

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYASHTA, 1937

CRL.A.No. 48 of 2011 ()

AGAINST THE JUDGMENT IN SC 454/2009 OF THE COURT OF SESSIONS
JUDGE,THODUPUZHA DATED 07-01-2011
(CP 39/2009 OF JFCM, DEVIKULAM)

APPELLANT(S)/ACCUSED:

JOHNSON @ JOHNY, AGED 36 YEARS,
S/O.ANTONY, VALIYAPARAMIL HOUSE, VELI BHAGOM
FORT KOCHI KARA, FORT KOCHI VILLAGE.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
(CRIME NO.44/2004 OF DEVIKULAM POLICE STATION).

BY PUBLIC PROSECUTOR SMT.MAYA P.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.48 of 2011

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Dated this the 18th day of June, 2015

JUDGMENT

The appellant was the sole accused in S.C.No.454 of 2009 on the files of the Court of Sessions, Thodupuzha. He was convicted under sections 376 and 306 of the Indian Penal Code (IPC). For the offence under section 306, IPC, he was sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.5,000/-. In default of payment of fine, he was ordered to undergo simple imprisonment for a further period of six months. For the offence under section 376, IPC, he was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-. In default of payment of fine, he was ordered to undergo simple imprisonment for a further period of six months. The sentences of imprisonment were ordered to be run concurrently. The appellant was tried for the offence under section 3(1)(xi) of the Scheduled Castes

and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short the 'Act'). This appeal is filed in the said circumstances against the aforesaid judgment of conviction.

2. The case of the prosecution is that a girl by name Mahalakshmi, aged 19 years, committed suicide in the night of 17.9.2004 hanging on a tree standing in the courtyard of PW1, the Estate Manager of HML Companies, Lakadu Estate, Munnar. PW1 was staying there along with his wife and minor child. The deceased Mahalakshmi was brought there to look after the said child and she was residing in that house along with them. According to the prosecution, she committed suicide between 10 p.m and 7 a.m on 18.9.2004 as she was subjected to rape by the accused. According to the prosecution, deceased Mahalakshmi used to wake up PW1 and his wife with morning tea. On that day, as she had not turned up to wake them up, the wife of PW1 went to her room where the deceased Mahalakshmi used to sleep and when she was not found there, she went outside and found the girl hanging on the branch of tree in the

courtyard. On being told about the same, PW1 went to the courtyard and saw the girl hanging on the tree. Thereafter, he went to Devikulam Police Station and lodged Ext.P1 FI statement to set the law in motion. Thereupon, crime No.44 of 2004 was registered under section 174 of the Code of Criminal Procedure. The Sub Inspector of Police then attached to Devikulam Police Station went to the scene of occurrence at about 9.30 a.m and he conducted inquest and prepared Ext.P3 inquest report. He collected the hair found on the body of the accused and also prepared Ext.P4 scene mahazar in respect of the room where Ext.P2 suicide note allegedly written by the deceased was found. He has also questioned certain witnesses and recovered MO1 to MO5 from the said room at the instance of the wife of PW1. According to the prosecution, on 21.9.2004, the appellant-accused was arrested. On 21.9.2004, PW8 the brother of the accused produced MOs 6 to 9 allegedly used by the accused at the time of commission of offence and they were recovered under Ext.P7 mahazar. PW20 took over the investigation and on 22.9.2004 at about 12.45 p.m he

prepared Ext.P9 mahazar with respect to the bed room where deceased Mahalakshmi used to sleep. He also recovered from there MOs 20, 21 and 22 which are respectively the bed sheet, writing pad and green colour ball point pen. PW7 the younger brother of the deceased produced Exts.P6 and P6(a) allegedly written by the deceased to her parents and also Ext.P5 transfer certificate before PW20 and they were recovered under Ext.P8 mahazar. PW15 continued the investigation and then PW16 continued with it. PW16 on getting suspicions as to whether Exts.P2, P6 and P6(a) were written by one and the same person sent them to Forensic Science Laboratory for examination. However, they were returned as no expert conversant to compare the handwriting in Tamil was then available with the Forensic Science Laboratory and that was intimated to the investigating officer as per Ext.P16. Ext.P2 suicidal note was then got translated through PW11. Earlier, after conducting inquest on the body of Mahalakshmi, Ext.P3 report was prepared and then the body was sent for autopsy. PW23 conducted autopsy and prepared Ext.P27

post mortem report. Material objects recovered from the scene of occurrence and dresses worn by the accused were sent for chemical examination. PW23 who conducted autopsy collected vaginal smear and swab of deceased Mahalakshmi and they were sent to FSL and Ext.P17 chemical report dated 28.4.2005 was obtained. On 19.8.2008, the accused was sent to Community Health Centre, Adimaly and hair samples were collected from various parts of his body. They were also sent to Forensic Science Laboratory along with forwarding note. After obtaining the chemical examination report, the Assistant Superintendent of Police, Munnar submitted report adding commission of offence under section 376, IPC by the appellant-accused. Earlier, crime was registered against the appellant/accused for offences under section 306, IPC and also under section 3(1)(xi) of the Act. After obtaining chemical examination report, offence under section 376, IPC was added against the accused. PW16, the then Deputy Superintendent of Police completed the investigation and submitted final report before the Court of Judicial First Class

Magistrate, Devikulam. Since the offences against the appellant were exclusively triable by Court of Sessions, it was committed to Sessions Court Thodupuzha. The accused appeared pursuant to the receipt of summons and after hearing, the charge was framed against him under sections 376 and 306, IPC and also under section 3(1)(xi) of the Act. It was read over and explained to him and he pleaded not guilty and claimed to be tried. To prove the charge against the accused/appellant, the prosecution had examined PW1 to PW23 and got marked Exts.P1 to P27 besides getting identified MOs 1 to 22. After the closure of the prosecution evidence, the appellant/accused was questioned under section 313, Cr.P.C and he denied all the incriminating circumstances put to him. The trial court found the appellant/accused guilty under sections 306 and 376, IPC and found him not guilty under section 3(1)(xi) of the Act. Virtually, the trial court entered into the finding of guilt against him under sections 306 and 376, IPC relying on the following circumstances and evidence:- The oral testimony of PW11 who translated Ext.P2 suicidal note

written in Tamil, in Malayalam (Ext.P2(a)) was relied on. She has also translated Ext.P6 and P6(a) letters allegedly written by the deceased Mahalakshmi to her parents in Malayalam. Though it is stated that PW11 translated it she deposed before the court that she did not know how to write in malayalam and that on her dictation it was written by another teacher and that teacher was not examined by the prosecution. PW7, the brother of deceased Mahalakshmi identified Ext.P2 suicidal note as one written by the deceased. In Ext.P2 suicidal note, it is stated that it is the sexual harassment by the accused that constrained her to commit suicide. Oral testimonies of PW3, the cook attached to the bungalow of PW1, was also relied on. PW3 deposed to the effect that after consuming liquor, he along with accused/appellant went to the house of PW1 and thereafter he returned to his house. The evidence of PW4, the worker attached to the guest house of PW17-General Manager, was also relied on by the trial court. He deposed to the effect that the accused returned to guest house of PW17 only after 12 'O' clock. In such circumstances, the

trial court found that the appellant had not given any explanation and also did not examine anybody to explain his conspicuous absence between 8.30 to 12 midnight on 17.9.2004. The trial court also found that detection of human black hair from the chest part of the deceased Mahalakshmi at the time of inquest is another incriminating material against the appellant/accused. It was found that PW19, the woman police constable, who was present at the time of collection of said hair, deposed that she found Ramanathan, the then Sub Inspector of Police attached to Devikulam Police Station collecting hair found on the chest of the deceased in a cover. The trial court found that the hair thus collected from the chest of the deceased on that day and the hair sample collected from various body parts of the accused on analysis found identical and similar. The aforesaid evidence and incriminating circumstances were relied on by the trial court to find that the appellant/accused committed the offence under sections 306 and 376, IPC. The trial court found that though going by Ext.P5 transfer certificate, deceased Mahalakshmi belonged to Praya community, the

headmaster who gave the same was not examined and the caste certificate from the concerned Village Officer was also not produced. The accused belonged to christian community going by Ext.P11 caste certificate proved through PW13. In view of the aforesaid circumstances, the trial court found that the prosecution had failed to prove the caste of the deceased and therefore, the offence under section 3(1)(xi) of the Act was not proved against the appellant. It was in the aforesaid circumstances that the appellant herein was found guilty under sections 306 and 376, IPC and was convicted as aforesaid.

3. I have heard the learned counsel for the appellant and also the learned Public Prosecutor.

4. The learned counsel for the appellant submitted that trial court had erred in placing reliance on Ext.P2 suicidal note as the prosecution had failed to prove conclusively that it was written by the deceased. The learned counsel for the appellant also submitted that PW3 deposed that he along with the accused/appellant after

consuming alcohol went to the house of PW1. It is submitted that oral testimony of PW3 would reveal that he found the appellant/accused while he was returning from the house of PW1 and thereafter they consumed alcohol from a shop belonging to one Murukan. He would also depose that thereafter he returned to his house and the appellant returned to the guest house of the General Manager which was about 50 metres from that place. It was also submitted that PW3 deposed that the distance to the guest house of PW1 from there was 3 kilometres, he did not depose that he along with the appellant went there. It is submitted that in fact, the prosecution got no case at all that after consuming liquor along with PW3, the appellant along with PW3 went to the house of PW1. The learned counsel further contended that the trial court also erred in finding that the hair recovered from the body of the deceased and the hair sample collected from various body parts of the appellant are identical and similar. It is contended that though PW19, the woman police constable deposed that she had seen Ramanathan, the then S.I of Devikulam police

station collecting hair from the chest part of deceased and put it in cover, no evidence whatsoever was tendered by the prosecution to establish as to in what manner it was kept or to establish that it remained in safe custody till it was sent for analysis. It is contended that it assumes relevance in view of the indisputable fact that the hairs were collected from various parts of the accused only after about four years since 17.9.2004, the date of occurrence, to be precise, on 19.8.2008. The learned counsel for the appellant also submitted that PW12 Joint Director of Forensic Science Laboratory deposed to the effect that the hair which was allegedly collected from the chest part of the deceased was subjected only to microscopic examination and that it was not subjected to DNA test. In such circumstances, it is contended that there was absolutely no basis for the statement of PW12 that the hair thus found on the chest part of the body of the deceased was completely utilised for examination. It is contended that subjecting hair to microscopic examination would not and could not result in its destruction especially when it is admitted that the same

was never subjected to DNA test or any other chemical test. In the said circumstances, it is contended that in the absence of any evidence to establish that till it was subjected to chemical examination, hair allegedly collected from the chest part of the deceased could not have been treated as belonging to the accused/appellant and in such circumstances, Ext.P10 chemical analysis report could not have been relied on to hold that the said hair and also hairs collected from various body parts of the accused/appellant are identical and therefore, it an incriminating circumstance against the appellant/accused. It is also submitted that the recovery of Ext.P2 suicidal note is very much suspicious as PW20, the investigating officer, himself would admit the fact that Ramanathan, then S.I of Devikulam Police Station had not searched the room where Mahalakshmi used to sleep and he prepared Ext.P4 mahazar in respect of another room and no evidence whatsoever was adduced by the prosecution to establish that the deceased Mahalakshmi used to sleep in that room in respect of which Ext.P4 mahazar was prepared. In other words, no explanation

whatsoever was offered by the prosecution as to how the dresses worn by the deceased at the time of occurrence as also Ext.P2 were found from the other room different from the room where she used to sleep. The learned counsel for the appellant placed reliance heavily on the oral testimony of PW23 with Ext.P27 postmortem report. PW23 would depose that no injuries were found on the body of the deceased indicating sexual assault. He would also depose that no ante mortem injuries were found on her body. It is contended that Ext.P27 post mortem report would reveal that the hymen of the deceased had only old healed tears and that the hymen orifice admitted two fingers easily. It is submitted that PW23 deposed that pressure abrasions seen on the neck of the deceased solely due to hanging and he also deposed that Ext.P17 chemical analysis report would reveal the absence of spermatozoa and semen in the vaginal swab and vaginal area would indicate that the deceased was not subjected to sexual intercourse. Going by the evidence of PW23, the deceased was subjected to sexual intercourse more than once. It is submitted by the learned counsel for

the appellant that the evidence of PW23 to the effect that only old healed tears were found in the hymen and the absence of spermatozoa and semen going by Ext.P17 report would suggest that there was no recent sexual intercourse. In such circumstances, it is submitted that there was absolutely no justification for arriving at the conclusion that the accused had committed rape on Mahalakshmi and that it is the commission of rape that constrained her to suicide. The learned counsel also submitted that the non-examination of the wife of PW1 is also fatal to the prosecution. It is submitted that by her non-examination, the prosecution has attempted to hide actual facts from the court. The learned counsel submitted that when it was brought out by the prosecution that the body of the deceased Mahalakshmi was firstly found by the wife of PW1 and that it was she who showed the dresses worn by the deceased as also the suicidal note to Ramanathan, the then S.I of Devikulam Police Station coupled with the deposition of PW1 to the effect that she informed him while he was in the police station regarding the detection of the suicidal letter, there was

absolutely no reason for giving up examination of the wife of PW1. The learned counsel for the appellant submitted that the appellant is entitled to be acquitted on the ground that no question whatsoever was put to the accused while being examined under section 313, Cr.P.C. pertaining to the incriminating circumstances in Ext.P2 relating the offence under section 376, IPC.

5. Before advertng to the arguments advanced and also the evidence on record, I am of the view that the question whether the appeal on hand invites re-appreciation of the entire evidence has to be looked into. There cannot be any inviolable position that in an appeal, the entire evidence has to be re-appreciated though the appellate court is empowered to do so. If in a case where the trial court entered into conclusions and findings which are found, in cross checking, perfectly in tune with the evidence on record, re-appreciation of such evidence for substituting the conclusions and findings are absolutely unwarranted.

6. There cannot be any doubt with respect to the position that

the appellate court cannot brush aside a judgment rendered by a trial court. In other words, even in a case of conviction, the judgment of the trial court has to be looked into by the appellate court certainly for the purpose of cross checking the conclusions and findings arrived at by the trial court in the light of the evidence on record. If on such consideration, it is found that the appreciation by the trial court is perverse, certainly, that is a case where the appellate court should re-appreciate the entire evidence. The finding of a fact recorded by a trial court can be said to be perverse if the findings are arrived at by ignoring or excluding the relevant materials or by taking into consideration irrelevant or inadmissible materials. The finding may also be said to be perverse if it is against the weight of evidence on record. It was so held by the Hon'ble Apex Court in **Charan Singh and others v. State of Punjab [AIR 1975 SC 246]**. The Hon'ble Apex Court Held:-

“Ordinarily in a criminal appeal against conviction the appellate Court can dismiss the appeal if the Court is of the opinion that there is no sufficient ground for interference after

examining the various grounds urged before it for challenging the correctness of the decision of the trial Court. It is not necessary for the appellate Court to examine the entire record for the purpose of arriving at an independent conclusion. The position, however, is different where in addition to an appeal filed by an accused who is sentenced to death, the High Court has to dispose of the reference for confirmation of the death sentence under Sec. 374 of the Code of Criminal Procedure. While dealing with a reference the High Court should consider the proceedings in all their aspects and come to an independent conclusion on the material on record apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law above mentioned it is for the High Court to come to an independent conclusion of its own (see *Jumman v. State of Punjab*, AIR 1957 SC 469 = (1957 Cri LJ 586) and *Bhupendra Singh v. State of Punjab*, (1968) 3 SCR 404 = (AIR 1968 SC 1438 = 1969 Cri LJ 6))

7. The decision of the Hon'ble Apex Court in **Prakash v. State of Karnataka [2004 KHC 4255]** would also lend support to the aforesaid view. The long and short of the above discussions is that there can be no inviolable position that in an appeal, there shall

invariably be re-appreciation of the entire evidence. The circumstances suggesting perversity or legal infirmity warranting an appellate interference has to be made out to make the appellate court to re-appreciate the evidence. In this case, the question is whether any such circumstances is available warranting re-appreciation of the evidence. I do not think that for the said purpose, each and every aspect have to be looked into.

8. As noticed from the arguments advanced, the learned counsel for the appellant contended that no evidence whatsoever was adduced by the prosecution to establish that Ext.P2 suicidal note was written by the deceased apart from the oral evidence of PW7, the younger brother of deceased Mahalakshmi. Ext.P2 was sought to be proved by comparison of Exts.P6 and P6(a) which are the letters written by the deceased Mahalakshmi during her lifetime to her parents. It is in evidence that PW16, upon perusing Exts.P6 and P6(a) and Ext.P2, opined that an expert opinion has to be obtained and in such circumstances, forwarded Exts.P6, P6(a) and Ext.P2 to Forensic

Science Laboratory. However, Ext.P16 report would reveal that the same were returned to the investigating officer stating that no facility to compare such handwriting in Tamil was available with FSL. Thereafter, no endeavour was made to obtain any expert opinion. True that even if an expert opinion is obtained on the said question, that by itself is not a conclusive proof. But, at the same time, when such a report is lacking, it was for the court to examine the handwriting and compare the signature invoking the power under section 73 of the Indian Evidence Act. Indisputably, in this case, no such power was invoked and no such comparison was effected. That letter was taken as a crucial evidence against the appellant. Yet another instance also compels this Court to re-appreciate the entire evidence. PW23 conducted the autopsy on the body of Mahalakshmi and prepared Ext.P27 post mortem report. It is reported that no signs of recent sexual intercourse was seen. It would also report that in the hymen what was seen is only old healed tears. Despite such a piece of evidence, no question whatsoever was put to the appellant while being

examined under section 313, Cr.P.C with respect to any other incriminating circumstance in Ext.P2 which suggest commission of offence under section 376, IPC. In such circumstances, I have no hesitation to hold that this is an eminently fit case for re-appreciation of the entire evidence.

9. I have already adverted to the incriminating circumstances relied on by the trial court to arrive at the commission of the offence under sections 306 and 376, IPC. A perusal of the impugned judgment would reveal that Ext.P2 suicidal note, Ext.P10 chemical analysis report and Ext.P27 post mortem report were relied on by the trial court to find the appellant guilty of the aforesaid offences. In the contextual situation, it is only apposite to refer to the situation under which Ext.P2 was recovered. The evidence of PW1 would reveal that he along with his wife and minor child is residing in the bungalow in question. The deceased Mahalakshmi was brought there to look after the minor child. Going by the evidence of PW1, deceased Mahalakshmi used to sleep in room No.3 of the said bungalow. In

this context, it is to be noted that there is no case for the prosecution that on the fateful day, she slept somewhere else. PW1 would further depose that deceased Mahalakshmi used to wake them up after preparing tea at about 6.30 a.m in the morning. On that fateful day, since she did not turn up to call them, his wife went to the room where deceased used to sleep and since she was not seen there, she went outside and found deceased Mahalakshmi hanging on the branch of a tree standing in the courtyard. Going by the prosecution case, she returned to the room and intimated the same to PW1 and then PW1 went outside and saw her hanging on the branch of a tree. Immediately, PW1 went to Devikulam Police Station to inform the matter to the police. His evidence would further reveal that while he was there, his wife called him over telephone and intimated him that she obtained suicidal note of deceased Mahalakshmi. He would also depose that the said fact was duly reported then and there to police. The evidence of PW3 who was a cook attached to the said bungalow would reveal that on coming to know about the death of

Mahalakshmi, he had also searched her room. According to him, it was thereafter that PW1 left for intimating the matter to the police. Ext.P1(a) FIR would reveal that it was recorded at 8.45 a.m on 18.9.2004. Ext.P3 inquest report would reveal that at 9.30 a.m, Ramanathan, the then Sub Inspector of Police attached to Devikulam Police Station, came to the scene of occurrence and prepared Ext.P3 inquest report and thereafter prepared Ext.P4 scene mahazar at 12.15 p.m. Ext.P3 did not reveal that the inquest was conducted in the presence of any of the relatives of deceased Mahalakshmi. Though it is stated in Ext.P3 inquest report that deceased Mahalakshmi was found dead by hanging, firstly, by the wife of PW1 and that she was lastly seen by PW1, there is nothing in Ext.P3 inquest report which would suggest their presence at the time of the inquest. This assumes relevance. Witnesses to inquest report allegedly stated that they got no suspicion regarding the cause of death. The evidence of PW1 would reveal that even prior to his giving Ext.P1 FIS, he was intimated about the suicidal note of deceased Mahalakshmi by his

wife and he intimated that fact to the police from the police station itself. Suicidal note was recovered only after preparing Ext.P3 inquest report in and vide Ext.P4 scene mahazar. Inquest was completed by 12 'O' clock on 18.9.2004 and it is only thereafter that scene mahazar was prepared and the suicidal note was allegedly recovered. The evidence on record would reveal that Ext.P4 scene mahazar pertains to another room and it is not at all related to room No.3 in which deceased Mahalakshmi used to sleep. MOs 21 and 22 and also Ext.P2 suicidal note were recovered from another room. Ext.P9 mahazar in relation to room No.3 wherein deceased Mahalakshmi used to sleep was prepared only on 22.9.2004 by PW20. Another aspect is that PW1 would depose that the room where deceased Mahalakshmi used to sleep was opened only after the arrival of the Sub Inspector of Police. Ramanathan, S.I of Police who prepared Exts.P3 and P4 breathed his last much prior to the trial and Ext.P3 inquest report was proved through PW2 who was a worker in the estate in question and Ext.P4 was marked though PW3 who was

the cook attached to the bungalow. PW19, the woman police constable who accompanied the S.I of Police, deposed that the inquest was conducted by Ramanathan. PW19 did not speak anything about the preparation of Ext.P4. The evidence of PW20 also assumes relevance in this context. He would depose that he took over the investigation on 22.9.2004 and thereafter prepared Ext.P9 mahazar of room No.3 where deceased Mahalakshmi used to sleep. Evidence of PW20 would reveal that Ext.P2 suicidal note was not recovered from room No.3 which was used by deceased Mahalakshmi whereas it was recovered from another room in relation to which Ext.P4 scene mahazar was prepared. Thus, it is evident that the suicidal note as also MO3 to 5 dresses allegedly worn by Mahalakshmi during the time when she was being raped allegedly by the appellant were also recovered from the room in relation to which Ext.P4 was prepared by Ramanathan, S.I of Police and not from room No.3 which was used by deceased Mahalakshmi. No investigation was seen conducted as to how MO2 to 5 and Ext.P2 happened to reach inside the said room. In

this context, it is to be noted that no evidence is forthcoming as to whether the deceased was using room No.4, as well. The evidence of PW1 and PW3 would reveal that they themselves and wife of PW1 searched the room used by deceased Mahalakshmi immediately after seeing her body but before leaving to the police station. PW16 who continued the investigation and forming the opinion that Ext.P2 should be compared with Ext.P6 and P6(a) which were the letters written by deceased Mahalakshmi produced by PW7, sent them for analysis to FSL. However, owing to the non-availability of expert conversant with Tamil, no expert opinion could be obtained on Ext.P6 and P6(a) and therefore, they were returned to the investigating officer. Thereafter, no efforts were taken to obtain an expert report to verify whether Ext.P2 suicidal note was written by deceased Mahalakshmi. In this context, the failure on the part of the trial court to compare the handwriting and signature of deceased Mahalakshmi invoking the power under section 73 of the Evidence Act would assume relevance. The impugned judgment would reveal that though

an expert opinion on Ext.P2 after comparing it with Exts.P6 and P6(a) was not available, even without comparing them by invoking the power under section 73 of the Evidence Act, the trial court found that Ext.P2 is the suicidal note of deceased Mahalakshmi and relied it as a crucial incriminating material against the accused.

10. There cannot be any doubt with respect to the fact that in order to rely a note allegedly prepared by a person who committed suicide, it is incumbent on the prosecution to establish that it was the handwriting of the person who committed suicide. As noticed hereinbefore, it is to ensure that PW16 opined that an expert opinion has to be obtained on Exts.P2, P6 and P6(a). It is also to be noted that in a bid to obtain such a report, the said documents were forwarded to FSL. But indisputably, no expert opinion could be obtained on those documents and they were returned as per Ext.P16 stating that owing to non-availability of an expert conversant with Tamil, such an examination was not done. Thus, it is evident that no expert opinion was obtained to establish that Ext.P2 was written by deceased

Mahalakshmi in her own handwriting. True that PW7 who is none other than the brother of deceased Mahalakshmi deposed that Ext.P6 and P6(a) are letters written by deceased Mahalakshmi to her parents. In this context, it is also to be noted that at the same breath, PW7 deposed that he was not shown Ext.P2 and he had no opportunity to go through the contents in Ext.P2. In such circumstances, it could not be taken that Ext.P2 was identified as suicidal note written by deceased Mahalakshmi by PW7 and he has categorically deposed before the court that even while deposing before the court, he was totally unaware of the contents in Ext.P2. If he had actually seen it he would not have deposed like that. In fact, he had deposed that he was not shown Ext.P2. In such circumstances, before fixing culpability on the appellant, the court should have exercised the power available under section 73 of the Evidence Act to compare signature, writing in Ext.P2 with Exts.P6 and P6(a). In this context, it is to be noted that Exts.P6 and P6(a) could not be taken as documents to prove Ext.P2 as written by deceased Mahalakshmi. True that PW7 deposed to that

effect. A perusal of Ext.P6 and P6(a) would reveal certain relevant aspects. Going by Ext.P6, the address of the sender of the letter is Laxmi K., Lokhart Estate, Munnar. Going by Ext.P6(a) the address of the sender is A.Lakshmi, Davilsulam, Munnar. Apart from the spelling mistakes in Ext.P6(a) with respect to the address, it is to be noted that there is striking difference in the manner they were written. A comparison of Ext.P6 and P6(a) would reveal that by no stretch of imagination, it could not be said that they were written by the same person. Before identifying as to whether it is Ext.P6 or Ext.P6(a), which is the letter actually written by deceased Mahalakshmi herself, Ext.P2 cannot be compared with Ext.P6 or Ext.P6(a). In short, in such circumstances, a comparison invoking the power under section 73 of the Evidence Act with a view to fix the culpability on the accused was also impossible. In such circumstances, in the absence of an expert opinion, though such an opinion may not be conclusive and in the absence of a comparison invoking the power under section 73 of the Evidence Act (even a comparison would not have enabled the

court to arrive at a finding that Ext.P2 is written by deceased Mahalakshmi in the aforesaid circumstances) Ext.P2 could not have been relied on as an incriminating material to fix culpability on the appellant.

11. It is evident from the materials on record that PW1 reached Devikulam Police Station in the morning after finding deceased Mahalakshmi hanging on the branch of a tree standing in the premises of his bungalow. He intimated that fact to the police by about 8.45 a.m on 18.9.2004. While he was there in the police station, he got information from his wife about finding of a suicidal note of deceased Mahalakshmi. Going by the testimony of PW1, he intimated that fact readily to the police station. Ramanathan, then S.I of Police attached to Devikulam Police Station thereafter came to the place of occurrence at about 9.30 a.m on 18.9.2004. The records would reveal that on reaching the place of occurrence, he straight away he proceeded to conduct inquest. The inquest started at 9.30 and concluded by 12 O' clock. It is only thereafter that he prepared

Ext.P4 scene mahazar. Ext.P4 is also not one relating to room which was being used by Mahalakshmi to sleep. Ext.P4 would reveal that suicidal note which was placed on a table under a glass tumbler and MOs 3 to 6 dresses allegedly worn by Mahalakshmi on that fateful day were shown to S.I of Devikulam Police Station, by the wife of PW1 and they were recovered not from room No.3 which was being used by Mahalakshmi to sleep. Ext.P4 scene mahazar was prepared in respect of that room from where those materials were allegedly seized. No material would reveal that despite such a situation, the investigation was made to find out the circumstances under which those materials came to be inside the said room. Obviously, the room which was being used for sleeping by deceased Mahalakshmi was searched by PW20 and he prepared Ext.P9 mahazar only on 22.9.2004. Going by Ext.P13 chemical analysis report, MO4 and MO5 contained human semen. Ext.P27 is the post mortem report prepared by PW23 who conducted autopsy on the body of deceased Mahalakshmi. PW23 would categorically depose that the hymen

revealed only old healed tears and that hymen permitted two fingers easily. In the box, he would depose that in such circumstances, it could not be said that deceased Mahalakshmi had sexual intercourse recently. The evidence would not reveal that there was any recent sexual intercourse. Ext.P17 would reveal that vaginal smear and vaginal swab collected from deceased Mahalakshmi were subjected to chemical analysis and on such examination, it was reported that semen or spermatozoa were not contained in the vaginal swab or vaginal smear. It is also to be noted that in Ext.P27, PW23 did not notice any sign of injuries on the body of deceased Mahalakshmi. In fact, no antemortem injuries were found on her body. In such circumstances, the trial court went wrong in relying on the evidence of PW23 with Ext.P27 to fix culpability on the appellant for the aforesaid offence. The officer who prepared Exts.P3 and P4 and allegedly collected a hair from the chest of deceased Mahalakshmi at the time of inquest was not alive at the time of trial and PW29 the woman police constable who accompanied him deposed to the effect

that Ramamanthan, the S.I of Devikulam Police Station who prepared Exts.P3 and P4 found a hair on the chest region of deceased Mahalakshmi and collected it in a cover. Neither the investigating officer nor PW19 or any other prosecution witnesses who are competent to depose as to in what manner the said hair was kept till it reached the FSL for analysis, did not depose the manner in which it was kept in custody or at least to establish that it was kept in safe custody till it reached the FSL for analysis. This assumes relevance in the context that the hair samples were collected from various parts of the body of the appellant only after about four years precisely on 19.8.2008. The said hair was compared with the hair samples allegedly collected from chest and other body parts of the appellant. In this context, the evidence of PW12 would also to be scanned carefully. He proved Ext.P10 report and at the same time, PW12 would depose that he had subjected the hair recovered allegedly from the body of Mahalakshmi and also the sample hairs collected from the body parts of the accused only through microscope and he had

categorically deposed that they were not subjected to DNA test. At the same time, it is strange to note that even after deposing in that manner, PW12 would depose that after such examination, the hair which was recovered from the chest part of deceased Mahalakshmi was completely utilised for such examination. When it is evident that the only microscopic examination was conducted, no explanation whatsoever was offered by him as to how and under what circumstances the hair could be utilised fully while subjecting to microscopic examination when admittedly no chemical examination was conducted using the said hair. No explanation whatsoever was offered by him for his statement regarding complete use of the recovered hair. Be that as it may, the question is, how in such circumstances Ext.P10 with the evidence of PW12 could be considered as a factor supporting the case of the prosecution. It is to be noted that the said factor was heavily relied on by the trial court to fix culpability on the appellant. There can be no doubt with respect to the position that when no material has been collected from the body of

deceased which could be utilised on a later point of time for chemical analysis or for any analysis or for the purpose of comparison with a like material of the accused it is the bounden duty of the prosecution to preserve the same under safe custody. Necessarily the prosecution is bound to establish that it was in safe custody till it reached the Forensic Science Laboratory for chemical analysis. When it is evident that the hair thus allegedly recovered from the body of deceased Mahalakshmi was sent for analysis only after collecting hair samples from the body of the appellant and when once it is admitted that the sample hair was collected from various parts of the appellant only on 19.8.2008 i.e., after four years since the alleged incident, the failure on the part of the prosecution to establish the factum of proper preservation of the same in safe custody could only be said to be fatal to the prosecution and at any rate, in such circumstances it could have been treated as a factor supporting the case of the prosecution. A careful scanning of the impugned judgment would reveal that the trial court relied on the evidence on PW3 to arrive at the conclusion that

on the alleged date, the appellant went to the house of PW1 where deceased Mahalakshmi was residing. A scanning of the evidence of PW3 would reveal that in fact, he had not deposed to the effect that the appellant went to the house of PW1. What he had deposed is that when he returned from the house of PW1 and when he reached near the shop of Murukan, he found the appellant there and thereafter they consumed alcohol from the said shop. He went on to say that thereafter he proceeded to his house and the appellant proceeded to the guest house of the General Manager. He would also depose that the guest house of PW17 is hardly 50 metres from there. At the same time, the distance to the house of PW1 from there is about 3 kilometres though there is short cut having a distance of 1.5 kilometres. Thus, it could be seen that PW3 had not deposed that he had seen the appellant going to the house of PW1 where deceased Mahalakshmi was staying, after consumption of liquor. In that context, it is to be noted that none of the prosecution witnesses had deposed before the court that they had seen the appellant in the house

of PW1. True that PW4 who is a watcher of the guest house of PW17 deposed that the appellant reached there at 12 O' clock. But that by itself is no reason for holding that the appellant was there in the house of PW1. Another crucial aspect which escaped the notice of the trial court is that the time of death was not at all mentioned in the post mortem report and there was absolute absence regarding any evidence relating the same. Even if PW4 is to be believed, his evidence is to the effect that the appellant reached there by 12 O' clock. It is also to be noted that PW1 deposed that after finding deceased Mahalakshmi hanging on the branch of a tree, he searched the house including the room used by her to sleep and he could not find the signs of breaking of any doors or windows. In that context, it is also to be noted that no signs of any altercation was noticed in Ext.P4 as also in Ext.P9. The evidence of PW1 would reveal that he had not noticed any signs of someone's entry into the room on 17.9.2004. Going by the alleged Ext.P2 suicidal note, deceased Mahalakshmi went to the toilet. But it is not stated whether it is inside the house or outside the house. It is

also crucial that the scene mahazar would reveal that an attached toilet is there inside the house which was being used by deceased Mahalakshmi though another toilet was seen outside the room where logs were used to be kept. In this context, it is also to be noted that PW20, the investigating officer also deposed that on inspection, the latches of doors and windows were found in tact and no signs of any attempt to break them were found. In this case, another aspect also assumes relevance. Though going by the evidence of PW1, the alleged suicidal note was firstly found by his wife and going by the case of the prosecution, the said note as also the dresses allegedly worn by deceased Mahalakshmi at the time of the alleged incident were shown to the S.I of Devikulam Police Station by the wife of PW1, prosecution has not examined her. It is also to be noted that going by the evidence of PW1, it was she who firstly found the body of deceased Mahalakshmi hanging on the branch of a tree. The most crucial aspect in this case is the manner in which examination under section 313, Cr.P.C was conducted. Incriminating statement made in

Ext.P2 pertaining to commission of offence under section 376, IPC by the appellant was not put to him and at the same time, the trial court relied heavily on Ext.P2 to connect the appellant with the crime. A scanning of 313 examination of the appellant would undoubtedly reveal that no such question was put to him. The learned Public Prosecutor submitted that it could not be said that the appellant was not subjected to 313 examination, rather, 313 examination was conducted in this matter and existence of Ext.P2 was put to him. The learned counsel for the appellant submitted that it could not and would not achieve the object of examination under section 313 Cr.P.C as to achieve the said purpose, the very incriminating circumstances in Ext.P2 should have been put to the appellant. In this case the contents in Ext.P2(a) assumes relevance and they read thus:-

രാത്രി	ഉറങ്ങുമ്പോൾ	ഞാൻ	എപ്പോഴും
പോകുന്നതുപോലെ			ബാത്റൂമിൽ
പോയി. അവനുടെ		ശല്യം.	ഒരുത്തൻ
എന്നെ വായ്പൊത്തി		കൊണ്ടുവന്നു.	എത്ര
എതിർത്തിട്ടും		കഴിഞ്ഞില്ല.	എന്നെ
നശിപ്പിച്ചു. എല്ലാം	കഴിഞ്ഞതിനുശേഷം	എന്നോടു	
മാപ്പാക്കണമെന്നു	പറഞ്ഞു.	ഇതൊക്കെ	
സ്വപ്നമാണ്.	ഇതാരോടെങ്കിലും,	അമ്മയുടടുത്തോ	

പറഞ്ഞാൽ എല്ലാവരെയും കൊല്ലും എന്നു പറഞ്ഞു. എനിക്ക് എണീക്കാൻ കൂടി വയ്യ. എനിക്ക് ജീവനിൽ ജീവനായ അച്ചനേയും അമ്മയേയും കാണണമെന്നാഗ്രഹമുണ്ട്. എന്നാൽ ഇത്ര പെട്ടെന്ന്, അതും ശവമായിക്കുന്നുമെന്നു വിചാരിച്ചതേയില്ല. എന്നെ പ്രസവിച്ച അമ്മ, അച്ചൻ ആയാലും ശരി, എന്നെ നാലുവർഷം വളർത്തിയ അമ്മ ചാർളവും ശരി, എന്റെ അണ്ണന്മാർ മൂന്നീശ്വരൻ, തങ്കരത്നം എല്ലാവരും എനിക്കുവേണ്ടി ജീവനേതരും.

.....എന്നെ നശിപ്പിച്ചത് യൂണിസ് ട്രൈവർ ജോൺസൺ ആണ്. അവനെ വെറുതെവിടരുത്.

12. The learned Public Prosecutor submitted that the defect in the examination under section 313 is not fatal to the prosecution and it could not vitiate the conviction. True that after referring to Ext.P2, a question was put to the appellant, but that was pertaining to the incriminating material with respect to the offence under section 306, IPC. In the light of the position discernible from 313 examination, the fact that no question whatsoever pertaining to the incriminating material in so far as it relates to the offence under section 376 was put to the appellant, cannot be disputed. But, when it is seen that existence of Ext.P2 was put to him during examination under section

313 Cr.P.C, this can only be taken as a defective examination. True that non-examination under section 313 Cr.P.C is fatal to the prosecution and it would vitiate the conviction. A defective examination under 313 would not vitiate the conviction unless it causes prejudice to the appellant. In this case, as noticed hereinbefore, no question whatsoever was put to the appellant regarding the incriminating circumstances in relation to the commission of offence under section 376, IPC. Without putting any such question and merely because existence of Ext.P2 was put to him, the prosecution cannot be heard to contend that the aforesaid defect in examination under section 313 was not prejudicial to the appellant and it is only a defect in the examination and it would not vitiate the conviction. The learned counsel for the appellant in such circumstances relied on the decision in **Prakash v. State of Karnataka [2014 KHC 4255]**. In that case also the existence of a serological note was put to the accused therein. But at the same time, the contents in the said note which is incriminating were not put to the

accused. The Hon'ble Apex Court in paragraph 63 of the decision in

Prakash's case (supra) held thus:-

“It is one thing to say that no prejudice was caused to Prakash by not affording him an opportunity to explain the serological report. It is quite another thing to put the report to his learned counsel in appeal and give him (the learned counsel) an opportunity to explain the report of the serologist. The course adopted by the High Court is clearly impermissible. The law on the subject was laid down several decades ago by the Constitution Bench in *Tara Singh v. State*, 1951 SCR 729 and is to the effect that an accused must be given a chance to offer an explanation if the evidence is to be used against him and the conviction is intended to be based upon it. It follows that if the accused is not given an opportunity to explain the circumstances against him in the testimony of the witnesses, then those circumstances cannot be used against him, whether they prejudice him or not. This is what the Constitution Bench said:

“It is important therefore that an accused should be properly examined under S.342 [Now S.313 of the Code of Criminal Procedure] and, as their Lordships of the Privy Council indicated in *Dwarkanath v. Emperor*, AIR 1933 PC 124 if a point in the evidence is considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that

the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This an important and salutary provision and I cannot permit it to be slurred over. I regret to find that in many cases scant attention is paid to it, particularly in Sessions Courts. But whether the matter arises in the Sessions Court or in that of the Committing Magistrate, it is important that the provisions of S.342 should be fairly and faithfully observed.”

13. To buttress the said point, the learned counsel for the appellant also relied on another decision of the Hon'ble Apex Court in **Sukhjit Singh v. State of Punjab [2014 KHC 4641]**. The said decision deals with the manner in which question under section 313 Cr.P.C should be conducted. It was held that the whole object of the section is to afford the accused a fair and proper opportunity to explain the circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person would be able to appreciate and understand. In the light of the said decision, the learned counsel appearing for the appellant submitted that the prosecution could not show that since the

existence of Ext.P2 was put to him, the failure to put the incriminating circumstances in Ext.P2 would not be fatal and it could not vitiate the conviction. It is to be noted that the very purpose of examination under section 313, Cr.P.C is evident from the very opening sentence in the said section. Section 313, Cr.P.C starts as follows:-

“In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him”

Thus, it cannot be disputed that the very purpose of examination under section 313, Cr.P.C is to afford the accused an opportunity personally to explain the circumstances appearing in evidence against him. It is to be noted that in such circumstances in the light of the provisions under section 313 Cr.P.C and also the decisions referred (supra), the incriminating circumstances appearing in Ext.P2 should have been put specifically to the appellant and he should have been afforded with an opportunity personally to explain such circumstances. Undoubtedly, no such opportunity was afforded and no questions were put to him. In such circumstances, I have no doubt

in my mind to hold that it is an incurable defect under section 462, Cr.P.C. A perusal of the impugned judgment would reveal that such circumstances appearing in Ext.P2 were taken as incriminating circumstances and relied on for the purpose of fixing culpability on the appellant. When that be so, necessarily the said defective examination under section 313 Cr.P.C could only be said to be prejudicial to the appellant and therefore, in the light of the said decision it can only be said that it vitiated his conviction. Another lapse which is fatal to the prosecution is that non-production of the ligature. There was no explanation whatsoever from the prosecution as to what happened to the ligature. In a case where the death was due to hanging and the accused is alleged of commission of offence under sections 306 and 376, IPC, the failure to produce ligature in question cannot be lightly taken. Owing to the failure on the part of the prosecution to produce the same, the appellant was virtually deprived of an opportunity to take appropriate defence. In such circumstances, that failure would be certainly fatal to the prosecution

and that aspect was also ignored by the trial court. As noticed hereinbefore, when the conviction of an accused is the outcome of a perverse appreciation of evidence, the trial court is bound to exercise the appellate power. I have already taken note of the fact that certain crucial aspects vividly explained hereinbefore which could not have been ignored by the trial court and at the same time, certain materials which were irrelevant and as such, inadmissible in law, were heavily relied on to fix culpability on the appellant. A judgment can be said to be perverse when it is against the weight of evidence. Having carefully scanned the evidence on record, it can only be said that the conviction of the appellant was nothing but an outcome of a perverse appreciation of the evidence and it can only be said that the prosecution in this case had miserably failed to prove the guilt of the accused under sections 306 and 376, IPC. I will be failing in my duty if I am not recording the displeasure in the manner in which the investigation was conducted in this case. To say the least, the investigation has not done justice both to the accused as also to the

deceased. No earnest endeavour was seen taken as to whether it was a case of mere suicide or murder. It is to be noted that in this case PW23 who conducted the autopsy categorically noted in Ext.P27 and deposed before court that apart from the marks of the ligature no other injury was found on the body of the deceased. In such circumstances, this appeal is allowed. The judgment in S.C.No.454 of 2009 passed by the Court of Sessions, Thodupuzha is set aside. The appellant is set at liberty and the bail bond of the appellant stands cancelled.

**Sd/-
C.T. RAVIKUMAR
(JUDGE)**

spc/

