(2006) 05 KL CK 0022

High Court Of Kerala

Case No: Criminal Appeal No. 1957 of 2005

Poovancherry Thekkeveettil Sankara Narayanan and Others		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: May 24, 2006

Acts Referred:

- Arms Act, 1959 - Section 3
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 201, 302

Citation: (2006) CriLJ 3215

Hon'ble Judges: V.K. Bali, C.J; J.B. Koshy, J

Bench: Division Bench

Advocate: M.K. Damodaran and M.P. Prabhanandan, Sojan Micheal, for the Appellant; Public Prosecutor and Sujith Mathew Jose, for the Respondent

Final Decision: Allowed

Judgement

V.K. Bali, C.J.

A school going girl aged 13 years, daughter of Poovanchery Thekkeveettil Sankara Narayanan alias Kutty (A1) was raped and murdered by Ahmmed Koya. After this heinous crime when the deceased somehow obtained bail, A1 in conspiracy with Thazhethethil Animon alias Ani Mohan and Mancheriyil Sankararmrayana, A1 and A3 respectively, is said to have committed his murder. The prosecution in the trial held against the appellants named above was able to secure conviction of A1 on the basis of circumstantial evidence consisting of strong motive that actuated him to commit the crimes as also recovery of the crime gun. He was thus held guilty for offence u/s 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1000/-, He was also sentenced to

undergo imprisonment for 3 years and to pay a fine of Rs, 500/-, in default to undergo imprisonment for three months u/s 201, IPC. He was further sentenced to undergo Imprisonment for one year u/s 3(a) of the Arms Act and the sentences were ordered to run concurrently. His co-accused A2 and A3 were, however, acquitted of the charges u/s 302, IPC but convicted u/s 201. IPC and sentenced to undergo imprisonment for 3 years and to pay a fine of Rs. 1000/- each and in default of payment of fine they were to undergo imprisonment for six months each. The order of conviction and sentence recorded by the learned Additional District and Sessions Judge, Fast Track Court No. I (Ad Hoc), Manjeri dated 20th October. 2005 has been challenged by the appellants in this criminal appeal.

2. Like in other cases based upon circumstantial evidence, so also in this, the pertinent point that needs consideration is as to whether the circumstances led by the prosecution unmistakably point towards the guilt of the appellants and all the circumstances are such that no other conclusion, but for the appellants being guilty is possible. The facts leading to the question posed above need a necessary mention.

3. The occurrence leading to death of Ahammed Koya, it appears, as per the prosecution story, had taken place somewhere in the midnight on 27-6-2002. The FIR with regard to the occurrence was, however, lodged on 4-7-2002 by the brother of the deceased, P.W. 1 Abdul Azeez. In the F.I. Statement Ext. P1 brother of the deceased stated that he was a Madrassa teacher and was doing his duties at Edakkara Thannikkadavu. He was residing along with his family at Cheruvannur in Charankavu in Elangoor amsom and desom. He had come to the police station to lodge a complaint that his younger brother Ahammed Koya had been missing from the area. It was after 8 p.m. on 27-6-2002 that he happened to be missing from the locality. He was an accused in the Krishna Priya murder case. He further stated that it was nearly six months since he got released on bail. After getting released on bail he did not come to the house. He was residing somewhere in the nearby area. He should be aged about 24 years. On the day he was missing, he was wearing black pants and dark black shirt. He stated that he was making a complaint about his brother being missing. This report was recorded by C. Sankaran. Head Constable on 4-7-2002. During the course of trial the prosecution examined. Dr. Shirly Vasu, P.W. 15, who stated that she was working as Professor in Forensic Department at Medical College Hospital, Calicut and had conducted autopsy on the body of Ahammed Koya, 24 years and she issued the certificate Ext. P10, The cause of death was due to shot gun injuries sustained on the chest and abdomen. The doctor noted the following ante mortem injuries on the dead body of Ahammed Koya:
1. Three lacerated puncture holes, the uppermost one 0.7 cm round 1 cm below "the right collarbone and 10 cm to the right of front midline, the next one 0.7 cm in diameter 1.5 cm below and 0.4 cm to the right of the previous one and the third one 1.2 cm in diameter 5 cm below and 0.3 cm to the left of the 2nd one.

2. Lacerated puncture held 1.5 cm. in diameter on back of chest 7 cm to the left of midline and 22 cm below top line of shoulder directed upwards and to the right, tissue block removed to expose a haematoma of 10 x 10 x 6 cm size.

Underneath, the left lung showed lacerations and was shattered with disintegrating collection of blood in the left chest cavity; 7th rib of left side fractured at back. 2 wads were recovered from the left chest cavity.

Internal : Underneath injury No. 1 the 4th and 5th ribs of right side were fractured in the anterior armpit line.

A total of seven pellets were removed from the body as follows:

2 Pellets from the chest wall from just underneath the parietal pleura from under the triple wound, 2 pellets from the lesser sac (below and behind the stomach), one from the front of sacrum and 2 from the abdominal wall near the midline from beneath the skin gaining entry therefrom behind.

The doctor further stated that she had traced 7 pellets from the dead body and 2 wads. There were two gun shot injuries on the body, one on the front of the right side of chest on upper region and the other one on the back of chest on the left side, 7 cm. away from the midline. In the cross-examination she stated that she could not notice the exact nature of tattoo mark on the body as it was in disintegrated condition due to decomposition. She had not noted any stinging or tattooing sign on the skin near to the wound injury. Abdul Azeez the first informant and brother of the deceased who appeared as P.W. 1 stated that he is a religious teacher and deceased was his brother. His brother was accused in a case involving the murder of a student by name Krishna Priya, the daughter of A1. They were neighbours. His brother was arrested by the police and was in jail. His kinsmen got him released on bail. He came to his house, but did not stay in their house. He was more closely related with the house of Krishna Priya. He had seen him last time on 27-6-2002. Thereafter, what he saw was his dead body. The dead body was recovered from a well in the compound of the house of A1. At the time it was recovered he was present and he had identified the body. There was a gunshot wound on the body. On 27th there was a talk among the local people that his brother was missing and that he might have been murdered. Following this he made the complaint Ext. P1. The dead body was seen on the 5th in an unused dilapidated well. There was no water in it. The corpse was removed to the hospital at Manjeri for conducting postmortem examination. He heard it said by Shihab that Suresh Babu (C.W. 3) was hired by A2 and A3 to bring an autorickshaw to remove the dead body. In cross-examination he stated that the case against his brother was that Krishna Priya was sexually assaulted, her ornaments were stolen and she was murdered. He did not know even before the incident his brother had assaulted ladies in the locality. He could not say that his brother was involved in theft cases. He denied that he stated before police that his brother was involved in many cases.

He, however, stated that if it was so written, then it may be correct. He was then cross-examined by way of question and answer form thus:

Q. Did the local people use to make complaint at the house ?

A. No one had complained to me.

Q. It is seen that you have told the Tahsildar that people in the area were complaining about Koya. What do you say ?

A. I do not remember. Ext. D-1.

Q. It is said that when he got bail and came to the residence, you did not allow him to enter into your house ?

A. That is right.

He stated that they felt that what his brother had done was a great mistake and mentally they were far away from him. He denied being not wholly correct that his brother separated from mother, father and wife was living a life pestering all the people in the locality. He, however, admitted that there were complaints about his brother by the people of the locality and the incident had taken place about six months after he was released on bail. He could not give the exact date when he had last seen his brother before 27th. He had not seen him near the Madarssa in the afternoon of 27th. He had staled that he had seen the dead body of his brother after 12 noon on 5th. The dead body was taken out of the well on 6th. He stated that Abdul Gafoor and Usman were also present and there were some others as well. He would not remember whether the dead body of his brother had on it black pants and dark black shirt. He would not remember the colour of the dress. He would not remember whether he had stated to the police that his brother had a gun-shot wound on his body. It was on 28th that he heard that the accused had shot his brother and it was following this that he lodged the complaint Ext. P1. He would not know whether his brother had taken liquor. He would not know where his brother stayed after he got released on bail. Aboobacker, T. P.W. 2, only stated that he knew the deceased Koya and he was acquainted with A1, whereas the other accused are not known to him. He further deposed that Koya was an accused in a murder case. But he would not know on what date he was granted bail. Ramachandran P.W. 3, stated that he knew deceased and the accused. The house of A1 was 75 meters away from his house. The house of deceased was some 10-20 metres from there. There was a temple dedicated to Vishnu near our houses. He was not aware whether the corpse of Koya was recovered from the well in the compound of A1. He was not then in the locality. He was declared hostile and cross-examined by the Public Prosecutor. E. C. Mohammed examined as P.W. 4 stated that he had held the Inquest over the dead body of Ahammed Koya. The corpse was taken out of the well in the compound of the house of A1 after removing the soil over the dead body. It was a well without any water in a dilapidated condition. The well was some 60

metres away from the house on the north-eastern side. The legs of the corpse were seen outside and the corpse was in a degenerated form. He was not in a position to Identify the body and the brother of the deceased had identified the dead body. After the inquest the dead body was removed to the District Hospital for post-mortem. In the cross-examination he stated that it was Sooppi (C.W. 8) who had first seen the corpse in the well. It was written that it was on 6-7-2002 at 9 a.m. in the morning. Inquest was held at 12.30 p.m. and completed at 2-30 p.m. Sooppi found the dead body underneath the soil. He admitted that the well was situated "in a property which had no compound wall or fence. He also admitted that the nearby areas are full of wild growth. He admitted that he had recorded in column No. 6 that separating himself from the mother, father and wife he was leading an immoral life. Dr. Sumi Mithra, P.W. 5 stated that she had inspected the scene of occurrence at Parammel Thodiparamba on 6-7-2002 when she was Forensic Assistant at Malappuram. On her own she collected from the place brown coloured blood-stains from the grass and earth. Controlled sample of soil too was collected. P.W. 6, P. Vijayakumar, only stated that the properties seized in the case were sent for chemical analysis. Sayed Mohammed, P.W. 7 only stated that he was present when the Scientific Assistant collected the properties, whereas Subramanian, P.W. 8 only stated that he was present when C.I. took into custody the properties produced before him by Dr. Sherly Vasu. Subramanian, P.W. 9 after admitting that he affixed his signature to the scene mahazar (Ext. P8) prepared by the police, further stated that he had signed Ext. P8 without reading it and he learnt that it was related to the murder of Koya. There does not appear to be any mention that the witness was turned hostile, even though it appears, that he was cross-examined by the Public Prosecutor. Abdul Gafoor, the elder brother of the deceased who was examined as P.W. 10 stated that the corpse was taken out of the well owned by Al and at that time he was present there. He had identified the dead body of his brother. He had seen the deceased last on 27th at 5 p.m. near the Madrassa. His brother was accused in Krishna Priya murder case and before that he was accused in a theft case as well. In cross-examination he stated that after being released on bail his brother had not come to their house. Ahammed, P.W. 11 after admitting that he knew accused persons stated that he had not seen A 1 coming near the Vishnu Temple or near the house along with the police. He was declared hostile and cross-examined by the Public Prosecutor. Alavi examined as P.W. 12 after stating that he knew the accused persons, however, stated that he had not seen A1 and police coming to the scene of occurrence and A1 taking out and producing the properties. He too was declared hostile and cross-examined. Devadas, P.W. 13 stated that accused were his neighbours. He had a jeep in his house. The accused had not asked for his jeep. He denied that A1 had come and sought the jeep at 11.00 in the night. He was declared hostile and cross-examined by the Public Prosecutor. E. C. Mohammedkutty was examined as P.W. 14. He stated that during the course of the incident he was the Additional Sub-Inspector of Police at Manjeri. Witnesses P.Ws. 1 and 2 were met and questioned and their statements were recorded. E. Sankaran examined as P.W. 16

stated that he had recorded the statement given by P.W. 1 coming to the police station at 11.30 a.m. on 4-7-2002 and based upon that a case was registered and the FIR. Ext. P1 was prepared. It is stated that the FIR had reached the Court next day and the Court was 100 metres away from the Police Station. C. P. Velayudhan examined as P.W. 17 stated that while he was the C.I. at Manjeri he took over the Investigation of this case. After verifying the Investigation he submitted a report to the Court for adding the provisions in the Arms Act. Soopikutty, P.W. 18, the witness regarding the recovery of Koya''s dead body from the well was declared hostile and cross-examined. V. Shahul Hameed, the main Investigating Officer of the case examined as P.W. 19, besides deposing with regard to the various steps that he had taken while Investigating the case also stated that while in search of the accused persons on 5-7-2002 at about 18 hours the second accused in the case was met near the house of his elder brother at Vandoor and when questioned he confessed to the crime and accordingly at 18.00 hours he was arrested from there. After second accused was brought to the police station he had prepared the confessional statement. Along with the 2nd accused, when investigating about the other accused persons, on 5-7-2002 itself at 21.30 hours third accused was met near the Cherukulam market and on being questioned from there, he confessed to the crime. The third accused was then arrested from there at about 21-35 hours. As per the confessional statement of the second accused ''after Narayanan removed the bullet from the body, the dead body of Koya was pushed to the well'', and ''if I am taken there, I shall show the well''. Based on the confessional statement, on 6-7-2002 at 8.45 a.m. they reached near the unused well on the north eastern side of the house of the first accused. In the presence of the Executive Magistrate and other witnesses, second accused was made to step into the well and after removing the earth, the legs of the corpse were shown to them and they were satisfied that it was a dead body. Accordingly the well and the environment around it were noted down in detail in the mahazar. Ext. P23 the witness proved is the mahazar showing the well and the surroundings. On 8-7-2002 at 14.30 hours the first accused appeared before him and made the confession statement which was recorded. The same was thus : "Thereafter, I went for a bath. If I am to be accompanied I shall show and take out the gun''. Based on this statement he along with the first accused reached the eastern side of the compound wall of the Vishnu Temple at Cheruvannoor in Elamgoor. As led by the accused he had reached there. On the eastern side of the compound wall outside the northern extremity, six metres away towards south from there, from underneath the dry leaves and waste, the first accused had taken out and produced before him a gun with 81 cm. length, with girth at one end 7 cms. and at the other end 5 1/2 cms. having 1 1/2 cm. circumference and 1 cm. width and from there above it a portion some 7 1/2 cms. with covering of mud and earth, a wooden gun cover with the writing Trees Quandam, Lock firing pen having a length of 44 cms, three pieces of wood having a length of 29 cms., a girth of 2 1/2 cms. and a width of 2 1/2 cms. with an iron barrel with a hole and a screw, two empty shells made of metal body, red in colour with the figure 12 on it at two places and words

''KF'' at one place were seized under the mahazar. These pieces when assembled together it would form a country machine gun.

4. Ext. PI3 is the report prepared by the Assistant Director (Serplogy), Forensic Science Laboratory, Police Department. As per the report aforesaid items 1 to 4, 9 to 11, 13 and 14 were subjected to Benzidine test. Blood was detected on items 1 to 4, 9 to 11 and 13 and blood was not detected on item 14 which was the unstained soil sample. The blood on items 1 to 4, 9 and 13 were subjected to Gel diffusion test and found to be human in origin. Ext. P14 is the report prepared by the Joint Director (General), Forensic Science Laboratory, Police Department. As per the report aforesaid items 5, 6 and 7 were assembled to form a. 12 bore SBBL firearm. On chemical examination, presence of nitrite could not be detected on the items 9, 10, 11, 13, 14 and 15. The M.Os. in items 5, 6 and 7 were assembled to form a. 12 bore SBBL firearm and was in working condition. M.Os. in item 8 were the spend cartridge cases fired with the assembled. 12 bore SBBL firearm. M.Os. in items 15 and 17 were the wads and pellets respectively of a 12 bore cartridge. Ext. PI5 is the report of the Assistant Director (Chemistry), Forensic Science Laboratory, Police Department.

5. When examined u/s 313 of the Code of Criminal Procedure, the appellants while denying the incriminating material put to them stated it to be a case of false implication, they produced some documents on record by way of their defence.

6. From the facts as have been detailed above it could be seen that the prosecution in order to base conviction against the appellants relied upon circumstantial evidence consisting of very strong motive on the part of A1 to cause the death of Ahammed Koya as also the recovery of the dead body from the well belonging to A1 on the statement made by A2 and recovery of crime gun at the instance and on the statement of A1. If these circumstances, as mentioned above, were fully established, it would be possible to record verdict of guilt, but the big question is as to whether these facts have been fully established. While taking into consideration the above circumstances we will first deal with the motive that actuated A1 to commit the crime. It is no doubt fully established that a teen-aged school going daughter of A1 was raped and murdered. It is further fully established that for this heinous crime the deceased-Ahammed Koya was facing trial and was on bail when he was done to death. There were friendly relationship between A1 and the deceased and they were on visiting terms with each other. This fact would add fuel to the fire and A1 would be emotionally highly charged to avenge for the rape and murder of his daughter at the hands of a friend. In the facts and circumstances as mentioned above, it perhaps, things might have rested there only motive alone might have been enough to hold at least A1 guilty of the commission of crime. However, it is proved on the records of the case that the deceased had a hoary past and was leading an immoral life. His parents and his wife had severed all connections with him and he was living at a separate place even unknown to his brother P.W. 1. It may be recalled at this

stage that his real brother P.W. 1 pleaded ignorance with regard to the deceased making assaults on ladies in the locality. Likewise, he denied knowledge with regard to his involvement in theft cases. Even though he admitted that he had stated before the police that his brother was accused in many cases, he however, hasten to add that he would not remember whether he had so stated before the police. When cross-examined in the shape of questions and answers, he would not remember that in Ext. D1 he had told the police that people of the area were complaining about his brother, even though he admitted that after he obtained bail and came to his house he did not allow him to enter his house. He admitted that there were complaints against his brother from the people of the locality. E. C. Mohammed, P.W. 4, who had held the inquest of the dead body of Ahammed Koya admitted that he had recorded in column No. 6 that separating himself from the mother, father and wife, he was leading an immoral life. P.W. 10 Abdul Gafoor admitted that Ahammed Koya was involved in theft cases. From the narration of facts as given above emanating from the statements of the witnesses it does transpire that Ahammed Koya was leading an immoral life, he was a trouble shooter, he was in the habit of teasing and tormenting women folk in the locality, he was involved in theft cases, his indulgence in unethical and immoral acts had assumed such proportions that his parents and wife had chosen to live apart from him-and his own brother P.W. 1 had not allowed him access to his house. Whereas, therefore, it may be proved to the hilt that A1 was highly charged and could well avenge for the rape and murder of his daughter, there could be many others who might have desired to achieve the same object. Ahammed Koya would have no dearth of enemies. Therefore, whereas, it may be possible to record a verdict that A1 had a motive to commit the crime, it shall also have to be held at the same time that there were others as well who wanted to achieve the same object. That being the position, the circumstance that A1 had a motive to commit the crime would not be such a fact established which may be consistent only with the hypothesis of the guilt of A1. In other words, the aforesaid circumstance should be such which may not be explainable on any other hypothesis. In fact, the other hypothesis is certainly available. The only finding that, thus, can be recorded is that it is possible that on account of the motive A1 might have caused the death of Ahammed Koya, but it is not possible to record that he alone would have done it.

7. The other evidence in the chain of circumstances relied upon by the prosecution pertains to recovery of the dead body. The first informant P.W. 1 in that connection stated before Court that he had seen the dead body on 5-7-2002. He further stated that after 12 noon A2 was also present in the place (well) from where the dead body was recovered. There does not appear to be any other evidence with regard to recovery of the dead body from the well. The first informant, however, admitted in his cross-examination that the dead body was recovered on 6-7-2002. This major discrepancy which gives lie to the recovery of the dead body on the alleged statement made by P.W. 1 has been explained by the learned trial Judge as a slip of

tongue. We are not prepared to accept this to be a slip of tongue. It is stated by P.W. 1 that he had seen the dead body on 5-7-2002 and that A2 was arrested after 12 noon and further that the dead body was recovered on 6-7-2002. P.W. 2 did not give '' any evidence to support the prosecution version whereas P.W. 3 turned hostile and was cross-examined. The investigating officer P.W. 19 admits in his evidence that A2 was arrested only on 5-7-2002 at 6 p.m. The alleged recovery of the dead body is on 6-7-2002. From this kind of discrepant evidence on material aspects pertaining to recovery of dead body supported by none other than the real brother of the deceased and not at all supported by any other recovery witness would not inspire any confidence. The mere fact that the dead body was recovered from the well in the boundary areas of the house of A1, in the facts and circumstances of the case, would not be of much significance. It may be recalled at this stage that the witness of inquest of the dead body, i.e. P.W. 4 stated that the well was situated in a property which had no compound wall or fence and further that the nearby areas were full of wild growth. The investigating officer P.W. 19 stated that Parammel Thotti Paramba where the well is situated is an open space. The dead body was found in the unused well in the compound of the house of the first accused. Some 150 metres on the north-east of the scene of occurrence there was the house of Vishnu Master. Some 100 metres away on the west was the house of Purameri Kunjumon and some 150 metres south-west was the house of Subramanian whereas some 150 metres on the south was the house of Padmavathi Amma and from there 25 metres on the south was the house of Ramachandran. Some 3 metres on the north of the scene of occurrence was the wild growth. The well may be in the compound of A1, but it appears to be a dry and abandoned well, where there is wild growth, and in the nearest vicinity there are houses of many other persons. In the circumstances as mentioned above, even if it is assumed that dead body of Ahammed Koya was indeed found from the well belonging to the first appellant, it would not be sufficient proof to connect A1 with the commission of crime, as the deceased had number of enemies. The possibility of someone else committing the murder and throwing the dead body into the well of A1 so as to involve him in the crime, cannot be ruled out.

8. The recovery of gun which appears to be the crime weapon at the instance of A1 on the basis of statement made by him besides being doubtful is wholly inadmissible in evidence. The investigating officer who alone supported the recovery of gun at the instance of A1, the other two witnesses P.Ws. 11 and 12 turning hostile, would depose that on 8-7-2002 at 14.30 hours the first accused had appeared before him and made a confessional statement. The relevant part of the said statement leading to recovery of gun when translated into English reads as follows:

Thereafter, I went for a bath. If I am to be accompanied I shall show and take out the gun.

A1 did not state that the gun, the weapon of offence, was concealed by him at a particular place known to him from where he could get it recovered. Ext. P26 contains relevant portions of the confessional statement made by A1. The same reads as follows:

Thereafter I went for a bath. If you accompany me, I shall take out and give the gun....While going for a bath, I took with me a bucket. After returning after bath, to the house, I brought the bucket and kept in the cow-shed of my house. If I am taken there, I shall take out the pestle, bucket and coil-yarn and produce it...

From the statement made by A1 u/s 27 of the Evidence Act as deposed by P.W. 19 and as recorded in Ext. P26 the question that arises is as to whether the said statement can partake the characteristic of a statement u/s 27 of the Evidence Act leading to recovery of the crime gun. Mr. M. K. Damodaran, the learned Counsel appearing for the appellants on the basis of the decision of the Honourable Supreme Court in Dudh Nath Pandey Vs. State of Uttar Pradesh, vehemently contends that the statement made by A1 cannot be said to be such which may have led to recovery of the crime gun. The Honourable Supreme Court in the said case held that evidence regarding recovery of a pistol at the instance of accused by itself cannot prove that the accused wielded it for the offence. Where the statement accompanying the discovery is vague as to who concealed the weapon, it was held that the pointing out of the weapon may only prove knowledge of the accused as to where the weapon was kept and nothing more. Paragraph 15 of the judgment which is relevant reads as follows:

Were this a case of circumstantial evidence, different considerations would have prevailed because the balance of evidence after excluding the testimony of the two eyewitnesses is not of the standard required in cases dependent wholly on circumstantial evidence. Evidence of recovery of the pistol at the instance of the appellant cannot by itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery is woefully vague to identify the authorship of concealment, with the result that the pointing out of the weapon may at best prove the appellant''s knowledge as to where the weapon was kept. The evidence of the ballistic expert carries the proof of the charge a significant step ahead, but not near enough, because at the highest, it shows that the shot which killed Pappoo was fired from the pistol which was pointed out by the appellant. The evidence surrounding the discovery of the pistol may not be discarded as wholly untrue but it leaves a few significant questions unanswered and creates a sense of uneasiness in the mind of a criminal Court, the Court of conscience that it has to be : How could the appellant have an opportunity to conceal the pistol in broad daylight on a public thoroughfare ? If he reloaded the pistol as a measure of self-protection, as suggested by the prosecution, why did he get rid of it so quickly throwing it near the Hathi Park itself ? And how come that the police hit upon none better than Ram Kishore (P.W. 4) to witness the discovery of the pistol ? Ram Kishore had already

deposed in seven different cases in favour of the prosecution and was evidently at the beck and call of the police.

9. Mr. Sujith Mathew Jose, learned Public Prosecutor appearing for the State on the other hand for a contrary view relies upon another judgment of the Honourable Supreme Court in State of Maharashtra v. Suresh 2000 SCC 263, paragraph 26 of the judgment which is relevant and which supports the contention of the learned Public Prosecutor reads as follows:

We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But, if the accused declines to tell the criminal Court that his knowledge about the concealment was on account of one of the last two possibilities the criminal Court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal Court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

10. We would have examined the respective contentions of the learned Counsel based upon the two decisions as mentioned above in greater details, but there may be no necessity to do so as a Division Bench of this Court in George alias Kunju v. State in Crl. Appeal No. 15 of 2003 decided on 8th September, 2005 has dealt with this controversy and observed as follows:

The decision rendered in Suresh''s case (supra) was followed in State of Karnataka Vs. David Razario and Another, also. But, the decisions in Suresh''s case and David Rozario''s case were rendered by a Bench consisting of two Judges. In Jaffar Hussain Dastagir Vs. State of Maharashtra, and Mahabir Biswas case AIR 1994 SCW 5052 (supra) the decisions were rendered by a Bench consisting of three Judges. We respectfully follow the decisions rendered by the larger Bench and hold that unless the authorship of concealment is established, the recovery in pursuance of the information stated to have been furnished by the accused will not fall under "discovery" as envisaged u/s 27 of the Indian Evidence Act.

Before arriving at the conclusion as reproduced above, the Division Bench of this Court relied upon a number of Supreme Court decisions in Jaffar Hussain Dastagir Vs. State of Maharashtra, ; Mohmed Inayatullah Vs. The State of Maharashtra, ; Bahadul alias Ghanshyam Padhan Vs. State of Orissa, ; Pohalya Motya Valvi Vs. State of Maharashtra, ; Dudh Nath Pandey Vs. State of Uttar Pradesh, ; Fr. George Cherian v. State of Kerala ILR 1989 Ker 95; Mahabir Biswas and Another Vs. State of W.B., and

Prem Prakash Mundra Vs. State of Rajasthan and Another, . We are in respectful agreement with the view expressed by the Division Bench as quoted above and thus hold that the admissible part of the statement made by A1 pursuant to which the alleged crime gun was recovered only proves that he knew that the gun was concealed from where it was taken at his instance, but on such knowledge no inference of committing the murder can be drawn. One of the primary requisites to make a recovery u/s 27 of the Evidence Act is that the authorship of concealment of articles must be proved. The inadmissible statement made by A1 leading to discovery of crime gun apart, the only statement of the investigating officer P. W. 19 in that connection cannot be taken as sacrosanct. As mentioned above, the recovery witness has not supported the prosecution case and further that no forensic expert was examined, nor any report obtained from them to prove that the cartridges recovered from the dead body of Ahammad Koya were fired from the crime gun. The prosecution has placed on record three chemical reports, Exts. P13, P14 and P15 respectively. Whereas, it may be possible to place reliance upon the chemical report Ext. P14 to hold that M.Os. in Items 5, 6 7 were assembled to form a. 12 bore SBBL firearm, it may not be possible to hold that M.Os. in item 8 are the spend cartridge cases fired with the assembled. 12 bore SBBL firearm. The M.Os. concerned were examined in the Laboratory using scientific aids, which was only chemical examination as clearly mentioned in the report Ext. P13. Assuming that the gun after assembling it was test fired using a. 12 bore cartridge and its firing pin impression mark was compared with that on the cartridge case in item 8 and further that individual characteristic marks were found matching and, therefore, even though the forensic expert was not examined nor any report was obtained it could still be possible to hold that the cartridges found from the dead body were fired from the crime gun, the basic question would be as to whether the gun was recovered pursuant to the statement made by A1. Once, the finding on that is that the statement made by A1 did not lead to any discovery, no further arguments would need any mention and, therefore, even if it is assumed that the prosecution has been able to prove the murder of Ahammed Koya by the firearm and that too with the crime gun, it would not be of much relevance. Before we may part with this order we would like to mention that the Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, has enumerated the following conditions to be followed in a case based upon circumstantial evidence when conviction can be ordered. These conditions are as follows:

(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely ''may be'' fully established,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Applying the test as laid down by the Honourable Supreme Court, whereas it may be possible to hold that A1 might have committed the murder of Ahammed Koya, it is not possible to hold that the circumstances led by the prosecution are consistent only with the hypothesis of his guilt or that they are all in such nature that they are not explainable on any other hypothesis except the guilt of A1.

11. There is hardly any acceptable evidence with regard to A2 and A3 concerning the offence of concealing the dead body of Ahammed Koya. In any case if A1 is entitled to acquittal even though by giving him the benefit of doubt, A2 and A3 cannot be convicted u/s 201, IPC as they had at the most lent a helping hand to A1 in the matter of concealing the dead body.

In view of the discussion as made above, we allow this appeal. The appellants would be acquitted by giving them the benefit of doubt. The order of conviction and sentence recorded by the learned Additional District and Sessions Judge, Fast Track Court No. 1, (Ad hoc), Manjeri against the appellants would be thus set aside.