IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 26TH DAY OF AUGUST 2021 / 04TH BHADRA, 1943

CRL.A NO.418 OF 2021

AGAINST THE JUDGMENT IN S.C.NO.441/2002 DATED 09.01.2004 OF THE COURT OF THE III ADDITIONAL SESSIONS JUDGE (ADHOC) FAST TRACK COURT NO.I, THRISSUR.

CRIME NO.174/2000 OF IRINJALAKUDA POLICE STATION, THRISSUR.

APPELLANT/ ACCUSED:

**BALU, AGED 40 YEARS, S/O.MANIKYAN,
THONDAYAR STREET, PNAYAMKOTT, MOORTHY, AMBALAPURAM,
P.O., TANJORE, LCT NO.17604, CENTRAL PRISON,
TRICHY - 620 020, TAMIL NADU.**

**BY ADVS.
SRI.V.JOHN SEBASTIAN RALPH
SRI.B.DEEPAK
SRI.VISHNU CHANDRAN
SRI.RALPH RETI JOHN
SRI.APPU BABU
SMT.SHIFNA MUHAMMED SHUKKUR**

RESPONDENT/ COMPLAINANT:

**STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM -682 031.**

**BY SMT.S.AMBIKA DEVI,
SPL.GOVT.PLEADER (ATROCITIES AGAINST WOMEN & CHILDREN)**

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09.08.2021, THE COURT ON 26.08.2021 DELIVERED THE FOLLOWING:

"C.R"

K.Vinod Chandran & Ziyad Rahman A.A., JJ.

Crl.Appeal No.418 of 2021

Dated this the 26th August 2021

JUDGMENT

Vinod Chandran, J.

The lure of gold has begotten more crimes than any reasonable man would think; often snuffing out innocent lives. 'Crime doesn't pay' is an adage which the deviants, the desperate and some desperadoes pay little heed to. Here we have a migrant labourer, eking out his living from odd jobs, snatching a valuable gold chain from the body of a housewife and drowning her; presumably in a bid to avoid identification.

2. The appeal is of the year 2021 and we took it out of turn since we take up matters giving priority to those convicted and imprisoned earliest. The appeal itself was filed with a delay of 6300 days and the appellant has been languishing in jail from 2001 onwards. The case set up by the prosecution rests entirely on the circumstances attempted to be proved through seventeen witnesses, twenty documents and twelve material objects. The defence is total denial and the learned Counsel for the accused asserts his right to silence and picks holes in the

evidence led by the prosecution.

3. Sri. John S. Ralph, learned Counsel appearing for the appellant, submits that though the cause of death is undoubtedly drowning, whether it is accidental or forceful, has to be proved by the prosecution and the evidence led falls short of absolute proof of the victim having been forcefully drowned. Even if the chain snatching is found to be established, there is absolutely nothing to find an intention to kill or even a knowledge that the act of chain snatching would lead to the death of the victim. The dead-body did not show signs of any struggle which would have been evident from the presence of algae and water plants on the body of the victim; which were totally absent. The prosecution also failed to carry out a diatom test. The injuries found on the body of the victim indicates an accidental drowning. The recovery is not one under Section 27 of the Evidence Act, since the facts allegedly disclosed, was already known to the police. The police knew about the sale of the chain which led to the arrest of the accused. Only that knowledge could have led to A2 and through him A1, who is the appellant before this Court. The learned Counsel relies on *Sukhbinder Singh v. State of Punjab* [*(1994) 5 SCC 152*] to urge that Section 27 cannot be used to rediscover an

already discovered fact. The confession is a joint one and the Investigating Officer [I.O] does not speak about the exact words used by the confessor. *Mohd. Abdul Hafeez v. State of A.P.* [*AIR 1983 SC 367*] and *Thampi Sebastian v. State of Kerala* [*1988 (1) KLT 247*] are relied on to further buttress the above contention. The pledging of gold ornaments even if proved, was by A2 and not A1. On the authorship of the confession, reliance is placed on *Ramachandran v. State of Kerala* [*2009 Cri.LJ 168*]. There is no proper identification as held mandatory in *Vayalalil Girishan v. State of Kerala 2016 Crl.LJ 1724*. There was no Test Identification Parade [TIP], which is fatal since many of the witnesses have no prior association with A1. The identification of the ornaments carried out first in Court is a weak piece of evidence as held in *Pannayar v. State of Tamil Nadu* [*AIR 2010 SC 85*]. The over anxiety of the prosecution to nail the accused is evident from the identification of MO2 gold ring by PW2 which was purchased by the accused to which PW2 is not privy.

4. The learned Counsel would in conclusion refer to Sections 299, 300, 302 and 304 IPC to contend that if at all the snatching of a chain is proved as against A1, there can only be a pure and simple 'culpable homicide' alleged against him as defined under Sec.299 and not

murder under Sec.300. The learned Counsel argues that Sec.299 is distinct and different from murder as defined under Sec.300 and is akin to manslaughter, which falls short of murder as understood in the United States of America. The appellant's refusal to offer an explanation has been projected by the prosecution, for which reliance is sought to be placed on Section 106 of the Indian Evidence Act. Section 103 and 106 of the Evidence Act are no longer applicable, the enactment being a pre-constitutional law, after the Constitution with Article 20(3) came into existence.

5. Smt. S. Ambikadevi, learned Special Government Pleader (Atrocities against Women & Children) points out that FIR was registered against A1 to A4; A1 for murdering the woman and stealing her valuable chain, A2 and A3 for receiving stolen property and A4 for purchasing such stolen property. A4 was discharged and the trial of A2 and A3 was carried out earlier, since A1 was absconding and his trial was split up. A2 was convicted and A3 was acquitted. The case was first registered under Section 174 Cr.P.C as an unnatural death and later converted into Section 302. Both A1 and A2 absconded from the locality and A2 was arrested from Pollachi, while A1 from Thanjavur. The circumstances proved, conclusively form an

unbroken chain, unerringly establishing the crime having been committed by A1. The learned Special Government Pleader would argue that murder, as defined in Sec.300, is culled out from what is defined under Sec.299; with a specific intention or knowledge as defined in 'Firstly' to 'Fourthly' of Sec.300. In the present case, A1 is a person who was intermittently engaged for odd jobs in the residential property of the victim. After snatching the chain worn by the victim, he killed her by deliberate drowning. The circumstances would establish that A1 killed the victim, presumably to avoid identification. He was seen going from the scene of occurrence and later along with a local, A2, pledged the gold ornament. The watches and rings purchased out of the proceeds of the pledge of the stolen ornament were seized from the accused. The appeal deserves to be dismissed, urge, the Prosecutor.

6. Before we look at the appeal, we notice a very disconcerting fact of the readable copies not having transcribed the original deposition fully. We cannot find fault with the persons who copied it, since the originals are undecipherable. The readable copies must be transcribed with the aid of the Judicial Officer, who recorded the evidence, which in every circumstance, may not be possible. Or there should be a transcription

carried out, immediately after the recording of evidence, which again would be time-consuming. We cannot but notice that Sec.276 Cr.P.C. requires the evidence of each witness; in all trials before a Court of Sessions to be taken down in writing, either by the presiding Judge himself or by his dictation in open Court; as the examination proceeds, in the form of a narrative or as the presiding Judge deems fit in the form of question and answer. We are also informed by the Registry that this Court has issued two circulars, Circular No.1 of 2016 and Circular No.3 of 2017, respectively dated 04.04.2016 and 07.08.2017, directing evidence to be recorded as envisaged in Order XVIII, Rules 4 & 5 of the Code of Civil Procedure, 1908 and Sec.274, Sec.275 and Sec.276 of the Code of Criminal Procedure, 1973. Such evidence on dictation could also be typed out in a computer so as to enable reading out the same immediately on the evidence of each witness being concluded for the day or finally. It is hence expedient that the Registry provides for computers inside the Court Hall for the purpose of dictation to be taken down as the examination of a witness proceeds. The Circulars above-mentioned need to be again communicated to the trial courts. We expect the Registry to take further steps to comply with these directions immediately.

7. We would also, at the outset, look at the arguments raised by the learned Counsel for the appellant on the definition of culpable homicide and murder. As also the argument that right of the accused to remain silent, rendered *otiose* Sec.103 & 106 of the Evidence Act; at least in the case of an accused. According to us, Sec.299, culpable homicide takes within its ambit and scope, murder, as defined under Sec.300. Sec.299 has three limbs, causing death by an act first, with the intention of causing death, second, with an intention to cause bodily injury, which is likely to cause death and the third, with the knowledge that the act is likely to cause death. Sec.300 has four limbs, firstly, Secondly, Thirdly and Fourthly. The first limb of 299 is analogous to the first limb of Sec. 300, i.e., an act with the intention of causing death resulting in such death; which is murder. The second limb of Sec.299 branches out into two limbs and corresponds to Secondly and Thirdly of Sec.300, both of which refers to the intention of causing bodily injury. Secondly of Sec.300, where bodily injury is caused with such intention, is coupled with the knowledge of the offender that it would be likely to cause the death of the person on whom the harm is caused. As far as Thirdly of Sec.300, the bodily injury caused with such specific

intention, should be sufficient in the ordinary course of nature to cause death; ie: the injury will most probably and in every probability cause death. Fourthly of Sec.300, takes in the gravest of the offences under the third limb of Sec.299, which is done by a person with the knowledge that such act is so imminently dangerous that it must, in all probability, cause death or such bodily injury, as is likely to cause death; without any excuse for incurring the risk of causing death or such injury, not necessarily to a particular person. Hence what corresponds to the first limb of Sec.299 is firstly of Sec.300 and the second limb of Sec.299 branches out to Secondly and Thirdly under Sec.300. The requirement in these limbs is the intention of the perpetrator of the crime in causing death or such bodily injury, which he knows is likely to cause death or that the injury caused, is sufficient in the ordinary course of nature to cause death. Fourthly of Sec.300 comes within third limb of Sec.299, and also qualifies to be murder. The punishment in these instances is under Sec.302. 'Culpable homicide not amounting to murder', appears under Exception 1 to 5. Though the intention is very much there, there is something; an external force or cause; more overwhelming and compelling, which tends to be the reason for the intention to arise or for harbouring

such an intention. Then the punishment is under the first limb of Sec.304. Wherein also the intention to cause death or bodily injury likely to cause death would be the standard of *mens rea.*

8. **The doubt arises as to what remains to be punished under the second limb of Sec.304. As we noticed, Fourthly of Sec.300 does not encompass the entire gamut of the third limb of Sec.299. What is covered by Fourthly of Sec.300 is the knowledge that the act committed would be so imminently dangerous, that in all probability death would be caused or such bodily injury would be inflicted, as is likely to cause death, and the act is also done without any excuse for incurring the risk of causing death or such injury. This is the most heightened knowledge that the perpetrator has and there is a lot more with lessor ramifications, which still remains under the third limb of Sec.299; which would be punishable under the second limb of Sec.304. It goes without saying that the acts committed under Firstly to Fourthly would be punishable under Sec.302, termed 'culpable homicide of the first degree'. The Exceptions 1 to 5, 'culpable homicide not amounting to murder' is punishable under the first limb of Sec.304; being of the 'second degree'. Any death caused with the knowledge that it is likely to cause death; wherein there**

is no element of the heightened knowledge; of the act being imminently dangerous as to cause death in all probability, is 'culpable homicide of the third degree' punishable under the second limb of Sec. 304.

9. We respectfully notice the judgment of the Hon'ble Supreme Court in *State of AP v. Rayavarapu Punnayya [(1976) 4 SCC 382]*, on which we place reliance for the above interpretation. We extract paragraph 11 to 22 of the aforesaid decision:

> ***"11. The principal question that falls to be considered in this appeal is, whether the offence disclosed by the facts and circumstances established by the prosecution against the respondent, is "murder" or "culpable homicide" not amounting to murder.***
>
> ***12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.***

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done -	*Subject to certain exceptions* culpable homicide is murder if the act by which the death is caused is done -

	INTENTION
(a) With the intention of causing death; or	**(1) With the intention of causing death; or**
(b) With the intention of causing such bodily injury as is *likely* to cause death; or	**(2) With the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or**
	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death; or
	KNOWLEDGE
(c) With the knowledge that the act is *likely* to cause death	**(4) With the knowledge that the act is so *imminently dangerous that if must in all probability cause death* or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.**

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased

heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of "probable" as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant v. State of Kerala (AIR 1966 SC 1874) is an apt illustration of this point.

18. In Virsa Singh v. State of Punjab AIR 1958 SC 465 Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

The aforecited decision was noticed with approval by a recent decision of a three-Judge Bench of the Hon'ble Supreme Court in *Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]*. We find no substance in the argument raised by the learned Counsel for the appellant on Sec.299 and Sec.300.

10. Now we come to the argument raised against Sec.103 and Sec.106 of the Evidence Act juxtaposed with Article 20(3) of the Constitution of India. The law permits the accused to mount the box as a witness in two situations. One, when he expresses his consent in writing to so mounting the box for the sole purpose of disproving the charges made against him under Sec.315 Cr.P.C. Two, when he is an approver; granted pardon under Sec.306 or Sec.307 Cr.P.C. The first situation does not militate against Article 20(3), since it is intended only to disprove the prosecution case and not to incriminate himself and significantly it is a voluntary action without the element of compulsion. Under Sec.306 & 307 Cr.P.C the question of incrimination does not arise, since he has already been granted a pardon. Sec.103 & Sec.106 also, according to us, do not militate against the right guaranteed under Article 20(3), to remain silent or rather not to be compelled to incriminate himself.

11. The maxim *'nemo tenetur prodere seipsum'* is the centrepiece of the traditional account of the history of privilege against self-incrimination as described by John H. Langbein in his essay on 'The Historical Origins of the Privilege Against Self-incrimination at Common Law' appearing in Vol.92 Michigan Law Review:1047. The learned author speaks of the transition from the early trials where the norm was *'the accused speaks'* in defence of himself, without any aid of Counsel, to that of *'the privilege to silence and against self-incrimination'. This privilege,* according to the learned author, is the creation of the defence counsel and an artifact of the adversary system of criminal procedure. The learned author concludes that " … *the core value of the privilege, the accused's right not to speak, presupposes an effective right to have another speak in the accused's stead"(sic).* We need not further delve into the history, since the principle is well entrenched in criminal jurisprudence from the late 18th Century and is given voice in the Constitution of India by Article 20(3).

12. We do not think that the privilege under Article 20 (3), in any manner, affects the principle under Sec.103 and Sec.132 of the Evidence Act. Sec.103 casts the burden of proof as to any particular act on that person

who wishes the Court to believe its existence unless any law provides such proof of fact to lie on any particular person. Sec.132 provides that a witness would not be excused from answering any question concerning a relevant matter in issue, in a civil or criminal proceeding, on the ground that the answer would directly or indirectly tend to criminate such witness; by which the privilege stands removed. The Proviso to Section 132 incorporates the privilege under Article 20(3) and no such answer which directly or indirectly tends to criminate the witness would subject him/her to any arrest or prosecution or be proved against him/her in any criminal proceeding; if there is a compulsion in answering the question.

13. The Hon'ble Supreme Court in *R.Dineshkumar vs. State (2015) 7 SCC 497* quoted with approval from a minority dissenting judgment in *R vs. Gopal Doss ILR (1881) 3 Mad 271* and made the following extract:

> ***"… It seems to me that the legislature in India adopted this principle, repealed the law of privilege, and thereby obviated the necessity for an inquiry as to how the answer to a particular question might criminate a witness, and gave him an indemnity by prohibiting his answer from being used in evidence against him and thus secured the benefit of his answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness when a criminal proceeding is instituted against him. The conclusion I come to is that Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every question***

> ***material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that that answer shall not be admitted in evidence against him in a criminal prosecution." (Gopal Doss case, ILR p. 287 per Muttusami Ayyar, J.)***

Holding that "*The rule against self-incrimination found expression in Indian law much before the advent of the Constitution of India [under Article 20(3)]"(sic-para43) ***Nandini Satpathy vs. P.L.Dani (1978) 2 SCC 424*** **was quoted wherein it was held that "*The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination."(sic).* It was held in *R.Dineshkumar* that:**

> ***"44. The proviso to Section 132 of the Evidence Act is a facet of the rule against self-incrimination and the same is a statutory immunity against self-incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a court".***

14. However, it has to be emphasised that the prohibition or protection does not apply when there is a voluntary deposition made as in the case of an accused offering himself to be examined as a witness; when he

would also have to subject himself to cross-examination. What assumes significance is the compulsion, which element is the crucial aspect both under the proviso to Sec. 132 of the Evidence Act and Art. 20(3) of the Constitution of India. It requires to be stated that such compulsion need only be one arising under the law and a summons issued, would suffice to find that crucial aspect. True an explanation offered would be voluntary and the protection would not be available; which at first blush would appear ambiguous, but not really so on closer scrutiny. Because, a particular fact which is in the sole knowledge of the accused, in the nature of an explanation, is in defence of the accused and not to incriminate him. When the Court concerned with the evaluation of evidence in a criminal case looks for an explanation from the accused, it is never intended to be used against the accused. The explanation is in defence of the accused which, if not offered, tends to be another circumstance in the chain of circumstances pointing to the guilt of the accused; which all the same cannot solely result in a conviction. In the present case, the accused gave an explanation, under Sec.313, for being in Thanjavur, from where he was apprehended. The explanation was that he was informed of the death of his mother, which he could have proved with

the production of the death certificate, without even examining himself; which he failed to do. We find the argument against Sec.103 and 132 of the Evidence Act to be frivolous and on the facts of this case, without any substance.

15. The FIS, Ext.P1 was at 5 p.m of 10.10.2000, by PW1, the victim's husband's brother. The brothers are neighbours and PW1's younger brother, PW2, the husband of the deceased, was residing along with his wife, two children and mother. PW1 was not the first to see the body of the deceased. Another neighbour, Padmini, PW4, when she went to the pond to wash clothes found a bundle of clothes on its banks. Padmini then went to PW2's house and enquired with his mother about his wife. PW2's mother, PW3, along with PW4 went near the pond and raised an alarm. Some neighbouring people gathered and one Sudhakaran stepped into the water and took the body out of the water and placed it on the banks of the pond. The deceased was taken to the Taluk Headquarters Hospital, Irinjalakuda, where she was declared dead. PW1 assumed that the deceased slipped and fell into the water and drowned.

16. PW1 deposed in tune with his statements made to the police. He identified MO-1 chain which he

asserted; his sister-in-law always wore on her neck. In cross-examination, he denied that the deceased died accidentally, contrary to the FIS. We do not find any inconsistency as such since, at the stage of FIS, PW1 was not aware of what exactly happened and what he stated about the cause of death was at best an intelligent guess.

17. PW2 is the husband of the deceased, who went to work at 8.30 a.m. on the fateful day. PW2 saw A1 on his way and A1 gestured that he was going towards the east, in which direction PW2's house was. He spoke of A1 having been engaged for work by him on the fateful day and also that A1 used to frequently come to him for work. PW2 was summoned home in the afternoon and on being informed about the tragedy, he went to the hospital. He spoke of having seen his wife's body and also noticed the absence of the chain. MO1, Mo2, and MO1(a) - the chain, the ring and the locket - were identified. The locket had the name 'Balu' and the date '8.4.90' inscribed therein. In cross-examination, he spoke of A1 having been earlier for 8 to 9 months, regularly engaged on a monthly salary. He asserted that his wife knew swimming. PW3, the mother-in-law spoke of having seen A1 at around 11-12 in the noon. She heard the dog bark and when she inspected, she saw the accused who moved away on seeing her. PW3 also

enquired with the deceased and was told that A1 had asked for PW2 and demanded hundred rupees which she did not give. PW3 and PW4 corroborate each other insofar as both having gone together in search of the deceased, who had gone to the pond to wash her clothes. Nearing the pond, they saw the floating dress of the deceased, upon which they raised an alarm. PW3 specifically said that when the deceased's body was brought ashore, she rubbed the chest of her daughter-in-law and she noticed the absence of the chain. PW3 went near the dock and identified the accused. She spoke of the accused being engaged regularly in her house and even afterwards having come to her house intermittently. In cross-examination, she admitted that the deceased was wearing four bangles when her body was brought ashore. Both PW3 and PW4 stated that the deceased knew swimming. PW4 went to the extent of saying that she has seen the deceased swim and bathe in the pond.

18. PW5 and PW6 were coolie workers who were working near the scene of occurrence. At around 12.00 noon, both of them saw the accused coming from the direction of the pond. Both said that he was looking perplexed and his dress was drenched. The accused asked them the way to Thanissery which the witnesses pointed out. In cross-examination, PW5 repeated that the dress

worn by the accused was wet and not his head. In re-examination, PW5 stated that to reach Thanissery, one could go over the canal bund or through the tar road. The suggestion of the Counsel for the accused that there are many ways to Thanissery was affirmed by the witness. PW6 corroborated the evidence of PW5. But she said that she did not have any acquaintance with the accused.

19. PW7 is an autorickshaw driver. On 10.10.2010 at around 12.45 p.m, the accused got into his autorickshaw to go to Kattoor. He went to a shop at Kattoor and with another, again proceeded to Pulinchodu, where, from the bus stop yet another person also boarded the auto. Three of them, in PW7's auto, reached Welfare Finance, where all of them alighted. After about 10-15 minutes, they came back and gave him Rs.63/- as fare. PW7 identified A1 as the person who travelled in his autorickshaw.

20. PW8 is the Clerk of Welfare Financiers, where MO1 chain was pledged. He spoke of A2 having pledged the ornament which weighed around 10 sovereigns, for which Rupees fifteen thousand was handed over. He identified MO1 and also the accused who was brought to the shop by the police on 13.10.2000. In cross-examination, PW-8 said that there was no 'Thali' on MO1. PW16 saw the recovery of MO1 chain with MO1(a) locket from Welfare Financiers and

witnessed the seizure as evident from Ext.P9 mahazar.

21. PW9 is the Managing Partner of one jewellery from where A1 and A2 purchased two rings. The purchase was made on 10.10.2000 which were identified as MO2 series. The bill was marked as Ext.P3. In cross-examination, PW9 identified the seal on MO2 rings which establish the rings to be those sold from his shop. The bill marked as Ext.P3 was in the name of A2. There was some wordy altercation between A1 and A2, upon which PW9 scolded them and asked them to leave the shop, which was not stated to the police. PW10 runs 'Seiko Times' from which A1 and A2 purchased two watches evidenced by Ext.P4 bill. The purchased items were identified as MO3 series. The watches were said to be duplicate Rado Watches.

22. PW12 is the person who identified A2. He went along with the police party to Pollachi, where A2 was apprehended from the bus stand at 3.30 a.m. One of the rings in MO2 series and one of the watches from MO3 series were recovered from the person of A2 along with the Pawn Ticket issued from Welfare Financiers. The mahazar evidencing the seizure was marked as Ext.P6. A2 informed the police party that A1 had proceeded to Thanjavur and PW12 along with the police party and A2 proceeded there. A2 pointed out A1, who was apprehended. A1 had a plastic

cover with him which contained a shirt, a dhoti, some hundred rupee notes and the bills of purchase of the rings and watches. One of the rings and one watch were also recovered from the person of A1 by mahazar, marked as Ext.P7. PW12 admitted that both the watches were identical and the ones recovered from each of them are not distinguishable or separately identifiable and so were the rings. PW13 is the Sub Inspector who recorded the FIS and registered the FIR, of 'unnatural death'. PW14 is the Sub Inspector who led the police accompanied by PW12 to Pollachi and Thanjavur. His testimony corroborates that of PW12; about the apprehension of the two accused, the recovery of the rings and watches from A1 & A2, the bills of purchase from A1 and the Pawn Ticket from A2.

23. PW15 is the IO, who submitted the final report. PW17 is a Circle Inspector of Police who prepared Ext.P10 report of investigation on the dead body and seized the Material Objects from the body and from nearby, as per Ext.P11 mahazar. He also arrested A1 and A2 at 8 O' Clock on 13.10.2000 when they were brought to the office of the Circle Inspector. He spoke of the recovery of MO1 chain as per the confession of A1, the extract of which was marked as Ext.P12. He also marked Ext.P13, extract of confession, which led to the Jewellery from which MO3

series rings were purchased.

24. The learned Counsel for the appellant argued that there are many inconsistencies in the testimonies of the witnesses; which we are not inclined to accept as having raised a reasonable doubt concerning the occurrence. That, A1 was engaged on the fateful day by PW2 is established through his evidence and PW3, his mother, confirms the presence of A1. It was argued that PW3's statement that a dog barked indicates the presence of a stranger and not that of A1, who was a regular visitor to the house. A1 though a regular, it was very evident that he was engaged for odd jobs by PW2 and for some months regularly too. But that does not lead to any presumption that the dog would not have barked on seeing him. PW3, the deceased and A1 were present at the same time in the property of PW2, where he resides with his family. PW4 is a neighbour and companion of the deceased, who together used to bathe and wash clothes at the pond. The husband of the deceased (PW2), the mother-in-law (PW3) and her regular companion (PW4) asserted that the deceased knew swimming.

25. Both PW3 and PW4 noticed the absence of the chain (thali or mangal sutra) on the dead body being recovered from the pond. The identification of a ring by

PW2 was a mistake committed by the prosecution and it is not significant enough to discredit the witness. PW5 and PW6 are coolie workers who saw A1 proceeding to Thanissery and his clothes were asserted to be wet when they saw him. The appellant argued that PW6 had no prior acquaintance with A1, which is not to say that she could not identify him by sight especially when he was a regular in the locality. It was also urged that if A1 was residing in the locality there was no reason why he should ask for directions to PW5 and PW6. Admittedly there are several pathways to reach Thanissery from the scene of occurrence, as spoken of by PW5 on a specific suggestion made by the defence in cross. PW5 and 6 were working near a canal bund and directions were sought by A1 to proceed to Thanissery over the canal bund and not through the regular tar road. We find no reason to disbelieve the evidence of PW5 and PW6.

26. There is also the compelling testimony of PW7, whose autorickshaw A1 boarded and his deposition that A1 was later joined by A2 and A3. PW7 dropped them at Welfare Financiers, from where the pledged ornament was recovered. PW8 witnessed the pledge being made by A2 accompanied by A1, of a chain he identified as MO1. PW8 said that there was no 'thali'. But PW8 was not the person

who accepted the pledge and the recovery shows a locket and not a 'thali', as conventionally used in Kerala. Ext.P2, Pawn Ticket dated 10.10.2000 describes the pawned ornament to be *'a locket chain with broken hook'.* On the locket, as is evident from Ext. P9 mahazar, the short name of the husband, PW2, and their date of marriage was inscribed; which obviously is the mangal sutra.

27. At this juncture, we have to look at the recovery under Section 27, of the chain. Ext.P12 is said to be the extract of the confession made by A1, according to PW17 I.O. Ext.P12 reads as follows:

> "മാല ഞങ്ങൾ ഏടമുട്ടത്തുള്ള ഒരു കടയിൽ പണയം വെച്ചിട്ടുണ്ട്. എന്നെ കൂട്ടിക്കൊണ്ട് പോയാൽ പണയം വെച്ച കടയും പണയം എടുത്ത ആളെയും കാണിച്ചുതരാം".

A1 confessed the pledge of the chain and agreed to point out the shop and the person who took the pledge. It is argued that this was a joint confession and that the I.O has not deposed the exact words used by the accused. In ***Mohd. Abdul Hafeez (supra)*** the Hon'ble Supreme Court held that '*If evidence, confessional in character is admissible under Section 27 of Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a discovery*

under the information received may be connected to the person giving the information so as to provide incriminating evidence against the person"(sic-para5). **In the present case, the confession was recorded as we saw in Ext. P12 which was marked by the I.O as the confession of A1. When the confession has been recorded and marked, we do not think the I.O is required to further state in deposition the exact words employed; which in any event would be read over from the document. The Hon'ble Supreme Court was dealing with a case in which such confession was not recorded; which document is not seen marked in that case. *Thampi Sebastian (supra)* was a case in which A1 and A2 jointly confessed about the place of concealment of the weapons. Herein, it is not a joint confession since what has been stated by A1 is that jointly the accused pledged the chain. A joint concealment is different from a joint confession. However, a doubt arises in our minds about the recovery, especially from the fact that PW12, a local accompanied the police party to Tamil Nadu for the purpose of identification of A2. It can be reasonably inferred that, on being informed of the death and the theft of the chain, the police made enquiries in the locality which led to the discovery of the pledge. This awareness of the pledge of the ornament in A2's name obviously led to the**

apprehension of A2 and then A1. Here, we reiterate that the locket on the chain which was pledged clearly indicated the ownership by its inscription. In fact, if the evidence were so led, it would have been a sufficient circumstance under Section 8 of the Evidence Act as subsequent conduct, which is a relevant fact; i.e., the pledge of the chain snatched from the body of the deceased.

28. Despite the recovery not being proved, the evidence of PW8 establishes the pledge of MO1 having been made by A2 in the presence of A1. Ext. P9 mahazar though styled as a recovery, which is disbelieved, can be reckoned as a seizure. Immediately thereafter, A1 and A2 together purchased two rings from PW9 and two watches from PW10, again, in the name of A2. The rings MO2 series and the watches MO3 series were recovered, one each from the person of A1 and A2, as attested by the independent witness PW12. The bills of purchase of these MOs were recovered from A1. PW9 and 10 identified A1 having accompanied A2 while the purchase was made. Presumably, with the proceeds of the pledge, A1 and A2 purchased two rings as evidenced from Ext.P3 bill, issued in the name of A2, from PW9 and two watches from PW10, evidenced by Ext.P4 bill. Ext. P4 shows the name 'Balu', which incidentally is also the name of A1. PW10 has clearly

identified the purchasers. Ext.P6 mahazar evidence the recovery of the Pawn Ticket and the ring and watch from A2. Ext.P7 mahazar evidence the seizure of the watch, ring, the bills of purchase of the two rings and two watches and Rs.1000/- from the person of A1.

29. The appellant argued that since the pledge was made by A2, A1 at best was an onlooker and there is a reasonable doubt arising in so far as the culpability of A1, especially for the offence of murder. As held in *Kali Ram v. State of H.P. (1973) 2 SCC 808* "*… As mentioned by us recently in the case of State of Punjab v. Jagir Singh (1974) 3 SCC 227 = 1973 SCC (Cri) 886 a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the*

accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures" (sic-para 25). **The 1st accused being a native of Tamil Nadu eking out his livelihood from odd jobs; none would have accepted the pledge of a very valuable chain, weighing around ten sovereigns, from him. It is hence natural that he approached a local and hence he also had to share the booty with that person, in whose name the ornament was pledged. This act has to be viewed with the evidence establishing the presence of A1 at the scene of occurrence and his flight over the canal bund and the auto, and A2 joining him in the auto.**

30. The circumstances established by the prosecution form an unbroken chain establishing the presence of A1 at the scene of occurrence, his flight over the canal bund, that too in drenched clothes, availing the assistance of a local (A2) to pledge the stolen ornament and having purchased two rings and two watches, one each of which was seized from the person of A1 and A2, on apprehension by the police. A1 and A2 had also fled the locality to the neighbouring State of Tamil Nadu from where they were apprehended. A1 was engaged for the day, as is deposed by PW2. PW3 asserts his presence in front of

their residence. A1 fled from the locality to the neighbouring state and so did A2. A2 has not been seen anywhere near the scene of occurrence, but A1's presence and flight over the canal bund, avoiding the regular tar road, is deposed by PW 5 & 6. A1 was identified by all these witnesses; by PW3, an old lady, after close examination by going near the dock, as recorded in her deposition. A1 has an explanation for leaving his workplace and proceeding to his native place; that he heard of his mother's death, in his Sec. 313 questioning. This could have been easily proved with a death certificate, but no proof was offered. We are of the opinion that the circumstances together unerringly establish the theft of the chain from the body of the deceased by A1. Now what remains is the vexing issue of whether it was an accidental death by drowning or one intentional and forceful.

31. PW11 is the Doctor who conducted the post-mortem. There were 15 abrasions noticed as ante-mortem injuries. Injury number (1) is a vertical abrasion over the front of neck, its upper end to the right of midline and its lower end 2.5 cm above the inner end of the collar bone. Injuries numbers (2) & (3) are also abrasions, the former oblique and directed towards

the left extending from the middle of inner margin of injury No.1 and the latter overlying one-third of the right collar bone. These three injuries, as per the expert opinion, indicate infliction most probably on a forceful snatching of the chain from the neck. The other injuries are on the upper lip (No.4), a contusion on the right of back of right elbow (No.5), abrasion over the front of right wrist (No.6), five abrasions over all the fingers of the right leg (No.7), a lacerated wound on the middle of left leg (No.8), two abrasions one above the other, on the back of left wrist (No.9), an abrasion on the back of left elbow (No.10), one over the outer aspect of left elbow (No.11), another two above the left of back shoulder (No.s 12 & 13) and two more over the left side of the face (no.14 & 15). The opinion as to cause of death was due to drowning and the Doctor, PW 11 specifically opined that if there was drowning, by force applied over the back of head, there would not be any injuries due to the presence of scalp hair.

32. It is stated in Ext.P5, post-mortem report that bone marrow and water samples were reserved for diatom test. The argument that the diatom test was not conducted does not hold any water (no pun intended) since it would not have indicated anything more than the cause

of death by drowning and would have only further confirmed it. Diatom test is an important tool for the diagnosis of death in drowning cases, as the typical features of ante-mortem drowning disappear rapidly with putrefaction. The diatom test cannot differentiate between an accidental drowning and a forceful one. The doctor has clearly opined that the possibility of injuries 1 to 3 occurring due to a fall is very remote and it can be caused due to scuffling and snatching of gold chain. The suggestion in cross-examination that the injuries could have been caused by the floating body coming into contact with hard objects was negatived by the doctor since the injuries noted were all ante-mortem and not post-mortem injuries.

33. The appellant argued that even if the snatching of the gold chain is found to have been done by A1, there is nothing to indicate the drowning having been intentionally caused by him. The worst scenario, according to the learned Counsel, is that in the course of snatching the chain, the deceased fell on the steps leading to the pond and then into the water and drowned accidentally. There is enough evidence to indicate that the pond was deep only at the middle and was on its edges quite shallow, the depth being 98 cms on its edges, as seen from Ext.P11 scene mahazar. PW1 deposed that the pond was

3 feet deep at the place, where one steps into the water. PW2 also said that the pond is shallow on its edges. The said testimonies were not disputed by the accused in cross-examination. PW3 did not in chief-examination say anything about the depth of the pond; but to her, a suggestion was made about the depth of the pond at its middle and not at its edges. PW4 who used to frequent the pond, with the deceased categorically stated that the body was found on the edge where it is not very deep. To a suggestion in cross-examination that the deceased would have drowned accidentally when she slipped on the banks of the pond; it was stoutly denied by PW4 and it was asserted that the pond was deep about 5 to 6 feet towards the middle. PW-11, the doctor has opined that if the victim knew swimming, the possibility of drowning in 98 cm. depth is very remote. That the victim knew swimming is spoken of by her husband (PW2), mother-in-law (PW3) and the neighbour (PW4); the latter who is her regular companion at the pond. Even if the victim fell accidentally into the pond, she could not have hence drowned.

34. The injuries are not that could be caused by a mere fall as opined by the Doctor. In addition to injuries 1 to 3, opined to be caused by the snatching of the chain, there are other abrasions on the face, on the

hands and on the back of the shoulder, from which there can be drawn a reasonable inference that the victim was intentionally and deliberately drowned by A1, as is the charge framed against him. The edges of the pond are not seen to have been paved. A1 found in possession of the chain worn by the deceased had a motive. Being closely acquainted with the accused it is possible of a sure identification, in the event of the victim of chain-snatching being left to live. We hence find that the prosecution has succeeded in bringing home the guilt of A1 on the offences alleged against him. We find no reason to interfere with the impugned judgment, we reject the appeal and we confirm the same in *toto*.

Sd/-
K.Vinod Chandran,
Judge

Sd/-
Ziyad Rahman A.A.,
Judge

vku/-