(1992) 08 KL CK 0045

High Court Of Kerala

Case No: Criminal Appeal No''s. 582, 584 nad 592 of 1992 and Cri. R. T. No. 3 of 1992

Valiyaveetil Ashraf and etc.	APPELLANT
Vs	
State, S.H.O.	RESPONDENT

Date of Decision: Aug. 4, 1992

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 21, 27, 3, 30, 8
- Penal Code, 1860 (IPC) - Section 120B, 201, 302, 34, 364

Citation: (1994) CriLJ 555

Hon'ble Judges: M.M. Pareed Pillay, J; L. Manoharan, J

Bench: Division Bench

Advocate: M.K. Damodaran and Swayam-prabha P.M, for the Appellant; K.C. Peter, Additional Director General of Prosecutions and T.G. Rajendran, Addl. D.G.P., for the Respondent

Final Decision: Dismissed

Judgement

M.M. Pareed Pillay, J.

Accused 1 to 3 in S.C. 6 of 1991 of the Sessions Court, Manjeri Division have filed the appeals challenging the conviction and sentence against them by the Sessions Judge. They stood charged Under Sections 364, 302 and 201 read with Section 34 of the Indian Penal Code. Learned Sessions Judge found them guilty Under Sections 364, 302, 201 read with Section 34 and u/s 120B of the Indian Penal Code. All the accused were sentenced to undergo rigorous imprisonment for seven years each under Sections 364 and 120B and for five years u/s 201 of the IPC. Death sentence was imposed upon A-1 subject to confirmation by this Court and A-2 and A-3 were sentenced to undergo imprisonment for life u/s 302 of the Indian Penal Code.

2. Musthafa alias Muthu was found missing from the afternoon of 1-5-1990. A dead body was found on 7-5-1990 in the ravine near the Sixth Hair Pin Curve in

Thamarasseri Ghats. P.W. 2. Muhammad-kutty on seeing the corpse repotted the matter to P.W. 30 Head Constable of Thamarassery Police Station. P.W. 30 recorded the statement of P.W. 2 and deputed two police constables to guard the scene. The dead body was not identified at that time. Ext. P-28 is the first information report.

3. As Musthafa did not return to his house on 1-5-1990, his brother P.W. 1 and others made enquiries. Till 7-5-1990 no complaint was given to the police. On questioning A-l and A-2, P.W. 1 got the information that they had caused the death of Musthafa and had thrown him to the ravine. P.W. 1 was startled by the information. Local people who collected there informed the matter to Kottakkal Police and they came there immediately. P.W. 31, Head Constable reached the tea shop of P.W. 1 and recorded Ext. P-l first information statement tendered by him. P.W. 31 registered Crime 79 of 1990 against A-l to A-3. P.W. 32 Circle Inspector took up the investigation and went to the place where the dead body was seen. He prepared inquest report Ext.P-11 and seized M.0.1 towel, M.O.2 white shirt, M.O.3 black pants and M.O.4 kakki shirt. M.O. 3 and M.O. 4 were seized from the corpse. P.W. 24 doctor conducted autopsy and issued Ext. P-19 post-mortem certificate. P.W. 32 on completing the investigation laid the charge before the Court.

4. Prosecution case is based on circumstantial evidence. Motive for the crime is stated to be on account of the avaracious attitude of A-1 in not paying the amount due to the deceased. According to the prosecution, A-1 owed Rs. 23,000/- to the deceased as the latter had helped him financially to purchase a jeep and A-l decided to do away with the deceased rather than paying the amount and sought the assistance of A-2 and A-3 to take the deceased from his house in a jeep to Wynad on the false pretext that on getting the money from Wynad he (A-l) would pay the same to the deceased.

5. Besides motive, prosecution relies on the extra-judicial confession made by A-l, recovery of incriminating articles and identification of dead body to prove its case. The judicial confessions made by A-l and A-2, recovery evidence and the evidence of the deceased seen in the company of A-l to A-3 were also pressed into service to bring home the; guilt of the accused.

6. Motive for the crime is stated to be the scheming machinations of A-l to avoid payment of the amount due to the deceased. P.W. 1, elder brother of the deceased stated that the latter had money dealings with A-l. P.W. 8, another brother of the deceased who was residing along with his mother and the deceased testified that A-1 owed money to the deceased. P.W. 8 deposed that deceased had told him that his autorickshaw was hypothecated to a financier and the amount so obtained was given to A-1. As this evidence was not challenged in cross-examination, it cannot be assailed, P.W. 17 deposed that her deceased son bad hypothecated his auto-rickshaw and the amount so realised was given to A-l to purchase a vehicle. She also stated that her son often used to tell her about it. P.W. 18, sister of the deceased deposed that on 1-5-1990 when the deceased came to her house along

with A-l to A-3 in a jeep he had informed her that A-l owed him money and that he was proceeding to Wynad along with the accused on the assurance of A-l that on getting the amount due to A-l from a person at Wynad it would be given to him. The above evidence along with the evidence of P.W. 9 that he saw the deceased in the company of A-l to A-3 in the jeep on 1-5-1990 at 7 p.m. and that on his query the deceased has told him that A-l owed him Rs. 23,000/- and on the assurance given by A-l that he would get the amount and pay the same to him they were proceeding to Wynad, would show that A-l had monetary transactions with the deceased. Thus, there is unassailable evidence to hold that A-l owed money to the deceased and the former lured the latter to accompany him in the jeep to Wynad.

7. Prosecution relies on the testimony of P.Ws. 4, 5, 9, 14, 15, 17 and 18 to establish a prominent link in the chain of circumstantial evidence against the accused. P.W. 17 (mother of the deceased) deposed that the deceased wearing a white shirt and black pants left her house on the first day of the month (specific date not mentioned) at about 2-30 p.m., that he was having with him a shirt wrapped in a packet and that he did not return thereafter.

8. P.W. 14 is a taxi car driven. He stated that A-1 came in a jeep driving the same to Kottakal, that A-1 talked to the deceased, that deceased with a paper packet got into the jeep and sat in the front seat and that A-2 and A-3 were seen inside the jeep. That was at about 3 p.m. on 1-5-1990. They went towards Malappuram in the jeep. P.W. 15, an auto-rickshaw driver stated that on 1-5-1990 at about 2-30 to 3-00 p.m. he had occasion to talk to the deceased, that he saw A-l in a jeep KLM 7651 being parked at Kottakal, that deceased and A-l talked, that deceased got into the jeep and sat in the front seat, that it was driven by A-l and that A-2 and A-3 were \\ sitting in the rear seat and they went towards Malappuram. P.W. 15 has corroborated the evidence of P.W. 14 in all material particulars.

9. P.W. 18, sister of the deceased deposed that she saw her brother (deceased) on 1-5-1990 at about 3 p.m. when he along with A-1 to A-3 came to her house at Chappanangadi in a jeep. She prepared tea and offered it to them. Attack on her evidence is that they need not have gone to her house as they were proceeding to Wynad and as her house is not on the route. As her evidence shows that they used to visit her occasionally, attack on her evidence is not well founded.

10. P.W. 9 saw the deceased at about 7 p.m. at Thakarappady along with A-l to A-3. He has sworn that while he was going to Sultan Battery in a Car KL-10-2333 and when it stopped at Thakarappady for cooling the engine he saw deceased and A-l to A-3 coming in a jeep driven by the deceased. The jeep stopped and deceased came out of the vehicle and he told P.W. 9 the purpose of his journey to Kalpetta.

11. Evidence of P.Ws. 4 and 5 is not very much helpful to the prosecution as they have no case that they saw the deceased in the company of the accused. P.W. 4 said only about seeing A-2 and A-3 on 1-5-1990 at 4 p.m. at Mukkom Bus Stand. P.W. 5

stated that he saw A-l and A-2 on 1-5-1990 at about 6-30 p.m. at Adivaram. They have no case that they saw the deceased along with A-l to A-3. Moreover, admittedly they had no previous acquaintance with the deceased. P.W. 4 stated that police brought A-2 before him and he was interrogated. But regarding A-3 he has no case. In view of his evidence that usually about 300 persons frequent his shop and he would not be in a position to remember them, identification of A-2 for the first time in Court does not inspire confidence. As P.W. 5 also did not have any previous acquaintance with A-l and A-2 and as there was no plausible reason for him to remember them, lack of test identification parade casts reasonable doubt on his evidence. In State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others, 3454 the Supreme Court held (at p. 3466 of Cri LJ):

In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

12. Even if the evidence of P.Ws. 4 and 5 is eschewed, the testimony of P.Ws. 17,18,14, 15 and 9 establishes the fact that deceased was in the company of accused 1 to 3. It is in evidence that body found in Thamarassery Ghats was that of the deceased.

13. Defence counsel pointed out that the body was in a highly decomposed state and so nobody could have identified it. He submitted that the attempt of the prosecution to get the corpse identified on the basis of the black pants and kakki shirt found on it, has boomeranged. It is also contended that the kakki shirt is an introduced item of evidence to make it appear that the corpse could be identified on account of it. Kakki shirt has a label ''Solar Vengara''. Counsel submitted that no attempt was made to trace the tailor to find out for whose purpose it was stitched. The argument is that had the prosecution attempted to trace the tailor who stitched the shirt it would have been helpful to know the identity of the corpse and as no attempt in that regard was made and as P.Ws. 18 and 19 do not have a case that the deceased was wearing kakki shirt when they saw him last it will have to be held that the prosecution deliberately suppressed an item of evidence. Defence counsel submitted that as P.Ws. 1, 18 and 19 have stated that the deceased was wearing white shirt and black pants it is not at all possible to make identification of the highly decomposed body on the basis of the wearing apparels on the corpse viz. black pants and kakki shirt.

14. Prosecution mainly relied on the evidence of the brothers of the deceased (P.Ws. 1 and 8) and P.W. 9 who saw him last for establishing the identity of the corpse. Inquest report Ext.P-11 shows that the body was highly decomposed. Ext. P-19 postmortem certificate reveals that superficial layer of skin had peeled off from all over the body. Skin and soft tissues have disappeared from the neck region. P.W. 24

doctor who conducted autopsy stated that the body was ! so decomposed that ligature marks if any could not be identified. P.W. 9 who saw the j deceased at 7 p.m. at Thakarappady along with the accused stated that the deceased was wearing a white shirt over a kakki shirt. He particularly observed the collar of the kakki j shirt. P.Ws. 1 and 8 stated that they could identify the dead body not only on seeing its general features, but also from the wearing apparels. P.W. 1 stated that immediately on seeing the dead body he could identify it as that of his brother. He admitted that he could not remember the wearing apparels found on the dead body. P.W. 8 stated that on 1-5-1990 he saw the deceased last in his house at about 3 p.m. and then he was wearing black pants and white shirt. According to him, he identified the corpse as that of his brother and he could do so from the pants and the kakki shirt belonging to the deceased. In cross-examination P.W. 8 stated that except the black pants and kakki shirt there was no other identifying mark and that he could not identify the dead body from its face. But he stated that he could j identify the body as that of his brother on seeing the legs and hands as the skin and fleshy parts were not decomposed, there is nothing to disbelieve him in view of the evidence in the case that deceased used to wear M.O. 3 pants and M.O.4 kakki shirt. It is useful to refer to Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad, where in para 13 the Supreme Court held:--
Though the body was in an advanced state of decomposition and many parts of the limbs were missing and even the flesh in the face was gone, it would not have been difficult for close associates of Venkatakrishna Shastry to say that it was his corpse, from the general features, form, outline, contour built of the body, and the appearance of such of the limbs as were available to see.

As the close relatives of the deceased could identify the dead body as gathered from the available evidence, the defence contention in this regard cannot stand.

15. Prosecution also relied on Ext. P-25 finger print opinion to hold that there cannot be any doubt with regard to the identity of the dead body as that of the deceased Musthafa. Ext.P-2 partition deed was produced by P.W.1. It is the prosecution case that Ext.P-2 partition deed contains the thumb impression of the deceased and that it favourably compared with that taken from the corpse. P.W. 1 in chief examination stated that at the time of investigation he produced the partition deed before the investigating officer. That was marked as Ext.P-2. But he did not say in his evidence that the deceased had put his thumb impression in Ext. P-2. As there is no such evidence, from Ext. P-25 report it cannot be held that the thumb impression taken from the corpse is similar to the thumb impression of the deceased.

16. Even if Ext. P-25 is eschewed from evidence, it would not affect the prosecution case as there is other evidence with regard to the identity of the dead body. P.W. 7 who was a witness in the inquest report stated that he could identify the corpse as that of the deceased from its physical features and dress. He had occasion to see the deceased wearing black pants. Though he admitted that the body was

decomposed and the skin had peeled off from the face and chest, he could still identify the corpse from the dress, general features and appearance of the body. In view of the evidence of P.Ws. 1, 7 and 8 that they could identify the body as that of the deceased, defence contention that the identity of the corpse is shrouded in mystery is devoid of merit.

17. One of the items of evidence relied on by the prosecution in this case is the extra-judicial confession. P.W. 1, elder brother of the deceased deposed that his brother (deceased) was missing from 1-5-1990, that his enquiries revealed no fruitful result, that he implored A-l to tell the truth as he became aware of the fact that deceased was in the company of A-1 to A-3, that A-1 told him that he and two others strangulated the deceased and threw him from Wynad hilly tract and that he wanted P.W. 1 to pardon them. According to P.W. 1, within ten minutes police came there and he told the police about it.

18. Counsel for the accused submitted that the very nature of the extra-judicial confession would show that it has been concocted for bolstering the prosecution case and so it deserves outright rejection. Counsel pointed out that in view of the prosecution allegation that A-l to A-3 engineered the murder of the deceased in a highly secretive manner it is not at all likely that A-l would have blurted out as stated by P.W. 1. It is also contended by him that the alleged extra-judicial confession does not involve A-2 and A-3 by name and so at any rate it cannot be used against them. According to him, the extra-judicial confession is an introduced item of evidence after seeing the corpse in the Wynad hilly tract. Counsel argued that from the chief examination of P.Ws. 1 and 16 it is not possible to discern the identity of the co-accused mentioned by P.W. 1 and so it is not in any way possible to hold that he meant A-2 and A-3 as the co-accused.

19. Merely because A-l contrived the murder of the deceased in secrecy, no conclusion is possible that he would not have made the extra-judicial confession to P.W. 1. P.W. 1''s evidence shows that in the presence of A-l and A-2 he talked to them in a cordial manner, that he implored them in the name of God to tell the truth and that it was then that A-l made the confession. P.W. 16 has corroborated the evidence of P.W. 1. Cross-examination of P.W. 16 has not brought out any circumstance to view his evidence with suspicion. Non-mention of extra-judicial confession to P.W. 1 in A-1''s confession before the Magistrate (Ext. P-26) cannot be considered as a factor detrimental to the veracity of the evidence of P.Ws. 1 and 16. In this context, it is useful to refer to the decision in State of U.P. Vs. M.K. Anthony, where the Supreme Court held that if the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach, the same can be relied upon and a conviction can be founded thereon. But the Court has to guard itself that the confession comes from a source unpolluted and free from doubt. So long as the evidence with regard to the extra-judicial confession is not biased or tainted or is not of doubtful character or does not spring from any hostile attitude against the accused, it cannot

be discarded. Though the extra-judicial confession made by A-l to P.W. 1 cannot be used against A-2 and A-3, we find no difficulty in accepting the same against A-l as there is also general corroboration for the same.

20. Learned defence counsel pointed out that the white shirt (M.O. 2) was seen lying separate from the dead body and the prosecution could not give any explanation for the same especially when P.W. 9 who saw the deceased last alive stated that he was wearing a white shirt. As P.W. 9''s evidence shows that the deceased was wearing white shirt over a kakki shirt and as there is evidence to hold that the kakki shirt really belonged to him, M.O. 2 white shirt found lying separate from the corpse cannot be considered as a circumstance detrimental to the prosecution case.

21. With regard to the retracted judicial confessions Exts. P-26 and P-27 of A-1 and A-2, defence counsel contended that it cannot form the basis for conviction. It is stated that during cross-examination of the witnesses and also while questioned u/s 313, Cr. P.C. the confessions have been retracted. He further contended that Ext. P-26 confession I implicates A-2 and A-3 and A-l does not admit his guilt in the crime. It is submitted that Ext. P-26 being exculpatory in nature should be excluded.

22. Confession is the admission of a gravely incriminating fact. Confession of the guilt of the accused alone can be termed as a proper confession. It is trite law that in order to render a confession admissible it must be perfectly voluntary. Before such a confessional statement can be acted upon, prosecution must establish that it was made in a voluntary and free manner and that police had exercised no influence. In this context, evidence of P.W. 29 Magistrate assumes considerable importance. He stated that he had taken all necessary precautions in accordance with law while recording the confessions Exts. P-26 and P-27. So long as there is nothing to hold that the confessions were vitiated in any manner it cannot be rejected in a cavalier manner. Of course, the Court cannot go on a roving enquiry for corroboration for the retracted confessions. When there is other evidence in support of the prosecution case, confessions made by the accused though retracted can be used to lend assurance to it. In Ext. P-26 A-1 has not admitted his complicity in the crime. That being so, possibility of an inference from the facts stated in Ext. P-26 regarding the complicity of the accused in the crime cannot be construed as his confession as to the commission of the crime.

23. A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence and as Ext. P-26 is not indicative of such admission it cannot be used as the confession of A-1 with regard to the perpetration of the crime. In AIR 1939 47 (Privy Council) the Court held thus :--

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

a conclusively incriminating fact is not of itself a confession. A statement that contains self exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.

It is also apposite to refer to Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator), where the Supreme Court held (para 16):

A confession must either admit in terms the offence, or at any rate, substantially all the facts which constitute "the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt.

As Ext.P-26 does not show of A-1''s complicity in the crime and as it would at best only show that he was in the company of A-2 and A-3, it cannot be construed as his confession of his involvement in the crime.

24. No doubt, in Ext. P-26 A-l has implicated A-2 and A-3 for strangulating the deceased. Ext. P-26 being the confession of A-l cannot be used against the co-accused A-2 and A-3. In Nathu Vs. State of Uttar Pradesh, the Supreme Court held that confessions of co-accused are not evidence as defined in Section 3 of the Evidence Act and no conviction can be founded thereon. Of course, if there is other evidence on which a conviction can be based it can be referred to as lending assurance to that conclusion and for fortifying it. In dealing with a case against an accused Court cannot start with the confession of a co-accused and seek corroboration thereafter. The Court has necessarily to scan the evidence excluding the confession and if it finds that that evidence is cogent and convincing it may not be necessary to advert to the confession of the co-accused. But even in such cases the Court may advert to it to lend assurance for its conclusion. The Supreme Court in Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar, observed that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In the said decision, the Supreme Court held (para 16):--

As we have already indicated, it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion

deducible from the said evidence.

In AIR 1949 257 (Privy Council) Privy Council held :--

a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmaties. Section 30, however, provides that the Court may take the confession into consideration and thereby no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.

25. So far as Ext.P-27 (confession statement of A2) is concerned, it cannot be said that it is exculpatory and hence not admissible. In Ext. P-27 A-2 admitted that he along with A-3 strangulated the deceased at the behest of A-1. Though it cannot be used against A-1 and A-3, being incalpatory so far as A-2 is concerned it can be used against him. Though it cannot be used as a confession against A-l and A-3, the same can be used to lend assurance to the conclusion of guilt reached against A-l and A-3 on the basis of other evidence.

26. In Ext. P-27 A-2 has confessed to his involvement in the crime and so it cannot be lightly brushed aside. A-2 in Ext. P-27 implicated A-l strangulating the deceased with thorthu. It is stated that A-l sought the help of A-2, that he refused at the outset, that he was threatened and that he was compelled to render help and he and A-3 strangulated the deceased. The confession has been retracted by A-2. Though A-2''s confession Ext. P-27 cannot be used against A-l and A-3, there cannot be any doubt that it can be used against him as he has clearly admitted his involvement in the crime. P. W. 29 Magistrate has given ample time to A-2 to have reflexion. P.W. 29 stated that he explained to A-2 the consequences he will have to face if he made the confession. The nature of questions put by the Magistrate shows that he took necessary precautions and wanted ardently only voluntary statement and not a statement due to inducement. So long as there is nothing to show that there was any inducement, threat or compulsion exerted on A-2 in making the confession (Ext.P-27) and also in view of P.W. 29 Magistrate''s evidence regarding the voluntary nature of the same, we cannot just ignore it on the ground that it was retracted. Due importance has to be given to confessions recorded by a judicial officer who has observed all the formalities required by law. If not, the entire procedure as per law in getting a confession recorded would become an; exercise in futility. So long as no material is forthcoming to hold that the confession recorded by the magistrate is vitiated, its significance and importance cannot be lost sight of merely because the accused has chosen to refute it for the obvious reason of extricating himself of its

tentacles.

27. Court cannot solely base conviction on the confession of an accused against his co-accused. At best the Court can only treat the confession of an accused as lending assurance to other evidence against the co-accused. Conviction solely based on the confession of a co-accused is bad in law. While admissions, which include confessions, are by Section 21 of the Evidence Act, declared relevant and may be proved as against the persons making them, all that Section 30 of the Evidence Act provides is that the Court may take them into consideration as against other persons. In Emperor v. Lalit Mohan Chuckerbutty ILR 1911 Cal 559 the Court held :

While admissions, which include confessions, are by Section 21 of the Evidence Act, 1872, declared relevant and may be proved as against the persons making them, all that Section 30 of the Evidence Act provides is that the Court may take them into consideration as against other persons. This distinction of language is significant, and shows that the Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction on the confession of a co-accused alone would be bad in law. Moreover, u/s 30, that only can be taken into consideration which is a confession in the true sense of the term, so that to place any reliance on a retracted confession against a co-accused would be most unsafe.

28. Retraction of confession would make no difference unless the admissions made in the confession are satisfactorily withdrawn, or, the making of it explained as having proceeded from fear, duress, promise or the like, of some one in authority. Attention of A-l and A-2 was drawn to their confession statements (Exts. P-26 and P-27) while they were questioned u/s 313, Cr. P.C. A-l and A-2 stated that on account of police threat and intimidation they gave the confession statements before the Magistrate. It is in evidence that, confession statements were made by A-l and A-2 while they were in judicial custody and the police officers were not present in the Court premises. The Magistrate P. W. 29 had taken all precautions while recording the confession statements. He did so in accordance with the law. In view of the magistrate recording the confessions strictly adhering to legal provisions, mere assertions of the accused that confessions were not voluntary deserve rejection. Merely because the confession has been retracted it does not lose its significance so long as there is no satisfactory explanation on the part of the accused that they made the confessions out of fear, duress or police compulsion. In Haroon Haji Abdulla Vs. State of Maharashtra, the Supreme Court held:

The fact that the confession was later retracted would make no difference unless the admissions made in the confession are satisfactorily withdrawn, or, the making of it explained as having proceeded from fear, duress, promise or the like, of some one in authority.

29. In view of the elaborate precautions taken by the Magistrate (P.W. 29) while; recording the confession statement of A-2 and in view of the fact that there is no

evidence to hold that he made the confession as a result of] threat or intimidation or under the influence of police, we have no hesitation to accept the same as against him especially when there is corroboration. A confession, which is properly and legally recorded does not lose its worth merely because the accused retracted from it as wisdom dawned on him later.

30. P.W. 8 stated that M.O. 6 watch belonged to the deceased. According to the prosecution, the watch was recovered at the instance of A-3. P.W. 13 is a witness to the recovery of the watch at the instance of A-3. He deposed that A-3 opened a black box from his house and produced M.O. 6 watch before the police. He is a witness to Ext. P-13 mahazar. The mahazar shows that Wester quartz watch was recovered. While questioned u/s 313, Cr. P.C. A-3 asserted that the watch belongs to him. Learned defence counsel submitted that the authorship of concealment of the watch is not there in the disclosure statement of A-3 and therefore no reliance can be placed on the recovery evidence. Counsel relied on Pohalya Motya Valvi Vs. State of Maharashtra, where the Supreme Court held (para 15):

To make such a circumstance incriminating it must be shown that the appellant himself had concealed the bloodstained spear which was the weapon of offence and on this point the language used in the contemporaneous record Ext.P-28 is not free from doubt and when two constructions are possible in a criminal trial, the one beneficial to the accused will have to be adopted.

Learned Additional Director General of Prosecutions submitted that there is no ambiguity with regard to the statement of A-3 which led to the recovery of M.O. 6 watch and as P. W. 8''s evidence shows that it belonged to the deceased the recovery evidence can be relied. It is also contended by him that at any rate the accused''s conduct in taking M.O.6 watch assumes importance. Though the disclosure statement does not reveal the authorship of concealment of the watch, the evidence with regard to A-3 producing the same before the police can be taken as a conduct against him along with other evidence in the case. In Prakash Chand Vs. State (Delhi Administration), Supreme Court held (para 8):

There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible u/s 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 Criminal Procedure Code. What is excluded by Section 162 Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, u/s 8 of the Evidence Act,

irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act.

The conduct of the 3rd accused in taking out M.O. 6 watch from the box in his house and producing the same before the police is a conduct admissible u/s 8 of the Evidence Act.

31. Prosecution cannot obviously rely on the circumstance as to the recovery of the dead body as pointed out by the accused as there is evidence to hold that the police was aware of the existence of the dead body in the ravine. In that view of the matter, recovery of the dead body cannot be taken as a circumstance against the accused. That apart, authorship of concealment of the dead body is also not there in the alleged disclosure statement of A-l.

32. To sum up, the extra-judicial confession made by A-l can be pressed into service by the prosecution to establish its case so far as he is concerned. Ext. P-27 confession recorded by P. W. 29 Magistrate can form the basis of conviction against A-2. Ext. P-26 confession made by A-l cannot be used against him or against A-2 and A-3. Conduct of A3 in producing wrist watch to the police and he being found with the deceased last along with A1 and A2 do establish his participation in the crime.

33. Section 364 is intended to punish abductor who put the abducted person to the danger of losing his life. There was misrepresentation by A-l that deceased would be given the amount due from him when he got it from Wynad. It is on that representation that deceased accompanied A-l to A-3 in the journey to Wynad. This misrepresentation, the evidence in the case discloses, was the result of the plan to murder the deceased and it was really accomplished by them. The prosecution has really proved that there was misrepresentation by the accused to the deceased and that such misrepresentation was really with a view to enable the deceased to go along with them in order to liquidate him. As there is such evidence, offence u/s 364 has been made out.

34. Prosecution could not establish any criminal conspiracy u/s 120B against any of the accused. There is also no evidence to that effect. Besides, there was no charge u/s 120B. Being so, conviction and sentence u/s 120B cannot be sustained.

35. On going through the entire evidence, we hold that the learned Sessions Judge was justified in accepting the prosecution case against A-l to A-3 for having murdered Musthafa alias Muthu and also for having caused disappearance of the evidence and giving false information of the crime. It has been established that the accused were tried for destroying the evidence in the crime by throwing the dead body into the ravine. Offences under Sections 364, 302 and 201 read with Section 34 of the IPC have been established against A-l to A-3. Conviction entered against A-l to A-3 under Sections 364, 302 and 201 read with Section 34 are confirmed.

36. Having considered all aspects of the matter, we hold that A-l alone need not be singled out for capital sentence. The capital sentence imposed against A-l is modified and he is sentenced to imprisonment for life. Sentence awarded to him under Sections 364 and 201 read with Section 34 are confirmed. Conviction and sentence entered against A-l to A-3 u/s 120B are set aside. Conviction and sentence against A-2 and A-3 under Sections 364, 302 and 201 read with Section 34 are confirmed.

37. In the result, Crl. A.Nos. 582, 584 and 592 of 1992 are dismissed as stated above and Crl. R.T. 3 of 1992 is disposed of.