

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 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

CRL.A.No. 605 of 2011

SC 159/2006 of ADDL.DISTRICT & SESSIONS COURT (ADHOC)-I, KOTTAYAM

APPELLANT/ACCUSED::

JOY @ JOY VARGHESE @ M.V.VARGHESE,
S/O.VARGHESE, MULANGASSERIL HOUSE
KURISHUMALA PUTHUVEL BHAGOM, DAIMUKKU, VANDIPERIYAR,
IDUKKI.

BY ADV. SRI.V.K.SUNIL

RESPONDENT/COMPLAINANT::

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

BY SMT.PRAICY JOSEPH, SPL. PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-07-
2015, THE COURT ON 31.7.2015 DELIVERED THE FOLLOWING:

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

Crl.A.605 of 2011

Dated 31st July, 2015

JUDGMENT

Raja Vijayaraghavan.J.

1. This appeal, filed by the sole accused in S.C.No.159 of 2006 on the file of the Court of Sessions, Kottayam, is directed against the judgment, conviction and sentence passed against him by the Additional Sessions Judge (Ad hoc)-I, Kottayam. He challenges the judgment dated 30.11.2006 as per which he has been convicted and sentenced u/s 449 302, 397 and 201 of the Indian Penal Code.

2. A conspectus of the prosecution case is as under:-

Deceased Ammini, was residing alone in a building bearing door No. NP XIII/63 in Erumeli North

Village of Mundakayom Village. On 13.7.2005, Ammini participated in a prayer meeting held at the house of her son Mathew (PW1). The prayer was over by about 6.30 P.M. and Ammini returned back home. PW3, Kamalamma, a friend and neighbor of deceased Ammini and also the Secretary of Koruthodu Navajeevan Kudumbasree, went to the house of Ammini at 10.30 AM on the next day , for discussing some matter with her. Nobody answered her call and when she looked inside through the open door , found Ammini lying on the floor of her house in a pool of blood. PW3 raised an alarm and alerted the neighbors. The son of the deceased Ammini, Mathew, was intimated and he rushed to the house. He went to the Mundakkayom police station and gave Ext.P1 statement to PW25 based on which Ext.P2 crime was registered. PW25 intimated PW27, the Circle Inspector of Police who arrived at the scene and started off with the investigation. Ext.P2 inquest was conducted over the dead body of Ammini and material objects were collected from the scene as well as the body of the deceased. Since there were no occurrence witnesses and the murder was

a mystery, the Investigating Officer sought for the assistance of the Finger Print expert, Scientific expert, dog squad etc., to obtain further clues. Initially, PW1 was the main suspect, as the persons having acquaintance with the deceased gave statements which revealed that the relationship between the deceased and PW1 was extremely troubled. A search was conducted in the house of PW1 to find the weapon of the offence but it did not yield any result. During investigation, when it was realized that the appellant herein, who is the brother of the wife of PW1, used to reside with PW1 at his residence about 20 days prior to the occurrence and that he had left the house of PW1 on 13.7.2005, the Investigating Officer took steps to locate his whereabouts. Information was received that the accused was working in a Sawdust factory run by PW14, Razak at Kannur. PW27 proceeded to Kannur and the appellant was found working there. He was taken into custody and brought to the Kanjirappally police station on 11.8.2005 itself. Finger prints were taken from the accused for comparison with the finger prints seen on a

drinking glass found in the house of deceased Ammini. When the same was compared by PW15, a finger print expert, it was found that the prints matched. On being satisfied that the accused was involved in the offence he was arrested and questioned. On questioning, the accused is alleged to have confessed that the gold chain and gold ring of the deceased had been sold to PW8, a jewellery shop owner. On the strength of the said disclosure, the gold chain belonging to the deceased was recovered at the instance of the accused. It was further revealed that the accused had exchanged the gold ring with another gold ring which was recovered from his bag. On the basis of the above investigation, PW27 completed the investigation and laid the final report against the accused before the Judicial Magistrate of First Class, Kanjirappally.

3. Committal proceedings were initiated by the learned Magistrate and the accused was sent up to the Court of Sessions to stand trial for the offence u/s 499, 302, 397 and 201 of the IPC from where the case was

made over to the Additional Sessions Judge (Ad hoc)-I, Kottayam. The accused faced the trial while in custody. Since the accused was not defended by a counsel of his choice, the learned Sessions Judge appointed a State legal aid counsel to defend him. After hearing both the prosecution and the accused, the charge was framed u/s 449, 302, 397 and 201 of the IPC and when the same was read over and explained to the accused, he abjured the guilt and claimed that he be tried.

4. In order to prove the case of the prosecution, PW1 to 27 were examined and Ext.P1 to P22 were marked. MO1 to 24 were produced and identified. After closure of the prosecution evidence, incriminating materials arising out of the prosecution evidence, were put to the accused u/s 313 of the Cr.P.C. Apart from denying the incriminating circumstances the accused gave his version of the case. His defense was that after the funeral ceremonies of Ammini was over, the appellant visited the house of PW1. Only then did he come to know about the death of Ammini. His sister who

is the wife of PW1 was alone in the house. A gold chain was handed over to him by his sister stating that she had obtained the ornament from a crevice in the mud wall from the precincts of house of the deceased. He was not aware of how much the gold chain weighed. He was told by his sister that it would be hazardous to retain the chain by her and he was asked to keep the same in safe custody. He went back to his house at Vandiperiyar with the chain. After some days, he called PW6-Shobha on her phone and his sister told him that the situation was not right and told him not to come there. He was asked to keep the ornament with him. Later, on the 10th day of particular month which he did not remember, he was arrested by the police from the road side at Valapatanam at Kannur. The gold chain was sold by him at Kottayam, but he did not remember the name of the shop. He obtained Rs.3500/- as sale proceeds. When the learned Sessions Judge asked him in the course of the statement as to whether MO1 and the ornament sold by him was one and the same, he answered in the affirmative. He asserted that he was innocent.

5. There is no eye witness of the occurrence and the case proceeded only on the basis of circumstantial evidence. The learned Sessions Judge, however, on an overall appreciation of the circumstantial evidence adduced by the prosecution and after hearing the prosecution and the accused, came to the conclusion that the prosecution had successfully proved that the accused had committed house trespass for committing the murder of the deceased and for robbing her valuables and committed murder of Ammini and sentenced him to life imprisonment u/s 302 of the IPC and various terms of imprisonment for other offences. It is against the above judgment that the appellant has come up in appeal.

6. We have heard Sr.V.K.Sunil, the learned counsel appearing for the appellant and Smt.Praisya Joseph, the learned Special Public Prosecutor.

7. Before we discuss the evidence, we shall briefly

point out the arguments advanced by both the sides.

8. The learned counsel appearing for the appellant, Sri.V.K.Sunil, at the outset itself, submitted that this is a case which revolves on circumstantial evidence and the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. It was assiduously argued by the learned counsel that the conviction was arrived at by the learned Sessions Judge purely on the ground of suspicion alone. It was argued that the circumstantial evidence on which the prosecution has fixed its case, was shaky and suspicious and it did not point to the guilt of the accused, but rather pointed to his innocence. It was emphatically contented that the scientific evidence adduced by the prosecution revealed in unmistakable terms that, the act was committed by someone else other than the accused. According to the learned counsel, the investigating agency has fabricated the material evidence with a view to connect the appellant with the crime. The learned counsel also relied on several decisions to bring home his

contentions and those decisions will be considered when the individual circumstances are analyzed.

9. On the other hand, the learned Public Prosecutor, Smt.Praicy Joseph, submitted that the prosecution has succeeded in proving all the circumstances leading to the guilt of the accused in committing robbery, causing disappearance of the evidence and murder of the deceased. It was pointed out that the recovery of gold ornaments belonging to the deceased at the instance of the accused and also the presence of blood in the clothes worn by the accused clearly proved that it was the accused and the accused alone, who had committed the offence. Reliance was also placed on the evidence of finger print recovered from a glass found in the house of the deceased which linked the accused with the crime. It was also submitted that the accused had pointed out the place where he had thrown the weapons used for committing offence and though police was not able to recover the offending weapon, the mere fact that the place of throwing of the weapon was pointed out, proved

his complicity in the crime.

10. As already noticed, there was no direct evidence of eye witness in this case and the case is based on circumstantial evidence. The law regarding circumstantial evidence is well settled. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum.

11. In **Hanumant, son of Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343**, the Apex Court had held 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 hypotheses of the guilt of the accused. Again, the circumstances would be of a conclusive nature and tendency and they should be such as to exclude 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." Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye - witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence.

12. In the light of the legal position about the appreciation of evidence in a case based on circumstantial evidence we shall examine whether the evidence let in by the prosecution satisfies the

requirement of law. The circumstantial evidence in the instant case can be broadly classified into (a) to (h) as has been found by the learned Sessions Judge in paragraph 43 on wards of the impugned judgment.

(a). The appellant was available in the house of PW1 for the last two weeks prior to the unfortunate death of Ammini.

(b). The appellant had left the place on 13.7.2005 at 2.30 pm and was not seen in the locality until he was arrested and brought by the police.

(c). Homicidal death of Ammini in the late hours of 13.7.2005 inside her house.

(d). Failure of the accused to explain in his 313 statement as to why he had not participated in the funeral ceremonies of deceased Ammini who was the mother-in-law of his sister.

(e). Recovery of MO1 gold chain from the shop of PW8 on the strength of the disclosure statement given by the accused.

(f). Recovery of MO3 to MO17

which included a ring and the umbrella of the deceased from the bag of the appellant found in the premises of PW14 at the instance of the accused.

(g). Presence of blood stains in MO4 dhoti and MO5 shirt found in the bag kept in the work place at Kannur which was seized at the instance of the appellant.

(h). Similarity in the finger prints obtained from one of the glasses found in the house of the deceased with that of the accused.

(i). False explanation given by the accused to justify the possession of MO1 gold chain.

(j). Failure of the appellant to offer a valid explanation for the possession of articles belonging to the victim entitling the Court to draw presumption u/s 114 of the Evidence Act.

(k). Conduct of the accused in pointing out the spot where he had thrown the murder weapon though no recovery could be effected in pursuance to the same.

13. With regards to circumstances No (a) and (b) , PWs 1 to 7, 13 and 17 were examined to prove the presence of the accused prior to the incident in the house of PW1 and also to prove that deceased Ammini was in possession of some gold ornaments. It was also sought to be brought out that earlier in the day in which Ammini was murdered, the accused was found in the locality and that he had left for his native place. These witnesses were having some acquaintance with deceased Ammini and some of these witnesses knew the accused as well.

14. PW1 is the son the deceased. He had lodged Ext.P1 statement before the Sub Inspector of police, Mundakayom, based on which Ext.P1(a) FIR was registered. He deposed before Court that the accused is the brother of his wife. He came to know about the death of his mother on the following day. His mother was living alone. He along with his family, were residing separately for the past ten years. On the previous day of lodging the FI statement, his mother had attended a

prayer meeting held at his home. The prayer was over at about 6.30 pm and she left the home after that. The accused is unmarried and he had earlier resided in his house about 10 - 20 days prior to the death of his mother. The accused did not attend the prayer ceremony and left early to his native place. The deceased owned a gold chain weighing one sovereign, a finger ring weighing two grams and gold ear rings. When he had seen his mother after she was murdered, she was not wearing the above gold ornaments. The accused had never visited his mother when he was alive. When he used to reside with his mother, the accused used to visit them. He identified MO1 chain and MO2 series of ear rings. One of his friends by name Rajesh (PW13), had misplaced a knife in the house of PW1 which went missing on the day the accused left his house. Though the accused did not attend the funeral ceremony of his mother he is aware that the accused had come on a subsequent day. He stated in cross examination that he is a coolie worker and also used to go for rubber tapping. According to him, there was dispute between him and his mother with

regard to 30 cents of property which was settled in his favour by his mother. He admitted that his mother had complained about him to the neighbors. It was brought out in cross examination that the fact that the appellant had resided in his house till about 20 days prior to the murder of his mother, was not stated to the police. He also admitted that there was a stone pelting incident in which some unidentified persons had thrown stones at Ammini's house and Ammini had lodged a complaint before the police. He also admitted that the accused had come to his place several times after the incident but he did not have the occasion to meet him. He also admitted that he and his wife had searched the house of Ammini in the presence of the police.

15. PW3 is having acquaintance with the deceased and she was the Secretary of Koruthodu Navajeevan Kudumbasree. She deposed before Court that deceased Ammini was also a member of the Society in which she is the Secretary and in order to convey some matter in connection with the Society she went to the house of

Ammini on 14.7.2005 at 10.30 am. It was PW3 who saw Ammini lying dead for the first time and she alerted the other people of the locality. PW3 also stated that she had helped the deceased in purchasing a gold chain as some money was due to the deceased from the society. When she was examined, she identified MO1 gold chain as the one which was purchased by her for and on behalf of the deceased. In her evidence, she deposed in unequivocal terms that she was aware that there was hostility between PW1 and the deceased. She said that she did not remember whether she had stated to the police that PW1 used to assault deceased Ammini during their fights. She stated that Ammini has told her that there used to be frequent fights between PW1 and the deceased. When her attention was brought to her previous statement to the police in which she had stated that Ammini had told her that PW1 used to assault the deceased, she stated that she would have stated so as her mind was agitated when she was questioned. She also stated that property having an extent of 30 cents lying adjacent to the property of the deceased was

obtained by PW1 from deceased Ammini after a series of fights and later the said property was exchanged with that of one Paramackal James. She denied when it was put to her that there occurred a fight between PW1 and the deceased when she refused to register the said document. In cross examination she also stated that the deceased Ammini was in the habit of hiding her gold ornaments under the shell of coconut and inside the crevices of the mud boundary wall at night to secure it.

16. PW4, Kathrina, is a neighbour of the deceased who had seen Ammini during the prayer ceremony held in the house of PW1 earlier in the day on which Ammini was found murdered. She had returned back home along with Ammini after 6.30 pm. She was examined to prove that Ammini was wearing gold ornaments and identified MO1 gold chain. Ext.D1 contradiction was marked when she denied her earlier statement that deceased Ammini used to have frequent fights with her son with regard to property disputes. Ext.D2 contradiction was marked when the said witness denied that the roof of Ammini's

house was destroyed as somebody had pelted stones.

17. PW5 was examined to prove the same point as PW4. She also took part in the prayer ceremony and identified the ornaments which were worn by the deceased Ammini. In addition, the said witness stated before Court that the accused had not taken part in the prayer and also did not attend the funeral ceremonies. She stated in her evidence that she had seen the presence of the accused prior to the incident at the house of PW1.

18. PW6 is acquainted with the deceased, the accused and PW1. She is aware of the fact that the accused used to reside in the house of PW1. He resided there, according to the witness, for about two weeks. On the day next to when Ammini was found dead ie, on 15th, the accused had called her over phone and enquired about the incident. When he was told that Ammini was no more he responded by saying that he had read the news in the papers. The sister of the accused who is the wife of PW1 came there and talked to the accused. He

was asked to come. On the next day also, the accused is alleged to have called her over phone and when she asked him to come down, he agreed. Thereafter on 21st, the accused had called her. The wife of PW1 talked to the accused and asked him to come down to offer his finger prints for comparison. According to the witness, the accused had called her to ascertain the developments which were happening in connection with the murder. During cross examination, it was brought out that the said witness had not stated to the police about the calls made by the accused on 16th and 21st. It was also brought out that, the fact that the sister of the appellant had asked him to come down to obtain his finger prints was not something which she had stated to the police. She admitted in cross examination that PW1 and his wife were taken to the police station on several occasions and they were kept under surveillance in connection with the investigation concerning the murder of Ammini. The defence also challenged that she did not have a telephone connection at her residence.

19. PW7 is the sister of the accused and she is a resident of Vandiperiyar. The said witness was examined to prove that on a Thursday at about 11.00 pm, the appellant came to her house and told her that she should inform if anyone asked, that the accused was present in her house on Wednesday and Thursday. Thereafter, he borrowed a sum of Rs.1000/-, a match box and a candle and left the place. In cross examination, she stated that she believed that the appellant had stated so fearing his creditors. She also admitted that the accused is in the habit of securing loans for others and also is a political worker and several persons visit her house enquiring about the accused.

20. PW13 is another witness examined by the prosecution to prove the presence of the accused in the house of PW1. He claimed to be a driver and was having acquaintance with deceased as well as accused. He used to go to the house of PW1 for playing cards. On one occasion, he misplaced his knife in the house of PW1. he enquired about the knife with PW1 after the death of

Ammini. Despite a search being conducted the knife could not be found. The witness further stated that while he was playing cards he noted the presence of the accused in the house of PW1.

21. PW17 is another witness who was examined by the prosecution to prove the presence of the accused in the locality. He stated that he is a driver by profession and is acquainted with the deceased, PW1 and the accused. He has seen the accused in the house of PW1. He came to know about the death of Ammini on 14.7.2005. He had seen the accused on 13.7.2005. He along with his child were going to the hospital in a pick up van and according to the said witness, the accused had come out from the house of PW1 and entered the van at about 2.30 pm. He got out from the van at a place called Koruthode. He identified the clothes worn by the accused. The same witness also sees the accused being brought by the police near the Kandakadath area and according to him, he had seen the accused pointing out the place where he had thrown the knife which was used by him for

committing the offence. He along with several others dived into the river in search of the knife but the same could not be found. In cross examination, the witness stated that he was acquainted with PW1 for the past 20 years and was a neighbour. His evidence was strongly challenged by the defence.

22. The above witnesses were examined by the prosecution to prove that the accused used to reside in the house of PW1 prior to the occurrence and that he had left the locality at about 2.30 pm on 13.7.2005. PW1, PW3, PW4 and PW5 have stated that the relationship between the deceased and PW1 was outright hostile and there occurred frequent fights. PW3 a close acquaintance of the deceased, had stated that the deceased used to hide her ornaments under coconut shells and crevices of the mud wall, to secure the same. It has also come out that the deceased had a gold chain, a gold ring and a pair of ear rings. The ear rings were found on the body of the deceased and it was seized when the inquest was prepared. It is pertinent to note

that the fact that deceased was wearing a gold chain and ring was not stated by PW1 when he had given the FI Statement. An appraisal of evidence of these witnesses would reveal that the prosecution was able to prove that the accused was present in the house of PW1 and that he had left the house prior to the murder of the deceased. From the defence version it is evident that the appellant also admits that he was there in the house of PW1 as stated by the witness. The only variance is that the case of the defence is that MO1 gold chain was handed over to him by the wife of PW1 on 15.7.2005 when he had visited her house. According to him, PW1 had asked him to keep it secure. It has to be held that the prosecution has succeeded in proving the presence of the accused in the locality prior to the death of the deceased. The prosecution has also succeeded in proving that the accused had left the house of PW1 early in the day on 13.7.2005. The 3rd circumstance relied on by the Sessions Judge is that the accused failed to offer an explanation as to why he did not attend the funeral ceremony of the deceased Ammini. While analysing this

aspect it has to be borne in mind that PW1 has stated in his evidence that he was aware that the accused had visited his area even after the death of his mother though he had not seen him in person.

23. Next circumstance is the homicidal death of Ammini inside her home in the late hours of 13.7.2005. There is absolutely no dispute from any quarters with regard to the mode in which Ammini was murdered and as regards the injury sustained by her. Ext.P2 inquest report prepared by PW27 and Ext.P10 post mortem certificate prepared by PW19, the Assistant Professor and Deputy Police surgeon Medical College hospital, Kottayam emphatically prove this aspect. In Ext.P10 post mortem certificate it has been reported that the death was due to incised wound sustained to the neck and the injury can be caused by cutting with a sharp weapon like knife. The said witness has also stated that the likely time of death will be at 10.30 pm on 13.7.2005. Since there is no dispute with regard to this aspect, the circumstance No.(d) should be regarded as satisfactorily

proved by the prosecution.

24. The next important circumstance relied on by the prosecution is the recovery of gold ornaments belonging to the deceased at the instance of the accused. According to the prosecution this is a very clinching circumstance which would point the finger of guilt at the accused.

25. According to PW27, the Investigating Officer, he received information about the availability of the accused at Kannur and accordingly he went to the concern of PW14 situated there. The accused was taken into custody and he was brought to the Kanjirappally police station on 11.8.2005 approximately a month from the date of occurrence. The fingerprint of the accused was taken and when it was compared with the prints obtained from the house of the deceased, the same matched. This pointed to the involvement of the accused in the crime. According to PW27, after confirming his complicity he was questioned and on questioning, the accused disclosed that the gold chain and gold ring belonging to

the deceased was sold by him to a shop at Kottayam and he had received Rs.2950/- towards the value. The accused was taken to the shop room of PW8.

26. While examined before Court, PW8 would state that he is running a shop by name 'Vallelil Manu Gold' at Kottayam, and he is engaged in the purchase and selling of gold. He identified the accused and stated that accused had come to his shop for selling a gold chain and a ring. The gold chain was sold and the gold ring was exchanged for another ring. He identified MO1 as the gold chain sold by the accused to him. The gold ring which was given by him in exchange was marked as MO6. In cross examination, he admitted that the police had visited his shop on a day previous to the day on which mahazar was prepared in respect of seizure of MO1. He stated that he does not maintain a register evidencing the transactions. The police had come about two days after their previous visit to prepare the mahazar evidencing the recovery. He admitted that he came to know about the murder of Ammini and that the

gold ornaments belonging to Ammini was sold to him by the accused only when the police had informed him about the same. He also admitted that ornaments of the same fashion was available in plenty in the market. The witness was re-examined by the prosecutor and he deposed that the gold ornaments were purchased by him for Rs.2950/-. The defence further cross examined him and during the same, he deposed that it was about two days prior to the preparation of the mahazar evidencing the seizure of gold that the police had come to his shop room and informed him about the fact that the gold ornaments were sold by the accused in his shop room. It is relevant to note that the seizure of the gold ornaments were effected as per Ext.P15 mahazar dated 13.8.2005. The arrest memo has not been produced or marked in this case. PW27 the Investigating Officer has stated in his evidence that the accused was arrested on 12.8.2005 when it was found that his fingerprints matched. If that be the case, the evidence let in by PW8 that the police had come two days prior to 13.8.2005 and informed him about the incident will render the

evidence let in by the prosecution as regards seizure suspect. Thereafter, the witness was declared hostile and at that point of time, the witness stated that it was by a mistake that he had stated that the police had come to his shop two days prior to the seizure. The fact remains that PW8 had stated repeatedly in his evidence that the police had come to his shop room about two days prior to the seizure.

27. PW24 is another witness who was examined to prove the seizure of the gold chain from the shop of PW8. According to the said witness, he noticed police in the shop room of PW8 and went there and saw the shop owner handing over a gold chain to the police in the presence of the appellant. He stated that he had signed on Ext.P15 recovery mahazar.

28. PW11 was examined to prove that MO1 gold ornament was actually purchased by deceased Ammini. According to the said witness PW3 Kamalamma and the deceased had come to the shop room and had purchased

MO1.

29. In order to prove the recovery of MO3 to MO17, the prosecution examined PW14, in whose concern at Kannur, the accused was employed. PW14 in his evidence stated that the accused came to him through an agent and sought for employment in his concern of manufacturing sawdust. Along with the application submitted through an employment agency the accused handed over his bank pass book and his application for employment. The police had come searching for the accused on 11.8.2005 and he was later brought to his concern for the purpose of seizing the bag of the accused. The items in the bag were all taken out and Ext.P3 mahazar was prepared. He identified the bag as MO7 and also identified the shirt as MO8 series, dhoti as MO9 series and the ring as MO6, in addition to other objects, which were marked separately. In cross examination, he denied that MO7 bag was handed over by him to the police. On an appraisal of the above evidence, what stands out is the fact that the gold chain

produced and identified as MO1 was in the possession of the accused and that the same was sold by him in the shop of PW 8. It has to be noted that the gold chain was seized on 13.8.2005 about a month after the occurrence. It is the specific case of the accused that the same gold chain was handed over to him by his sister for safe keeping when he went to her house after the murder of deceased Ammini. The accused has offered an explanation with regard to the possession of the gold ornaments. The question is whether the authorship of murder pursuant to the robbery of gold can be laid on the accused on the basis of the above circumstance. We have no doubt in our mind that this is a clinching circumstance forming a strong link concerning the involvement of the accused in the crime. If the other links in the chain of evidence form a complete chain of circumstance this evidence of recovery of gold chain will go a long way in connecting the accused with the crime. The question is as to whether the other circumstances are clinching or not.

30. The next circumstance is the detection of blood in MO4 dhoti and MO5 shirt seized from MO7 bag from the work place of the accused at Kannur. The prosecution through the evidence of PW1 and PW17, let in evidence that the accused was wearing MO4 dhoti and MO5 shirt when they had seen him last on 13.7.2005. PW17 was a co-passenger in a pick up van who also claims to have noticed the shirt and dhoti which were worn by the accused. MO4 and MO5 were sent to PW21, Assistant Director of Serology who issued Ext.P12 report. Ext.P12 report would reveal that MO4 dhoti contained blood which is insufficient to determine the origin and MO15 contained human blood. Admittedly, the accused is working in a saw dust manufacturing unit and the mere presence of blood which is insufficient to determine the origin cannot be taken as a conclusive circumstance to connect the accused with the crime. It has been held by the Apex Court that a few blood stains on the clothes of a working man may be of his own, and when conclusive evidence of blood grouping is absent, connecting the stain with that of the deceased, the same cannot be

taken to be a circumstance from where any inference can be drawn. (**See Kansa Behara V State of Orissa 1987 Cri.L.J . 1857)**)

31. The next circumstance is the presence of fingerprints of the accused found in one of the glasses kept in the house of the deceased. PW27 the Investigating Officer had stated that on 11.8.2005 after locating the whereabouts of the accused, he had taken fingerprint samples while he was in his custody and had sent it for comparison to PW15, the fingerprint expert from Single Digit Fingerprint Bureau, Thiruvananthapuram. PW16 is the Director of Kerala State Finger Print Bureau who had forwarded the opinion on the basis of the conclusions arrived at by PW15. But it has come out that PW27 did not obtain the permission from the Magistrate prior to taking of specimen fingerprint from the accused. It has come out in evidence that the accused was taken into custody by PW27 on 11.8.2005 and he was produced before the learned Magistrate on 12.8.2005. In spite of the same,

he did not seek permission from the Magistrate for obtaining sample fingerprints from the accused. It is now settled that when the finger samples are obtained from the accused, without obtaining the sanction of the Magistrate, the same is inadmissible in evidence as being violative of the provisions of S.5 of the Identification of Prisoners Act, 1920 (see **Mahamood v. State of U.P. (1976 (1) SCC 542)**.) In the said judgement, the Apex Court has held that when the specimen fingerprint of the appellant were not taken before or under the order of a Magistrate in accordance with S.5 of the Identification of Prisoners Act, the same leads to a suspicious nature of the conduct of investigation. We are not inclined therefore, to place reliance on the presence of fingerprints brought out by the prosecution to be a clinching circumstance to connect the accused with the crime.

32. The next circumstance relied on by the learned Sessions Judge is the failure of the accused to offer sufficient explanation for the admitted possession of

MO1 gold chain belonging to the deceased. It can be seen as narrated above, while discussing the case of the defence , the accused had stated in his 313 statement that the gold chain was handed over to him by his sister after the death of Ammini when he had visited her. Admittedly, MO1 gold chain belongs to the deceased and the prosecution has let in overwhelming evidence to prove this aspect. Through PW3, who was having close acquaintance with the deceased, it was brought out that the deceased used to hide her gold ornaments in the crevices of the boundary wall and under the shells of coconut to keep the same away from prying eyes. PW1 has stated in emphatic terms in his evidence that he along with his wife had searched the house of the deceased after the death of their mother. It has also come out from the evidence of PW1, PW3, PW4 and PW5 that the relationship between PW1 and the deceased was very tumultuous, and in their previous statements which was contradicted, they had even stated that PW1 used to physically harm the deceased. With this perspective in mind when we analyse the case of the accused that it

was the wife of PW1 who had handed over MO1 gold chain to the accused which came into her possession after the death of the deceased, it cannot be said that the explanation offered by the accused is unreasonable. It has to be evaluated on the basis of the totality of circumstances. As stated above, the finger of suspicion pointed at the accused when the fingerprint from one of the glasses matched with that of the accused. It has also come out that the fingerprint was not taken in the presence of the Magistrate. The learned Public Prosecutor at this juncture would emphasize that the Court was bound to draw the presumption under S.114 (a) of the Evidence Act. To counter this, the learned counsel for the appellant has contended that this was a case in which the gold ornament was seized after a month of the occurrence and the accused had a reasonable explanation to offer to account for the manner in which he came into possession of the ornament. We are of the opinion that it is for the prosecution to establish all the circumstances upon which a presumption could be raised under S 114

illustration (a), and no burden is shifted to the accused at any stage. The accused is bound to account for the possession and offer an explanation which might reasonably be true. The learned Counsel appearing for the appellant also invited our attention to (**Tulsiram Karu V State (1954 Cri.L.J. 225)**), a decision rendered by the Apex Court to substantiate the proposition that the time factor is important and only if the ornament of the deceased are found in the possession of the accused soon after the murder can a presumption of guilt can be drawn . Whether the presumption under S 114 (a) could be raised in this case or whether the explanation offered by the accused to account for the presence of the gold ornaments is reasonable will be considered after the evaluation of the entire materials .

33. The next circumstance relied on by the learned Judge is the conduct of the accused in pointing out the place where he had thrown the weapon of offence. It is the case of prosecution that when the accused was questioned, he is alleged to have disclosed to PW27 that

he had thrown the weapon into the Azhutha river and also showed the spot in the river where he had thrown the weapon. It appears to us that the prosecution has not succeeded in bringing home any valid circumstance with the aid of this aspect.

34. The most important aspect which troubled us in this case and which is not seen noted by the Sessions Judge is the evidence regarding comparison of hair. Immediately after the lodging of FI Statement, PW27 had come to the scene of occurrence and he had prepared Ext.P2 inquest over the dead body of the deceased. His observations are found in column 8(a) and the list of items seized are also mentioned there. The inspection of the dead body was carried out in the presence of the Scientific Assistant M.K.Ajithkumar, the Fingerprint Expert K.Prasanthkumaran Thampi and also the Departmental Photographer Sri.C.Ramachandran. It was found when the body was examined, both the palms were in a clenched position and inside the left palm was found hair strands which were seized as item No.2.

Another piece of hair, was found on the northern side of the body which was seized as item No.1. Microscopic particles were seized from both the palms using cellophane tapes and all these items were sealed by the scientific experts and the same was forwarded for analysis. PW20, the Assistant Professor of Forensic Medicine, Medical College hospital, Kottayam was requisitioned by PW27, the CI of police on 13.8.2005 to examine the appellant and to obtain blood sample and for collection of hair. His blood group was found to be A+ and the hair collected from the accused was sealed and handed over for forwarding for analysis.

35. Sri M.K. Ajith Kumar, Scientific Assistant, had also submitted a scene examination report dated 19.7.2005 in which he has detailed the material objects collected from the scene of crime. Ext.P12(a) is the report submitted by the Scientific Assistant. For reasons best known to the prosecution, Sri M.K. Ajith Kumar who was cited in the charge as CW43, was not examined before court. The items forwarded was tested by Sri R. Sreekumar,

Assistant Director (Biology) of the Forensic Science Laboratory , Thiruvananthapuram. Exhibit P12 is the report issued from the Forensic Science Laboratory signed by Dr R. Sreekumar.

36. Item No.5 in Ext.P12 are three black hairs in a packet named as (1): hair from floor . Item No.6 are two very short black hairs in a packet labeled as “left palm” . Item No.11 is a tuft of black hair in a packet labeled as scalp hair of Joy Varghese, the appellant. Item No.12 contained hair from the right and left fore arm of Joy Varghese, the appellant herein. Specifically item No.12 (a) are tuft of hairs obtained from the left fore arm and item No.12(b) are the tuft of hairs obtained from the right fore arm of Joy Varghese. As is evidenced from Ext.P12 a very detailed examination was conducted in respect of the hair by Dr.R. Sreekumar M.Sc Ph.d, the Assistant Director, Biology, of the Forensic Science Laboratory which report was later forwarded to PW21. It was through PW 21 that Exhibits P12 and P 12 (a) was marked in evidence.

37. We have perused P 12 (a) and we find that the experts of the Forensic Science Lab has given a detailed picture of the tests conducted which included ascertaining the detailed structure of the medulla and its diameter compared with that of the hair shaft as a whole, details of the root and tip portion, its scale pattern, pigment distribution, and the result of bleaching the hair with hydrogen peroxide. The identification of hair has seen great advancements and it enables the expert to report that the hairs tested are dissimilar.

38. A startling fact which was revealed from Ext.P12 and P12(a) report is that, item No.5 which are the three black hairs found from the floor of the house near to the dead body of Ammini were human scalp hairs which were not similar to the sample scalp hair of the accused taken by PW20. In the same manner the hairs found in the clenched left palm of the deceased Ammini were not similar to the sample body hairs found in item 12(a) and 12(b) which are sample body hairs of the accused taken

from the left and right forearms. This conclusion arrived at by the Experts from the Forensic Science Laboratory will militate with the case set up by the prosecution in no small measure.

39. In **Kanbi Karsan Jadav v. State of Gujarat AIR 1966 SC 821**, dealing with the question, the Supreme Court observed as follows :

"It was argued that the finding of the hair was of no consequence and at least the Chemical Examiner was not the proper expert who could depose as to the similarity or otherwise of the hair. The writers on medical jurisprudence, however, have stated that from the microscopic examination of the hair it is possible to say whether they are of the same or, of different colours or sizes and from the examination it may help in deciding where the hair come from. In **Taylor's Medical Jurisprudence (1956 Edn.) Vol. I, at p. 122**, some cases are given showing that hairs were identified as belonging to particular persons."

The Supreme Court acted upon the evidence furnished by the prosecution based on the presence of hair.

40. In **Maghar Singh v. State of Punjab AIR 1975 SC 1320** : also, the Supreme Court considered the question again and made the following observations :-

"Apart from this circumstantial evidence, which conclusively connects the two accused with the murder of the deceased, namely, recovery of the weapon of offence, the false explanation given by Surjit Kaur, the recovery of the clothes from the person of the accused, there is another important circumstance which almost clinches the issue, and completes the link in the chain of circumstantial evidence and this is that the Kirpan recovered from the possession of the appellant Maghar Singh contained blades of hair of the deceased stuck to it and on scientific examination, the blades were found to be identical with the hair of the deceased. This, therefore, completely establishes that it was the accused Maghar Singh along who had caused the death of the deceased with the Kirpan and this circumstance is not explainable on any other hypothesis except that the accused was guilty of the offence of murder."

41. A Division Bench of this Court in **Royson alias Paul v. State of Kerala (1990 (2) KLJ 46,** considered **Fr. George Cherian v. State of Kerala (ILR 1989 (2) Kerala 95)** cited in support of the contention that the evidence based on Comparison of hair cannot be acted upon. The Division Bench observed that though the science is having certain imperfections, at least, in certain aspects, the science could be considered to have attained at least nearness to perfection. This Court held :

"In the text book of Criminal Investigation by John Adam and Collyer Adam, fifth edition, by Richard Leofric Jackson, at page 110, it is said that the detailed structure of the medulla and its diameter, compared with that of the hair shaft as a whole, together with the distribution and character of the pigment, the scale pattern of the cuticle and the appearance of the hair in transverse section, all provide features which, in the aggregate, enable the expert to identify any given hair with certainty. From the microscopic examination itself, it may be possible to say whether the hair are of the same or of different colours or size and from, the examination it may help in deciding where the hair come from."

42. In **Sudheer Babu @ C.D. Babu and Others v. State of Kerala (2013 (2) KLT 168)**, a Division Bench of this Court has held that the presence of hair strands on the dead body of victim, which are dissimilar in characteristics with that of the hair strands of the accused, gives an indication that some other person was involved in the crime.

43. Forensic Analysis of hair has been successfully used by the investigating agencies to obtain evidence of association between the hair found at the scene of crime with that of the assailant. A microscopic hair examination can also determine whether the hairs are similar, if they are artificially treated or diseased. A comparison microscope can be used to compare a questioned hair to a known hair sample in order to determine if the hairs are similar and if they could have come from a common source. In order to confirm the findings of the microscopic analysis Nuclear DNA Analysis can also be done on human hairs. The positive evidence let in by the prosecution that the hairs found

inside the clenched palm of the deceased and also near the body is dissimilar to that of the accused , would throw serious doubts on the genuineness of the prosecution version. As contented by the learned Counsel it gives sufficient indication to rule out the presence of accused and pointed to the involvement of some other person as the assailant.

44. The most unfortunate thing is that the final report was laid by the Investigating Agency before the Judicial Magistrate of First Class-I Kanjirappaly, on 16.6.2006 as seen from the endorsement in the final report . The case was numbered as C.P. No 11 of 2006 and was posted for the appearance of the accused to 22.6.2006. Exhibit P 12 report is dated 31.5.2006 and reaches the court on 2.6.2006 on the eve of filing of the final report. It is doubtful whether PW 27, the investigating officer had occasion to assimilate the findings in Exhibit P 12 and P 12 (a). If in fact the final report was laid after noting the inconsistency in the scientific report, there should have been some justification and necessarily Dr. Sreekumar,

should have been examined to justify the same . It also appears that the learned counsel who defended the accused before the trial court , as a state brief , and also the learned Sessions Judge, who conducted the trial has overlooked this aspect, the implications of which cannot be lost sight of. In our view Exhibit P 12 and P 12 (a) would destroy the prosecution case and break the chain of circumstances. We fail to understand the reason behind the investigating agency not subjecting the hair of PW1 for scientific analysis to at least find whether they are similar so that a different version of the whole incident would have been there. We dread to even comprehend the unbearable fact that, this report, having material bearing on the facts of the innocent case, and on which hinged the life of the appellant, was purposefully kept in the dark shadows and suppressed from the eyes of the learned Trial Judge. If that was the attempt of the investigating agency, the same has to be deprecated .In a case based on circumstantial evidence it is for the concerned Investigating Officer, to look into all the probabilities so as to avoid the chance of an innocent

being sent up for trial for something he has not committed on the basis of suspicion alone.

45. The learned Sessions Judge has relied on innocuous circumstances like the conduct accused in pointing out the place where he had thrown the knife though no recovery was effected pursuant to the same, the presence of blood of unknown origin in the clothes of the accused who was working in a saw dust factory, the failure of the accused to attend the funeral ceremony and the presence of a gold ring in the bag of the accused which was not that of the deceased as clinching circumstances to connect the accused with the crime.

46. It also has to be borne in mind at this juncture that most of the witnesses have unequivocally stated that the relationship between PW1 and his mother was not at all cordial and it is discernible from their evidence that they had even stated before the police that the deceased used to be physically harmed by PW1. A truthful and fair investigator would have definitely

forwarded the hairs of PW1 also the forensic lab for analysis. We also look at the identification of finger prints obtained by the investigating officer with grave suspicion as the finger prints of the appellant were obtained without involving the learned Magistrate.

47. Looking at the prosecution evidence and on our independent appraisal , we find that the explanation offered by the accused in his 313 statement to account for the mode in which the MO1 gold chain came into his possession is a reasonable one . The evidence of recovery of the gold ring and that of the clothes with blood stain are discrepant and contradictory and suffers from glaring infirmities rendering it unsafe to rely upon.

48. In view of the above, we hold that the sketchy materials on which the finding of guilt has been arrived at by the learned Sessions Judge has been overshadowed by the specific finding by the forensic laboratory. The hair found inside the clenched left palm of the deceased could be of the assailant, whoever he may be, and when

the report totally extricate the appellant, the same cannot be ignored. This vital circumstances will totally forestall us from holding that, within all human probability , the crime was committed by the accused and none else. Furthermore it cannot henceforth be said that circumstantial evidence is so complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and inconsistent with his innocence. In **Surinder Pal Jain V Delhi Administration (1993 Cri.L.J 1871)** it was held that the chain of the circumstantial evidence will snap badly when the recovery of the hair from near the cot where the dead body was lying and the removal of the hair from the scalp of the appellant by the Intelligence for the purpose of their comparison did not correspond. The same situation has arisen in this case as well.

49. Having regard to the above facts and circumstances and in view of the discussion, we are of the definite view that the prosecution has failed in proving that the appellant/accused is guilty of murder of Ammini. The

Finding arrived at by the learned Sessions Judge cannot be sustained. Consequently, the conviction recorded as per the impugned judgment will have to be set aside.

50. In the result, this appeal is allowed setting aside the judgment dated 13.11.2006 in S.C.No.159 of 2006 on the file of the Additional Sessions Judge (Ad hoc)-I, Kottayam, and the appellant/accused is acquitted of all the charges leveled against him. The appellant shall be entitled to get released from the prison forthwith, if he is not required in any other case.

Sd/-

V.K.MOHANAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

/True copy/