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Vasudevan Vs. the State

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Court : Kerala

Decided On : May-31-1993

Reported in : 1993CriLJ3151

Judge : K.T. Thomas and; K.K. Usha, JJ.

Acts : Evidence Act, 1872 - Sections 8, 9, 10, 11(2) and 27; Code of Criminal Procedure (CrPC) , 1974 - Sections 162, 176, 313, 342 and 386; Indian Penal Code (IPC), 1860 - Sections 201, 202, 118, 302 and 404

Appeal No. : Crl. A. No. 211 of 1989

Appellant : Vasudevan

Respondent : The State

Advocate for Def. : K.C. Peter, Addl. Director General of Public Prosecution

Advocate for Pet/Ap. : A.X. Varghese, Adv.

Disposition : Appeal dismissed

Judgement :

K.K. Usha, J.

1. Many a young man and woman of Kerala could find life's oasis in the oil rich deserts of Gulf Countries. But, few unfortunates burned their wings in futile pursuit

of the mirage. Vasudevan, the appellant, belongs to the second category. The effect of flow of oil money and the desperation of young men and women in acquiring visa and work permit to anyone of the Gulf Countries, on the social life of Keralites is a fertile ground for study by the social scientists. The crime, which is subject-matter of this appeal, is a bye-product of the phinomina.

2. Aniyankunju alias Vijayananda Menon was reported missing from 27th September, 1980. The prosecution alleged that the appellant - first accused, Vasudevan, had murdered him and buried his body in the courtyard of the accused. Learned Sessions Judge found him guilty under Sections 302, 404 and 201 of Indian Penal Code. The second accused, Ponnamma, wife of the first accused, was found not guilty of the charges levelled against her under Sections 118 and 202, I.P.C.

3. The prosecution case is as follows:

Deceased Aniyankunju was engaged in arranging Visa to those who were desirous of taking up employment in Gulf countries. In the year 1979, Aniyankunju arranged such a Visa for the first accused on payment of an amount of Rs. 11,000/-. Since the first accused was not able to get a proper employment, he returned after one and a half years harbouring in his heart, a desire to wreak, vengeance against Aniyankunju who was responsible for all his miseries at Dubai. With the help of P.W. 1 (who was originally arrayed as 2nd accused but later turned as approver), a school teacher whose wife is a cousin of the first accused, he was successful in circulating a story that he had returned from Dubai with few Visas for 'sale'. As expected, deceased Aniyankunju swallowed the bait without any hesitation and offered to pay for the Visas. He handed over certain amounts to P.W. 1 along with some passports and promised to bring the balance amount. On 27-9-1980, Aniyankunju left his house by about 5.30 p.m. and after collecting some more amount for payment in connection with the Visa, he reached the house of the first accused by about 7 p.m. The first accused entertained him with liquor and then strangulated him to death. His body was buried in the courtyard of the 1st accused's house 'Vrindavanam'.

4. Ext. P60 First Information Statement was given by Rama Raja Menon, younger brother of deceased Aniyankunju on 14-10-1980 to the effect that Aniyankunju was missing from 5.50 p.m. on 27-9-1980. On enquiry, it was known that during the relevant time, Aniyankunju had received money from certain persons for arranging N.O.C., that on 27-9-1980 after leaving home, he had gone to the house of one Paramu (P.W. 33) and taken a loan of Rs. 4,500/- and that for about a week before the date of his disappearance, he had been visiting frequently Vasudevan (1st accused) who had recently returned from Persia. Aniyankunju was described in the F.I. Statement as a 33 year old lean person having a height of about 5 1/4 feet. When he left his house on 27th September, 1980, riding his old cycle, he was wearing a double dothi and slack shirt with full sleeves made of crape material in gray colour with circular design in red. He was also wearing a Seiko wrist watch and two gold rings. When Vasudevan was contacted, he was told that Aniyankunju had gone to Bombay for clearing N.O.C. But, on verification with their elder brother in Bombay, it was known that Aniyankunju had not reached their brother in Bombay. Ramaraja Menon having died before the trial, the F.I. Statement was marked as Ext. P60 through P.W. 58 Gopinathan Pillai, his brother-in-law. The accused denied all the charges raised against them and contended that they had been falsely implicated in the crime. Prosecution examined 71 witnesses and marked 101 documents. For the defence, Dl to D29 were marked. Altogether, M.Os. 1 to 31 were got identified. This appeal is directed against the judgment of the learned Sessions Judge, Kollam, finding the first accused guilty of the charges levelled against him.

5. The main attack by learned counsel for the appellant was directed against the proof of corpus delicti. According to him, there was no legal proof that the dead body exhumed from the courtyard of the accused was that of Aniyankunju. Nobody could have ventured an identification by seeing the face of the highly putrefied body. The witnesses to the inquest, who had alleged to have identified the body as that of Aniyankunju, cannot be believed as their identification was not with reference to any peculiar mark or feature on the dead body. The identification of a putrefied body with the help of its dress alone is highly dangerous and should not be accepted by the court in the normal course. The appellant has also a case that M.O. 9 shirt which was mainly relied on by the witnesses, was not really worn by

the dead body when it was exhumed, but, on the other hand, it was separately placed on it. He further contended that Ext. P1 photograph is not that of Aniyankunju but of his brother PW 6. The difference in the height of Aniyankunju shown as 156 cms. in his passport and that of the dead body given in the inquest report as 166 cms. and spoken to by PW 70, the investigating officer, 165 cms. measured and found by PW 54, the forensic surgeon, at the time of post mortem examination, would indicate, according to the appellant, that the dead body found from his courtyard was not that of Aniyankunju. In support of the above contention, he relies on the evidence or PW 6 -brother of Aniyankunju - also who was stated that Aniyankunju was the shortest in their family.

6. PW 25 Sivanandan, a labourer, staying near the house of the first accused, had given evidence that the police had dug up the compound of the first accused and a masonry over constructed on the southern side of the house was dismantled. If the dead body had been hurried there at that time, the police would have certainly found the same. Therefore, the argument is that it was planted in the courtyard by the police at a subsequent stage in order to implicate the accused.

7. Learned Addl. Public Prosecutor referred to the following factors available in this case which, according to him, would justify the finding of the learned Sessions Judge regarding corpus delicti. (1) The dead body of Aniyankunju was exhumed from the courtyard of the first accused as per the information given by him to the police from the spot pointed out by him to the Executive II Class Magistrate who conducted the inquest. (2) The dead body was that of a male aged between 25 and 35. The evidence in the case was that Aniyankunju was aged 33 at the time of his disappearance. (3) The period of putrefaction tallied with the alleged date of death. (4) The dothi and the shirt seen worn by the dead body were the dress which was worn by the deceased when he was seen last on 27-9-1980. (5) While proceeding to the residence of the first accused, the presence of a five rupee currency note in the folds of the left sleeve of the shirt worn by the dead body in the light of the evidence of PW 62 and (6) 8 points of similarities found by Forensic expert on doing the test of photographic super-imposition of the skull and mandible of the dead body with the photograph of deceased Aniyankunju.

8. Pursuant to a statement made by the first accused to the police that he had buried the dead body of Aniyankunju in the courtyard of the accused, 'Vrindavanam' along with the dress worn by Aniyankunju and the cloth tied around his neck, enquiry was conducted as provided under Section 176 of Cr. P. C. by the Executive II Class Magistrate, Karunagappally. When the first accused was brought to the courtyard of his residence, he pointed out a spot on the southeastern portion of the compound saying that it. was there he had buried the dead body of Aniyankunju. Pursuant thereto, the dead body was exhumed. The discovery of the dead body as a result of the statement made by the first accused as contemplated by Section 27 of the Indian Evidence Act, is an important factor which would support the prosecution case regarding corpus delicti. 'The fact discovered includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this'. (Vide Mohd. Inayatullah v. State of Maharastra, AIR 1976 SC 483 : (1976 Cri LJ 481)).

9. We do not find any merit in the contention raised on behalf of the appellant that the statement pointing out the place from which the dead body was exhumed is hit by Section 162 of the Cr.P.C. and therefore it cannot be relied on by the prosecution. Apart from the fact that the statement of the accused would come within the purview of Section 27 of the Indian Evidence Act, the action of the appellant in leading the Executive II Class Magistrate and pointing out the place where the dead body was buried would be admissible as a conduct under Section 8 of the Evidence Act also. Vide Prakash Chand v. State (Delhi Administration), AIR 1979 SC 400 : (1979 Cri LJ 329).

10. The evidence of PW 25 is of no help to the appellant. He had not said that the police had dug up the whole compund of the accused nor has he seen them digging. Even the demolition of the oven by the police was not witnessed by him.

11. The dead body which was exhumed from the courtyard of the first accused was identified by PWs 3 and 58 as that of Aniyankunju. PW 3 has not stated that he could identify the dead body as that of Aniyankunju with reference to any specific features. P. W 58, Gopalapillai, a school teacher, had married the sister of deceased Aniyankunju in the year 1973 and had been staying in the house of his

wife along with the deceased and other members of his family. He had stated that he had no difficulty in identifying the dead body as that of Aniyankunju even in the putrefied condition. He had deposed that when Aniyankunju left their residence on 27-9-1980 in the evening by about 5.30 to meet the first accused, he was wearing M.0.8 double dothi and M.O.9 shirt which were seen worn by the dead body. It is true that PW 6 Unnikrishna Menon, brother of deceased and PW 33 paramu were not present at the time of exhumation and therefore had not seen the dead body wearing M.O. 8 and M.O. 9. But their evidence that it was M.O. 9 shirt which was worn by Aniyankunju on the evening of 27-9-1980 when he went out to meet the first accused, would corroborate that portion of the evidence of PW58.

12. Learned Addl. Public Prosecutor made a reference to Ext. P60 F.I. Statement dt. 14-10-1980 given by Ramaraja Menon, another brother of Aniyankunju, who died during the pendency of the trial, wherein the shirt and dothi worn by Aniyankunju when he went out on the evening of 27-9-1980 from his residence had been described and the description would completely tally with M.O. 8 dothi and M.O. 9 shirt. Of course, serious dispute was raised by the learned counsel appearing on behalf of the appellant regarding the evidentiary value of the F.I. Statement which was later proved not by the maker of the statement as he was no more, by PW 58, his brother-in-law. It was contended on behalf of the prosecution that the statement regarding the shirt and dothi contained in Ext. P60 can be used under Section 11(2) of the Evidence Act as it probabilises the statements of PWs 6, 33 and 58 regarding this aspect. We are not expressing any opinion on this dispute as we find that even without reference to Ext. P60, the evidence of Pws 6,33 and 58 are sufficient to prove that deceased Aniyankunju was wearing M.O. 8 dothi and M.O. 9 shirt when he went out from his residence on the evening of 27-8-1980 to meet the first accused, PW 3, PW 51 the Executive II Class Magistrate who conducted the inquest, PW 54 Dr. Umadathan the Forensic Surgeon who did the autopsy, PW 57 who helped in digging up the dead body, PW 58 and PW 70 the Investigating Officer have spoken to the fact that M.O. 9 and M.O. 8 were worn by the dead body when it was exhumed and not placed on it as alleged by the accused.

13. Ext. P1 is a colour photograph of deceased Aniyankunju as identified by PW 6 and PW 58. We are not impressed by the argument put forward on bahalf of the appellant that Ext. P1 is the photograph of PW 6, the younger brother of Aniyankunju and not that of Aniyankunju. It is relevant to note that no question was put to PW 6 when he was examined as to whether Ext. P1 was his photograph. Ext. D4 passport of Aniyankunju admittedly contains his photograph. We are of the view that Ext. P1 and the photograph in Ext. D4 are that of one and the same person. PW 6 has stated that in Ext. P1 photograph, Aniyankunju was wearing M.O. 9 shirt.

14. PW 62 used to keep a bunk shop near 'Kuthirapanthi' market, about 200 metres away from the house of the accused, was acquainted with both the accused and the deceased. On 27-9-1980 between 6 and 7 p.m., Aniyankunju came to his shop and purchased a packet of Charminar cigarette and offered a five rupee currency note. Since he had no change, the witness returned the note. He kept the currency note in the folds of his shirt sleeve and said that on his return, he will pay the amount. He then went towards the eastern side. Neither did he return nor paid the price of the cigarette. The five rupee note was recovered from the folded sleeves of M.O. 9 shirt found worn by the dead body at the time of exhumation. This is another factor which would go to show that M.O. 9 was the shirt which was worn by Aniyankunju on the day on which he was last seen. We do not find any reason to take a different view from that of the Sessions Judge that M.O. 8 and M.O. 9 seen worn by the dead body were the dress which Aniyankunju was wearing on the evening of 27-9-1980.

15. Ext. P53 post mortem report and the evidence of PW 54 would show that the dead body was that of a male between the age of 25 and 35. Aniyankunju was aged 33 at the time of his disappearance. PW 54 has opined that the death would have occurred more than two months before the date of post mortem, namely, 15-12-1980. Aniyankunju was last seen on 27-9-1980. PW 54 has applied super imposition technique using skull and mandible taken from the dead body exhumed with Ext. P1 photograph of Aniyankunju. On the basis of 8 points found by observation, he had given the opinion that the skull and mandible taken from the dead body could have belonged to the deceased. Even though photographic

superimposition is not a sure test, it certainly is an additional factor corroborating the prosecution case regarding the identity of the dead body exhumed.

15-A. The evidence of PWs 11 to 15 neighbours of first accused excludes the possibility of any other dead body already buried in the compound of Vrindavanam being mistaken to that of Aniyankunju. They have deposed that there was no death in the house of first accused for a long number of years and nobody was buried in the compound to their knowledge. PW 59, the Panchayath Executive Officer has stated with reference to Ext. P62 Death Register of the year 1980 that no death was reported from the house of first accused or the nearby houses. We find it difficult to accept the suggestion of the appellant that the police would have planted a dead body in his residential compound to implicate him. It is totally improbable for the police to get at a dead body with correct period of putrefacation, get it clad with M.O. 8 and M.O. 9 and then bring it in the courtyard of first accused without the knowledge of the public who had been taking keen interest in the investigation as revealed from the evidence.

16. Can all the above mentioned materials pointing in favour of the prosecution regarding the identity of the dead body be ignored for the reason of the discrepancy in the measurement of the height of deceased as entered in his passport Ext. P56 and the measurement of the stature of the dead body noted by Forensic Surgeon PW 54, as contended for the appellant. From the evidence of PW 54, it can be deducted that for finding out the stature of the dead body, he had adopted Karl Pearson's formulae even though there is no specific statement to that effect. He has stated that the skull, mandible and long bones were collected for detailed examination and determination of stature.

17. In the book Practical Forensic Medicine authored by PW 54, he has referred to Karl Pearson's formulae at page 63 as the method for estimating the stature of an individual from the length of long bones. But a reference to the text books on medical jurisprudence by other authors, it is seen that Karl Pearson's formulae is now rarely used and that the method of arriving at the stature of the body on the basis of the length of the long bones is not quite satisfactory. The 5th edition of Medical Jurisprudence and Toxicology, originally written by H. W.V. Cox and

revised and re-written by Dr. Bernard Knight deals with this aspect in Ch. 3 pages 137 to 141. It is mentioned therein that while Pearson's formulae was drawn up on the basis of fresh material, later tables constructed by Trotter and Gleser were based on the study of skeletons of- victims of Korean war which included white, mongoloid and negroid subjects. It is further noted :

'Concerning an Indian population, it has already been stated that the above formulae devised in and North America are even more inaccurate for inhabitants of the Indian subcontinent. Considerable anatomical work has been carried out in India, and the original papers of the numerous authors should be studied if the medical examiner is keen on getting the best possible local data. Once again, it must be emphasised that there is considerable variation between the different ethnic and geographical groups in India, for instance the inhabitants of the Punjab are obviously of different stature from the small people of the extreme south of India.'

The table of Ostelogical data of Indian origin recorded by Modi do not contain any material regarding Keralites. (Refer Modi's Medical Jurisprudence and Toxicology, 21st Edn. Appendix V Table II page 331)/ Parikh's text book on Medical Jurisprudence and Toxicology by Dr. C. K. Parikh at page 971 mentioned the same view regarding Karl Pearson's formulae. The table given therein also does not contain any material regarding Keralites. Under these circumstances, it cannot be taken that the measurement of the stature of the dead body assessed by PW 54 was accurate or near accurate. In Ext. P2 inquest in the column regarding height, it was originally written as 156 cms. and then corrected as 166 cms. It is not seen from the inquest as to how the measurement was taken. There is no material before us to show whether the entry in the passport was correct or not. The evidence of PW 6 that deceased was shortest in their family is also of no help to the appellant as there is no evidence available regarding the height of other members of the family. Under these circumstances, we find it not possible to accept the contention of the appellant that the dead body exhumed from his courtyard was not that of Aniyankunju, in view of discrepancy regarding height. On the other hand, large amount of substantial factors as detailed above, would indicate that it can be only the dead body of Aniyankunju. We are therefore

inclined to agree with the learned Sessions Judge that the dead body exhumed from the courtyard of first accused was that of deceased Aniyankunju.

18. The next question to the considered is whether Aniyankunju has met with homicidal death as alleged by the prosecution and found by the learned Sessions Judge. It has come out in evidence that when the dead body of Aniyankunju was exhumed, there was a cloth legature found tied around the neck region with a double reef knot on the front of the neck. In Ext. P54, the final opinion given by PW 54, the Forensic Surgeon, based on the post mortem findings and results of laboratory examinations, he has stated that due to decomposition of body, no definite finding as to the cause of death can be given and the system of the deceased contained ethyl alcohol at the time of death. The appellant therefore contended that it is a case of no evidence regarding the cause of death and therefore there is no justification for the finding that Aniyankunju was murdered. We find it difficult to accept the above contention. PW 54 did not notice any external sign of violence or any evidence of natural disease. Poisoning was excluded by chemical analysis. Under these circumstances, the presence of the legature around the neck of the dead body would lead to an irresistable conclusion that Aniyankunju was strangulated to death. PW 54 also has stated that taking into consideration the nature of the knot of the legature around the neck, a reasonable presumption could be drawn that the death could have been due to strangulation. None of the arguments put forward on behalf of the appellant could persuade us to take a different view from that of the learned Sessions Judge on the above issue. We therefore hold that death of Aniyankunju was caused by strangulation while be had consumed alcohol.

19. There is no direct evidence as to the actual commission of the murder. Learned Sessions Judge has convicted the appellant of the murder of Aniyankunju purely on the basis of circumstantial evidence. It has therefore to be examined whether there are sufficient circumstances available in this case which are of conclusive nature and consistent only with the hypothesis of the guilt of the accused and whether the chain of evidence is so complete not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and that in all human probability, the act must have been done by the appellant.

20. In order to establish that deceased had dealings with the first accused in the matter of visa transactions, the prosecution had mainly relied on the evidence of PW 1. After few days of his return from Dubai, the first accused met PW 1 with some gifts and informed him that one Kurup belonging to Alappuzha had entrusted with him six or seven Visa for 'sale' and requested PW 1 to impersonate one Padanilam Pillai, brother-in-law of Kurup and get an amount of Rs. 25,000/- and passports from a person who would be intruduced to him later. Even though PW1 originally protested, he later agreed and the first accused promised to pay him an amount of Rs. 1,000/- as consideration. PW1 has narrated in detail the meetings which he and first accused had with Aniyankunju and how money and passports changed hands from Aniyankunju to first accused through PW1.

21. Learned counsel appearing on behalf of the appellant cautioned us from accepting the evidence of PW 1 who was an accomplice and originally arrayed as second accused and later turned approver. Of course, it is not always safe to rely on the evidence of an accomplice. But it is not the law that under no circumstances, the evidence of an accomplice shall be relied on. The correct legal position has been adverted to by the Supreme Court in State of Bihar v. Basawan Singh, AIR 1958 SC 500 : (1958 Cri LJ 976) as 'even in respect of evidence of an accomplice, all that is required, is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. Corroboration need not be direct evidence that the accused committed the crime, it is sufficient even though it is merely circumstantial evidence...'.

22. The evidence of PW 1 regarding the Visa transactions between deceased and first accused is amply corroborated by PW 28 Sadanandan, PW 32 Pankajakshan and PW33 Paramu. PW 28 has stated that he came to know from Aniyankunju that first accused had brought some Visa and Aniyankunju offered to get one for him. PW 28 therefore entrused an amount of Rs. 5,001/- along with a passport to Aniyankunju on 23-9-1980 for getting a Visa to his brother. Even though deceased had promised to give the Visa on 27-9-1980, when the witness met him at his house on the morning of 27th, deceased told him that A1 had said that Visa cannot be handed over unless the entire amount was paid. When he met first

accused on 26-9-1980 and enquired about deceased Aniyankunju, he was informed by the first accused that Aniyankunju had gone to Alappuzha taking an amount of Rs. 1000/- from him and he clarified that it was one Kurup who was dealing with N.O.C. and not himself. PW 32 Pankajakshan had deposed that he had paid an amount of Rs. 9500/- in three instalments with a passport to decessed Aniyankunju through PW 33 Param for getting Visa for his son Karthikeyan. The last instalment of Rs. 4.500/- was paid on 27-9-1980 at about 5 O'clock at his own residence to PW 33 who, in turn, handed it over to deceased Aniyankunju. The evidence of PW 33 corroborates PW 32 and he further states that he and deceased left the house of PW 32 together riding their cycles and deceased went towards the house of first accused saying that it was the first accused who was giving the N.O.C. It was at about 6-30 in the evening and thereafter he had not seen Aniyankunju.

23. Learned counsel for the appellant strongly contended that no reliance could be placed on the evidence of PW 33 in view of his strange conduct of not informing anybody that Aniyankunju was with him till 6.30 in the evening of 27th Sept. 1980, even when he was informed that Aniyankunju was missing from 27th evening. We do not think that for the above reason, the evidence of PW33 has to be discarded. His conduct has to be appreciated in the background of the transactionss between the parties. Everybody knows that these types of Visa transactions are illegal and therefore nobody would be inclined to come out with their part in such transactions and get himself embroiled in the connected complications. We are of the view that the evidence of PW1 corroborated by PWs 28,32 and 33 would clearly prove that the first accused and deceased Aniyankunju were engaged in Visa transactions during the relevant period and amounts had been received by the first accused from deceased Aniyankunju on the promise of arranging Visa.

24. Coming to the most important issue, namely, the part played by first accused in the death of Aniyankunju, we find that there is ample evidence to show that on the evening of 27-9-1980, Aniyankunju had gone to the house of the first accused and was with the first accused at least till 7 p.m. PW 58, brother-in-law of deceased Aniyankunju, has given evidence that by about 5 O' clock in the evening of 27th Sept. 1980, Aniyankunju left his residence on his old Rally cycle (M.0.7)

saying that he was going to the house of first accused. The evidence of PW 33 and PW 62 are to the effect that deceased had gone towards the house of first accused between 6.30 and 7 p.m. on 27-9-1980.

25. PW 52 Lekshmanan who had been doing some odd works for the first accused, had deposed that last time he saw Aniyankunju was about 8 years back the date he could not remember - in the house of first accused. He had purchased arrack in the evening from the shop of PW 34 as directed by first accused and brought the same to the house of the first accused. At about 7 p.m. when he was returning home, the deceased was in the house along with first accused. PW 34, the owner of the arrack shop and PW 35 his salesman corroborate the evidence of PW 52 that he purchased arrack for the first accused in the month of Sept. 1980.

26. PW 53, Ponnappan, a goldsmith, has given evidence that when he went to the house of the first accused on 27-9-1980 at about 9.30 p.m. to borrow an amount of Rs. 100/-, he saw first accused and deceased Aniyankunju sitting in the courtyard of the house. Trial Court has not relied on his evidence. Even excluding his evidence, there is sufficient material in the evidence of PWs 58,33,62,52, 34 and 35, together with the finding in the post mortem report regarding presence of ethyl alcohol in the dead body, which would probabilise the prosecution case that the deceased was last seen with the first accused in his residence on 27-9-1980 and the deceased was entertained before his death with liquor by the first accused.

27. Recovery of the dead body of Aniyankunju who was last seen in the company of the first accused, from the courtyard of the first accused pursuant to a statement made by the first accused, is an important factor pointing to his guilt. So also, recovery of the wrist watch (M.O. 11) of the deceased from a bin containing paddy kept inside the house of the first accused, pursuant to a statement made by him, would further, indicate his involvement in the crime. Learned counsel for the appellant very vehemently contended that the discovery made pursuant to the information given by the appellant cannot be brought under Section 27 of the Indian Evidence Act as the so called information was given by the appellant under compulsion. Referring to the petitions the first accused sent to the Home Minister and Chief Minister, copies of which are Ext. D 18 and D20, learned counsel

submitted that the appellant was taken into custody much earlier and tortured by the police. According to him, under these circumstances, recovery of the dead body from his courtyard or the recovery of the wrist watch from his house cannot be put against the first accused. We do not find any merit in this contention. The inquest in this case was conducted by Executive II Class Magistrate. Ext. P2 inquest report would show that the first accused had pointed out at the time of inquest the place where he had buried the dead body of Aniyankunju. So also, the wrist watch was taken from the paddy kept in the bin, by the first accused himself and handed over to PW 70. We are of the view that the learned Sessions Judge has correctly found that the recovery would come within the purview of Section 27 of the Indian Evidence Act.

28. PW 1 has given evidence that M.O. 7 cycle was brought to his house by the first accused six or seven days after his meeting the deceased in the house of first accused. First accused left the cycle in the house of PW 1 saying that it was punctured and borrowed another cycle from PW 1. Even though he returned the cycle next day itself, he did not take back M.O. 7 cycle saying that he would take it later after getting it repaired. Later, when PW 1 came to know about the disappearance of Aniyankunju and that he was riding a cycle, he became apprehensive and removed the cycle from his varanda and kept it inside. About 2l/2 months later when he came to know about the exhumation of the dead body of Aniyankunju from the courtyard of the first accused and the arrest of the first accused, he got the cycle disposed with the help of his son and his brother PW 42, who threw it into a big pond. M.O. 7 cycle was recovered from the above pond. PW 1 is corroborated by PW 55 who had seen first accused going into the house of PW 1 rolling M.O. 7 cycle. PW 58 had identified M.O. 7 as the cycle on which deceased was riding when he left home in the evening of 17-9-1980 to meet the first accused. PW 8, the original owner of M.O. 7, identified it as the cycle which he had sold to Aniyankunju. The first accused's coming into possession of MO. 7 and his attempt to hide the same in the house of PW 1 are also strong indications of his guilt.

29. Apart from the above mentioned telling facts, certain counduct of the first accused after the disappearance of Aniyankunju would go a long way to support

the case of the prosecution that the first accused had caused the death of Aniyankunju.

30. Ext. P 58 is a telegram at 29-9-1980 sent by 'Menon' (Aniyankunju was known as Menon also) from Alappuzha to his brother which was received by PW 58 on 30-9-1980. It reads as follows:

'Going to Bombay, Follow letter'.

Ext. P74 is a similar telegram addressed to the 1st accused. The prosecution case is that these telegrams were sent by the first accused himself in order to mislead everybody. It is alleged that Exts. P14 and P15 applications relating to the above two telegrams are in the hand writing of the first accused. The learned Sessions Judge has found in favour of the . prosecution accepting the evidence of the handwriting expert PW 63, who is the Asstt. Director in the Documents Division of the Kerala State Forensic Science Laboratory, Trivandrum. Two serious objections were raised by the learned counsel for the appellant against the above finding.

31. Firstly, it was contended that the science of identification of handwriting is too imperfect and weak and therefore the trial Court should not have entered a finding that it was the appellant who had sent Exts. P58 and P74 telegrams in the name of deceased relying on the opinion of PW 63 supported by his report Exts. P68, P92 and P95. In support of his contention, reliance was placed on the decision of the Supreme Court in State of Maharashtra v. Sukhdeo Singh, AIR 1992 SC 2100: (1992 Cri LJ 3454). After surveying the case law on this point, it was held at page 2116 (of AIR): (at p. 3470 of Cri LJ):

'It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded.....

No hard and fast rule can be laid down in this behalf but the Court has to decide in each case on its own merits what weight should attach to the opinion of the expert.'

In the above case, the trial Court found the opinion of the expert not dependable. But, as far as the evidence of PW 63 is concerned, his opinion is well founded on good reasons. Even though he was cross-examined elaborately, nothing has been brought out to doubt the correctness of his opinion. No question was put to him suggesting bias. In Murarilal v. State of M.P., AIR 1980 SC 531: (1980 Cri LJ 396), the Supreme Court upheld a conviction under Section 302 of I.P.C., namely relying on the opinion of a hand writing expert. In the nature of the data and other materials pointed out by PW 63, we find that the learned Sessions Judge had correctly accepted his opinion.

32. The second objection raised by the learned counsel for the appellant was that while the accused was examined under Section 313, of Cr.P.C., no question was put to him in this regard and therefore no reliance could be made by the prosecution on the evidence of the handwriting expert. In support of his contention, he relied on a decision of this Court in Boban Jacob Cheriyan v. State, (1992) 1 Ker LJ 573. Arguments were addressed by both sides on this aspect. On going through the statement of the accused under Section 313 of the Cr.P.C., we find that the trial Court had not put any question to him relating to the evidence of the handwriting expert. Learned counsel for the appellant contended that the defect is not curable. The object of questioning an accused person by the court is to give him an opportunity to explain the circumstances that appear against him in the evidence. But, an omission on the part of the Sessions Judge to put questions in respect of a material brought out in evidence against the accused at the time of examining the accused under Section 313 of Cr.P.C. is not such a jurisdictional error which cannot be rectified at a subsequent point of time. We are of the view that in the light of the very wide and concurrent power given to the High Court under Section 386 of the Cr.P.C. while considering an appeal from conviction, it is open to the appellate court to put necessary questions so that there would be no miscarriage of justice.

32-A. A similar question arose before the Supreme Court under Section 342 of Cr.P.C. 1898 corresponding to Section 313 of the present Code in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (1973 Cri LJ 1783). V.R. Krishna Iyer, J., speaking for the Bench, held as follows (at p. 1794 of

Cri LJ):

'It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failure in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred, it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused.'

(Emphasis supplied)

33. In the facts and circumstances of the case, we were convinced that it would be unjust to eschew an important piece of evidence due to an irregularity which could be rectified by the appellate Court. The first accused was therefore summoned and additional questions were put to him under Section 313 read with Section 386 of the Cr.P.C., referring to the opinion of PW 63 handwriting expert that Exts. PI4, PI5 and P70 were written by the same person who wrote the standard writings Section 9, Section 9(a) to Section 9(m) and Section 10, Section 10(a) to Section 10(r)>. Ext. P70 was a letter sent by the first accused to the 2nd accused. The standard writings were those of the first accused. He replied that he had not sent any letter or telegram to anyone. He said that Exts. P14, P15 and P70 were not in

his handwriting. When questioned whether he had anything to say about Exts. P68, P92 and P95 reports of the handwriting expert PW 63, he replied that the questioned documents were not in his handwriting. In the light of the above, we are inclined to accept the opinion of PW 63 and agree with the finding of the learned Sessions Judge that Exts. P 58 and P74 telegrams and P70 letter were sent by the first accused himself. The conduct of the first accused in telling PW 28 on 28-9-1980 that Aniyankunju had gone to Alappuzha and his sending false telegrams to put everybody on a wrong track further probabilities the prosecution case that he was instrumental for the death of Aniyankunju.

34. Motive assumes importance when the prosecution has to prove the guilt of an accused by circumstantial evidence. We find that there are ample evidence in this case that the first accused was entertaining severe bitter feelings against deceased Aniyankunju sufficient to provide him with a motive to put an end to his life. PWs 16,17 and 18 have spoken ain detail as to how the first accused went to Dubai in March, 1979 with Visa arranged through deceased Aniyankunju along with PW 20 Bhaskaran. The disappointment and difficulties they had to endure by not getting the promised job have been narrated by PW 20. Both of them had to do earth escavation work which was extremely strenuous. They had no proper accommodation or arrangement for food. Even their salary which was much less than what was promised was not received in time. PW 20 has deposed that the first accused had written to Aniyankunju on several occasions complaining about his miserable life at Dubai. The first accused got involved in a litigation with his sponsor and he was even locked up by his employer. Ultimately, he managed to return in July, 1980. PW22, Joseph Philip who was also working in Dubai during the relevant period, had, at the instance, of the first accused, written Ext. P20 letter dated 16-8-1980 to the deceased as if the letter was being sent by Simon (PW 16) who was also working in Dubai at that time. In the letter, it was mentioned that the first accused was returning home along with one Kurup of Alappuzha and he was carrying seven Visas with him. It was suggested that if Aniyankunju could contact first accused, he may be able to find out persons for the Visa. It was also mentioned therein that the first accused was having a very good job at Dubai and he was returning by about 18th or 20th of August. When PW 22 enquired with the first accused as to why he himself could not write the above letter, he was told that

since first accused had already written to Aniyankunju that he was in great difficulties, Aniyankunju would not believe if such a letter was written by him and as Aniyankunju was familiar with his handwriting, the first accused could not write the letter even in the name of Simon.

35. The above would show that the first accused was carefully laying down a scheme which he later got implemented through the help of PW 1. He collected large amounts from deceased Aniyankunju through PW 1 and he had no Visa to offer in return. First accused had to incur substantial liability to pay for his Visa and he could not liquidate the same with the mearge salary. He found himself in deep financial crisis. Desperation is writ large in his letter Ext. P70 addressed to his wife, the 2nd accused. These circumstances, we are of the view, would indicate a motive for the first accused to commit the offence alleged against him.

36. A series of vital circumstances, namely, recovery of the dead body of Aniyankunju from the courtyard of the first accused, his watch from the residence of the first accused, for which no acceptable explanation could be offered by him, the fact that Aniyankunju was last seen in the company of the first accused on the evening of the day of his disappearance, the conduct of the first accused in luring Aniyankunju to him under the pretext that he had Visas with him for 'sale', his subsequent conduct of sending false telegrams coupled with a strong motive, can lead only to one irresistable conclusion that it was only the appellant who had strangulated Aniyankunju to death. We are in entire agreement with the learned Sessions Judge who has taken the above view.

We affirm the finding of the learned Sessions Judge that the appellant is guilty of the offences under Sections 302, 404 and 201, I.P.C. and confirm the sentence of life imprisonment passed on him. In the result, the appeal fails and it is dismissed.

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