

SOMASUNDARAM @ SOMU

v.

STATE REP. BY DY. COMM. OF POLICE

(Criminal Appeal No. 403 of 2010)

SEPTEMBER 28, 2016

[V. GOPALA GOWDA AND ARUN MISHRA, JJ.]

Penal Code, 1860 – ss. 120B, 365/109, 387/109, 302/109, 347/109, 364/109 and 201 – Prosecution under – Of the appellants-accused (A-3, A-4 and A-15), alongwith other 15 accused – For entering into criminal conspiracy for abduction and murder of the deceased – Trial court acquitted A-12 and A-18 and convicted rest of the accused mainly relying on the evidence of PWs 10 and 11 – High Court confirmed the order of trial court except that of A-10 – Appeal by A-3, A-4 and A-15 – Held: Difference of opinion between the Judges - Per V. Gopala Gowda, J. : Evidence of PWs 10 and 11 are not reliable and hence cannot form basis for conviction of appellants-accused – Also in view of their acquittal under s.120B and in absence of establishing their involvement individually in each offence, they could not have been convicted for the offences of abduction and murder – The appellants-accused are entitled for acquittal – Per Arun Mishra, J.: Involvement of the appellants-accused in the commission of offence is established by the evidence of PWs 10 and 11 and also by other evidence – When charge u/s. 109 is established, mere acquittal u/s. 120B is of no avail to the appellants-accused – Conviction of the appellants-accused affirmed.

Per V. Gopala Gowda, J. :

Allowing the appeal,

HELD : 1. The case of the prosecution as far as A-3 and A-4 are concerned rests heavily on the evidence of PW-10 and PW-11, whose evidence is supported by the evidence of PW-33 and PW-34. From a perusal of the evidence of PW-10 and PW-11, it becomes clear that they are accomplice witnesses. PW-10 and PW-11 have not been granted pardon by any Court and have been arrayed as prosecution witnesses. The mere fact that pardon has not been tendered by a court of law, does not make an accomplice

- A cease being an accomplice. Thus, PW-10 and PW-11 being accomplice witnesses, their evidence must be treated as such, and subject to the same test of reliability of the evidence of an accomplice or approver are subject to. While the evidence of an accomplice can be used to convict an accused, as a rule of prudence, the Court must first ensure that the testimony of the accomplice is corroborated in material particulars by adducing independent evidence. It is also a well settled position of law that the evidence of two accomplices cannot be used to corroborate with each other. The independent evidence must be such that it corroborates with the testimony of the accomplice in material particulars, that is, the corroboration must be both in respect of the crime as well as the identity of the accused. This particular test assumes significance when there is more than one accused in a case. [Paras 50, 55, 57, 59, 61 and 63] [305-C; 306-H; 307-F; 308-F; 312-C; 313-D]

- D *Laxmipat Choraria v. State of Maharashtra* AIR 1968 SC 938 : 1968 SCR 624; *Chandran @ Maniyan v. State of Kerala* 2011 (8) SCR 273 : (2011) 5 SCC 161; *Sarwan Singh v. State of Punjab* AIR 1957 SC 637 : 1957 SCR 953; *Haroom Haji Abdulla v. State of Maharashtra* AIR 1968 SC 832 : 1968 SCR 641;
- E *Ravinder Singh v. State of Haryana* 1975 (3) SCR 453 : (1975) 3 SCC 742; *R v. Baskerville* [1916] 2 KB 658; *Mohd. Hussain Kochra v. K.S. Dalipsinghji & Ors.* 1969 (3) SCR 130 : (1969) 3 SCC 429; *Chonampara Chellapan v. State of Kerala* (1979) 4 SCC 312;
- F *Sheshanna Bhumanna Yadav v. State of Maharashtra* AIR 1970 SC 1330 : 1971 (1) SCR 617 – relied on.
- Black's Law Dictionary*; *Ramanatha Aiyar's Law Dictionary* – referred to.

2. The Trial Court acquitted all the appellants-accused (A-3, A-4 and A-15) of the charge of conspiracy under Section 120-B of IPC. They have however, been convicted for, among others, the offences under Section 302 read with Section 109 and Section 364 read with Section 109 of IPC. There is nothing on record to show the direct involvement of the accused – appellants in either the abduction of the deceased or his murder. The requirement of corroboration from independent sources in material particulars

has not been met in the instant case. This makes it impossible A
for the accused to be convicted of the offences under Sections
302 and 364 of IPC. Neither PW-10 nor PW-11 are witnesses to
the abduction of the deceased. PW-13, who witnessed the
abduction, also did not mention the above three accused at the
site of the abduction. PW-10 places A-3 and A-4 at the meeting. B
But this fact loses significance in view of the fact that they have
been acquitted of the offence of conspiracy under Section 120B
of IPC. PW-10 and PW-11 also saw the body of the deceased being
brought down. But neither of them places any of the three accused C
at the site at that time. Further, what comes to light from the
testimony of PW-10 and PW-11 is that even at the premises where
deceased was kept, A-3 stayed downstairs, while it was PW-11
who went upstairs and actually saw the deceased tied to chains
and the room where he was kept. PW-11 only saw A-15 at the
site, carrying a tiffin parcel. A-4 has not been mentioned anywhere
at the premises at all. Further, so far as A-3 is concerned, another D
evidence used against him is the testimony of PW-32 and PW-33
who have admitted to creating the evidence of the death
certificate, which was allegedly required by A-3 to produce at the
crematorium in order to cremate the deceased. PW-32 has
admitted to issuing the death certificate without even seeing the
dead body of the deceased at the request of PW-33. There is no E
other evidence on record to connect A-3 to the death certificate.
Even if the death certificate is taken to be genuine, it does not in
any way connect A-3 to the deceased, thus rendering the claim of
the prosecution doubtful and shaky.[Para 64][314-F-H, 315-A-E]

3. So far as A-15 is concerned, the crucial evidence on which F
reliance was placed upon by both the courts below to convict him
was the recovery of M.O. 1, reebok shoes on his direction. In
respect of PW-31, who was a supervisor at the premises where
the deceased was kept, both the courts below, failed to notice
that PW-31 had explicitly stated in her testimony that she could
not be able to identify the person who had taken the reebok shoes G
from the premises. Thus, the evidence of PW-31 cannot be used
against A-15, which has erroneously been done by the courts
below. Further, PW-1 and PW-2 have both stated in their testimony
that the particular reebok shoe did not belong to the deceased.
Thus, there is nothing on record which connects A-15 either to H

A the crime, or to the deceased. [Para 65] [315-F, 316-A]

4. Thus, the evidence of PW-10 and PW-11 is not reliable for recording the finding of guilt on the charges against the accused-appellants. Even if it is placed reliance upon, A-3, A-4 and A-15 cannot be convicted of the offences of kidnapping and murder, more so in the light of the fact that they had been acquitted of the charge of criminal conspiracy under Section 120-B of IPC by the courts below. There was no basis for convicting them under the other Sections like 302 and 365 of IPC. After having found that the accused persons were not guilty under Section 120-B of IPC, it was the duty of the Trial Court to establish the involvement of each of the accused persons individually in each offence for which they had been charged to hold them guilty under the same. [Para 66] [316-B-D]

5. The accused-appellants in the instant case have also been convicted under Section 109 of IPC (Section 302 read with 109 and 365 read with 109 IPC), which prescribes the punishment for the offence of abetment. For Section 109 of IPC, it is not enough to show a conspiracy. It has to be taken a step further. What needs to be proved is an act committed in furtherance of that conspiracy. In the instant case, both the courts below did not find sufficient evidence to convict the accused-appellants of the charge under Section 120B of IPC. Once the charge under Section 120B of IPC falls, in order to convict the accused appellants under Section 302 read with Section 109 IPC, or Section 365 read with Section 109 IPC, what was needed to be established was the happening of some overt act on the part of the accused appellants. There is no evidence except the testimony of PW-10 and PW-11 which links the accused appellants to the crime. Since the testimony of PW-10 and PW-11 is untrustworthy and cannot be relied upon to convict the accused appellants in the instant case, the charge under Section 109 of IPC also cannot sustain. [Para 67] [316-D-E; 317-D-G]

Kehar Singh & Ors v. State (Delhi Administration) : 1988 (2) Suppl. SCR 24 : (1988) 3 SCC 609; *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* AIR 1962 SC 876 : 1962 Suppl. SCR 297 – relied on.

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6. The Trial Court erred in convicting the accused-appellants, more so, after having acquitted them of the offence of criminal conspiracy punishable under Section 120B of IPC. Even the High Court adopted the same erroneous approach while re-appreciating the evidence against the accused-appellants and attempting to look for a complete link, as if the accused persons had been convicted for the charge of criminal conspiracy as well. This shows a gross non-application of mind on the part of the courts below, which certainly cannot be allowed to sustain by this Court, as the same is wholly erroneous in law. The accused appellants are entitled for acquittal from the charges. [Para 68] [317-G-H; 318-A-B]

Daya Singh v. State of Haryana 2001 (1) SCR 1115 : (2001) 3 SCC 468; *State v. Nalini* 1999 (3) SCR 1 : (1999) 5 SCC 253; *Rameshwar v. State of Haryana* AIR 1952 SC 54 : 1952 SCR 377; *Bhiva Dolu Patil v. State of Maharashtra* AIR 1963 SC 599 : 1963 SCR 830; *Ismail s/o Hassan Ali v. Emperor* AIR 1947 Lah 220; *Narain Chandra Biswas v. Emperor* AIR 1936 Cal 101; *K Hashim v. State of Tamil Nadu* 2004 (6) Suppl. SCR 1 : (2005) 1 SCC 237 – referred to.

Per Arun Mishra, J.(Dissenting)

Dismissing the appeal,

HELD: 1. With regard to prior relationship of accused persons, prosecution has examined PW-4, PW-5, PW6, PW7, PW8 and PW14. Evidence as to prior relationship has also been furnished by PW-10, PW-11, PW-34, PW-14 and PW-2. The happenings in-between 5.12.2001 and 30.12.2001 regarding preparation are apparent from the statements of PW-10, PW-11, PW-49, PW-7, PW-8, A-2, PW-16, PW-18, PW-20 and PW-34. [Paras 13, 14] [325-F-G; 326-G-H; 327-A]

3. It is proved that selection of the factory premises where the deceased was kept after abduction, had been done by A-3 and A-9. It is stated by PWs.10, 11 and 34 that accused A-3 and A-9 had selected the same. PW-10 and PW-11 were partners for some time with its proprietor PW-34. The evidence also discloses that after inspecting the premises, A-3 and A-9 had asked to put fan, table, chair, cot, bedpan in the room in the upstairs and screen

A cloth to cover the windows. The premises were earlier too hired before a month in November and earlier part of December for about a week. PW-34 has deposed that from 29th day of November, 2001 leave was given to the factory workers for a period of one week. Same has been supported by PW-31 and PW-10, but as the deceased could not be abducted at that time, no one came in the factory. Statement of PWs.10 and 11 is corroborated by PWs.31 and 34. Evidence also discloses that A-9 had called PW-10 and asked for his Ford car MO-6 for 2-3 months on rent. Use of said car is established from evidence. There is nothing to doubt that PW-10 and PW-11 visited the house of A-3 along with A-9; and it is established that A-3 had told A-9 in the presence of PWs.10 and 11 that the deceased has to be brought as some amount had to be collected from him. The involvement of A-3, A-4 and A-15 is established at the relevant time, and were part of the design to abduct the deceased. A-4 had an active participation in the commission of the offence. Ford car which was given was used by A-3. A-4 had followed them in another car along with 3 other persons; A-6 and A-11 etc. Evidence also discloses that on 24.12.2001, A-9 phoned to PW-10 and went to the house of A-3 and A-3 had asked PW-10 to arrange for a Maruti van. PW-48, owner of Hero Honda motorcycle has been examined. PW-10 has stated that the said motorcycle was given through him. Thus PW-48 corroborates and confirms the evidence of PW-10 and PW-11. [Paras 15, 16, 17] [327-B-H; 328-A-C]

3. On assessment of evidence, it becomes apparent that PW-3 has clearly stated that the deceased (former MLA) was abducted on 30.12.2001 at about 5.30 a.m. PW-3 has stated that a person was put inside a van by three persons. Thereafter motorcycle followed the said van. That his friend A-15 also came there. PW-13 had also stated that he had seen the deceased taking morning walk at about 5.30 a.m. A person was pushed into a Maruti van. After abduction was made in the morning at about 5.30 a.m. on 30.12.2001, the evidence discloses meeting at the residence of A-9. On 30.12.2001 at 8.30 a.m. as unfolded by PW-10 and PW-11, where A-3 stated that abduction of the deceased has been made and money remains to be collected. [Para 20-21] [328-H; 329-A-C]

4. Presence and participation in abduction and at factory

premises of accused A-3, A-4 and A-15 is established by the evidence of PW-10 and PW-11. In addition presence of A-15 stands established at place of abduction also as stated by PW-3. It is apparent from the evidence of PWs.10 and 11 that when the deceased was brought to the factory premises, A-3 to A-7, A-11 and A-15 to A-17 were present or came there. Thus, it is apparent that all the three appellants along with other convicted accused persons were involved in the abduction of the deceased. A-3 played an important role in the entire episode. The finding recorded by the trial court as affirmed by the High Court is that the appellants were involved in the abduction stands established to the hilt. PW 56 lends support to evidence of PW-10. PW-56 also supports version of PW-11. [Paras 23, 24] [330-C-F]

5.1 The dead body of the deceased could not be found as it was cremated in the name of a fictitious person. His post mortem also could not be conducted but the evidence clearly indicates that the dead body of the deceased was taken from the factory premises. It gives an inference that the accused persons had murdered the victim. It is not necessary for recording a conviction that corpus delicti to be found. There is ample evidence leading to an inescapable conclusion that the deceased was done to death by the appellants. His dead body was seen by the witnesses. [Para 25] [331-B-C]

5.2 Thus, it is clear that abduction of the deceased is proved and deceased had been murdered soon after his abduction in two days and thereafter his body had been cremated under the name of a fictitious person. In the aforesaid circumstances it was for the accused persons to satisfy the court how the abducted victim was dealt with by them. In the absence of such explanation it is open to the court to draw a presumption that the abductor was the murderer also. [Para 26] [331-D-E]

State of M.P. v. Lattora (2003) 11 SCC 761; *Ram Gulam Chaudhary & Ors. v. State of Bihar* 2001 (3) Suppl. SCR 279 : (2001) 8 SCC 311 – relied on.

6. Body of the deceased was carried by A-6, A-7, A-8 and A-11. Version is supported by PW-21 and PW-35. It is apparent that the deceased was killed in factory some time on 1.1.2002 and the

A fact that the appellants were not persons who brought down body from upstairs is not enough to exonerate appellants considering the established facts and circumstances in case they have been rightly held guilty of murder also.[Paras 29, 32][333-F; 334-D-E]

B 7. For cremating the body of the deceased in the cremation ground, death certificate was required to accompany the dead body. Death certificate in a fictitious name was obtained at the instance of A-3 through PW-33. Thus it is apparent that the death certificate related to non-existent person and dead body of the deceased was cremated under the guise and at the instance of A-3; false certificate Ex. P-27 was prepared and produced at
C cremation ground on next day showing cremation of fictitious person. PW-36, Office Assistant in the Corporation has deposed that Ex. P-27 was given to him in the morning at about 8.15 a.m. He had made the entry Ex.P-27 in Form 2 in the death register as 1st row of 1.1.2002 and that portion is marked as Ex. P-30. The
D dispatch book Ex. P-32 has also been proved by the witness along with memo Ex. P-33. Thus, the involvement of A-3 is proved to the hilt by the aforesaid evidence also. [Paras 35, 36] [335-F-G; 340-A-E]

E 8. Witnesses as to various accused persons have been furnished. The seizure of articles has been proved. The accused persons' confessional statements and recoveries based thereon support the version of PW-10 and PW-11. [Paras 38, 39, 40] [340-F, H; 341-B]

F 9. On the basis of statement of PW-11, it is established that A-4 was present when the deceased was brought to the factory premises after abduction and after about half an hour, A-15 also came there along with A-5 to provide tiffin. PW-10 has also stated that the deceased was tied with iron chain on 31.12.2001, his eyes were shut and he was sitting on a green colour cot and was wearing a black colour pant and a T-shirt. Thus it is apparent that
G A-3, A-4 and A-15 along with other accused persons were involved in the abduction of the deceased. The trial court with respect to commission of offence under section 387 IPC has rightly given the finding in that the prosecution has established its case to the effect that the accused 1 to 11 and 14 to 17 have committed the
H offence punishable under section 387 IPC beyond all reasonable

doubt. [Para 48] [343-H; 344-A-D]

A

10.1 In the facts and circumstances of the case when charge under section 109 has been found established, mere acquittal of the accused under section 120B is of no avail to them. Charges which were framed were specific ingredients of section 109 have been rightly found to proceed by both the courts below. Their acquittal under section 120B of IPC cannot help them as offences of both sections are separate. Section 120B found established against A-1 and A-2 and other charges against accused/appellants. [Para 49] [344-E-F]

B

10.2 Under section 109 IPC, the abettor is liable to the same punishment which may be inflicted on the principal offender if the act of the latter is committed in consequence of the abetment. The offence of conspiracy under section 120B IPC is different. Section 120A IPC is bare agreement to commit an offence which has been made punishable under section 120B IPC. The punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with punishment of abetment for which no express provision has been made in the IPC. An offence of criminal conspiracy on the other hand is an independent offence which is made punishable under section 120B IPC for which a charge under section 109 IPC is unnecessary and inappropriate. [Para 50] [344-G-H; 345-A-B]

C

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Ranganayaki v. State by Inspector of Police 2004 (5)
Suppl. SCR 452 : (2004) 12 SCC 521 – relied on.

10.3 Thus commission of offence under section 109 IPC has been established along with other sections. The conviction and the sentence imposed by the trial court and the High Court is absolutely proper and no benefit can be obtained by acquittal under section 120B IPC. That does not adversely impinge upon the ingredients of section 109 IPC and other sections for which he has been found guilty. Thus on appellants having been acquitted under section 120B the entire case does not fall down. [Para 51][347-G-H]

F

G

11. Even if PW-10 and PW-11 are taken as accomplices their depositions are corroborated by overwhelming evidence on record on each and every aspect. The accused persons have

H

A been found guilty under section 109 IPC also. All convicted accused persons including appellants acted together. Entire gamut of evidence, admissible portions of confessional statements of various accused persons including appellants, recovery of articles of offence also lends credence to versions of PWs. 10 and 11. [Para 52] [348-B-C]

B 12. Holding test identification parade has been proved by PW-60. Recording of statement under section 164 Cr.PC has been proved by PW-59; PW-61 for A-12, PW-32 and PW-33, PW-62 recorded the statements of PW-12 and PW-19. PW-64 has recorded the statement under section 164 Cr.P.C. of PWs.10 and 11. [Para 53] [348-D-E]

C 13. The trial court has rightly found that the accused A-3, A-4 and A-15 had acted upon the conspiracy of A-1 and A-2 and have been found guilty of offences under sections 365, 387, 302, 347, 364, 109 and 201 IPC. The conviction and sentence imposed by the Trial Court as affirmed by the High Court calls for no interference in the appeals. [Paras 37 and 57] [340-E-F; 349-F]

Case Law Reference

In the Judgment of V. Gopala Gowda, J.

E	2001 (1) SCR 1115	referred to	Para 10
	1999 (3) SCR 1	referred to	Para 19
	1952 SCR 377	referred to	Para 23
	1963 SCR 830	referred to	Para 24
F	1962 Suppl. SCR 297	relied on	Para 27
	AIR 1947 Lah 220	referred to	Para 44
	AIR 1936 Cal 101	referred to	Para 45
	2004 (6) Suppl. SCR 1	referred to	Para 47
G	1968 SCR 624	relied on	Para 57
	2011 (8) SCR 273	relied on	Para 58
	1957 SCR 953	relied on	Para 60
	1968 SCR 641	relied on	Para 60
H	1975 (3) SCR 453	relied on	Para 60

[1916] 2 KB 658	relied on	Para 61	A
1969 (3) SCR 130	relied on	Para 61	
(1979) 4 SCC 312	relied on	Para 62	
1971 (1) SCR 617	relied on	Para 63	
1988 (2) Suppl. SCR 24	relied on	Para 67	B
<u>In the Judgment of Arun Mishra, J.</u>			
(2003) 11 SCC 761	relied on	Para 26	
2001 (3) Suppl. SCR 279	relied on	Para 27	
2004 (5) Suppl. SCR 452	relied on	Para 50	C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 403 of 2010

From the Judgment and Order dated 06.10.2007 of the High Court of Judicature at Madras in Criminal Appeal No. 698 of 2004 D

WITH

Crl. A. Nos. 827 and 828 of 2013.

Manoj Prasad, Sidharth Luthra, Basant R., Sr. Advs., A. Dubey, Sanjay Misra, Raj Kumar, Sangita Chauhan, Aditya Chaudhary, Rakesh K. Sharma, V. Gandhi, Sameer Choudhary, P. V. Yogeswaran, Karthik Ashok V. Susheatha, Advs. for the Appellant. E

M. Yogesh Kanna, Jayant Patel, Advs. for the Respondent.

The Judgments of the Court were delivered by F

V. GOPALA GOWDA, J. 1. The present appeals arise out of the common impugned judgment and order dated 06.10.2007 in Criminal Appeal Nos. 698, 716 and 781 of 2004 and Criminal Appeal No. 685 of 2005 passed by the High Court of Judicature at Madras, whereby the conviction and sentences awarded to the accused-appellants by the Additional District and Sessions Judge, (Fast Track Court-I), Chennai were upheld for the offences punishable under different sections of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), for the abduction and murder of one M.K. Balan (hereinafter referred to as the "deceased"). G

H

- A 2. The following table outlines the conviction and sentences awarded to each of the accused by the Trial Court:

Senthil Kumar (A-1)

- **Section 120-B IPC:** Imprisonment for life and fine of Rs. 50,000/-
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

Hariharan (A-2)

- **Section 120-B IPC:** Imprisonment for life.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

Poonga Nagar Manickam (A-3)

- **Section 120-B IPC:** Acquitted under Section 235(1) of Code of Criminal Procedure, 1973(hereinafter referred to as the "CrPC").
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Somasundaram (A-4)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

A

- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.

B

- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

Balamurugan (A-5)

C

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.

- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

D

- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.

E

- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

F

- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Shankar Ganesh (A-6)

G

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.

- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

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- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year. A
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year. B
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years. C
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Irudhayaraj (A-7)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC. D
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year. E
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year. F
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years. G
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year. H

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Jaibeam Anbu (A-8)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

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Udhayam Kumar (A-9)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

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- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

Leela Shankar (A-10)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Sampath (A-11)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.

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- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

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- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Romita Mary (A-12)

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- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.

Swamikannu (A-13)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.

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- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.

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- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.

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- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Sori Ramesh (A-14)

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- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.

- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.

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- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Bomb Selvam (A-15)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

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Jagadeesan (A-16)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.
- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

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Gunasekar (A-17)

- **Section 120-B IPC:** Acquitted under Section 235(1) of CrPC.
- **Section 365 IPC read with Section 109 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 387 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 302 IPC read with Section 109 IPC:** Imprisonment for life and fine of Rs. 50,000/-, in default of payment, rigorous imprisonment for 1 year.
- **Section 347 IPC read with Section 109 IPC:** Rigorous Imprisonment for 3 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 6 months.

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- **Section 364 IPC read with Section 109 IPC:** Rigorous Imprisonment for 10 years and fine of Rs. 5,000/-, in default of payment, rigorous imprisonment for 2 years.
- **Section 201 IPC:** Rigorous Imprisonment for 7 years and fine of Rs. 10,000/-, in default of payment, rigorous imprisonment for 1 year.

Naraimudi Ganesan (A-18)

- **Section 120-B IPC :** Acquitted under Section 235 (1) of CrPC.

3. The aforesaid sentences imposed upon each one of the accused persons were ordered to run concurrently.

4. Out of all the accused persons who were tried by the Sessions Court, only three, i.e., Manickam @ Poonga Nagar Manickam (hereinafter referred to as "A-3"), Somasundaram (hereinafter referred to as "A-4") and Bomb Selvam (hereinafter referred to as "A-15") are in appeal before us. Since we are only required to examine the correctness of the conviction and sentences as against these three accused persons, we shall restrict to the appreciation of facts and evidence relevant to these three accused persons only. The facts of the incident leading up to the case, the arrest of the accused persons followed by their trial and conviction are stated as under:

The case of the prosecution is that on 30.12.2001, at about 5:30 a.m., the deceased went for morning walk, but did not return home. As a result, his son, B. Manimaran (PW-1) lodged a missing person complaint at the Pattinapakkam Police Station at 11.00 a.m. The same was registered as Crime No. 986 of 2001. PW-66, the Inspector started the investigation. The statements of various witnesses were recorded. The breakthrough came on 21.02.2002, when the Investigating Officer came to know of the involvement of Balamurugan (A-5) in the case through an informant. A-5 was arrested on 18.03.2002 by PW-67, who also recorded his statement, produced as Ex. P-43. On the basis of the statement of A-5, the FIR was altered and the offences under Sections 120B read with Sections 364, 365, 302 and 201 of IPC were added to the same. Subsequently, the rest of the accused persons were arrested on the basis of the statements of the witnesses. A-3 was arrested on 25.03.2002 and his statement was recorded, which is produced as Ex.

- A P-20. On the basis of the evidence of A-3, M.O. 12- Maruti Zen Car, under mahazar Ex. P-6 was recovered on the same day. On 01.04.2002, A-3 and A-1 were remanded to police custody as per the order of the Magistrate for a period of ten days. A-4 was arrested on 09.04.2002 from Chrompet Railway Station. His statement was recorded as Ex.P-34 in the presence of PW-9. On the basis of the disclosure made in the statement, M.O.-6, Ford Escort Car bearing Registration No. TN-10-F-5555 was recovered, which has been produced as Ex. P-19. A-15 was arrested on 25.04.2002 from near the Egmore Railway Station, from where he was taken to the office of the CBCID. On the basis of the disclosure made in the statement of A-15, a 'Tiruvalluvar Hero Honda 6475', marked as M.O.-10 and a black coloured Reebok shoe, marked as M.O.- 1, kept inside the side box of that motor cycle were recovered.

5. On 14.06.2002, the final report under Section 173(2) of CrPC was filed in PRC No. 55 of 2002 before the XXIII Metropolitan Magistrate, Chennai, against A-1 to A-17 and one unknown person.
- D Pursuant to further investigation and apprehension of A-18, final report was filed on 10.01.2003 under Section 120-B read with Sections 364, 365, 419, 437, 387, 302, 402 and 201 of IPC.

6. During the course of the trial, the prosecution examined 67 Prosecution Witnesses to establish the guilt of the accused persons.

- E 7. The Trial Court, after examining the evidence produced on record, convicted and sentenced A-1 to A-11 and A-13 to A-17, as specified in the table referred to supra. A-12 and A-18 were acquitted of all charges. The accused persons preferred appeals against their conviction and the State preferred an appeal against the acquittal of A-12 and A-18 before the High Court. The High Court, after consideration of the evidence placed on record, upheld the order of conviction and sentence passed by the learned Sessions Judge against all the accused, except A-10. A-10 was acquitted of all the charges by the High Court. The appeals filed were accordingly, dismissed. The High Court, in the impugned judgment and order relied on the testimony of PW-1, the son of the deceased, who spoke about the fact that his father went on his usual morning walk but did not return and the testimony of PW-13, who saw the deceased walking. The next crucial link, according to the High Court is provided from the evidence of Venugopal (PW-10) and Newton (PW-11), who saw some of the accused bringing the deceased into the vermicelli manufacturing factory premises at Mudichur on the morning
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of 30.12.2001. Both PW-10 and PW-11 also deposed as to the prior arrangements made by them on the direction of the accused persons, including the arrangement of the premises of the vermicelli factory, vehicles and food. PW-11 also deposed that he saw four of the accused persons carrying the dead body of the deceased. PW-32, the Doctor, deposed that at the instance of A-3, he had issued a death certificate to PW-33, which was needed to cremate the body of the deceased. He also stated that he had done so without actually seeing the body of the deceased as he had known PW-33 for a long time and trusted him. Both the Trial Court and the High Court treated PW-10 and PW-11 as accomplices, keeping in view their role in the entire incident. The High Court then went on to examine the case law with regard to the reliability of the evidence of the accomplice. On this aspect, the High Court held as under:

“An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence.

It would not be right to expect that such independent corroboration should cover the whole of the prosecution story on even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous.....

.....the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration.”

The High Court accordingly, came to the conclusion that the evidence of PW-10 and PW-11 was reliable and could be considered while examining the guilt of the appellants. It was held as under:

“PW-10 and PW-11 are accomplices and they were present at all stages along with the accused and aided them in very

A many ways, we have analysed their evidence with great
care and caution. It is true that both of them had not informed
the occurrence to anybody and were not to be seen for
more than a period of months. For their conduct they have
given acceptable explanation. Both the witnesses have
B spoken that as they came to that A-3 and A-9 had indulged
in an act of serious offence, they were threatened by the
accused that if they reveal what had happened, they and
their family members would be in danger. Afraiding such
danger, they had hided themselves and therefore, they had
not disclosed to anyone, only fearing not only to their lives
C but also to their family members.....”

8. The High Court held that the case of the prosecution, as sought
to be proved by the evidence of PW-10 and PW-11, is that PW-10 was
a business associate of A-9. A-9 informed PW-10 that A-3 would get
him in a post in a political party if he completed a task that was assigned
D to him. A-9 asked PW-10 to help him finish the same. At the request of
A-9, PW-10 had arranged the vermicelli manufacturing factory premises
belonging to PW-34 for a week. Further, A-9 informed A-3 of the place
that had been chosen to carry out the task. PW-10, A-3 and A-9 then
visited the places to inspect the suitability of the premises. After the
same had been approved by A-3, PW-10 at the request of A-3, arranged
E a Maruti van, table, chair, cot, bedpan etc. and kept the same in the said
premises of the vermicelli manufacturing factory. PW-10 and PW-11
also made arrangements for procuring cash as and when A-3 and A-9
needed them. PW-10 and PW-11 also arranged rooms at Hotel Henkala,
Tambaram for A-9. PW-10 also heard the driver of A-3 asking him for a
chain to tie the deceased. A-3 also asked PW-10 to provide food for
F those who are staying in the vermicelli factory premises. PW-10 and
PW-11 also saw four of the accused persons bringing down the body of
the deceased, which was loaded in the van and taken out of the place.
PW-10 was also informed by A-13 that the body of the deceased had
been burnt in the Erukancheri cremation ground. PW-10 then left for
G Bangalore and stayed there till he was informed by his wife on 18.03.2002
that A-5 was arrested by CBCID police in connection with the murder
of the deceased.

9. The High Court further observed that PW-10 has implicated A-
1 to A-11 and A-14. He also identified A-4, A-5, A-6, A-7, A-8, A-11 and
H A-15 on three occasions as spoken to by PW-60, the Magistrate who

conducted the identification parade. On the issue of delay in test A
identification parade, the High Court held that:

“In a complicated investigation like this, where there was
no clue for the involvement of any of the accused till A-5
was arrested on 18.03.2002, the delay in holding the test
identification parade, if at all from the last arrest of A-16,
i.e., on 22.05.2002 would not in our view render the same
inconsequence and consequently it would not affect the test
on the ground of delay.” B

10. The High Court placed reliance on the decision of this Court in
the case of *Daya Singh v. State of Haryana*¹ for the same. The High C
Court further held that the common object for the offence was to collect
some money from the deceased, and in case the money did not come
through, to do away with the deceased. The High Court held that to
achieve the common object, they had conspired together.

11. Further, on the contention that the body which was cremated D
was not identified by anybody, the High Court held that the man who
was abducted on the morning of 30.12.2001, was kept in the vermicelli
factory premises by the accused persons, and was murdered there. His
body was cremated in the Perambur crematorium. It was held that the
circumstances adequately point to the same.

12. The High Court, therefore, held that the conviction and sentence E
imposed by the Trial Court in respect of all the accused persons is liable
to be confirmed as the same does not suffer from any infirmity in law.

13. The correctness of the impugned judgment and order passed
by the High Court is under challenge in these appeals by three of the
accused-appellants, i.e. A-3, A-4 and A-15 in support of which they F
have urged various facts and legal contentions before this Court.

14. The rival legal contentions urged on behalf of the accused
persons and the prosecution are stated hereunder:

Contentions urged on behalf of the accused-appellants: G

15. Mr. Siddharth Luthra, learned senior counsel appearing on
behalf of A-4 in Criminal Appeal No. 403 of 2010, contends that the
conviction of the appellant is wholly erroneous and is liable to be set
aside.

¹ (2001) 3 SCC 468

A 16. The learned senior counsel contends that the recovery of the Ford Car (M.O.-6) was not done in accordance with law, and thus, the same is vitiated. According to the statement given by A-4 to the Police [Ex. P- 34], he had stated as under:

B “If I am taken, I will identify the house, in Chrompet, wherein we were staying and the Muddichur Vermicelli Factory, wherein we had detained M.K. Balan and the cars which were used by us for the kidnapping of Balan.”

C 17. The Ford Car in question, M.O-6 was recovered from the house of PW-10 on 09.04.2002. In the evidence of PW-10, he had deposed that he had purchased M.O.6 Ford Car for Rs.3,60,000/-. He had bought the same from one Advocate Duraipandi. He further stated that M.O.6 was not registered in his name. It was registered in the name of one Ranjit Kumar. The learned senior counsel contends that in the absence of the proof of ownership of the vehicle, the only evidence of the use of the vehicle on 30.12.2001 is the testimony of PW-10, and the same cannot be used against A-4.

D 18. The learned senior counsel further contends that since the accused A-4 has been acquitted of the charge under Section 120-B of IPC, Section 10 of the Indian Evidence Act, 1872 (hereinafter referred to as the “Evidence Act”) has no application either. Section 10 of the Evidence Act reads as under:

E **“10. Things said or done by conspirator in reference to common design.** Where there is reasonable round to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

F 19. The learned senior counsel places reliance on the decision of this Court in the case of *State v. Nalini*², wherein the scope of Section 10 of the Evidence Act was discussed as under:

G ² (1999) 5 SCC 253

“The first condition which is almost the opening lock of that provision is the existence of “reasonable ground to believe” that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement “in reference to their common intention”. Under the corresponding provision in the English Law the expression used is “in furtherance of the common object”. No doubt, the words “in reference to their common intention” are wider than the words used in English Law.....

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..... We cannot overlook that the basic principle which underlies in Section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under Section 10.”

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20. The learned senior counsel contends that since A-4 has been acquitted of the charge of conspiracy, no statement made by any witness or accused which seeks to prescribe any sort of common intention can be used against A-4.

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21. The learned senior counsel further contends that the only relevant testimonies as far as A-4 is concerned are that of Manimaran (PW-1), Sudhakar (PW-3), Venugopal (PW-10), Newton (PW-11), Krishnapandi (PW-34) and the Investigating Officer (PW-67). PW-3, who is one of the eyewitnesses to the kidnapping of the deceased, deposed in his evidence as under:

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“.....On 30.12.2001, at about 5.30 A.M. as usual I started to run. By that time, I heard a sound. I saw that 3 persons were forcing a person to get into a van at a distance of

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A about 75 metres. Thereafter, all of them went in the same van. It's an Omni Van. A motor cycle followed that van. Thereafter, my friend Selvam came there. I told this to him. I told Selvaraj Master. Selvaraj Master told me "Why should we bother about others"....."

B 22. The learned senior counsel further contends that PW-3 thus, neither names, nor identifies nor prescribes any specific role to A-4 in kidnapping of the deceased on 30.12.2001. The learned senior counsel further contends that according to the evidence of PW-3, the deceased was kidnapped in an Omni Van, which was followed by a motorcycle. However, even if the alleged confession of A-4 is taken to be true, what
C was recovered at his direction was a Ford Escort Car (M.O.6).

23. The learned senior counsel further contends that during the trial, the prosecution has not arrayed PW-10 and PW-11 as accused, nor have they been made approver in the case. Thus, the testimonies of PW-10 and PW-11 cannot be relied upon in absence of corroboration from independent sources, as the same are in the nature of accomplice evidence in terms of Section 133 of the Evidence Act. The learned senior counsel places reliance on the decision of this Court in the case of
D *Rameshwar v. State of Haryana*³:

E ".....The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without,
F corroboration can, be sustained....."

24. The learned senior counsel further places reliance on the three judge bench decision of this Court in the case of *Bhiva Dolu Patil v. State of Maharashtra*⁴:

G ".....the provisions of s. 133 of the Evidence Act which reads:-

S. 133 "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely

³ AIR 1952 SC 54

H ⁴ AIR 1963 SC 599

because it proceeds upon the uncorroborated testimony of an accomplice”.

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It cannot be doubted that under that section a conviction based merely on the uncorroborated testimony of an accomplice may not be illegal, the courts nevertheless cannot lose sight of the rule of prudence and practice which in the words of Martin B in Res. v. Boyes (1861) 9 CCC. 32 “has become so hallowed as to be deserving of respect” and in the words of Lord Abinger “it deserves to have all the reverence of the law”. This rule of guidance is to be found in illustration (b) to s. 114 of the Evidence which is as follows:-

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“The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars”

25. The learned senior counsel contends that PW-10 and PW-11 were witnesses to the entire conspiracy and does not prescribe any role to A-4 after the meeting on 05.12.2001 at the house of A-9. Nor does he prescribe any specific role to A-4 for the kidnapping of the deceased on 30.12.2001. The learned senior counsel further places reliance on the cross examination of PW-10 which reads as under:

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“When I and Newton had gone to the house of the 3rd accused Manickam, 3rd accused Manickam said to the persons available there that the Ex M.L.A. Balan has to be brought and that some money has to be collected from him. After hearing this it was not struck to me that it could be violence act. After Manickam said as such I and the witness Newton came out of the house, I do not know what they had spoken and decided thereafter. Thereafter I did not see the accused Somasundaram.....”

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(emphasis laid by this Court)

26. The learned senior counsel contends that PW-10 does not place A-4 on the spot at the vermicelli factory at any of the days from 30.12.2001 till 01.01.2002. Further, in his cross examination he admits the fact of not having seen A-4 after 05.12.2001. According to PW-10, A-4 was not even one of the four persons who carried the body of the

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A deceased out of the premises of the vermicelli factory.

27. The learned senior counsel further contends that since A-3 to A-11 and A-13 to A-17 have been acquitted by the Trial Court of the offence punishable under Section 120-B of IPC, the conviction under Section 107 of IPC cannot be sustained. Reliance has been placed on the decision of this Court in the case of *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar*⁵, wherein it was held as under:

C “Furthermore, it appears to me that though the expression “criminal conspiracy” occurs in para. 5 of the complaint, the facts alleged in the petition of complaint essentially disclose an offence of abetment by conspiracy. This brings us to the distinction between the offence of criminal conspiracy as defined in s. 120A and the offence of abetment by conspiracy as defined in s. 107 of the Indian Penal Code. Section 120A which defines the offence of criminal conspiracy and s. 120B which punishes the offence are in Ch. VA of the Indian Penal Code. This Chapter introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It was introduced by the criminal Law Amendment Act, 1913 (VIII of 1913). Before that, the sections of the Indian Penal Code which directly dealt with the subject of conspiracy were these contained in Ch. V and s. 121 (Ch. VI) of the Code. The present case is not concerned with the kind of conspiracy referred to in s. 121A. The point before us is the distinction between the offence of abetment as defined in s. 107 (Ch. V) and the offence of criminal conspiracy as defined in s. 120A (Ch. VA). Under s. 107, second clause, a person abets the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and an order to the doing of that thing. Therefore, in order to constitute the offence of abetment by conspiracy, there must first be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing. It is

H ⁵ AIR 1962 SC 876

not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Something more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing for which the conspiracy was made. Before the introduction of Ch. VA conspiracy, except in cases provided by Sections 121A, 311, 400, 401 and 402 of the Indian Penal Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence. Chapter VA, however, introduced a new offence defined by s. 120A. That offence is called the offence of criminal conspiracy and consists in a mere agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The position, therefore comes to this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very

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- A agreement or plot is an act in itself and is the gist of the offence.”

(emphasis laid by this Court)

- B 28. The learned senior counsel submits that the language of the charge is that of abetment for fulfilling the conspiracy against the accused persons. As the charge under Section 120-B of IPC has not been proved, Section 107 of IPC cannot be attracted in this case as the distinction between the offence of abetment by conspiracy and offence of criminal conspiracy is that in the former, a mere agreement among persons is not enough.

- C 29. Mr. Basant R., the learned senior counsel appearing on behalf of A-3 submits that A-3 has been acquitted of the offence under Section 120-B of IPC. The learned senior counsel further submits that A-3 was never charged with the offences under Sections 34 and 149 of IPC. He was only charged with the offence under Section 109 of IPC, which by itself was a vague charge, making it impossible to defend. The learned senior counsel contends that the inclusion of the charge under Section 109 of IPC would indicate that A-3 was in fact not involved in the actual murder of the deceased. It is further contended that once the charge under Section 120B of IPC fails to be established, the prosecution has to show the exact manner in which the abetment of an offence was done by A-3. The learned senior counsel contends that this did not happen in the instant case.

- F 30. The learned senior counsel further contends that as far as the charge of offence under Section 302 of IPC is concerned, even that has not been proved by the prosecution satisfactorily. At the outset, the learned senior counsel contests the factum of the death of the deceased itself. It is contended that no prosecution witness has identified the dead body that was burnt on the night of 01.01.2002. No DNA tests have been conducted to conclusively verify the identity of the body that was allegedly burnt on 01.01.2002. It is submitted that the reliance placed by the courts below on the evidence of PW-32 and PW-33 is also misplaced. PW-33 stated in his testimony that A-3 had told him to procure a death certificate for one Rajamani Chettiar who had died. PW-33 then asked PW-32, a doctor he knew for the last fifteen years to issue the same. There is nothing to actually connect A-3 to the death certificate except the spoken word of PW-33. It is contended that it was in fact PW-32

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and PW-33 who created the false evidence, and are now conveniently pinning it squarely on A-3. The learned senior counsel further contends that the specific role of A-3 in the murder of the deceased has not been proven, which makes it erroneous in law to convict him of the offence under Section 302 read with Section 109 of IPC. A

31. The learned senior counsel further contends that the testimony of PW-10 and PW-11 should not be relied upon, as their evidence is not corroborated by other material evidence. The learned senior counsel further contends that the fact that PW-10 and PW-11 have not been termed as 'accomplices' by the courts below and their evidence has no bearing on the reliability to record the finding of guilt. The fact that the term 'accomplice' has not been used to describe them is irrelevant, as if the evidence on record points to them being accomplices, then PW-10 and PW-11 are in fact, accomplices. The learned senior counsel further submits that the term accomplice has not been defined in any statute. He places reliance on the definition of the term 'accomplice' in Black's Law Dictionary, in which it has been defined as under: B
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"One who is in some way concerned or associated in commission of crime, a partaker of guilt, one who aids or assists, or is an accessory."

Ramanatha Aiyar's Law Dictionary defines 'accomplice' as:

"There is some authority for using the word 'accomplice' to include all principals and all accessories, but the preferred usage is to include all principals and accessories before the fact, but to exclude accessories after the fact. If this limitation is adopted, the word 'accomplice' will embrace all perpetrators, abettors and inciters. E
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The term in its fullness includes in its meaning all persons, who have been concerned in the commission of a crime, all *participles criminis*, whether they are considered in strict legal property as principals in the first or second degree or merely as accessories before or after the fact." G

32. The learned senior counsel submits that the burden upon the accused to show that someone is an accomplice is only to the extent that the term accomplice is commonly understood. The burden on the accused is not to show the guilt of the witness beyond reasonable doubt. H

A 33. The learned senior counsel contends that it becomes clear
from a perusal of the testimony of PW-10 and PW-11 (extracted in the
earlier part of this judgment) that they were actively involved in the
preparation of the crime. The learned senior counsel further contends
B that the testimony also clearly shows that both the PWs had full knowledge
of the purpose for which they were making the preliminary preparations,
i.e., for the abduction of the deceased and keeping him in the premises
of the vermicelli factory. The learned senior counsel further submits that
PW-10 and PW-11 can by no stretch of imagination be said to be
approvers, as no court has granted them pardon and made them as
approvers.

C 34. On the question of the role prescribed by PW-10 and PW-11
to A-3, the learned senior counsel submits that there is no evidence
which suggests that A-3 came in contact with the deceased while he
was at the vermicelli factory premises. PW-10 had deposed as under:

D “On 30.12.2001 at 8:30 A.M., Udaykumar called me over
my cell phone. Asked me to come to Henkala Hotel. I also
went there. After sometime Accused Manickam came by
Uno car. After coming to the room, he asked Udaykumar
E that he need a Maruti Van. Manickam took myself,
Udaykumar and Senthilkumar in that Maruti Van and went
to the vermicelli factory at Mudichur. When we went to
the company, Manickam alone got down and was standing
there. One person came down from upstairs and took me
and Senthilkumar to upstairs. There were about 5 or 6
F persons. Ex. M.L.A. Balan was tied up with chain and his
eyes were also closed with a cloth and he had been made
to sit on the green steel cot which was provided by us
already.....”

Further, PW-10 identifies four accused who brought down the
dead body of the deceased and A-3 is not one of these four accused.

G 35. The learned senior counsel contends that even if the evidence
of PW-10 and PW-11 are accepted in toto, it does not at all suggest that
A-3 was present in the vermicelli factory, which is the alleged scene of
crime when the death occurred. Hence, the charge of the offence under
Section 302 read with Section 109 IPC cannot be sustained against A-3
at all.

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36. Mr. P.V. Yogeswaran, the learned counsel appearing on behalf of A-15 contends that there is nothing in the evidence to directly implicate A-15 except M.O.1, the Reebok shoes produced by the prosecution on record which allegedly belonged to the deceased. PW-1 however, in his testimony stated that M.O.1 showed to him in court, did not belong to his father. PW-2, the driver of the deceased has also denied that those shoes belonged to the deceased. The learned counsel further submits that the testimony of PW-10 and PW-11 cannot be relied upon, as the proper procedure as required under Section 164 of CrPC has not been followed by the Court while recording their evidence.

Contentions urged on behalf of the prosecution:

37. On the other hand, Mr. Yogesh Kanna, the learned counsel appearing on behalf of the State of Tamil Nadu contends that there is no infirmity in the impugned judgment and order passed by the High Court, upholding the conviction and sentence passed against the accused-appellants by the Trial Court, and the same need not be interfered with by this Court in exercise of its jurisdiction under Article 136 of the Constitution of India.

38. The learned counsel places reliance on the evidence of Venugopal (PW-10). PW-10, in his deposition mentions the scouting for locations that had taken place, to carry out the most suitable location where the crime could be carried out. He deposed as under:

“In the second week of November, 2001, this Accused Udayakumar called me over telephone and came to my office. At that time he asked me whether the houses are ready. I replied him that I have made them ready. Next day, Udaykumar called me once again and asked me and Newton to be in the office. He also told me that Poonga Nagar Manickam of Perambur is coming to my office. Around 2 P.M. on that day Udaykumar and Poonga Nagar Manickam came to my office. I and Newton were present in our office. Myself and Newton took Poonga Nagar Manickam and Udaykumar for the purpose of showing the houses. First we went from Tambaram to Camp Road and in a considerable distance from there to Mahalakshmi Nagar and showed my friend Mr. Choudry’s house. Besides that, we showed 4 or 5 houses in that place. At last, they

A saw my house also. Then Manickam told Udaykumar that
he don't like the houses shown by us including my house.
Then, Udaykumar asked to show the Vermicelli factory in
Mudhichur Road. Myself and Newton took Poonga Nagar
Manickam and Udayakumar and showed the Vermicelli
B factory in Mudichur Road. Witness Krishnapandi was also
there. Manickam saw the factory. After seeing the factory,
Manickam told Udayakumar that this place is the correct
place for the work to be done by us."

38. The learned counsel further contends that apart from explaining
the meetings between the accused persons to hatch the conspiracy to
C abduct the deceased, PW-10 has also spoken about the Maruti Van that
was used to carry the dead body of the deceased after the crime had
been committed. PW-10 has deposed as follows:

"On 30.12.2001 at 8:30 A.M., Udaykumar called me over
my cell phone. Asked me to come to Henkala Hotel. I also
D went there. After sometime Accused Manickam came by
Uno Car. After coming to room, he asked Udayakumar
that he needed a Maruti Van. He went outside and brought
one sandal colour Maruti Van. Manickam took myself,
Udayakumar and Senthilkumar in that Maruti Van and went
E to the vermicelli factory at Mudichur. When we went to
the company, Manickam alone got down and was standing
there. One person came down from upstairs and took me
and Senthilkumar to upstairs. There were about 5-6 persons.
Even Ex MLA M.K. Balan was tied up with chain and his
F eyes were also closed with a cloth and he had been made
to sit on the green steel cot which was provided by us
already. He was wearing black pant and sandal colour T-
shirt....."

The learned counsel further submits that PW-10 in fact also saw
the accused carrying the body of the deceased out of the vermicelli
G factory premises. The relevant portion of his evidence is extracted
hereunder:

"On 1.1.2002 morning, I came back to my house. By 10:30
a.m. Udayakumar called up over phone and asked me to
come to Henkala Hotel. I also went there. After sometime
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Manickam came there. Manickam asked Udayakumar to provide an ambulance to him. Udayakumar took me with him and went to 2,3 places in search of an ambulance. He could not find ambulance. Then Manickam told him that if ambulance is not there it does not matter, but to arrange one Maruti Van and fix one Lumax light as fixed in ambulance vehicle. By that time, Manickam's driver Viji came there.....After sometime Manickam called Udayakumar over phone. Then Udayakumar told me that Manickam asked me to arrange for a Maruti Van. Udayakumar asked me to wait there and went out and came back with a Maruti Car. That Maruti Van is of gold colour.....I came to a tea shop with Newton by his motor cycle. Newton told me that lunch was not supplied in the afternoon to the Vermicelli factory and they have told over phone that they do not need dinner also. I also told Newton about their requirement of ambulance. Also I told him that they are arranging for a vehicle like ambulance. I told him about Udayakumar sending the Maruti van by 8.00 P.M. and also about my fear on seeing all these. Newton was also very much scared. Both of us suspected that something is going on in the company. Then, both of us started around 8:45 P.M. from Tambaram and reached the Mudichur company by 9.00 P.M. There the gate in the ground floor was closed.....The Golden colour Maruti sent from Henkala Hotel was standing there.....Then 4 persons came from upstairs carrying on Mr. M.K. Balan's body. Among that four persons, 2 persons were holding his legs and the other 2 persons were holding his hands. By that time also M.K. Balan was wearing black colour pant, and sandal colour T shirt. After coming from the upper steps, there is a slab like place. They kept the body there. They took a cloth from the bag brought by Balamurugan and tied around M.K. Balan's body, like doing a dead body. There is no movement in the body."

39. The learned counsel thus, submits that PW-10 has explicitly mentioned seeing the dead body of the deceased by some of the accused, and has also spoken about the Maruti Van which was recovered from

- A the accused-appellants. His testimony is crucial in placing the accused-appellants at the scene of the crime, and their involvement in the same. It thus, establishes their guilt beyond reasonable doubt.

- B 40. The learned counsel further places reliance on the testimony of Newton (PW-11). PW-11 has also spoken about making the preparations on the instruction of Poonga Nagar Manickam, A-3. Significantly, PW-11 also mentions seeing the dead body of the deceased being carried down the vermicelli factory premises. The relevant portion of his evidence is extracted as under:

- C “.....As per that, both of us went to the vermicelli company by the motor cycle. By that time, 2 persons were near the gate. Then both of them told us that we do not have any work there and we can go from there. Then I left the bike adjacent to the company and when I and Venugopal crossed the company gate, we saw Balamurgan going into the vermicelli factory. At that time, 4 persons came from upstairs of the vermicelli factory, carrying M.K. Balan, who was wearing Black colour pant and T shirt (sandal colour) and they left him on the floor. They tied up M.K. Balan with the dhoti brought by Balamurugan and carried him to the van and the van started from there.....I and Venugopal were
- D scared and came back to home. PW-10 Venugopal told me that he was called by Poonga Nagar Manickam and told by him that if this matter is leaked out anywhere he will kill him and his family.”
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- F 41. The learned counsel further places reliance on the testimony of PW-33, Kamaraj, who had procured the death certificate, which was shown as that of the deceased in order to cremate him. PW-33 stated that he had procured the death certificate at the instance of A-3. The relevant portion of his evidence is extracted hereunder:

- G “.....At that time Sami told me that Manickam asked me to come by 6 am in the morning. Next day I went to Manickam's house by 6 am and when he enquired about my conveyance and I told him that I had come by Auto and he gave me Rs 50/- for expenses. Further he told that watchman working in a Kolathur company had died; and one Rajamani Chettiar expired and asked me to get a
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certificate. I immediately told about PW-32, Dr. Anbarasu known to me for the past 15 years; and went to his place by auto. The Doctor was there. I told him that a watchman in a Kolathur Company had died. He believed me and gave it in writing in a letterhead. I gave it to Manickam in Perambur and came back to my house.....”

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42. The learned counsel further relies on the evidence of Dr. K.V. Chinnaswamy, PW-32, who had stated that PW-33 had asked him for a death certificate in the name of one Rajamani Chettiar. PW-32 stated that he had no reason to suspect PW-33, whom he had known for about fifteen years, and thus, issued the death certificate without even looking at the dead body of the deceased.

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43. The learned counsel further submits that after considering the evidence of PW-1 and PW-3 and after perusal of the First Information Report, that according to the circumstantial evidence, it can be seen that it was indeed the deceased who had been kidnapped from MRC Nagar on 30.12.2001 at about 5:30 a.m by the accused appellants.

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44. The learned counsel further contends that PW-10 and PW-11 are not accomplices, and thus, their evidence can be safely relied upon, in light of the fact that they corroborate each other on all material aspects in relation to the charges. The learned counsel places reliance on the decision of the High Court of Lahore, in the case of *Ismail s/o Hassan Ali v. Emperor*⁶, wherein an accomplice was defined as:

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“The expression ‘accomplice’ has not been defined in the Evidence Act, but there can be little doubt that it means a person who knowingly or voluntarily cooperates with or aids and assists another in the commission of a crime. The expression obviously includes principals in the first and second degree. In the case in (’36) 23 A.I.R. 1936 P.C. 242 : 163 I.C. 681 (P.C.), *Mahadeo v. The King* their Lordships of the Privy Council held that the expression is wide enough to include persons who are known to the English law as accessories after the fact. An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts or assists the felon. Three conditions must unite to render one an accessory

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⁶ AIR 1947 Lah 220

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- A after the fact: (1) the felony must be complete; (2) the accessory must have knowledge that the principal committed the felony; and (3) the accessory must harbour or assist the principal felon. Mere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction nor aid his escape, do not render one an accessory after the fact (4 Blackstone's commentaries p. 38). He must be proved to have done some act to assist the felon personally (1823-41) 9 C.P. 355). The mere fact, that one had knowledge that a crime had been committed, and that he concealed or failed to disclose such knowledge, does not render him an accomplice. If, for example, the concealment is due to the witness's anxiety for his own safety rather than to any desire to shield the criminal, he would not be an accomplice. Nor would a person who remains passively silent after obtaining knowledge of the commission of the crime be an accessory or an accomplice within the rule as to the testimony of accomplices. To render a person an accomplice his participation in the crime must be criminally corrupt."
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(emphasis laid by this Court)

- E 45. The learned counsel further contends that PW-10 and PW-11 only did the things they were told to do, like scouting for the location and arranging the necessary items needed to keep the deceased at the vermicelli factory premises at the instance of the accused-appellants. PW-10 and PW-11 were also threatened with harm to themselves and to their families if they did not comply with the instructions given to them by the accused-appellants. The learned counsel further contends that mere knowledge of a crime does not make a person an accomplice. Reliance has been placed on the decision of the Calcutta High Court in the case of *Narain Chandra Biswas v. Emperor*⁷, wherein it was held as under:
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- G " It may further be noticed that where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime, as it is well settled that all accessories before the fact, if they participate in the preparation for the crime

H ⁷ AIR 1936 Cal 101

are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. "Whether therefore a person is or is not an accomplice depends upon the facts in each particular case considered in connexion with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial are charged. All persons coming, technically within the category of accomplices cannot also be treated as on precisely the same footing."

46. The learned counsel submits that there is nothing on record to prove that PW-10 and PW-11 had prior knowledge that the deceased would be murdered at the hands of the accused-appellants. The only knowledge they had was that the factory premises was needed for some work by the accused appellants.

47. The learned counsel further contends that even if PW-10 and PW-11 were taken to be accomplices, their testimony can still be safely relied upon, for the reason that they corroborate each other, as well as corroborated by other independent witnesses, including PW-1, the son of the deceased, as well as PW-13, who is an eyewitness to the kidnapping of the deceased. The learned counsel places reliance on the decision of this Court in the case of *K Hashim v. State of Tamil Nadu*⁸, wherein it was held that:

"First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Readings says -

'Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony.'

38. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

⁸ (2005) 1 SCC 237

A 39. Secondly, the independent evidence must not only make
it safe to believe that the crime was committed but must in
some way reasonably connect or tend to connect the
accused with it by confirming in some material particular
the testimony of the accomplice or complainant that the
B accused committed the crime. This does not mean that the
corroboration as to identify must extend to all the
circumstances necessary to identify the accused with the
offence. Again, all that is necessary is that there would be
independent evidence which will make it reasonably safe
to believe the witness's story that the accused was the one,
C or among those, who committed the offence. The reason
for this part of the rule is that -

“a man who has been guilty of a crime himself will always
be able to relate the facts of the case, and if the confirmation
be only on the truth of that history, without identifying the
persons, that is really no corroboration at all It would
D not at all tend to show that the party accused participated
in it.”

40. Thirdly, the corroboration must come from independent
sources and thus ordinarily the testimony of one accomplice
would not be sufficient to corroborate that of another. But
E of course the circumstances may be such as to make it
safe to dispense with the necessity of corroboration and in
those special circumstances a conviction so based would
not be illegal. I say this because it was contended that the
mother in this case was not an Independent source.

F 41. Fourthly, the corroboration need not be direct evidence
that the accused committed the crime. It is sufficient if it is
merely circumstantial evidence of his connection with the
crime. Were it otherwise, “many crimes which are usually
committed between accomplices in secret, such as incest,
G offences with females’ (or unnatural offences) could never
be brought to justice”. [See *M.O. Shamsudhin v. State of
Kerala.*]”

48. The learned counsel contends that the Trial Court and the
High Court were correct in placing reliance on the testimony of PW-10
H and PW-11 and convicting and sentencing the accused-appellants for

kidnapping and murder of the deceased and the same does not warrant any interference by this Court in exercise of its appellate power under Article 136 of the Constitution. A

49. We have heard the learned counsel appearing on behalf of all the parties and have appreciated the evidence on record. The essential question that would arise for our consideration is whether the High Court was justified in upholding the conviction and sentence imposed on A-3 and A-4 by the Trial Court. At the cost of reiteration, since the only appellants before us in the present appeals are A-3, A-4 and A-15, we shall restrict our examination of the evidence on record only to their role in the crime as has been alleged by the prosecution. B

50. From a perusal of the evidence on record, it becomes clear that the case of the prosecution as far as A-3 and A-4 are concerned rests heavily on the evidence of PW-10 and PW-11, whose evidence is supported by the evidence of PW-33 and PW-34. C

51. At the outset, it is crucial for me to examine the evidence of PW-10 and PW-11, as this forms the backbone of the case of the prosecution against A-3 and A-4. D

52. PW-10 has admitted to making preparations for the crime, albeit on the instructions of the accused. PW-10 stated that he had shown various houses to the accused, including his own, before settling in on the vermicelli factory premises as the place where the deceased would be brought and kept. PW-10 was also present in the alleged meeting held on 05.12.2001 at the residence of A-3 at Perambur. In that meeting, PW-10 stated that A-3 told everyone present there that the deceased had to be abducted and money recovered from him. It is further evident from the evidence of PW-10 that he arranged money and vehicles, as and when needed. What becomes further clear from the evidence of PW-10 is that he has squarely kept himself out of the actual abduction and murder of the deceased. According to PW-10, on 31.12.2001, the day that the deceased was abducted, A-9 Udayakumar called PW-10 to a hotel, from where A-3, A-9, A-1 went in a Maruti Van to the vermicelli factory at Mudichur. It was after reaching the vermicelli factory that PW-10 was taken to the room where the deceased was tied up in chains. PW-10 was then asked by A-3 to arrange for an ambulance or a vehicle like an ambulance. On 01.01.2002, at about 9:00 P.M., he saw the body of the deceased being carried downstairs by four persons. A-3 and A-4 were not among them. E
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A 53. Newton, PW-11, in his deposition states that at the request of A-9, he and PW-10 showed houses to A-3 and A-9. PW-11 was also present at the meeting on 05.12.2001 and saw A-4, A-6 and A-11 there. On the day of the abduction, PW-11 saw the deceased being brought into the vermicelli factory premises. He stated as under:

B “.....After half an hour, Udayakumar called me over the
phone and told me to open the gate of the vermicelli factory.
Then, the Tata Sumo car came first, followed by the Ford
Escort Car and a Maruti Zen Car. 4 persons got down from
the Ford Car. Those 4 persons brought M.K. Balan by
closing his eyes, mouth and tying his hands and took him to
C the 1st floor. M.K. Balan was wearing black colour pant,
sandal colour T shirt and shoes. 3 persons came out of the
zen car. Udayakumar came to me and asked me whether I
know that he is M.K. Balan and he also threatened me that
D if I disclose the same to anybody Poonga Nagar Manickam
will kill me and my family members. Then all the three cars
went from the company. I can identify the 4 persons, who
brought M.K. Balan in the Ford Car, if I see them. They
are 4th accused, 11th Accused, 16th Accused and 17th
Accused.....The next day around 6.00 A.M.
when Udayakumar came there, I went from there.
E Thereafter, Udayakumar called me over phone and asked
me to buy tiffin for 10 persons and give the same to
Balamurugan in the vermicelli factory. By 12.00 noon,
Udayakumar called again and asked me to buy lunch for 10
persons, B.P. tablets and head ache tablet and to handover
F the same to Balamurugan in Mudichur vermicelli factory. I
gave them the same and went home.....”

54. PW-11 also speaks about seeing the dead body of the deceased. He also identified the Ford Escort Car, M.O. 7, whose registration number is T.T.N. 10-F-5555. As far as A-15 is concerned, only PW-11 identifies
G him at the vermicelli factory premises on 30.12.2001, when he states
that A-15 was one of the four persons who came with accused
Balamurugan with the tiffin parcel.

55. From a perusal of the evidence of PW-10 and PW-11, it
becomes clear that they are accomplice witnesses. It is also clear that
H the case of the prosecution heavily rests on their evidence. Before we

proceed to examine the culpability of A-3 and A-4, it is important for us to examine the reliability of the evidence of the above accomplices. Section 133 of the Indian Evidence Act, 1872, which deals with the testimony of accomplice witness, reads as under: A

“an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.” B

56. The High Court, in the impugned judgment and order also considered this aspect at some length. After advertng to judgments of both the Privy Council as well as this Court, the High Court concluded as under: C

“ A deep study on the above approach in law as to the evidentiary value of the deposition of an accomplice, the following settled principles culminate; that an evidence of an accomplice need not necessarily be rejected, that the evidence requires corroboration in material particulars as well as the corroboration of the evidence connecting or tend to connect the accused with the crime, that such accomplice witness is reliable. If the above tests are satisfied, the evidence of an accomplice can be safely relied upon to hold the accused guilty of the offence. Keeping the above principle in mind, the evidence of PW-10 and PW-11 should be considered.” D E

57. In the instant case, PW-10 and PW-11 have not been granted pardon by any Court and have been arrayed as prosecution witnesses. This Court has held that the mere fact that pardon has not been tendered by a court of law does not make an accomplice cease being an accomplice. The learned senior counsel Mr. Basant R. has aptly placed reliance upon the case of *Laxmipat Choraria v. State of Maharashtra*⁹, this Court held as under: F

“The word accomplice is ordinarily used in connection with the law of evidence and rarely under the substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person. G

⁹ AIR 1968 SC 938

A The witness was, of course, treated as an accomplice. The
 evidence of such an accomplice was received with
 necessary caution in those cases. These cases have all been
 mentioned in *In re Kandaswami Gounder* AIR 1957 Mad 727,
 and it is not necessary to refer to them in detail here. The
 leading cases are : *Queen Emperor v. Mona Puna* I.L.R.
 B 16 Bom. 661, *Banu Singh v. Emperor* I.L.R. 33 Cal. 1353,
Keshav Vasudeo Kortikar v. Emperor I.L.R. 59 Bom. 355,
Empress v. Durant I.L.R. 23 Bom. 213, *Akhoy Kumar*
Mookerjee v. Emperor I.L.R. 45 Cal. 720, *A.V. Joseph v.*
Emperor I.L.R. 3 Rang. 11, *Amdumiyar and others v.*
 C *Crown* I.L.R. 1937 Nag. 315, *Gallagher v. Emperor* I.L.R.
 54 Cal. 52, and *Emperor v. Har Prasad, Bhargava* I.L.R.
 45 All. 226. In these cases (and several others cited and
 relied upon in them) it has been consistently held that the
 evidence of an accomplice may be read although he could
 have been tried jointly with the accused. In some of these
 D cases the evidence was received although the procedure
 of s. 337, Criminal Procedure Code was applicable but was
 not followed. It is not necessary to deal with this question
any further because the consensus of opinion in India is
that the competency of an accomplice is not destroyed
 E because he could have been tried jointly with the accused
but was not and was instead made to give evidence in the
case."

(emphasis laid by this Court)

F 58. The same view has been reiterated by this Court more recently
 in the case of *Chandran @ Maniyan v. State of Kerala*¹⁰.

59. Thus, PW-10 and PW-11 being accomplice witnesses, their
 evidence must be treated as such, and subject to the same test of reliability
 of the evidence of an accomplice or approver are subject to.

G 60. As far as how much reliance can be placed upon the evidence
 of such witnesses is concerned, in this regard this Court has laid down
 the well settled position of law. In support of the above legal submission,
 the learned senior counsel Mr. Basant R. relied upon the case of *Sarwan*
*Singh v. State of Punjab*¹¹, a three judge bench of this Court held as

¹⁰ (2011) 5 SCC 161

H ¹¹ AIR 1957 SC 637.

under:

“An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story -or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.”

(emphasis laid by this Court)

The above principle was reiterated in the case of *Haroom Haji Abdulla v. State of Maharashtra*¹², as under:

“8. The Evidence Act in Section 133 provides that an accomplice is a competent witness against an accused

¹² AIR 1968 SC 832

A person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in Illustration (b) to Section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law.

9. The argument here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice. Therefore, unless there is some evidence besides these implicating the accused in some material respect, conviction cannot stand. Reliance is placed in this connection upon the observations of the Judicial Committee in *Bhuboni Sahu v. Emperor* a case in which a conviction was founded upon the evidence of an accomplice supported only by the confession of a co-accused. The Judicial Committee acquitting the accused observed:

“..... Their Lordships whilst not doubting that such a conviction is justified in law under s. 133, Evidence Act,

and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and how has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution: the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue....”

(emphasis laid by this Court)

In the case of *Ravinder Singh v. State of Haryana*¹³, a three judge bench of this Court held as under:

“12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given, of minute details according with reality is likely to save it from being rejected. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the

¹³ (1975) 3 SCC 742

A distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based.”

B (emphasis laid by this Court)

61. It becomes clear from a perusal of the abovementioned case law that while the evidence of an accomplice can be used to convict an accused, as a rule of prudence, the Court must first ensure that the testimony of the accomplice is corroborated in material particulars by adducing independent evidence. It is also a well settled position of law that the evidence of two accomplices cannot be used to corroborate with each other, as held in the case of *R v. Baskerville*¹⁴. The same position of law has been reiterated and adopted in India in a catena of cases. In this regard, the learned senior counsel Mr. Basant R. has placed reliance upon the case of *Mohd. Hussain Kochra v. K.S. Dalipsinghi & Ors.*¹⁵, a three judge bench of this Court held as under:

E “The combined effect of Sections 133 and 114 Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another.”

F (emphasis laid by this Court)

62. The said position of law was reiterated by this Court in the case of *Chonampara Chellapan v. State of Kerala*¹⁶ as under:

G “The law is well settled that the Court looks with some amount of suspicion on the evidence of an accomplice witness which is tainted evidence and even Section 133 of

¹⁴ (1916) 2 KB 658

¹⁵ (1969) 3 SCC 429

H ¹⁶ (1979) 4 SCC 312

the Evidence Act clearly provides that the evidence of an accomplice witness should not be accepted unless corroborated. At the same time, it must be remembered that corroboration must be in respect to material particulars and not with respect of each and every item however minor or insignificant it may be. Actually the requirement of corroboration is a rule of prudence which the courts have followed for satisfying the test of the reliability of an approver and has now been crystallized into a rule of law. It is equally well settled that one tainted evidence cannot corroborate another tainted evidence because if this is allowed to be done then the very necessity of corroboration is frustrated."

(emphasis laid by this Court)

63. Further, the independent evidence must be such that it corroborates with the testimony of the accomplice in material particulars, that is, the corroboration must be both in respect of the crime as well as the identity of the accused. This particular test assumes significance when there is more than one accused in a case, as is the case here. In the case of *Sheshanna Bhumanna Yadav v. State of Maharashtra*¹⁷, this Court held as under:

"The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114 illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the time. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a

¹⁷ AIR 1970 SC 1330

A piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused, and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.

C This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh v. State of Punjab* and the recent decision is *Lachi Ram v. State of Punjab*. In *Sarwan Singh's* case this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in *Lachi Ram's* case said that the first test of reliability of approver and accomplice evidence was for the court to be satisfied that there was nothing inherently impossible in evidence. After, that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime."

64. The accused before us are A-3, A-4 and A-15. What is crucial to consider at this stage is that the Trial Court acquitted all the above accused of the charge of conspiracy under Section 120-B of IPC. They have however, been convicted for, among others, the offences under Section 302 read with Section 109 and Section 364 read with Section 109 of IPC. There is nothing on record to show the direct involvement of the accused – appellants in either the abduction of the deceased or his murder. The Ford Escort Car (M.O.12) recovered at the instance of PW-10, from the house of A-3, does not trace back its ownership to A-4. The requirement of corroboration from independent sources in material particulars has not been met in the instant case. This makes it impossible for the accused to be convicted of the offences under Sections 302 and 364 of IPC. Neither PW-10 nor PW-11 are witnesses to the abduction

of the deceased. PW-13, who witnessed the abduction, also did not mention the above three accused at the site of the abduction. PW-10 places A-3 and A-4 at the meeting on 05.12.2001. But this fact loses significance in view of the fact that they have been acquitted of the offence of conspiracy under Section 120B of IPC. PW-10 and PW-11 also saw the body of the deceased being brought down in the vermicelli factory premises on the night of 01.01.2002. But neither of them places any of the three accused at the site at that time. Further, what comes to light from the testimony of PW-10 and PW-11 is that even at the vermicelli factory premises, A-3 stayed downstairs, while it was PW-11 who went upstairs and actually saw the deceased tied to chains and the room where he was kept. PW-11 only saw A-15 at the site on the night of 30.12.2001, carrying a tiffin parcel. A-4 has not been mentioned anywhere at the vermicelli factory at all. Further, as far as A-3 is concerned, another evidence used against him is the testimony of PW-32 and PW-33 who have admitted to creating the evidence of the death certificate, which was allegedly required by A-3 to produce at the crematorium in order to cremate the deceased. In light of the fact that PW-32 has admitted to issuing the death certificate without even seeing the dead body of the deceased at the request of PW-33. PW-33 has stated that he only did so at the instance of A-3. There is no other evidence on record to connect A-3 to the death certificate. Even if the death certificate is taken to be genuine, it does not in any way connect A-3 to the deceased, thus rendering the claim of the prosecution doubtful and shaky.

65. As far as A-15 is concerned, the crucial evidence on which reliance was placed upon by both the courts below to convict him was the recovery of M.O. 1, reebok shoes on his direction. PW-31, Samundeswari, a supervisor at the vermicelli factory, in her deposition stated that she saw a person at the vermicelli factory premises on the next day, i.e. 01.01.2002, who stated that he had come to take something. He took a Reebok shoe from the factory. Both the courts below, however, failed to notice that PW-31 had explicitly stated in her testimony that:

“On 18th March, one person was brought by the police that I only shouted him and that if it is asked me whether I could be able to identify the said person, I could say that as it is a lapse of more than 2 years, I could not remember that person.”

(emphasis laid by this Court)

A Thus, the evidence of PW-31 cannot be used against A-15, which has erroneously been done by the courts below. Further, PW-1 and PW-2 have both stated in their testimony that the particular reebok shoe did not belong to the deceased. Thus, there is nothing on record which connects A-15 either to the crime, or to the deceased.

B 66. Thus, the evidence of PW-10 and PW-11 is not reliable for recording the finding of guilt on the charges against the accused appellants. Even if it is placed reliance upon, A-3, A-4 and A-15 cannot be convicted of the offences of kidnapping and murder, more so in light of the fact that they had been acquitted of the charge of criminal conspiracy under
C Section 120-B of IPC by the courts below. There was no basis for convicting them under the other Sections like 302 and 365 of IPC. After having found that the accused persons were not guilty under Section 120-B of IPC, it was the duty of the Trial Court to establish the involvement of each of the accused persons individually in each offence for which they had been charged to hold them guilty under the same.

D 67. The accused appellants in the instant case have also been convicted under Section 109 of IPC (Section 302 read with 109 and 365 read with 109 IPC), which prescribes the punishment for the offence of abetment. Section 107 of IPC provides for the offence of abetment as under:

E **"107. Abetment of a thing—** A person abets the doing of a thing, who—

(First)— Instigates any person to do that thing; or

F (Secondly)— Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(Thirdly)— Intentionally aids, by any act or illegal omission, the doing of that thing.

G Explanation 1— A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to dis-close, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

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Mr. Siddharth Luthra, the learned senior counsel appearing on behalf of appellant A-4 rightly places reliance on the decision of this Court in the case of *Pramatha Nath Talukdar* (supra), wherein this Court discussed the distinction between the offence of criminal conspiracy under Section 120A of IPC and that of abetment by conspiracy under clause second of Section 107 of IPC. The view taken in that case was reiterated by a three judge bench of this Court in the case of *Kehar Singh & Ors v. State (Delhi Administration)*¹⁸ as under:

“.....For the present, it may be sufficient to state that the gist of the offence of criminal conspiracy created under Section 120-A is a bare agreement to commit an offence. It has been made punishable under Section 120-B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wordings of Section 107 (Secondly).....”

(emphasis laid by this Court)

Thus, for Section 109 of IPC, it is not enough to show a conspiracy. It has to be taken a step further. What needs to be proved is an act committed in furtherance of that conspiracy. In the instant case, both the courts below did not find sufficient evidence to convict the accused appellants of the charge under Section 120B of IPC. Once the charge under Section 120B of IPC falls, in order to convict the accused appellants under Section 302 read with Section 109 IPC, or Section 365 read with Section 109 IPC, what was needed to be established was the happening of some overt act on the part of the accused appellants. From the evidence on record which has already been appreciated in detail in the preceding part of this judgment, there is no evidence except the testimony of PW-10 and PW-11 which links the accused appellants to the crime. For the reasons stated supra, I have already come to the conclusion that the testimony of PW-10 and PW-11 is untrustworthy and cannot be relied upon to convict the accused appellants in the instant case. Thus, the charge under Section 109 of IPC also cannot sustain.

68. Thus, for the reasons stated supra, the Trial Court erred in convicting the accused appellants, more so, after having acquitted them of the offence of criminal conspiracy punishable under Section 120B of

¹⁸ (1988) 3 SCC 609

- A IPC. Even the High Court adopted the same erroneous approach while re-appreciating the evidence against the accused appellants and attempting to look for a complete link, as if the accused persons had been convicted for the charge of criminal conspiracy as well. This shows a gross non-application of mind on the part of the courts below, which certainly cannot be allowed to sustain by this Court, as the same is wholly erroneous in law. Therefore, these criminal appeals must be allowed in exercise of the power of this Court under Article 136 of the Constitution of India and the accused appellants are entitled for acquittal from the charges.
- B

69. For the reasons recorded supra, I set aside the impugned judgment and order dated 06.10.2007 passed by the High Court in upholding the judgment and order passed by the Trial Court convicting A-3, A-4 and A-15. The prosecution has not proved its case beyond reasonable doubt against the accused appellants. Hence, I acquit A-3, A-4 and A-15 of all charges. They may be released forthwith if they are not required in any other case.

C

D **ARUN MISHRA, J.** 1. I have gone through the opinion of my esteemed Brother but I find myself unable to agree with the same. In my opinion judgment-order of conviction of Trial Court affirmed by the High Court deserves to be upheld.

2. The appellants are aggrieved by their conviction. They have been convicted and sentenced, as noted by my learned Brother, for commission of abduction and murder of one Shri M.K. Balan, former Member of Legislative Assembly. In all, 18 accused were put to trial. The trial court acquitted Romita Mary accused No.12 and Ganesan accused No.18 and convicted the remaining accused. The appeal filed by accused No.10, namely, Leela Shankar, has been allowed by the High Court and with respect to remaining 15 appellants, the same has been dismissed; thereby maintaining the conviction and sentence imposed by the trial court. Out of the convicted accused, only three accused Manickam @ Poonga Nagar Manickam A-3; Somasundaram A-4; and Bomb Selvam A-15 are in appeal before us. Senthil Kumar A-1 and Manickam were highly influential figures and the murder is a high profile political murder involving various personalities.

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3. As per the prosecution case, on 30.12.2001 one M.K. Balan went for a morning walk at about 5.30 a.m. but did not return home. Hence, a complaint was lodged by his son Manimaran PW-1. Complaint

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Ex. P1 was filed at Pattinakkam P.S. at about 11 a.m. Photo of deceased Shri M.K. Balan was published in the newspaper and sent to the Police Stations. The case was transferred to CBCID, Chennai on 12.1.2002. Initially, the investigation was done by John Joseph, PW-66. Later on, it was taken over by PW-67, the Deputy Superintendent of Police, CB CID. On 21.2.2002, the Investigating Officer (IO) came to know of the involvement of accused A-5, Balamurugan, in the offence through an informant. On 18.3.2002, at about 5.30 a.m. Investigating Officer PW-67 arrested A-5 and recorded his confessional statement Ex. P-43 who identified T.K.P. Food Products Company i.e. vermicelli factory at Mudichur as place where deceased was kept after abduction. A-5 also took the IO to a cremation ground at Perambur where body was cremated, the IO prepared a memo Ex. A-47, sketch Ex. P-48 and recorded statements of PWs. 12 and 19, two vettians, who identified MO 14, the photograph of the deceased M.K. Balan whose body was cremated. Identification memo Ex. P-46 was prepared in the presence of PW-44. Thereafter, one Kannan, Office Assistant of Corporation of Chennai had been examined and death report Ex. P-29 submitted in the name of fictitious person to cremate deceased, was seized which related to one Rajamani Chettiar son of Chindamani Chettiar, aged about 61 years. Ex. P-30 death register, Ex. P-31 the counterfoil and Ex. P-32 despatch notebook were also seized. Deceased was cremated on the basis of false death certificate Ex. P-27. After two and half months on 19.3.2002, certain articles were recovered from cremation ground and on the same day at about 11.30 p.m., Shankar Ganesh A-6 was arrested near Perambur bus-stand, and I.O. recorded the confessional statement of A-6 on 20.3.2002 in the presence of Jagannathan PW-24 and other witnesses. Seizure of Maruti Omni van under memo Ex. P-17 was also made. Irudhayaraj A-7 was also arrested on the same day and his confessional statement Ex. P-38 was recorded. Pursuant thereto, an iron cot, used in factory premises of Mudichur, MO-11 was seized vide memo Ex. P-7 in the presence of Geetha PW-17.

4. On 25.3.2002, at about 8.15 a.m., Manickam A-3, was arrested and his confessional statement Ex. P-20 came to be recorded on the basis whereof MO-12 Maruti zen car was seized vide memo Ex. P-6. On the same day the IO also recorded the statement of PW-32 who was Lusker in the Corporation of Chennai, and the proprietor of vermicelli factory T.K.P. Food Products, Mudichur, namely, Krishnapandi PW-34.

- A Accused No.9 was arrested and as per his information furnished under section 27 of the Evidence Act, Maruti van TN-22-B-8853 was recovered from V.R. Pandian PW-18, in the presence of Sriramulu PW-25. On the basis of confessional statement of A-3 dated 5.4.2002, recovery of MOs. 28 to 33 vide memo Ex. P-36 was made. Somu @ Somasundaram A-4, had been arrested on 9.4.2002 at about 6 a.m. at Chrompet Railway Station. His confessional statement Ex. P-34 had been recorded in the presence of PW-9 and recovery of MO-6 Ford Escort car No. TN-10-F-5555 was made vide memo Ex. P-9. Bomb Selvam A-15, was arrested on 24.4.2002 and his confessional statement Ex. P-50 was recorded in the presence of PW-44. Pursuant to information furnished by him, recovery of MO-10 Hero Honda bike was made vide memo Ex. P-51.
- B
- C Other accused persons were also arrested from time to time. Their confessional statements were also recorded and recoveries made. Ultimately, after investigation, final report was filed. In the course of trial, the prosecution examined all the 67 witnesses. Documents Ex.P-1 to P-86 were exhibited and articles MOs. 1 to 39 were produced
- D consisting of six cars : MO6 Ford Escort Car TN 10F 5555; MO7 Golden colour Maruti van TN 22P 8853, MO8 Maruti van TN 02 0343; MO9 Maruti van TNA 7484; MO-12 Maruti Zen TN 02 Z99; Tata Sumo car TN-04 D 9657; Motorcycle MO-10 – Hero Honda; tape-recorder; suitcase; bedpan; chain; iron cot; photo of M.K. Balan; TTK cassettes;
- E 2 pants, 2 shirts, one dhoti, knife, charger, mobile phones etc. were recovered. Accused abjured their guilt and pleaded innocence.

5. The arguments advanced and evidence produced by prosecution consists of different sets which can be divided in the following heads :

- F (i) Prosecution case - Evidence of PWs. 10 and 11;
- (ii) Prior relationship of accused;
- (iii) Selection of premises where M.K. Balan was kept/and other arrangements;
- G (iv) Abduction of deceased M. K.Balan on 30.12.2001 in white omni van;
- (v) Taking of M. K. Balan to factory premises/meeting dated 30.12.2001 at the residence of A-9;
- (vi) Commission of offence under section 302 IPC;
- H (vii) Removal of dead body from factory premises;

(viii) Cremation of dead body;

A

(ix) Procurement of death certificate by A-3;

(x) Confessions and recoveries from accused;

(xi) Commission of offence under section 387 IPC;

(xii) Effect of acquittal under section 120B IPC;

B

(xiii) Evidence of accomplices;

(xiv) Holding TI/recording of statement under section 164 Cr.P.C.;

(xv) Cell phones/cassettes/forensic evidence

C

6. Evidence of PW-10 and PW-11 :

It appears that Venugopal PW-10 and Newton PW-11 helped the accused persons for hiring of vermicelli factory at Mudichur, renting some of cars, arranging for hotels, food, arrangement of fan, bedpan, cot, arrangement for money, hiring of vermicelli factory which was hired twice firstly for a week in the end of November/early December then again in end of December to 1.1.2002 when incident took place.

D

7. Venugopal PW-10 is one of the main witnesses in the instant case. He has deposed that he and Newton PW-11, are business partners. During 1999, he and A-9 had obtained licence to quarry sand at Kulur, Tiruvallur district. A-9 told him that one Krishnapandi PW-34 is running a Semiya manufacturing company in the name of T.K.P. Food Products at Mudichur and as the company was running at loss, and if they invested, they may earn profit. Therefore, both, PW-10 and PW-11 invested Rs. 3 lakhs each in the said company and gave money to Krishnapandi. That while PW-10 and PW-11 had gone to a polling booth in the election held during August 2001, A-9 met PW-10. A-9 told PW-10 that he will be joining a leading political party and A-3 will help him and to reciprocate, he should do some favour for A-3. A-9 also told him that A-3 has promised him to get him a post in the party and therefore, he wanted a place to complete the job assigned to him by A-3.

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8. Venugopal PW-10 has clearly stated that he had shown the house at Mahalakshmi Nagar of his friend Mr. Chowdry but that was not liked by Manickam and Udayakumar. The house of the witness was also not liked by accused Manickam A-3 and Udayakumar A-9. A-9 had asked to show the vermicelli factory at Mudichur Road then the

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- A said witness took A-3 and A-9 to vermicelli factory where Krishnapandi P-34 was also present. Manickam A-3 told A-9 that place is suitable for the work to be done by them. Later on, it was this factory where deceased M.K. Balan was kept after abduction. Krishnapandi was told that they required the factory for one week and the loss to be caused will be paid to him. The witness has identified A-3. The said witness Venugopal PW-10, Newton PW-11, A-3 and A-9 travelled in the same car to Tambaram, that is in the white Ambassador car PY-01-H-4046. The witness has also stated that Manickam, A-3 told him that a screen was required to be put on the windows of factory in the first floor in which M.K. Balan was kept. The witness also arranged two cots on credit from M/s. Nirmala Industries. On being asked by A-9 besides the chairs from his house, fan from A-9's house, bed pan was also kept in the vermicelli factory at Mudichur. Venugopal PW-10, A-9 and his friend Newton PW-11 had put them in the room. Screen over the windows was also fitted. Manickam A-3 and Udayakumar A-9 asked Krishnapandi to give one week off to the employees of the factory but on and around 5.12.2001, no VIP came there as at that time, M.K. Balan could not be abducted. In the end of November, A-9 asked the witness for his Ford Escort car for 2-3 months to send it to A-9. Vijayan PW-49, driver of A-3 took the car. On 5.12.2001, A-9 called Venugopal PW-10 over phone and requested him and Newton PW-11 to reach the house of Manickam A-3 at Perambur. On that day they went to the house of A-3. In the house 2-3 persons were also there. They went inside the house. Manickam A-3 was telling to the persons who were present there and Udayakumar A-9 that ex-MLA M.K. Balan has to be brought as some money was to be collected from him. After that PW-10 and PW-11 went and sat in the car. After about half an hour A-9 came. Manickam A-3 also came out who went out in Ford Escort car of Venugopal PW-10 which had been given by him on rent. They followed the said car. Venugopal PW-10, Newton PW-11 and A-9 followed the said car of A-9. Other persons who were present in the meeting at the residence of Manickam, came by another car. They were Somasundaram A-4, Shankar A-6, and Sampath A-11. When they were travelling by a car, Manickam A-3 called A-9 over phone and asked him to come to the temple at N.S.C. Bose Road. Venugopal PW-10, Newton PW-11 and Udayakumar A-9 went to the temple. After sometime Manickam A-3 brought two men and one woman in the Ford Escort car. Four persons came in the car, went to a temple and came out after worship. Thereafter

Manickam travelled in the same car. They followed them. The persons accompanying A-3 were Senthil Kumar A-1, Hariharan A-2 and Romita A-12. A-12 was dropped at Chintadripet and the car ultimately reached Woodlands Drive Hotel. Then PW-10 and PW-11 left for their respective places. By that time Manickam A-3 told A-9 to follow and went along with Senthil Kumar A-1 and Hariharan A-2 in the Ford Escort car. A-3 came alone to the hotel by the car then Venugopal, Newton and Udayakumar came by the car of A-9 to Tambaram. A-9 again contacted PW-10 over phone on the next day, and requested him to get the key of the house belonging to one Chowdry of Mahalakshmi Nagar. Accordingly, PW-10 and PW-11 collected the said key from Chowdry and waited in the house for A-9 to come. At around 7 p.m., Manickam A-3, A-9 and A-1 came with one more person by Ford Escort car along with A-5. A-3 introduced Venugopal and Newton to A-1 by referring him as a big VIP known as Senthil Kumar and that they should not talk to him. A-3 also asked Venugopal PW-10 to arrange food for Senthil Kumar and to do other works for him. Balamurugan A-5 served the food to A-1. Since mobile connection was not available for Senthil Kumar A-1 at the said place, he was made to stay in the house of A-9, Cell No. used by Senthil Kumar A-1 was 9840230709.

9. PW-10 has further stated that on 08.10.2001, A-1 informed PW-10 that A-3 requires Rs.1,10,000/- and it will be returned in two to three days. On 10.12.2001, PW-10 pledged jewels belonging to him and obtained Rs.1,10,000/- and took the said amount to A-9's house as per his instruction. Thereafter A-9 took PW-10 to Hotel Excellency in T.Nagar where A-9 handed over the said amount to A-2. As factory at Mudichur was selected to keep abductee. That at the request of A-9 and A-3, PW-10 had arranged the Semiya manufacturing factory belonging to PW-34 for a week. On 30.12.2001, after getting the keys of Semiya manufacturing factory from him, A-3 handed over the said keys to A-5 and A-3 returned to A-9's house along with PW-10, where PW-10 saw A-1 and A-2 were staying and PW-10 heard A-3 telling them that M.K. Balan was brought (abducted) and the money alone remains to be collected. On 31.12.2001, A-1 asked A-9 to collect the recorded cassettes from A-2 and bring a tape recorder and empty cassettes. A-3 also directed A-9 to collect the same from A-2, A-9 collected two audio cassettes.

10. PW-10 has stated that PW-11 had provided food to A-1 on

A 30.12.2001 and 31.12.2001. Again A-3 requested PW-10 to arrange a Maruti Van, but he expressed his inability to provide Maruti Van. That thereafter, on the request PW-10 and PW-11 had arranged rooms in Hotel Henkala, Tambaram for A-9. He heard A-3 asking A-9 as to where they have disposed the Maruti Van on that A-9 replied that the Maruti van was just in front of Vasantha Bhavan Hotel. PW-10 also heard the driver of A-3 asking him for a chain to tie M.K. Balan. He also saw A-9 handed over Rs.100/- to the driver Viji PW-49 for purchasing a chain. He also saw A-3 informing PW-10 to provide food for those who are staying in the Semiya factory. On 31.12.2001 at about 8.30 p.m., both PW-10 and PW-11 saw M.K. Balan tied in a chain, his eyes also tied and was sitting on the green colour steel cot which PW-10 and PW-11 had purchased. He also saw M.K. Balan wearing the T-shirt and dark pant and also the Reebok shoes lying just some distance away from the cot. PW-10 made arrangement to buy the audio cassettes and he also arranged the two-in-one tape recorder which was used for recording. Thereafter, PW-10 heard A-3 saying A-9 that he wants one Ambassador car and A-9 replied that in spite of the best effort, he could not get an Ambassador car. Thereafter, he also heard that if no Ambassador car was available, if he could get one Maruti van and to fix one Lummo light on it to look like ambulance. As PW-10 and PW-11 had suspected something was going on, they again went to the Semiya factory at 8.45 p.m. on 1.1.2002, and saw four persons bringing down the body of M.K. Balan and A-5 covered the body with a cloth brought by him. Both of them saw no movements in the body, it was the dead body and they also saw the body was loaded in the van and taken out from the place. PW-10 had paid the room hiring charges to Henkala Hotel, Tambaram. He was also informed by one Sami A-13 that M.K. Balan was murdered and his body was burnt in cremation ground and therefore, he requested PW-10 to perform pooja in the factory premises but PW-10 did not do. He also saw the fan, bedpan, chair, cot etc., were removed from the premises on 01.01.2002. On 03.01.2002, he made arrangements for taking a room as told by A-9 for A-1, A-2 and A-12 to stay. Thereafter he left for Bangalore and stayed there till he was informed by his wife on 18.03.2002 that A-5 was arrested by CBCID Police in connection with the murder of M.K. Balan and the police had enquired her. He contacted his wife on 25th or 26th of April, 2002, and at the request of his wife, he came to CBCID Office on 01.05.2002 and narrated as to what had happened.

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11. Newton PW-11 is another witness in the instant case. He has fully supported the version given by Venugopal PW-10. He has deposed that Venugopal and Udayakumar were partners in Sand Quarry business. If he happens to see Udayakumar A-9, he could identify him. A-9 was same person produced before the court. In August, 2001, Venugopal PW-10 purchased a Ford Escort car bearing Regn. No.TN 10-F-5555. By the end of August, Corporation election was held. He along with PW-10 went to the Polling Booth in the said car. At Udayakumar's A-9 request, he and Venugopal showed some houses to Udayakumar A-9 and Manickam A-3. Venugopal PW-10 showed his house and some other houses to Udayakumar and Manickam, as they had asked. In 1999, Udayakumar A-9 told him and Venugopal PW-10 to invest money in vermicelli factory which had been run by Krishnapandi PW-34, since he had faced losses in business. Accordingly he and Venugopal became partners in the said company. Manickam A-3 told Udayakumar that vermicelli factory was the correct place for the works to be done by him as it was away from other buildings. He also told that the said place is needed by them for a week and that company should be given leave for a week and also he was ready to pay the amount towards the loss of income during that period. He has totally supported the other version of Venugopal PW-10 with regard to other facts also.

12. In addition he has deposed that M.K. Balan was brought to Mudichur Semiya factory on 30.12.2001. He has also stated that he saw four persons bringing body of M.K. Balan from upstairs and put the same in a Maruti van and also saw the van leaving the said place. He had also stated that even on 5.12.2001 he travelled with accused Manickam in his car along with other accused persons.

In re: Prior relationship of accused

13. With regard to prior relationship of accused persons, prosecution has examined Mohan Babu PW-4, Ganeshan @ Vethilai Ganesan PW-5, Nehru PW6; Kamal Anand PW7; Deivanayaki PW8; and Lalitha PW14. PW-4 has stated in respect of meeting of deceased M.K. Balan with Senthil Kumar – A1. PW 5 Ganeshan alias Vethilai has stated that he knew M.K. Balan. Mohan Babu PW-4 has also deposed that Senthil Kumar came with him. PW-4 deposed that one Lalitha helped him in getting the job in the financial institution belonging to deceased. Lalitha asked him to arrange for a loan of Rs.2,50,000 for lesser interest and she stated that she would return the amount by lending the said amount

- A for higher rate of interest but she paid interest for the first month only and was avoiding further payment. That he met A-1 on road when he took lift from him. Thereafter he even sought help of A-1 in getting the money back from Lalitha. It is stated that deceased M.K.Balan told PW-4 that he wanted to meet A-1. Both the deceased and A-1 met each other. Nehru PW-6 has stated that he knew Manickam A-3. He also met Hariharan A-2. Kamal Anand PW-7 has deposed that Deivanayaki PW-8 had asked for his cell phone for two days. He gave her cell phone No.9840053887. After two days he asked the cell phone back for which she told that she requires the cell phone for one more week and he told that he will procure another cell phone from one Muttu. As told to her he got one cell phone from Muttu with No.9840133368 and gave it to her and got back Mobile No. 9840053887 from her. PW-8, sister in law of A-2 has stated that her brother-in-law had asked for the cell phone for the purpose of party work for two days which she obtained from Kamal Anand PW-7 who in the meantime procured the cell phone from his friend Muttu. A-2 returned the cell phone in the first week of December and she handed over the same to Kamal Anand PW-7. Christopher PW-9 has stated that he knew A-1 and A-2. Durai Swami PW-15 had stated that he knew Udayakumar A-9 and sold Tata Sumo car No. TN 04T-9657 - MO-13 to A-9 for Rs.1,75,000/-. Udayakumar also sold Maruti zen car to him. In January, 2002, Udayakumar A-9 left the car stating that the car was not auspicious and took his old Maruti zen back from him. Laxminiwas Chaudhary PW-16 gave Zen car MO-12 to Manickam A-3. Danasekar PW-27 was known to A-1. Jayaprakash PW-28 was in the company of deceased M.K. Balan. Soundarajan PW-30 knew Udayakumar A-9 and owner of van MO-9. Samundeswari PW-31 worked with T.K.P. Food Products factory where the deceased was kept after abduction. John Kennedy PW-37 is the owner of Maruti van MO-8. He had given the same to Venugopal PW-10. Syed Akbar PW-48 is the owner of motorcycle, Viji @ Vijayan PW-49 is the Driver of A-3 Manickam. Suresh PW-57 is stated to be driver of Somasundaram A-4. Evidence as to prior relationship has also been furnished by Venugopal PW-10, Newton PW-11, Krishnapandi PW-34, owner of vermicelli factory; Lalitha PW-14, mother of kept of deceased; and Ramesh PW-2, driver of the deceased.

14. The happenings in-between 5.12.2001 and 30.12.2001 regarding preparation are apparent from the statements of PW-10, PW-11,

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statements of PW-49, PW-7, PW-8, A-2, Laxminiwas Chaudhary PW-16 about Maruti van MO-12, PW-18 V.R. Pandian, Velmayal PW-20 and Krishnapandi PW-34 etc. on record. A

In re : Selection of premises where M.K. Balan was kept/and other arrangements

15. It is proved that selection of premises T.K.P. vermicelli factory at Mudichur near Tambaram where M.K. Balan was kept after abduction, had been done by A-3 and A-9. It is stated by PWs.10, 11 and 34 that accused A-3 and A-9 had selected the same. PW-10 and PW-11 were partners for some time with proprietor Krishnapandi PW-34. A-9 met and told PW-10 that he would join an important political party for which Manickam, A-3 will help him, and for that some obligations have to be done to him. Manickam was one of the secretaries of the Branch of an important political party. The evidence also discloses that after inspecting vermicelli factory at Mudichur, A-3 and A-9 had asked to put fan, table, chair, cot, bedpan in the room in the upstairs and screen cloth to cover the windows. The premises were earlier too hired before a month in November and earlier part of December for about a week. PW-34 has deposed that from 29th day of November, 2001 leave was given for a period of one week. Same has been supported by PW-31 and PW-10 but as M.K. Balan could not be abducted at that time, no one came in the factory. Statement of PWs.10 and 11 is corroborated by PWs.31 and 34. B
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16. Evidence also discloses that A-9 had called PW-10 and asked for his Ford car MO-6 for 2-3 months on rent. The same was given by Viji to A-9. It was taken by Viji who was driver of A-3. Use of said car is established from evidence. There is nothing to doubt that PW-10 and PW-11 visited the house of Manickam at Perambur along with A-9; and it is established that Manickam had told A-9 in the presence of PWs.10 and 11 that M.K. Balan has to be brought as some amount had to be collected from him. The involvement of Manickam-A-3, A-4 and Bomb Selvam-A-15 is established at the relevant time, and were part of the design to abduct M.K. Balan. It is unbelievable that A-4 was present by chance but he had an active participation in the commission of the offence. Ford car which was given was used by A-3. A-4 had followed them in another car along with 3 other persons; A-6 and A-11 etc. Venugopal PW-10 had arranged for a sum of Rs.1,10,000/- by pledging his jewels F
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- A and handed over the amount to accused Hari along with A-9 in the Hotel Excellent. Evidence also discloses that on 24.12.2001, Udayakumar A-9 phoned to PW-10 and went to the house of A-3 and A-3 had asked PW-10 to arrange for a Maruti van. As the charges for Ford car were not paid to him, he replied in the negative. Udayakumar A-9 then informed PW-10 that he had already made arrangements to get a Maruti van from one Kennedy PW-37 and another Maruti van from one Jayaprakash, brother-in-law of Soundara Rajan and sent them to the house of Manickam A-3.

- C 17. Syed Akbar PW-48, owner of Hero Honda motorcycle has been examined. PW-10 has stated that the said motorcycle was given through him. Thus PW-48 corroborates and confirms the evidence of Venugopal PW-10 and PW-11.

In re : Abduction of M.K. Balan on 30.12.2001

- D 18. With respect to abduction of M.K. Balan on 30.12.2001 in white Maruti van, statement of Sudhakar PW-3 is that he used to practice boxing, skipping and running along with others at MRC Nagar from 5.30 to 7 a.m. On 30.12.2001 at about 5.30 a.m. he started to run and at that time he heard a noise and saw that at a distance of 75 mtrs. a person was pushed down in the van by the three persons and all the three persons went in the same van. The van was an Omni Van and one motor cycle was chasing the said Van. Nirmal Kumar PW-13 has stated that he used to go for walk in M.R.C. Nagar everyday at about 5.30 a.m. On 30.12.2001 at about 5.45 a.m. in the morning when he was walking in the Kasturi Estate, M.K. Balan came from opposite direction. He was wearing bright shoes, sandal color T-Shirt and dark pant. He crossed him and left.

- G 19. Son of M.K. Balan, deceased, Manimaran PW-1, lodged a complaint about missing of his father M.K. Balan stating that the deceased used to go for morning walk everyday at about 5.30 a.m. He used to walk up to Ayappan Temple M.R.C. Nagar and return by 7.30 a.m. On 30.12.2001 his father went for walk but did not return back. He was informed about the same by his mother at around 8.30 A.M. Since his father was not found anywhere he gave a complaint E-5 to police station. He also filed a Habeas Corpus petition before the High Court.

- H 20. When we assess evidence, it becomes apparent that PW-3 has clearly stated that the former MLA was abducted on 30.12.2001 at

about 5.30 a.m. Sudhakar PW-3 has stated that a person was put inside a van by three persons. Thereafter motorcycle followed the said van. That his friend Selvam A-15 also came there. PW-13 had also stated that he had seen M.K. Balan taking morning walk at about 5.30 a.m. A person was pushed into a Maruti van. It is apparent that M.K. Balan had been abducted from M.R.C. Nagar.

21. After abduction was made in the morning at about 5.30 a.m. on 30.12.2001, the evidence discloses meeting at the residence of Udayakumar A-9. On 30.12.2001 at 8.30 a.m. as unfolded by Venugopal PW-10 and Newton PW-11, where A-3 stated that abduction of M.K. Balan has been made and money remains to be collected.

In re : Taking of M.K. Balan to factory premises

22. On the day of abduction 30.12.2001 at about 8.30 a.m., A-9 phoned to PW-10 asking him to come to the house of A-9. PW-10 asked PW-11 to come to the house of A-9 and then he had taken Newton, PW-11 in a motorcycle which belonged to a boy working in the office of PW-10 and left Newton, PW-11 at the house of A-9. Udayakumar A-9 asked PW-10 to give the key of vermicelli factory and as he had no vehicle to go to the vermicelli factory, he asked him to take PW-10 on the motorcycle kept in his house. Accordingly he had done so. PW-10 and Balamurugan A-5 were getting down at vermicelli factory at that time A-9 contacted PW-10 on his cell phone and asked whether they had reached the vermicelli factory to which PW-10 replied that they had reached. A-9 further asked PW-10 whether he had received the key of the factory. Cellphone was given for talking to Krishnapandi PW-34 by A-9. Krishnapandi agreed to give the key to PW-10 and after some time the key was entrusted by Krishnapandi to PW-10. Newton PW-11 and Manickam came there in an auto-rickshaw and the key kept by PW-10 was given to Manickam A-3. The key was entrusted by A-3 to A-5. A-3 asked Venugopal PW-10 how he came to which he replied that he came on a motorcycle. Manickam A-3 asked Venugopal to drive the motorcycle. He also sat on the motorcycle and went to the house of A-9. While Manickam A-3 went upstairs, PW-10 followed him where accused A-1 and A-2 were also present. At that time Manickam had told those two accused persons that M.K. Balan was brought and the collection of amount was to be made from him. These are the facts stated by PW-10.

- A 23. The evidence of Newton, PW-11 indicates that on 30.12.2001 after about half an hour, A-9 phoned to him to open the gate of vermicelli factory. At that time firstly the Tata Sumo car and then Ford Escort car followed by one Maruti zen car came there and four persons got down from the said Ford car and they took M.K. Balan to upstairs of the said vermicelli factory by shutting his eyes, mouth and hands. M.K. Balan was wearing black colour pant, sandal colour T-shirt and shoes. At that time Manickam A-3 and A-9 had asked him not to disclose it to anybody. The persons who came in Ford car were Somasundaram @ Somu A-4, A-11, A-16 and A-17. PW-11 has further stated that A-5 went in zen car and came back after about 30 minutes in Tata Sumo car carrying tiffin to the factory. Along with A-5 were other accused, namely, A-4, A-6, A-7 and Bomb Selvam A-15. Thus presence and participation in abduction and at vermicelli factory of accused Manickam A-3, Somasundaram A-4 and Bomb Selvam A-15 is established. In addition presence of A-15 stands established at place of abduction also as stated by PW-3. It is apparent from the evidence of PWs.10 and 11 that when M.K. Balan was brought to the vermicelli factory at Mudichur, A-3 to A-7, A-11 and A-15 to A-17 were present or came there. Thus, it is apparent that all the three appellants along with other convicted accused persons were involved in the abduction of deceased M.K. Balan. A-3 played an important role in the entire episode. The finding recorded by the trial court as affirmed by the High Court is that the appellants were involved in the abduction stands established to the hilt.
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24. On 31.12.2001 and 1.1.2002 when M.K. Balan was abducted, the meals were supplied through Newton PW-11 and in order to establish the fact that PW-56 has been examined where he has stated that on 31.12.2001 and 1.1.2002 he had taken the tiffin in the morning, meals in the afternoon and evening tiffin, they carried the food for about 8 to 10 persons. The witness lends support to evidence of Venugopal PW-10. PW-56 also supports version of PW-11.
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In re: commission of offence under section 302

- G 25. With respect to charge of murder against A-3 and A-4 it is apparent that MO-31 is in the handwriting of A-1. It was read out by A-12 and heard by A-3 and was acted accordingly. Evidence of Sahul Hameed PW-47 also proves recovery of chain with which M.K. Balan was tied and that of other articles. It is apparent that M.K. Balan was abducted. There was an attempt to extract money when it was not
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possible, he was murdered in factory premises. The appellants were charged for committing the murder by putting nylon rope around his neck and tightening it. Though there is no direct evidence with respect to that but it can be inferred in the circumstances that they committed the offence of murder also. Once they had abducted M.K. Balan it was for them to explain how they dealt with him. The dead body of M.K. Balan could not be found as it was cremated in the name of a fictitious person – Rajamani Chettiar. His post mortem also could not be conducted but the evidence clearly indicates that the dead body of M.K. Balan was taken from the vermicelli factory. It gives an inference that the accused persons had murdered the victim. It is not necessary for recording a conviction that corpus delicti to be found. There is ample evidence leading to an inescapable conclusion that M.K. Balan was done to death by the appellants. His dead body was seen by the witnesses.

26. I find no force in the submission that at the time of murdering M.K. Balan there is no evidence and appellants were not present when dead body was taken out. In the instant case it is clear that abduction of the deceased is proved and deceased had been murdered soon after his abduction in two days and thereafter his body had been cremated under the name of a fictitious person. In the aforesaid circumstances it was for the accused persons to satisfy the court how the abducted victim was dealt with by them. In the absence of such explanation it is open to the court to draw a presumption that the abductor was the murderer also, as held by this Court in *State of M.P. v. Lattora* (2003) 11 SCC 761:

“4. Learned counsel for the appellant State contended that the High Court, while rendering the impugned judgment, did not follow the correct legal position. This Court in *State of W.B. v. Mir Mohd. Omar* (2000) 8 SCC 382 held that if the deceased was proved to have been abducted by the accused and was found murdered soon thereafter it is for the abductors to satisfy the court as to how else the abducted victim was dealt with by them. In the absence of any such explanation it is open to the court to draw the presumption that the abductor is the murderer also. The said view of this Court was reconsidered subsequently in *Sucha Singh v. State of Punjab* (2001) 4 SCC 375 and the legal position has been reiterated by this Court.

A 5. In the light of the legal position so adumbrated by
this Court, we deem it necessary, in the interest of justice,
that the High Court should consider the appeal filed by the
respondent all over again. This is to enable the respondent
to canvass regarding the conviction under Section 364 of
B the Indian Penal Code also. If the conviction is to be
maintained the High Court has to consider how far the
presumption mentioned above will apply to the situation of
this case. For enabling the High Court to reconsider the
appeal afresh we set aside the impugned judgment. The
appeal filed before the High Court shall stand remitted to
C the High Court.”

27. In *Ram Gulam Chaudhary & Ors. v. State of Bihar* (2001)
8 SCC 311, this Court considered assaulting the victim by the accused
persons and they carried away the body, the victim was not seen alive
thereafter. No explanation was given by the accused as to what they did
D with the victim. The accused abductor who had special knowledge in
this regard, having withheld the information, this Court held that an
inference can be drawn that they had murdered the victim. This Court
has laid down thus :

E “24. Even otherwise, in our view, this is a case where
Section 106 of the Evidence Act would apply. Krishnanand
Chaudhary was brutally assaulted and then a chhura-blow
was given on the chest. Thus chhura-blow was given after
Bijoy Chaudhary had said “he is still alive and should be
F killed”. The appellants then carried away the body. What
happened thereafter to Krishnanand Chaudhary is especially
within the knowledge of the appellants. The appellants have
given no explanation as to what they did after they took
away the body. Krishnanand Chaudhary has not been since
seen alive. In the absence of an explanation, and considering
the fact that the appellants were suspecting the boy to have
G kidnapped and killed the child of the family of the appellants,
it was for the appellants to have explained what they did
with him after they took him away. When the abductors
withheld that information from the court, there is every
justification for drawing the inference that they had
murdered the boy. Even though Section 106 of the Evidence
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Act may not be intended to relieve the prosecution of its A
burden to prove the guilt of the accused beyond reasonable
doubt, but the section would apply to cases like the present,
where the prosecution has succeeded in proving facts from
which a reasonable inference can be drawn regarding death.
The appellants by virtue of their special knowledge must B
offer an explanation which might lead the Court to draw a
different inference. We, therefore, see no substance in this
submission of Mr Mishra.”

In re: Removal of dead body from factory premises

28. With respect to the death of deceased M.K. Balan in the factory C
premises and removal of his dead body from the same, the evidence of
PW-10, PW-11, Rajendran PW-21 and Head Constable on Beat Duty,
and Arumugham, Head Constable PW-35 are relevant.

29. PWs.10 and 11 both have stated that body of M.K. Balan was
taken out of the vermicelli factory on 1.1.2002. Both of them suspected D
that something was going on in the factory and at about 8.40 p.m., they
reached the factory at Mudichur. At 9 p.m. the gate of the vermicelli
factory was closed. A-6 was standing there. A-5 came to the factory on
a motorcycle. He carried one cloth bag on the motorcycle. Four persons
came down from upstairs carrying body of M.K. Balan. Two persons E
were holding legs; two others were holding the hands and the body was
brought down and covered like a dead body with cloth brought by A-5.
There was no movement in the body, it appeared to be a dead body.
Body was taken in the Maruti van. The Maruti van went away speedily.
A-5 followed the same on motorcycle. One person was sitting along
with him on the motorcycle. Due to fear, PW-10 and PW-11 came out of F
factory. Body of M.K. Balan was carried by A-6, A-7, A-8 and A-11.
Version is supported by PW-21 and PW-35.

30. PW-21 deposed that he was the Head Constable of Sembiam
Crime Branch Police Station. That on 01.01.2002 he was given beat
tickets and appointed for night rounds from 23 hours to 6 PM. At about G
100 ft. away from Melpatti Ponnappa Street a Maruti Van was standing
in the middle of the road and he went along with constable Arumugam to
the Van and enquired 4 persons who were in the van. Then they left the
place. MO-7 Golden Color Maruti Van was identified by him, and 4
persons were identified as Accused 6, 7, 8 and 11.

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A PW-35 deposed that he was working as Head Constable. That on
01.01.2002 he was given beat tickets and appointed for night rounds
from 23 hours to 6 PM. At about 100 ft. away from Melpatti Ponnappa
Street a Maruti Van was standing in the middle of the road and he went
along with the head constable Rajendran went to the Van and enquired
B 4 persons who were in the van. Then they left the place. MO-7 Golden
Color Maruti Van was identified by him, the 4 persons were identified as
Accused 6, 7, 8 and 11.

31. Driver Vijayan PW-49 was examined so as to prove attempt
of procurement of Dumax top light for the van to look like an ambulance.
C However, the witness has turned hostile, resiled from his statement
recorded under section 164 Cr.PC. Even if his statement is ignored it is
apparent from other statements that the vehicle was procured and light
was fitted on it.

32. The van on which body was taken was bearing Regn. No.
TN-22-B-8853 and was marked as MO-7. It is apparent that M.K. Balan
D was killed in factory some time on 1.1.2002 and the fact that the appellants
were not persons who brought down body from upstairs is not enough to
exonerate appellants considering the established facts and circumstances
in case they have been rightly held guilty of murder also.

In re: cremation of dead body

E 33. Next set of evidence is with respect to the cremation ground.
Ramu, PW-12 was asked by Hari Krishnan PW-19 to lit pyre. He was
declared hostile as he resiled from part of his statement.

F Ramu PW-12, who had cremated the body had deposed that he is
a Cemetery Keeper. That on 01.01.2002 he was told by Harikrishnan to
light the pyre. That they did not know who came in the vehicle and the
vehicle particulars. He further deposed that they did not know if the
body was of male or female.

G Hari Krishnan PW-19, vettiyan in the cremation ground at Melpatti
Ponnappa Mudali Street, has stated on 1.1.2002 at about 6 p.m. two
persons came and told that a body has to be burnt and they would take
the body from the hospital to the cremation ground and paid the expenses
for getting woods, cow-dung cakes, kerosene and informed that the body
would come at 8 p.m. in the night but the body came at 10 p.m. They
carried the body and on asking the death certificate of hospital, they told

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that they would bring the same the next day. Body was cremated at night itself. It was deposed that the CB CID had examined him and put his signature on the reverse of MO-14, photo of M.K. Balan; and the test identification parade was conducted. He was able to identify certain accused persons, out of 7-8 persons who came for cremation. He had identified MO-14 the photo of M.K. Balan. He stated that he under threat of police, had stated to the Magistrate in statement under section 164 Cr.PC that accused Manickam came there and told Hari Krishnan that he is an important person in the area and asked him to cremate the body and told that he will produce the death certificate in the next morning. Be that as it may. He also said that he did not identify the accused before the Magistrate and was not aware whether A-3 was an influential person of a political party. Be that as it may. We ignore the part of statement under section 164 from which he has resiled.

34. Kannan PW-36, in-charge of the cremation ground has deposed that he is working as Office Assistant in Chennai Corporation. That on 01.01.2002 he left early from the cremation ground. That when returned on the next date then he was informed by Hariharan that one dead body came after he left the office and that the dead body has been cremated and the person who came along with the dead body assured that death certificate would be produced in the morning. That at around 8.15 AM one person came along with Hariharan who produced the death certificate in the name of Rajamani Chettiar. That in the certificate the address and father's name of the deceased was not mentioned and he got the particulars from the person who came with the death certificate. The same were recorded in the Death Register.

In re: Procurement of death certificate by A-3

35. Next set of evidence is relating to procurement of death certificate in the name of Rajamani Chettiar. For cremating a body in the cremation ground, death certificate was required to accompany the dead body. Death certificate in a fictitious name of Rajamani Chettiar was obtained from PW-32 at the instance of Manickam A-3 through one Kamaraj PW-33.

Dr. Anbarasu PW-32 deposed that on 02.01.2002 at 6 AM in the morning one Kamaraj who is working in the Government General Hospital and known to him for the past 15 years came and requested to issue death certificate for Rajamani Chettiar aged about 61 years. Kamaraj

- A PW-33 submitted that Rajamani Chettiar was the poor person and died due to chest pain. That there was no one to perform his last rites. He believed the word of Kamaraj PW-33 and issued the death certificate in question.

- B Damodaran PW-38 has been examined so as to prove that no person in the name of Rajamani Chettiar ever resided in his house in question, the particulars of which were falsely given in the death certificate.

- C Dr. Prabhavathi PW-45 deposed that she is working as Asst. Welfare Officer in the Chennai Corporation. That she has given Medical Report Ex.P27, Death Report Form 2 Ex. P29. That the letter given by him to DSP is marked as Ex.P52. Medical certificate and death certificate have been proved by PW-45.

36. With respect to obtaining of death certificate by A-3, the trial court has given the following findings :

- D “171. Now we have to analyze whether there are any other evidences for that and for that purpose, the evidence of PWs-32, 33, 36 and 38 have to be perused. PW 32 is the Doctor Anbarasu and before analyzing the evidence of PW-32, the evidence of PW-33 has to be analyzed. PW-33 has deposed in his evidence that on 1.1.2002 while he was on bed due to illness in the evening at about 5.00 p.m. one
- E **Samikannu came to him and told that Poonga Nagar Manickam is calling him** and that at that time he told that he was not well and asked him as to what was the matter for which he said he did not know anything about the same, then the said **Samikannu took him along with him and**
- F **that Poonga Nagar Manickam was in his house and that at that time he informed him that one watchman of a company at Kolathur expired and that he asked him whether any truma car is available for taking the body for that he had replied to him (Manickam) that to bring out the dead body no such vehicle would be**
- G **available and then he has informed me to try for the same** by saying so he has sent Samikannu to accompany him and that then he has gone to Government General Hospital, Chennai from Perambur and after finding out that no such vehicle was available there and informing the same
- H and when he was about to board a bus to go, **Samy informed**

him that Poonga Nagar Manickam asked him to come to his house at 6.00 am in the morning and that accordingly on the next day morning i.e. on 2nd he went to the house of Poonga Nagar Manickam and that this was the time for finding out car in many ways for bringing the body of the deceased M.K. Balam as established by the evidence of PW-32 and that in the said circumstances, on the next day i.e. on 2.1.02 PW-33 went to the house of the said Poonga Nagar Manickam and that at that time the 3rd accused Manickam informed him that one Rajamani Chettiar, aged about 61 years died on the previous day for which he asked him to get a doctor's certificate, as deposed. He has further deposed in his evidence that he has been well acquainted with him (Manickam) for the past 16 years and that he went to the doctor Anbarasan (PW-32) and obtained a certificate from him in his English letter pad to the effect that one watchman of a company at Kolathur died due to chest pain and that certificate has been marked as Ex. P.27. That Doctor Anbarasu PW-32 has been examined as a witness in this case and he has deposed in his evidence that he has issued the certificate Ex.P.27 and that as requested by PW-33 Kamaraj, he has issued the said certificate Ex.P.27 as deposed by him. As per his evidence only on the compulsion of PW-23, the certificate Ex.P.27 has been issued and in the certificate issued by him in Ex.P.27 it has been mentioned by him that 'Rajamani Chettiar, aged about 61 years died due to chest pain'. Investigation was done to prove the fact that no such person in the name of Rajamani Chettiar on the side of the prosecution, and to that effect one Damodharan has been examined as PW-38. He has deposed in his evidence that 'I am residing at No.11/18 4th street, Anjuham Nagar, Kulathur, Chennai and that this is my own house and that my wife is Lalaitha and my father is Ramasamy and that I have one daughter and two sons and that they are Prahbaharan and Sudhakaran aged about 29 and 27 respectively. Both Prabaharan and Sudhakaran have no other names; that I am working in Sharp Motor company

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- A for the past 5 years. In one portion of my house Auto driver Devaraj is residing and that no person in the name of Rajamani chettiar, aged about 61 years was residing in my house ever before. Either on 1.1.02 or on 2.1.02 no person
- B in the name of Rajamani chettiar, aged about 61 years was residing either in our house or in any portion of our house; that like wise no person in the name of Rajamani chettiar, son of Chinthamani chettiar, aged about 61 years died either on 31.12.01 or 1.1.2002 in the above said house and that no dead body of that person was also brought to that house, as deposed. **It is seen from these evidences and**
- C **documents that the 3rd accused Manickam sent the 13th accused Samikannu, asking him to meet PW-33 Kamaraj and through the said Kamaraj, a forged document (doctor's certificate) marked as Ex.P.27 has been obtained in the name of one Rajamani chettiar, aged about 61 years from PW-32 and that the evidence of PW-36 has to be analysed to find out the fact as to where that certificate has been given. PW-36 is Kannan and he has deposed in his evidence that 'I am residing at No. 371, Sanjan Nagar, Melpatti Ponnambala street, Vyasarpadi, Chennai-39. I am working as Office Assistant in the Corporation of Chennai on compassionate ground from 1979 onwards. I joined in service during 1998 as incharge of Hindu Grave yard at Melpattu Ponnappa Mudali street, Chennai belonging to Chennai Corporation; that my immediate superior officer is the Assistant Health Officer'. He has further deposed in his evidence that 'on 2.1.02 as usual I came to grave yard at about 7.30 a.m. and that at that time Hari Krishnan who was present there told me that after I left that place one dead body had come and that doctor's certificate would be given today by the party for cremating the body'. He has further deposed in his evidence that 'Ex.P.27 was given to me by a person who accompanied with the said Hari Krishnan on 2.1.02 morning at about 8.15 a.m'. He has further deposed in his evidence that I registered this Ex.P.27 in Form.2. This is the said Form.2 marked as Ex.P.29. That death has been**
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registered in the Death Register as 1st row of the date 1.1.02 and that portion has been marked as Ex.P.30 and that in that connection death report of the grave yard has been prepared and a copy of the same has been given to the person who came along with the said Hari Krishnan and the other copy is marked as Ex. P.31. In that regard I filed a Despatch note book which is marked as Ex.P.32 (the entry made in the said Despatch Note Book is marked as Ex.32). The person who came along with Hari Krishnan signed in Ex.P.31 and Ex.P.29 and that for the seizure of these documents the DSP attached to CB CID had prepared a magazar and obtained my signature therein. That magazar has been marked as Ex.P.33. He has deposed evidence now that there is no necessity to produce the doctor certificate to cremate the body of a person who is aged more than 60 years. While that being so it is the case of the accused that this Ex.P.27 has been fabricated falsely for the purpose of the case. The body of the deceased M.K. Balan was taken to the grave yard and tried to cremate the body by saying that the deceased was the age of 61 years. But PW-12 asked for the production of doctor certificate by saying that the age of the person would be 48 to 50 yrs. Therefore Ex.P.27 has been created as if that deceased person would be aged about more than 60 years and the same has been issued by PW-36 and the same has been recorded which has to be taken into consideration. In that manner also the contention of the accused could not be acceptable one. Now we have to peruse the evidence of PW-45 Dr. Prabhavathi (Health officer) and that as per her statement it has been stated by her that 'a letter dated 20.3.02 was shown to me and that Medical Certificate (Ex.P.27) and death report (Form II) Ex. P.29 were given by me to the DSP, CB CID. The letter given by me to the DSP has been marked as Ex.P.52'. Now even as per this evidence also, it has been established on the side of the prosecution that the body of M.K. Balan was cremated."

(emphasis supplied by me)

A From the aforesaid discussion made by the trial court and evidence it is apparent that Kamaraj PW-33 on 2.1.2002 went to the house of Manickam A-3 who had informed him that one Rajamani Chettiar aged about 61 years had died and a doctor's certificate was required. PW-33 had stated that he knew A-3 for the last 5 years and as such on his request went to Dr. Anbarasan PW-32 and obtained death certificate Ex. P-27 from him with respect to death of Rajamani Chettiar. Dr. Anbarasan PW-32 had deposed that he issued the certificate Ex. P27 in the aforesaid circumstances to Kamaraj PW-33. Damodharan PW-38 has stated that no such person Rajamani Chettiar resided in House No.11/18, 4th Street, Anjuham Nagar, Kulathur, Chennai. Thus it is apparent that the death certificate related to non-existent person and dead body of M.K. Balan was cremated under the guise and at the instance of Manickam A-3; false certificate Ex. P-27 was prepared and produced at cremation ground on next day showing cremation of Rajamani Chettiar. Kannan PW-36, Office Assistant in the Corporation of Chennai has deposed that Ex. P-27 was given to him in the morning at about 8.15 a.m. He had made the entry Ex.P-27 in Form 2 in the death register as 1st row of 1.1.2002 and that portion is marked as Ex. P-30. The dispatch book Ex. P-32 has also been proved by the witness along with memo Ex. P-33. Thus, the involvement of Manickam A-3 is proved to the hilt by the aforesaid evidence also.

E 37. The trial court has rightly found that the accused A-3, A-4 and A-15 had acted upon the conspiracy of A-1 and A-2 and have been found guilty of offences under sections 365, 387, 302, 347, 364, 109 and 201 IPC.

In re: confessions and recoveries from accused

F 38. Witnesses as to police confessions of various accused persons have been furnished by : Sahul Hameed PW-44 with respect to A-5; Tulasirangan PW-22 with respect to A-1, Pasupathy PW-23 with respect to A-1, Jagannathan PW-24 with respect to A-6; Siva PW-26 with respect to A-3; Seetha PW-29 with respect to A-12, Francis Arpudham PW-39 with respect to A-4; Prasad PW-42 with respect to A-7; Raja Masilamani PW-46 with respect to A-10 and A-11; and Sahul Hameed PW-47 with respect to A-16 etc.

H 39. The seizure of articles has been proved by TMT Geetha PW-17 of green cot MO-11; Sriramulu PW-25 of Ford Escort car MO-6;

Babu PW-40 of audio-cassettes MO-33; Raja Masilamani PW-46 of tape recorder MO-2; Kuteeswaran PW-41 of golden colour Maruti van and Tata Sumo van MOs. 9 and 13 etc. Similarly, seizure of other articles has been proved. A

40. The accused persons' confessional statements and recoveries based thereon support the version of PW-10 and PW-11. A-5 was arrested on 18.3.2002 at Perambur Railway Station. Kaha Sahul Hameed PW-44 has proved the confessional statement of A-5. It is stated that he identified the Maruti omni van and also the cremation ground where the body was burnt and also disclosed the name of A-3 and the Maruti van which was used for abducting and that on instructions of A-3, dead body was burnt in the cremation ground. The witness has also proved the spot map of factory Ex. P-44 signed by Selvaraj also. At the instance of A-5, Maruti van MO-9 has been seized from one Jayaprakash vide Ex. P-25. As stated by PW-3, M.K. Balan was abducted in the said van. It has been established that the place of occurrence is vermicelli factory at Mudichur. Samundeeswari PW-31 and Krishnapandi PW-34 have proved the said facts. PW-30 has also stated that A-9 studied with him and one Somu of Chitlapakkam had entrusted a Maruti van bearing Regn. No. TSI 7484 and A-9 had asked him to lend the said car, and he had given the same to A-9 who told him to return the same on the next day. On receiving the van, its tape recorder and speaker were found missing and there were liquor bottles in the same and seats were burnt with fire. Then he went upstairs in the house of Udayakumar A-9 and asked about the said condition of vehicle, and A-9 assured him to compensate for the loss but did not give any amount. Thereafter, CBCID came to PW-30 and seized the vehicle and prepared Ex. P-25. Thus it is apparent that MO-9 was in custody of A-9 and the vehicle was used in commission of offence. This also lends corroboration to statements of PW-10 and PW-11. B C D E F

41. Sankar Ganesh A-6 was arrested on 19.3.2002 who identified Maruti Omni van No. TN-0343 and his confessional statement Ex. P-16 had been recorded in the presence of PW-24. At his instance said Maruti van was recovered in front of the house of John Kennedy, PW-37 at 11.30 a.m. under Ex. P-17. Said Maruti van is MO-8. PW-37 has owned a signature on the memo. At the instance of A-7, cot which was used to keep M.K. Balan in the factory had been recovered. Cot had been identified also. This lends further support to versions of PWs. 10 and 11. G H

A 42. A-3 was arrested on 25.3.2002. His confessional statement was recorded by CB CID in the presence of Premkumar. PW-26 has deposed as to seizure of Maruti zen TN-02-Z-99. He was taken to the residence of PW-16. On being identified by A-3, said Maruti zen car had been seized from PW-16. Ex. P-20 is the admissible portion of the confessional statement of A-3. Seizure memo Ex. P-6 of Maruti zen car, MO-12, was drawn. PW-16 has stated that he had given the car for marriage of said Manickam as his office is near to his house so he could identify Manickam A-3. A-3 had taken MO-12 Maruti car in November, 2001 and was returned to him during the month of February, 2002. The police seized the car from him on 25.3.2002 as per Ex. P-6. Use of this car in offence is established by evidence on record.

C 43. PW-26 who is an Administrative Officer, has also proved the confessional statement of A-3. The witness has proved his signature on the same. A-3 had identified the Maruti zen car of maroon colour. PW-11 has stated that the Maruti zen car came to the vermicelli factory along with Ford car and Tata Sumo car. It is apparent from PWs.10 and 11 that Maruti zen car was used for committing the offence. Maruti van was also recovered on 30.3.2002 at the instance of A-9 from PW-18. At the instance of A-9, bedpan was also recovered. Maruti omni van MO-7 of golden colour, bearing Regn. No. TN-22-B-8853 and Tata Sumo car were also recovered. PWs.10 and 11 have deposed about bedpan, D Tata Sumo and Maruti van. As instructed by A-3, bedpan was kept at vermicelli factory, Maruti van MO-8, had been used for taking the dead body of the deceased, Tata Sumo car was also used by the accused persons. PW-18 has deposed that he had given Maruti van to A-9. On 31.12.2001 at about 10 a.m., he had taken the van and returned it in the night itself and on 1.1.2002 he took the same at about 10 a.m. but did not return as usual on the night of 1.1.2002 but returned it only on 2.1.2002 at about 11 p.m. i.e. after M.K. Balan was killed and body cremated. Thereafter on 30.3.2002 CB CID seized his Maruti car MO-7, vide Ex. P-8. The statement of PW-18 corroborates the versions of PW-10 and PW-11.

E F G 44. Manickam's confession was recorded on 5.4.2002 in the presence of Purushothaman and Babu-PW-40. PW-40 deposed that on the direction of the Tehsildar, he along with one Purushothaman went to the CB CID Office on 05.04.2002, where one Manickam was being investigated with regard to the M.K. Balan murder case and he along H

with Purushothaman signed the confession statement. Based on the A
confessional statement the TTK 90 Cassette along with a piece of paper
kept in the back of the photo of the Accused No.3 was seized by CB
CID and the same were marked as MO28 and MO33 respectively. The
Mahazar was prepared and they signed the same. The admitted portion
Ex. P-35 of the confessional statement given by Manickam was also B
signed by them as witnesses.

45. The bit of paper MO-33, which had been seized from A-3 and
also bit of paper MO-31 regarding extortion of money seized from A-12
in order to establish the fact that both had been written by A-1. As
mentioned above the High Court has ignored it as the articles were not C
kept in a sealed condition, we also leave it out of consideration.

46. On 9.4.2002 accused Somasundaram A-4 was arrested at about
6 a.m. near Chromepet police station. His confessional statement Ex.
P-34 was recorded in the presence of Francis Arpudham PW-39. On
the basis thereof Ford white colour car bearing Regn. No. TN-10-F- D
5555 was recovered as per memo Ex. P-19. PW-39 has proved his
signatures on the confessional statement. Use of car is corroborated by
PWs.10 and 11. The car had been entrusted to accused A-9. Recovery
of the car also implicates Somu A-4 and supports the versions of PWs.10
and 11.

47. Bomb Selvam A-15 was arrested near Egmore Railway Station E
on 25.4.2002 at about 12.30 p.m. in the presence of Muthurakku and
Kaha Sahul Hameed PW-44. His confessional statement Ex. P-51 came
to be recorded. As per his statement Hero Honda 6475 and black colour
Reebok shoes were recovered as per Ex. P-51. Motorcycle was article
MO-10, and shoes were marked as MO-1. Samundeeswari, PW-31, F
has stated that at about 11.30 a.m., a person came and went upstairs
and took along with him Reebok shoe, MO-1. At that time he came in a
car and took an object in a gunny bag. Even if we discard recovery of
Reebok shoes it is apparent that motorcycle used by the accused had
been recovered at the instance of A-15. This lends additional support to
versions of PWs.10 and 11. G

In re: Commission of offence under section 387 IPC

48. On the basis of statement of PW-11, it is established that A-4
was present when M.K. Balan was brought to the vermicelli factory
after abduction and after about half an hour, Bomb Selvam A-15 also H

- A came there along with A-5 to provide tiffin. PW-10 has also stated that M.K. Balan was tied with iron chain on 31.12.2001, his eyes were shut and he was sitting on a green colour cot and was wearing a black colour pant and a T-shirt. Thus it is apparent that A-3, A-4 and A-15 along with other accused persons were involved in the abduction of ex-MLA M.K. Balan. PW-10 has deposed that driver of Manickam namely Viji told that he wanted a chain to tie M.K. Balan. A-9 had taken out Rs.100/- from his shirt pocket to buy one chain. However, Viji PW-49 turned hostile. He was confronted with his statement under section 164 Cr.PC. He admitted that he had given a statement before the Magistrate but under fear. Be that as it may. We ignore the version of Viji PW-49.
- C There is nothing to doubt the aforesaid statement of PW-10 regarding purchase of chain. The trial court with respect to commission of offence under section 387 IPC has rightly given the finding in para 166 that the prosecution has established its case to the effect that the accused 1 to 11 and 14 to 17 have committed the offence punishable under section 387 IPC beyond all reasonable doubt.
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Effect of acquittal under section 120B

49. Now I take up effect of acquittal of appellants under section 120B IPC. The accused appellants have been convicted for commission of offence under section 365 read with section 109 IPC, under sections 387, 302 read with section 109, under section 347 read with section 109; under section 364 read with section 109 and section 201 IPC. In the facts and circumstances of the case when charge under section 109 has been found established, mere their acquittal under section 120B is of no avail to them. Charges which were framed were specific ingredients of section 109 have been rightly found to proceed by both the courts below.
- F Their acquittal under section 120B of IPC cannot help them as offences of both sections are separate. Section 120B found established against A-1 and A-2 and other charges against accused/appellants.

50. This Court has considered the abduction under section 109 and the conspiracy and the explanation thereof and compared with the same under section 120B. This Court held that under section 109 the abettor is liable to the same punishment which may be inflicted on the principal offender if the act of the latter is committed in consequence of the abetment. The offence of conspiracy under section 120B is different. Section 120A is bare agreement to commit an offence which has been made punishable under section 120B. The punishment for these two
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categories of crimes is also quite different. Section 109 IPC is concerned only with punishment of abetment for which no express provision has been made in the IPC. An offence of criminal conspiracy on the other hand is an independent offence which is made punishable under section 120B IPC for which a charge under section 109 is unnecessary and inappropriate. In *Ranganayaki v. State by Inspector of Police* (2004) 12 SCC 521, this Court has held thus :

“10. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murder has been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Campbell struck a note of caution in *Red v. Palmer* [Shorthand Report at p. 308, May 1856] thus:

“But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.”

Though, it is a sound presumption that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailants. In *Atley v. State of U.P.* AIR 1955 SC 807 it was held: (AIR p. 810, para 6)

“That is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty, but absence of

A clear proof of motive does not necessarily lead to the contrary conclusion.”

B In some cases it may be difficult to establish motive through direct evidence, while in some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes it may appear that the motive established is a weak one. That by itself is insufficient to lead to an inference adverse to the prosecution. Absence of motive, even if it is accepted, does not come to the aid of the accused. These principles have to be tested on the background of factual scenario.

D 11. Under Section 109 the abettor is liable to the same punishment which may be inflicted on the principal offender: (1) if the act of the latter is committed in consequence of the abetment, and (2) no express provision is made in IPC for punishment for such an abetment. This section lays down nothing more than that if IPC has not separately provided for the punishment of abetment as such then it is punishable with the punishment provided for the original offence. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the

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act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of (a) instigation, (b) conspiracy, or (c) with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend upon facts of each case. The offence of conspiracy created under Section 120-A is bare agreement to commit an offence. It has been made punishable under Section 120-B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by Section 107 (secondly), "engages ... in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy". The punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in IPC. The charge under Section 109 should, therefore, be along with charge for murder which is the offence committed in consequence of abetment. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120-B for which a charge under Section 109 is unnecessary and inappropriate. [See *Kehar Singh v. State (Delhi Admn.)* (1988) 3 SCC 609] Intentional aiding and active complicity is the gist of the offence of abetment."

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51. Thus commission of offence under section 109 has been established along with other sections. The conviction and the sentence imposed by the trial court and the High Court is absolutely proper and no benefit can be obtained by acquittal under section 120B IPC. That does not adversely impinge upon the ingredients of section 109 IPC and other sections for which he has been found guilty. Thus I find no force in submission of appellants that once appellants have been acquitted under section 120B the entire case falls down.

A In re: evidence of accomplices

52. Several decisions were cited which are referred to by esteemed brother which indicate that accomplice version requires corroboration, same cannot be rejected outrightly. It was submitted that PW-10 and PW-11 are not reliable being accomplices and there is no corroboration of their version. Submission is too tenuous to be accepted. Though only their help was taken as discussed above. In my opinion even if PW-10 and PW-11 are taken as accomplices their depositions are corroborated by overwhelming evidence on record on each and every aspect. The accused persons have been found guilty under section 109 IPC also. All convicted accused persons including appellants acted together. Entire gamut of evidence discussed above, admissible portions of confessional statements of various accused persons including appellants, recovery of articles of offence also lends credence to versions of PWs. 10 and 11.

In re : Holding T.I./recording statement under section 164 Cr.PC

D 53. Holding test identification parade has been proved by Krishnasamy-PW-60. Recording of statement under section 164 Cr.PC has been proved by Thangamariyappan PW-59; Karunanidhi PW-61 for A-12, PW-32 and PW-33, Vijayakanth PW-62 recorded the statements of Vettiyans PW-12 and PW-19. Junath Sherif PW-64 has recorded the statement under section 164 of PWs.10 and 11.

E In re : Cell phones/cassettes/forensic evidence

F 54. Evidence discloses that cell phone was given to A-2 by PW-7. Cassettes were recovered with suitcase MO3 from A-1 which is supported by PW-43 Accountant of Butts Paradise Hotel where suitcase was left and for stay money was paid by Venu. Forensic evidence is furnished by Kasi PW-63 and Dr. C.P. Singh PW-65. PW-63 has deposed that he had compared the documents MO31 and MO33 with the specimen handwritings and signature of Senthil Kumar and submitted his report Ex. P-55 dated 24.7.2002 by concluding that both the handwritings were of the same person. PW-65 had deposed that he had received four video cassettes and two audio cassettes which are marked as MOs.27 and 28. After analyzing he found both the voices to be same and marked the report as Ex. P-83. However, the High Court has not relied upon forensic evidence relating to cassettes and MOs. 31 and 33 and also regarding voice comparison, for the reason that the said articles were not kept in a sealed condition. We also ignore this evidence but ignoring this evidence

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also does not further the case of the appellants in any way as their guilt stands established by other overwhelming evidence. A

55. It was also contended that recovery of Ford car at the instance of A-4 is of no value. In my opinion, in whose name car was registered is immaterial as its use in offence and recovery is material aspect. The registration of car is in name of Ranjit Kumar who paid money for its purchase is a matter inter se between PW-10 and Ranjit Kumar. PW-10 may have purchased the car in the name of Ranjit Kumar. However, the evidence clearly disclosed that the car was in possession of PW-10 and was given by him to accused. Total six cars were used in offence including Ford Escort car and one motorcycle. They were used by one or other accused persons at one or other time while committing offence thus which vehicle was used at particular time by which accused would not create any circumstance in favour of an accused person when it has been proved that various vehicles seized have been used in offence their recovery at the instance of accused persons cannot be ignored. B C

56. Coming to submission that remains recovered from cremation ground are not proved to be of deceased M.K. Balan. As per the case of prosecution the body of the deceased was fully burnt as such the recovery of certain remains which was made after several months from the cremation ground was of no utility. Remains would not have been at cremation ground after 2 ½ months when everyday bodies are cremated. Their seizure and the forensic science report regarding that are of no value. D E

57. Thus in my opinion the appeals preferred by appellants sans merits hence, liable to be dismissed. The appeals are hereby dismissed. The conviction and sentence imposed by the Trial Court as affirmed by the High Court calls for no interference in the appeals. F

Kalpana K. Tripathy

Matter referred to Three Judges Bench*.

*In view of divergent opinion in the separate judgments of the Two Judges Bench.