AMMINI AND ORS. A

v.

STATE OF KERALA

NOVEMBER 18, 1997

[G.T. NANAVATI AND M. JAGANNADHA RAO, JJ.] B

Indian Penal Code, 1860—Sections 300 & 120 B (1)—Murder—Circumstantial evidence—Sufficient evidence to prove that accused persons entered into criminal conspiracy to Murder 'M' and her children—Accused C *administered poison and caused death of 'M' and her two children—Evidence regarding movements of accused persons at relevant time near house of deceased, finding of finger prints of one of the accused on one of the glasses seized from the house of deceased, confession of one of the accused & other circumstances prove the guilt of accused beyond reasonable doubt—Held, the conviction of accused by the High Court justified.* D

Murder—Appreciation of evidence—Death caused by adiministering potassium cyanide—Evidence of prosecution witness, Goldsmith from whom poison was obtained by accused rejected on ground that he had no licence to possess potassium cyanide and he had not disclosed the fact of giving potassium cyanide to accused or to any person—Held, not proper. E

Criminal Procedure Code, 1973—Section 164—Confession before Magistrate—Reliablity and Voluntariness—Comparison with record in case diary by trial court is illegal—Direction by Magistrate, to keep away the accused from police does not mean that confession was made involuntarily— F *Merely because the Magistrate started recording the confession after the accused was produced before him does not mean that confession was not voluntary—Merely because the accused during his examination under Section 313 Cr. P. C. alleged that he had made the confession under pressure and force from the police does not mean that confession was not voluntary—Trial Court not justified in considering the length of confession as a suspicious* G *circumstance—Accused clearly warned that his confession was likely to be used against him—Omission to inquire from the accused as to whether he was promised to be made an approver if he made confession does not mean that confession was not voluntary—Held, the High Court was justified in placing reliance upon the confession made by the accused.* H

A *Section 293(4)—Report signed by joint Director of Forensic Science Laboratory—Held, expression 'Director' includes 'Joint Director' and hence report is admissible in evidence.*

Evidence Act, 1872—Sections 10 and 24—Criminal conspiracy—Confession by one of the accused—Reasonable ground to believe that other
B *accused had conspired together in committing murder—Confession made by accused can be used against other accused also.*

Section 17—Evidence—Admissibility—Medical examination of injuries sustained by the accused—Statement given by the accused to doctor as to
C *cause of injuries—Held, statement of the accused amounts to an admission and therefore, admissible in evidence.*

Section 45—Medical Evidence—Certificate issued by doctor regarding injuries caused to accused persons rejected on ground that they were on plain piece of paper and not on printed form—Held, not proper when it was
D *shown that printed forms were in short supply in Government Hospitals in that district.*

Section 45—Evidence regarding finger prints—Impressions of earlier photographs not clear enough to enable expert to come to any definite conclusion—Second impression taken by the photographer—Held, in absence
E *of any effective cross—examination of the photographer his evidence that he could take better photographs on the second occasion could not be rejected by the court.*

The four accused persons, A-1, A-2, A-3 and A-4 entered into a criminal conspiracy to murder one 'T' and his family due to animosity of A—1 toward
F **'T' and his wife 'M'. The accused administered poison to 'M' and her two children which resulted in their death. The accused persons were then charge-sheeted and tried for the offence. As there were no eye-witnesses, the prosecution relied on the circumstantial evidence. The trial court acquitted the accused disbelieving the prosecution evidence of accused person and**
G **confession made by A-4. In appeal, the High Court on re-appreciation of the evidence held that most of the circumstances relied upon by the prosecution were proved beyond reasonable doubt. They formed a complete chain and in absence of any valid explanation by the accused, circumstances were sufficient to lead to a conclusion that all the four accused had entered into a criminal conspiracy to murder 'M' and her children and did murder them. Thus the**
H **High Court set aside the acquittal of the accused and sentenced them to**

suffer imprisonment for life. Hence this appeal. Dismissing the appeal, this court A

HELD : 1. The circumstantial evidence regarding movements of accused persons at the relevant time near house of deceased, find of finger prints of one of the accused on one of the glasses seized from the house of deceased, confession of one of the accused and other circumstances prove the guilt of B accused beyond reasonable doubt; therefore, the conviction of accused by the High Court is upheld. [201-B-C]

2. The trial court looked at the confession before the Magistrate with suspicion whereas the entire proceedings shows that the confession of the co-accused was made voluntarily and was reliable. Therefore, the High Court C was justified in placing reliance upon the confession made by the co-accused. [199-D-E]

3. Section 10 of the Evidence Act provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by any one of such persons D 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 as for the purpose of providing the existence of the conspiracy as for the purpose of showing that any such person was a party to it. Thus, the High Court was right in holding E that the confession made by A-4 could be used against other accused also. [200-E-G; 200-D]

4. The trial court was wrong in holding that the report given by the Forensic Science Laboratory with respect to the mixture of Parataph and eccalex was not admissible in evidence as it was signed by Joint Director and F not by the Director. On true construction of Section 293(4) Cr. P.C. it has to be held that Joint Director is comprehended by the expression 'Director'. A Joint Director is a higher officer than a Deputy Director or an Assistant Director and, therefore, it would be unreasonable to hold that a report signed by Joint Director is not admissible in evidence though a report signed by Deputy Director or Assistant Director is now admissible. Therefore, the G High Court was right in holding that the report made by the Joint Director was admissible in evidence and it deserves to be relied upon. [191-G-H; 192-B]

5. The High Court was right in rejecting the evidence of the prosecution witness—Goldsmith, from whom poison was obtained by accused on the H

A ground that he had—no licence to possess potassium cyanide and he had not disclosed the fact of giving potassium cyanide to accused or to any person. The circumstance under which the Goldsmith had obtained potassium cyanide and given it to A-4 was such that he would not have liked to disclose that fact to anyone and it was quite likely that he was able to obtain potassium cyanide even though he did not have a licence to possess it, as cyanide is B commonly used by goldsmiths for electroplating gold ornaments.[192-G-H]

6. The trial court rejected evidence of A-4 on the ground that the Medical certificate issued by A-4 was also on a plain piece of paper and an endorsement made therein was in different ink. The High Court considered both the grounds as improper and insufficient. It observed that it was well C known then that printed forms were in short supply in Government hospitals in that district and the certificates were issued by the doctors, who were attached to Government hospitals. There was nothing to show that the doctors had any reason to prepare false certificates. The High Court, therefore, was right in holding that the evidence of the doctors and the certificates issued D by them were true and what A-3 and A-4 told the doctors amounted to an admission and, therefore, they were admissible in evidence. [196-F-H]

7. The impressions of earlier photographs of finger prints on glasses were not clear enough to come to any definite conclusion and so second impression was taken by the photographer. The trial court doubted the E genuineness. The High Court was right in holding that in the absence of any effective cross-examination of the photographer his evidence that he was able to take better photographs on the second occasion could not have been disbelieved by the trial court. [197-B; C; E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 521 F of 1987.

From the Judgment and Order dated 1.4.87 of the Kerala High Court in Crl. A. No. 475 of 1982

Romy Chacko and N. Sudhakaran for the Appellants.

G

A. S. Nambiar and G. Prakash for the Respondent.

The Judgment of the Court was delivered by

NANAVATI, J. The appellants, four in number, were tried in the Court of the Additional Sessions Judge, Parur, in Sessions Case No. 7 of 1981, for H committing murders of Merli and her two little children. The Sessions Court

acquitted them but on an appeal by the State the Kerala High Court, set aside their acquittal and convicted them under Section 120-B(1) and Section 302 read with Section 34 IPC. Accused No. 2, Karthikeyan was also convicted under Section 34 IPC. Accused No. 2, Karthikeyan was also convicted under Section 411 IPC. They have, therefore, filed this appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

Tomy and his brother Francis were doing business in partnership at Alwaye. They first started a piece-goods business under the name 'Rani Silk House, and then another one named 'Maharani Textiles'. In 1969, they started a third business initially under the name 'Rani Umbrella Mart' which was later on changed to 'Rani Cut Piece Center'. Besides Tomy and Francis, Merli, (deceased) and Josephine (PW-26) were the other partners. After the death of Francis in 1975, Ammini (A-1) was inducted as a partner in the first two firms; but, she was not allowed to join the third firm as Francis had overdrawn his share in the capital of the firm. Ammini was periodically paid certain amounts by Tomy for maintenance of herself and her children, but she was not satisfied with that arrangement and often expressed her resentment openly. Ammini was at times required to borrow money from others and that is how she came in contact with Kartikeyan (A-2), who was her neighbour. Gradually, their acquaintance developed into illicit intimacy. In June, 1979 she fell ill and during the period of her hospitalisation A-2 was often seen with her in the hospital and it was freely talked by the people that they had developed illicit intimacy. On one occasion when Tomy had visited the hospital he had also seen A-2 with her. So he had questioned A-1 about him and told her that what she was doing was not proper. A-1 suspected that Tomy's wife Merli had informed Tomy about her illicit relationship with A-2 . As a result of this incident the animosity of A-1 towards Tomy and his wife became more intense and both of them were looked upon by A-1 as her enemies. She started believing that Tomy and his wife were the cause of all her ills and that they were also an obstacle in her affair with A-2. Therefore, A-1 and A-2, sometime between June, 1979 and May, 1980, decided to ruin Tomy and his family. They first tried to achieve their object by resorting to black magic. Those attempts, however, remained ineffective. In May, 1980 A-1 had gone to Maharani Textiles for getting cloth for a safari suit for her son. When the salesman was about to cut the costly cloth selected by her, Tomy told him not to give it but to give a cheaper variety. As a result of this incident A-1 felt humiliated and returned without taking any cloth. A-1, A-2 and Johny (A-3), whose mother was the maid servant of A-1 and who was also often rendering services to her, decided to do away with Tomy and his family members. First attempt was

A made on 29.5.1980 when A-1 and A-3 had gone with an insecticide 'Dalf' to the house of Tomy but it failed. Thomas (A-4) had also by that time come in contact with A-1. He also joined the conspiracy to kill Tomy and the members of his family on being promised a payment of rupees one lakh. Pursuant to that conspiracy A-4 procured insecticides known as Parataph & Eccalex and the second attempt was made on 10.6.1980 to administer the B mixture of those two insecticides after using Chloroform and making Merli and children unconscious. That attempt also failed as Josephine (PW-26) was found present in Merli's house. A-1, A-2 and A-4 then made a final decision to use cyanide which is a more powerful poison. A-4 was able to procure some cyanide from one Chinnappan (PW-27). As pre-planned, on 23.6.1980 at C about 7. p.m. A-1 first went to Tomy's house and started talking with her. After sometime A-3 and A-4 went there with a pretext that they wanted to see A-1. A-4 requested Merli to get some water for him to drink. While she was bringing water A-3 and A-4 caught her from behind, applied pressure on her neck, made her open her mouth and then forcibly put cyanide in her mouth. She tried to resist that attempt by giving a bite on the hand of A-3 D but she was not successful. The poison had its effect and Merli died immediately. Then, A-1 with the help of A-3 forcibly gave cyanide to Merli's two children. They also died instantaneously. Ammini then left the house after removing a gold chain of Merli from a cupboard. The other two accused, namely, A-3 and A-4 remained behind waiting for Tomy to come; but as he E did not come at the expected time they also left. When Tomy came and saw what had happened he screamed and that brought the neighbours there. Soon the Police was informed about the incident. All the accused were then charge-sheeted and tried for the offences punishable under Section 120-B and Sections 201, 302, 452 all read with Sections 34, 109 and 114 IPC. A-2 was separately charged for the offence punishable under Section 411 IPC.

F

There being no eye witness the prosecution relied upon the following circumstances to prove its case :-

(1) A-1 had sufficient motive to exterminate Tomy and his family.

G

(2) A-1 along with A-2, who was the neighbour of A-1 and with whom she had developed illicit intimacy, first tried to ruin the family of Tomy with the aid of persons practising black magic and witch-craft.

(3) First attempt by A-1, A-2 and A-3 to administer insecticide to Merli H and her children on 29.5.1980.

(4) Second attempt by A-1, A-2 and A-3 to administer a stronger insecticide to Merli and her children on 10.6.1980. A

(5) A-4 joined the conspiracy and procured cyanide from a goldsmith through PW-27.

(6) Testing of effectiveness of that cyanide by A-1 and A-3 on a cat, which died and whose body was buried by A-3 in the compound of A-1. B

(7) A-1 seen going to the house of Tomy on 23.6.1980 at about 6.30 p.m. and falsely telling persons, whom she met on the way, that she was going to Tharakan's Hospital.

C

(8) A-3 and A-4 were also seen following A-1 and going towards the house of Tomy.

(9) A-1 was seen coming out of the house at about 7.30 P.M.

(10) A-3 and A-4 were seen together near the place of occurrence at about 8.30 P.M. and thereafter at another place not far away. A-2 was also seen near that place at about 9.00 P.M. D

(11) A-3 and A-4's disclosure to the doctor who examined them as to how they had received injuries on their hands.

E

(12) Discovery by A-2 of a gold chain belonging to the deceased.

(13) Recovery of empty bottles of parataph and eccalex on the information given by A-3.

(14) Discovery by A-2 of a mixture of insecticide purchased earlier for killing the deceased. F

(15) Discovery by A-4 of a bottle containing cyanide.

Besides the above circumstances the prosecution also relied upon the confession made by A-4 before the Judicial Magistrate and the medical evidence, which proved that the deaths were the result of poisoning by cyanide. G

The Trial Court held that Merli and her children had died as a result of cyanide poisoning sometime between 7.30 p.m. and 9 p.m. on 23.6.1980. It ruled out the possibility of Merli and her sons' having committed suicide by H

A taking poison. But it did not believe the prosecution evidence regarding involvement of the accused and also the confession made by A-4. It, therefore, acquitted the accused. We are not stating here the reasons given by the trial court for disbelieving the prosecution evidence as we will be referring to them a little later.

B The State challenged the acquittal before the High Court. The High Court found that most of the reasons given by the trial court for rejecting the prosecution evidence were grossly unreasonable and some of them were almost perverse. After re-appreciating the evidence it came to a different conclusion as regards the guilt of the accused.

C The High Court accepted the evidence of Tomy (PW-2) and his elder brother Paul (PW-15) and held that A-1 was on inimical terms with Tomy and his wife and that she had sufficient motive to finish Tomy and his family members. The trial court had also accepted that evidence and held that A-1 had strong ill-feeling against PW-2 and his wife, Merli. The High Court D also agreed with the finding of the trial Court that Merli and her children had died as a result of cyanide poisoning sometime between 7.30 p.m. and 9.00 p.m. on 23.6.1980 and that it was not a case of suicide but cyanide was administered to them by an external agency. The High Court also confirmed the finding recorded by the trial Court relying upon the evidence of PWs 41, E 43, 44 and M.Os. 27, 28, 29, 40 and 41, that A-1 and A-2 had resorted to black magic and witch craft for ruining Tomy and his family. The High Court believing the evidence of PWs 2, 15, 17, 40 and 41 confirmed the finding that Ellyamma, mother of A-3 was employed by A-1 as a maid-servant and that A-3 was also occasionally rendering services to her.

F The High Court believed the evidence of PWs 15 and 16 from whose shops A-3 had purchased insecticide 'Dalf' on 16.5.1980 as they were found to be independent witnesses because they had no reason either to oblige Tomy or the prosecution or to depose falsely against A-3. The trial Court had rejected their evidence. PW-15 was disbelieved on the ground that he had not G issued a bill and the explanation given by him that he allowed A-3 to go away without taking a bill as he was acquainted with him, was not believable . The trial Court rejected the evidence of PW-16 on the ground that the copy of the bill produced by him appears to have been prepared subsequently. Moreover, 'Dalf' was neither used by nor recovered from any of the accused. It has been submitted by the learned counsel for the appellants that the reasons given H by the trail court for rejecting the evidence of these two witnesses were quite

proper and, therefore, the High Court should not have reversed the findings. In our opinion the reasons given by the trial court were not at all proper. The evidence of PW-15 could not have been discarded merely because the name of A-3 was not mentioned in the bill and that PW-95, the Investigating Officer, had not made further enquiries with respect to that bill. What the trail court failed to appreciate was that there was no requirement of mentioning name of the purchaser of the insecticide 'dalf' and that there was no reason for the Investigating Officer to make further enquiries with respect to the said bill. The trial court had held that the bill prepared by PW-16 appears to have been prepared subsequently because in the 2 earlier bills the date mentioned was 17.5.1980. The trail court failed to appreciate that this witness was approached by the police on 4.7.1980 for his statement. The bill was already in existence then. It was, nobody's case that it was prepared on or after 4.7.1980. As regards the first attempt made on the evening of 29.5.1980 by him and A-1 to administer that insecticide to Merli and her children, the prosecution had examined PW-38 who was an employee in one of the shops of Tomy and was sent by Tomy to his house for some work. He deposed that when he reached there at about 7.15 p.m. he saw one slim lady and one black fat chap sitting in the house. He was told by Merli that the lady was her sister-in-law and the other person was Johny (A-3). The evidence of this witness was not believed by the trial Court on the ground that he did not identify A-1 and A-3 in the court as the persons who were seen by him sitting in Tomy's house though he had identified them at the test identification parade held for that purpose. The High Court accepted the evidence of PW-38 as there was nothing in his cross-examination which could have created any doubt regarding truthfulness of his version. Merely because he did not specifically identify A-3 in the court his evidence could not have been rejected. It was not that he was asked to identify A-3 in the court and he failed to identify him. Moreover, even the defence had proceeded on the basis that A-3 was identified in the court as pointed out by the High Court. Nothing substantial could be urged by the learned counsel for the appellant to disbelieve the evidence of this witness.

The trail court reluctantly accepted the evidence of PWs 20 and 21, as they were independent witnesses and nothing could be alleged against them by the defence. It, therefore, held that their evidence established that A-4 had purchased one bottle of parataph and one bottle of eccalex on 7.6.1980 from the shop of PW-20. It, however, held that "this circumstance did not constitute an incriminating circumstance because as deposed by these witnesses, he had come to their shop earlier and purchased insecticides. Another reason

A given by the trial court for taking that view was that there is no evidence adduced to show that parataph and eccalex purchased by A-4 were used by him or any other accused for commission of this offence''. The High Court disagreed with this view and observed that the trail court had failed to appreciate that this circumstance was relied upon as a link in the chain and to prove the preparations that were jointly made by the accused. In our B opinion, the High Court rightly held that its importance and effect were required to be considered along with other circumstances, including the false denial by A-4.

As regards the incident of 10.6.1980 the prosecution had relied upon the C evidence of Josephine PW-26, sister of Tomy. According to her she had come to Alwaye from Madras on 10.6.1980 as she had some work. In the evening when she and Merli were at home, A-1 had come there. Seeing her there A-1 was surprised. Soon after entering the house she had made a telephone call to someone. She left the house after about 15 minutes. When she and Merli had stepped out of the house to see off A-1 she had seen two persons near D the gate. One of them uttered the name of Merli as if he was an acquaintance. Merli had then informed her that he was Johny (A-3). The trial court did not believe PW-26 for the reason that her version was artificial and that she had not identified A-3 in the court as the person whom she had seen on that day though she had identified him at the identification parade. The trail court did E not attach any importance to the identification of A-3 at the test identification parade as it found that it was not satisfactorily held and also because by that time photographs of all the accused were published in newspapers. To prove this incident of 10.6.1980 and involvement of A-3 and A-4 the prosecution had also relied upon the recovery of MOs 31, 32 and 44. MOs 31 and 32, being bottles of Parataph and eccalex, were recovered at the instance of A-3 from F the courtyard of house of A-1 on 3.7.1980. The trial court did not attach any importance to it on the ground that it was not established that they were the same bottles as were purchased by A-4 from the shop of PW-20 on 7.6.1980. MO 44 was recovered at the instance of A-2. It was a whisky bottle and it contained mixture of Parataph and eccalex as stated in the certificate issued G by the Joint Director of the forensic Science Laboratory. The trial court rejected this evidence as the bottle was recovered from an open space accessible to all and that even though only 100 ml. of parataph and 100 ml. of eccalex were purchased, the mixture that was recovered from the bottle was 220 mls. The trial court also held that the prosecution had failed to establish that the said bottle contained mixture of parataph and eccalex as the certificate H was signed by the Joint Director of Forensic Science Laboratory, and not by

the Director and, therefore, it was not admissible under Section 293(4) of the Cr. P.C. A

The High Court after referring to the cross-examination of PWs 26 and 38 held that even the defence had proceeded on the basis that the accused were correctly identified in the court also, and, therefore, the Sessions Court was wrong in discarding their evidence. As regards the recovery of MOs 31, and 32, the High Court held that PW-20 had correctly identified those bottles by the caps of those bottles. The High Court further held that though MO 44 was recovered from an open space, *i.e.*, from the gutter nearby the office of A-2, but as it was proved that it contained mixture of parataph and eccalex, this recovery evidence deserved to be believed. The sessions court was of the view that these circumstances even if believed were not incriminating circumstances. The High Court was of the view that these circumstances, namely, purchasing of parataph and eccalex by A-3, recovery of empty bottles from the courtyard of the house of A-1 at the instance of A-4 and recovery of MO 44 containing mixture of parataph an eccalex at instance of A-2, did indicate a joint attempt by the four accused. The learned counsel for the appellants could not seriously challenge the evidence of Josephine (PW-26) but submitted that the evidence regarding recovery of MOs 31, 32 and 44 should not have been accepted by the High Court. It is true that MOs 31 and 32 did not have any label on them but PW-20 was able to identify them by their caps being familiar with them. The High Court was, therefore, right in holding that the prosecution was able to establish that the bottles which were discovered by A-3 from the court-yard of the house of A-1 were the bottles of parataph and eccalex. A-3's knowledge about the concealment of those bottles was not innocent. When facts which have a bearing on the guilt of the accused, are established, yet denied by the accused they assume importance. This aspect was totally missed by the trial court. Similarly, MO 44, though recovered from a place accessible to all, was found from under the water and was thus not visible to all. It was A-2, who had taken it out of water. Moreover the contents of the bottle turned out to be the mixture of parataph and eccalex as stated by A-2. The statement made by A-2 before recovering the bottle thus stood corroborated. The trial court was wrong in holding that the report given by the Forensic Science Laboratory with respect to the contents of MO-44 was not admissible in evidence as it was signed by its Joint Director and not by the Director. On true construction of Section 293 (4) Cr.P.C. it has to be held that Joint Director is comprehended by the expression 'Director'. The amendment made in clause (e) of Section 293(4) now indicates that clearly. If the Joint Director was not comprehended within B C D E F G H

A the expression Director then the Legislature would have certainly named him while amending the clause and providing that Section 293 applies to the Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory. A Joint Director is a higher officer than a Deputy Director or an Assistant Director and, therefore, it would be unreasonable to hold that a report signed by Joint Director is not admissible B in evidence though a report signed by Deputy Director or Assistant Director is now admissible. In our opinion the High Court was right in holding that the report made by the Joint Director was admissible in evidence and it deserved to be relied upon.

C To prove that A-4 had procured potassium cyanide the prosecution had examined Chinnappan (PW-27). This witness has stated that about a couple of weeks prior to the death of Merli and her children, while he was walking along with A-4 on a road, A-4 had told him that he was in need of some effective poison to kill stray dogs which were destroying his poultry. He was first hesitant to give potassium cyanide to A-4 but on further persuasion he D gave a small quantity of it in a bottle of Vicks. The prosecution had also examined PW-23, who was working with PW-27 in the same jewellery shop to establish that about 4 or 5 days before the death of Merli and her children he had seen PW-27 and A-4 together discussing something secretly. The prosecution had also examined PW-24 to prove that A-4 was seen in the E house of PW-27 a few days before the death of Merli. The evidence of PW-27 was disbelieved by the sessions court on the ground that he did not have a licence to possess cyanide and the Investigating Officer had not made any attempt to find out the source. The High Court held that these reasons were not at all sufficient for discarding his evidence. PW-27 was working in a jewellery shop and the shop owner did have a licence to possess potassium F cyanide. Moreover, PW-27 had stated that he had obtained it from one Narayanan, another goldsmith and the Investigating Officer could not question him as he had died before he could have been questioned by the Investigating Officer. One more reason was given by the trial court for disbelieving the evidence of PW-27 was that he had not disclosed the fact of giving potassium G cyanide to A-4 to any other person. The High Court observed that this was not at all a good ground for rejecting his evidence. In our opinion, the High Court was right in observing that this important piece of evidence was very lightly brushed aside by the trial court on flimsy grounds. The circumstance under which PW-27 had obtained potassium cyanide and given it to A-4 was such that he would not have liked to disclose that fact to anyone. As rightly H pointed out by the High Court PW-27 being a goldsmith, it was quite likely

that he was able to obtain potassium cyanide even though he did not have a licence to possess it, as cyanide is commonly used by goldsmiths for electroplating gold ornaments. A

In order to prove that Merli and her children were alive till 7.00 p.m. the prosecution had examined PW-32, a boy aged 14 years, who had gone to Tomy's house to give a packet of surf at 7.00 p.m. The evidence of this witness was not at all challenged. The trail court did not record any finding with respect to his evidence. The High Court accepted it and held that till 7.00 p.m. on 23.6.1980, Merli and her children were alive. B

The prosecution had also led evidence to prove the movements of A-1, A-3 and A-4 between 6.30 p.m. and 8.00 p.m. on that day. Ennamma (PW-3), who was residing just opposite to A-1's house, stated that she had seen A-1 coming out of her house at about 6.30 p.m. and proceeding towards the house of Tomy. She further stated that her attention was drawn towards A-1 because it was unusual for A-1 to move out of her house at such a late hour. She has also stated that a few minutes later she had seen A-3 and A-4 coming out of the house of A-1and going towards Tomy's house. The trial court did not disbelieve the evidence of this witness but held that what she had stated did not amount to an incriminating circumstance and therefore, no weight could be attached to it. Only omission brought out in her cross-examination was that she had not given the name of A-4 in her police statement but had described it as "Duck Youngster". The High Court held that her evidence deserved to be believed and it did establish that A-1, A-3 and A-4 were seen together near the house of A-1 about an hour before the incident. PW-4 had met A-1 some time thereafter on the road and inquired from her as to where she was going. A-1 had told her that she was going to Tharakan's Hospital to see one Raju, who was admitted as an indoor patient. To prove that she had not really gone to the hospital the prosecution had examined Rosy (PW-11), mother of Raju. She categorically stated that A-1 had not come to see Raju and she had not noticed her in the hospital. Her evidence was discarded by the trial court on the ground that it was quite likely that she might not have remained present near Raju all the time and therefore, might not have noticed A-1. The prosecution had also examined PW-47 whose two children were also admitted in the hospital. He has stated that his relations with A-1 were quite intimate and, therefore, if she had come to the hospital she would not have gone away without meeting him and enquiring about the health of his two sons. He was present in the hospital from 6.00 p.m. to 9.00 p.m. on that day and , therefore, he would have certainly C D E F G H

A noticed the presence of A-1. The evidence of this witness was not disbelieved by the trial court but it held that it did not falsify the explanation of A-1 that she had in fact gone to the hospital to see Raju. The High Court held that this was not a reasonable view and the trial court ought to have appreciated that the explanation given by A-1 was false and thus this was an incriminatory circumstance. We are also of the view that the trial court had completely misunderstood the significance of the evidence of PWs-11 and 47. The evidence discloses that Raju was serious. Therefore, his mother was bound to be by his side. It was, therefore, not likely that when A-1 had gone to see Raju, his mother was not by his side and, therefore, she had not noticed the presence of A-1 in the hospital. She would have returned without meeting PW-47 and inquiring about the health of his two sons. The reason given by the trial court for holding that the evidence of PWs-11 and 47 did not falsify the explanation of A-1 was thus not sustainable. The High Court was, therefore, right in placing reliance upon the evidence of these two witnesses and holding that the explanation given by A-1 was false.

The movements of A-1, A-3 and A-4 between 7.00 p.m. and 7.30 p.m. were also noticed by other witnesses. Evidence of some of them was not disbelieved by the trial court. Evidence of others was discarded on flimsy grounds as pointed out by the High Court. We do not think it necessary to refer to the evidence of all those witnesses and it would be sufficient to state that the said evidence was rightly believed by the High Court. We will only refer to the evidence of Joseph (PW-8) who was, at that time, serving as an officer in the Life insurance Corporation. He has deposed that at about 7.35 p.m., while he was passing by the house of Tomy, he had seen one woman coming out of his house. He first thought that she was Merli and, therefore, looked at her to have a talk with her. He at once noticed that she was not Merli so without talking with her he proceeded further after passing by her side. He has further stated that on the next day he had visited Tomy's house to attend the funeral and at that time, inside the room where the dead bodies were laid, he had seen the woman, whom he had seen on the previous night. He, therefore, enquired from Paul dominic (PW-46) and PW-47 as to who she was and they had told him that she was Ammini, widow of Francis. He informed both of them that he had seen her coming out of Tomy's house on the previous evening. This revelation by him had raised a flutter among the mourners and it had finally reached Tomy. Tomy has stated that he had informed his brother Paul (PW-50) that he had come to know that A-1 had visited his house at about 7.30 p.m. on the day of the incident. PW-50 has stated that he had asked Ammini about her said visit but she had flatly denied

it. The trial court disbelieved the evidence of this independent witness PW-8. One reason given was that while Tomy informed his brother Paul that Lucy, Sheela and two boys had seen A-1 going and coming out of his house he had not mentioned the name of PW-8 as one of the persons who had also informed him about A-1's visit. The High Court has strongly criticised the learned sessions Judge for discarding the evidence of this witness. It pointed out that PW-8 had not stated that he had told Tomy that he had seen Ammini. Many persons had informed Tomy that they had seen Ammini walking near about his house at the time of incident. Therefore, while informing his brother he had only generally stated that Lucy Sheela and two boys had told him about that. Since he was not directly informed by PW-8 it is quite likely that he had either thought it not fit or in view of his mental condition, had forgotten to mention the name of PW-8. Another ground given by the trial court for rejecting his evidence was that the woman seen by him was wearing spectacles but A-1 was not seen wearing spectacles during the whole trial and that no attempt was made by the Investigating Officer to trace the spectacles of A-1. The High Court held that these reasons were perverse. It observed that it was absolutely unnecessary for the Investigating Officer to search for her spectacles. Moreover, the evidence of PW-46, PW-47 and PW-50 the eldest brother-in-law of A-1 proved that A-1 was often wearing spectacles. The High Court after considering the reasons for rejecting the evidence of PW-8 by the trial court observed : "Sessions Judge was groping for some reason to reject the valuable testimony of PW-8, and when he failed to trace out any good reason, he traversed through preposterous ideas for rejecting his testimony". On re-appreciation of his evidence the High Court found that it had a ring of truth in it and it established beyond any doubt that A-1 was seen coming out of the house of Tomy at about 7.45 p.m.

We may also refer to the evidence of Aliamma (PW-13) who has stated that at about 7.30 p.m. while she and one Kunjamma were returning from the hospital and were passing by the house of Tomy they had heard a cry of a child coming from the house of Tomy. As no further cry was heard and it was drizzling they did not stop and proceeded further. This witness was not at all cross-examined by the defence. Her evidence was not disbelieved by the trial court but no importance was attached to it. The High Court rightly considered this as a relevant circumstance as it proved that at about 7.30 p.m. something had happened in the house of Tomy which had made a child cry loudly. The High Court held that the evidence of this witness together with the other evidence regarding movements of the accused and the evidence of PW-8 established that A-1 had gone to the house of Tomy some time after 7.00 p.m.,

A that Merli and her children were killed at about 7.30 p.m. and that A-1 was found leaving that house at about 7.35 p.m. As regards the subsequent movements of the A-1, A-3 and A-4 the prosecution had led the evidence of PWs-25, 28 29 and 30. Their evidence was also disbelieved by the trial court on flimsy grounds. The High Court has pointed out how the said reasons can not be considered as proper and sufficient. It therefore, held that even their B evidence deserved to be accepted.

The next circumstance relied upon by the prosecution was that while administering cyanide to Merli, A-3 and A-4 had received injuries A-3 was arrested on 2.7.1980 and he was taken to Dr. Abraham (PW-60) for his medical C examination. The doctor had found three injuries on the fingers of his right hand. When the doctor had asked him how he had received those injuries, he had stated that "these small injuries were caused by biting when I closed Merli's mouth to silence her at 7.30 p.m. on Monday before last". This evidence was disbelieved by the trial court on the ground that the certificate issued by the doctor was on a plain piece of paper and not on the printed D form, that no serial number was mentioned in that certificate and that when finger prints of third accused were taken by the police on 3.7.1980 the Investigating Officer had seen only scars of the wound which indicated that the wounds had healed up earlier. A-4 was arrested on 5.7.1980 and when he was taken to Dr. Vasant Kumari (PW-64) for medical examination, she had E noticed that his two injuries were in the healing process. On being asked about the injuries A-4 had told her that "my left elbow and the outer part of the right hand were injured while taking Merli to the kitchen, holding her from behind with left hand, inside Merli's house at about 7.30 p.m. on Monday, 26.3.1980". The trial court rejected her evidence on the ground that the certificate issued by her was also on a plain piece of paper and an endorsement F made therein was in different ink. The High Court considered both the grounds as improper and insufficient. It observed that it was well known then that printed forms were in short supply in Government hospitals in the district of Ernakulam. The certificates were issued by the doctors, who were attached to Government hospitals at Alwaye and Perumbavoor, both of which were G situated in the same district of Ernakulam. The High Court further found that there was nothing to show that the doctors had any reason to prepare false certificates. The High Court, therefore, held that the evidence of the doctors and the certificates issued by them were true. The High Court also held that what A-3 and A-4 told the doctors amounted to an admission; and, therefore, they were admissible in evidence. In fact the trial court had also held that they H being admissions were not hit by any provision of the Evidence Act.

Next important circumstance disbelieved by the trial court was the find of finger prints of A-3 on one of the two glasses (MOs 1 and 2) seized from Tomy's house on 24.6.1980 under Mahazer (Exh. 57). Finger prints found on those two glasses were compared with the admitted finger prints of A-3 and it was found that the finger prints found on one glass tallied with the finger prints of A-3. The trial court disbelieved this important evidence on the ground that the earlier photographs of those impressions were not clear enough to enable the expert to come to any definite conclusion and, therefore, it was doubtful whether the subsequent photographs were of the original finger prints. The trial court took this view as it found that the prosecution had not explained how on the subsequent occasion it was possible for the photographer to redevelop those impressions in a better manner and have better photographs. The trial court was also of the view that even though the photographs were taken on the second occasion in presence of the Judicial Magistrate, not much value could be given to them as the glasses had remained in the custody of the Investigating Officer and, therefore, there was a possibility of introducing fresh finger prints of A-3 on those glasses. The trial court also doubted their genuineness on the ground that when photographs were taken the Judicial Magistrate had not taken care to see whether the camera had any lens. The High Court has severely criticised the trial court for taking such a view and in our opinion rightly. It was not even suggested by the defence that A-3's finger prints were again taken by the Investigating Officer on those glasses. The finding of the trial court was, therefore, speculative in nature. In absence of any effective cross-examination of the photographer his evidence that he was able to take better photographs on the second occasion could not have been disbelieved by the trial court. It was also improper to brush aside this clinching evidence on the ground that the confession of A-4 does not mention that A-3 had again taken water from the glass that was found in the kitchen. In our opinion, the High Court was right in relying upon this evidence regarding which nothing else could be urged. That evidence established the presence of A-3 in Tomy's house.

To prove the complicity of A-2 the prosecution had relied upon the recovery of gold chain (MO-9) belonging to the deceased and the bottle (MO-44) containing mixture of parataph and eccalex recovered on the basis of information given by him. It has been held proved that the gold chain belonged to the deceased. The trial court, however, held that it was not proved that A-2 had concealed the same in the store room of sub-Divisional Office of the Telegraph Department, where he was working. The trial court placing reliance upon the evidence of the office watchman (PW-88) and the defence witness

A DW-3 came to the conclusion that the chain appeared to have been planted there by the police. The trial court also held that the whole story regarding removal of the chain and it being given by A-1 to A-2 and A-2 concealing it in the store room was "too shady to be worthy of any judicial credit". The High Court on close scrutiny of their evidence found that the watchman and D-3 being the Co-employees had fabricated evidence regarding A-2's leave to B help A-2 and had falsely deposed that on 27.6.1980 some policemen accompanied by A-2 had approached the watchman and told him to open the store room and after going inside had left it after some time. The High Court believed the prosecution evidence and held that it has successfully established that the gold chain (MO-8) was concealed by A-2 below a bundle of wire in C the store room where he was working and that it was recovered on the basis of the statement made by him before the panch witnesses. We have already pointed out earlier why the trial court had not believed the recovery of bottle containing mixture of parataph and eccalex and why the High Court has held that the reasons given by the trial court are improper.

D The confession made by A-4 before the Judicial Magistrate was discarded by the trial court as it found it to be not voluntary and true. The reasons given by it for taking that view were - (1) while A-4 was remanded to judicial custody by the Judicial Magistrate on 7.7.1980 the Magistrate had thought it fit to give a direction that he should not be kept in the sub-jail at Alwaye E as the three co-accused were in that sub-jail and this indicated that if he had been allowed to remain with the other accused he would not have made the confession. (2) The confession was retracted soon after A-4 was released on bail. (3) While retracting the confession and also during his examination under section 313 Cr.P.C. A-4 had stated that he was made to take an oath to make a confession and he was told by the police that if he made a confession he F would be protected. (4) The Judicial Magistrate had not asked him whether he was pressurised by the police to make the confession. (5) The Judicial Magistrate had started recording the confession soon after A-4 was produced before him on 7.7.1980. (6) The Judicial Magistrate had not recorded separate reasons, apart from stating so in the memorandum, for believing that A-4 was G making the confession voluntarily. (7) The confession is very long and runs into as many as 20 pages. (8) A-4 had disowned the first bail application which was made on his behalf after 7th. According to the trial court all these circumstances indicated that A-4 had made the confession while he was in a state of fear and mental collapse and that even after he had made the confession he was under pressure from the police while in custody. The trial H court had held the confession as not true as it found that there were some

discrepancies between the confession as recorded by the Judicial Magistrate and what was recorded with respect to it by the Investigating Officer in his case diary. The following inconsistencies were noted by the trial court :-

1. In the confession A-4 has stated that the first attempt was made on 9.6.1980 whereas in the case diary it was mentioned that the first attempt was made initially on 9th and then on 10th.

2. No reference is made to the chain of Merli in the confession Exh. P-40 though that fact is referred to in the case diary.

3. The name of Chinnappan P-27 is not mentioned in Exh. P-40 but it is mentioned in the case diary.

4. Though breaking of a glass in the hands of the Merli is mentioned in the case diary, it is not so stated in the confession.

According to the trial court these omissions indicated that A-4 was forced and tutored to make the confession.

The High Court held that the trial court had looked at the confession with suspicion. The High Court also held that in comparing the confession with the record of it in the case diary the trial court had committed an illegality and the finding recorded by it, therefore, stood vitiated. We are of the opinion that the High Court was right in taking this view. If while remanding A-4 to judicial custody the Judicial Magistrate thought it fit to keep him away from the police and the co-accused, it is difficult to appreciate how such a direction can be regarded as a circumstance indicating that confession was not voluntary. So also it is difficult to appreciate how from the circumstance that the Judicial Magistrate had started recording the confession within a short time after A-4 was produced before him on 7th an inference could have been drawn that he was not making the confession voluntarily. Merely because A-4 while retracting his confession and during his examination under section 313 Cr.P.C. had alleged that he had made the confession under pressure and force from the police, it was not proper for the trial court to conclude that the confession was not voluntarily made. The trial court ought to have appreciated that the confession was retracted four days after the accused was released on bail. No such complaint was made by him while he was in judicial custody from 7th till he was released on bail after about a fortnight. Except the bare allegation there was no material on record to indicate that police had pressurised A-4 or had forced him to make the confession. The trial court was not justified.

A in considering the length of the confession as a suspicious cirumstance. The confession was a complete record of the steps taken by the Magistrate, the questions put to the accused and the answers given by him. The High Court has also pointed out how other reasons given by the trail court are also improper. While agreeing with the trial court that the Judicial Magistrate had failed to inquire from A-4 as to whether he was promised that he would be B made an approver if he made the confession, the High Court held that this omission was of no significance as A-4 was clearly warned that if he made a confession it was likely to be used against him. The High Court was also right in holding that the trial court in relying extensively on the case diary had committed an illegality. The omission found by the trial court as a result C of that illegal effort were minor and did not justify the conclusion that the confession was not voluntarily made. In the absence of any requirement that separate reasons were required to be recorded for believing that the confession was made voluntarily it was not proper for the trial court to doubt its genuineness on the ground that the reasons were not recorded separately though the satisfaction was recorded in the memorandum. The High Court D was therefore right in placing reliance upon the confession made by A-4.

The trial court had further held that even if the confession was regarded as voluntary and true it could be used only against A-4 and not against other accused. The High Court found the trial court wrong on this point in view E of Section 10 of the Evidence Act which provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, 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 as for the purpose F of providing the existence of the conspiracy as for the purpose of showing that any such person was a party to it. The High Court held as there was reasonable ground to believe that Ammini and other accused had conspired together and, therefore, the confession made by A-4 could be used against other accused also.

G

On re-appreciation of the evidence the High Court held that most of the circumstances relied upon by the prosecution were proved beyond reasonable doubt, that they formed a complete chain and that in absence of any valid explanation by the accused they were sufficient to lead to a conclusion that all the four accused had entered into a criminal conspiracy to murder Merli H and her children and did murder them, between 7.00 p.m. and 7.45 p.m. on

23.6.1980. It, therefore, allowed the appeal, set aside the acquittal of the accused and sentenced them to suffer imprisonment for life. A

Same contentions which were urged on behalf of accused before the High Court were urged before us. We agree with the reasons given by the High Court for rejecting them. Other reasons have been stated by us earlier while pointing out how the view taken by the trial court regarding each circumstance was not proper. The evidence regarding the movements of A-1, A-3 and A-4 between 6 and 7.00 p.m. near Tomy's house, the find of finger prints of A-3 on one of the glasses seized from the house of Tomy and the confession of A-4 together with other circumstances stated above establish the guilt of the accused beyond reasonable doubt. B C

As we do not find any good reason to differ from the view taken by the High Court, this appeal is dismissed.

N.J. Appeal dismissed.