

**(1989) 02 KL CK 0073**

**High Court Of Kerala**

**Case No:** Criminal A. No. 22 of 1986

Sivaraman Divakaran and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision:** Feb. 6, 1989

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 154
- Penal Code, 1860 (IPC) - Section 182, 201, 203, 302, 34

**Citation:** (1989) 1 KLJ 305

**Hon'ble Judges:** S. Padmanabhan, J; P.K. Shamsuddin, J

**Bench:** Division Bench

**Advocate:** S. Venkitasubramanya Iyer and V. Girt, for the Appellant; M.M. Mathew Public Prosecutor, for the Respondent

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### **Judgement**

Padmanabhan, J.

All the three accused before the Sessions Judge are the appellants before us. Accused 1 and 2 were tried and convicted for murder with the aid of Section 34 and sentenced to imprisonment for life. All the three were also tried and convicted for an offence punishable u/s 201 of the Indian Penal Code and sentenced to rigorous imprisonment for 4 years each. The terms of imprisonment were made concurrent for accused 1 and 2. Deceased is one Avarachan alias Abraham, brother of the second accused and brother-in-law of the first accused. Third accused; (he first cousin of the second accused and the deceased, being the son of their father's brother. PW 1 is the sister and PW 2 is the wife of the second accused. Accused. 1 and 2, their mother, deceased Abraham and PWs 1 and 2 were residing together. As usual, at about 6 PM on 20-10-1983, Abraham came home fully drunk. His friend PW 6 was also with him. Mother served food to both at his request. Inability of the mother to supply cooked tapioca desired by Abraham due to non-availability added fury to his intoxication. He became violent. When mother left for hospital with food for her daughter (wife of the first accused), who was hospitalized violence and

misbehavior were directed against PWs 1 and 7. When first accused came and prevented, he was slapped and there was a scuffle. He gave a few blows to the deceased with MO 3 (concrete piece) readily available in the kitchen causing six injuries to the deceased. PWs 1 and 2 with a little child took shelter in a neighboring house of PW 3 and narrated the incident.

2. On getting information, third accused and his father came. Seeing Abraham struggling in pain with injuries in the kitchen, third accused was directed by his father to bring a taxi to take him to the hospital. But taxi was not available. Meanwhile, PW 3 saw second accused and his friend PW 4 coming. He gave information to the second accused and requested him to take back PWs 1 and 2. He promised to take them after going home and making enquiries. Second accused went to his house with PW 4. Then PW 3 saw accused 1 and 2 along with PW 4 lifting and carrying the deceased. He was laid in an adjacent unoccupied property called "Kumpalamannil". PW 4 left the place. A tussle ensued between accused 1 and 2 on one side and the deceased on the other. That was by about 8.15 PM. Accused, 1 and 2 tightened the neck of the deceased with MO 2 towel and strangled him to death ignoring his cries to save him. They left the body there and came back to the house of PW 3. PWs 1 and 2 and the child were taken home. Early morning at 5.30, accused 1 to 3 took the dead body home and placed it in a cot after washing it. The body was covered with MO 1 lunki worn by the deceased and MO 2 was placed behind the head. Then third accused went to the police station and gave Ext. P11 first information statement as if the dead body was found only early morning. It was also alleged that the deceased is a drunkard and criminal and he might have died under suspicious circumstances, having gone out the previous evening fully drunk with a knife after making an announcement that he will kill somebody and kill himself. This is the gist of the prosecution case. The defence of the accused is what is stated in Ext. P11.

3. The case was registered under the caption "suspicious death". The same day after preliminary investigation, Sections 302 and 201 were substituted and these three persons were arrayed as accused.

4. There is no dispute regarding the place where Abraham died. It also admitted that accused 1 to 3 took the body home early morning and laid it in the cot after cleaning it, though washing is denied. PWs 1 and 2 have spoken to these facts. Defence seems to be that Abraham courted death from some unknown source on account of his violent habits and the dead "body" was seen only early morning when third accused went to answer the calls of nature.

5. It is not in dispute that Abraham had a homicidal death. Ext. P5 postmortem certificate and the evidence of PW 8, who conducted autopsy, reveals that fact. The dead body had sixteen ante-mortem injuries. The only fatal injury is Injury No. 11, which is pressure abrasion in the neck caused by the ligature strangulation. All others are lacerations, contusions and abrasions. Items 1 to 6 could be caused by

beating with MO 3 and others by the scuffle and fall. Cause of death, according to Ext. P5 and the evidence of PW 8, is the ligature strangulation which could be caused by tying a knot with a towel like MO 2 around the neck. This is quite in accordance with the evidence of PW 3 and the other circumstances brought out in the case.

6. PWs 1 and 2 quite naturally turned hostile. But they admitted the deceased having come drunk in the evening and picked up quarrels. This is supported by PW 6 also. PWs 1 and 2 also said that the next morning accused 1 to 3 brought the dead body. The quarrel at 6. 15 between the first accused and the deceased and the injuries sustained by him at the hands of the first accused and the further fact that he was bodily carried were not admitted by them. Instead, they said that the deceased went away with a knife saying that he will kill somebody and kill himself. This version is completely belied by PWs 3 and 4. Though there is no direct evidence as to how Abraham sustained injuries 1 to 6 in Ext. P5, the evidence of PW 4 shows that when he came along with second accused he saw the deceased lying in the kitchen and groaning with injuries. The fact of having carried him along with accused 1 and 2 at the instance of the father of the third accused was also admitted by him. Though PW3 did not see that part of the incident inside the kitchen, he heard the commotion and he is a close neighbor, at whose residence PWs 1 and 2 took shelter and narrated the incident, PWs 3 and 4 are disinterested persons against whom there is not even a suggestion of enmity or interest. When Injuries 1 to 6 were sustained inside the house itself, it could be only in the manner alleged by the prosecution and not otherwise.

7. The evidence of PWs 3 and 4 show that after reaching Kumbalamannil Purayidom, PW 4 left the company. PW4 has given his own explanation. He went to bring one Baby and for that purpose, he went to a neighbor Divakaran to, get a bicycle. But Divakaran advised to go away without getting involved because this is the daily routine there. That seems to be a plausible explanation after having joined innocently thinking that the deceased is being taken to the hospital He supported the evidence of PW 3 that thereafter the cry of the deceased was heard from the scene of occurrence.

8. PW 3 stated with clarity these portions of the incidents narrated by in Paragraphs 2 and 3 which he could perceive by his senses from his court-yard. He heard the commotion. He saw PWs 1 and 2 taking shelter in his house with the child consequent on it. Their versions were heard. Then he saw second accused and PW 4 coming. He requested second accused to take PWs 1 and 2. But second accused went to his house promising to come back and take them after enquiring in the house. Then he saw the deceased being carried through near his court-yard. He saw the scuffle in the scene heard the cries of the deceased and saw the process of strangulation. He also saw Abraham lying motionless. Thereafter, accused 1 and 2 came to his house and took PWs 1 and 2 and the child. Next day he was informed that Abraham is no more. He went to the house and saw the dead body also. We do

not find any reason at all to disbelieve him.

9. The night of incident was previous to the full moon day. Clear moon light spoken to by the witness has only to be accepted. Ext. P8 plan shows that the place of murder is 50 metres away from the house of PW 3. Going by the decisions in Mohammed v. State of Kerala (1962 KLT 120). [Gambhir Vs. State of Maharashtra](#), and the authorities on medical juris-prudence it could be seen that clear vision at such a distance" in moon light is not possible. A blurred vision of the outline of the figure or actions alone may be possible at such a distance. Identification of the persons involved or their overt acts may not be possible at such a length. But these aspects are applicable only when a man sees such an incident for the first time at such a distance. The deceased and the assailants are close neighbors and associates of PW3 for a pretty long time. He was posted with knowledge of the incident from the inception. He saw the deceased being carried by accused 1 and 2 and PW 4 at close range. Then only they went to a distance. Distance of 50 metres is only from the house and not from where he was standing. Nobody else intervened. From the earlier assessment he could have easily located the persons. He heard the cry and saw the blurred vision of what is going on there. Thereafter, accused 1 and 2 came back to him. He saw the person lying motionless and next morning he was able to confirm that he was strangled to death. Part of his evidence could be inference from what he saw earlier, what he heard and saw at the scene and what he knew later. Therefore, there is no reason to reject his evidence which is supported by PW 4 and various other clinching circumstances. Truth of what he saw, heard and inferred is fully confirmed.

10. The evidence of PW 4 makes it clear that third accused and his father came there even before the deceased was carried to the scene. It was he who went for the taxi at the direction of his father. So also, it is in evidence and admitted that the next day he was deputed to give Ext. P11 first information at the instance of accused 1 and 2 and others. False information's were given in Ext. P11. Normally when a close relation is found dead in suspicious circumstances indicating that it is a homicide, first information will be given keeping the dead body there itself. Normal tendency may not be to malign the deceased by making false accusations to bring out that he met with his death due to his own habits. But unusually Ext. P11 indicates a guilty mind which was over enthusiastic only in bringing about that Abraham died in circumstances created by him alone. The homicidal nature of the death was not given any importance at all. This is highly suspicious. It is clear that Ext. P11 is a calculated act to suppress the crime.

11 We do not find any merit in the contentions that: (i) accused were arrested only on 1 -- 11--1983 though they were not absconding; (ii) the dead body was given to second accused even after knowing that he is one of the murderers; (iii) the material objects were sent to court late; (iv) MO 3 was not sent for chemical examination; (v) there is suppression of material evidence; and (vi) the intestine of the dead body

contained indigested tapioca.

12. It is a fundamental rule of criminal trial that any irregularity or illegality during the course of investigation in collecting materials or otherwise will not affect the trial on the basis of materials placed before court unless injustice or prejudice is thereby caused and the materials are unacceptable in evidence. Delayed arrest is said to be due to non-availability of the accused. Even otherwise it is not having any bearing in the application of evidence. So also, the fact that the Police Constable entrusted the dead body to second accused is of no consequence even if it is not considered as a mistake. It is true that material objects are to be forwarded to court without delay. In this case, they were retained for some time only to get them identified by witnesses. No substitution, malpractice or prejudice resulted thereby. Delay in that respect cannot be a technical ground to reject that part of the evidence. Mo 3 was not sent for chemical examination because it did not contain blood. There is no rule that every material object should be sent for chemical examination. Prosecution has the right to pick and choose materials to be presented before court in the form of evidence- The question of suppression of evidence itself arises only because of the duty of the prosecution to present before all materials necessary for unfolding the true picture, whether favorable or unfavorable, to enable the court to arrive at the correct conclusion. The evidence Act does not require any particular number of witnesses to prove a point. Evidence is weighed and not counted. So long as there is no allegation or evidence that any material witness or evidence was not made available to court, the contention that there was suppression of evidence cannot stand. Presence of indigested tapioca is immaterial because the deceased could have consumed it from somewhere else. When there is direct evidence regarding crime, time of death in relation to such aspects is immaterial.

13. The evidence do not indicate that there was common intention to murder before reaching Kumpaiamannil Purayidom. He might have been carried for being taken to hospital. But the fact remains that the deceased was a headache to all including the females who take in his sister and mother as well. The final resistance at the scene of occurrence might have given then the murderous provocation. Common intention to murder was evidently developed at the spot. That is why they took the towel of the deceased himself and joined hands in strangulating him to death. Murder with common intention of accused 1 and 2 is established beyond doubt.

14. Then the only question is whether the offence u/s 201 and common intention for that purpose is made out. In this connection, we are constrained to observe that the Sessions Judge has not applied her mind in framing the charge by perusing the records. She simply copied the police charge to frame the court charge. Giving Ext. P 11 was not made the subject matter of charge. Charge is the basic document on which the accused is called upon to answer. He cannot be held guilty for something of which he is not accused and called upon to answer. If Ext. P 11 was made the

subject matter of court charge u/s 201 on the basis of the materials available, the case would definitely have ended in conviction of all the three accused for that charge with the aid of Section 34 because the evidence is that Ext. P 11 was falsely given with ulterior motive at the instance of accused 1 and 2 also to screen them from the consequences of the offence. But the court charge under this head is only that the dead body was removed and false information was given to neighbours that Abraham died. We would like to impress upon the judicial officers of the necessity for application of mind to frame charge personally.

15. Section 201 lays down the essential ingredients of the offence. *Palvinder Kaur v. State of Punjab* (ATR 1952 SC 354) and [Roshan Lal and Others Vs. State of Punjab](#), dealt with this aspect. It must be proved that an offence was committed. The accused must know or have reason to believe that the offence has been committed. With such knowledge or belief, he must either have caused any evidence of the commission of the offence to disappear or give any information respecting the offence which he knows or believes to be false. So also, the accused must have acted with the intention of screening the offender from legal punishment. Whether causing disappearance of evidence or giving false evidence, the intention and knowledge or reasonable belief are essential requisites. The intention must be to screen the offender, whether himself or somebody else, from legal punishment. Giving false information is a separate offence u/s 203. Unlike Section 182 of the Indian Penal Code, the information under Sections 201 and 203 can be to anybody and it need not be to a public servant. If any person gives first information to the police which is recorded u/s 154 of the Code of Criminal Procedure and if ultimately it turns out to be false, an offence u/s 201 is attracted if the other ingredients are satisfied ( [State of Kerala Vs. Markose](#), ) On the basis of the evidence in this case, Ext. P11 attracts all the ingredients of Section 201. But the charge is only that dead body was removed and false information was given to neighbours that Abraham died. In all probability the dead body was removed by accused 1 to 3 with ulterior motive and while doing so, they were aware that the offence of murder is committed. But the essential ingredient of causing disappearance of any evidence of the commission of the offence of murder is not there. The information given to neighbour that Abraham died cannot be taken as false. It will become false only if it is shown that cause of death was stated to be anything other than what actually happened-For that there is no evidence. Mere omission to narrate the circumstances of death cannot be taken as false information. Therefore, on the basis of the court charge, the offence u/s 201 cannot stand. Sentences for murder do not require any interference.

Conviction of accused 1 and 2 for murder with the aid of Section 34 and the sentence of imprisonment for life awarded to them are confirmed and the appeal is dismissed to that extent. But the appeal is partly allowed and the conviction of all the three accused for the offence u/s 201 of the Indian Penal Code with the aid of Section 34 and the sentences awarded for that offence are set aside and all the

three accused are acquitted of that charge Bail bonds of third accused are cancelled.