

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. 343 of 2011 ()

**S.C.NO.69/2010 of ADDITIONAL SESSIONS COURT (AD HOC)-1, MANJERI
DATED 26-08-2010**

APPELLANT(S):

**JOSE S/O.POVVAS, C.NO.8729,
CENTRAL PRISON, KANNUR.**

BY ADV. MURALEE KRISHNA R (STATE BRIEF)

RESPONDENT(S):

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

BY PUBLIC PROSECUTOR SMT.BINDU GOPINATH.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.06.2015, THE
COURT ON 10-07-2015, DELIVERED THE FOLLOWING:**

Bb

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

Crl.Appeal.343 of 2011

Dated 10th July, 2015

JUDGMENT

Raja Vijayaraghavan.J.

1. The sole accused in S.C.No.69 of 2010 on the file of the Additional Sessions Judge-(Ad hoc) –I , Manjeri, is the appellant. He stands convicted under Section 302 of the IPC and has been sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs 10,000/- in default to undergo rigorous imprisonment for 1 year.

2. The skeletal facts are as follows :-

(i). The accused and the deceased Mohan Das are building construction workers. The deceased was the supervisor of the accused. The accused wanted to marry the younger sister of PW2. The deceased intervened and dissuaded PW2 which resulted in the accused being

inimically disposed towards the deceased. The accused and the deceased were occupying the same room situated in a Lodge by name Nilambur Lodge at Kalikavu Panchayath. On 22.1.2009, in the evening, the accused and the deceased came back to their room after consuming toddy from the toddy shop in which PW9 was the salesmen. Thereafter, on 22.1.2009 at about 9:30 pm, the accused is alleged to have hacked on the neck of the deceased with a spade and inflicted fatal injuries on the deceased. Thereafter, using a rope purchased from the shop of PW5 the deceased was hanged on the roof of the room in the lodge to make it appear that the deceased had hanged himself to death. After confirming the death of the deceased, the deceased was brought down and his body was laid on the cot inside the room.

(ii). Thereafter he went to the house of PW4 who is also a co-worker and informed him that their supervisor had hanged himself to death. The accused and PW 4 went to the room to take a look at the body and thereafter went to Venjarammoodu Police Station and informed

about the incident. They were directed to approach the jurisdictional police station.

(iii). On 23.1.2009 at 6 am the statement of the accused was recorded by the Sub Inspector of police Kalikavu, on the basis of which exhibit P 22 (a) FIR was registered under the head “unnatural death”. It was mentioned that the roommate of the first informant had committed suicide by hanging on the roof.

(iv). After registration of the crime investigation was taken over by PW15, who was the circle inspector of police Wandoor Police Station on 23.1.2009 itself. After taking over investigation, he conducted inquest over the dead body of the deceased. Thereafter the body was sent for postmortem examination. The accused was kept under surveillance and on questioning the accused, he is alleged to have confessed to the crime and disclosed to the investigating officer that the spade used by him for hacking the neck of the deceased was concealed inside the water tank on the upper floor of the building. Based on the disclosure statement given by the accused, he was

taken to the Nilambur Lodge and a spade was recovered from the top of the water tank as per Ext. P5 mahazar. A scene mahazar was prepared by the investigating officer with the assistance of the scientific expert. The accused was later arrested and his nail clippings were obtained. After completion of investigation final report was laid before the Judicial First Class Magistrate, Nilambur.

3. The learned Magistrate initiated committal proceedings as CP No. 33/2009 and after complying with the formalities committed the case to the Court of Sessions, Manjeri. The Sessions Court later made over the case to the Additional Sessions Judge (Ad hoc)-I Manjeri, for trial and disposal. On production of the accused, it was noticed that he was not defended by any counsel of his choice. A counsel was appointed by the learned Sessions Judge with the assistance of the District Legal Service Authority.

4. The learned Additional Sessions Judge, after

hearing the prosecution and the accused framed the charge against the accused for the offence punishable under section 302 of the IPC. When the charge was read over and explained to the accused, he pleaded not guilty and hence trial was proceeded with.

5. In order to prove the case of the prosecution, PWs 1 to 16 were examined and Exts.P1 to P 24 were marked. MOs were produced and identified as MO1 to 10 . After the close of prosecution evidence, the incriminating circumstances arising out of the evidence were put to the accused under Section 313 Cr.P.C. The accused after denying all incriminating circumstances, stated that he was innocent. No evidence was adduced by the defense .

6. The learned Sessions Judge, after appreciating the evidence let in and the various circumstances proved, came to the conclusion that the prosecution was able to successfully prove the guilt of the accused. On that basis the accused was convicted and sentenced to undergo

rigorous imprisonment for life under Section 302 IPC.

7. The appeal was filed from the Jail by the appellant and when the matter had come up for admission, the registry was directed to appoint a legal aid counsel for prosecuting the appeal. Sri.Muraleekrishnan, was appointed as counsel to prosecute the appeal .

8. We have heard Sri Muraleekrishnan, the counsel appearing for the appellant and and Smt. Bindu Gopinath the learned Public Prosecutor appearing for the State.

9. The learned counsel for the appellant, Sri Sri.Muralikrishnan argued that the case against the appellant rests on circumstantial evidence and after elucidating the principles of law relating to appreciation of circumstantial evidence contented that the finding of guilt against the appellant by the learned Sessions Judge is unsustainable. The learned counsel argued that the prosecution had failed to establish the circumstances

from which the conclusion of guilt was to be drawn and further contended that the facts that have been established by the prosecution is totally inconsistent with the hypothesis of the guilt of the accused. It was pointed out that the evidence of the witnesses examined did not provide a convincing connecting link to enter upon a finding of guilt as against the accused. The prosecution could not establish the motive alleged and this failure is fatal, it was submitted. According to the learned counsel, none of the circumstances unerringly pointed to the guilt of the accused and hence argued for an acquittal.

10. The learned public prosecutor on the other hand argued that the prosecution had succeeded in proving all the circumstances and there was no need for interfering with the considered findings of the learned Sessions Judge. It was submitted that the accused and the deceased were residing together in the same room and they were moving together. They were last seen together by PW4 a co-worker and PW9, the toddy salesman. It was

also submitted that the accused had given false explanation as to how the deceased had sustained fatal injuries on his neck. It was also pointed out that, the rope used for hanging was purchased by the accused on the previous day from the shop of PW5 and it was the same rope which was found on the neck of the deceased. It was also submitted that based on the disclosure statement given by the accused the spade used for inflicting cut injury on the neck of the deceased was recovered at the instance of the accused under section 27 of the Evidence Act and the said recovery is a very incriminating circumstance against the accused. It was finally submitted that there was no reason to disbelieve the case of the prosecution and the judgment, conviction and sentence passed by the learned Sessions Judge, after proper analysis of the facts and circumstances, is only to be confirmed.

11. We have been taken through the evidence, materials on record and also through the judgment of the

Court below. We have heard the counsels in extenso.

12. Before we make an endeavor to analyze the individual circumstances we shall briefly take a look at the evidence adduced by the prosecution to prove its case.

13. PW1 is an attestor to Ext.P1 inquest report. He identified the objects seized which included the yellow plastic rope which was found tied around the neck of the deceased which was marked as MO1.

14. PW2 is a person who was known to both the accused and the deceased. He deposed that he had asked the accused to get married and to set up a family life. When the accused expressed his desire to marry the sister of PW2, he asked him to convert to Islam. Though PW2 was cited to prove that the deceased had warned him of the antecedents of the accused, he did not state so before Court and was declared hostile to the prosecution. He would say that the accused and the

deceased were close friends .

15. PW3 is the village officer of Kalikavu, who prepared Ext.P3 sketch of the scene of occurrence. PW4 is a coworker of the accused and he deposed before court that the deceased was their supervisor. He would say that on the date of incident at about 12.00 am the accused had come to the house of his wife where he was staying and informed them that their supervisor had hanged himself. They together went back to the lodge room and he noticed the deceased lying dead on the bed. There was a pool of blood inside the room. He saw a plastic rope tied on the neck of the deceased, and also on the iron rod on the roof of the room. There was blood on the wooden cot and also on the bed. When asked, the accused informed that he had gone for a movie and when he returned back he had seen the deceased lying dead on the bed. He also deposed before court that the clothes worn by the accused contained bloodstains when he had seen him. When the accused was questioned as regards

the presence of blood on his clothes, the accused had informed that this had happened when he brought the body down and placed it on the wooden cot. Immediately thereafter the accused and PW4 rushed to the police station to give the first information. He stated in chief examination that it was the accused who murdered the deceased because the deceased had dissuaded PW 2 and prevented the marriage with the sister of PW2 with the accused from being solemnized. In cross examination he stated that when he had gone to the police station the accused was wearing a pant. He also would say that he had only hearsay knowledge that the accused was the person who had perpetrated the act of murdering the deceased. He has no knowledge as to whether the deceased had warned PW2 about the bad antecedents of the accused .

16. PW5 was examined by the prosecution to prove that on the previous day of the incident the accused had visited his shop to buy cigarettes and he also bought

yellow plastic rope having a weight of 250 g. He identified MO1 plastic rope when it was shown to him. In cross examination he denied that he had sold plastic rope weighing 2.30 kg. He also deposed that similar type of rope was available in all shops and he can only say that the rope is similar to the one sold.

17. PW6 is the attestor to Ext.P4 scene mahazer. He identified MO3 piece of bed sheet seized at the time of preparation of Exhibit P4.

18. PW7 was examined to prove the seizure of the spade at the instance of the accused. He would say that he had seen the accused taking out a spade from the top of the water tank on the upstairs portion of the Nilambur lodge and also identified his signature in Exhibit P5 mahazer evidencing the seizure.

19. PW8 had taken Exhibit P6 photographs at the time of inquest. PW9 is the sales man of a toddy shop and he

deposed before court that he is acquainted with both the accused and the deceased and that they used to come very often for taking toddy from his shop. He deposed that on the previous day of the death of Mohandas, the appellant and the deceased had come to his shop and consumed 3 bottles of toddy.

20. PW10 is the medical officer attached to the Taluk Hospital, Nilambur, who deposed before Court that he had examined the accused on 25.1.2009 and took his nail clippings as per the request of the Sub Inspector of police Kalikavu.

21. PW11 is the forensic surgeon attached to the medical college hospital who conducted the post-mortem over the body of the deceased and he had issued exhibit P8 post-mortem certificate which contained the following findings.

B. INJURIES(ANTEMORTEM):

"1. Lacerated wound 11x5x4cm transverse on front of upper part of neck. It was 4cm below chin on midline. Left end at 2cm below left angle of lower jaw. Right end 1cm above angle of jaw. Contusion 8x3x0.5cm adjacent to upper border more on left side crossing the midline for 2cm. The muscles sterno thyroid sternohyoid, omohyoid and submandibular salivary glands were cut bilaterally. Internal jugular vein was cut on left side. Air passage was cut just below the vocal cords. The cartilages thyroid, cricoid were fractured at multiple places.

2. Lacerated wound 6x1cm muscle deep transversely placed on front of neck below injury No.1. In midline there was a tag of skin 0.5cm broad separating it from the previous injury.

3. Superficial lacerated wound 1.5x0.5cm over right jaw margin 3cm to the right of midline.

4. Superficial lacerated wound transverse 4x1cm with irregular edges over neck left of midline, 4cm below lower border of injury No.2.

5. Superficial lacerated wound 5.5cm, linear, transverse over left side of front of neck, 1.5cm above previous injury, inner end at midline.

6. Superficial lacerated wound linear 4cm long front of left side of neck, 1.5cm above injury No.5 and 2.5cm to the left of midline.

7. Superficial lacerated wound 2.5cm long on left side of front of neck, 3cm above injury No.6, inner end touching the lower outer border of injury No.1.

8. Two superficial lacerated wounds 1cm each, close to left jaw margin, 2.5cm outer to midline.

9. Abrasion in number 1.5x0.5cm,

0.5x0.5cm, 1x1.5cm on right side of front of neck. Inner one was 5cm above jugular notch.

10. Contusion front of neck, and left side 14x10cm, lower end at jugular notch incorporating previous abrasion and injury No.4.

11. Multiple contusions over an area 11x5.5cm upper chest, right upper end at collar bone and 7cm above nipple and 4.5cm to the right of midline.

12. Abrasion 9x1cm outer aspect of left forearm upper end at elbow.

13. Spot abrasion over back of left forearm 2cm above wrist.

14. Contusion of thenar eminence of right hand 0.5x0.5cm.

15. Contusion 7.5x2cm front of right forearm, vertical 7cm below elbow.

16. Contusion 3x2cm inner aspect of right forearm 6cm below elbow and 3cm above and outer to previous one.

17. Linear abrasion, vertical 3.5cm inner left thigh 12cm above knee.

He also stated that the death was due to combined effect of injuries to the neck and Asphyxia.

22. PW 12 is the Scientific Assistant, District Crime Records Bureau, Malappuram, who inspected the place of

occurrence and collected the material seized by the circle inspector. He identified the material objects which were marked MO5 to MO9.

23. PW13 was the Sub Inspector of police and he was examined to prove that he had witnessed PW 15 seizing the shirt as evidenced by Ext.P9 mahazer.

24. PW14 is the head Constable of police attached to the Kalikavu police station and he deposed before court that he was an attester to Ext.P9 mahazar prepared at the time of seizure of the shirt of the accused. He also was an attester to Ext.P10 mahazar prepared when the properties were seized by the scientific assistant.

25. PW15 was the circle inspector of police Wandoor, who conducted the investigation in this case. He had prepared the inquest over the dead body of the deceased . The accused, who was under surveillance was questioned and he is alleged to have confessed to the

crime and on the basis of the disclosure statement furnished MO2 spade was recovered from the top of a water tank as per Ext.P5 seizure mahazar. He prepared Ext.P4 Scene mahazar. It was on completion that the charge was laid before the court below.

26. PW16 was the Sub Inspector of police and he deposed before court that on 23.1. 2009 at about 6 AM he had recorded the statement of the accused based on which Ext. P22(a) FIR was registered. It was on the basis of the above evidence that the finding of guilt was arrived at by the learned Sessions Judge.

27. Admittedly, there are no eye witnesses to the occurrence and the prosecution case is based on circumstantial evidence. After hearing the parties and after going through the judgment of the Court below it appears that the following are the circumstances with the aid of which the prosecution sought to establish that it was the accused and the accused alone who had

committed the crime.

CIRCUMSTANCES

(i). Homicidal death of the deceased.

(ii). The accused and deceased were construction workers and were living in the same room in Nilambur lodge .

(iii). The accused was interested in marrying the sister of PW 2, which was scuttled by the deceased, who was his supervisor which incidentally is the immediate motive.

(iv). On the fateful day the accused and the deceased were moving together as spoken by PW4 and PW 9.

(v). The accused went to the wife's house of PW4, another co worker and gave a false explanation as to how he had found the deceased hanging inside the room to make it appear that the deceased had committed

suicide .

(vi). The accused on the previous day had purchased MO 1 rope from the shop room of PW5, which was found tied on the neck of the deceased .

(vii). Disclosure statement given by the accused based on which MO 2 spade was recovered .

(viii). Presence of blood in the clothes worn by the accused and also in the nail clippings .

28. It would be advantages to recall the law relating to appreciation of evidence in a case based on circumstantial evidence before evaluating the circumstances.

29. The law relating to the appreciation of evidence in a case based on circumstantial evidence was lucidly stated by the Apex Court is in **Hanumant v. State of**

Madhya Pradesh (AIR 1952 SC 343) where the principle was laid down as follows:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. All the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

30. This decision was followed in **Tufail v. State of Uttar Pradesh (1969 3 SCC 198)** and in **Ramgopal v. State of Maharashtra (AIR 1972 SC 656)**. Analysing the decisions, a later Bench of the Apex Court in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR**

1984 SC 1622) has laid down the golden principles in a case based on circumstantial evidence as follows:

*"(1).The circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is only a grammatical but a legal distinction between may be proved and must be or should be proved as was held by this Court in **Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC, 793**; **(AIR 1973 SC 2622)** where the following observations were made: certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions".*

(2). 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.

(3). the circumstances should be of a conclusive nature and tendency.

(4). there must be a chain of evidence so complete as not to leave any reasonable ground for that 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.

(5). there must be a chain of evidence so complete as not to leave any reasonable ground for that 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.

31. The Apex Court in **State of U.P v. Ashok Kumar Srivastava (AIR 1992 SC 840)** has cautioned the Courts regarding application of circumstantial evidence as follows:

This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forwarded by the accused, however, far fetched and

fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise. The circumstances ought to justify the inference of guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person."

32. Having noticed the principles governing the case based on circumstantial evidence we propose to consider the circumstances relied on by the prosecution.

33. The fact that the deceased had died a homicidal death is not disputed. The evidence let in by the prosecution through, PW1 and PW11 and Ext. P1 and P8 would clearly establish this fact

34. The next circumstance projected by the prosecution is the fact that the accused and the deceased were living in the same room at the Nilambur lodge. Except for such an allegation absolutely no evidence is forthcoming to establish this fact. No person was examined by the prosecution to establish that the

accused or the deceased were ordinarily residing in the lodge. None of the occupants of the adjoining rooms were examined. Neither the register maintained in the Lodge or any record book was produced to show that they were residing in the same room. Even the watcher, if any, or the care taker/Manager of the lodge was examined to prove this aspect. This assumes great significance as according to the prosecution, the murder was committed at 9.30 pm on 22.2.2009 in the upstairs room in the Nilambur Lodge. Ext.P3 sketch and Ext.P4 scene plan would reveal that there are several other rooms on this floor. Column No.8 of P1 inquest also details the names of various persons who were occupying the adjacent rooms. It is also the case of the prosecution that injuries were inflicted to the neck of the deceased prior to hanging him. It appears that the case of the prosecution is that the accused and the deceased had consumed 3 bottles of toddy from the shop room of PW9 and had left together. We are unable to decipher from the evidence as to whether the accused and the deceased had together

come to the room at Nilambur lodge or not. Obviously, somebody might have seen their entry into the lodge more so because the room is admittedly in the first floor. No explanation is forthcoming as to why the occupants of the same floor was not cited, questioned or examined . It is quite likely, in the nature of the injuries sustained by the deceased, that there would have been some disturbance or noise from the room. We fail to understand the logic behind shutting away all such evidence by the investigating agency. No explanation is forthcoming from PW15, the Investigating Officer as regards this very material aspect. If that be the case, we are of the considered opinion that a fair and truthful investigation would have ascertained the entry of the accused into the room, his exit, the responses of the adjacent occupiers etc. No such evidence is forthcoming and all these matters are shrouded in secrecy. Even the registers maintained in the lodge are not seized to ascertain the other occupiers or any person in charge questioned as to what had transpired late in the evening on that day. This

creates a lot of suspicion in our mind as to the genesis of the incident. This is a fatal defect in the prosecution and will create grave doubts. We are of no doubt in our mind that the prosecution has miserably failed establish conclusively that the accused and the deceased were occupying the same room in the Nilambur lodge.

35. The next circumstance projected by the prosecution is that the accused was inimical towards the deceased as he was instrumental in scuttling his marriage with the sister of PW2. This, according to the prosecution, is the motive behind commission of this heinous act by the accused. It has come out from the evidence of witnesses, that the accused and the deceased were close friends and they were moving together. PW2 and PW4 are co workers of the accused and the deceased, PW5 the shop owner near to the Nilambur lodge and PW9, the toddy shop owner where the accused and deceased frequent regularly. They have deposed that the accused and deceased appeared to be close friends. When the

prosecution let in evidence to reveal their closeness, the defence counsel has contented, that there was no reason for the accused to annihilate the deceased. It is for that reason that PW2 was examined by the prosecution to prove that the deceased had sabotaged the attempt of the accused to marry his sister. But when PW2 was in the box, he had stated that, he had asked the accused to get married and to set up a family and when the accused asked whether he would give his sisters hand in marriage, he asked him to convert to Islam. The witness does not say that the deceased had spoken in a disparaging sense about the accused or that it was after hearing the words of the deceased that he had decided not to give his sisters hand in marriage to the accused. Thus from the evidence of the prosecution, it does not appear that the accused and the deceased who were bosom friends had any disputes between them so as to prompt the accused to put an end to the life of the deceased. No such evidence is forthcoming in the instant case.

36. It is the case of the prosecution that the accused and the deceased were moving together on the date of occurrence. This fact was deposed to by PW4, a co-worker and also PW9, the toddy shop worker. PW2, another co-worker has also stated about the apparent closeness between the appellant and the deceased. An appraisal of the evidence of all these witnesses would reveal that the appellant and the deceased were moving together on the previous day. It would also be revealed that they were very much close to each other thus eliminating any chance for a dispute.

37. One important circumstance which the prosecution relies on to connect the accused with the crime is through the evidence of PW5, who was cited and examined to prove that on the previous day of the death of Mohandas, the accused had come to his shop and had purchased a plastic rope. According to PW5, the accused had purchased 250 gm of rope similar to MO1 at about 8.00 - 8.30 pm., on the day previous to the day when Mohandas

was murdered. When he was cross examined he was contradicted with his previous statement that the accused had purchased 2.30 kg of rope . He would fairly admit that plastic rope similar to the one he had sold was available in all shops . The mere fact that the accused had purchased 250 gms of rope from the shop room of PW 5, cannot be said to be an incriminating factor to fix the culpability. When this aspect is discussed it will be relevant to point out that from Ext.P21 chemical analysis report it has come out that, cello tapes taken from both the hands of the deceased revealed the presence of fibers similar to that of MO1. No explanation is forthcoming from the prosecution with regard to this aspect. Of course, the purchase of MO1 can be taken as a corroborating circumstance if other evidence are available.

38. It is the case of the prosecution that it was the accused who had seen the deceased lying dead on the cot inside the room of Nilambur lodge. This is one of those

circumstances which pointed the finger of suspicion at the accused. It can be seen from Ext.P1 inquest report, that the accused was the person who had first seen the deceased in the upstairs room of the Nilambur lodge after 9.00 pm on 22.1.2009. Immediately thereafter, it has come out from the evidence of PW2 that the accused had gone to his house and informed him about the death of Mohandas. PW2 has given evidence that he asked the accused to inform the police. Thereafter, the accused went to the house of PW4, Vinod, who is a co-worker. PW4 has stated that late in the night on 22.1.2009, the accused had come to his wife's house and informed him that the deceased was found hanging in the room. Immediately PW4 and the accused goes to the Nilambur lodge in a bike and PW4 sees the deceased lying on the bed. He also finds blood all over the place. He has specifically stated that he along with the accused went to the hotel where they normally take food and informed about the death. None of them responded and thereafter, they decided to go to the police station. They reached the

station at 12.30 - 1.00 am but their statement was not recorded. The police also did not come to the scene. They were asked to take the deceased to the hospital. Thereafter, the accused and PW4 returned back and PW4 went back to his house. In the morning when PW4 called the accused on his mobile phone, a policeman had answered the call and PW4 was asked to come to the police station, and later, to the lodge room. It was thereafter, that the accused was brought to the police station.

39. PW16 is the Sub Inspector of police Kalikavu police station who gave evidence that it was on 23.1.2009 at 6.00 am that Jose had come to the police station and given the statement based on which Ext.P22(a) crime was registered. Originally the crime was registered under the head "unnatural death". It was thereafter, that the scene was inspected with the assistance of the scientific expert. When PW16 had reached the room he had seen the dead body of the deceased lying face down and he also saw a

plastic coir tied on the neck. PW16 also prepared inquest over the dead body. PW16 pleaded ignorance when he was asked whether the accused had given the statement at 1.00 A.M. in the morning. He has also stated that from 6.00 am onward the accused was with him and he was under surveillance. He also stated that it was after the postmortem of the deceased was conducted that he had sent Ext.P24 report incorporating S. 302 of the IPC.

40. PW15 is the Investigating Officer who took over investigation on 24.1.2009. It appears that it was after the postmortem was conducted that the Investigating Officer decided that it was a case of murder and not unnatural death. It can be seen from an overall appreciation of evidence that the conclusion of the prosecution that it was the accused who has committed the offence is based on an extra judicial confession allegedly made by the accused when he was questioned by the Investigating Officer after he had taken over the investigation. Other than this confession, which cannot be relied upon for any

purpose whatsoever, there is nothing in evidence even remotely connecting the accused with the crime. From the above sequence of events it cannot be said that the accused had acted in a suspicious manner or that he had made an effort to suppress the actual incident by giving a false version of the incident. It is also equally possible that after seeing his close friend lying dead on the bed , the accused had immediately gone to the other co workers and sought for their help . Thereafter he along with the co worker had approached the police who also did not register the crime till early in the morning . From an evaluation of the evidence it does not appear that the accused had given a false explanation of the actual incident. It could have been what the accused had actually seen in that room and due to total lack of evidence as to what happened inside the Nilambur Tourist home after 9 pm, we are unable to accept the prosecution version that the accused had given a false explanation. It was for the prosecution to establish the primary facts before requiring the accused to explain his version as

regards his response after seeing the dead body of the deceased in one of the rooms in the Nilambur Lodge .

41. The main stay of the prosecution is the recovery of MO2 spade allegedly used by the accused for hacking the neck of the deceased. This recovery was effected much prior to the arrest of the accused and while he was under surveillance. As far as the recovery of MO2 spade is concerned, it is the case of PW15 that the accused had disclosed to him that he had kept the spade allegedly used for commission of offence concealed inside the water tank on the upstairs portion of the building. According to PW15, he had taken the accused to the Nilambur lodge, where the murder had occurred and based on the information given by the accused the MO2 spade was recovered from the top of the water tank situated on the northern side of the lodge. According to the investigating officer, the spade was blood stained and it was recovered on the strength of Ext.P5 mahazar. He has specifically stated in his cross examination that the

water tank was situated about 15 meters away from the building and it had a separate stair case made of iron. He also admitted that no reference to the water tank is there either in Ext.P4 scene mahazer or in Exhibit P 3 sketch. .In order to prove the recovery the prosecution has examined PW7, the attestor to the mahazer. PW7 in his evidence stated that he was present when the accused had recovered MO2 spade. He would further depose that the water tank was situated on the top of the stairs leading to the 1st floor of the Nilambur Lodge building. It is his specific case that the water tank was on top of stairs leading from the ground floor. He would further say that people can access the building only using the said stairs. This evidence let in by PW 7 is diametrically opposite to the evidence of PW15. This would create doubt as regards the sanctity of recovery of MO2 based on the alleged disclosure statement of the accused.

42. In **Vijay Thakur V State of Himachal Pradesh** , the apex court has held thus :-

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.

43. In **Mani v. State of Tamil Nadu (2008 (1) SCR**

228). this Court made following pertinent observation on this very aspect:

[21]. "The discovery is a weak kind of evidence and cannot be wholly relied upon 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...."

In a case of this nature, where the allegations against the accused are all vague circumstances, this Court will not be justified in relying on such uncorroborated pieces of evidence by way of recovery to advance the prosecution version.

44. The next incriminating circumstance is the presence of blood in the clothes and the nail clippings of the accused as evidenced by Exhibit P 21. It is the specific case of the prosecution that the accused was the person who had found the deceased lying on the cot inside the room of the Nilambur lodge on the night of 22.1.2009 . It

is his specific version that it was he who had brought down the dead body and had laid the deceased on the bed . His clothes were also stained with blood as stated by PW4 .It is the case of the prosecution that the accused had first gone to the house of PW2 and then to the house of PW4. Later the accused and PW4 had gone to the nearby hotel as well to inform them about the incident . It was thereafter that PW 4 and the accused had gone to the police station at 12.30 - 1.00 am to give information about the incident. This is the version brought about by the prosecution through their own witnesses. PW4 has also stated that after coming back from the room, the accused had changed his dhoti which was stained with blood and had worn a pant. The shirt worn by the accused was seized by the investigating officer as per Exhibit P9 mahazer. Thereafter, the accused was examined by the Medical officer attached to the Nilambur Hospital and the nail clippings of the accused were taken as per Exhibit P15 mahazer. In the facts of the instant case, when the specific case of the prosecution itself is that the accused

was the person who had come to the scene, brought down the dead body, and when the accused himself has reported the fact to the police along with PW4, the presence of blood on his shirt cannot be considered to be significant in the absence of other materials .

45. But there is another significant aspect which the Court below has lost sight of. The Scientific Assistant who was present in the room also took samples using cellophane tapes from the left and right hand of the deceased and also from the plastic coir rope. Portion of the coir was also sent for analysis .Exhibit P 21 certificate of chemical analysis report reveals that the fibers found in the left and right hand of the deceased clearly corresponded with the fibers in the coir rope. This aspect of the matter has not been explained by the prosecution. It creates doubt on the mind of the court with regard to the whole case of the prosecution. One fails to fathom the reason as to how fibers from the plastic rope came to be handled by the deceased. No investigation is directed on

this line. We are also kept in the dark as to whether there was a scuffle in the room. If in fact the deceased was hacked on the neck resulting in deep injuries cutting bilaterally the sterno thyroid sternomastoid, omohyoid and sub mandibular salivary glands, and the internal jugular vein etc., and thereafter attempted to be hanged , there was no reason how fibers of the plastic rope would have been present in the hands of the deceased which corresponded with the MO1 rope. These are very suspicious circumstances which throws genuine doubts on the veracity of prosecution case .

46. It has also come out from the evidence of PW 15, the investigating officer that Mukundan Unni, a finger print expert had been summoned to get finger prints from the room. Specific question was put as to the result of the examination and as to whether any evidence as regards finger prints were obtained. No explanation is offered by PW15 for not producing his report or for not citing him . The learned counsel for the appellant had argued that the

said report has been with held as it was in favour of the accused .

47. The learned Sessions Judge has found the accused guilty on the ground that the accused had given a false explanation that he had seen the deceased hanging on the roof of the room when he had come back from the movie and the body was brought down by him. At the same time, the learned Sessions Judge has observed in para No. 31 of the judgment as follows.

[31]. There is a serious latches on the part of the investigating agency in conducting the investigation. The incident happened form inside a lodge named Nilambur Lodge but not even a single inmate of the lodge or the manager or other concerned people like night watch man of the lodge is either questioned or made witness in this case by the investigating officer . No reason is stated why they have not questioned the lodge authorities or other inmates of the lodge.

Thus even though the learned Sessions Judge also was not impressed with the evidence let in by the prosecution, on the ground of broad suspicions the finding of guilt was arrived at.

48. It can be seen that conviction is based on circumstantial evidence alone. Fingerprints have been lifted from the scene, but the same is not before Court. The expert has not even been cited or examined. The weapon has been recovered but the evidence of recovery cannot be believed as the attesting witness has spoken about a different place from where the weapon was recovered. The motive sought to be proved for committing the extremely grave act of murdering his own friend has not been proved by the prosecution. Motive assumes great significance where a conviction is sought to be predicated on circumstantial evidence alone, and its absence can tilt the scales in favor of the accused where all links are not avowedly present. Evidence has been let in to the effect that they were good friends and were

moving together. Scientific evidence points out a different possibility of the occurrence, which doubt could not be cleared. The persons who are naturally expected to be in the vicinity were not cited or examined . No explanation was offered by the prosecution with regard to the fibers present in the hands of the deceased which resembled MO1. It cannot even be contended that the accused was the last person to be seen with the deceased since several persons including the neighboring occupants, the watchers, manager, or guests in the adjoining rooms could have accessed the room where the deceased was eventually found. Immediately on seeing the dead body of the deceased, the accused has approached PW2, PW4 and the nearby shops to intimate about the occurrence and he has also set the law in motion. While circumstantial evidence is sufficient to return a conviction, this is possible if it contains all the links that connect the accused to the incident, and the inconsistencies are extremely trivial in character.

49. Judged by the above missing links we do not think that the circumstances from which the conclusion of guilt is to be drawn has been fully established or that the facts so established is consistent only with the hypothesis of the guilt of the accused. It is also quite difficult to conclude that the prosecution has been able to establish that in all human probability the act must have been done by the accused. The circumstances established cannot be said to be wholly inconsistent with the innocence of the accused and is consistent only with his guilt. By evaluating the evidence it can be seen that there was enough reasons to point the finger of suspicion at the accused but for reasons best known to the investigating agency they did not pursue with the same and did not make any effort to obtain any clinching evidence against the appellant.

50. It is the golden principle of Criminal jurisprudence 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 '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 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 Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan (2013 (5) SCC 722)

51. Therefore, we are of the considered view that the learned Sessions Judge has erred in concluding that the complicity of the accused in the murder of the deceased had been proved beyond reasonable doubt. For the aforesaid reasons, we are convinced that the benefit of doubt should be extended to the accused.

52. Accordingly, the conviction and sentence recorded against the appellant, who is the accused in Crime No.22 of 2009, of the Kalikavu Police Station is set aside.

53 The appeal is allowed. The judgment dated

26.8.2010 in S.C.No. 69 of 2010 of the Court of Additional Sessions Judge (Ad hoc)-I, Manjeri Division, is set aside. The appellant/accused is found not guilty of the offences charged. He is acquitted and set at liberty. He shall be released from prison forthwith, if not wanted in any other case.

Sd/-

**V.K.Mohanan
Judge**

Sd/-

**Raja Vijayaraghavan. V.
Judge**

MrCs

//True Copy//

P.S.ToJudge