

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

CRL.A.No. 831 of 2010

SC 625/2007 of THE SESSIONS COURT,KOLLAM
CRIME NO. 610/2006 of SASTHAMCOTTA POLICE STATION

APPELLANT(S):

MEHABUL, C.NO.4790,
CENTRAL PRISON, THIRUVANANTHAPURAM-12

BY ADVS.SRI.K.S.MADHUSOODANAN
SRI.T.V.JAYAKUMAR NAMBOODIRI
SRI.THUSHAR NIRMAL SARATHY
SRI.M.M.VINOD KUMAR
SRI.P.K.RAKESH KUMAR
SMT.M.A.RUXANA

RESPONDENT(S):

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADGP SRI. TOME JOSE PADINJAREKKARA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
18.6.2015, THE COURT ON 10-07-2015, DELIVERED THE FOLLOWING:

V.K.MOHANAN & RAJA VIJAYARAGHAVAN.V, JJ

Crl.A.831 of 2010

Dated 10th July, 2015

JUDGMENT

“CR”

Raja Vijayaraghavan.]

1. The accused No. 1 is the appellant. He along with a co-worker, Hakku Bullu , were charged for offences under section 392, 376 (G), 302 & S 202 r/w S. 34 of the IPC and S.3 (2) and (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 for having committed gang rape and murder and also for causing disappearance of evidence of “the deceased” (the name is withheld) , a 22 year old female.

2. The learned Sessions Judge, Kollam, found that the case against the 2nd accused has not been proved by the prosecution but found the appellant guilty, and holding so, convicted and sentenced him to undergo rigorous

imprisonment for life for the offence under section 302. He was also sentenced to undergo rigorous imprisonment for 10 years each under section 376 (2) (g) and under section 392 of the IPC. For the offence under section 201 of the IPC, he was sentenced to undergo rigorous imprisonment for a period of seven years. The accused challenges the finding, conviction and sentence in this appeal.

3. Skeletal facts and circumstances are narrated below :-

(i)The appellant, a native of West Bengal, along with the second accused and eight others had come to Kerala about three months back from the date of incident and started their work at the Sreedevi Brick Factory of Ajithkumar - PW7. "The deceased ", was working in a cashew factory by name St Mary's cashew factory at Puthoor. The said factory was situated about 4.5 km from her residential home. Her mother Bhavani – PW4 and her friend Latha PW6 were also working in the same factory.

On 22.12.2006, after the work in the cashew factory, "the deceased " along with PW4 proceeded home . PW4 went to the market and "the deceased " went along with her friend Latha and parted ways at Achanvila about 50 metre from the tea shop of PW 5 through a bund road which provided easy access for her to reach home. On her way, she passed the shop room of PW 5 where the accused and other workers were having tea. According to the prosecution, the accused left the shop at about 6:15 PM about 10- 100 m behind "the deceased", and between 6.15 PM and 6. 45 PM on the same day, committed gang rape of "the deceased" by the side of the bund road leading to her house and thereafter strangulated her with a shawl and committed theft of a gold chain worn by "the deceased ". It is the further case of the prosecution that after committing the offence as aforesaid, "the deceased" was packed in a sack, while she was still alive and after putting in bricks and a rock inside the sack , was tied and sealed with a cloth, and was left immersed in a waterlogged area belonging to PW 6 – Babukuttan Pillai

on the eastern side of the bund road with the intention of causing disappearance of the dead body and thus screening themselves from punishment. "The deceased" drowned to death as a result.

(ii). When "the deceased " did not return home as usual , PW1 , her father went in search of her . When it didn't yield any result he submitted Exhibit P1 statement before PW 31, the Sub Inspector of Police , Sasthamkotta who registered P 1 (a) FIR under the heard "woman missing " .

(iii) On the next day, while PW1 was going in search of his daughter, he noticed that the grass and vegetation near to the brick kiln of PW 7 were trampled, with signs of activity on the banks of the water logged area as well. He, through CW13 - Baiju, informed the police. The police reached the scene and they obtained the assistance of PW3 Abraham, to enter into the water and to conduct an inspection of the area, which is waterlogged due to

mining of clay. After much effort, PW3 met with success and he was able to locate a sack. Thereafter PW33, the Circle inspector came to the scene and when the sack was opened the dead body of “the deceased” was found inside along with the weighty materials put in apparently to prevent the sack from surfacing.

(iv) The investigation was carried out by PW33, who conducted Inquest over the dead body. The accused were arrested and the scene of crime was located. The assistance of the scientific assistant was obtained and certain items found near the scene of crime were seized. On the strength of the disclosure made by the accused the belongings of the deceased were recovered under S, 27 of the Indian Evidence Act. The clothes worn by the accused at the time of commission of offense were seized separately. The Assistant Surgeon at Taluk Headquarters Hospital, Sasthamcotta, examined the first accused and issued exhibit certificate identifying the injuries found on his body and also collected some hairs from the accused.

Investigation was thereafter, handed over to PW34, the Dy Supdt. of Police, Karunagappally, who after verification submitted the final report before the Judicial Magistrate of the First Class, Sasthamcotta.

4. The family members of the deceased were not satisfied with the Final report submitted by PW34. They filed a complaint before the Home Minister complaining that the actual culprits have not been brought to book and the accused was just a scapegoat. The case was transferred to the Crime branch as per order dated 18.10.2007 and the CBCID, Kollam was directed to conduct further investigation. PW35, the DYSP of Police CBCID, Kollam took over investigation on 29.10.2007 and based on their application, trial proceedings were stayed. Witnesses were again questioned and finally report was submitted before Court confirming the findings in the final report.

5. The learned magistrate before whom the final report

was laid initiated committal proceedings as C.P.No.41 of 2007 and the case was committed to the Court of Sessions, Kollam. The Sessions Court took cognizance of the offence against the accused and the case was registered on file as S.C.No.625/2007.

6. On appearance of the accused, the learned Judge of the Sessions Court, after hearing the prosecution and the accused, framed charge for the offence under Section 392, 376 (G), 302 & S 202 r/w S. 34 of the IPC and S.3 (2) and (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. When the charge was read over and explained to the accused through a translator, they pleaded not guilty. To prove the case of the prosecution, PWs 1 to 35 were examined and Exts.P1 to P30 were marked. MO's 1 to 41 were produced and identified.

7. On completion of the prosecution evidence, the incriminating materials arising out of the prosecution case

were put to the accused under Section 313 of the Code of Criminal Procedure. He denied the incriminating circumstance and stated as follows:-

“The crime was committed by his employer, PW7 Ajith Kumar, CW5 Pushpakumar and Rajesh, a friend of PW5 Harikumar. According to him, he is an eye witness to the occurrence. He further stated that CW5 had threatened him with death at knife point not to disclose the incident to anyone. After committing the murder of "the deceased ", he was threatened and he along with PW7 Pushpakumar and Rajesh had put the dead body in a sack and sunk it in the water. He further stated that he had seen Rajesh committing rape on "the deceased " and that he was threatened that if the fact was disclosed to any person, all of them will be done away with. On the next morning, the accused No.1 was asked to continue with the work. At 10 AM police came to the brick factory. At 3.30 pm, the workers were asked to stop work and he was asked to go and take a bath. His shirt was lying

outside. After the bath when he tried to wear his shirt he found that two buttons of his shirt were missing. Thereafter, the police came and took him and PW7 in the police jeep and PW7 was let off after some time. On the same day, at 8.00 p,m PW7 Ajith, and CW5, came to the police station and they talked with the SI. After PW7 had gone from the Police station, the police manhandled the appellant and his friend. According to the appellant, he was innocent and he was framed in the case”.

8. The learned Sessions Judge after evaluating the evidence came to the conclusion that the prosecution has established that "the deceased" was gang raped, and thereafter robbery was committed of her gold ornaments, then strangled with a shawl and her body was put in a sack and immersed deep in the water with such intention/knowledge of causing bodily injury which are sufficient in the ordinary course of nature to cause death. The accused was on the strength of the above findings, found guilty of the above offence and he was convicted

for offence punishable under Sections 376 (G), 392, 302 and 201 of the IPC. It was further held that the prosecution has failed to prove that the second accused has committed any offence as alleged beyond reasonable doubt and he was acquitted.

9. The above judgment is impugned in this appeal.

10. We have heard Sri.K.S. Madhusoodanan, the learned counsel appearing for the appellant and Sri Tom Jose Padinjarekkara , the learned Additional Director General of Prosecution for and on behalf of the State.

11. It has to be mentioned at this juncture that this case has a chequered history . This is one of those rare cases that the father of the poor deceased girl , who met with a gravely dismal and sorry fate , has been knocking the doors of this Court seeking for justice . His contention is that the investigation was not fair and the actual culprits have not been brought to book. Even before the

commencement of the trial, the father of deceased had approached this court by filing WP (C). No 16418 of 2009 seeking further investigation. During the pendency of the writ petition trial proceeded which resulted in the conviction of the appellant. In the said circumstances the writ petition was dismissed as per order dated 13.9.2010. Thereafter WP (C) No 10541 of 2013 was preferred by the father of the deceased with a prayer to entrust the further investigation of crime number 610/2006 of Sasthamcotta police station with the Central Bureau of Investigation. The said writ petition was also dismissed by a Single Judge of this Court as per order dated 16.8.2013. Challenging the said Judgment dated 16.8.2013 , Writ Appeal. No. 297 of 2014 was preferred by the Father of the deceased. When the matter came up before a Division Bench of this Court, after hearing the parties, it was directed that the Writ Appeal also be posted along with the instant appeal filed challenging the order of conviction by the appellant / 1st accused .

12. We have narrated the facts in detail because of the fact that PW1 in the sessions case, who is none other than the father has approached this Court fervently contenting that the investigation is not fair and that the wrong person has been convicted .

13. In view of the above directions issued by the Division Bench of this Court, we have also heard Sri.P.Vijayabhanu, the learned senior counsel appearing for the appellant in W.A.297 of 2014 and Sri.P.Chandrasekhara Pillai the learned Standing Counsel for the CBI , which has been arrayed as a respondent in the matter . They have supplemented and developed on the arguments raised by the respective counsel in the Criminal Appeal filed challenging the conviction and also raised rival contentions in the Writ Appeal .

14. Sri.K.S.Madhusoodanan learned counsel appearing for the appellant submitted that the learned Sessions Judge has entered upon the finding of guilt without

appreciating the prosecution evidence in the proper perspective. Highlighting the fact that the instant was a case resting on circumstantial evidence , It was submitted by the learned counsel , that none of the circumstances relied on by the prosecution has been established. Taking us exhaustively and meticulously through the sequence of investigation, the various mahazars and contemporaneous records, the seizures effected and the evidence of the prosecution witnesses, the learned counsel has fervently submitted that, this was a case where the Investigating agency has not been fair to the accused as well as to the victim. After having taken a decision to place the burden of the guilt on the accused No 1 , the Investigating officer has sought to concoct connecting links by using scientific evidence is the primary contention. It was argued that the collection of hair and button said to belong to the appellant from the scene of occurrence are falsified by the prosecution witnesses and records. The learned counsel submitted that the prosecution has failed to establish that the

circumstances proved were consistent only with the hypothesis of the guilt of the accused. Placing before us a catena of decisions of the Apex Court, it was contented that the finding of guilt arrived at by the learned Sessions Judge is liable to be reversed. The learned counsel attacked the main stay of the prosecution , which are the recoveries effected at the instance of the accused, and submitted that they were all planted to connect the accused with the crime. It was submitted that it was incongruous to convict the appellant herein for gang rape after acquitting the 2nd accused for lack of evidence. Taking us through the Charge, it was submitted that according to the prosecution the incident is said to have occurred by the side of a public road accessed by people of the area just about 40 meters from brick factories on either sides and that too between 6.15 and 6.45 in the evening which itself shows that the prosecution case is suspect and cannot be believed. We were taken through the post mortem certificate to bring home the point that when the case of the prosecution is that “the deceased”

was gang raped in the open ground and that too in bushes by two men, the absence of even an abrasion on the back side of her body will reveal that the incident had not taken place in the alleged scene of occurrence . It was argued that the appellant was not conversant in Malayalam and he was defended by a state brief counsel but the Sessions Court have ignored these aspects and found fault with the appellant in not complaining before the learned Magistrate about the atrocities committed on him by the investigating agency. It was pointed out that the accused was conversant only in Bengali and the records does not reveal that the services of a translator was provided when the accused were produced before the Magistrate at the stage of remand. He also brought to attention the grievance espoused by the family and relatives of the deceased and contended that their grievance supports the contention of the appellant that he was falsely implicated in the crime.

15. On the other hand Sri Tom Jose Padinjarekkara , the

learned Additional Director General of Prosecution submitted with much vehemence and clarity that there was nothing to doubt in the prosecution case. According to the learned ADGP, the evidence of the prosecution witnesses clearly showed that the perpetrator of the heinous act is the appellant and the circumstances unerringly point towards his guilt. It was argued that even if one or the other circumstances were not conclusive enough, if the effect of the cumulative circumstances were such that the court can unmistakably conclude about the guilt of the accused, there is no reason to take a different view from that of the Sessions Judge. A large number of precedents rendered by this court as well as the Apex court were placed before us to contend that the minor discrepancies brought out at the stage of evidence or defect in the investigation which do not affect the very substratum of the case need not be looked into if the evidence let in by the prosecution otherwise is watertight. It was further argued that the recovery of button and hair from the scene of occurrence and its similarity with that

of the hair of the accused and also the button from his shirt would reveal the complicity of the appellant. It was also argued that the injury on the body of the accused which was revealed when he was inspected by the doctor was another circumstance to connect the accused with the crime. According to the learned counsel all these circumstances will cumulatively and unerringly point towards the guilt of the accused. To fortify his arguments, the learned ADGP has placed reliance on **Sangeet and Another v. State of Haryana (2012 (11) SCALE 140), Neel Kumar @ Anil Kumar v. State of Haryana (2012 (5) SCC 766) , Munshi Prasad and Others v. State of Bihar (2002 (1) SCC 351), Mohanan V. State of Kerala (2000 (2) KLT 562), State of Maharashtra v. Suresh (2000 (1) SCC 471), Earabhadrapa v. State of Karnataka (1983 (2) SCC 330), Baiju v. State of M.P. (1978 (1) SCC 588), Mangaraju v. State of Andra Pradesh (AIR 2001 SC, 2677) , Govinda raju v. State of Karnataka (2013 Crl.Law Journal 4710), NCT of Delhi v. Sunil**

(2001 (1) SCC 652) and Mohan Anna Chavan v. State of Maharashtra (2008 (7) SCC 561).

16. The learned senior counsel P.Vijayabhanu also addressed arguments in the connected Writ Appeal for and on behalf of the father of the deceased argued that the actual assailants have gone scot free and the implication of the appellant is with mala fide motive. The learned Standing Counsel for the CBI supported the case of the prosecution and submitted that minor flaws in the investigation were not sufficient to shake the overall truth of the prosecution case and there was no reason to interfere with the finding of guilt by the learned Sessions Judge.

17. Admittedly, this is a case based on circumstantial evidence. Strong challenges are raised by the appellant on the very truthfulness of the investigation and the same is supported by none other than the grieving parents of the deceased. The task cut open to this court is to

meticulously analyze the evidence and the various circumstances to ascertain whether the fusillades directed against the prosecution by the appellant as well as the father of the deceased are sustainable or not. Before advertizing to the various circumstances it will be profitable to notice the evidence of witnesses , albeit briefly.

18. PW1 is the father of "the deceased ". He had lodged the FI Statement on 22.12.2006 at 10.00 pm. According to him "the deceased" used to go for her employment to the St.Mary's cashew factory at 7 in the morning and used to return back home at 7 pm. On 22.12.2006, when "the deceased" did not return home till 7.30 he went in search of her. When it did not yield any result, he went to the police station and gave Ext.P1 statement based on which P1(a) FIR was registered on 22.12.2006. According to him, on 23.12.2006 while he was going in search of his daughter, he was informed by one Krishnan that he had seen "the deceased " going through the front of his house in the evening on 22.12.2006 at about 6.15 pm. PW1

went in search of "the deceased" through the bund road and when he reached near the Sreedevi Brick factory he noticed some trampling of grass and vegetation by the side of the bund road and also signs of activities on the bank of the waterlogged area on the eastern side of the road. According to PW1, at 10 – 10 30 pm on 23.12.2006, police came to the scene and they inspected the area. They availed the services of PW3 Abraham to enter the water. He chanced across a sack in the water bed and it was pulled out. When the sack was opened, the dead body of his daughter was found inside the sack together with five bricks and a piece of rock. He identified before Court the sack and the brick pieces and also the rock. He also identified the clothes worn by the deceased. A chain worn by the deceased was missing from her body.

19. PW2 was examined to prove that on 22.12.2006 at 6.00 PM he had occasion to see "the deceased" at a place called Ambalathum mukku which is about half a km away from the Kadavu bridge.

20. PW3, stated that on 23.12.2006, at the instance of the Sub Inspector of Police he entered the water logged area in the property of Babu Kuttan Pillai and conducted search. After a long effort he chanced across a sack , down in the water and it was brought to the ground. At about 11.30 am, the Circle Inspector came to the spot and the sack was opened. Inside the sack was found the dead body of "the deceased" along with some pieces of brick and pieces of rock. He noticed that "the deceased " was strangled by a shawl .

21. PW4 is the mother of "the deceased" who testified before Court that she along with her daughter had worked in the St.Mary's Cashew factory 5- 5.15 P.M. on 22.12.2006. She went to the market and her daughter went to her house through the bund road. When PW4 returned back at 6.30-6.45 pm, she found that her daughter had not returned home. She identified the dress and other belongings of the deceased while she was

examined.

22. PW5 is a tea shop owner and he deposed before court that he was conducting a tea shop at Ambalathumukku in between Sreedevi brick factory and the shop of Gopalakrishna pillai. According to him, the house of "the deceased " is at a distance of 1 km towards west from his tea shop. The accused used to take tea from his shop and they used to settle the account on every Sunday. Through PW5, Ext.P2 account book maintained by the witness was marked. He stated further that he had recorded the name of the accused No.1 as Ashith and that of the accused No.2 as Blue. He also identified the accused before Court. He also stated that on the day when "the deceased " was reported missing the accused had come to the shop in the morning and also in the evening. In the evening they had come at 5 – 5.30 pm had returned at about 6 – 6.15 pm through the bund road leading to the brick factory. He also stated that after the accused had left, he had seen "the deceased ", and she was going towards the bund

road. He further stated that the distance between the accused and "the deceased" was about 10 to 100 meters. He further stated that the distance from his shop to the property of Babukuttan Pillai is less than half a kilometer. According to him on 23.12.2006, at 6.30- 7 am the accused had come to his tea shop for breakfast and the appellant requested for a loan of Rs.500 which he did not advance. According to him, after 2- 3 days he had seen the accused at the Sasthamcotta police station and through him the prosecution tried to let in an extra judicial confession made by the accused to him that too in the presence of the police officers. During cross examination, he admitted that there are discrepancies in the handwriting in Exhibit P 2. In cross examination, he went back on his version in chief examination and stated that "the deceased " had gone in front and the accused 1 and 2 were going behind her and that the distance between them was 10 – 50 meters. He also stated that after the body of "the deceased " was recovered all the workers of West Bengal working in the factory of P W7

were rounded up by the police and were taken for the purpose of investigation.

23. PW6 is a friend and co- worker of "the deceased ". According to her, on the day when "the deceased " was reported missing, herself and "the deceased" had come out of the Cashew factory at 5.30 pm and they came together till Achanvila. Thereafter, they parted ways and "the deceased " went home

24. PW7 is the proprietor of Sreedevi bricks and also the employer of the accused. According to him his family house is situated on the eastern side of the brick factory and his family members are residing there. He identified the accused and stated that they are from West Bengal. According to him during that period, about 10 Bengali workers were employed in his factory. They had joined work only during the Onam period in the year 2006. He stated in cross examination that the workers used to work from 8 am till 10.00 pm and the workers were housed in

two rooms in the factory building. He deposed that on 22.12.2006, after he had returned from his wife's house at 9.30 pm he found all the ten workers sleeping inside their room . On getting to know that there were some signs of violence on the ground near to his factory building, he along with CW5 and Chandradas went and inspected the place. The police were brought to the scene and they took out a sack from the water logged area. When the sack was opened, few bricks and the cadaver was found inside . He also stated that all the ten workers from Bengal were taken by the police. According to him accused No.1 informed him that he wanted to go home and demanded Rs.500/- on Saturday when salary is usually paid. PW7 had seen the accused when the accused was brought near to the scene of occurrence for recovery of gold ornaments. On 24.12.2006, somebody had set on fire his brick factory and fire force had to be summoned to quell the fire. He stated that he is not aware as to who had burnt down his cashew factory and also stated that he had not submitted any complaint. He

denied the defense suggestion that CW5 and "the deceased " were in love and as per his request, CW5 had procured "the deceased" and had brought her to the factory premises and that CW5 and PW7 had raped and when she tried to scream they had strangled her and murdered her.

25. PW8 is the attester to the scene mahazar. According to him, he did not see police seizing any item at the time of preparation of ext.P3. PW9 examined to prove the recovery turned hostile and did not support the prosecution case.

26. PW10 a conductor in the KSRTC and he was cited to depose that he along with had gone in search of "the deceased " on 22.12.2006.

27. PW11 is working as a sweeper in the postal department. He testified before Court that he was acquainted with the brick factory and its premises and he

also came to know about the disappearance of "the deceased ". He was examined to prove Exhibit P23, the seizure mahazar as per which MO6 to 9 gold ornaments were seized. He identified the 1st accused as the person who had taken out the gold chain.

28. PW12 is a local person who was acquainted with the brick factory of PW7 and also the waterlogged area belonging to Babukuttan pillai. He stated that he had occasion to see the accused while they were workers in the factory of PW7. According to him he had signed on P4 seizure mahazar at 8 am near to the scene of occurrence. He emphatically stated he had signed on P4 mahazar on the next day after the body was found. When asked whether the accused was present there, it was stated by PW12 that it was in the presence of the accused that the recovery was effected. He also stated that the cover was taken from the clay hole near to the waterlogged area of Babukuttan Pillai.

29. PW13 was an attester to P5 inquest. PW14 was examined to prove Ext.P6 seizure mahazar a per which the kaili and underwear of the 1st accused was seized by the police. PW15 was examined to prove Ext.P2 seizure mahazar prepared by the police. PW16 is a gold assayer who was examined to prove that he had assayed the gold ornaments belonging to the deceased. PW17 is the Hindi translator working at the ISRO who assisted the investigating officer in questioning the accused. PW18 was the clerk in the St.Mary's factory and she deposed before Court that on the day the deceased was went missing she worked in the Cashew factory till 5.00 pm. PW19 was the Kunnathur Village Officer during the relevant period and he had issued P3 ownership certificate in respect of the property owned by Babukuttan pillai. He also prepared Ext.P9 scene plan as directed by the Investigating Officer.

30. PW20 is Dr.C.S.Sreedevi, who was the Assistant Professor Forensic medicine, Medical College hospital,

Thiruvananthpuram. On 24.12.2006, at 10.15 am, she had conducted the postmortem examination on the body of "the deceased ", aged 22 years involved in crime No.610 of 2006. She stated as follows :

At the time of post mortem a green synthetic shawl was seen tied around neck with a half knot in the front. Eyes were closed. Conjunctivae was congested with subconjunctival hemorrhages. Blood stained fluid was oozing from the nostrils and mouth. Hymen showed a tear at 9 O clock position, its edges showed reddish infiltration of blood. Green leaves dried twigs of plant, a safety pin were seen entangled in the scalp hair. Rigor mortis was retained at ankles only, absent in other parts of the body. She noted the following injuries

Injuries (Antemortem)

(i). Grooved pressure abrasion (ligature mark) 32 cm long oblique and continuous around the neck. It was

placed 5 cm below the right ear lobule (2cm broad) 5.5 cm below the chin (3 cm broad) at the level of thyroid cartilage, 7 cm below the left ear lobule (3.5 cm broad) and 7 cm below the occiput 4.5 cm broad.

(ii). Abrasion 1 x 0.5 cm on the left side of neck 10 cm below the ear lobule.

(iii). Abrasion 3.5 x 0.2 to 0.5 cm oblique on the right side of neck, its upper inner end 13 cm below the ear lobule.

Flap dissection of neck was done under bloodless field. Subcutaneous tissue underneath the injury number (1) was pale. Other neck structures including muscles, bones, cartilages and vessels were normal and intact.

(iv). Abrasion 0.6 x 0.5 cm on the right side of chin 6.5 cm outer to midline.

(v). Abrasion 0.5 x 0.4 cm on the right side of chin 4.5 cm outer to midline

(vi).Contusion 2.3 x 1.5 x 0.5 cm on the right side of chin 1.5 cm outer to midline

(vii). Contusion 1 x 1 x 0.3 cm on the left side of chin 5 cm outer to midline

(viii). Abrasion 0.6 x 0.3 cm on the right side of upper lip margin 2 cm outer to midline

((ix). Contusion 2 x 1.5 x 0.3 cm on the right side of face 3.5 cm outer and 1.5 cm below the angle of mouth.

(x). Lacerated wound 2.7 x 0.6 x 0.5 cm vertical on the forehead just above the root of nose.

(xi). Lacerated wound 0.7 x 0.2 cm involving the whole thickness of hymen at 9 O' clock position with infiltration of reddish blood at its edges.

Air passages contained blood stained froth. Lungs were congested, soft and oedematous. Stomach contained 60 ml of brownish fluid no unusual smell,

mucosa normal. Urinary bladder was empty. Uterus measured 7 x 4x 2 cm, cavity empty. Tubes and ovaries normal. All other internal organs were congested and soft.

PW 20 on after perusal of Exhibit P 11 chemical analysis report opined that the deceased had died due to combined effect of ligature strangulation and drowning.

31. PW21, the Assistant Surgeon at Taluk headquarters hospital, Sasthomcotta deposed that he examined the accused on 1.1.2007 at 11.30 am and issued Ext.P13 certificate. In Ext.P13 certificate he had noticed the following injuries on the body of the accused.

- (i). A healed scratched abrasion across the right thigh about 10 cm long.
- (ii). A healed scratched abrasion left thigh 5 cm in length on the medial aspect
- (iii). A healed abrasion just below the nostril 3 cm long .

32. He was also asked whether he remembered taking the hair of the accused and handing over the same to the Investigating officer to which he responded in the affirmative . He also stated that the injuries were about 5 to 7 days old when he had examined the accused .

33. PW22, the Tahasildar Kunnathur was examined to prove Ext.P15 caste certificate of "the deceased". PW23 who was the Assistant Director of Biology in Forensic science laboratory , Thiruvananthapuram, deposed that he had received a sealed parcel from JFMC Sasthamcotta in connection with crime No.610 of 2006 of Sasthamcotta police station. Through him, P16 certificate issued by him was proved. Ext.P17 was the list of items which were forwarded to him. He gave evidence that the hairs in item No.1 were human male scalp hairs which are similar to the sample scalp hairs in item No.8a. He further stated that both of them could have belonged to the same source. He also deposed that hairs collected from item 10

(d) and item No.13 in Ext.P17 are human scalp hairs which are similar to the sample scalp hairs in item No.10© in Ext.P17. He also deposed that seminal stains were not detected on items 19 to 23. Fibers were also not detected in the nail clipping item 10(b) and 10(c) of Ext.P17. In cross examination the witness deposed that Ext.P16 issued by him reveals that the packet which contained two short black hairs was collected on 24.12.2006.

34. PW24 is the Assistant Director Serology FSL, Thiruvananthapuram. He deposed that 21.3.2007, he had received a parcel from Biology division in connection with crime No. 610 /2006 of Sasthamcotta police station. He examined the items and issued Ext.P18 certificate.

35. PW25 is the scientific assistant Biology District police office Pathanamthitta and he deposed that as directed by the Superintendent of police Pathanamthitta he had examined the scene of occurrence in crime No.

610 of 2006 of Sasthamcotta police station. He stated that the examination of the scene was conducted in the presence of the Investigating Officer. He had seized eight items from the scene which are two short hairs as item No.1, five short hairs as item No.2, blood stained leaves and two long hairs as items No.3, blood stained soil as items No.4, unstained control soil as item NO.5, blood stained vegetation as items No.6, blood stained dry leaf as item No.7 and a nylon button with four holes and fibers attached to it as item No.8. According to the said witness he had packed label, signed and sealed the items separately and handed over the same to the Investigating Officer for transmission to the Forensic Science Lab Thiruvananthapuram, for detailed examination. He identified the labels as MO 33 to MO38. In cross examination, he stated that he had received information on 23rd of December 2006 and since the message was received after 4.30 pm he was unable to visit the scene. He further stated that on the next day that is on 24.12.2006, between 9.00 and 10.00 am he had reached

the scene of occurrence. The Circle Inspector and the Sub Inspector were present at the scene. The accused were not present. He spent quite a lot of time at the scene of occurrence. He also stated that he is unaware as to whether the police had prepared a mahazar. According to him, he did not sign on any of the records prepared . He asserted that he had not gone to the scene on 25.12.2006 but had gone on 24.12.2006 which was a Sunday.

36. PW26 deposed that the cadaver of "the deceased" was found from the waterlogged area in his property.

37. PW27 was working as Assistant Director of Ballistics in Forensic science Lab, Trivandrum. He gave evidence before Court that the portion of the gunny bag stitched to the gunny bag in item No.1 did not match with item No.6 and the towel taken from the room of the accused and the towel found with dead body looked similar and further he stated that the button sent to him for examination

could have been detached from the shirt in item No.4. Through him Ext.P9 report prepared by him was marked.

38. PW28 was the SI of Sasthamcotta police station and he stated before court that he had handed over MO10 earring found on the body of the deceased to the Investigating Officer.

39. PW29 is the ASI of the Sasthamcotta police station and he deposed that as directed by the Investigating Officer he had gone to West Bengal to ascertain the address and caste status of the accused . PW30 , the Assistant Surgeon, Taluk Headquarters hospital was examined to prove Ext.P21 potency certificate of the appellant.

40. PW31 was the Sub Inspector of Sasthamcotta police station and according to him, he had recorded the statement of PW1 and registered crime No.610 of 2006. Through him Ext.P1a FIR was also marked.

41. PW32 is the Grama Pradhan of Coochbehar district and he was examined to prove Ext.P20 to prove that the accused belonged to the Muslim community and are residents of Sakunthala Roy Panchayat.

42. PW33 is the Sasthamcotta CI who deposed before Court that he took over investigation in crime No.610 of 2006 on 23.12.2006. Exhibit P5 inquest over the dead body was conducted by PW33. Certain items found on the ground near to the dead body were seized. Thereafter, the services of PW 25 , the scientific assistant Biology, District Police office Pathanamthitta was sought for. He examined the scene of occurrence and surroundings for biological trace evidence. Certain materials found were seized and the same were handed over to him. Thereafter the dead body was forwarded to PW20, who conducted autopsy over the same and issued Exhibit P10 Post Mortem certificate. On 24.12. 2006, the accused were arrested at 5 PM . Based on the disclosure made by the

accused at 6 P.M on 24.12.2006 , MO 6 to 9 gold ornaments which was worn by the deceased were seized by PW 33 from near to the Sri Devi Brick Factory premises as per P 23 recovery mahazar. Thereafter on 25.12.2006 at 8 AM Exhibit P 3 scene mahazar was prepared by PW 33, in the presence of PW 25 , the scientific assistant and certain materials which included MO 38 button were seized from the scene of occurrence. On 25.10. 2006 at 10 AM on the basis of the disclosure statement given by the first accused, PW 33 seized MO – 27 shirt alleged to have been worn by the first accused when the offence was committed. Two buttons of the shirt were missing and there was also evidence of violence in the shirt as was discernible from Exhibit P25 seizure mahazar. Thereafter, the custody of the accused was obtained from court and on 31.12 2006 at 8:30 AM based on the disclosure statement given by the Accused No 1, the plastic cover which was carried by the deceased on her return from the cashew factory was seized from the waterlogged area which contained the personal

belongings of the deceased like the ESI card, purse, coins, and a wedding invitation letter. These items were seized as per exhibit P4 recovery mahazar. On the same day itself at 12 noon the lunki and the underwear of the accused was seized from the brick factory premises as per exhibit P6 mahazar. On 1.1.2007 at 11:30 AM, PW 21, the Assistant Surgeon at Taluk Headquarters Hospital Sasthamcotta examined the first accused and issued exhibit P13 certificate. He also collected some hairs from the accused and handed over the same to the officer for the purpose of analysis. Investigation was thereafter handed over to PW 34, the Dy.Suptd. of Police, Karunagappally, who after verification submitted the final report before the Judicial Magistrate of the First Class, Sasthamcotta.

43. The entire prosecution case rests on circumstantial evidence. The learned Sessions Judge has founded the conviction based on the following circumstances .

(1). The deceased left home on 22.12.2006 and did not return home and was found missing.

(2). She was seen going towards her house by foot at about 6.15 P.M. through the road lying in front of the shop room of PW5 towards her house.

(3). The dead body of "the deceased " was located ultimately in the waterlogged area belonging to PW 26 by the side of the bund road on 23.12.2006.

(4). The deceased was raped , strangulated and left to drown after 6.45 P.M on 22.12.2006 after putting her in a sack on 22.12.2006 as seen from the medical evidence.

(5). Gold chain , locket and ganta worn by her and the plastic cover carried by her was found missing from her body when the body was found in the sack.

(6). The accused was a worker , employed in brick kiln of PW 7 which is about 40 meters to the west of the place from where the dead body of "the deceased " was found .

(7). The accused was seen in that locality at 6 P.M. and was seen walking behind "the deceased " at some distance .

(8). The grass and vegetation on the western side of the waterlogged area was found with signs of activity and also of dragging revealing that there was some violence in the area.

(9). Incriminating materials like hair and button were found from near the scene of occurrence which ultimately was found to be apparently that of the accused . The hair found at the scene of occurrence was similar to that of the accused and the button found at the scene could have been detached from the shirt of the accused seized as per his disclosure .

(10). The accused led the police to the alleged scene of occurrence and pointed out the scene of crime from where some incriminating articles were seized .

(11). In the course of interrogation after arrest, the accused made statements which led to the recovery of gold ornaments of the deceased under Sec.27 of the Evidence Act .

(12). The statement made by the accused which led to the recovery of plastic cover and other belongings of the deceased under Sec.27 of the Evidence Act

(13). Healed abrasion injuries were found in the face of the accused and also on his inner thighs when he was examined by the doctor on the 10th day of the arrest.

14). False explanation given by the accused in his 313 statement.

44. While the learned counsel for the appellant/ accused contends that these circumstances have not been satisfactorily established and that the proved circumstances do not point unerringly to the guilt of the accused, the learned Additional Director General of Prosecution contends that all these circumstances have been established satisfactorily and the circumstances established do lead to an unerring inference about the guilt of the accused - to the exclusion of every reasonable hypothesis of innocence of the accused.

45. We shall now proceed to consider the various circumstances extracted above. We shall initially consider whether those circumstances have been proved. We shall later consider whether the circumstances are sufficient to lead a prudent mind to a safe inference of guilt of the accused - to the exclusion of every reasonable hypothesis of innocence of the accused.

46. We take note that instant is a case where a poor 22 year old girl was snuffed out in the prime of her youth by a barbaric act. She was raped, strangled and drowned to death in an inhuman manner. The barbaric nature of the crime notwithstanding this Court in appeal will have to re-appreciate and analyze the evidence in a detached manner taking into consideration all the attendant factors to come to a conclusion that the accused was the perpetrator of the crime and it could not have been done by anyone else. It has been held by the Apex Court as well as this Court in a catena of decisions that in spite of

revolting nature of the crime, there should be judicial consideration of evidence in a cool and detached manner. Mere suspicious circumstances alone are not enough to convict a person guilty of murder. It is true that commission of offence can be proved by circumstantial evidence. But as held by the Apex Court in *Balwinder Singh v. State of Punjab* (AIR 1996 SC 607) that in a case based on circumstantial evidence the Court has to be on its guard to avoid the danger of being swayed by emotional considerations.

47. In **Tomaso Bruno and others V State of UP , (2015 KHC 4047)** the Apex Court has , after referring to celebrated judgments on the subject has laid down as follows :

In Padala Veera Reddy v. State of A.P. and Others (1989 KHC 828) : (1989 Supp (2) SCC 706) : (AIR 1990 SC 79) : (1989 BBCJ 121), it was laid down that in a case of circumstantial evidence such evidence must satisfy the following test:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
(3). the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;
and
(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir v. State of Maharashtra* (1982 (2) SCC 351))."

48. Having reminded us of the law, we shall now proceed to consider the 15 circumstances specifically relied on by the prosecution. In respect of circumstances

which are not seriously disputed, we may not refer to the whole gamut of evidence that has been placed before the Court. In respect of such circumstances we shall only broadly refer to the materials that are placed.

Circumstances No 1.

49. The prosecution has sought to prove this circumstance with the aid of the evidence of PW1, father and PW4, mother of the deceased . We also have Ext. P1 FI statement lodged by PW1 on the very night on which "the deceased " was found missing. There is no dispute with regard to this circumstance from any quarters . The prosecution has clearly established that "the deceased " had gone to the St Mary's Cashew factory on 22.12.2006 and that she did not return on the same day.

Circumstance No 2.

50. There is also virtually no dispute about this circumstance as well. PW2, PW5 and PW6 were examined by the prosecution to prove this circumstance. They

would all speak about seeing the deceased at various times in the evening on 22.12.2006 going towards her house by foot at about 6.15 P.M. through the road lying in front of the shop room of PW5 .

Circumstance No 3

51. The evidence let in by the prosecution through PW 1 , PW 3 , PW 7 and PW 31 would clearly establish that the dead body of "the deceased " was found in the waterlogged area belonging to PW 26 by the side of the bund road early in the morning on 22.12.2006 . The evidence let in through PW 14 Village officer together with Exhibit P 9 plan prepared on the basis of P 3 scene mahazar would further establish this fact . With regard to this fact also there can be no dispute .

Circumstance No 4

52. The evidence let in by the prosecution by examining PW 20 and Exhibit P 10 autopsy report and P 11 and P 12 chemical analysis reports establishes that death was due

to the combined effect of ligature strangulation and drowning . Though semen and presence of spermatozoa were not detected , it was revealed from P 10 autopsy report that there was signs of penetration . It can therefore be concluded that the deceased was raped , strangled and left to drown in a sack in the waterlogged area belonging to PW 26 by the assailants.

Circumstance No 5 .

53. PW 1 , 4 and 6 would speak that the gold chain worn by the deceased was missing from her body . They would also identify MO 6 to 9 , when the same was shown to them. The probative value of the recovery will be considered while considering circumstance No 11.

Circumstance No 6

54. The prosecution relies on the evidence of PW 5 and 7 to prove that the accused was a worker , employed in brick kiln of PW 7 which is about 40 meters to the west of the place from where the dead body of "the deceased "

was found. This fact is admitted by the accused as well and there is no controversy . The distance between the alleged place of occurrence and also the Brick Kiln is spoken to by PW 7 and also evident from the scene mahazar . The accused also admits the fact that he was employed in the brick factory of PW 7.

Circumstance No 7

55. The prosecution case is that at about 6.15 P.M. on 22.12.2006, the accused 1 and 2 were seen walking behind "the deceased " at some distance. PW5 in his evidence stated that the accused had come to the shop at 5 – 5.30 pm on 22.12.2006 and they had left at 6- 6.15 pm. It has also come out from his evidence that the accused and other out station workers employed in the brick kilns used to frequent his shop and they used to purchase goods on credit basis. According to him when the accused had left , he did not see anyone on the road. Thereafter he stated that after the accused went down to the road, he saw "the deceased " going through the same

road towards the west. According to him the distance between "the deceased " and the accused was about 10 – 100 meters. It has also come out in evidence that the alleged scene of occurrence was at a distance of less than 500 meters from the shop room of PW5. In cross examination, the witness deviated from his earlier statement and deposed that the accused was walking behind "the deceased " and that there was a distance of about 10- 50 meters between them. It has to be said that PW5 has no consistent version as regards this material point. The defense has a case that PW5 is a close friend and associate of PW7 who according to the accused had a role to play in the incident. In order to bring out that PW 5 was a witness on whom no reliance could be placed, it was submitted that through PW5, the prosecution had attempted to bring in an extra judicial confession while in police custody.

56. As regards the topography and accessibility of the area, PW 1 would depose that the only access to his

house from Kadavu Palam is through the bund road. He would also state in his evidence that this road was frequented by several persons. PW2 would also say that the deceased was seen by him at Ambalathu Mukku which is about 50 meters to the east of the shop room of PW 5 at 6 P.M. on 22.12.2006. He stated that after "the deceased" had gone, he had seen Krishnan Nair after about 2 – 3 minutes. From the above evidence let in by the prosecution it has come out that the road is much frequented and also that the presence of the accused at the shop room of PW 5 and their return towards the brick kiln is not unusual. Whether the accused was walking behind "the deceased "or whether "the deceased" was walking in front by about 10 – 100 meters cannot be said for certain .It is also the specific case of the prosecution that the incident had taken place between 6.15 and 6.45 on 22.12.2006 and that too at a distance of less than 500 meters from the shop room of PW 5.

57. The last seen together theory comes into play where

the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In this case the prosecution has no case that the deceased was last seen with the accused. Merely the fact that the accused was also found in the same locality cannot be taken as a conclusive circumstance against the accused but if there are any other positive evidence to corroborate this circumstance , the court would be justified in considering this as an additional circumstance. The prosecution has clearly established that "the deceased " had gone through the bund road but unless more cogent materials are there , the circumstance that the accused being seen in the locality by itself, according to us, is not sufficient. We shall get back to this circumstance after discussing the other incriminating circumstances.

Circumstance 8 to 12

58. Before evaluating these circumstances we shall minutely scrutinize the various steps taken by PW33, the investigating Officer who arrived at the scene at 11.30 am on 23.12.2006 after the sack containing the dead body of the deceased was retrieved from the waterlogged area. The said officer prepared Ext.P5 inquest report in the presence of the Panchayatdars. In column 8(a) of the inquest, PW33 has noted that there are signs of activity on the banks of the waterlogged area and the vegetation was seen trampled. On closer inspection he finds blood, one button, hairs, twigs stained with blood, sand and leaves. He notes signs of a recent scuffle and violence in the area. He also notes drag marks towards the waterlogged area as the vegetation and grass in the area showed signs of dragging. He specifically notes in Ext.P5 that the distance from the place where signs of activity of violence is 4.47 meters from the adjacent road. What is evident from the above is that at the time of inquest, the objects like hair, one button and blood stained soil etc., were not seized by the Investigation officer but was kept

aside to be later seized by the scientific assistant. The inquest prepared on 23.12.2006 between 2 P.M. and 5 P.M. reaches the court on 25.12.2006.

59. The investigating officer - PW 33, is specific when he says that the appellant was arrested on 24.12.2006 at 5 P.M. On 25.12.2006 at 8 AM accused was brought near to the water logged area where the body was found and it is the case of the prosecution that the accused had pointed out the scene of crime. It is pertinent to note that the scene of crime pointed out by the accused is the very same area that was noted by PW 33 when he had prepared the inquest over the dead body and where the presence of hair and button was noted.

60. According to PW33 he ensures the presence of PW 25 - scientific assistant at the time when the accused points out the scene based on which he prepares Exhibit P 3 scene mahazar. Exhibit P3 scene mahazar prepared at 8 AM on 25.12.2006 would emphatically reveal that the

same is prepared in the presence of PW 25. It is also evident from Exhibit P3, that the accused is present at the spot and it was he who pointed out the specific scene of crime to PW 33. It was argued by the prosecution that this fact of pointing out the scene of crime is relevant under S 8 of the Indian Evidence Act as well. It is further stated in P3 scene mahazar that the scientific assistant seized one button, blood stained sand, leaves found in the scene of crime. It is relevant to note that at the time of preparation of scene mahazar the Investigating Officer has not mentioned about the seizure of hair, the presence of which was noted in Ext.P5 inquest. While the Investigating Officer was examined in Court the said Officer deposed with no uncertainty that it was in the presence of the scientific assistant that Ext.P3 was prepared and that the scientific assistant had come to the scene on 25.12.2006 and thereafter on various days. It is further stated that the items seized by the scientific assistant was handed over to him only on 29.12.2006 along with a report. He also stated that he has not prepared any separate

mahazar. The specific case of the defense is that the recovery of these incriminating articles is suspect and that the materials seized by the scientific assistant on 24.12.2006 have been replaced by the investigating officer and instead, certain other materials were sent for analysis to the respective labs. In order to bring out this aspect they are relying on the evidence tendered by PW25, the scientific assistant. When PW25 was examined, he had deposed that he reached the scene between 9 AM and 10 AM on 24.12.2006 and conducted inspection. He asserted that the accused was not present and also that he had no occasion to go to the scene thereafter. He also stated that eight items were recovered from the scene and all these items were separately packed, labeled, signed and sealed and the same was handed over to the Investigating Officer with instruction to forward the same to FSL, Thiruvananthapuram for further detailed examination. He asserted that he had given a written report with his seal and signature then and there to the Investigating Officer. To top it all , PW25 has specifically

stated in his evidence that he had no occasion to go to the scene of occurrence on 25.12.2006 and asserted that he visited the scene only on 24.12.2006 that too between 9 AM and 10 AM. When he was examined , the report said to have been given by PW25 to the Investigating Officer on 24.12.2006 was also not proved through him in evidence. The evidence let in by the prosecution in respect of this most material aspect militates with each other rendering the same suspect.

61. The evidence of PW25 creates a lot of suspicion in our minds with regard to the mode adopted by the investigating officer with regard to the seizure of these articles , which without any doubt is the most important circumstance connecting the accused . If the button and the hairs found at the scene on 23.12.2006 did not reached the hands of the ballistic expert or the Forensic Science Lab, and if by some manipulation, some other items had reached resulting in Ext.P16 to P19 report, the same cannot be granted the same sanctity as sought for

by the prosecution. It is true that the samples seals and labels were identified through PW25 but it does not ensure the identity of the hair and button found at the scene of occurrence and alleged to have been seized by him.

62. The evidence of PW25, though limited to the seizure has certain other implications as well. The evidence of this witness along with that of PW5, PW7 and PW12 is relied on by the defense to convince us that the arrest of the accused and the consequent recovery based on his disclosure statement is also doubtful.

63. According to PW33, the arrest of the accused was effected on 24.12.2006 at 5.00 pm and later, at 6.00 pm as per Ext.P23 mahazar the gold ornaments were seized on the strength of his disclosure statement. On the next day that is on 25.12.2006 the accused was taken to the scene and the 1st accused pointed out the exact scene of occurrence. The witness also deposed that at this point of

time PW25 was also present and the scientific assistant examined the scene and seized certain items. It is also the case of PW33 that on 25.12.2006 at 10.00 am based on the disclosure statement given by accused No.1, the shirt worn by the accused allegedly at the time of occurrence was seized from a room in the brick factory premises as per P25 mahazar. According to PW33, two buttons in the shirt were missing and there were also indications of violence in the shirt. This mahazar is prepared at 10 AM immediately after the preparation of the scene mahazar at 8.00 am on 25.12.2006. Immediately after that, at 10.45 am on the same day at the instance of the 2nd accused MO25, a piece of gunny sack and MO 26 a piece of "thorth" was recovered. It is thereafter that 31.12.2006 at 8.30 am that the custody of the 1st and 2nd accused was again obtained from Court and MO11 to Mo15 the plastic cover and its content were recovered.

64. At the same time, it has come out from the evidence

of PW5, the tea shop owner, that immediately after the dead body of the deceased was found, all the workers working in the company who are natives of Bengal were rounded up and taken away by the police. This was on 23rd of December 2006. PW7 the employer of the accused also stated in his evidence that on 23rd his workers were taken by the police. PW12 another witness cited by the prosecution to prove the recovery of MO11 to MO15 as per P4 mahazar would also depose that on the day next to the day when the body of the deceased was found, the accused was brought to the scene and they had pointed out MO14 plastic cover containing the other material objects. Thus, the evidence of all these witnesses would reveal that on 23.12.2006 itself and on 24.12.2006, the accused and all other workers from Bengal were rounded up by the police and they were all present at the scene. This evidence let in by the prosecution witnesses themselves have not been explained or clarified by the prosecution and the same stands unchallenged. In the light of the above unchallenged evidence, the arrest of

the accused said to have been affected on 24.12.2006 at 5.00 pm and the consequent recovery of gold ornaments thereafter appears to have been given a devastating setback . When PW 12 deposes that the accused was brought to the scene of crime at 8 A.M. on 24..12.2006 to recover the plastic cover and other belongings of the deceased and also that he had signed Exhibit P 4 mahazar evidencing the seizure on that day , it would be far fetched to believe the case of the prosecution that Exhibit P 4 was prepared only on 31.12.2006. The recovery said to have been affected of the gold ornaments on 24.12.2006 at 6 P.M. after the arrest will become gravely suspicious . The evidence of PW25 which controverts the evidence of PW33 will also create grave doubt on the prosecution version. In the light of the above conflicting pieces of evidence we find it unsafe to rely on the evidence of recovery of the belongings of the deceased at the instance of the accused.

65. On appraisal of the evidence let in as regards hair

and button, PW25 has deposed that the items were seized and sealed on 24th of December 2006 after arriving at the scene before 10.00 am in the morning. If the evidence of PW33 is believed, only on 25.12.2006 at 08.00 am was the scene of crime located when the 1st accused had pointed out the scene to the Investigating Officer. Without locating the scene of crime as aforesaid, it is inconceivable that necessary directions could have been issued by the Investigating Officer to the scientific assistant to examine the scene. But the scientific assistant asserts that he has never visited the scene on 25th of December 2006 or later. Further the report said to have been given by the scientific assistant along with the seized materials on 24.12.2006 is not before the Court. No independent mahazar was prepared and the report was also not proved through the scientific assistant. The Investigating Officer is particular in his evidence that the scientific assistant had inspected the scene only on 25.12.2006 and on subsequent days and the report was handed over along with the seized materials only on

29.12.2006 A photo copy of a letter said to have been issued by PW25 to PW33 was taken out from the CD and the same was marked through PW33. Surprisingly P28 was not put to PW25 when he was in the box. The unchallenged testimony of PW25 that he did not visit the scene on 25.12.006 gives a body blow to the case of the prosecution and makes it suspect . It is pertinent to note that it was the items said to have been seized by PW25 on 25.12.2006 which were later forwarded to PW23, the Asst. Director Biology, PW24 Asst. Director Serology and PW27, the Asst. Director Ballistics in the Forensic Science Lab for examination. It is also relevant to note that Ext.P5 inquest report prepared on 23.12.2006 reaches the Court only on 25.12.2006. The scene mahazar prepared on 25.12.2006 reaches Court on 27.12.2006. The failure on the part of the prosecution to prove the report of PW25 issued on 24.12.2006 through PW25 himself would further dent the prosecution case. These aspects create severe doubts in our mind with regard to the alleged seizures. We are therefore of the opinion that there arises

insurmountable doubts in our mind over the sanctity of the seizures of hair and button and Ext.P4, P23 and P25 recoveries also does not inspire our confidence.

66. MO 14 plastic cover was recovered based on the disclosure statement given by the 1st accused on 31.12.2006 . MO14 plastic cover contained MO 11 ,MO 12, MO 13 and MO 14 (a) , which are the personal belongings of the deceased. This is one of the most clinching circumstances connecting the accused . These items were also recovered from the waterlogged area belonging to PW26 from where the dead body of the deceased was found. PW 12 was examined by the prosecution to prove this aspect . PW 12 deposed in unmistakable terms before court that recovery of plastic cover was effected on 24.12.2006 early in the morning . He did not specifically mention the date but deposed that the recovery was effected the day next after the body of “the deceased” was found. The case of the prosecution is that the recovery was effected on 31.12.2006 after obtaining

custody of the accused from court. These conflicting pieces of evidence rendered by the prosecution renders the recovery doubtful . It would also create severe doubt as regards the arrest of the accused also which according to the prosecution was only at 5 P.M. on 24.12.2006 . In other words, if the evidence of PW 12 is believed, even early morning on 24.12.2006 , the accused were being taken around by the Investigating officer and recoveries were being effected . Thereafter Exhibit P 4 mahazar was prepared making it appear that the seizure was on 31.12.2006. This cannot be countenanced and would throw serious doubts on the prosecution case . If the version of the prosecution is believed immediately after the arrest of the accused, and that too , within one hour, the gold ornaments of the deceased were recovered on the basis of the disclosure statement. On the next day the clothes worn by the accused were seized. It defies logic as to why the accused was not questioned to obtain information about the belongings of the deceased which were admittedly in her possession when she had come

out from the Cashew factory. Bearing this aspect in mind, we have serious doubts in our mind with regard to the authenticity of the recovery effected on 31.12.2006 as evidence by Ext. P4. This is exacerbated by the evidence let in by the prosecution thorough PW12 who was considered to be a very truthful witness by the learned Sessions Judge. The learned Sessions Judge plainly relied on the evidence of PW 12 without noticing the conflict of dates and its consequence. More over, in paragraph No.54 of the impugned judgment, the learned Sessions Judge observes that PW12 would say that the recovery of articles referred in Ext.P4 were recovered on the next day of finding the dead body. It is apparent that the learned Sessions Judge has failed to note that P4 mahazar was prepared only on 31.12.2006 and not on 24.12.2006 as observed. Interestingly enough the learned Sessions Judge, in para 55 takes note of the grievance of PW1, the father of the deceased and observes that the case of the accused could have had merit, if PW12 had a different version to give. The learned

Sessions Judge further states that the complaint of PW1 reinforces the trustworthiness of PW12. According to us, if the evidence of PW12 is believed, the whole prosecution case will be rendered doubtful as stated above. In

Vijayakumar V State of Kerala (1994 (2) KLJ 903) a

Division Bench of this Court had observed as follows :

“ The function of the court in a criminal trial to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to convince to pass the conviction of the accused and to hold that he is guilty of the offence with which he is charged. **If in a case prosecution leads 2 sets of evidence, each one of which contradicts and strikes at the other and shows it to be reliable the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon the conviction of the accused might be based.** Inevitably, the accused would have

the benefit of such a situation . The plight that the prosecution has put itself in cannot be better explained .

67. After analysis of the evidence as above, it is felt by us that the failure to seize the button and hair at the time of inquest, the conflicting evidence tendered by the prosecution as regards the seizure effected by PW 25, the failure to prove the report submitted by PW 25 through him, the conflicting evidence tendered by PW12 and PW7, and the recoveries alleged to have been effected even prior to the period when the accused was in lawful custody would seriously throw doubts on the very prosecution case. This leads credence to the case of the defense that the investigation was not fair and a conscious attempt was made to obtain connecting links so as to connect the appellant with the crime . This also reinforces the claims of the parents of the deceased that the investigation was not fair to the deceased as well. A

68. As far as seizure of the button is concerned as has been stated above , the seizure is said to have been

effected by P W 25 on 24.12.2006 . The said button seized from the scene was compared with the missing buttons from the shirt of the accused which was seized as per P 25 seizure mahazar dated 25.12.2006. The accused has a specific case that the buttons from his new shirt was taken away by the police and evidence was planted to prove his presence at the scene of occurrence . Exhibit P25 would also reveal that the shirt was seized from the room in which nine other workers were residing and the seizure was not the strength of any disclosure .Great sanctity could have been given to this item of evidence if the prosecution was able to conclusively establish this fact , which it has failed to do. Moreover the prosecution has failed to establish that the button found on the scene when P 5 inquest report was prepared was the same button which was seized by PW 33 at the time of preparation of the scene mahazar .When the fact discloses that the accused was in the custody of the police even before the arrest was effected on 24.12.2006, the genuineness of the recovery is rendered doubtful ,

and the same has become worthless as a piece of evidence . The same has had a snow balling effect on all the other aspects of the prosecution case throwing a pall of doubt . We are of the considered opinion that the evidence of recovery has lost its significance in the facts of the instant case for the aforesaid reasons .

69. We also notice another aspect of the case. It is borne out from Ext.P1(a) that the scene of occurrence was located about 17 Kms north east of the Sasthamcotta police station as is borne out from column No.5 of Ext.P1 (a). PW33 has stated in his evidence that the accused were arrested on 25.12.2006 at 17 hours from the premises of the brick factory. The brick factory as per the prosecution case is situated less than 50 metres from the scene of crime. A perusal of Ext.P23 the recovery mahazar would reveal that the said recovery was effected at 24.12.2006 at 6.00 pm. It is also evident from Ext.P23 that the services of PW17 Jayapalan, the translator was sought for by PW33 to decipher the

disclosure made by the accused. When PW17 was examined he has stated that the accused was questioned when they were at the police station. He also stated in cross examination as requested by the police he had gone to the police station on two occasions. Therefore, it would be far fetched to believe that after the arrest of the accused at 5.00 pm on 24.12.2006, they were taken to the police station in order to be interrogated by PW33 with the assistance of PW17 and after that they were brought back to the scene of crime at 6.00 pm to effect recovery of the gold ornaments from the waterlogged area. It also becomes impossible to believe that after the disclosure made by the accused in respect of the gold ornaments, no effort was made to enquire about the personal belongings of the deceased which as per Ext.P4 was recovered only on 31.12.2006. This is contradictory to the evidence tendered by PW12 as discussed above. All these matters raise grave doubts about the genuinty and truthfulness of the recoveries effected by the prosecution and also the totality of the prosecution case.

70. In **Vijay Thakur V State of Himachal Pradesh (2014 (11) SCALE 63**, the Apex Court was confronted with a case based on circumstantial evidence in which the mainstay of the prosecution was the various recoveries affected at the instance of the accused which appeared to be doubtful . The Apex Court had this to say :

It is to be emphasized at this stage that except the so - called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on

the basis of the aforesaid recoveries.

[14]. In *Mani v. State of Tamil Nadu*, 2008 (1) SCR 228, this Court made following pertinent observation on this very aspect: "The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...." 15. There is a reiteration of the same sentiment in *Manthuri Laxmi Narsaiah v. State of Andhra Pradesh*, 2011 KHC 4791 : 2011 (14) SCC 117 : 2012 CriLJ 2172 in the following manner:

"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."

16. Likewise, in *Mustkeem alias Sirajudeen v. State of Rajasthan*, 2011 KHC 4611 : 2011 (11) SCC 724 : AIR 2011 SC 2769 : 2011 CriLJ 4920, this Court observed as under:

"24. In a most celebrated case of this Court, *Sharad Birdhichand Sarda v. State of Maharashtra*, 1984 (4) SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the

case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185)

(i). The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

(ii). The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii). The circumstances should be of a conclusive nature and tendency;

(iv). They should exclude every possible hypothesis except the one to be proved; and

(v). There must be a chain evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

[25]. With regard to S.27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close

link between discovery of the material object and its use in the commission of the offence. What is admissible under S.27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution." It is settled position of law that suspicion, however strong, cannot take the character of proof.

71. As far as hair collected from the scene of occurrence is concerned, the same is beset by the very same infirmities. The hair found at the scene of occurrence at the time of preparation of Exhibit P 5 inquest was not seized by the Investigating officer . It was on 25.12.2006 that the hair was seized by PW 25 according to PW 33 . The matter of seizing the hair by PW 25 is absent in Exhibit P 3 scene mahazar . On the other hand PW 25 seizes certain items and hands it over to the investigating officer on 25.12.2006 after carefully sampling and sealing the same with a report to be dispatched to the Forensic science lab. The said report has not been proved through PW 25 . The hair from the body of the accused is alleged to have been extracted by PW 21 , the assistant surgeon , Taluk Head Quarters Hospital . No mahazar was prepared

with regard to the sampling of hair from the accused . It has not been labeled or sealed to ascertain without doubt that the hair was in fact that of the accused and that the same hair had reached the hands of the analyst . No effort has been made by the prosecution to establish conclusively that the sample of hair taken by PW21 is that of the appellant and it is the same hair that has reached the hands of the analyst. According to us, prosecution has failed to prove the identity of hair recovered from the scene of occurrence with certainty and as evidence is lacking as to the sampling of hair from the body of the appellant , we are not satisfied that the said circumstance has been established with certainty ruling out all the other hypothesis .

Circumstance no 13

72. The accused were arrested according to the prosecution, and Ext.D1 is the inspection memo prepared by the Investigating Officer on 24.12.2006 at 6 P.M. It is the specific case of the prosecution that the accused had

forcibly violated the deceased and during the course of the transaction they had also sustained injuries on their body. Ext.D1 is the inspection memo concerning the appellant herein. Ext.D1 does not speak about any injuries on the body of the accused on 24.12.2006 at 5.00 pm. It has to be remembered that the postmortem was completed at 11.15 am on 24.12.2006 and there were signs of sexual intercourse on the body of the deceased. It cannot be expected that PW3 would fail to note an injury on the face or body of the accused if in fact, there was one. Curiously enough the custody of the accused was obtained by the police and he was produced before PW21, the Assistant Surgeon of Taluk Headquarters hospital Sasthamcotta on 1.1.2007 at 11.30 am. This was about 10 days after the occurrence. When the appellant was examined by the Doctor he noticed three injuries. They are (a). healed scratched abrasion across the right thigh about 10 cm long. (b). healed scratched abrasion left thigh 5 cm in length on the middle aspect. (c). healed abrasion just below the nostril 3 cm long. He also

examined the 2nd accused and did not notice any injuries. It is the same Doctor who collected hair from the accused and handed over the same to the Investigating Officer. The witness had stated specifically in his cross examination that on the date of his examination the injuries noted on the body of the accused were 5 to 7 days old. It is these injuries which have been considered as an additional circumstance to connect the accused with the crime.

73. The learned counsel appearing for the appellant attacked this aspect of the prosecution case and pointed out that this is yet another instance by which evidence was manipulated by the prosecution to connect the accused with the crime. It was pointed out that any officer with basic level of intelligence will not miss this conspicuous injury below the nostrils of the accused more so in a case of instant nature. If it was indeed a scratch mark from the nail of the deceased it would have been a clinching circumstance. The abraded skin of the accused

which would have been found in the nails of the deceased was also not noted or nail clippings taken . Ext.P13 is the wound certificate issued by PW21 wherein the alleged cause of injury is stated as resulting from the nail of the deceased. The age of the injury as spoken to by PW21 and absence of injuries noted in Ext.D1 throws serious shadow of doubt on this evidence as well. It is also incomprehensible as to why immediately after the Investigating Officer formed an opinion as regards rape from the report of the Forensic Surgeon as to why he did not subject the accused to medical examination. If in fact, there was no injuries on the body of the accused and if these injuries were made while they were in the custody of the police, it necessarily will have to be regarded as a very unfortunate occurrence throwing grave doubt on the case of the prosecution. If it was an attempt to bring out another clinching circumstance to connect the accused with the crime, we can only say that the mode adopted by the Investigating Agency is against all tenets of law.

Circumstance 14.

74. The learned Sessions Judge has also held that the non explanation by the accused as to the presence of his hair and shirt button from the scene of crime by PW25 which was confirmed as belonging to the accused is an additional circumstance as the accused had failed to furnish a proper explanation. As discussed above, the prosecution has not been able to conclusively establish that the seizures effected from the place of occurrence are genuine. On the other hand, from the evidence adduced by the prosecution it has come out that there are innumerable doubtful circumstances throwing the whole seizures suspect and unbelievable. The seizures and the recoveries effected at the instance of the accused cannot be placed reliance on in an absolute sense to hold that those materials are sufficient to link the appellant with the crime. In view of the above, as the prosecution has failed to establish the circumstances, the failure of the accused to explain the same cannot be held to be an

additional link to connect the accused.

75. Now coming to the case of the accused, according to the appellant he also had a role to play in the incident. According to him he had witnessed the commission of rape by his employer and their friends and after the “ deceased ” was raped and smothered he was threatened at knife point and was asked to transfer the body into a sack and the body was dumped in the water logged area in the property belonging to PW 26 . He also stated that they had threatened that he would be done away with if he disclosed the same to any person. The learned Sessions Judge has disbelieved the appellant for the reason that the appellant had not opened his mouth before the learned Magistrate when he was taken for remand . We have gone through the remand application and it does not appear that the accused was granted the assistance of a translator when he was produced before the learned Magistrate . It has also come out that the accused was taken in by the police from the day the body

of the deceased was found on 23.12.2006 . Reasons may be several as to why the accused did not divulge this fact. During the trial, the accused was defended by a State Brief, who according to us, has conducted the case with much effort. The defense of the accused was put to PW7 and also PW33 and he has also stated his version in his 313 statement. It is quite another matter as to whether the culpability of the accused as regards the offence punishable under Section 201 is made out or not. If the version of the accused is true, his act will arguably attract S.201 of the IPC. The accused has been convicted to undergo rigorous imprisonment for a period of seven years for the said offence. Whether the statement of the accused in his 313 statement can be considered to prove his complicity in a case of instant nature is also to be looked into. It has been held by the Apex Court in **Nagaraj V State rep. By the Sub Inspector of Police, Salem Town, Tamil Nadu (2015 (3) SCALE 396)** that the substance of examination of an accused under Section 313 of the Code cannot be indicative of his guilt.

No inference can be drawn against the accused because of what he stated or had failed to state in his examination under Section 313 of the Cr.P.C if the evidence adduced by the prosecution did not inspire the confidence of the Court. In that case the witnesses had given contradictory statements with regard to seizure, and finding that the investigation conducted by the police was less than satisfactory, in a case based exclusively on circumstantial evidence, the accused was extended the benefit of doubt.

76. The learned Sessions Judge has also observed in para 36A of the judgment that the case of the accused in his 313 statement about the role played by PW7 and his friends were not put to PW7 when he was cross examined. The said observation is not correct as specific question was put to PW7 while he was cross examined by the counsel for the accused. It is the fundamental principle of Criminal law that Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and

something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that

miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (See 'Sujit Biswas V State of Assam AIR 2013 SC 3817')

77. There are several disturbing facts which has come out which persuades us to hold that the investigation conducted left a lot to be desired. The charge is that the crime was committed between 6.15 and 6.45 P.M by the side of the bund road about 46 meters from the brick factory of PW 7. Admittedly there is another brick factory by name Siva Bricks in the near vicinity . None of the workers in these factories have been questioned or cited . The place of occurrence is by the side of the bund road , just 500 meters from the shop room of PW 5 . It is also deposed by PW 5 and PW 1 that the house of the deceased is just about 500 meters towards west from the

scene of occurrence. It is also spoken to by PW 1 that the road is much frequented by the locals . No body has a case that darkness would fall in the area at that time . It is specifically stated by PW 7 that the working hours in his factory is from 8 AM till 10 PM. If the appellant and the other accused were missing , the same would have been noticed. The seizure of the items by PW 33 , the arrest of the accused , the sampling of hair from the body of the accused , the finding of button and hair from the scene of occurrence, the seizure of the shirt , the gross inconsistency between the evidence of PW 33 and PW 25 etc leads us to no other option but to conclude that the investigation conducted has left a lot to be desired. It is, of course settled that defect in the investigation by itself cannot be a ground for acquittal . Even in a case where it is found that there has been negligence on the part of the Investigating Agency or omissions which resulted in defective investigation, it is for the Court to examine the prosecution evidence *de hors* such lapses carefully to find out whether the evidence is reliable and can be the

basis for conviction. After examining the evidence and also the various circumstances, it appears to us without any semblance of doubt that the prosecution has miserably failed to prove the circumstances and strong doubts have arisen in our minds as regards the culpability of the appellant.

78. It is submitted by the learned Additional DGP , that several investigating officers had considered the findings of PW 33 after filing of the final report and all the investigating officers have concluded on the basis of the available materials that the circumstances pointed unerringly towards the guilt of the accused . We have considered the circumstances very closely and we are of the considered opinion that the investigation has not been fair and it appears that a conscious attempt was made to connect the appellant with the crime after coming to a conclusion, *prima facie*, about the involvement of the accused.

79. It appears to us that the trial court has not at all considered the numerous infirmities and inconsistencies in the oral and documentary evidence adduced on the side of prosecution. The trial court failed to consider the fact that the prosecution has failed to prove, by reliable evidence, the complicity of the accused in a case based on circumstantial evidence . As detailed above , the evidence of identification of hair and button was inconsistent and various suspicious circumstances have been noted in the case which points to the fact that the investigation was shabby and the appellant was made a scapegoat. The learned sessions judge has not properly appreciated the evidence of PW 5, 7, 12, 25 and 33, the material witness to arrive at a proper finding . As already discussed, the oral evidence of PW25, PW12 and PW33 are contradictory and further falsify the prosecution case. The learned Sessions Judge appears to have been morally convinced of the involvement of the appellant accused influenced by the recoveries effected at his instance and also with regard to the incriminating hair and button

seized from the scene of crime. It is settled law that the rules of evidence can not be departed from because there may be a strong conviction of guilt, for a Judge can not set himself above the law. The conviction must be based on sufficient evidence and not merely on moral predilections. We have appreciated, analysed and assessed the evidence placed before us by the yardstick of probabilities, its intrinsic value and the animus of witnesses and we have no doubt in our mind that the prosecution has miserably failed to prove any one of the circumstances beyond reasonable doubt. In **Harijana Thirupala and Ors.Vs. Public Prosecutor, High Court of A.P., Hyderabad ((2002) 6 SCC 470)** The Apex Court has held as follows :-

In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in

the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon the facts of each case.

80. We have given anxious thought to the various circumstances and the evidence let in and we have no doubt in our mind that the benefit of doubt will have to be extended to the accused . While extending the benefit of doubt to the accused, we also feel that the investigation conducted by PW33 left a lot to be desired. Though the learned Addl.Director General of Prosecution took immense pains to convince us that the investigation conducted by PW33 was reviewed by PW35 and Sri.P.S.John, Dy. Superintendent of Police , after having gone through the prosecution evidence we feel that the investigation has not been very fair and fool proof. It is settled law that even if there are some flaws in the investigation , if the thread of the prosecution case is inspiring enough to found a conviction on its basis , nothing prevents the court from holding so . But in this case, as discussed above , we have grave doubts in our mind and the mode adopted by the investigating agency to bring about clinching circumstances against the

accused has aggravated the suspicion further. We also take note of the persistence grievance espoused by the parents of the deceased that the actual culprits have not been brought to book. In view of the above, while granting the benefit of doubt to the appellant, we are of the considered view that necessary directions are to be issued to the State Police Chief to entrust the matter relating to Crime No. 610 of 2006 of the Sasthamcotta police station with an Officer of utmost integrity and investigative prowess , to look into the various aspects of the case and to consider whether further investigation or re-investigation as the case may be is required. . The said Officer may submit a report before the State Police Chief and the said authority may take appropriate action in accordance with law. If fresh facts comes to light with regard to the complicity of any other person other than the appellant herein , who has undergone substantial part of the sentence, the State Police Chief can initiate necessary steps as has been held in **Mani M.M. v. State of Kerala (2012 (3) KLT 118)**. Necessary orders in that

regard will be passed in the Writ Appeal. No. 297 of 2014 preferred by the father of the deceased. We take this extra ordinary decision because of the special facts and circumstances and since we have genuine doubt in our mind that the actual truth has not been unraveled during investigation. We feel that an attempt will have to be made, at least, at this stage, to trace out the truth.

81. In **Nagaraj V State rep. By the Sub Inspector of Police, Salem Town, Tamil Nadu (2015 (3) SCALE 396)** , in a case based on circumstantial evidence, the Apex Court had this to say about the investigation and the need for a specialized branch of the police :

It is thus abundantly clear that the investigation conducted by the police was less than satisfactory, nay, it was non-existent. We are constrained to reiterate yet again that it is necessary to have a specialized section of the Police to investigate cases of heinous nature.

82. Therefore, we have no hesitation to hold that the prosecution has failed to establish that the appellant has committed gang rape and murder of the deceased in the manner alleged.

83. Accordingly, the conviction and sentence recorded against the appellant, who is the 1st accused in Crime No.610 of 2006 of Sasthamcotta Police Station, is set aside.

84. In the result, this Appeal is allowed, setting aside the judgment dated 22.2.2010 in S.C.No. 625 of 2007 of the Court of Sessions Judge, Kollam, in Crime No.610 of 2006 of Sasthamcotta Police Station and the appellant is acquitted of all the charges leveled against him.

85. As the appeal is allowed and the appellant is acquitted of all the charges leveled against him, the appellant is entitled to get released from the jail forthwith, if he is not required in any other case.

86. Copy of this judgment shall be forwarded to the State Police Chief for initiation of necessary steps as directed in para 80 of this judgment and for follow up action.

Sd/-

V.K.MOHANAN.

Judge

Sd/-

RAJA VIJAYARAGHAVAN. V.

Judge

MrCs

/true copy/

P.S. To Judge