed by the lower Court it is idle to think that he would have walked all the way from the place of the incident back to the premises of the T.D. High School with only the underwear he had on his person. The injuries show that after 2-30 p.m. and 4-30 p.m. he must have had a scuffle with somebody in or about the premises of the T. D. High School. If by 2-30 p.m. he had left the premises of the school it is unreasonable to think that he would have come back to the place after two hours dressed as he was at that time only as described by P.Ws. 6 to 8. According to the medical evidence Swaminathan's death must have taken place within four or five hours of his taking his meals. The postmortem examination showed partially digested pulpy food in the stomach.

20. The facts and circumstances so far referred to are in our opinion incompatible with the appellant's innocence and are incapable of explanation upon any other reasonable hypothesis than that of his guilt regarding the offences he has been

found guilty by the trial Court. In our view apart from his confession there is clear proof in the case against him for murder and robbery. That does not however mean or imply that we regard the confession as inadmissible, involuntary or untrue.

21. However before considering its value to the case, it may be mentioned that the lower Court has referred to the subsequent conduct of the appellant as evidence of his guilt. We feel afraid that unless we argue back from the conclusion the subsequent conduct in the case is not of much avail. As argued on behalf of the appellant each and every piece of subsequent conduct the prosecution attributed to him might as well be that of an innocent man. Once his guilt is assumed or taken to be established it is easily appreciated that he was trying to mislead people about the whereabouts of Swaminathan, That does not in our opinion lead us anywhere.

22. The defence urged that there was no adequate motive to commit murder. The evidence however shows that the appellant was without employment and that his parents had not the wherewithal or the inclination to nuance his expensive habits like patronising the pictures or tea shops and smoking. As an apprentice to a master tailor he was getting only 8 annas per day and that too he was not getting for a fortnight or so before the occurrence. To such a person the allurements of getting ornaments worth one hundred rupees or more might serve as a sufficient motive. Some of the cases referred to earlier show that similar murders have been committed where the value of the property involved was much less. Swaminathan's father's evidence showed that the value of the ornaments which Swaminathan was wearing was not less than one hundred rupees.

23. The defence also argued that in broad day-light the appellant would not have dared to commit such a grave crime in so public a place as the T.D. High School premises. It was also pointed out that the Harbour Labour Union had an office opposite the canal adjoining the High School compound and that, people were likely to be there throughout day time. There is no evidence however that anybody used to be in that office during the afternoon. The latrine had walls all round of a height of 9 ft. or more and it was sufficiently away from the school buildings. As a

latrine it was unused and from the particulars noticed in the yadast drawn up by the police on their inspection of it and other attendant circumstances already referred to we do not think that there is any substance in the criticism. Perhaps regard being had to all the circumstances a more secluded place could not have been found at that part of the day.

24. Now we come to the confession. As we are not for accepting any of the legal objections raised to its admissibility etc., we may straightway say that it is a full and complete confession by the appellant that he committed the murder of Swaminathan and that he robbed him of his valuable jewels. Though retracted, it is corroborated in material particulars by circumstantial evidence. The injuries noticed on the dead body of Swaminathan and those found on the person of the appellant fully corroborate the version given there as to how Swaminathan was killed. The version that the occurrence took place inside the latrine finds corroboration in the yadast drawn up with respect to it and the recoveries made therefrom. Likewise the removal of the ornaments, the throwing away of the bloodstained clothes - both of the appellant and the deceased - as also of the knife and the sheath gain corroboration by the recovery of these articles. The lower Court has set out the confession elaborately in paragraph 8 of its judgment and we do not think it necessary to repeat the details of the confession here, particularly as in our opinion independent of it there is abundant proof of the appellant's guilt.

25. The first legal objection raised to the admissibility of the confession was that P.W. 17 who is a Second Class Magistrate has not been specially empowered as required by Section 164, Criminal P.C. to record confessions. Section 37 of the Code states 'inter alia' that in addition to his ordinary powers any Second Class Magistrate may be invested by the State Government with any powers specified in the Fourth Schedule as powers with which he may be invested by the State Government. So far as Second Class Magistrates are concerned, the power to record statements and confessions during a police investigation is an additional power with which he may be so invested. Section 39 dealing with conferment, continuance and cancellation of powers enacts that in conferring powers under the Code the State Government may, by order empower persons specially by name or in virtue of their Office, or classes of officials generally by their official titles. After

the Indian Criminal Procedure Code was extended to this State what the State Government did was to confer on all Second Class Magistrates power to record statements and confessions under Section 164. Vide Notification No. CJ 3-13967/51/C.S. dated 5th November 1951 published in the Travancore-Cochin Government Gazette dated 13.11.1951. The point of the objection appeared to be that so long as this particular Magistrate was not specially named in the notification there was no proper empowerment.

The objection no doubt finds support in a decision of the Madras High Court reported as - Mahomed Kasim v. Emperor AIR 1915 Mad 1159 (M), where the words 'specially empowered' occurring in Section 3 of the Opium Act, 1878, came up for consideration. In that case the Court held that where a notification empowered all Second Class Magistrates to try cases under the Opium Act there was only a 'general empowerment' and not a 'special empowerment'. However, as pointed out in a recent decision of the Assam High Court - 'State v. Judhabir AIR 1953 Assam 35 (FB) (N)', the Madras High Court itself seems to have gone back upon the view expressed in the above case. See - Alaga Pillai v. Emperor AIR 1924 Mad 256 (O). The requirements of Section 3 of the Opium Act was again In question. There, it appears, there was no empowerment of the Magistrate concerned by his name but only by virtue of his office. The Court held that it was a sufficient valid empowerment within the meaning of Section 3, Opium Act, and Section 39, Criminal P.C. Section 39 states that in conferring powers under the Code, State Government may by order empower persons specially by name or in virtue of their office or.... In view of the words 'in virtue of their office' occurring in the section, we do not think it is necessary that for the purposes of special empowerment within the meaning of the section the names of the persons must be disclosed even though they hold an office. That is the view that the Assam case took and we find that that view has support in the Allahabad High Court also. See - Sundar Lal v. Emperor AIR 1933 All 676 (P).

In the Assam case it was said that a notification empowering all First Class Magistrates of Assam to exercise powers under the Assam Opium Prohibition Act was a valid special empowerment as required by the Act. Likewise the Allahabad High Court held that a general order empowering all First Class Magistrates to

take cognizance of cases under Section 110, Criminal P.C. was a valid special empowerment. This Allahabad case follows an earlier Bench ruling. In view of these authorities, we do not think it necessary to say more and we hold that the notification impugned is valid and that P.W. 17 was competent to record the confession.

26. The other objections to the admissibility of the confession were of the familiar type that it was not voluntary, that it was taken soon after the appellant was taken into custody, that the Magistrate had not recorded the questions and answers by which he got himself satisfied that the confession was voluntary, that the confession ought to have been taken in open Court and not at the residence of the Magistrate, that the Magistrate went wrong in sending the appellant back to police custody after the confession was recorded etc. We have read the deposition of the Magistrate carefully and also perused the confessional statement very closely and we are of the view that there is no substance in the contention that the confession was not voluntarily made. It has been recorded in due form & we hold it to be admissible. As for the other objections there cannot be any hard and fast rules regarding the place of recording confessions or as to whether the deponent should after the confession be detained in judicial custody etc. Circumstances and exigencies of different cases might demand different courses to be adopted. In this case, the appellant was produced before the Magistrate within half an hour or so of his being taken into custody and as the Court had risen for the day the appellant had necessarily to be produced at the Magistrate's residence. The police had not detained him for twenty four hours when he was sent up for the recording of the confession and he was wanted for further questioning by the police. In these circumstances we cannot think that any irregularity, much less any illegality was committed by the Magistrate in recording the confession at his residence or in sending the appellant back to police custody. The discussion earlier has shown that the confession was also substantially true.

27. All told, in the circumstances of the case, we hold that the learned Judge rightly convicted the appellant of murder and robbery.

28. There has been no consideration of the question of the commission of the offence under Section 201 by the lower Court. Paragraph 22 of the judgment indicates that the learned Judge thought that as the appellant had himself committed murder he could not be convicted for the offence under Section 201. In - *Kashmira Singh v. State of Madhya Pradesh* : 1952 CriLJ839 , the Supreme Court left open the question whether a person convicted of murder could also be convicted of the offence under Section 201. More recently in - *Kalawati v. Him-Pra. State* : 1953 CriLJ668 , it has been held that Section 201 is not restricted to the case of a person who screens the actual offender, but that it can be applied even to a person guilty of the main offence, though as a matter of practice a Court will not convict a person both of the main offence and under Section 201. There was no argument at the bar on this aspect of the case but we might here refer to a decision of the Cochin High Court reported as - *Narayanan v. Cochin Sirkar* 39 Cochin LR 120 (S) to which one of us was a party. The view taken in that case was that there was no legal bar to a person being convicted both of murder and of the offence under Section 201 and that the proper course for the trial Court in a case where the evidence warrants it will be to enter a conviction for both the offences but not to award any sentence for the accessory offence. We affirm that view. All the leading cases bearing on the point then available have been referred to there. In this case the prosecution has not invited us to record a finding regarding the offence under Section 201 and we do not propose to embark upon that task on our own.

29. The question that remains now is whether the death sentence should be confirmed. The only ground pressed upon us was the appellant's age. He was only 18 years old when the crime was committed. The ground was urged before the trial Court also. It rightly repelled it and referred to a Madras case already cited.... '*AIR 1943 Mad 69 (D)*'. The learned Judges in that case said that youth was not a reason why the Court should not do its duty and to accede to the argument that on account of the fact that an accused is young the Court should not sentence him to the extreme penalty of the law will be to usurp the function of the Legislature. No mitigating circumstance exists in this case. It was a cold blooded and deliberate murder. Whether the invitation to go to the latrine was with the object of committing murder or for any other unlawful purpose what the appellant did was

cruel beyond measure. No mercy he is entitled to at the hands of the Court and in our view the sentence of death has to be confirmed.

30. At the fag-end of the case, a point was raised that notwithstanding the extension of the Indian Penal Code and the Indian Criminal Procedure Code to the State, Courts here are not competent to impose the death penalty. By Proclamation 8 of 1120, dated 26.11.1944 the Maharaja of Cochin had abolished death sentence for all except a very few offences for which the Cochin Penal Code had prescribed the death penalty. Murder was not an offence in which the death penalty was retained under that Proclamation. There was a similar Proclamation in Travancore on 11.11.1944 and that Proclamation purported to be an amendment of the Travancore Penal Code. The contention raised on behalf of the defence was that those Proclamations continue to be good law in the respective areas of Cochin and Travancore notwithstanding the Code of Criminal Procedure (Amendment) Act, 1951 (Act I of 1951) and the Part B States (Laws) Act, 1951 (Act 3 of 1951) and the Notification issued extending the enactments mentioned in them to Part B States from 1.4.1951.

31. We regret we cannot accede to the argument. The Cochin Proclamation had no existence independent of the Cochin Penal Code and when that was replaced the Proclamation went along with it. Section 6 of the Part B States (Laws) Act, 1951 replaced the Cochin and Travancore Penal Codes with their various amendments by the Indian Penal Code and under that Code the death penalty is the normal punishment for murder. The saving clause in Section 25 of the Code of Criminal Procedure (Amendment) Act, 1951, contained in the words 'but not so as to restore any jurisdiction or form of procedure not then existing or followed' does not in our opinion retain the two proclamations referred to in force. Similar saving clauses existed in the Travancore and Cochin Criminal Procedure Codes (Section 2) and also in Section 2 of the Criminal Procedure Code Act, V of 1898. Section 2 of the latter Code was repealed by the Repealing and Amendment Act, X of 1914. The effect of a saving provision like that in Section 25 of Act 1 of 1951 is that the repeal shall not revive any enactment repealed by the repealed Act. Under the Indian Penal Code, death sentence is the proper sentence for murder and under Section 31, Criminal P.C. a Sessions Judge is entitled to pass any sentence

subject to the reservation that when the death penalty is imposed that must be confirmed by the High Court. The High Court is competent to pass any sentence authorised by law. Unlike the Cochin and Travancore Codes of Criminal Procedure, the Indian Code does not require that the 'Sovereign' should approve a sentence of death passed by a competent Court. Sovereignty now vests in the people and it is against the spirit and the scheme of the Constitution of India, nay even anachronistic to think that a sentence of death passed by a competent Court should have superadded to it the imprimatur of the Executive for its validity or before it could be carried into effect.

32. No doubt we are now concerned with the competence of the Courts in this State to pass a sentence of death. The Court is concerned only with the passing of the sentence. To carry it into effect is the function of the Executive. The Constitution reserves in the President and in the Governor or the Raj Pramukh, as the case may be, the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any 'person convicted of any offence'. Vide Articles 72, 168 and 238. The Penal Code and the Criminal Procedure Code confer authority on the Government to exercise powers of remission, suspension or commutation of sentence passed by the Courts. The Court's duty is done when it passes or confirms a sentence.

33. We think that in this case that duty demands that the sentence of death passed by the lower Court should be confirmed and we decide accordingly. This is our answer to the reference. Criminal Appeal No. 168 of 1952 is dismissed.

34. Leave asked for is refused.