Supreme Court of India
R. Pandian And Anothera. ... vs State Of Tamil Naduthrough The ... on 21 October, 1997
Author: Pattanaik
Bench: G.N. Ray, G.B. Pattanaik

PETITIONER:
R. PANDIAN AND ANOTHERA. DEIVENDRAN SON OF M. AMMAVASITHEVAR

Vs.

RESPONDENT:
STATE OF TAMIL NADUTHROUGH THE SECRETARY, DEPARTMENT OF HOME

DATE OF JUDGMENT: 21/10/1997

BENCH:
G.N. RAY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr. Justice G.N.Ray Hon'ble Mr. Justice G.B.Pattanaik S. Muralidhar and Ms. Neery Vaid, Advs. for the appellants R. Mohan, Sr. Adv., V.G. Pragasam, Adv. with him for the Respondents J U D G M E N T The following Judgment of the Court was delivered:

with CRIMINAR APPEAL NO.988 OF 1997 (@SPECIAL LEAVE PETITION (CRL.) NO.398 OF 1996) PATTANAIK,J.

Leave granted on both Special leave Petitions. Criminal appeal arising out of Special Leave Petition (Crl). No. 487 of 1996 is by the convict A. Devandran who has been sentenced to death by the learned District and Session Judge, Madurai in Sessions Case No. 91 of 1994 and the said death. sentence has been confirmed by the High Court of Madras in Criminal Appeal No. 717 of 1995. The Criminal Appeal arising out of special Leave Petition (Criminal) No. 3598 of 1996 is by accused R. Pandian and R. Thungamalai who have been convicted under Section 302 and have been sentenced to imprisonment for life by same learned Sessions Judge in the same Session Trial and their conviction and sentence has been upheld by Madras High Court in the aforesaid Criminal Appeal No. 717 of 1995. These three appellants alongwith two others stood charged of several offence under

Section 120B, 148, 449, 302/34 and 326/34. Out of the five accused persons accused Bellaithai was acquitted by the learned Sessions Judge. Accused Mohd. Rafiq was granted pardon by the Chief Judicial Magistrate on 14.11.1994 while the case had already been committed to the court of Sessions and was pending trail before the learned Sessions Judge. He was examined as approver and is PW-1 in the criminal proceedings. The three accused appellants were also convicted under Section 120B, 449, 326/34 IPC and were sentenced to imprisonment for 10 years for conviction under Section 120B, 10 years for conviction under Section 449 and 3 years fro conviction under Section 326/34 IPC. The learned Sessions Judge directed the sentences to run concurrently. All of them, however, were acquitted of the charge under Section 148 IPC. The High Court by the impugned judgment apart from affirming the conviction and sentence under Section 302 IPC, as already stated, affirmed the conviction and sentence under Section 449, 326/34 IPC and 120B.

The prosecution case in nutshell is that accused Devendran had given some monetary assistance to the approver PW-1 while he was ill. After the approver was cured of his illness he was asked to work in the house of Devendran. While he was so working the accused Nos. 2 and 3 came to the house of Devendran and informed him that there was lot of jewels and cash in the house of PW-5 and they could commit robbery in the said house. Accused Devendran, however, respondent that it would not be easy affair to commit dacoity without knowing the topography of the house. At the point of time accused No. 2 replied that his mother who was accused no. 5 has been working in the house of PW-5 for more than ten years and, therefore, it would not be difficult to know the topography of the house from her. Accordingly accused no. 2 went to the house of PW-5 on the direction of accused no. 1 ascertain the topography of the house. The said accused no. 2 then intimated that the inmates of the house of PW-5 will be going out on 24.11.1992 and that would be an ideal occasion for committing robbery. He also intimated that the only way to enter into to the house is through the Chimney. In accordance with a conspiracy thus hatched, on 24.11.1992 accused Devendran gave some conspiracy thus hatched. on 24.11. 1992 accused Devendran gave some money to other accused persons and asked them to the come back after taking tiffin. PW-1 started weeping as he was forced to become a party to commit a robbery. Then under pressure from accused Devendran PW-1 accompanied by other accused persons entered the house through the Chimney. Further prosecution case is that the accused persons while entering into the house of PW-5 to commit robbery took with them a double barrel gun, a pistol, a small knife, a torch light, gloves and some ropes. Thereafter all of them entered into the house through the Chimney by the help of the rope which had been tied upon. After entering the house accused Devendran made some sound and on hearing the said sound an old lady came out of the room through the kitchen. Immediately Devendran twisted her neck while the accused no.3 tied her legs with a rope. PW-1 was asked to stand as a guard. When the lady asked PW-1 to get some water PW-1 went inside but before water could be brought the lady died. The accused persons then entered into the room where another lady was sleeping and accused Devendran strangulated the said lady with a piece of cloth while accused Devendran was strangulating her the 2nd accused was holding her legs and on account of such strangulation the old lady also died. PW- 2 a young girls who was there inside the house then came running but the accused persons threaten her to kill if she makes any sound. Then the accused persons wanted the keys of the house from her and PW-2 gave a particular set of key. Through the help of that key the 2nd and 3rd accused persons opened up a container wherein lot of jewels and cash was there. The accused persons brought out a box and filled the same with the cash and jewels. As they could not

get the keys of other containers they broke open trough a crow-bar and it is at that point of time the blowing of horn of a jeep was heard. PW-2 somehow escaped through the front door to tell her parents, who had gone but, about what has happened in the house. Nagarajan the driver and PW-5 the father of PW-2 rushed into the house and immediately accused Devendran fired at him. Nagarajan sustained the Bullet injuries on his chest and fell down. All the accused persons the took the jewels and cash and then escaped through the staircase. By this time several other people had gathered but nobody could venture to catch hold of the accused persons as they were having the guns and threatened to kill whosoever tries to catch them. The accused persons then went out of the place of occurrence and distributed the ornaments recovered from the house of PW-5 and then dispersed. PW-2 then gave a written complaint to the police which was treated as FIR and police thereupon started investigation. Ultimately after completion of investigation chargesheet was submitted and the learned Magistrate on being satisfied about the existence of prima facie case committed the accused for trail. The case has been committed to the Court of Sessions on 27.1.1994 and while the matter was pending before the learned Sessions Judge an application was foiled for grant of pardon to accused Mohd. Rafiq on 8.8.1994. The learned Sessions 164 of Code of Criminal Procedure on 25.8.1994. The learned Sessions Judge then considered the application for grant of pardon and by order dated 27.10.1994 forwarded the same to the Chief Judicial Magistrate to be dealt with in accordance with law. The Chief Judicial Magistrate finally granted pardon to the said accused Mohd. Rafiq on 14.11.1994 and re-submitted the records to the learned Sessions Judge. Before the learned Sessions Judge the said accused who was granted pardon by the Chief Judicial Magistrate was examined as PW-1 and thereafter the other prosecution witness were examined and finally the learned Sessions Judge by his judgment dated 14th July, 1995, convicted the three accused appellants under different Sections and sentenced them differently as already stated. Accused No. 5, however, was acquitted of the charges levelled against her on a finding that the prosecution failed to establish charges beyond reasonable doubt. Said conviction and sentences passed by the learned Sessions Judge have been upheld by the High Court and thus the appeals. It may be stated here that the prosecution examined as many as 25 witnesses and exhibited large number of documents in support of its case and the defence also examined three witness and exhibited number of documents. Out of the 25 prosecution witness examined in these cases apart from the evidence of PW-1, the approver two other important witnesses are PW-2, the young girl who ran out of the house immediately when the second of the jeep was heard and PW-5 who was injured while entering into the house after hearing the incident from his daughter PW-2. The learned Sessions Judge as well as the High Court relied upon the evidence of the approver PW-1 having held the same to be trustworthy and having come to the conclusion that the approver's evidence gets corroboration in material particulars from the evidence of the doctor and certain recoveries made from the accused persons. The two Courts also believed the evidence of PWs 2 and 5 which establishes the complicity of the three appellants with the commission of the crime.

Mr. Muralidhar. the learned counsel appearing for the appellants attached the evidence of PW-1 on several grounds and submitted that the said evidence of the approver cannot at all be relied upon by the prosecution in support of the prosecution case. According to the learned counsel under Criminal Procedure Code, 1973, the power to grant pardon lies only with the Sessions Judge, once the case is committed to the Court of Sessions, as provided in Section 307 of the Code of Criminal Procedure (hereinafter referred to as the `Code'). Since the Session Judge did not exercise his power and on

the other hand forwarded the matter to be dealt with by the chief Judicial Magistrate and ultimately Chief Judicial Magistrate granted pardon to the accused the said order is without jurisdiction and illegal and as such the accused Rafiq cannot be held to be an approver in the eye of law. The learned counsel further contended that even assuming the order of the Chief Judicial Magistrate granting pardon to the accused can be sustained, but yet non- compliance of Sub-section (4)(a) of Section 306 of the Code vitiates the entire proceedings and consequently the evidence of the approver when he was examined as PW-1 has to be excused from consideration. According to the learned counsel the requirements of Sub-Section (4)(a) of Section 306 is mandatory in nature and confers a valuable right on the accused and non-compliance thereof vitiates the entire proceedings relating to the examination of the approver as witness in the case. He also ***** that if the approver's evidence is examined it would appear that the same is wholly exculpatory in nature and, therefore, no reliance can be placed on the same. The further contention of the learned counsel is that the circumstances under which the accused agreed to become an approver indicated that it was under coercion and threat and not voluntary and on the score the evidence of the approver PW-1 cannot be relied upon. The last argument advanced by Mr. Muralidhar, the learned counsel relating to the reliability of the approver's evidence is, that the said evidence does not get corroboration from any independent materials neither with regard to the identity of the accused persons nor with regard to the role played by them, and as such the approver's evidence must be held to be untrustworthy and should not be acted upon. So far as the other items of evidence relied upon by the prosecution the learned counsel appearing for the appellants urged that after the approver's evidence is excluded from, consideration, on the residuary evidence the charges against the appellants cannot be said to have been established by the prosecution beyond all reasonable doubts and, therefore, the appellants are entitled to acquitted. On the question of award of death sentence on accused Devendran the learned counsel urged that no doubt in course of incident three persons have been alleged to have been killed by said Devendran but the circumstances leading to the death of those three persons as unfolded the prosecution evidence, even if believe in toto do not make out the case to be one of the rarest of rare category justifying imposition of the extreme penalty of death and, therefore, the order of the High Court confirming the death sentence has to be set aside.

Mr. Mohan, the learned senior counsel appearing for the respondent/State on the other hand contended that the very object of granting pardon to one of the accused who agrees to be a witness of the prosecution to unfold the entire incident engrafted under Section 306 and 307 of the Code will frustrated if a technical view of the provisions is taken and, therefore, no prejudice having been caused by the grant of pardon by the Chief Judicial Magistrate the said order cannot be held to be beyond jurisdiction. Mr. Mohan, the learned senior counsel further urged that a Sessions Judge has to the power to delegate his function under the Code to a subordinate office by the virtue of sub-section (3) of Section 10 of the Code and, therefore, the impugned direction of the Sessions Judge calling upon the Chief Judicial Magistrate to deal with the application for grant of pardon in accordance with law cannot be held to be without jurisdiction. The learned counsel also urged that on a plain reading of Section 306 of the Code it appears that the Chef Judicial Magistrate can exercise power to grant pardon even after the committal of the proceedings to the Court of Session which is apparent from the expression `at any stage of the trial' used in Sub-section (1) of Section 306 and, therefore, a combined reading of Section 306 and 307 would indicate that the Sessions Judge and the Chief Judicial Magistrate have concurrent jurisdiction to grant pardon. Judged from

this stand point the order of the Chief Judicial Magistrate granting pardon to accused PW-1 cannot be held to be illegal. So far as non-compliance of Sub- section (4)(a) of Section 306 of the Code is concerned, the learned senior counsel appearing for the State urged that after the case is committed to the Court of Sessions when pardon to an accused is granted under Section 307 the provision of Section 306, and more particularly Sub-Section (4)(a) thereof are not attracted. According to the learned counsel the expression `tender a pardon on the same condition' used in Section 307 is referable to condition engrafted in Sub-section (1) of Section 306 of the Code, namely, a Magistrate may tender pardon to a person on condition of his making a full and true disclosure. The procedural requirements of sub-section (4)(a) of Section 306 cannot be held to be a condition and as such the said provision cannot be attracted to a case where pardon is granted under Section 307 after the case is committed to the Court of Sessions. In support of this contention reliance was placed on the decisions of this Court in : S Naravanaswami vs. Paneer Salvam (1973) 1 SCR 172, Iqbal Singh vs. State (Delhi Administration) Ors. (1978) 2 SCR 174, and a decision of Orissa High Court in State vs. Bigvan Mallik & Ors. (1975) Crl. Law Journal 1937.

The learned counsel further urged that even if it is held that the Chief Judicial Magistrate had no jurisdiction to grant pardon since the case had been committed to the Court of Session yet the said order of the Magistrate is curable under Section 460 (g) of the Code inasmuch as the most it would be case of Magistrate not empowered by law to grant pardon has granted pardon. The leaned counsel also urged that no objection having been taken to the procedure adopted by the Sessions Judge and then to the granting of pardon by the Chief Judicial Magistrate and there have been no failure of justice on the score, the provisions of section 465 of the Code get attached and the conviction and sentence of the accused appellants cannot be reversed. On question of appreciation of the evidence the learned counsel urged that when the learned Sessions Judge and the High Court have appraised the evidence and have accepted the same, it would not appropriate for this Court to enter into the arena of appreciation unless it is established that there has been violation of principles of natural justice or a mis-reading of a vital part of the evidence or the Court have committed and error of law or of the forms of legal process or procedure by which justice itself has filed. Since none of there pre-conditions are satisfied, the learned counsel urged that this Court should not re-appreciate the evidence and record its own conclusion. In support of this contention reliance was placed on the judgment of this Court in the case of Sarvanabhavan and Govindaswamy vs. State of Madras AIR 1966 SC 1278. The learned counsel further urged that the evidence of the approver gets corroborated from other independent sources to the material particulars of the approver's evidence and such corroboration makes the approver's trustworthy and reliable. According to the learned counsel the medical evidence relating to the death of three persons and the injuries of PW-5, the statement of the investigating officer as to what he found immediately after the occurrence when he reached the place of occurrence, the recovery of Mahaja exhibit P-29, the evidence of PW-2 who was in the house at the time of occurrence and the lodging of FIR immediately after the occurrence as well as the recoveries made from different accused persons and further the evidence of the ballistic expert PW-25 fully corroborate the evidence of the approver PW-1 and as such the Courts below rightly relied upon the evidence of the said approver. The learned counsel also urged that the murder of 3 persons and robbery committed by the accused constitute an integral part of same transaction and, therefore, the possession of stolen or named by the accused would establish that the accused committed both murder and robbery and the presumption would arise under Section

114 of the Evidence Act. The learned counsel also urged that even excluding the evidence of the approver the conviction of the appellants can well be sustained on the residuary evidence of PWs 2 and 5 and other recoveries made from the accused persons. Lastly on the question of death sentence on appellant Devendran the learned counsel urged that the manner in which said accused mercilessly killed two ladies and then shot at the man who entered inside the house indicate the action to be of depraved mind and in the absence of any mitigating circumstances the case would be one coming within the category of rarest of rare case and as such imposition of death sentence is wholly justified. In support of this reliance has been placed on the decision of this Court in Sevaka Perumal vs. State of Tamil Nadu (1991) 3 SCC 471 and Shankar @ Gaurishankar & Ors. Vs. State of Tamil Nadu (1994) 4 SCC 478.

In view of the rival submission, the first question that arises for consideration is whether the approver's evidence can at all be relied upon to bring home the charge against the accused persons? It si no doubt true that the very objected of granting pardon to an accused is to unfold the truth in grave offence so that other accused persons involved in the offence could be brought home with the aid of the evidence of the approver. But all the same the legislative mandates as well as the safeguards enshrined in the provisions of the Code for the accused cannot be given a go by merely because of gravity of the offence. With his backgrounds in mind it would be necessary to examine the provision of the Code for testing the correctness of the rival submission. Coming now the question as to whether the Chief Judicial Magistrate could have at all granted pardon to the accused even after the committal of the proceedings to the Court of Sessions, the same would depend upon the interpretation of Section 306 and 307 of the Code. A combined reading of Section 306 and 307 of the Code. A combined reading of the aforesaid two provision would indicate that under Section 306 power has been conferred upon the Chief Judicial Magistrate or a Metropolitan Magistrate as well as the Magistrate of the First Class to tender pardon to a person on condition of his making a full and true disclosure of whole of the circumstances within his knowledge relating to the offence. The only distinction between the two sets of Magistrate for exercise of their power lies at the stage when the power can be exercised. While a Magistrate of the First Class can exercise the power while enquiring into or trying the offence in question, the Chief Judicial Magistrate or a Metropolitan Magistrate can exercise the power at any stage of investigation or enquiry into or trail of the offence which they themselves may not be trying. But under Section 307 the power has been conferred upon the Court to which the commitment is made to grant pardon. In other words once a proceeding is committed to a Court of Session then only the said Court can exercise power to tender pardon to an accused. Section 307 of the Code corresponds to Section 338 of Criminal Procedure Code, 1878, If the two provisions are examined in justaposition it would be clear that while under Section 338 of the old Code after commitment is made the Court to an accused or could order the committing Magistrate or the District Magistrate to tender pardon, but under Section 307 of the Code of 1973 the Court to whom commitment is made, no longer retains the power to order the committing Magistrate or the District Magistrate to tender pardon. In other words under Section 307 of the present Code after commitment of a case the only Court which can tender pardon is the Court to which the commitment has been made. It would be appropriate at this state of extract Section 338 of the old Code and the corresponding provisions of Section 307 of the new Code:-

> "338. Power to direct tender of pardon. - At any time after commitment, but before judgment is passed, the Court to which to the commitment is made may. with the view of obtaining on the trail the evidence of any person supposed to have been directly or indirectly concerned in, or privy, to any, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same conditions to such persons."
>
> "307. Power to direct tender of pardon. -At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trail the evidence of any person supposed to have been directly or indirectly concerned in, or privy to any such offence, tender a pardon on the same condition to such person."

In view of the aforesaid change in the provisions it is difficult for us to accept the contention of the learned counsel appearing for the State of even under Section 307 after commitment of a case a Chief Judicial Magistrate retains the power to grant pardon. It may not be out of place to notice the recommendation of the Law Commission in its 41 st Report in paragraph 24.23 "24.23. Under Section 338, the Court of Session may at any time after commitment of the case, but before passing judgment either tender pardon itself, or may "order the committing Magistrate or the District Magistrate" to tender pardon. Though this power is rarely resorted to by a Court of Session, it will be useful to retain the section. But in view of the abolition of the commitment proceedings the Court of Session need not be authorised to direct "the committing Magistrate" or any other Magistrate to tender pardon.

The section may be revised to read as follows:-

"338. At any time after commitment of a case but before judgment is passed, the Court of Session may, with the view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any such offence, tender a pardon on the same condition to such person."

The aforesaid Section has now taken the place of Section 307 in the new Code. This indicates that in the changed circumstances the legislatures thought it necessary to delete the expression "or order the committing Magistrate or the District Magistrate to tender a pardon" from Section 307 of the present Code which was there in Section 338 of the previous Code. On a plain reading of the provision contained in Section 306 and 307 of the Code and on examining the changes that have been brought about by the legislature from the corresponding provisions of the old Code, the conclusion is irresistible that under the new Procedure Code of 1973 once a case is committed to the Court of Sessions then it is only that Court to which the proceedings have been committed can tender pardon to a person and the Chief Judicial Magistrate cannot be said to have concurrent jurisdiction for tendering pardon.

It would be necessary in this context to examine the contention raised by Mr. Mohan, learned counsel appearing for the Court to whom commitment has been made could exercise power under

Sub-section (3) of Section 10 of the Code of Criminal Procedure and, therefore, could direct a Chief Juridical Magistrate to deal with the question of tender of pardon notwithstanding the deletion of the said power in Section 307 of the Code. The aforesaid contention though prima facie looks attractive but does not sustain a deeper scrutiny. Section 10(3) of the Code may be extracted for better appreciation of the point in question.:-

> "The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application."

A plain reading of the aforesaid provisions indicate that a Sessions Judge has been empowered to make provision for disposal of any urgent application in certain contingencies by requiring an Additional or Assistant Sessions Judge or in their absence the Chief Judicial Magistrate to deal with an application which otherwise would have been dealt with by the Sessions Judge. The power can be exercised when the Sessions Judge himself is absent or is unable to act. The again Chief Judicial Magistrate can be required to act under this sub-section not merely when the Sessions Judge himself is absent or unable to act but also when there is no Additional or Assistant Sessions Judge. In the case in hand there is no an iota of material to indicate that the pre-conditions for exercise of power under-section (3) of Section 10 of the Code were satisfied or that in fact the Sessions Judge exercised his power under sub-section (3) of Section 10. In this view of the matter, the order of the Sessions Judge dated 27.10.1994 in forwarding the application for grant of pardon to the Chief Juridical Magistrate as well as order of the Chief Juridical Magistrate dated 14.11.1994 granting pardon to the accused who was examined as PW-1 is not sustainable in law. It would also be appropriate to deal with submission of Mr. Mohan appearing for the respondent that the expression `trial' in Section 306(1) would mean trial of an offence triable by the court of session and as such a Metropolitan Magistrate or the Chief Judicial Magistrate may tender a pardon to a person even after the commitment of the case to the court of session during the course of trial by the sessions judge. WE are unable to accept this contention of the learned counsel as in our view the plain and unambiguous language of Section 307 of the Code makes it explicitly clear that after the commitment of a case the power to tender pardon lies, under the Code, with the court to which the commitment is made and not with any other magistrate including the Chief Judicial Magistrate. Once a commitment is made the committing magistrate no longer retains jurisdiction over the proceedings and that apart the unambiguous language of Section 307 of the Code does not confer such power on a magistrate to tender pardon after a case is committed to the court of session. The expression `trial' used in sub-section (1) of Section 306 would, therefore, covey the meaning those cases which are triable either by a magistrate or the chief judicial magistrate. In other words, in respect of those cases which are triable by a magistrate, while the magistrate of First Class inquiring into or trying the offence can tender pardon at any stage of inquiry or trial, the Chief Juridical Magistrate can tender pardon at any state of investigation, or inquiring into or the trial. Further a magistrate First Class who is in session of the case can tender pardon in course of inquiry or trail of the said case while the Chief Juridical Magistrate or Metropolitan Magistrate can tender pardon even though the trial is pending before another First Class Magistrate. But buy no stretch of imagination it can be construed that under Section 306(1) of the code a Chief Juridical Magistrate or

Metropolitan Magistrate has a power to grant pardon even after the commitment of the proceeding to the court of sessions.

At this stage we think it appropriate to notice another submission of Mr. Mohan appearing for the respondent that the order of the Chief Judicial Magistrate tendering pardon can at the most be in irregularity curable under Section 460(g) of the Code and is not null and void. Section 460, not doubt cures the irregularity specified in the Section if it is committed by a Magistrate not empowered by the law provided he committed irregularity erroneously in good faith. Clause (g) relates to tender pardon under Section

306. It would, therefore, appear that a Magistrate who was not empowered under Section 306 to tender pardon but actually tenders pardon in good faith erroneously then such an irregularity would be curable. Section 460 can have no reference to an act of a Magistrate who is empowered under Section 306 but does not possess the jurisdiction after an order of commitment is passed. Their Chief Judicial Magistrate no doubt was authorised under Section 306 of the Code to tender pardon in course of an investigation, inquiry or trial before the committal of the proceedings to the court of sessions. But after commitment of the proceedings he does not have jurisdiction to grant pardon and in such a case if the said Chief Judicial Magistrate tenders pardon then that would not be a curable irregularity within the ambit of clause (g) of Section 460 of the Code. The conclusion of ours is further strengthen from the fact that under the 1898 Code, the corresponding provisions to Section 460 (g) of the 1973 Code was Section 529(g). In the said provisions it was specifically stated that if any Magistrate not empowered by law to tender pardon under Section 337 or 338 the same would not vitiate the proceedings. But under Section 460(g) of the new Code the legislatures have omitted Section 307 which is corresponding to Section 338, and therefore, such irregularity committed by the Magistrate cannot be said to be a curable irregularity under clauses

(g) of Section 460.

The next question that arises for consideration is as to whether non-examination of the approver as a witness after grant of pardon and thereby non-compliance of sub- section 4(a) of Section 306 vitiates the entire proceeding. In the case in hand there is no dispute that after the Chief Judicial Magistrate granted pardon to the accused he was not-examined immediately after the grant of pardon and was only examined once by the learned Sessions Judge in course of trial. The question that arises for consideration is : when an accused is granted pardon after the case is committed to court of sessions would it be necessary to comply with sub-section (4)(a) of Section 306 of the Code. The contention of Mr. Mohan, the learned counsel appearing for the State in this connection is that Section 307 merely mandates that pardon should be tendered on the same condition and such condition obviously refers the condition indicated in sub-section (1) of Section 306, namely on the accused making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. According to the learned counsel sub-section (4) of Section 306 is not a condition for tendering pardon but is merely a procedure which has to be followed when a person is tendered pardon by a Magistrate in exercise of power under Section 306. Since after a case committed to the court of session pardon is tendered by the court to whom the commitment is

made, it would not be necessary for such court of comply with sub- section (4)(a) of Section 306. Mr. Murlidhar, the learned counsel appearing for the appellants on the other hand contended, that the objects and purpose engrafted in clause

(a) of sub-section (4) of Section 306 is to provide a safeguard to the accused who can cross-examine even at the preliminary stage on knowing the evidence of the approver against him and can impeach the said testimony when the approver is examined in court during trial, if any contradictions or improvements are made by him. The right of the accused cannot be denied to him merely because pardon is tendered after the proceeding is committed to the court of sessions.

The correctness of the rival submission again would depend upon true interpretation of Section 306 and 307 of the Code. Under Section 307 when pardon is tendered after commitment has been made the legislative mandate is that the pardon would be tendered on the same condition. The expression "on the same condition" obviously refers to the condition of tendering a pardon engrafted in Sub-section (1) of Section 306, the said condition being the person concerned on making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Sub-section (4) of Section 306 cannot be held to be a condition for tendering pardon. A combined reading of Sub- section (4) of Section 306 and Section 307 would make it clear that in a case exclusively triable by the Sessions Court if an accused is tendered pardon and is taken as an approver before commitment then compliance of sub-section (4) of Section 306 becomes mandatory and non-compliance of such mandatory requirements would vitiate the proceedings but if an accused is tendered pardon after the commitment by the Court to which the proceedings is committed in exercise of powers under Section 307 then in such a case the provision of Sub-section (4) of Section 306 are not attracted. The procedural requirement under Sub-Section (4)(a) of Section 306 to examine the accused after tendering pardon cannot be held to be a condition of grant of pardon. The case of Suresh Chandra Bhari etc. vs. State of Bihar 1995 Supp. (1) Supreme Court Cases 80, on which the learned counsel for the appellants strongly relied upon deals with a case where pardon had been tendered to an accused before the commitment proceedings and the question was whether non- compliance of Sub-section (4)(a) of Section 306 would vitiate the trial. The Court held that the provision contained in Clause (a) of Sub-section (4) of Section 306 is of mandatory nature and, therefore, non-compliance of the same would render an order of commitment illegal. It is no doubt true, as contended by Mr. Muralidhar the learned counsel appearing for the appellants, that the procedure indicated in sub-section (4)(a) of Section 306 is intended to provide a safeguard to an accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and thereby accused becomes aware of the evidence against him and further such evidence of an approver can be ultimately shown as untrustworthy during the trial when the said approver makes any contradictions or improvements of his earlier version. But still when the legislature in Section 307 have made specific reference to only on "such conditions" and not to the other procedures in Section 306 it would not be a rule of interpretation to hold that even Sub-section (4)(a) of Section 306 would also be applicable in such a case.

The decisions of this Court in the case of Iqbal Singh vs. State (Delhi Administration) & Ors. 1978 (2) Supreme Court Reports, 174, supports our conclusion, as aforesaid, to a great extent. In this said

case under the Criminal Procedure Code, 1878 the question for consideration was that when pardon had been tendered to a person at the stage of investigation under Section 337(1) of the Code then a Special Judge who had the power to take cognisance of offence offence under Section 8(1) of the Criminal Law Amendment Act 1952 would have no jurisdiction to take cognisance and, therefore, charge sheet has to be filed before a Magistrate. This contention had been advanced because of Sub-section (2)(B) of Section 337 of the Code of Criminal Procedure 1898. A contention has been advanced in the said case that if a Magistrate takes cognisance of the offence the approver will have to be examined as a witness twice, once in the Court of the Magistrate and again in the Court of Special Judge to whom the Magistrate sends the case for trial but on the other hand if charge sheet is filed in the Court of Special Judge itself then the approver is ***** only once and this is discriminatory. This Court repelled ***** ******* advanced on behalf of the accused and held : "It is clear from the scheme of Section 337 that what is required is that a person who accepts a tender of pardon must be examined as a witness at the different st ages of the proceedings. Where, however, a Special Judge takes cognizance of the case, the occasion for examing the approver as a witness arises only once. It is true that in such a case there would be no previous evidence of the approver against which his evidence at the trail could be tested, which would have been available to the accused had the proceedings, be initiated in the court of a Magistrate who under sub-section (2B) of section 337 of the Code is required to send the case for trial to the special Judge after examing the approver. But we do not find anything in sub-section (2B) of Section 337 to suggest that it affect s in any way the jurisdiction of the Special Judge to take cognizance of an offence without the accused being committed to him for trial. Sub-section (2B) was inserted in section 337 in 1955 by Amendment Act 26 of 1995. If by enacting sub- section (2B) in 1995 the legislature sought to curb the power given to the Special Judge by section 8(1) of the Criminal Law Amendment Act, 1952, there is no reason why the legislature should not have expressed its intention clearly. Also, the fact that the approver's evidence cannot be tested against any previous statement does not seem to us to make any material difference to the detriment of the accused transgressing Article 14 of the Constitution. The special Judge in any case will have to apply the well established tests for the appreciation of the accomplice's evidence."

In this view of the matter in the case in hand, admittedly having been tendered after the case was committed to the Court of Session question of compliance of Sub- section (4)(a) of Section 306 does not arise and on that score no invalidity is attached to the statement of the approver.

A contention had been raised by Mr. Muralidhar, learned counsel appearing for the appellants to the effect that statement of the approver being exculpatory in nature and his entire statement having revealed that he was merely a bystander and was compelled to do something at the behest of accused Devendran, the said evidence of the approver should be rejected. In support of such competition reliance has been placed on the decisions of this Court in the case of Ravinder Singh vs. State of Haryana (1975) 3 SCC 742, State of Punjab vs. Raj Kumar (1989) 1 SCC 696, Rampal Pithwa Rahidas vs. state of Maharashtra 1994 Supp. (2) SCC 73. In Ravindran's case this Court has observed that :

> An approver is a most unworthy friend, if at all, and he having bargained for his immunity, must prove his worthiness for credibility in Court. This test is fulfilled,

firstly if the story he related involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. Secondly, once that hurdle is crossed, the story given by the approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt." In Raj Kumar's case this Court held:-

"He evidence has been read by the counsel for the parties before us and his evidence clearly indicates that he attempted to suggested that he did nothing. Neither he stated that he participated in looting nor in injuring or attacking the deceased. Reading t this evidence clearly indicates that he has claimed to be a spectator at ever movement but has not participated at any stage. Apart from it the initial story appears also to be unnatural as according to him, he did not know anyone of these accused persons but a month before the incident they took him into confidence and told him to join them. After reading the evidence of the witness as whole apparently the impression created is that the version does not appear to be a natural version. In this view of the matter, in our opinion, the testimony is not such which inspires confidence."

In Rampal Pithwa's case this Court observed:-

"From all the attendant circumstances, we are satisfied that the approver Ramcharan is not a reliable witness; his arrest was intrinsically unnatural and his self-confessed participation in the crime without taking any active part in it is unacceptable. The approver has claimed to be a spectator of every fact and of every moment but asserted that he did not participate in the assault at any stage and remained at a distance taking care of the clothes of some of the co-accused. His statement is almost of an exculpatory nature. His statement as a whole does not inspire confidence. His story is not worth of credence. We find ourselves unable to place any reliance on his untrustworthy and unreliable evidence."

All these aforesaid three cases deal with the question as to what extent a Court can rely upon the evidence of an approver. Whether the evidence of an approver can be relied upon by a Court would depend upon the facts and circumstances of the case. As has been indicated by this Court in the case of Suresh Chandra (supra) that when heinous crime is committed in a manner leaving no clue or any trace is available for its detection, pardon is granted to one of the accused persons for apprehending other offenders and for production of the evidence which other is unobtainable. This Court held :-

"The dominant object being that the offenders of the and grave offences do not go unpunished, the Legislature in its wisdom considered it necessary to introduce Section 306 and confine its operation to cases mentioned in it. The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of

evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does no implicate himself to the same ex tent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to involved directly or indirectly in or privy to an offence."

Bearing in mind the aforesaid principle and on going through the evidence of the approver we are not in a position to hold that the said evidence is entirely of exculpatory nature. The approver's evidence indicates that he did participate in the crime though under persuation and threat of other persons but in the matter of killing three persons only accused Devendran played the major role. Yet the statement of the approver cannot be held to be of purely of exculpatory nature and on that score the evidence ****** be excluded from consideration, particularly when he indicated in his evidence that he brought a bicycle from a cycle shop took accused no, 2 on the cycle and then took accused no. 3 on the cycle to the place of occurrence, climbed up and reached the chimney of the house. tied the rope to the bricks of the chimney through which he alongwith others got down, room the first victim, a woman, to the next room, went away through the first floor of the house carrying jewels which they had collected and received two golden bangles. These acts on the part of the approver indicate that he participated in the commission of the offence though not to the same extent as accused Devendran and as such, the statement cannot be aside to be exculpatory nature. Mr. Muralidhar, learned counsel appearing for the appellants further contended that the approver's evidence at any rate has not been corroborated in the material particulars from any independent source connecting each of the accused persons, and therefore, the said evidence cannot relied upon. There cannot be any dispute with tie proposition that ordinarily an approver's statement has to be corroborated in material particulars. Certain clinching features of involvement disclosed directly to an accused by a approver must be tested qua ea ch accused from independent credible evidence and on being satisfied the evidence of an approver can be accepted. What is the extent of corroboration that is required before the acceptance of the evidence of the approver would depend upon the facts and circumstances of the case. The corroboration required, however, must be in material particular connecting each of the accused with the offence. In other words the evidence of the approver implicating several accused persons in commission of the offence could not only be corroborated generally but also qua each accused. But that does not mean that there should be independent corroboration of every particular circumstances from and independent source. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true. Corroboration also could be both by direct or circumstantial evidence. (see Ramanlal Mohanlal Pandava vs. The State of Bomaby-AIR 1960 SC 961: Tribhuvan Nath vs. The State of Maharashtra - AIR 1973 SC 450; Swaran Singh vs. The State of Punjab - 1957 Supreme Court Reports 953; Ram Narain vs. State of Rajasthan (1973) 3 Supreme Court Cases 805; and Balwant Kaur vs. Union Territory of Chandigarh - 1988 (1) Supreme Court Cases 1) But we need not examine this question in greater detail to find whether the evidence of the approver gets corroboration from any other evidence since in view of our interpretation of the provision of Section 306 and 307 of the Code and in view of our conclusion that after commitment of the proceedings the Session Judge had no power to remit the matter for grant of pardon to the Chief Judicial Magistrate and the order of the Chief Judicial Magistrate tendering pardon is without jurisdiction not curable under Section 460 (g) of the Code, the evidence of the approver cannot be relied upon by the prosecution in the present case.

We may notice the arguments advanced by Mr. Mohan. learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been failure of justice. WE are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trail already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code. In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does not posses any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief, Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. The aforesaid provision cannot be applied to a patent defect of jurisdiction. The again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been failure of justice. It is a case of total lack of jurisdiction, and consequently the follow up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all. In this view of the matter the contention of Mr. Mohan, leaned counsel appearing for the State in this regard has to be rejected.

The next question which requires consideration, therefore, is excluding evidence of the approver from consideration whether prosecution case can be held to be proved beyond reasonable doubt?.

The other evidence pressed into service by the prosecution is the evidence of PW2, PW3, PW4 and PW5 and the recovery of stolen articles belonging to PW4 from different accused persons and identification of those article by PW 4. That apart certain incriminating material recovered on the basis of information given by the accused while in custody have been pressed into service by the persecution for establishing the charge beyond resonable doubt. PW2 is the girl whose marriage ceremony was to be performed and it is for her marriage parents had gone to Madurai for purchase of marriage article. According to her evidence she was sleeping in the Puja room whereas the two decreased grand-mothers were sleeping in the hall. It was about 2.30 a.m. on 24.11.1992 she heard some sound and so she went to her senior grand-mother but the grand-mother asked her not to worry as junior grand-mother went to observe and advised her to sleep. Sometime thereafter she heard some galloping and so when woke up, she then found that 4 outsiders are there and two of

them were strangulating the senior grand-mother. She further found that two others gagged the junior grand- mother and then they threatened PW2 that if she raises any alarm she will be shot. According to he all the accused persons were wearing masks and one of them was holding rifle MO-1. The second accused was holding a pistol and the third one holing a rod while the fourth one was holding a bag. It is the further evidence that when they demanded the key she replied that she does no possess the same and the grand-mother might be having it. The accused persons then removed the key from the bag of the grand-mother and then opened the bureau and removed cash and jewels from the blue colour box. She also stated that she herself gave out the chain, locket, the pair of gold rings to the accused persons. At that point of time she heard the noise of the jeep and so she ran away towards the front gate. Seeing her father she told that dacoits are inside and warned her father not to go in but the driver Nagarajan and her father PW5 went inside the house and they were followed by her brother and Mohan. While she stayed outside when head the sound of firing of rifle and she saw her father coming out bleeding. Thereafter her elder brother and neighour Mohan came and informed that two grand-mothers as well as driver nagarajan have died. This evidence of PW2 establishes the fact of dacoity having been committed in the house and the fact of murder of her two grand-mothers by way of strangulation by four accused persons throught the witness is unable to identify as to which of the accused person strangulated the elder grand-mother and which of the accused person strangulated the younger grand-mother. She has been cross-examined at great length by the accused persons but we do not find anything that has been brought about in cross examination to impeach the veracity of her statement. She being an inmate of the house and being present at the time of the commission of the offence had the full opportunity to notice the manner in which the incident occurred and vide account of the same has been given by her. Since the accused persons were not known to her she has not been able to identify which of the accused person strangulated the senior grand-mother and which of the accused person strangulated the junior grand-mother. PW3 had gone with his father to Madurai for making some marriage purchases. According to him they reached the village at about 2.00 a.m. and hardly they had gone inside after getting down from the jeep his sister PW2 ran out of the house and intimated them not to go inside as thieven are there. But notwithstanding such warning the driver Nagarajan followed by his father went inside the house and he followed them. It was at that time he heard the blasting sound of the revolver and Nagarajan came and fell down in the hall. His father PW5 also sustained an injury and he came out by holding his chest. He then found both his grand-mothers lying dead and further found driver Nagarajan lying dead in the main hall. He also found Almiriahs to be kept open. So he came out and told PW2 about the entire incident. His evidence establishes the commission of offence of robbery in the house and three people found dead in the house one of whom on account of gun shot but neither he had seen the actual assault given by anyone of the accused persons on any of the decreased nor had seen the very presence of the accused persons in the house. But all the same, his evidence corroborates the evidence of PW4 that was grand-mothers were found dead inside the house and it further establishes that the driver Nagarajan who entered into the house after getting down from the jeep was shot at by the accused persons and ultimately he died on account of such gun shot injury. PW 4 is the mother of PW2 who had gone to Madurai for the marriage shopping. She corroborates the evidence of PW3 to the effect that her daughter PW2 came running from the house as soon as the jeep reached the house and warned them from entering into the house as thieves are there inside. While she was standing outside with her daughter PW2, the driver Nagarajan and her husband PW5 as well as the son PW3 entered inside the house and at that point

of time sound of gun blast was heard from inside the house. It is further evidence that she found her husband coming out of the house holding his chest and she was tole that the thieves haves shot at him. While she was holding her husband who had been injured and was preparing to take her husband to the hospital she was informed about the death of the two ladies as well as the death of the driver Nagarajan. She was also able to identify the ornaments which were recovered from the possession of the accused persons. He evidence, therefore, establishes the fact of commission of offence in the house but she had not sen the assailants who are responsible for the death of two old ladies as well as the death of driver Nagarajan.

PW5 is the owner of the house who had gone to Madurai for marriage shopping. He states in his evidence that when they were getting down from the jeep at about 2.00 a.m. his daughter Priya came running from inside the house and stated "Daddy thieves are committing theft in the house. They have snatched the jewels from me by tying may hands forcibly." he then attempted to go inside the house to find out what has happened but his driver Nagarajan ahead and his wife and daughter prevented him from going inside. He however, could not resist and rushed inside the house following Nagarajan and then switched on the light one the southern side. Hardly he attempted to proceed to the room where his mother was sleeping gun shoot sound was heard and then Nagarajan's shout that he had been shot. While he was proceeding towards Nagarajan he also received gun shot injury. Then he came back to the jeep where he found his wife and son and then he was carried go the Government hospital at Cumbum. There at Cumbum hospital he was advised to go to madurai and so he was taken to Madurai and was admitted in the Meenakshi Mission Hospital. Doctors at Meenakshi Mission Hospital and tole him that bullets are there inside in a dangerous area near the heart and it cannot be operated upon their at Madurai. So he was taken to G. Kuppusamy Hospital at Coimbatore and there bullets were removed by operating upon him. While he was in Meenakshi Mission Hospital at Madurai he had been examined b the Police and he had narrated the occurrence to the Police. His evidence, therefore, establish, the fact that on the fateful night while he was trying to get into the house to find out what all has been stolen and what incident had happened right in his front his driver Nagarajan received the gun shot injury and then he also received the bullet injury which could be removed only in the Hospital at Coimbatore. In addition to the aforesaid evidence of the four inmates of the house with regard to the occurrence in question, the evidence of the Investigating Officer PW-25 who at the relevant time was the Inspector of Police Chinnamannur Circle clearly indicates that on reaching the place of occurrence he found the dead bodies of two ladies as well as the dead body of the deceased Nagarajan and the prepared the Inquest Report in respect of the three dead bodies. He also made some seizure from the place of occurrence and then examined the witness and recorded their statements under Section 161 Cr.P.C. The post mortem examination conducted by Dr. N. Manimohan PW-10 on the body of Saraswati Ammal clearly indicated that she died due to strangulation and gagging, Similarly the evidence of Dr. R. Anandan PW-11 who had conducted the post mortem examination on the dead body of Deivammal the other lady establishes the fact that she died due to strangulation of the neck and smothering. This evidence fully corroborates the evidence of PW-2 the young girl that two of her grand- mothers were strangulated by the accused persons. The evidence of PW-9 the Assistant Medical Officer, Government Hospital, Cumbum who had conducted the post mortem examination on the dead body of Nagarajan clearly indicates that said Nagarajan died on account of injuries sustained by the shooting of revolver which fact corroborates the evidence of PW-5 to the fact that

while Nagarajan was proceeding inside the house he received the bullet injury but of course, he has not been able to see the assailants. From the aforesaid prosecution evidence it si clearly established that on the relevant date of occurrence at mid- night four persons entered into the house of PW-5, one of them strangulated two ladies while other persons were holding or gagging those ladies and then received the key by show of force and opening the Almiriah, took away the valuables and also snatched ornaments from the person of PW- 2 and finally when the owner of the house PW-5 arrived from Madhurai and his driver Nagarajan rushed into the house he was shot dead and PW-5 who was closely following also received bullet injuries which could be removed only by operating at the Hospital at Coimbatore.

Let us now examine the recovered of the ornaments and other incriminating materials from different accused persons which have been identified by the inmates of the house to belong to them.

The pistol MO-2 was lying in front of the house of PW- 20 and was seized under Mazahar Exhibit P-30 the trigger of the pistol had been welded with bras powder. PW-7 in his evidence stated the he knew accused Devendran. It is he who had brought one pistol and requested him to weld the trigger and said PW-7 had done the welding and thereafter Devendran had taken away the pistol giving him Rs.15/-. He also identified the portion of MO2 stating that it is this welding he had done on the pistol. In his cross-examination he categorically stated that he had been able to identify the pistol by seeing welded part of the trigger of the pistol. During search of the house of accused Devendran on 26.11.1992 pellets MO75 series, Ball beareaus (Paulrus pellets), empty cartridges MO 78, paper corks of bullet cartridges MO 93, empty cartridges MO 79 which could be used in 12 bore gun were all seized under Exhibit P-31. The prosecution has further been able to establish that the pellet which was removed from the body of PW-5 are similar in size as pellets MO 72 series recovered from the house of acccused Devendran. It was further established MO 78 seized from the house of accused Devendran as well as empty cartridges seized under Mazahar 28 are similar in nature. The Ballistic expert PW-24 in his evidence stated that while conducting test on the pistol with dummy rounds he observed the similarity of the marking of the earlier firing and the ultimately came to the conclusion that MO 79 empty cartridges must have been fired by using the pistol MO 2. The report of the ballistic expert is Exhibit P24. MO-2 was seized under Mazahar Exhibit P37 on the basis of the statement made by accused Devendran while in custody. The aforesaid evidence unequivocally indicated that the pistol which was used for shooting driver Nagarajan and injured PW- 5 was the pistol belonging to the accused Devendran and the empty cartridges recover from the house of Devendras also corroborates to the aforesaid conclusion. The jewellery belonging to the informant were re covered on the basis of the statement of accused Devendras are MOs 16 to 12, MOs 24 to 28 and MOs 30 to 59. PW 4 not only identified those jewellery but also stated theat these ornaments had been taken away by the culprits from her house. Similarly jewels MOs 13, 14 and 15 were seized from accused no. 3 which the culprits had snatched from PW2 and MO 29 was seized from accused no. 2 under Mazahar Exhibit P 35 and PW4 identified the same to belong to the family and had been stolen in the course of dacoity. The question for consideration would be whether the recoveries of the jewelleries belonging to PW-5 from different accused persons at their instance while in custody and the recovery of some of the weapons of assault from the house of different accused persons would be sufficient to arrive at a conclusion that it is these accused persons who are the perpetrators of the murders which took place in the house of PW-5 on the fateful night and it is these accused

persons who committed murder as well as dacoity in the house and left the place with the booty. This conclusion can be arrived at only by taking recourse to the provisions of Section 114 of the Evidence Act under which the Court is entitled to presume existence of certain facts. Under Illustration (a) to Section 114 the Court may presume that a man who is in possession of stolen goods after the theft, is either the their or has received the goods knowing them to be stolen, unless he can account for his possession. From the prosecution evidence, as already discussed it must be filed that the prosecution has been able to prove beyond reasonable doubt that the commission of murders and the robbery formed part of one transaction which has been fully unfolded through the evidence of PW-2 and in such situtation the recovered of the stolen properties from the house of some of the accused persons and at their instance and no explanation from those accused persons, on being questioned under Section 313 Cr. P.C. reasonably points to the guilt of those accused persons establishing the fact that it is they who committed the murders in the house and then committed the robbery and left the scene of occurrence. Whether a presumption under Section 114 Illustration (a) of the Evidence Act should be drawn in a given situation is a matter which depends on the evidence and circumstances of its recovery, the intervening period between the date of occurrence and the date of recovery, the explanation of the persons concerned from whom the recovery is made are all factors which are to be taken into consideration in arriving at a decision. In the case of Baiju vs. State of Madhya Pradesh, AIR 1978 Supreme Court 522, this Court had held that the prosecution having succeed in proving beyond any doubt that the commission of the murders and robbery formed part of one transaction and the recent and unexplained possession of the stolen property by the appellant justified the presumption that it was he and no one else, who had committed the murders and the robbery. In the said case the offence had been committed on the night of January 20 and 21, 1975 and the stolen property was recovered from the house of the appellant on January 28,1975.

In the cases of Shivappa and other vs. The State of Mysore-AIR 1971 SC 196 the same question was considered by this Court. The Court had said "If there is other evidence to connect an accused with the crime itself, however, small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthen the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presumption or the other may be drawn, it is not necessary to state categorically in this case. It all depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. It has been stated one more than one occasion that if the gap of time is too large. the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed. The reason is obvious. Disposal of the fruits of crime requires the finding of a person ready to receive them and the shortness of time, the nature of the property which is disposed, of, that is to say, its quantity and its character determine whether the person who had the goods in his possession received them from another or was himself the thief or the dacoit. In some cases there may be other elements which may point to the way as to how the presumption may be drawn. They differ from case to case .." In the aforesaid case the recoveries had been made within 5 days of the date of occurrence and therefore, the Court ultimately came to the conclusion that the High Court was right drawing the presumption that the person concerned are

dacoit themselves.

In Gulab Chand vs. State of Madhya Pradesh (1995) 3SCC 574, this Court considered at length the law relating to Section 114, Illustration (a) of the Evidence Act and the circumstances under which the presumption can be drawn. it was held by Court that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstance. It was further held that if the ornaments in possession of the deceased are found in possession of the person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. The Court approved the earlier decision of this Court in Earabhadrappa vs. State of Karnataka (1983) 2 SCC 330 wherein it was held that the nature of presumption and illustration (a) under Section 114 of the Evidence Act must depend upon the nature of the evidence adduced. No fixed time-limited can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not, calculated to pass readily from hand to hand. If the stolen article were such as were not likely to pass readily from hand to hand, the period of one years that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. s In the case of Gautam Maroti Umale vs. State of Maharashtra- 1994 Supp. (3) SCC 326, on the other hand this Court held mere recovery of ornaments belonging to the deceased at the instance of the accused did not connect him with the murder and at the most he can be convicted for possession of stolen property under Section 411 IPC. To the same effect is the judgment of this Court in Union Territory of Goa vs. Bea Ventura D'Sourza and another - 1993 Supp (3) SCC 305. Bearing in mind the principle laid down in the aforesaid cases and on examining the facts and circumstances of the present cases which have been established by the prosecution beyond reasonable doubt there did cannot be any hesitation in coming to the conclusion that the prosecution case as against Devendran under Section 302 has been provided beyond reasonable doubt. The evidence of PW7 indicating that Devendran had brought the pistol MO 2 to get trigger welded and getting the same welded by PW-7 Devendran had taken away the pistol, the identification of the pistol MO 2 by said PW-7, the recovery of pellets MO 75 series from the house of accused Devendran two days after the fateful incident i.e. on 26.11.1992, the seizure of empty cartridges and ball beareaus (Paulrus pellets), the recovery of similar pellets from the body of PW-5 as were recovered from the house of accused Devendran, the evidence of Ballistic expert PW-24 that the MO-2 must have been fired which is apparent from the examination of empty cartridges, the jewelleries MOs 16 to 23, MOs 24 to 28 and MOs 30 to 59 belonging to the informant were recovered on the basis of the statement of accused Devendran and those jewelleries were identified by PW-4 to the effect that those ornaments had been taken away by the culprits from her house are sufficient to raise the presumption under Section 114 of Illustration (a) of the Evidence Act and the conclusion becomes irrestible that is accused Devendran who committed the murders in the house PW- 5 on 24.11.1992 and thereafter left the place with the booties and as such the prosecution case against accused Devendran under Section 302 IPC must be held to be proved beyond reasonable doubt. But so far as the two other accused persons are concerned the only items of evidence is the recovery of some of the jewelleries after more than two months of the occurrence. On such recoveries alone after two months of the occurrence it will not be safe to draw a presumption for holding that they are also parties of the offence of murder committed in the house

of PW-5. It is no doubt true that PW-2 in her evidence had indicated that there were four persons who committed the offence in their house but said PW-2 has not been able to identify the culprits. It will, therefore, be wholly unsafe to convict the two other accused persons in the charge of murder by taking recourse to presume under Section 114 of the Evidence Act for the mere recovery of some of the ornaments belonging to the informant after two months of the occurrence. In that view of the matter the conviction of two other accused persons for the charge of murder cannot be sustained and is accordingly set aside, but instead they are convicted under Section 411 IPC and are sentenced to rigorous imprisonment of three years each.

Coming now to the question of the sentence for conviction of accused Devendran under Section 302, as has been stated earlier, he has been sentenced to death by the learned Session Judge and the said sentence has been affirmed by the High Court. From the prosecution evidence it is apparent that there was no premeditated plan to kill any person and the main objective was to commit robbery. In course of the incident as stated by PW2 when the two old ladies got up and rushed towards culprits one of them strangulated them one after the other. The post mortem report also indicated that the death of the two ladies are on account of strangulation. The learned Session Judge awarded death sentence to accused Devendran on the ground that as soon as the driver Nagarajan entered into the house said Devendran shot the gun which hit Nagarajan and he died. This itself cannot be held to be sufficient to hold that it is an act of an depraved mind. The number of persons did in the incident is not the determinative factor for deciding whether the extreme penalty of death could be awarded or not. On the evidence of PW2 as well as the evidence of PW5 it is difficult to hold that the death of the persons were either diabolical, ghastly or gruesome.

In Machhi Singh and others vs. State of Punjab - (1983) 3 Supreme Court Cases 470, the three judge of this Court consideration the Constitution Bench decision in Bachan Singh vs. State of Punjab - 1980 (2) SCC 684 and came to hold that where there is no proof of extreme culpability, the extreme penalty need not be given. This Court also further observed that the extreme penalty of death may be given only in the rarest of rare cases where aggravating circumstances are such that the extreme penalty meets the ends of justice. In Suresh vs. State of U.P. - 1981 (2) SCC 569, the conviction was based upon the evidence of a child witness and Chandrachud, C.J. speaking for the Court held that it will not be safe to impose extreme penalty of death in a conviction based on the deposition of a child. I was further observed that the extreme sentence cannot seek its main support from the evidence of a child witness and it is not safe enough to act upon such deposition, even if true, for putting out a life. In Raja Ram Yadav and others vs. State of Bihar (1996) 9 SCC 287, this Court came to hold that a gruesome and cruel incident did take place and yet did not think it appropriate to affirm a sentence of death and commuted to life imprisonment. It would be appropriate to quote the observation of the Court from the aforesaid case -

"We feel that both the murders had been committed in a premeditated and calculated manner with extreme cruelty and brutality, for which normally sentence of death is wholly justified but in the special facts of the case, it will not be proper to award extreme sentence of death."

In one of the most recent case in the case of Mukund @ Kundu Pradesh vs. State of Madhya Pradesh - 1997 (3) Scale 769, this Court while upholding the conviction of the appellant for causing the

murder of two persons set aside the sentence of death on the ground that it was not one of the rarest of the rare case. Bearing in mind the ratio of the aforesaid cases it may be seen that since the evidence of an approver has been taken out of consideration the conviction of appellant Devendran under Section 302 has been upheld on the basis of the evidence of PW2, PW5 and the recovery of the pistol which was used for the commission of murder from the house of said Devendran as well as the recovered of ornaments and other jewelleries belonging to the informant recovered from the house of Devendran on the basis of his statement, while in custody and those jewelleries being identified by PW 4. The aforesaid evidence by no stretch of imagination beings the case in hand to be one of the rarest of rare cases where the extreme penalty of death can be awarded. Accordingly, though we uphold the conviction of accused Devendran under Section 302 IPC but we set aside the sentence of death awarded by the learned Sessions Judge and affirmed by the High Court and instead commute the same by imprisonment for life. So far as the conviction of the appellants under Section 120B IPC is concerned, in view of our conclusion arrived at and the evidence of the approver being out of consideration the said charge cannot be said to have been established beyond reasonable doubt and accordingly all the appellants are acquitted from the said charge.

So far as the conviction under Section 449 IPC is concerned, for the same reasonings the conviction of appellants R. Pandian and R. Thungamalati cannot be sustained and they are acquitted of the said charge. But accused Devendran must be found guilty of the said charge and accordingly his conviction and sentence thereunder would remain unaltered.

So far as the conviction under Section 326/34 IPC is concerned, on the conclusion arrived at by us accused R. Pandian and R. Thungamalai cannot be convicted thereunder and it must be held that the prosecution failed to establish the charge beyond reasonable doubt and they are accordingly acquitted from the said charge. But the case against accused Devendran must be held to be proved beyond reasonable doubt and, therefore, he is convicted under Section 326 IPC and sentenced to undergo rigorous imprisonment for three years. The sentence against accused Devendran directed to run concurrently.

These appeals are disposed of accordingly. Before we part with this case we must keep on record our appreciation for the invaluable service rendered by Shri Muralidhar, learned counsel who appeared for the appellants as amicus curiae and by his sincere and hard work put forth all possible arguments for a correct interpretation of the provisions of Section 306 and 307 of the Code of Criminal Procedure. The analysis made by him on the question of law as well as evidence on record became an asset for delivering this judgment.