

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015 / 18TH BHADRA, 1937

CRL.A.No. 2221 of 2011

AGAINST THE ORDER/JUDGMENT IN SC 1652/2006 of SESSIONS COURT, KOLLAM
DATED 25-07-2009

APPELLANT/ACCUSED:

THOMAS MATHAI @ SHAJI
S/O. IYPE ABRAHAM
THOTTAMALIL VEEDU, NIRANAM VILLAGE, KOLLAM

BY ADVS.SRI.C.P.PEETHAMBARAN
SRI.I.J.AUGUSTINE
SRI.SEBIN THOMAS
SRI.SAIJO HASSAN
SRI.RAJAN VELLOTH
SRI.PRATHAP PILLAI
SRI.M.NOOHUKUNJU SAHIB
SRI.NAGARAJ NARAYANAN
SMT.J.KASTHURI
SRI.BENOJ C AUGUSTIN
SRI.SWATHY DAS

RESPONDENT/ACCUSED:

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

BY PUBLIC PROSECUTOR SRI. K.K. RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR & K.P. JYOTHINDRANATH, JJ.

Criminal Appeal No.2221 of 2011

Dated this the 9th day of September, 2015

J U D G M E N T

C.T. Ravikumar, J.

This appeal is directed against the judgment dated 25.07.2009 passed by the Court of the Sessions Judge, Kollam in S.C.No.1652/2006 whereby and whereof the appellant was found guilty, convicted and sentenced to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code.

2. The case of the prosecution is as follows:

On 27.09.2003 at about 11.45 p.m. on the banks of Kallada River at Pidavoor Village the appellant committed murder of Surendran by inflicting injuries on various parts of his body with cement blocks and then throwing him in Kallada River in unconscious stage. Surendran died due to the combined effect of the injuries and also of drowning. PW1 the brother of the deceased Surendran gave Ext.P1 statement regarding the missing of Surendran and based on

the same PW27 registered Ext.P1(a) FIR on 28.09.2003. In fact, it was originally registered for man missing under Section 174 Cr.P.C. and later, PW27 the then Sub Inspector of Pathanapuram conducted the preliminary investigation and he prepared Ext.P8 inquest report. He recovered MOI and MOII, the dresses worn by the deceased Surendran after describing them in Ext.P8 and sent the body of Surendran for postmortem and obtained Ext.P17 certificate. Thereafter, PW27 submitted Ext.P20 whereby, in the place of man missing, Section 302 was added. Based on the information passed on by PW6, Gopalan MOIII shirt and MOIV dhoti worn by the appellant were seized by PW28, who took over the investigation from PW27, under Ext.P9 mahazar. PW28, the Investigating Officer went to the scene of occurrence and prepared Ext.P24 scene mahazar. He received the cover submitted to PW26 by PW24, the doctor who conducted autopsy on the body of Surendran under Ext.P19 mahazar. All the material objects collected by PW28 under Ext.P11 were sent for analysis. After

completing the investigation, final report was filed before the Judicial First Class Magistrate Court-III, Punalur and it was committed to the Court of Sessions, Kollam as per proceedings in C.P.84/2006. After a preliminary hearing charge was framed against the appellant/accused under Section 302 IPC and it was read over and explained to him in Malayalam. He pleaded not guilty and claimed to be tried.

3. To prove the charge against the appellant the prosecution had examined 28 witnesses and exhibited 32 documents besides identifying MO1 to MOXIII. After the closure of the prosecution evidence the appellant was examined under Section 313 of the Code of Criminal Procedure. He denied all the incriminating circumstances put to him. Finding that the appellant was not entitled to be acquitted under Section 232 Cr.P.C. he was asked to enter on his defence. Besides getting marked a portion of 161 statement of PW15 as D1 during his examination no evidence, either oral or documentary, was adduced in

defence. After consideration of the arguments advanced and appreciation of the evidence on record the trial court arrived at a conclusion that the prosecution had succeeded in establishing the offence punishable under Section 302 IPC against the appellant beyond reasonable doubt and consequently convicted and sentenced him as aforesaid.

4. We have heard the learned counsel for the appellant Sri. Nagaraj Narayanan and also the learned Public Prosecutor Sri.K.K. Rajeev..

5. Admittedly, nobody witnessed the occurrence and the case of the prosecution rests only on circumstantial evidence. In view of the settled position when a case rests squarely on circumstantial evidence, the inference of guilt of the accused can be justified only if all the incriminating facts and circumstances are found incompatible with the innocence of the accused or in otherword, they irresistibly leads only to the guilt of the accused. The prosecution, in order to discharge the burden to establish the same and to prove the guilt of the accused relied on the following

circumstances:-

- 1) The death of Surendran was homicide going by the evidence of PW24 with Ext.P17;
- 2) The deceased Surendran was lastly seen with the accused on the night of occurrence viz. on 27.09.2003 by PW6 and PW14;
- 3) Extra judicial confession of the accused to PW2 and PW3 and the factum of such confession contained in Exts.P3 and P5;
- 4) Recording of Exts.P3 and P5 by PW7 under Section 164 Cr.P.C. which were testified by PW2 and PW3;
- 5) The oral testimony of PW24 with Ext.P17 regarding the collection of cotton gauze containing blood from the body of the deceased and the oral testimonies of PW26 and PW28 as to the forwarding of the same for chemical analysis and the testimony of PW8 with Ext.P6 revealing the identification of the blood group of the deceased Surendran as 'O';
- 6) The oral testimony of PW8 with Ext.P6 revealing the presence of human blood of the origin 'O' group in the dresses worn by the deceased (MOI and MOII) as also by the dresses worn by the appellant/accused viz. as MOIII ad MO IV;
- 7) The identification of the dresses worn by the appellant/accused as also by the deceased by PW6 and PW14;

- 8) Oral testimony of PW5, the employer of the accused regarding the abscondance of the accused immediately after the incident;
- 9) The oral testimony of PW12 who was the then Watchman of AMRL, to the effect that on 27.9.2003 at about 2 a.m. the appellant made a query regarding conveyance and its timing;

6. Evidently the prosecution has relied on the last seen theory to complete the chain of circumstances referred above and contended that those circumstances would unerringly lead to the culpability of the accused alone.

7. Firstly, we will deal with the evidence adduced by the prosecution. PW1, the first informant is the brother of the deceased Surendran and he deposed that he had lodged Ext.P1 complaining of the missing of Surendran from 27.09.2003. Based on Ext.P1 F.I. Statement a case was registered for 'man missing'. PW2 is a distant relative of the accused and PW3 is her husband. They turned hostile to the prosecution. PW2 had earlier given Ext.P3 statement and PW3 earlier had given Ext.P5 statement to PW7, the Judicial Magistrate of First Class, Chengannur and those statements

were recorded under Section 164 Cr.P.C. They had stated to the effect that on the night of the day of occurrence the accused knocked at their door and talk them that he had murdered one person and two persons had witnessed it besides seeking dresses to change the bloodstained clothes. Though they admitted the factum of recording of their statements by PW7 virtually, they had resiled from it and had not deposed in tune with Exts.P3 and P5 in the box. PW4 deposed that immediately after the incident the appellant/accused had contacted him over phone and he asked:- "what you have done", he disconnected the phone. PW5 was the employer of the appellant/accused. He deposed that since the incident on 27.9.2003 the appellant had not turned up for work. PW6 was conducting a petty shop in a place called Periyapunna. He would depose that on 27.9.2003 at about 9.30 p.m. the deceased came to his shop along with the accused and purchased a matchbox after paying 50 paise. He would further depose that the deceased was carrying a kerosene lamp and from there the

appellant went away with the deceased. He identified the dresses worn by the appellant viz.MOIII and MOIV as also by the deceased viz., MO1 and MOII on that day.

8. PW7 is the Judicial Magistrate of First Class, Chengannur who recorded Ext.P3 statement of PW2 and Ext.P5 statement of PW3, under Section 164 Cr.P.C. PW8 is the scientific expert attached to the Forensic Science Laboratory who analysed the material objects and issued Ext.P6 report. PW9 is the Village Officer who inspected the place of occurrence and prepared Ext.P7 scene plan. PW10 is the attesting witness to Ext.P8 inquest report. He admitted his signature thereon and deposed to have witnessed the recovery of MOI & MOII dresses worn by the deceased Surendran. PW11 is the other attesting witness to Ext.P8 inquest report and he would depose that blood stains were found in the shed located near the scene of occurrence which was being used for illicit distillation of arrack. PW12 is the watchman attached to ARMF. He would depose that during the odd hours on the day of occurrence viz. about

2.30 p.m. the appellant came to him enquiring about the availability of conveyance from there and its timing. PW13 deposed to the effect that the accused had travelled along with him in an autorickshaw driven by PW19 at about 9 p.m. on 27.9.2003 along with him and that there occurred a verbal altercation between himself and the accused/appellant in regard to the sharing of the auto fare. When autorickshaw reached Sathyamukku one Devan was there and two persons including the deceased Surendran came out from the office of Devan and interfered in the matter. Thereupon, the appellant gave Rs.20/- to the autorickshaw driver, on the compulsion of Surendran. PW14 Jayamohan deposed to the effect that when he was there in the house of his employer the appellant/accused came there at about 9.30 p.m. on 27.9.2003 and on being asked the purpose of his visit he revealed it as to make complaint about the compulsion to give excess auto fare. PW14 would further depose that he pacified the appellant and thereupon, he went away from there. According to them

after after 5 minutes since the leaving of the appellant/accused he went to Sathyamukku junction and there he had seen the appellant/accused engaged in a verbal altercation with one Sivan relating the payment of the auto fare. He further deposed that when the appellant/accused was about to leave the deceased Surendran came there and thereupon they left for Aruvithara with Surendran behind the appellant/accused. PW15 and PW16 are the attesting witnesses to Ext.P9 mahazar relating to the seizure of MOIII and MOIV the dresses worn by the appellant. They would admit their signature in Ext.P9 as also the seizure. PW17 is the witness to Ext.P10 mahazar relating the seizure of charcoal from the shed that situates near Aruvithara Kadavu which was being used for distillation of arrack. PW18 is the thondi clerk attached to the Court of the Judicial First Class Magistrate-III, Punalur. He would depose that the items included in Ext.P11 were sent for examination to the Forensic Science Laboratory and that he received the material object collected under Ext.P10

mahazar in a sealed cover. Ext.P12 is the list of property relating to the same and he would also depose that it was also sent for examination. PW19 is the driver of the autorickshaw in which PW13 and the appellant/accused allegedly travelled together, on 27.9.2003 at about 9'o clock. He deposed that on 27.9.2003 at about 9 p.m. he was returning from the house of the autorickshaw owner after settling the accounts and PW13 hired the autorickshaw for his journey to Sathyamukku. Enroute to Sathyamukku the appellant/accused signalled to stop the auto and PW13 asked him to stop the autorickshaw. The accused then asked whether he could be taken to Avaneeswaram and PW13 told him that the autorickshaw would be available only up to Sathyamukku. Then, the appellant/accused boarded the autorickshaw telling that he need be taken only up to Sathyamukku. A verbal altercation occurred thereafter between the appellant and PW13 when the latter told the accused to share Rs.10 towards the auto fare. He deposed that he stopped the autorickshaw at

Manchalloor and then the accused told him that he would pay Rs.10/- and thereupon, both the accused and PW13 asked him to take the vehicle further. On reaching Sathyamukku PW19 parked the vehicle on the road side and the accused alighted from the autorickshaw and again PW13 and the accused entered in verbal altercation. PW13 was remaining inside the autorickshaw. Then one Devan came there and from his office Sivan and Surendran also came out and they interfered in the matter and asked the appellant/accused to pay the hire. According to PW19 the accused/appellant then gave him Rs.20/- and when he started the vehicle the appellant had attempted to board on it and PW13 prevented him and thereafter he took PW13 Prasad to a bar. PWs 20 to 23 were examined by the prosecution to prove that they were present near Madathi Kadavu of Kallada River for distilling arrack and the appellant and the deceased came there after 10'o clock on 27.9.2003 and consumed liquor. However, they turned hostile to the prosecution and denied their presence

categorically. PW24 is the doctor who conducted autopsy on the body of deceased Surendran and issued Ext.P17 postmortem certificate. He opined that the cause of death of Surendran is the combined effect of the injuries noted in Ext.P17 and drowning. PW25 is the police constable in whose presence MO6 chitty book was recovered under Ext.P18 mahazar. He would depose that PW1, the brother of the deceased Surendran had produced the said chitty book. PW26 is the police constable who deposed that he received MO7 sealed cover from PW24 and thereafter he entrusted the same with PW28, the investigating officer who received it under Ext.P19 mahazar. PW27 is the Sub Inspector who recorded Ext.P1 F.I.S from PW1 and registered Ext.P1(a) FIR with crime No.347/03 on its basis. He would also depose that MO6 chitty book was seen stained with blood and that MO1 and MOII dresses worn by the deceased were seized at the time of inquest after describing them under Ext.P8. He prepared Ext.P20 report and in place of man missing the offence under Section 302, IPC was added.

PW28 is the then Circle Inspector of Police who took over the investigation from PW27. He arrested the appellant/accused on 9.10.2003 at about 4.30 p.m. under Ext.P29 memo. He would depose that he prepared Ext.P9 mahazar whereby the dresses of the accused were taken into custody and also prepared Ext.P19 on receipt of MO7 sealed cover carrying the gauze containing the blood collected from the body of the deceased. He made the requisition to the Magistrate to forward the articles seized for chemical examination and the charge was also marked through him.

9. From the evidence thus tendered the prosecution the prosecution claimed to have established the circumstances, referred hereinbefore, which unerringly led to the guilt of the accused for the offence punishable under Section 302 IPC. Evidently, the trial court on appreciation of the evidence on record held that the prosecution had succeeded in proving such circumstances and in establishing the guilt of the accused. It was based on such

conclusions and findings that the appellant/accused was found guilty, convicted and sentenced, as aforesaid.

10. The contentions of the learned counsel for the appellant can be encapsulated as hereunder:-

Being a case rests completely on circumstantial evidence motive has a significant role and having put forth a definite motive the prosecution was bound to prove the same. But, in this case the prosecution has failed to prove the motive and therefore, it is fatal to the prosecution. The oral testimonies of PW6, PW14 and PW19 testifying to the effect that the appellant was seen lastly with the deceased, are absolutely unreliable. The last seen theory is inapplicable in this case in view of the evidence on record. It is also contended that identification of the appellant by PWs 6, 12, 14, 19 from the court for the first time is not reliable and therefore, it ought not have been accepted as a piece of evidence against the appellant. Further, it is contended that recovery and identification of the dresses of the appellant though unworthy for acceptance as an

evidence it was relied on as a circumstance against the appellant. In view of the rival contentions and the indisputable position obtained in this case that it rests completely on circumstantial evidence we think it appropriate to re-appraise the evidence on record to ascertain whether the trial court had correctly arrived at the finding that the prosecution had succeeded in establishing the circumstances relied on and also even if such circumstances were taken as established whether they would irresistibly lead to the commission of the alleged offence by the appellant/accused and to cross-check the reasons assigned by the trial court.

11. Firstly, we will consider the question whether the death of Surendran is homicide or not. PW24 is the doctor who conducted autopsy on the body of Surendran and issued Ext.P17 postmortem report. In Ext.P17 twelve anti mortem injuries were noted as hereunder:-

1. Lacerated wound 7x0.5x0.3 to bone deep horizontally placed on the right eyebrow the inner and 2.5 cm outer to midline.

2. Multiple oblique superficial lacerated wounds (grase like) 2.5 to 3.5 cm long linear obliquely placed on the right side of inner face over an area 12x4 c.m, its upper inner and 5.5 c.m. outer to the midline and 1.5 c.m. below the middle of eyebrow.
3. Lacerated wound 2x1 cm, superficial to bone deep, obliquely placed on the right side of face, its lower inner and 8 cm outer to midline and overlying the jawbone.
4. Fracture of mandible in the middle separated it in to two halves.
5. Fracture of maxilla on the left side between the first molar and second premolar tooth.

Brain was liquefied and uniformly blood stained.

6. Fracture of sternum between manubrium and first place of body anterior mediastinum and muscles above were found infiltrated with blood.
7. Fracture of I to IV ribs on the left side 6 cm outer to the costochondral junction.
8. Lacerated wound 1.5x0.5x0.5cm on the inner aspect of right side of lower lip. 1 cm outer to midline.
9. Contusion 7.5x2x0.3cm on the whole of back of left ring finger.
10. Abrasion 3x2 cm on the back of right ring finger.
11. Lacerated wound 2x1 cm superficial on the top of

right little toe just behind the nail bed.

12. Multiple small abrasions over an area 8x1.5 cm on the front of left leg 5 cm below knee.

12. PW24 deposed to the effect that the cause of death of Surendran is the combined effect of the injuries noted in Ext.P17 and drowning and he had recorded the said opinion in Ext.P17 as well. He would also depose that the approximate time of death is 48 to 72 hours prior to the time of conduct of the postmortem. Postmortem on the body of Surendran was commenced at about 1.20 p.m. on 29.9.2003 and it was concluded by about 2.20 p.m as can be seen from Ext.P17. Thus, going by the opinion of PW24 the death of Surendran must have occurred at about 1.20 p.m. on 27.9.2003. But, at the same time the ocular evidence of PW6 and PW14 is to the effect that they had seen the deceased Surendran alive in the company of the appellant /accused at about 9.30 p.m. on 27.9.2003. The incompatibility in the matter of approximate time of death cannot be a reason for holding that the death of Surendran

is not homicide in view of the unimpeached evidence of PW24. The evidence in this case would reveal that body of Surendran was found floating in Kallada River. PW24 would categorically depose that when it was brought for autopsy it was in a decomposed stage. The ante mortem injuries found on the body of Surendran were noted by PW24 in Ext.P17. Though the evidence of PW24 is to the effect that injuries like injury No.6 would immediately make a man unconscious was not challenged and though we have our own reservation with respect to the said opinion, we do not think it necessary to dwell into the matter further as the opinion of PW24 to the effect that as a person who sustained such injuries as noted in Ext.P17 if thrown into a river it would be sufficient in the ordinary course of nature to cause death. We do not find any reason to doubt the said opinion of PW24. Taking into account the circumstances under which the death of Surendran had occurred the evidence of PW24 is to the effect that the cause of death is the combined effect of the injuries noted in Ext.P17 and

drowning can only to correct conclusion. We do not find any reason to disagree with the opinion of PW24 which is corroborated with Ext.P17. Therefore, the death of Surendran is a clear case of homicide.

13. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish the point of guilt of the accused with some certainty. But we are not oblivious of the fact that this theory should be applied taking into consideration of the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being lastly seen. We will consider the said question a little later. Evidently in this case a motive was alleged for the commission of the offence. Going by the prosecution the interference of the deceased Surendran in the quarrel between PW13 Prasad and the accused is the motive behind the murder. PW14 deposed to the effect that on 27.09.2003 at about 9 p.m. he was returning from the residence of the owner of the autorickshaw after settling the accounts and

on the way PW13 hired the autorickshaw for going to Sathyamukku. Hardly he proceeded after PW13 entering the autorickshaw the appellant/accused signalled to stop the autorickshaw. He would further depose that the appellant asked whether he would be taken to Avaneeswaram and PW13 then replied that the autorickshaw would be available only up to Sathyamukku. However, the appellant/accused got inside the autorickshaw. Later, PW13 asked the appellant to pay an amount of Rs.10/- towards the auto fare and consequently a verbal altercation occurred between the appellant and Prasad. When they reached Sathyamukku, Devan was there and from his office the deceased Surendran and one Sivan (CW14) also came there from the office of Devan. He would also depose that Sivan and Surendran asked the appellant to settle the issue by paying the auto fare and therefore the appellant had to pay an amount of Rs.20/-. The evidence of PW14 is to the effect that subsequently, to air his grievance relating the aforesaid issue the appellant had reached the

house of his employer while he was there. It is to be noted that from the evidence of PW14 it is not really discernible as to who was the person referred to as the owner of the autorickshaw. True that PW14 would depose that during the period 2003 he was working under one Sajeewan and the incident in question had occurred on 27.9.2003. Therefore, it could be taken he was then working with Sajeewan. But the Sajeewan was not even a charge witness. He would further depose that he told the appellant/accused that the matter could be settled in the next day and thereafter Surendran went away from there. He also deposed that he proceeded to Sathyamukku soon after viz., just about 5 minutes since the appellant left the place. He would also depose that when he reached Sathyamukku he had seen the appellant and the aforementioned Sivan indulging in verbal altercation and when the appellant accused was about to leave the place the deceased Surendran came there. He would also depose that Surendran then asked the appellant: “എന്താ അച്ഛായാ

ഇവിടെ വഴക്ക് എന്ന് ചോദിച്ചു. അവർ രണ്ട് പേരും കൂടി പോയി.” Thus it is evident that going by the evidence of PW14 there occurred a verbal altercation between the appellant/accused and the aforementioned Sivan and the appellant and the deceased Surendran left the place to away together. Thus, going by the evidence let in by the prosecution on the issue of the alleged motive it can be held that prosecution had not succeeded in establishing that the issue relating payment of auto fare had grown into such proportion to create an ill-feeling among the appellant and the deceased Surendran and to form the motive behind the commission of the offence. But at the same it is to be noted that establishment of a motive is not a sine qua non for establishing the case of prosecution in a case for commission of the offence of murder. Though in a case of circumstantial evidence motive has a significant role to play merely because the prosecution had failed to prove the motive, the case of the prosecution cannot be thrown away. The case of the prosecution is that there is extra judicial

confession in this case.

14. The learned Public Prosecutor contended that the statements in Exts.P3 and P5 should be treated as extra judicial confession and a scanning of the impugned judgment would reveal that the statement of PWs 2 and 3 viz Exts.P3 and P5 recorded by PW7 was found containing extra judicial confession and that was acted upon. The word 'confession' is not defined in the Evidence Act. A confession must either contain an admission in terms of the offence or at any rate substantially all the facts which constitute the alleged offence. See the decisions in **Veera Ibrahim v. State of Maharashtra [AIR 1976 SC 1167]** and **Rameshwar v. The State of Rajasthan [AIR 1952 SC 54]**. It is the case of the prosecution that the appellant/accused was residing, during the relevant period, in the house of PW2 and PW3 and during the late hours on 27.9.2003 he knocked at the door and when the door was opened he stated them to that he had murdered a person and it was witnessed by two persons. It is the further case

of the prosecution that subsequently their statement to that effect were recorded by PW7. Ext.P3 is the statement so recorded under Section 164 Cr.P.C. from PW2 and Ext.P5 is the statement so recorded under Section 164 Cr.P.C. from PW3. At the same time it is evident that while being examined as PW2 and PW3 they had virtually resiled from their statements that on 27.9.2003, at late hours, the appellant/accused came to their residence and knocked at the door and stated to them that he murdered one person and it was witnessed by two. It is true that their previous statements viz. Ext.P3 and P5 were put to them and they had deposed to the effect that they gave such statements to PW7. Thus it is evident that PW2 and & PW7 who gave Exts.P3 and P5 subsequently turned hostile to the prosecution. A confession which is neither made to a Magistrate nor in the course of legal proceedings is described as an extra judicial confession. There cannot be any doubt with respect to the fact that a statement in order to be a confession for the purpose of Section 24 of the

Evidence Act must be a statement made by an accused in terms of an offence or at any rate substantially all the facts which constitutes the offence. In this case going by the very nature of Exts.P3 and P5, it is evident that they are not statements made by the appellant/accused. True that it contain a statement of PW2 and PW3 to the effect that the appellant accused divulged to them that on 27.9.2003 he murdered a person and that was witnessed by two. In such circumstances in the light of the decisions in **Veera Ibrahim's** case and **Rameshwar's** case (cited supra) Ext.P3 and P5 could not strictly said to be confession for the purpose of Section 24 of the Evidence Act. At the same time there cannot be any doubt with respect to the fact that Ext.P3 is a previous statement of PW2 and Ext.P5 is a previous statement of PW3. In the contextual situation the decisions of the Hon'ble Apex Court reported in **Utpal Das v. State of West Bengal [AIR 2010 SC 1894]** and the decision in **Brij Bhushan v. Emperor (Sir John Beaumont) [AIR (33) 1946 Privy Council 38]** assume

relevance. It was held in Brij Bhushan's case (supra) that a statement made under Section 164 Cr.P.C. can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of court under Section 164 Cr.P.C. is true. In **Utpal Das's** case (supra) the Hon'ble Apex Court held that a statement recorded under Section 164 Cr.P.C. could never be used as a substantive evidence or truth of the facts but could be used to contradict under Section 145 of the Evidence Act and to corroborate under Section 157, the version of a witness who made it. It was further held that it could be used to cross-examine the maker of it and the result made by it to show that the evidence of the witness concerned is false. In the said circumstances, when once it has come out from the evidence of PW2 and PW3 that they had not deposed before the court that the appellant/accused had knocked at the door on 27.9.2003 during night and divulged to them the factum of commission of murder also the

factum of its witnessing by two persons merely because in Exts.P3 and P5, which were recorded by PW7, such a statement is there, it could not be treated as extra judicial confession for the purpose of Section 24 of the Evidence Act. At any rate, in the light of the decision in **Brij Bhushan**'s case Exts.P3 and P5 would not establish what PW2 and PW3 had stated out of court, under Section 164 Cr.P.C. In short, in the light of the evidence rendered by PW2 and PW3 in this case, apart from using them for the purpose of impeaching their credibility it could not have been accepted in evidence as a piece of evidence connecting the accused with the crime. In the light of the said position, the finding of the learned Sessions Judge that Exts.P3 and P5 contained extra judicial confession and it is a piece of evidence against the appellant/accused cannot said to be sustained, in law.

15. The learned Public Prosecutor contended that the prosecution had succeeded in showing that the gauze containing the blood of the deceased Surendran, collected

during his autopsy, was ultimately analysed chemically and the evidence of PW8 with Ext.P6 would reveal that the blood group of Surendran is of the origin 'O' and it tallies with the blood group allegedly found in the dresses worn by the accused and also worn by the deceased viz MOI to MOIV. It is further contended that the appellant/accused owe an explanation in the said circumstances and the non-explanation regarding the presence of the blood of the deceased Surendran in his dresses viz. MOIII and MOIV is a strong circumstance which should go against the appellant. A scanning of the evidence on record would reveal that PW24 the doctor who conducted the autopsy had deposed to the effect that he had collected the blood in gauze, as revealed from Ext.P17. PW26 deposed that a cover containing the same was received from PW24 and ultimately it was handed over to PW28 and it was received under Ext.P19. The evidence of PW8 would reveal that the gauze containing the blood of the deceased Surendran was chemically analysed and the blood group was found to be of

the origin 'O' group. Evidence of PW8 with Ext.P6 would further show that MOI and MOII are the dresses worn by the deceased Surendran. MOs I to IV which are item Nos.1, 2, 10 and 11 were subjected to test and blood was detected on those items and the presence of the blood was conformed by spectroscopic assessment. The evidence of PW8 with Ext.P6 would further show that item Nos.1 to 5, 10 and 11 contained human blood belonging to 'O' group. True that the evidence of PW24 with Ext.P17 would reveal that the gauze containing the blood of deceased Surendran was collected and the evidence of PW8 with Ext.P6 would reveal that it was subjected to test to identify the presence of the blood and also its origin. As noticed hereinbefore, the dresses allegedly worn by the appellant/accused viz. MOIII and MOIV seized under Ext.P9 mahazar and MOI and MOII, the dresses of the deceased seized under Ext.P8 were also subjected to analysis. The results of the analysis revealed from Ext.P6 and together with the evidence of PW8 would reveal that the blood group of the deceased Surendran was

identified as 'O' and the blood found in MOI to MOIV were also found belonging to 'O' group. The question is whether in such circumstances it could be treated as piece of evidence to connect the accused with the aforesaid crime. It is to be noted that though MOIII and MOIV were seized under Ext.P9. It was based on the information from PW6 that MOIII and MOIV dresses of the appellant/accused were seized under Ext.P9. PW6 deposed to the effect that he had shown the dresses to the police and he would also depose that those dresses were not having any notable peculiarities. PWs 15 and 16 are the attesting witnesses to Ext.P9. They would admit their signatures in Ext.P9. PW15 would depose that the dresses were wrapped in a plastic cover shown to him and Ext.P9 was prepared from the side of Aruvithara - Pathanapuram road. PW6 is one among the witnesses relied on by the prosecution to canvas the theory of last seen together. PW6 is a petty shop owner. He deposed that usually he would close the said shop at about 9 o' clock. He would further depose that on 27.9.2003 at

about 9.30 p.m. Surendran came to his shop holding a kerosene lamp, accompanied by the accused. He further deposed that Surendran purchased a match box after giving 50 paise and thereafter they went away. He also identified MOI and MOII as the dresses worn by the deceased Surendran and also identified MO3 and MO4 as the dresses worn by the accused. He deposed to the effect that the appellant was wearing a green colour shirt and the deceased was wearing a red colour shirt when they came to the shop owner on 27.9.2003. With respect to the adequacy of the light at the relevant point of time the prosecution had not adduced much evidence. The sufficiency or otherwise of light assumes relevance in this context as the dresses of the appellant allegedly seized from the road side was virtually identified by PW6 and the prosecution heavily relied on the oral testimony of PW6 to connect the appellant with the dresses seized under Ext.P9. It is in this context the evidence of PW9 that in the light available in his shop he had seen the deceased wearing MOI and MOII2 and MOI

was red in colour and the appellant/accused was wearing MOIII and MOIV and MOIII is green in colour, has to be tested. There is no evidence to show that the shop in question was having any electric connection. What was the type of light available at the relevant point of time in the shop, was not specifically spoken by PW6 during the chief examination. True that during the cross-examination PW6 would depose that in the shop kerosene lamp was being used. True that PW6 deposed that Surendran came there holding a kerosene lamp and he would also depose that after purchasing the match box the accused and the deceased went away. Obviously in this case the kerosene lamp allegedly held by Surendran at the relevant time when he visited the shop of PW6 was not recovered. It is to be noted that none of the other witnesses who had seen them, in and around time, had deposed to the effect that deceased Surendran was having a kerosene lamp with him. We will, now consider the evidence of PW14. Going by the evidence of PW14, after the incident, in which a dispute arose

between the appellant and PW13, the appellant/accused came to the house of his employer. As noticed hereinbefore there is absence of evidence as to who is the employer of PW14. It means the evidence of PW14 is to the effect that on 27.9.2003 at about 9.30 a.m. when the appellant/accused came to the said residence he was there. He would further depose that he was told by the appellant that he came there to make his grievance to the employer of PW14 regarding the compulsion to give excess auto fare. Nothing was brought out by the prosecution to establish the relationship between the appellant and the said person who was referred to as the owner of the autorickshaw by PW14. Going by the evidence of PW14, he told the appellant that the matter could be settled next day and thereafter the appellant went away. Those circumstances would suggest that in regard to the excessively collected auto fare his grievance was against PW14. This is because nothing was brought out and in fact, there is not even a suggestion to the effect that Surendran and the said employer of PW14

got some close connection between them so as to make the appellant to reach the house of the said employer to make complaint against deceased Surendran. PW14 would further depose that after about 5 minutes since the appellant left the place, he too left that place. PW14 did not specifically depose as to time when he reached Sathyamukku. At the same time, PW14 would depose that when he reached Sathyamukku from the residence of his employer, the accused and one were seen engaged in a verbal altercation. It is to be noted that going by the version of PW14 the appellant came to the house of the employer to make a complaint against him and the said Sivan. He would depose:- “ശിവൻ ഇടപെട്ട് auto കൂലി മേടിച്ചു കൊടുത്തു എന്നും അതിന്റെ ബാക്കി auto driver തന്നില്ല എന്നും പറയാൻ ആണ് ഷാജി വന്നത് എന്നു പറഞ്ഞു. ഞാൻ നാളെ ആവട്ടെ എന്നു പറഞ്ഞപ്പോൾ ഷാജി പോയി.” He had also deposed that after such altercation when the appellant was about to leave the place the deceased had reached there. It is relevant to note that even

going by the evidence of PW6, no heated words were exchanged between the appellant and the deceased at that time. More importantly, going by the version of PW14 the deceased asked the appellant/accused as to what is the issue, by calling him as “achaaya (അച്ചായാ)”. PW14 would further depose that after putting such a cordial question they left the place together. These circumstances would also reveal the feebleness and virtually, the hollowness of the alleged motive. What was the approximate time at which they left the place is not discernible from the evidence of PW14. At any rate, going by the evidence of PW14, the appellant came to the residence of his employer only at about 9.30 p.m. and subsequently when he reached Sathyamukku the appellant was there. The incidents deposed to by PW6 must have occurred only after the accused and the deceased left Sathyamukku. If that be so, it could not be said that by about 9.30 p.m. the appellant and the deceased had reached the shop of PW6. The prosecution did not have a case that the appellant and the

deceased had visited the shop of PW6 before the incident mentioned by PW14. PW14 did not depose that while leaving the place after 9.30 p.m the appellant or the deceased was carrying a kerosene lamp. No evidence is forthcoming as to from where Surendran purchased the kerosene lamp. In such circumstances and also in view of the failure to recover the kerosene lamp allegedly held by Surendran the deposition of PW6 to the effect that Surendran came there holding a kerosene lamp cannot be believed. It is to be noted that though the two incidents were deposed to have been occurred at about 9.30 p.m. on 27.09.2003 respectively by PW6 and 14 nothing is on record as to show which among the two incidents occurred earlier in point of time. If the appellant and the deceased had arrived at the shop of PW6 prior to the incident deposed to by PW14 that occurred at Sathyamukku then the last scene spoken to by PW6 would pale into insignificance. Going by the evidence of PW14 the appellant alone was seen at Sathyamukku at 9.30 p.m when he reached there and at

that time he was seen engaged in a verbal altercation with Sivan. It is only when he was about to leave that place that the deceased Surendran came there. It is also relevant to note that going by the evidence of PW13 and PW19 the incident which is alleged as the motive occurred at about 9 p.m. at Sathyamukku. We will have to consider all the aforesaid circumstances to answer the question whether for completing the chain of circumstances the theory of last seen, could be successfully applied in this case. There cannot be any doubt with respect to the position that the factum of last seen together by itself is not sufficient to lead to the finding of guilt against an accused. It cannot be said to be a conclusive evidence. Undoubtedly, the last seen theory is an important theory in the chain of circumstances. But, as noticed hereinbefore the theory could be applied by keeping in mind the circumstances preceded and followed the point of being so lastly seen. In this case, the appellant was claimed to have been lastly seen in company of the deceased by PW6 and PW14. It is to be noted that both of

them deposed to the effect that they had seen the appellant in company with the deceased at about 9.30 p.m. on 27.9.2003. PW6 deposed that by that time, the deceased in company of the appellant came to his petty shop which situates at Periyapunna and purchased a match box and thereafter went away from there. However, going by the evidence of PW14 to the effect that at about 9.30 p.m. on 27.9.2003 the appellant came to the house of his employer. He would further depose that only after 5 minutes since appellant left there he went to Sathyamukku and when he reached he had seen appellant engaged in a verbal altercation with one Sivan. It is when the appellant was about to leave Sathyamukku that the deceased Surendran came there. The further deposition of PW14 as discussed earlier would not reveal any hatred in the minds of the appellant towards the deceased Surendran. In fact, his evidence would reveal that Surendran had made a friendly enquiry with the appellant as to what happened there, by calling him “അച്ചായാ”.

16. We will also consider credibility or otherwise of PW6. Certain aspects have to be taken into account in that regard. He deposed to the effect that he used to close his petty shop by 9 p.m. and that while about 9.30 p.m. on 27.9.2003 the deceased came there in company with the appellant. In fact, going by the evidence of PW14 at that point of time the appellant was there in the house of his employer and he came to Sathyamukku only thereafter. Bearing in mind all those aspects we will consider the applicability of the last seen theory. In the decision reported in **Rishi Pal v. State of Uttarakhand [AIR 2013 SC 3641]** the Hon'ble Apex Court held that referring to an earlier decision in *Mohibur Rahman and Anr. v. State of Assam (AIR 2002 SC 3064)* that the circumstances of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. Further the decision in *Mohibur Rahman's* case the Apex court held: "there may however be cases where, on account of close proximity of

place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide". In **Rishi Pal's** case *Godabarish Mishra v. Kuntala Mishra and another* (AIR 1997 SC 286) and the decision in *State of Goa v. Sanjay Thakran and Anr.* [(2007) 3 SCC 755] where also referred to. In *Godabarish Mishra's* case the Apex Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in chain of circumstances. The Hon'ble Apex Court went on to hold that mere non-explanation could not lead to the proof of guilt against an accused. The prosecution has to prove its case against the accused beyond reasonable doubt. In *Sanjay Thakran's* case the Apex Court held that in the absence of any other corroborative piece of evidence to

complete the chain of circumstances it is not possible to fasten the guilt on the accused on the solitary circumstance of the two being seen together. Further it was held that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would further held that it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists and in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In **Kanhaiya Lal v. State of Rajasthan [(2014) 4 SCC 715]** virtually the same principle was reiterated by the Hon'ble Apex court. The Apex Court held that the circumstance of last seen together does not by itself

necessarily lead to inference that it was accused who committed crime. Evidently it was held that there must be something more establishing connection between accused and crime, that points to guilt of accused. So also it is held that the mere non-explanation of being last seen together with the deceased person on part of accused, by itself cannot lead to proof of guilt against him. In view of the said decisions referred (supra) the fact that the mere non-explanation of being last seen together with the deceased by the accused cannot by itself be taken as a proof of his guilt. So also the fact that the accused was seen lastly together with the deceased by itself cannot be a reason to hold that it was the accused and none else who committed the offence.

17. We have already taken note of the fact that incongruity in the evidence of PW6 and PW14 regarding the time. That apart we have already found that the motive alleged by the prosecution was not proved by the prosecution and that apart even the motive alleged cannot

be said to be one which could be taken as a motive that would prompt a person to commit a heinous crime of murder. The evidence discussed hereinbefore would reveal that existence of any hatred or animosity so as to constrain the appellant to commit such an offence was not actually brought out, by the prosecution. When that is the nature of evidence, we will have to look into the proximity of the time between the time allegedly the accused and the deceased seen together and the approximate time when his body was found. Going by the court charge the appellant is accused of committing murder of Surendran at about 11.45 p.m. on 27.9.2003. In that context also we have earlier taken note of the fact that the evidence of PW24 if taken into account the alleged murder must have occurred prior to 48 or 72 hours the time of the post mortem which was commenced at about 1.20 p.m. on 29.9.2003. Going by the case of the prosecution, body of Surendran was found floating only on 29.9.2003. Though the prosecution has sought to prove that the appellant was seen during the late hours on

27.09.2003 in the banks of Kallada River by examining PW20 to PW23 they turned hostile to the prosecution and they denied their presence at the relevant point of time, at the aforesaid place of occurrence. At the same time it is to be noted that from a shed which was allegedly being used for illegal distillation of arrack, charcoal was recovered and blood stains were also found. Another aspect also assume relevance in this case. Though PW9, then the Village Officer had prepared Ext.P7 scene plan besides the fact that it did not bear any date, a scanning of the same would reveal that the places which are relevant for the purpose of this case, were actually not located. Periyapunna wherein PW6 runs the shop and Sathyamukku wherein PW14 had seen the appellant in company of the deceased were also not seen located. What was the exact distance between these places has not brought out in evidence. By taking into account all such aspects, it can only be said that by virtue of the proximity of time the possibility of interference of any other person in between, cannot be ruled out. Necessarily,

to apply the last seen theory, such a possibility has to be ruled out. The failure on the part of the prosecution to prove the motive and also the presence of blood stains in a place which was being used for an illicit purpose and the absence of any evidence revealing the distance between all these places are all the circumstances which would constrain as to take the view that it would be unsafe to apply the last seen theory to arrive at the guilt of the accused in this case. The circumstances which we have discussed hereinbefore with respect to the seizure of the dresses allegedly worn by the accused etc. would again compel us to come to the conclusion that though some circumstances are available to doubt the accused, circumstances which unerringly point to the guilt of the accused are absent in this case for completing the chain of circumstances to apply the last seen theory. In view of the nature of evidence relied on by the prosecution as discussed hereinbefore it is unsafe to convict the accused relying on the theory of last seen together.

18. We are of the considered view that in view of the

the evidence on record and the circumstances available the appellant is entitled to the benefit of doubt. In other words it cannot be said prosecution has succeeded in conclusively establishing the guilt of the accused beyond reasonable doubt and on the foregoing reasons, the impugned judgement calls for interference.

In the result, this appeal is allowed. The judgment dated 25.7.2009 passed by the Sessions Court, Kollam in S.C.No.1652/2006 and the conviction of the appellant/accused and the sentence imposed on him are set aside. If his detention is not required in connection with any other case, he shall be set at liberty immediately.

Sd/-

**C.T. RAVIKUMAR
JUDGE**

Sd/-

**K.P. JYOTHINDRANATH
JUDGE**

//True copy//

P.A. TO JUDGE

shg/