

Vijyakumar and Another Vs. State of Kerala Rep By Public Prosecutor Kerala

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Court : Kerala

Decided On : Mar-29-2016

Judge : V. Raja Vijayaraghavan

Appeal No. : CRL.A. No. 527 of 2011 (A)

Appellant : Vijyakumar and Another

Respondent : State of Kerala Rep By Public Prosecutor Kerala

Judgement :

1. The appellants figured as accused Nos.1 and 2 in S.C.No.1980 of 2008 and they, along with one Sheela, were prosecuted for having committed offence punishable under Section 120-B, 364, 368, 302 and 201 read with Section 34 of the IPC. The learned Additional Sessions Judge acquitted the 3rd accused of all charges and the appellants were found not guilty of the offence under section 120-B, 364, 368 r/w section 34 of the IPC. However, they were found guilty for the offence under Section 302, 201 read with Section 34 of the IPC and were sentenced to undergo imprisonment for life and also to pay a fine of Rs.50,000/- each with a default clause of RI for five years each for the offence under Section 302 read with Section 34 of the IPC. They were also sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000/- with a default clause of six months for the offence under Section 201 read with Section 34 of the IPC. The aforesaid conviction and sentence are under challenge in this appeal.

2. The prosecution case unfolded in the following manner:-

On 25.6.2004 , PW 2 - Vivin Varghese, the son of deceased P.J. Varghese approached the Sub Inspector of Police, Kattakkada and submitted Ext. P 3 complaint. In Ext. P3, it was stated that , his father P.J.Varghese had been running a tyre retreading business from two separate shops at Kattakkada and Vithura in the name and style as V.S.Tyres . He was residing with his wife Valsala and two sons at a place called Onnumpara. The 1st accused herein, who was arrayed as the 1st respondent in the complaint, was working as a driver in the office of the Assistant Commissioner of Police, Cantonment, Thiruvananthapuram. The 2nd respondent, who is the 2nd appellant herein , is an associate of the 1st accused and is an army personnel. The deceased Varghese was indebted to various persons and his list of creditors included the 1st accused. On 21.6.2004, the deceased was persuaded by the appellant No.1 to believe that it would be in his best interests to assign the Vithura property standing in his name to the name of the 1st accused, ostensibly to shield the property from his numerous creditors. On 22.6.2004, accused Nos.1 and 2 came to the house of the deceased and went with the deceased Varghese. Later in the evening, the 2nd appellant came to the house of the deceased and convinced the family members that the deceased would return and there was nothing to fear. On 23.6.2004 at 8.00 am, the 1st appellant came to the house of the deceased and informed the family members that the deceased would return in two days. Two days prior to 22.6.2004, the appellant No.1 had insisted that the Kattakkada property should also be assigned in their favour. Further, a month prior to the above incident, a Mahindra jeep of 1989 make bearing registration No. KL-01-H-6159 was taken away by appellant No. 1. It was stated in the complaint that he feared that his father was illegally detained in some secret hide out and requested the police to take immediate measures to get him released.

3. Independent of these happenings, on 24.6.2004, PW1 - Praveen Chand, who is the ward member of the VI ward of Vellanad panchayat was informed by locals that a dead body was found floating on the eastern side of the Koovakkudi bridge. He immediately rushed to the Aryanad police station and gave information based on which Ext.P36 was registered on 24.6.2004 by PW38, the Additional Sub

Inspector of Police, under Section 174 of the Cr.P.C. The said report was forwarded to the Sub Divisional Magistrate.

4. On 24.6.2004 at 3.30 p.m, PW-38 went to the place where the dead body was found and Ext.P15 inquest report was prepared. MO1 - dhoti , MO2 - shirt and MO3 underwear, found on the body of the deceased, were seized. The dhoti was found tied around the neck. He secured the services of a photographer and Ext.P37 series of photographs were taken and thereafter, the body was shifted to the Medical College Hospital. Dr. Geetha conducted autopsy on the body of deceased Varghese on 25.06.2004 and issued Ext.P50 postmortem certificate.

5. In the meantime, PW1 was intimated by the Aryanad Police that they have received information from the Kattakkada police station that the body of an unidentified person was found near the Koovakkudy Bridge. The clothes found on the body was shown to PW1 and he identified the same as that of his father.

6. Investigation was thereafter, taken over by PW52, the Circle Inspector of police, Aryanad police station, on 26.06.2004. He questioned the witnesses and also PW52, the doctor, who conducted autopsy.

7. Realizing that his father was murdered, PW2, preferred a complaint before the RDO, Thiruvananthapuram, raising suspicion regarding the circumstances surrounding the death of his father. In view of the above, PW 52, the RDO, Thiruvananthapuram, passed Ext.P56 order ordering that postmortem and inquest be conducted again to clear the suspicions surrounding the death. Inquest report prepared by him is marked as Ext.P58.

8. Immediately thereafter, Dr.K.Sreekumari, Professor and Head of the Dept. of Forensic Medicine, Medical College, Alappuzha, conducted re-postmortem on the body of the deceased and issued Ext.P53 report detailing her findings.

9. Investigation was thereafter, taken over by PW53, the Deputy Superintendent of Police, Nedumangad, as per Ext.P58 order issued by the Rural S.P, Thiruvananthapuram. As per Ext.P57 report, he intimated the RDO that the investigation was being taken over by him. He prepared Ext.P26 mahazar after

seizing the lease deed in respect of the Kattakkada shop and also the cheque handed over to PW4 - Babu by the deceased Varghese. On 08.07.2004, the mother of the 1st accused produced before PW53, the registered deed executed by the deceased Varghese in her favour in respect of the Vithura property. She also produced the deed executed by Varghese in favour of the 1st accused transferring the machineries of the Vithura shop run by Varghese. Ext.P27 mahazar was prepared detailing the same. The relevant agreement and registered deed were produced as Exts.P2 and P9 respectively. On the same day, accused Nos.1 to 3 were arrested by PW53 from their house at Malayinkeezhu. The arrest and inspection memo in respect of the 1st accused are Exts.P59 and P60, in respect of the 2nd accused are Exts.P61 and P62 and in respect of the 3rd accused, are Exts. P63 and P64 respectively. Mahazar was prepared in respect of the well situated adjacent to the house. While preparing the mahazar in respect of the well, he had secured the presence of PW47- Sreekumar, the Forensic Scientist. PW47 collected trace evidence from near the well and also from inside the house and the same was handed over to him which is marked as MO8 and MO9 respectively. His investigation revealed that the accused had committed offence punishable under S.306, 201, 120B r/w S.34 of the IPC. In view of the above, Ext.P66 report was submitted before court to delete Section 174 of the Cr.P.C and to add Section 306, 201, 120-B read with S 34 of the IPC. The detailed name and address of the accused were furnished before court as per Ext.P67 report. Based on the statement given by the 1st accused that the jeep owned by deceased Varghese bearing Reg.No. KL01H 6159 was parked outside the Police Control room, Thiruvananthapuram, PW53 along with the 1st accused reached the place and the Jeep was seized as per Ext.P68 mahazar. Thereafter, on the basis of the confessional statement given by the 1st accused, the clothes worn by the deceased were seized from the rest room barrack of the Police Control Room as per Ext.P29 mahazar. The relevant disclosure portion is Ext.P29(a) and the clothes were marked as MOs 4 and 5. On the next day, the accused were produced before court with Ext.P69 remand report. On 10.07.2004, the investigation was transferred to the Crime Branch and the CD file along with the objects and documents seized were handed over to the Crime Branch, SIG, Thiruvananthapuram unit. Ext.P70 is the order issued by the Additional Director

General of Police transferring the investigation to the Crime Branch.

10. PW54, the Dy.SP, Crime Branch SIG-I, Thiruvananthapuram, took over investigation on 13.07.2004. He was authorized by the Superintendent of Police, Crime Branch, as per Ext.P72 order. He submitted Ext.P73 report before court. On 14.07.2004, Ext.P74 application was filed before the Judicial First Class Magistrate Court-I, Nedumangad, seeking police custody of the accused. The learned Magistrate, on 20.07.2004, granted police custody and the accused were questioned in detail. The accused were taken to the home of the 1st accused at Karippor. In order to ascertain whether the conclusion arrived at by PW 53 that it is a case of suicidal hanging was credible, PW 52 enacted a mock hanging on the cross bar of the well. A person was made to hang on the well and another person was asked to enter the well . The person inside the well was asked to lift up the hanging person inside the well and another person was made to stand outside and to untie the knot on the cross bar. This was found to be impossible by PW 54. It was finally concluded by PW 54 that the accused had managed to misdirect the earlier investigating officers to make it a case of suicidal hanging. Thereafter, the accused were taken to the Koovappady bridge from where, the deceased was dumped into the river flowing underneath. Ext.P76 is the mahazar prepared. Thereafter, on the basis of the statement given by the 1st accused that the accused along with the deceased had taken food from a hotel after registering Ext.P9 deed on 21.06.2004, PW54 along with the accused went to the Kerala hotel at Vithura and Ext.P30 mahazar was prepared. Though an attempt was made to retrieve the lunki and the footwear worn by the deceased from the Koovakkudy river, the same did not materialise. The house of accused Nos.1 and 3 were searched in their presence on 22.07.2004 and photographs were taken. Exts.P71 to P71(s) are the photographs and Ext.P31 is the mahazar prepared by him. The crime was later renumbered by the Crime Branch as per Ext.P77 report. The material objects and properties seized by the local police during the investigation conducted by them were produced before court as per Ext.P78 and P79 property list. The jeep was retained in the Crime Branch office itself as ordered by the learned Magistrate. Thereafter, on 24.07.2004, the house of accused Nos.1 and 3 was searched. Ext.P80 is the search memo and Ext.P81 is the search list. Letter dated 23.07.2001 issued by Kairali Malayalam channel to

Mythri creations was seized as per Ext.P82 mahazar. On 17.08.2004, PW 48 and PW 49 , the doctors who conducted the autopsy over the dead body of Varghese were questioned and their final opinion was sought. Based on their opinion that the death was consistent due to combined effect of constrictive force applied around the neck and drowning, Ext.P84 report was submitted before court deleting Section 306 of the IPC and adding Section 302 of the IPC. MO3 mat on which Varghese had allegedly slept while he was in the house of accused Nos.1 and 3 at Karipoor was seized . The documents, blank signed papers and cheques were included in Ext.P86 property list and were produced before court. Application was submitted before court to send the objects seized for chemical examination and Ext.P91 is the forwarding note. Ext.P51 and P54 are the reports of chemical examination. Requisition was given to the respective Village Officers to prepare the plan in respect of the house at Karipoor and also the Koovakkudy bridge. The same was prepared by PW44 and PW45 and they were marked as Exts.P43 and P44 respectively. The vehicle daily diary of departmental vehicle bearing Reg.No.KL- 01-H-4187 of the Assistant Commissioner of Thiruvananthapuram of which the 1st accused is one of the drivers was obtained from the AR camp Thiruvananthapuram and the same was seized as per Ext.P32 mahazar. The vehicle daily diary which was seized as per Ext.P18 mahazar was produced and marked as Ext.P17. Thereafter the motor bike bearing Reg.No.KL-01-L-8038 which was used for transporting Varghese from Thookkampara to Karipoor was seized as per Ext.P20 mahazar. The said vehicle was later released to the 1st accused as per Ext.P92 kaicheet. Ext.P93 is the report submitted before court seeking correction as regards the direction of Koovakkudy bridge. The Assistant Commissioner of the City police control room, Thiruvananthapuram, produced the Photostat copy of the weekly diary for the period from 14.06.2004 till 04.07.2004 and the same was seized as per Ext.P19 mahazar and the photostat copy of the weekly diary was produced as Ext.P24. The photocopy of the registration certificate of motor cycle bearing reg.No.KLO1 L8038 produced by the 1st accused was seized as per Ext.P40 mahazar. The Manager of the District Co-operative Bank, Thiruananthapuram had produced the application forms submitted by the deceased for availing a loan for Rs.4,50,000/- which was seized as per Ext.P11 mahazar. The Village Officer of Malayinkeezhu Panchayat issued Ext.P12

certificate which revealed the ownership and possession of the house at Malayinkeezhu. The registration certificate of jeep bearing Reg.No.KL-01-H-6159 was produced by PW2 - Vivin Varghese and the same was seized as per Ext.P21 mahazar. A detailed mahazar was prepared in the presence of witnesses of the Koovakkudy bridge and its surroundings on 03.06.2006 and Ext.P94 is the mahazar. The Secretary of the Kandala Cooperative Society produced the MDS ledger which detailed the chit account and the loan account of deceased Varghese and the same was seized as per Ext.P95 mahazar. The petition register maintained by the Kattakada police station was seized as per Ext.P41 mahazar. The motor bike bearing reg.No.KLO1 L 8038 belonging to the 1st accused was produced before court as per Ext.P97 property list. The Malayinkeezhu Village Officer issued Ext.P45 report in which it was stated that it was the accused Nos.1 and 3 who were residing at the Karipoor house. On 09.05.2008, he completed the investigation and laid the charge before the jurisdictional Magistrate.

11. The court before which the final report was laid took cognizance of the offence and finding the offence to be exclusively triable by the Court of Sessions, committed the case to the Court of Sessions, Thiruvananthapuram, under Section 209 of the Cr.P.C. after complying with the legal and procedural formalities. The Sessions Court, on receipt of the records and on appearance of the accused before the said court framed charge for the offence punishable under Section 120B, 364, 368, 302 and 201 of the IPC r/w S.34 of the IPC.

12. When the charge was read over and explained to the accused, they pleaded not guilty and claimed that they be tried. The prosecution therefore examined as many as 54 witnesses as PWs 1 to 54 and had Exts.P1 to P96(a) marked. MOs 1 to 13 were also got identified and marked.

13. At the close of prosecution evidence, the accused were questioned under Section 313 of the Cr.P.C with regard to the incriminating circumstances brought out in evidence against them. They denied the circumstances and maintained that they were innocent. According to them, they were all falsely implicated in the case by the police. The 1st accused stated that the deceased had committed suicide and he was falsely implicated. The accused Nos. 2 and 3 asserted that they had

no role to play in the death of Varghese .

14. Finding that the accused could not be acquitted under S.232 of the Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

15. The court below concluded that the case rested purely on circumstantial evidence and marshaled 7 circumstances which according to the learned Sessions Judge established the role of the accused Nos.1 and 2 in the crime. The circumstances are :

(a). Last seen together theory

(b). Motive

(c). Detection of fibre from MO1 dhoti from the cross bar of the house of the 1st accused at Karipoor

(d). presence of accused Nos.1 and 2 with the jeep of the deceased near Koovakkudy bridge on the early hours of 23.06.2004

(e). Motive for not giving the amount promised to be given by the 1st accused to the deceased.

(f). Conduct of the accused thereafter and

(g). failure of the accused in explaining the possibility of the deceased being in the house of the accused No.1 at Karipoor and thereafter, the body being found near the Koovakkudy bridge which is 40 kms away.

16. The court below came to the conclusion that the above circumstances were clinching enough to lead to the irresistible conclusion that the accused were the perpetrators of the crime and the circumstances were inconsistent with the innocence of the accused Nos.1 and 2. The benefit of doubt was extended to the 3rd accused. The above findings of conviction and sentence are assailed this appeal.

17.Sri.B.Raman Pillai, the learned Senior counsel who appeared for and on behalf of the appellants at the outset itself submitted that an earnest appraisal of the evidence of PW48 and PW49 who had conducted the postmortem over the dead body of deceased Varghese would destroy the very edifice of the prosecution case. The learned counsel pointed out that though the report submitted by PW48 was that the cause of death was due to combined effect of constrictive force applied around the neck and drowning, PW 48 in cross examination had emphatically stated that autopsy revealed that it is more of a suicidal hanging than strangulation. The only reason that the doctors had opined that the deceased was alive when he was pushed into the water is because of the diatom test. The learned Senior counsel pointed out that not even a scrap of paper was produced by the prosecution to bring out the fact that sample of water was taken from any place in the river so as to conduct the diatom test. None of the investigating officers testified to this fact in evidence. Further, it was contended that the emphasis given by the trial court to the conclusiveness of the diatom test was misplaced as the doctors themselves had stated that the said test was inconclusive and unreliable.

18. The learned Senior counsel then directed his attack at PW54, the Dy. SP of police, Crime Branch, who, after taking over investigation on 13.07.2004, differed from the conclusions arrived at by PW 52 and PW 53, the earlier investigating officers. The investigation conducted by PW 53, pointed to a case of suicide by hanging and this was substantiated by the medical evidence let in by PW 48 and PW 49. The earlier investigating officer had concluded in unmistakable terms that it was a case of suspicious death and there was no material to conclude that accused Nos.1 and 2 had any role to play in the death of the deceased. The learned Senior counsel would vehemently submit that after taking over investigation, PW54 had concocted false evidence to speak about a chance meeting by PW 10 and his friend with the 1st and 2nd accused near the Koovakkody bridge. It was asserted by the learned Senior counsel that PW2, the son of the deceased had not stated to the earlier investigating officers that he had occasion to meet PW14 on the date of funeral of his father and the said person had informed him of the chance meeting with the accused, early in the morning of 23.6.2004 with the Jeep of the deceased.

19. The learned Senior counsel would further submit that the learned Sessions Judge has erroneously concluded that the last seen together theory could be applied on facts. According to the learned Senior counsel, the evidence of PW2, PW3, PW4, PW5, PW6 and PW9 who were examined to prove that they had occasion to see 1st accused and the deceased together in the early hours of 22.04.2004 would be seriously discredited by the evidence of PW27. It was pointed out that Ext.P24 weekly report of PW27, the Asst. Commissioner of police would inflict a serious blow to the evidence let in by the aforesaid witnesses who were examined to prove the last seen together theory. According to the learned Senior counsel, Ext.P24 would reveal that on 22.06.2004 from 8.00 a.m onwards the accused was working as the driver of PW27. He would further assert that in order to fabricate false evidence, after lapse of more than a year, Ext.P25 report was got prepared by PW27, the Asst. Commissioner with a view to correct the entry in Ext.P24. According to the learned Senior counsel, this is clearly an after thought and the prosecution had absolutely no explanation as to how the contemporaneous records prepared proximate to 22.06.2004 and in the ordinary course of business was found to be incorrect after an year. This is an attempt to cook up false evidence against the 1st accused, is the submission of the learned Senior counsel. Even otherwise according to the learned Senior Counsel , the long lapse of time between the last seen incident and the finding of the dead body would clearly rule out the application of the said theory.

20. The learned Senior counsel would submit that less said about the motive alleged the better. The prosecution allegation is that the accused No.1 had assured that he would hand over Rs.1.5 lakhs to Varghese on condition that he transfers his right over the Vithura Property and the machineries to the 1st accused and his mother. It was in pursuance to the said arrangement that on 15.06.2004, Ext.P9 document was executed as per which the machineries in the Vithura shop run by the deceased was transferred in the name of the 1st accused. Later, on 21.06.2004, a document was registered as per which the rights that the deceased had over the Vithura shop was transferred in the name of CW42, the mother of the 1st accused. Even thereafter, the 1st accused insisted that the Kattakkada shop should be transferred in his name. For that purpose, on 22.06.2004, the 1st accused along with the deceased had met PW4 but it did not

yield any result. According to the learned Senior counsel, the deceased was neck deep in debt and indebted to numerous persons. It has come out in evidence that the deceased as well as the accused were having acquaintance for more than 25 years. Ext. P2 reveals that the deceased had only limited rights in the property at Vithura and had only lease hold rights in the Kattakada property. There was absolutely no reason to put an end to the life of the deceased if the various materials adduced by the prosecution is dispassionately looked into, is the submission of the learned Senior counsel. It was asserted that on appreciation of evidence, the version of the prosecution that the accused No.1 had committed murder of Varghese on the ground that Varghese had demanded a sum of Rs.1.5 lakhs due to him is inherently improbable and against common sense. The said allegation was also absent in Ext.P3 complaint lodged on 25.4.2004. The learned counsel would further argue that though motive generally may not be of much significance, when the prosecution alleges a definite motive and when the same is found to be brittle to the core, the said aspect assumes relevance particularly in a case which rests on circumstantial evidence alone.

21. The learned senior counsel would submit that it cannot be disputed that the deceased was found dead under suspicious circumstances. According to the learned senior counsel, the transactions which the deceased had with the accused No.1 immediately prior to his disappearance, instead of pointing fingers at the accused would only go to show that the accused had nothing to do with the crime. It was pointed out the manner in which the evidence of prosecution witnesses were embellished and developed can easily be revealed from the evidence of PW2, PW10 and PW14. PW2, the son of the deceased had no case in Ext.P3 dated 25.06.2004 as regards various aspects which were brought in after investigation was taken over by PW54.

22. The learned Senior counsel would then contend that prejudice of an irreparable variety has been caused to the accused for failure of the prosecution to produce before court the statements of the witnesses recorded by PW52 and PW53 under S.161 of the Cr.P.C. According to the learned senior counsel, PW 54, the officer who laid the charge had stated in unequivocal terms that the statements of witnesses recorded by PW52 and PW53 were not forwarded to court along with

the final report under S.173 of the Cr.P.C. Those documents were also not furnished to the accused persons. Referring to S.173(5)(b) of the Cr.P.C., the learned Senior counsel would submit that the prosecution was bound to forward to the Magistrate, along with the report, the statement recorded under Section 161 of all the persons whom the prosecution proposes to examine as witnesses. Only those statements of witnesses recorded during the course of investigation, and whose statement, the prosecution does not intend to rely, can be kept away but even those statements are to be found in the case diary. According to the learned senior counsel, in the case on hand, when the investigation conducted by PW 54 takes a different track and conflicts with the conclusion arrived at by PW52 and PW53, the prosecution was bound to hand over to the court as well as the defence the statements of witnesses whom they propose to examine and whose statements were recorded by the previous officers. In short the contention is that the prosecution cannot pick and choose statements of witnesses whom they propose to rely and suppress statements which would shed a different light to the case set up.

23. Referring to the evidence PW 47 , PW 48 ,PW 49, PW 53 and PW 54, the learned Senior counsel would contend that this is an unusual case in the sense that there are 3 conflicting versions with regard to the cause of death. The prosecution has not made any attempt to establish conclusively as to how the deceased Varghese had met with his death. It was pointed out by the learned Counsel , that the conclusion arrived at by PW 53 who conducted the initial investigation is that the deceased had committed suicide and fearing repercussions, the accused had hid the body inside the bathroom of their house and later removed the body in a car and had thrown the dead body into the Karamana River. Though PW 54 concludes on the basis of his investigation that the accused are responsible for the homicidal death, the evidence of PWs 48 and 49 , which he relies on to arrive at the said finding, speaks more of the possibility of a suicidal hanging, which incidentally is the conclusion arrived at by PW 52 and PW 53. Though detailed investigation was conducted by PW 54, he does not state in his evidence as to how and in which manner the deceased had met with his death. According to the learned senior counsel, when serious doubts are cast as to how and in which manner, the deceased had met with his death and when there

are conflicting opinions, the benefit of the said doubt undoubtedly, has to be extended to the accused.

24. The learned senior counsel would further submit that an evaluation of the evidence of PW 54 would not reveal that the deceased after having been strangled at midnight on 22.06.2004 by a thorth and after making him unconscious, was attempted to be hanged on the cross bar of a well. It was also not found on investigation that they had failed in their endeavor and in the said circumstances they had kept the body of the deceased in the bathroom of the house and later he was taken in a jeep belonging to the deceased and was thrown to the river at 3 a.m. on 23.06.2004. Pointing to the evidence of PW54, it was argued by the learned Senior counsel that an attempt was made by PW54 to reenact the hanging to ascertain firsthand as to how the deceased was done away with. It did not turn out to be successful and it was in the said circumstances, that he had concluded that the deceased was taken to the Koovakkody bridge and was dumped into the river. According to the learned senior counsel, the court charge does not refer to the hanging incident on the cross bar of the well. If that be the case, the reliance placed by the learned Sessions Judge on the presence of fibre found on the cross bar of the well was clearly misplaced and unsustainable.

25. According to the learned senior counsel, the benefit of all these inconsistencies should be extended to the accused as the learned Sessions Judge has simply ignored the principles laid down by the Apex Court as well as this Court in the manner of appreciation of evidence and entering conclusions in a case depending exclusively on circumstantial evidence. The learned Senior Counsel relied on the judgments reported in *Sujit Biswas v. State of Assam* (2014 (1) SCC (Cri) 677, *State of Rajasthan v. Daulat Ram* (1980 SCC (Cri) 683), *State of Kerala v. Raghavan Alias Maniyan* (1974 KLT 148), *Orsu Venkat Rao v. State of A.P.* (AIR 2004 SC 4961), *Abadhraj Dukharam Pande and Others v. State of Maharashtra* (1980 SCC (Cri) 154), *Keshav v. State of Maharashtra* (2009 (1) SCC (Cri) 184), *Chandran @ Surendran and Another v. State of Kerala* (1991 SCC (Cri) 245), *Nizam and another v. State of Rajasthan* (2015 Cri.L.J 4655), *Raghava Kurup v. State of Kerala* (AIR 1965 Ker. 44) and *Ishwar Singh v. The State of Uttar Pradesh* (AIR 1976 SC 2423), to buttress his contentions.

26. Au contraire, the learned Public Prosecutor has pointed out that the learned Sessions Judge has marshaled 7 circumstances which, in unmistakable terms, pointed to the role played by accused Nos.1 and 2 in the crime. Referring to each of the circumstances, the learned Public Prosecutor submitted that each are of clinching nature and the facts established are consistent only with the hypothesis of the guilt of the accused. According to the learned Public Prosecutor, 1st accused is a police driver and it is therefore, obvious that the investigation did not proceed in the proper lines at the hands of PW 52 and PW 53. It was later when investigation was taken over by PW 54 that the actual facts had come out and the complicity of the accused were established. The delay in questioning PW 14 and PW 10 does not have any significance in the facts and circumstances of the instant case. According to the learned Public Prosecutor, there is no discrepancy or doubt as regards the cause of death of deceased Varghese and the same has been emphatically stated by PW 48 and PW 49. The motive has been proved beyond any shadow of doubt and the gruesome murder was perpetrated to avoid payment of Rs.1.5 lakhs due to the deceased from the 1st accused. According to the learned Public Prosecutor, the presence of fibre on the cross bar of the well situated outside the house of the 1st accused and also the presence of blood of unknown origin in the bathroom of the house would clearly bring on the presence of the deceased in the house of the accused. As the above fact was established without any semblance of doubt by the prosecution, it was for the accused to furnish a proper explanation. The failure of the accused to furnish proper explanation to the above gravely incriminating aspects would be an additional link in the chain of circumstances. The learned Public Prosecutor laid great importance to the evidence of PW14, who had occasion to see accused Nos.1 and 2 standing near Koovakkody bridge on the early hours of 23.06.2004 and that too with the jeep of the deceased. The learned Public Prosecutor highlighted the conduct of accused Nos.1 and 2 in visiting the home of the deceased in the late hours on 22.06.2004 and thereafter, to contend that accused Nos.1 and 2 had made genuine efforts to conceal the heinous acts. Finally, it was contended that the learned Sessions Judge has meticulously considered all the relevant aspects and have analyzed the circumstances minutely to arrive at a conclusion that the prosecution had successfully established the role played by the accused and the

chain of evidence was so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. According to the learned Public Prosecutor, no grounds warranting interference was made out and the appeal was liable to be dismissed.

27. We were also taken in depth through the evidence let in and the documents produced .

28. Before we undertake a detailed evaluation of evidence, it shall only be just and proper to remind us of the principles of law in relation to evaluation of evidence in a case resting on circumstantial evidence .

29. In Vasant Sampat Dupare V State of Maharashtra , 2015 (1) SCC 253, the principles based on which a case resting on circumstantial evidence is to be dealt with was laid down referring to the classic Judgments of the Apex Court . It was held as follows:-

[34]. Regard being had to the aforesaid circumstances, it is to be seen whether on the basis of the said circumstances, it can be held whether such circumstances lead towards the guilt of the accused regard being had to the principle that they lead to a singular conclusion that the appellant is guilty of the offence and it does not allow any other probability which is likely to allow the presumption of innocence of the accused. In this context, we may refer with profit to the decision rendered more than six decades back in Hanumant Govind Nargundkar v. State of M. P., AIR 1952 SC 343 : 1953 Cri LJ 129 wherein it has been held as follows: (AIR pp. 345-46, para 10)

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

of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

[35]. In *Sharad Birdhichand Sarda v. State of Maharashtra*, 1984 (4) SCC 116: 1984 SCC (Cri) 487 the five golden principles which have been stated to constitute the "panchsheel" of the proof of the case based on circumstantial evidence are:

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

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

(iii) that the circumstances should be of a conclusive nature and tendency;

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

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

[36]. In *C. Chenga Reddy v. State of A.P.*, 1996 (10) SCC 193 : 1996 SCC (Cri) 1205 it has been held that: (SCC pp. 206-07, para 21)

"27. In a case based on circumstantial evidence ... the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. That apart, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

30. In other words , conviction can be based solely on Circumstantial evidence , but when tested on the touchstone of law relating to circumstantial evidence , the guilt of the accused has to be established on the basis of the above time tested

principles.

31. There cannot be any dispute with regard to the fact that Varghese had met with his death. The first question that is to be answered is whether the same is homicidal or suicidal. Before delving into this aspect, it will be apposite to recollect the prosecution allegations as is borne out from the court charge.

32. The prosecution case as per the charge is that on 22.6.2004 , the 1st accused took the deceased to his house at Karipoor and wrongfully restrained him. Thereafter, on the same day at midnight, while the deceased was praying, accused Nos. 1 and 2 strangled the deceased using a thorthu (a coarse cotton towel) and when he became unconscious , the appellants took him in a the Jeep bearing registration No KL-01-H-6195 and threw him into the river near the Koovakkudy bridge. According to the prosecution, it is on account of strangulation and drowning, that Varghese had met with his gruesome death.

33. While considering the above aspect and before dealing with the evidence of the forensic surgeons, a very pertinent aspect is to be taken note of . It was PW 52 , the Circle Inspector of Police, Aryanad Police Station, who had taken up the investigation on 26.6.2004. He had conducted investigation till 30.4.2004. He did not get any clue with regard to the death and thereafter, the investigation was handed over to PW 53, the Circle Inspector of Police, Nedumangad. PW 53 had taken up the investigation on 30.4.2004 and his investigation revealed that Varghese had committed suicide by hanging himself on the cross bar of the well outside the house of the 1st accused. He also concluded on the basis of his investigation that the accused, with a view to absolve themselves of any liability, hid the body in their bathroom and then took the body in a Jeep and disposed it off by throwing into the river. It was PW 53 who had after investigation, came to the prima facie conclusion, that the offence made out are under section 120 B , 306 , 201 r/w Section 34 of the IPC. He had continued with the investigation till the same was taken over by PW 54. PW 54 , who took up investigation on 13.7.2004 did not concur with the findings of PW53 and according to him, he attempted to reenact the manner in which the offence was perpetrated by the accused on the cross bar of the well after he had fallen unconscious as a result of strangulation. It was found

impossible. In other words, the version of PW54 appears to be that Varghese was strangled by the accused and after he became unconscious, he was thrown into the river while he was still alive. The said conclusion has been arrived at by PW54 after taking note of the results of the diatom test as revealed from Exts. P51 and P54 certificates of Chemical Analysis .

34. The prosecution relies on the evidence of PW48 , The Assistant Professor of Forensic medicine at Medical college, Thiruvanthapuram. She had conducted autopsy on the body of the deceased and had issued Ext.P50. She had noted the following findings in the certificate issued by her.

Body was that of a moderately built adult male of height 167 cm and weight 70 kg in a state of decomposition. Eggs of flies were seen on the right side of scalp hair. Partial de-glowing of hands seen. Blackish discolouration was seen on the upper part of back of trunk. Eyes were closed, eyeballs bulging. conjunctivae red. Bloodstained fluid was coming out of mouth and nostrils. External body orifices showed decomposition changes, otherwise normal. Nails blue. A dirty white polyester double mundu with brown border was seen tied, around the neck with a slip knot on the left side of neck. The loop around neck measured 38 cm, the long free portion 109 cm in the folded state and the short free portion 24.5 cm with a simple knot 2 cm inner to the end.

Comeae hazy, rigor mortis had passed off completely from the body. Postmortem staining could not be made out due to put fraction. Greenish discoloration was present on the body at places. Marbling was seen on the right upper limb. Gas rigidly was present on the thighs and arms. Abdomen, penis and scrotum were distended with gas. Postmortem blebs and peeling of cuticle were seen on the body at places. Hair was easily bluckable. Nails loose. Teeth were not loose. Decomposition changes were more on the face, neck and upper part of trunk. Body was kept in cold chamber.

Injury (ante mortem)

Pressure abrasion (ligature mark), 44 cm long, oblique and continuous on the neck, over the thyroid cartilage. It was placed 8 cm below right ear (1 cm broad), 8

cm below chin (1.5 cm broad), 8 cm below left ear (2.5 cm broad) and 11 cm below occiput (2.5 cm broad).

Flap dissection of neck was done under bloodless field, subcutaneous tissue underneath the injury was pale. Muscles, vessels, cartilages and bone of neck were normal and intact except for the decomposition change.

Superficial injuries of any other could not be made out due to decomposition changes. No injury was seen to the deeper structures of skeleton.

Air passages contained blood mucoid fluid, lungs were soft, decomposed and slightly oedematous. Chest cavities contained 100 ml of blood stained fluid in each. Aorta showed reddish discolouration of its inner surface and atheromatous change. Anterior descending branch of the left coronary artery showed atheromatous thickening of their walls narrowing the lumen to pinhole size at its proximal part. Left coronary artery right coronary artery showed atheromatous thickening right one narrowed to a slit. Liver was decomposed and foamy. Stomach contained 10 ml of brownish fluid without any unusual smell, mucosa showed decomposition. Urinary bladder was empty. All other internal organs were soft and decomposed, otherwise normal.

Viscera, sample of blood stained fluid, water sample and bone marrow sample were preserved and sent for chemical analysis and diatom test. Nail clippings and a gauze soaked in blood stained fluid dried and packed in sealed covered were handed over to investigating officer.

35. PW 48 reserved her final opinion pending chemical analysis report and diatom test. After receiving Ext. P 51 chemical analysis report, she gave her final opinion. According to PW 48, the cause of death was the combined effect of constriction force applied around the neck and drowning. She also stated that death could have occurred about 48 to 72 hours prior to her examination.

36. In cross examination, when PW 48 was asked whether the positioning of the slip knot in the ligature material is suggestive of a case of suicidal hanging than a case of homicide, she stated that it may be indicative of suicidal hanging. She also

stated in unmistakable terms that the possibility of suicidal hanging cannot be ruled out. She went on to state that the ligature mark was seen over the thyroid cartilage and when asked whether the location of the ligature mark seen over the thyroid cartilage and above is an indication of suicidal hanging, she answered in the affirmative. PW 48 stated that it was likely that two ligature marks would have been present if the deceased was hanged after strangulating him. She however, stated that if the first pressure applied does not produce any external injury then there is a possibility of a single abrasion in such cases. In the same breath, she stated that in a case of strangulation, ordinarily the ligature mark will be below the thyroid cartilage and hyoid bone will be fractured and there was a distinct possibility of other neck structures like thyroid cartilage, trachea etc. being fractured in the course of strangulation. No such indications were there in the instant case. It was further testified by PW 48 that she had examined the neck structures and she found the subcutaneous tissues underneath the injury was pale. When asked whether the same was not an indication of suicidal hanging than strangulation she answered in the affirmative. She also stated that if the body is in a hanging position for a long time that can produce paleness in the subcutaneous tissue under the injury as has happened in the instant case. PW 48 also testified while she was cross examined that she had dissected the air passages thoroughly and properly and all proper dissections were done. She had dissected the lungs and heart. According to the witness, this was done to find out whether any foreign particles had entered the lungs. She found no foreign particles in the air passages. She also stated that if the diatom test was not considered, and the findings in the postmortem were alone considered, she would not have opined that the death occurred prior to the body was immersed in water.

37. The evidence let in by PW 48 distinctly speaks of the possibility of a suicidal hanging rather than a case of strangulation . This aspect of the matter is highlighted by the learned Senior counsel to contend that, PW 53, the officer who had investigated the case at the first instance had also come to the same conclusion. It has to be noted at this juncture that the evidence of PW 54 clearly rules out a case of suicidal hanging and if his evidence is analyzed meticulously , one would get the impression that he had attempted to conduct a mock hanging, which did not come out successful . In unequivocal terms PW 54 had stated in his

evidence, that the earlier investigators were misdirected by the accused.

38. We shall now deal with the evidence of PW 49, the Professor of Forensic Medicine, who was directed as per Ext.P56 order issued by the RDO, Thiruvananthapuram, to conduct another postmortem with the assistance of a team of doctors . We have gone through the evidence let in by PW 49 as well . We note that the observations and findings arrived at by PW 49 is identical to that of PW 48 and in view of the same, it will be unnecessary to reiterate the same again . Suffice it to note that , PW 49 stated in her evidence that apart from the ligature mark, all the other findings had been removed by the earlier dissection and therefore she was unable to give any definite opinion as to whether it was a case of hanging or not. According to PW 49 , there was no other material or data available on the body except the ligature mark to come to a conclusion as to whether it is a case of hanging or strangulation. She also stated that death was due to constrictive force applied around the neck and drowning.

39. One may also have to take note of the fact that there is no consistent case for the prosecution . Different theories are propounded and all these theories militate with each other. The prosecution has no case now that the deceased was initially strangled and thereafter was hanged on the cross bar of the well . The medical evidence also excludes this theory. PW 48 has deposed that there is the likely hood of presence of distinct pressure abrasions on the neck if the deceased was initially strangled and thereafter hanged on the cross bar. There theories propounded by the prosecution are irreconcilable with each other creates grave suspicion in the mind of the court .

40. Both PW 48 and PW 49 , on the basis of the chemical analysis reports produced as Exts. P 51 and P 54 , had deposed that identical diatoms were detected in the bone marrow which was suggestive of the fact that the deceased had entered the water alive and could have drowned as a result .

41. The learned counsel appearing for the appellant would strongly attack the aforesaid conclusion on various grounds. PW 49 in her evidence had stated that diatom alone was not sufficient to come to the conclusion that the results are confirmative. According to the said witness, if the diatom found in the body and in

the drowning media are one and the same and if there is possibility of any diatom available in the drowning media, then the test can be said to be conclusive. If the result is different, it cannot be said to be conclusive. It was also testified that taking non vegetarian food may cause presence of diatom in the body as well as in the bone marrow.

42. We notice that a striking feature in this case, in which contemporaneous documents are seen prepared at all stages of the investigation, and the same is deposed to by the investigating officers concerned, no one has even whispered about the sample water being lifted from the river from where the body was found. We have gone through the evidence of PW 38 , the Sub Inspector who prepared Ext.P 15 inquest and also the evidence of PW 52 to 54 . None of these witnesses have deposed of having taken sample water from the river in order to forward the same to the chemical analyst for the purpose of conduct of the diatom test. PW 47, Dr. Sreekumar, who was called to the scene of crime has also not deposed of having taken sample water from the river . All the items which were seized by PW 47 are seen forwarded as per Ext.P91 forwarding note by PW 54. The sample water is not seen included in the same. We have gone through all the materials and we find that there is reference to taking of water samples in Ext. P 15 inquest report .But the same is not seen forwarded nor is any mention about the same made by PW 38 , the Sub Inspector ho prepared Ext. P15 , in his evidence.

43. In Principles and Practice of Medical Jurisprudence, by Taylor, 13th edition, page No.299, the learned author has stated as follows:

As regards the 2nd criticism that diatoms have been found in the organs of persons who have died from causes other than drowning Hendey points out that :

(i). A large number of diatoms are ingested with unprepared foods eaten raw, such as salads , water cress , which come into contact with the soil diatoms , and particularly selfish such as mussels , limpets , winkles , cockles ,and oysters , which feed exclusively on Diatoms.

(ii). There is extensive use of diatomaceous earth for industrial purposes. It is used extensively in building, chemical processes and insulating material. It is

reasonable , therefore, that people living in the immediate vicinity of such industry will be exposed to diatoms in the atmosphere.

(iii). There is contamination by diatom containing dusting powder, formerly extensively used by pathologists on rubber gloves

Hendey considers however, that their presence from the sources outlined above amply confirm that the diatom test is only valid if it can be shown that the species recovered from the pathological specimens are all present in the sample from the site of drowning. All species of diatom in the pathological specimen other than those represented in the site must be ignored.

44. Thus, what the learned author has stated in his treatise is spoken to in so many words by PW 49 as well. In the case on hand, there is absolutely no evidence of taking of sample water from the river and analysis of the presence of diatoms in the said water. It cannot therefore, be said that with certainty that the species found in the pathological specimens were exactly the same species which were found in the water in which the body was found.

45. Further in Medical Jurisprudence and Toxicology by Modi, Edition No 24 , page No 472 , the learned author has given the characteristic signs which would be present in the body in a case of death by drowning. The characteristic signs are:-

(a).The presence of profuse fine, white, lathery persistent froth around the mouth and the nostrils; this is a vital phenomenon and not an evidence of putrefaction;

(b). The presence of some object firmly grasped in the hands;

(c). The presence of fine, white froth in the air-passages;

(d). The bulky and oedematous water logged lungs, which exude a copious, frothy, bloodstained fluid on section;

(e). The presence of water, mud or weeds in the stomach or small intestine or both;

(f) Diatom Test: Finding of diatoms by microscopic examination of tissues like brain, liver or bone marrow from the femur or humerus, after acid digestion is also helpful in confirming death from drowning. Diatoms are a class of tiny unicellular algae of different shapes found in fresh or seawater. There are about 15,000 types of diatoms of which half are found in fresh water and the rest in seawater. They may be fan shaped (stellate), ribbon like and seen singly or in groups. They vary in size from 2m-1.0 millimeter, the usual size being 10.80 cm. They have hard siliceous, almost indestructible outer covering (frustule) and can pass through the alveolar walls of the lungs of a living person to the brain, liver and bone marrow. The diatom flora of the sample of water from the site of immersion must be carefully collected with special technique and compared with those found from the body to get a reliable report. The diatom test has certain limitations like diatoms could have been inhaled or ingested with material containing diatoms before death or aspirated water containing diatoms or contamination of the glassware and reagents that are used to detect diatoms.

(Emphasis supplied by us)

46. The characteristic signs which are expected to be present in the body in a case of death by drowning as observed by the learned author are absent in this case. The evidence let in by PW 48 clearly reveals that she had dissected the air passages , the lungs and heart and had failed to detect any foreign particles . She did not notice the presence of froth, in the air passages , the lungs , or the presence of water, mud or weeds in the stomach or small intestine or both. This indicates that it was not a case of the person being alive when he had entered the water. This would further create serious doubts .

47. In World of Forensic Science e-edition in (Two Volumes)by K.Lee Lerner and Brenda Wilmoth Lerner, reference is made to the conclusiveness of the diatom test.

Laboratory tests may reveal the presence of diatoms in the body. Diatoms are microscopic algae found in both seawater and fresh water. Their silica based skeletons do not readily decay and they can sometimes be detected even in heavily decomposed bodies. If the person is still alive when entering the water,

diatoms will enter the lungs if the person inhales water and drowns. The diatoms are then carried to distant parts of the body such as the brain, kidneys, and bone marrow by circulation. If the person is dead when entering the water, then there is no circulation and diatoms cannot enter the body. Diatoms do not occur naturally in the body. If laboratory tests show diatoms in the corpse that are of the same species found in the water where the body was recovered, then it may be good evidence of drowning as the cause of death. However, the diatom test is now considered very unreliable and would never be used, on its own, as evidence of drowning. The forensic pathologist has to rely on many other sources of evidence to determine cause of death when a body is found in water.

(Emphasis supplied)

48. The limitations of the diatom test are clearly emphasised by the learned authors. We are therefore, unable to attach much conclusiveness of the diatom test to conclude that Varghese might have been thrown into the water while he was still alive. After having analyzed the evidence of PW 48, we find it difficult to rule out a case of suicidal hanging . It is also next to impossible to believe the prosecution version that the deceased was strangled first and thereafter, he was dumped in the river, while he was still alive. Both the doctors had stated that their opinion would have been different if the diatom test was negative.

49. The learned Sessions Judge after analyzing the evidence of PW 48 and 49 have concluded that the doctors had deposed that the death of Varghese could not have been a case of suicide, and that the witnesses had stated that the diatom test is conclusive. It was also found that the evidence of PW 48 and 49 coupled with Ext.P50 to P55 will go to show that it could not be a case of suicide. The said conclusion arrived at by the learned Sessions Judge is against the evidence on record.

50. We are therefore of the view that the medical evidence is not at all helpful to the prosecution. On the other hand , according to us , the medical evidence militates to a great extent with the prosecution case.

51. We shall now advert to the other items of evidence to find out whether the prosecution has succeeded in establishing its case.

52. As stated earlier, Varghese and the accused No 1 were having close acquaintance for more than 25 years and were close friends . Prosecution case is that the deceased was also indebted to the 1st accused and his mother. The assets of the deceased were transferred to the name of the 1st accused and his mother on the premise that a sum of RS 1.5 Lakhs would be paid to Varghese after settling all the debts . It is with a view to avoid payment of the above Rs 1.5 lakhs, that the life of Varghese was put to an end to an end by the accused, is essentially the case of the prosecution. As there are no eye witnesses to the occurrence the prosecution relies on various circumstances as stated above.

53. For the purpose of evaluating the various circumstances, the learned Sessions Judge had relied on the oral evidence of PW 2 to 9, 10 and 14.

54. To prove the motive alleged prosecution relies on the evidence of PW 2 , 3 and 4 . To prove the other circumstances in addition to the evidence of PW 2, 3 and 4 , the evidence of 5 to 10 and 14 are also relied on by the learned Sessions Judge. The evidence of the aforesaid witnesses will have to be referred to in some detail .

55. PW2 - Vivin Varghese, is the son of the deceased. He deposed that during 2004 he along with his father Varghese, mother, and elder brother Silvymon Varghese used to reside at Thungampara near Kattakkada. His father was 51 years old. His father's sister Elsamma (PW9) used to reside close to their home and as her husband was employed at Kuwait he used to go and sleep in her house at night . His father was conducting a tyre resoling business at Vithura and Kattakkada in the name V.S.Tyres . The business at Kattakkada was run in a rented premises and the one at Vithura was run from a shop owned by him. Kattakkada shop was owned by a person by name Babu (PW4). PW 2 used to assist his father in running the business. His father had incurred some debts in the course of business. His father had taken a loan from the Kandala service Co-operative Bank and had also availed loans from private persons. His father also had taken loans from his partners namely Saji, Padmakumar and Ani. He had also

availed loans from the 1st accused and his mother. The 1st accused was working as a driver in the crime Branch Department of Police. He was residing near to their house. The 2nd accused is related to the 1st accused and is a close associate. His father had availed a loan of Rs.2,00,000/- from Omana Amma, the mother of the 1st accused and out of the said amount, a sum of Rs.1.5 Lakhs was repaid. His father had also availed a loan of Rs.50,000/- from the 1st accused. His father also owned a jeep bearing registration No.KL-01-H 6159. Deceased had applied for a loan from the Co-operative Bank, Neyyattinkara, with a view to clear off all his debts and for availing the loan , the 1st accused had rendered assistance. His application was not considered favorably by the Bank. The Jeep owned by the deceased was handed over to the 1st accused on his demand about 1 month prior to his death . The jeep was valued at Rs.50,000/- and the 1st accused insisted that interest also should be paid to him.. As per an agreement entered into between the deceased and the 1st accused, the Vithura property was transferred in the name of Omana Amma on 21.6.2004 as per a registered deed. Even prior to that, the machineries lying in the Vithura shop were transferred in the name of the 1st accused and PW2 was an attester to the deed. The agreement was that if the property is transferred as above, all the debts would be cleared and a sum of Rs 150,000/ would be paid to Varghese. In spite of execution of the above deeds no payment as assured was effected. On 21.6.2004, he along with the deceased went to the house of Omana Amma, the mother of the 1st accused. They were told about the plans of the other creditors to attach the movables lying inside the Kattakkada shop and they were asked to execute a lease deed in respect of the Kattakkada shop in the name of the 1st accused and his mother. This was not agreeable to the deceased and they returned back home. On 22.4.2004, PW 2 was told by Varghese that the 1st and 2nd accused were pressurizing him to execute a deed in respect of the Kattakkada premises. They devised a plan to contact Babu, the landlord of the Kattakkada shop, and to request him to refuse their proposal for a transfer of lease. Babu was informed through his wife Ambili. On 22.6.2004 when PW2 reached the Kattakkada shop in the morning, he saw the deceased Varghese and the 1st accused talking to Babu. Later, they came to the shop and his father informed PW 2 that Babu was not agreeable to execute any document in the name of the 1st accused. At that time, the 1st accused informed

Varghese that he would withdraw money from the Thiruvananthapuram Bank and would hand over the same to Varghese. In order to get the money, Varghese went with the 1st accused in his bike bearing registration No.KL 01-L 8038. The 1st accused asked the 2nd accused to go to his Karipoor house where the 3rd accused Sheela resides. According to PW1, after the deceased had gone with the 1st accused at 9.00 a.m on 22.4.2004 he was not seen thereafter. He identified MO2 and MO1 as the shirt and dhoti which was worn by the deceased on that day. He also identified MO4 and MO5 as the shirt and pant worn by the accused. He returned back home and when he enquired about his father to his mother, his mother told him not to worry as Varghese had gone with the 1st accused. At about 12.30 a.m, the 2nd accused rang the bell of the house of PW 9, where he was staying and he was informed that Varghese would return only at 11.00 a.m as he was with the 1st accused at Thiruvananthapuram. PW2 was warned not to open the shop or to go out on the reason that Ani and his friends may pick up quarrel with him. On 23.6.2004, while he was getting out of his house to go to the shop, the 1st accused came to his house in a bike. He inquired with PW3 as to whether the deceased had come back. Perturbed by the query, PW3 asked him as to why he was asking so, as Varghese had gone with him on the previous day. The 1st accused responded by saying that the deceased had gone to purchase pan and did not return thereafter. The 1st accused then left the place in his bike. His mother was very much worried and asked PW2 to inquire about the whereabouts of his father. He went to his shop and returned back during lunch time. At that time, PW3 told him that the 1st accused had come to his house and asked her to send PW2 to the office of the Commissioner. PW2 went to the Commissioners' office and when he inquired about the 1st accused, he was told that the 1st accused was on leave. He then went to the Kattakkada shop and informed all the details to PW5 - Issac. After closing the shop in the evening, PW2 went back home. His mother informed him that the mother of the 1st accused had come to their house and had told that the deceased might have gone to his relative's house at Changanassery or to Potta. He telephoned his relatives and he was told that Varghese had not reached their houses. On 24.6.2004, he went to his shop and after entrusting the business with PW5, went to Changanassery. He came to understand that his father had not reached there. He stayed at Changanassery on

24.4.2004 and returned back on the next day. When he returned back home he was told by PW 3 that the 1st accused had come home and stated that Varghese is not a small boy and he would return back home. Thereafter, he went to the Kattakkada police station along with PW 5 and one Ani. He got a complaint drafted by a clerk and the same was lodged before the Kattakkada police. Ext.P3 is the complaint. He along with two policemen went to the house of 1st and 2nd accused but they were not found there. When he returned to the Kattakkada police, he was told that on the previous day, a dead body was seen near the Koovakudy bridge and the same was intimated to the Kattakkada police station by the Aryanad police. PW2 along with PW5 and Ani, went to the Aryanad police and he was told that a dead body was found with a dhoti tied around the neck. He was shown the underwear and the shirt found on the body and he identified the same to be of his father. There was a label of City Fashions stitching, Thungampara on the shirt. On the next day, relatives of his father came from Changanassery and he along with his relatives went to the Medical College hospital at 7.00 am in the morning. He identified the body as that of his father. They were permitted to take the body as the postmortem had been completed by them. When he was on his way back home with the dead body, the ambulance was obstructed by the local people and they demanded that a fresh inquest and postmortem be conducted. The RDO and the DYSP, Nedumangad had come to the house. It was decided that inquest and postmortem be conducted on the next day. The body was again taken to the Medical College Hospital, mortuary. Thereafter, the funeral ceremonies were held. On that day he was told by PW 14 that on 22.6.2004 while PW 14 and his friend were returning back after a program, they had occasion to see the 1st and 2nd accused standing near the Koovakudy bridge with the jeep of Varghese. After the funeral ceremonies he was asked to come to the police station and he was shown MO1 dhoti worn by Varghese which was identified by him.

56. The next witness examined by the prosecution to establish the circumstances and to corroborate the version of PW2, is PW3, the wife of deceased Varghese. She also stated in tune with the evidence of PW2. She identified both accused Nos.1 and 2 and stated that the 1st accused and her husband were good friends for the last 10-25 years. Varghese had availed loans for the purpose of his business from the 1st accused and his mother but she was not aware as to how

much amount was availed by way of loan. She was told that her husband had availed a loan of Rs.50,000/- from the 1st accused. In order to settle the amount due to the mother of the 1st accused, a sum of Rs.1.5 Lakhs was availed by way of loan from the Kandala society. She also spoke about the handing over of the jeep for settling the amount due to the 1st accused. In order to settle the loan due to Vijayan and his mother, the deceased Varghese had made an attempt to take a loan by placing his sister's property in mortgage. The 1st accused had one with the deceased and had provided him with all the assistance to secure the loan. When the deceased had failed to secure the loan, the Vithura property and shop room situated therein was assigned in the name of Omana Amma, the mother of the 1st accused, and the machineries were transferred in the name of the 1st accused. All these documents were executed on the basis of the assurance given by the 1st accused that all the debts would be cleared and a sum of Rs.1.5 lakhs would be given to the deceased. The transfer was effected on 21.6.2004. The 1st appellant did not honor his part of the promise. On 21.6.2004, Varghese and PW2 went to the house of the 1st appellant. He demanded that the lease deed in respect of the Kattakkada property be executed in the name of the mother of the 1st accused. On 22.6.2004, early in the morning, the accused Nos.1 and 2 came in a bike to their house. The 1st accused had a conversation with Varghese and thereafter went to the house of PW9 to talk with PW2. After sometime they all returned back to the house and thereafter PW2 went to his shop. Varghese took some papers and went with accused No.1. On 22.6.2004 at 9.30 am while PW3 was on her way to the church at Kattakkode she had occasion to see the 1st accused and the deceased going in a bike. On seeing PW 3 the bike was stopped and the deceased told her that he was on his way to Trivandrum with the 1st accused to make arrangements for money. She had not seen her husband thereafter. She also stated about the arrival of accused No.2 late in the evening and about the arrival of Vijayakumar at 7.30 am on the next day. She deposed that she was told by the 1st accused that the deceased would return only on 30.6.2004 after making arrangements for securing the money.

57. PW4 is the landlord of the Kattakkada shop. He had leased out the shop to Varghese for the purpose of running tyre retreading business. He is having acquaintance with the 1st accused as well. Varghese had availed a sum of

Rs.20,000/- as loan from him and he also stated that he had seen Varghese for the last time on 22.6.2004 at 8.30 am. The 1st accused was with Varghese on that day. They had come together to demand that the lease deed in respect of the shop room be executed in the name of the 1st accused. He also deposed in tune with the evidence of PW 2 that he was told by PW 2 and the deceased to refuse the request to transfer the lease in respect of the premises to the 1st accused. He also stated that Varghese owed a sum of Rs.50,000/- in addition to a sum of Rs.16,000/- and he demanded that the said amount be repaid if any fresh deed is to be executed.

58. The prosecution relies on the evidence let in by the above three witnesses to prove the motive . On going through the evidence of PW 2 , 3 and 4 , one cannot ignore Ext.P2 and Ext. P9 which are seen executed by Varghese in the name of the mother of the 1st accused and the 1st accused himself . Though the prosecution witnesses state that the Vithura property stands in the name of the Varghese , Ext.P2 document would reveal that he only had a limited right over the property and that too only to take the usufructs. The consideration fixed in the deed is Rs 30,000 for the property and the building and is stated to have been received by Varghese in advance. As per Ext.P9 dated 15.6.2004 , the machineries used for tyre resoling in the Vithura shop were transferred in the name of the 1st accused by Varghese and the consideration stated in the said deed is Rs 80,000/. In Ext.P3 , PW 2 has no case that the accused had assured that a sum of RS 1.5 Lakhs would be paid after clearing all the debts due to the accused and others if the properties were transferred in the name of the 1st accused or his mother. On the other hand his case in Ext.P3 was that the family members were all kept in the dark by the deceased about his transactions. Moreover, the evidence let would reveal that the 1st accused wanted the deceased to transfer the rights over the property and machineries in the Kattakkada shop as well and an endeavor was made in that regard on 22.6.2004 . PW2 would assert that no money had changed hands and the property was transferred on the mere assurance by accused No. 1 that he would pay a sum of Rs.5 Lakhs which is against the recitals in the contemporaneous documents. Taking note of the fact that Varghese was indebted to all and sundry, it would be far fetched to believe that the 1st accused had assured that if the properties are

transferred in his name, all the debts would be settled and a sum of Rs 1.5 Lakhs would be paid back to Varghese. This is more so improbable in view of the unequivocal evidence let in by PW 2, that the above agreement will not be reflected in any contemporaneous documents executed between the parties. If the prosecution case is believed, then the intention of appellant No. 1 was to obtain possession of the business and machineries in the Kattakkada shop as well . That did not fructify on that day .Taking note of the long standing relationship between the parties and also the confidence reposed on the 1st accused by PW3, it is quite difficult to believe the prosecution case that the deceased was murdered to avoid payment of Rs 1.5 Lakhs. Moreover if the claim of The accused could very well have obtained possession of the Kattakada Shop and premises as well, which according to the prosecution was doing good business. This is what is discernible from the evidence.

59. At this juncture, the learned Prosecutor would submit that even if the motive alleged was not proved, the same would not stand in the way, if the other evidence convincingly established the role of the accused. No doubt, proof of motive is not necessary to sustain a conviction but when the prosecution puts forth a specific case as to motive for the crime , the evidence regarding the same has got to be considered in order to judge the probabilities. It is also well settled that motive for a crime is a satisfactory circumstance of corroboration when there are other convincing evidence to prove the guilt of an accused person but it cannot fill up a lacuna in the evidence. (see Smt.Omwati v. Mahendra singh and others (1998 (9) SCC 81).

60. We are, in view of the above discussion , not entirely convinced about the motive alleged and are of the view that the other circumstances are also to be meticulously considered to decide on the complicity of the appellants .

61. The next circumstance relied on by the learned Sessions Judge is the last seen together theory. For the evaluation of the said circumstance, in addition to the evidence of PW2, 3 and 4 , the learned Sessions Judge has also relied on the evidence of PW5 to PW9. We shall therefore, refer to the evidence of PW5 to PW9 in some detail.

62. PW5 was employed by Varghese and he was stationed at the Kattakkada shop. He was examined to prove that on 22.6.2004 at 8.30 am Varghese and the 1st accused had come to his shop. He saw them going to the house of PW4 which was nearby. He also stated that he had seen the 1st accused and the deceased going away in a bike. He deposed that he had gone with PW2 to draft a complaint and the same was submitted before the Kattakkada police.

63. PW6 is having acquaintance with Varghese as well as the 1st accused and she had occasion to see Varghese going with Vijayan on a bike on 22.6.2004. PW7 is another witness who was employed as the DTO in the KSRTC and he also would say that he had occasion to see Varghese going with the 1st accused on 22.6.2004 at 9.30 am on a bike. He had given Ext.P7 statement under Section 164 of the Cr.P.C before the Judicial Magistrate of First Class-II, Nedumangad. PW8 is a neighbour to the house of the mother of the 1st accused. According to the said witness, on 21.6.2004, at 7.00 a.m she had occasion to see Varghese along with the 1st accused and his mother. The 1st accused was insisting that a document be executed in his name and Varghese was asked not to test his patience. She also stated that the 1st accused threatened Varghese with dire consequences if the document as demanded was not executed. When Varghese told the 1st accused that he will not execute any document, the 1st accused got enraged and he hit the deceased on his back. She also stated that she had given a statement under Section 164 of the Cr.P.C before the learned Magistrate. The evidence of PW 8 appears to be of no significance on facts as it is opposed to what has been spoken to by PW 2 and PW 3 . Moreover it has come out in evidence , that later in the day Ext.P2 document was registered in the name of the 1st accused . It is obvious that PW 9 was adding embroidery to the prosecution version.

64. PW9 Elsamma Thomas is the sister of Varghese. Varghese used to reside near to her house. She is having acquaintance with accused Nos.1 and 2 . As her husband was working in Kuwait, PW2 used to come and stay in her house at night. She would say that on 22.6.2004 Varghese had come to her house and she overheard him talking to PW2. She also had seen accused Nos.1 and 2 who were standing outside her house. Later in the day, while she was taking her daughter, to the school she had occasion to see Varghese going with the 1st accused on a

bike. It was the last time that she had seen her brother. She also spoke about the 2nd accused coming to her house late in the night on 22.6.2004 and talking to PW2.

65. The evidence of these witnesses are relied on by the prosecution to establish the fact that the deceased was last seen in the company of the accused.

66. The Last Seen Theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so proximate with each other that the possibility of any person other than the accused being the author of the crime becomes impossible.

67. While appreciating this circumstance, we may also have to refer to the evidence of PW 27 , the Assistant Commissioner of Police , City Police Control room ,Thiruvananthapuram. PW27 in his evidence stated that the accused was his official driver of police jeep bearing registration No.KL-01- M-4187. As requested by the investigating Officer he had handed over the weekly diary for the period 14.6.2004 to 4.7.2004. He identified the copy of the weekly diary as Ext.P24 . As per Ext.P24, the duty of PW 27 commenced at 8.00 a.m on 22.6.2004 and concluded at 10.30 p.m on the same day. Ext.P24 contains the journey and duty details of PW 27. The witnesses further stated that on 17.6.2005 he had submitted Ext.P25 report before the Commissioner of police, Thiruvananthapuram city. The said report was submitted to correct the time details in Ext.P24. As per Ext.P25, duty on the said day had commenced only at 10.30 a.m and concluded at 8.00 p.m. He would also depose that he had remitted back a sum of Rs.50/- towards T.A which was wrongly claimed. According to PW 27, the same mistake has crept into his vehicle diary as well. He also stated that Ext.P17 vehicle diary was handed over to the investigating Officer. Further down in his evidence he would state that after 22.6.2004, the 1st accused had attended to his duty as driver of his vehicle on 24.6.2004 as well. This would make it amply clear that the 1st appellant was working as the driver of PW 27 on 22.6.2004 as well . Ext.P17 is the extract of the Kerala Police Vehicle diary in respect of the vehicle bearing registration No.KL 01 M 4187. The said diary would also reveal that his duty had commenced at 8.30 a.m and had concluded only at 10.30 p.m.

68. Banking on the evidence of PW 27 and also Ext.P24 and P17, the learned Senior counsel would argue that this is yet another instance wherein a conscious attempt was made by PW54 to manipulate false evidence after he had taken up investigation. He pointed out that Ext.P25 report was submitted almost an year after Ext.P24. Ext.P24 was being prepared contemporaneously and the same was being submitted before the higher authorities. The said record would reveal that it passes through various higher authorities and the same is maintained regularly in the ordinary course of business. On what basis , the entries in Ext.P24 was found to be incorrect is not stated by PW27. One is unable to discern as to what made PW 27 to suddenly realise that an entry made about an year ago was wrong. It is also relevant to note that the said entry remains as such in the official records . If reliance is placed on Ext.P24 and if it is found that the 1st accused had attended duty at 8.30 a.m on 22.6.2004 at the office of the Commissioner , Thiruvananthapuram, the evidence of prosecution witnesses that the accused was seen in the company of the deceased at 9.30 a.m and later at Kattakkada would be seriously discredited. That can be the only reason why Ext.P25 report was given after a period of one year and to lend credibility to the same, a sum of Rs.50/- was drawn as per Ext.P22 chellan dated 17.6.2005 and the said amount was remitted back. The court below did not give much emphasis to either Ext.P17(a) and P17(b) because of the fact that the incident had taken place late in the night according to the prosecution.

69. But it cannot lost sight of the fact that the aforesaid evidence let in by PW27 will cast serious doubts on the evidence tendered by PW2 to 9 as regards the Last Seen Theory propounded by the prosecution.

70. There cannot be any doubt that it is the duty of the prosecution to establish that the accused was last seen together with the deceased prior to the approximate time of death. In the instant case, the evidence of PW48, the doctor who conducted the postmortem examination, would reveal that the death could have occurred between 48 to 78 hours prior to the postmortem examination which was conducted on 25.6.2004. If the said finding is placed reliance upon, the death might have occurred between 1.15 p.m on 22.6.2004 and 1.15 p.m on 23.6.2004. According to the prosecution charge, the deceased was strangled at midnight

on 22.6.2004 and he was later thrown into the river. It can be seen from the charge sheet that several witnesses were cited by the investigating agency who are neighbors of the 1st accused at Karipoor. None of these witnesses were examined. The Last seen together theory , being based on the proximity between last seen together and the death of Varghese , cannot be said to have been established in this case . In view of the doubt created by the evidence of PW27, we are unable to hold that the prosecution has successfully established that the deceased was last seen together with the accused early in the morning on 22.6.2004.

71. The next and most important circumstance is the scientific evidence relied on by the prosecution to prove the presence of the deceased in the house of the 1st accused at Karippoor before his death. The services of PW 47 , the Joint Director of Forensic Science Laboratory, was availed by PW 53 and they had inspected the house of the accused and had collected materials from the place of occurrence .Ext.P 43 is the report prepared by PW 47 and the items seized were sealed and the same were handed over to PW 53. PW 53 has deposed that he had collected MO 8 fibres from the cross bar of the well and also MO 9 blood stained soil from the bathroom of the house. This was on 8.7.2004. Ext.P 48 is the report of analysis which reveals that the fibers collected as item 4, 5 (a) and 5 (b) were similar to those contained in MO 1 Dhoti. The learned Public Prosecutor would point out that PW 47 was not even cross examined by the accused .

72. We note that the case of fibre being present on the cross bar of the well was on the basis of the theory propounded by PW 53 , which view is not subscribed by PW 54 . The court charge would also reveal that there is no mention of the deceased being hanged on the cross bar of the well in the house of the 1st accused at Karippoor . If that be the case, we fail to understand how the said circumstance would incriminate the accused. The report does not say that the fibres were identical but it says only that the fibres were similar. The presence of blood in the bathroom on 8.7.2014 also will not advance the case of the prosecution as there is no clinching evidence of serological examination. The prosecution has no case that blood grouping was conducted or that the blood of the deceased was present inside the bathroom after more than 15 days of the

incident. The 3rd accused is a lady and it is the case of the prosecution that she is residing there. There are therefore, umpteen reasons for the detection of human blood in the bathroom of a house where a woman resides. These facts according to us will create serious doubt in the case of the prosecution.

73. The learned Sessions Judge had concluded that the absence of explanation by the accused as regards the presence of fibre on the cross bar of the well and also the presence of blood stains in the bathroom are major circumstances and that the accused were bound to explain the same. Failure to furnish a proper explanation as regards its presence was taken as an additional link in the chain of circumstances. In view of the peculiar facts of the instant case , no such inference could have been taken . We have already referred to the inconsistency in the prosecution case as regards the detection of fibre and also the presence of blood.

74. The next incriminating circumstance is the evidence brought in by examining PW 14 who had allegedly seen accused Nos. 1 and 2 standing near to the Koovakkudy bridge in the early hours of 23.6.2004 with the Jeep of the deceased . The said witness stated that he was having acquaintance with the deceased as well as the accused. He would depose that he had gone to Vaikom on 22.6.2004 to have discussions with PW 10 in connection with a serial to be telecast in Television. After concluding the discussion with PW 10, he along with his friend Vincent Louis returned back in a motor bike. When they reached near the Koovakkudy bridge, they had chanced upon accused Nos. 1 and 2 standing near to the Jeep of the deceased. They stopped the bike and inquired whether they needed help. They were told that the tire got punctured and did not require their help. He also stated that he came to know about the disappearance of Varghese on 24.06.2004, that too , after he had gone with the 1st accused. Later he came to know about the surfacing of the dead body. On 27th he had gone to attend the funeral ceremonies of Varghese and on that day he divulged to PW 2 about the chance meeting with the accused on 23.6.2004 , early in the morning.

75. PW 14 is seen questioned by PW 54 on 2.8.2004. PW 54 in his evidence had deposed that he came to know about PW14 from PW2. PW2 stated in his evidence that on 27.6.2004 , when the funeral ceremonies of his father was being

held , he was informed by PW 14 about the chance meeting he had with accused No 1 and 2 near the Koovakkudy Bridge . In this context it is to be noted that PW 52 and PW 53 had occasion to question PW 2 and 3 on numerous occasions and the said officers have stated that PW 2, in his statement had not mentioned about the disclosure made to him by PW 14.

76. At this juncture, it will be apposite to refer to a very pertinent aspect which is pointed by the learned Senior Counsel. As reiterated by us before, the main thread of argument by the learned Senior Counsel, is that PW 54 has not placed the actual facts before court. Instead of placing the true facts before court a conscious effort has been made to suppress the facts which had come out in investigation. It is for the attainment of this purpose that the 161 statements of all the witnesses questioned by the earlier investigating officers has been suppressed is the contention. The introduction of PW 14 at a late stage of investigation is a pointer to this aspect, according to the learned Senior Counsel.

77. It has been brought out in evidence that after taking over the investigation by PW 54 on 13.7.2004 , he had questioned all the witnesses who were earlier questioned by PW 52 and PW 53 . PW 54 has admitted in cross examination that the 161 statements of PWs 2, 3, 47, 48 and 49 were handed over along with the Case Diary File when the investigation was handed over. He had admitted that he had occasion to question PW 2 and 3 on numerous occasions and those witnesses did not mention to PW 52 or PW 53 about the conversation that they had with PW 14 on 27.6.2004 , on which day the funeral ceremonies of Varghese was held . He also had deposed that he questioned PW 14 for the first time on 2.8.2004. He also stated in unmistakable terms that the 161 statements of the witnesses recorded by PW 52 and PW 53 were not handed over to the accused nor was the same produced before court. The learned Senior Counsel would submit that prejudice of an irreparable variety has been caused to the accused as a result. Pointing to the suppression of materials by PW 54 , it was argued that if those materials were produced before court , the evidence could have been appreciated in an impartial manner and the manner in which the case was modulated after investigation was taken over by PW 54 could have been brought to light. In a case of instant nature , when the deductions entered by different

investigating officer point to alternate possibilities, at least the statements of witnesses whom the prosecution proposed to rely on should have been furnished. This is more so when there is no case for the prosecution that there are any lapses or impropriety in the investigation conducted by the officers who earlier conducted the investigation .

78. The learned Counsel relied on the Judgment in Murali vs. State of Kerala : 2003(3) KLT 226, wherein a Division Bench of this Court held thus :

[14]. As held by this Court in the decision (cited supra) reported in (1974 Cr.L.J.1373), the prosecution is bound to produce the entire statements obtained from the witnesses under Section 161 Cr.P.C. whether the statement is in favour of the accused or in favour of the prosecution because the role of the police is to bring the real truth before the Court. Necessarily, as held in that decision, non-furnishing of some of the statements or some part of the statements of the same witnesses will vitiate the trial and the accused will be denied of a fair trial. Denial of fair trial would necessarily prejudice the accused to have a proper defence."

79. As in the instant case , in Murali (supra) , more than one statement was recorded from a particular witness. The investigating officer also admitted in his evidence that more than one statement was given by that particular witness. One of such statements gives a different story than the case put forward by the prosecution. Totally conflicting versions were given by the witness at two different stages of the Investigation. The main contention in that case was that the statement given by the witness, which gave a different version, was concealed from the gaze of the court and also the accused. The Division Bench, on facts, held that the trial was vitiated as a fair trial was denied to the accused.

80. However, in Sukumaran and others vs. State of Kerala (ILR 2005 (1) KLJ 743), another Division Bench went on to hold that the judgment in Murali (supra) may not be reflective of the true statement of the law. It was held thus :-

What emerges from the above decisions is that non supply of statements recorded under S.161(3) Cr.P.C. by itself cannot amount to prejudice, nor will it vitiate the trial. Prejudice is a mental decision based on grounds other than reason or justice

or a premature or adversely biased opinion or a detriment or injury or harm arising from a hasty or unfair judgment or a judgment favourable or unfavourable formed beforehand or without due examination. The question of prejudice is ultimately one of inference from the facts and circumstances of each case (*Moseb Kaka Chowdhari v. State of West Bengal* (AIR 1956 SC 536)). It is not enough merely to allege that the accused has suffered prejudice.

81. In *Orsu Venkata Rao v. State of Andhra Pradesh* (AIR 2004 SC 4961), it was held that where the earlier statements of the witnesses are suppressed by the prosecution, it is a serious infirmity in the prosecution case.

82. As held in *Moseb Kaka Chowdhari v. State of West Bengal* (AIR 1956 SC 536) the question of prejudice is ultimately one of inference from the facts and circumstances of each case. It cannot therefore, be enough merely to allege that the accused has suffered prejudice.

83. Section 172 (1A) of the Cr.P.C provides for inserting the statements of witnesses recorded during the course of investigation under Section 161 in the case diary. Section 172 (2) of the Code provides that any criminal code may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Section 173 (5) (b) of the Code mandates the police officer who files the report on conclusion of investigation to forward the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. Section 173(6) provides that if the police officer is of the opinion that any part of such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request. Section 173(7) also provides that where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub section (5).

84. The learned Public Prosecutor is justified in contending that the omission in supplying the 161 statement recorded by the earlier investigating Officers will not necessarily vitiate the trial. As was held by this Court in Sukumaran (supra) it is not enough to allege that the accused has suffered prejudice.

85. Here what is contended by the appellant is that in the peculiar facts of the instant case, much credence may not be given to the evidence of PW 14. PW53 in his evidence has unequivocally stated that he had questioned PWs 2 and 3 on numerous occasions even after the funeral of Varghese and at no point of time had they mentioned that PW 14 had stated to them that he had witnessed accused No.1 and 2 standing near the Koovakkudy bridge at 3. a.m. on 23.6.2004, . PW 14 comes into the picture only after the investigation was taken over by PW 54 and it is admitted by PW 54 that his statement was recorded only on 2.8.2004. When the prosecution has no case that the earlier investigating officer had conducted the investigation unfairly, and when most of the contemporaneous records prepared by the earlier officer are relied on by the prosecution to sustain the charge, the suppression of the earlier statements, has created a doubt in our mind as regards the authenticity of the evidence tendered by PW 14. On facts , we are of the view that the evidence of PW 14 does not appear to be credible enough to place implicit reliance on his testimony.

86. The next circumstance relied on by the prosecution is the subsequent conduct by the appellants. PW2 and PW3 had stated that the accused had come to their residence after Varghese went missing and gave false information about his whereabouts. We have already referred to the evidence let in by PW2 and PW3. Their evidence stands corroborated to a great extent by the evidence of PW9 as well. Even in Ext.P3 complaint filed by PW2 before the police, the fact that the accused No.1 and 2 had approached him and his mother and had given information about Varghese is mentioned. The evidence of the said witnesses also reveals that on numerous occasions after Varghese had gone missing, the accused had approached the family members. After re-appreciation of the evidence , as we have genuine doubt about the complicity of the accused in the crime, we are unable to give much emphasis to this aspect. It appears that the attitude of PW 2 and 3 towards the 1st accused underwent a drastic change after it

was concluded that the accused 1 and 2 had a role to play in the death of Varghese. After having given our earnest consideration we are not able to say that these vague circumstances will amount to legal proof of the guilt particularly when the crucial circumstances as regards the cause of death and last seen theory could not be established by the prosecution.

87. Yet another circumstance relied on by the learned Sessions Judge is the non explanation by the accused of the possibility of the presence of the deceased at the house of the 1st accused at Karippoor and the finding of the body in the river near to the Koovappady bridge. The possibility of the presence of the deceased at Karippoor is based on the presence of fibre and blood, which has already been dealt with by us. The aforesaid circumstances are rendered weak by the conflicting case set up by the prosecution and the same cannot be taken as the basis of conviction. When the main link goes, the chain gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubts.

88. The Apex Court has reminded that the court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of may be true . But there is a long mental distance between may be true and must be true and the same divides conjectures from sure conclusions. (see Jaharlal Das v. State of Orissa (1991 SCC (Cri) 527).

89. As pointed out by the Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984 (4) SCC 116), the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence and that it is not the law where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

90. The Apex Court in Ashish Batham v. State of Madhya Pradesh (2003 (7) SCC 317) has observed :

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