

C.Nimith vs State of Kerala

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Court : Kerala

Decided On : Apr-09-2021

Judge : Honourable Mr.Justice K.Vinod Chandran,Honourable Mrs. Justice M.R.Anitha

Appeal No. : CRL.A/1019/2014

Appellant : C.Nimith

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MRS.JUSTICE M.R.ANITHA FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943 CRL.A.No.1232 OF 2014(D) AGAINST THE JUDGMENT IN S.C.NO.97/2014 DATED 02.09.2014 OF THE COURT OF ADDITIONAL DISTRICT AND SESSIONS JUDGE-III, KASARAGOD. [CP NO.130/2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I, HOSDURG] [CRIME NO.594/2013 OF CHANDERA POLICE STATION, KASARAGOD] APPELLANT/ ACCUSED NO.7: JASEER M.K., AGED 22 YEARS, S/O.KUNHU MARAIKAR, CHOORIYATH HOUSE, MANTHALAM P.O., ALAMKODU

VILLAGE, MALAPPURAM DISTRICT. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SRI.P.M.RAFIQ SRI.V.C.SARATH SRI.M.REVIKRISHNAN SRI.AJEESH K.SASI SRI.VIPIN NARAYAN SMT.POOJA PANKAJ SRUTHY N. BHAT SRI.THOMAS J.ANAKKALLUNKAL

RESPONDENT/ COMPLAINANT & STATE: STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-31. BY SPECIAL GOVT.PLEADER (CRIMINAL) SRI.NICHOLAS JOSEPH. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-04-2021, ALONG WITH CRL.A.1019/2014, CRL.A.1025/2014, CRL.A.40/2015(D) & CRL.A.960/2020, THE COURT ON 09-04-2021 DELIVERED THE FOLLOWING: CrI.A.Nos.1232/2014 & - 2 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MRS.JUSTICE M.R.ANITHA FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943 CRL.A.No.1019 OF 2014 AGAINST THE JUDGMENT IN S.C.NO.97/2014 DATED 02.09.2014 OF THE COURT OF ADDITIONAL DISTRICT AND SESSIONS JUDGE-III, KASARAGOD. [CP NO.130/2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I, HOSDURG] [CRIME NO.594/2013 OF CHANDERA POLICE STATION, KASARAGOD] APPELLANT/ ACCUSED NO.5: C.NIMITH, AGED 24 YEARS, S/O.K.CHANDRAN, PULIYAMKOTTU HOUSE, EDACHOVVA P.O, CHOVVA, KANNUR DISTRICT.

BY ADVS. SRI.P.VIJAYA BHANU (SR.) SMT.M.M.DEEPA SRI.VIPIN NARAYAN RESPONDENT/ COMPLAINANT: STATE OF KERALA, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY SPECIAL GOVT.PLEADER (CRIMINAL) SRI.NICHOLAS JOSEPH. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-04-2021, ALONG WITH CRL.A.1025/2014, CRL.A.1232/2014(D), CRL.A.40/2015(D) & CRL.A.960/2020, THE

COURT ON 09-04-2021 DELIVERED THE FOLLOWING:
Crl.A.Nos.1232/2014 & - 3 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MRS.JUSTICE M.R.ANITHA FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943 CRL.A.No.1025 OF 2014 AGAINST THE JUDGMENT IN S.C.NO.97/2014 DATED 02.09.2014 OF THE COURT OF ADDITIONAL DISTRICT AND SESSIONS JUDGE-III, KASARAGOD. [CP NO.130/2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I, HOSDURG] [CRIME NO.594/2013 OF CHANDERA POLICE STATION, KASARAGOD]

APPELLANTS/ ACCUSED NOS.2&4: 1 ASHKAR P.M., AGED 31 YEARS, S/O. O.K. MUHAMMED, ORAVIL HOUSE, CHIRANALLUR, VIA KECHERI, THRISSUR DISTRICT. 2 SHIHAB O.M., AGED 33 YEARS, S/O.O.K. MUHAMMED, ORAVIL HOUSE, CHIRANALLUR, VIA CECHERI, THRISSUR DISTRICT. BY ADVS. SRI.B.RAMAN PILLAI (SR.) SRI.R.ANIL SRI.T.ANIL KUMAR SRI.MANU TOM SRI.M.SUNILKUMAR SRI.SUJESH MENON V.B. SRI.THOMAS ABRAHAM (NILACKAPPILLIL) SRI.M.VIVEK

RESPONDENT/ COMPLAINANT: STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM 682 031 BY SPECIAL GOVT.PLEADER (CRIMINAL) SRI.NICHOLAS JOSEPH. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-04-2021, ALONG WITH CRL.A.1019/2014, CRL.A.1232/2014(D), CRL.A.40/2015(D) & CRL.A.960/2020, THE COURT ON 09-04-2021 DELIVERED THE FOLLOWING: Crl.A.Nos.1232/2014 & - 4 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MRS.JUSTICE M.R.ANITHA FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943 CRL.A.No.40 OF 2015-D AGAINST THE JUDGMENT IN S.C.NO.97/2014 DATED 02.09.2014 OF THE COURT OF ADDITIONAL DISTRICT AND SESSIONS JUDGE-III, KASARAGOD. [CP NO.130/2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I, HOSDURG] [CRIME NO.594/2013 OF CHANDERA POLICE STATION, KASARAGOD]

APPELLANTS/ ACCUSED 1 & 3: 1 MUHAMMED NOUSHAD C.K @ NOUSHAD, S/O KUNHABDULLA, BAITHUL FARSANA, ANACHAL, NILESWAR. 2 MUHAMMED RAMEES E.K @ RAMEES, S/O.ABDUL RASHEED, IDAKKAVIL HOUSE,KOTTAPPURAM, NILESWAR BY ADVS. SRI.S.SANAL KUMAR SMT.BHAVANA VELAYUDHAN SMT.T.J.SEEMA RESPONDENT/ COMPLAINANT: 1 STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KEERALA, ERNAKULAM 31 * ADDL.R2 THE SUPERINTENDENT, GENERAL HOSPITAL, KANNUR.

* ADDITIONAL 2ND RESPONDENT IS SUO MOTU IMPEADED AS PER ORDER DATED 02.02.2021 IN CRL.M.A.NO.1/2021 IN CRL.A.NO.40/2015. R1-R2 BY SPL.GOV.T.PLEADER (CRIMINAL) SRI.NICHOLAS JOSEPH. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-04-2021, ALONG WITH CRL.A.1019/2014, CRL.A.1025/2014, CRL.A.1232/2014(D) & CRL.A.960/2020, THE COURT ON 09-04-2021 DELIVERED THE FOLLOWING: Crl.A.Nos.1232/2014 & - 5 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MRS.JUSTICE M.R.ANITHA FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943 CRL.A.No.960 OF 2020 AGAINST THE JUDGMENT IN S.C.NO.97/2014 DATED 02.09.2014 OF THE COURT OF ADDITIONAL DISTRICT AND SESSIONS JUDGE-III,

KASARAGOD. [CP NO.130/2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I, HOSDURG] [CRIME NO.594/2013 OF CHANDERA POLICE STATION, KASARAGOD] APPELLANT/ ACCUSED NO.6: AMEER.K.P., AGED 24 YEARS, S/O. ABOOBACKER, AMAIL HOUSE, CHANGARAM KULAM, MALAPPURAM DISTRICT. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SRI.P.M.RAFIQ SRI.M.REVIKRISHNAN SRI.VIPIN NARAYAN SRI.V.C.SARATH SRI.AJEESH K.SASI SMT.POOJA PANKAJ SRUTHY N. BHAT SHRI.ABEL TOM BENNY RESPONDENT/ COMPLAINANT: STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682031. BY SPECIAL GOVT.PLEADER (CRIMINAL) SRI.NICHOLAS JOSEPH. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-04-2021, ALONG WITH CRL.A.1019/2014, CRL.A.1025/2014, CRL.A.1232/2014(D) & CRL.A.40/2015(D), THE COURT ON 09-04-2021 DELIVERED THE FOLLOWING: Crl.A.Nos.1232/2014 & - 6 - K. VINOD CHANDRAN & M.R. ANITHA, JJ. ----- Crl.Appeal Nos.1232/2014, 1019/2014, ----- Dated this the 09th day of April, 2021

JUDGMENT

K. Vinod Chandran, J.

The best laid schemes of Mice and Men oft go awry, an' lea'e us nought but grief an' pain, For promis'd joy ! [Robert Burns] A seemingly well planned loot motivated by avarice turned sour with death, nay murder of the

house owner. Technology led to the arrest of the accused; both the perpetrators and the conspirators, who are left counting the bars. 'Foresight in vain' argues the prosecution relying on the direct evidence as also the circumstantial to plug the guilt on the accused, seven in number. The eighth accused was acquitted by the trial Court.

2. The charges are under Sections 120B

[criminal conspiracy], 143 [unlawful assembly], 402 [assembly for committing dacoity], 449 [house-trespass for commission of offence punishable with death] 342 [wrongful confinement], 324 [voluntarily causing hurt with dangerous weapons], 396 [dacoity with murder], 302 [murder] and 201 [disappearance of evidence] read CrI.A.Nos.1232/2014 & - 7 - with Section 149 of the IPC. A1 and A3 were convicted under Section 120B and Section 302 and the other accused for the offences herein above mentioned except Section 302. The prosecution examined 140 witnesses, marked 266 exhibits and produced 50 material objects.

The defence marked D1 to D4 cont

conviction and sentence are challenged in the appeals. For and Against Acquittal:

3. Sri.B.Raman Pillai, learned Senior Counsel assisted by Adv.Sri.Sujesh Menon V.B., appearing for A2 and A4, pointed out various contradictions from the FIS, S.161 statements and depositions of PWs.1 to

3. The test identification parade [for brevity, 'TIP']

was seriously assailed pointing out that the Magistrate [PW-98], who carried out the same, has not deposed to the identification proper. The accused were taken to various places for investigation before the TIP. The conspiracy is not proved and the mere presence of A2 & A4, as spoken of by PW-104, at Kasaragod does not implicate them in the crime. The mobile phones of A2 & A4 were stationary and in Trichur, where they ordinarily reside. The FIS does not speak of PW-1 being able to identify the accused and in the context of his statement that the trespassers had their face covered; it is a very remote possibility. PWs.1&2 could not have identified CrI.A.Nos.1232/2014 & - 8 - A2 & A4 and PW-3, a child, is definitely a tutored witness. Many of the overt acts spoken of against the accused have not come out in the FIS, which makes the direct evidence weak for grounds of obvious embellishments. The inconsistencies in direct evidence and improbability of the circumstantial evidence including the recoveries, make this a fit case for acquittal of the accused.

4. Sri.P.Vijayabhanu, learned Senior Counsel assisted by Adv.Ms.Pooja Pankaj, appearing for A5 to A7, took us through the evidence to pick-holes in the

incriminating material against each of the said accused. The recovery as against A3 & 5 to 7 even as per the evidence led by the prosecution falls on its face for reason of it being obvious plants carried out

by the Investigating Officer [IO]. The confessions said to have been made by the accused as marked by the prosecution includes that of involvement in the crime, which causes prejudice to the accused for reason of the bias created in the mind of the Judge trying the case. For that sole reason, the accused are to be acquitted. The TIP is challenged on the ground that the objections raised by each of the accused having

not been considered by the trial Court. The IO's [PW-114] evidence in Court also is to the effect of the accused having been taken to the scene of occurrence prior to the commencement of trial; facilitating easy identification in Court. There is CrI.A.Nos.1232/2014 & - 9 - absolutely no scientific evidence linking the recoveries with the crime and though the blood sample taken from A6 is said to have matched the DNA detected from the piece of gloves recovered from the scene of occurrence, there is no evidence for the sampling.

5. Sri.S.Sanal Kumar, learned Counsel appearing for A1 and A3 argued that even according to the prosecution they were not present at the crime scene. If the crime itself stands disproved, the

prosecution cannot press the charge of conspiracy against A1 & A3. The conspiracy said to have been hatched by A1 & A3 on 05.07.2013 and 01.08.2013 is not proved for reason of there being no evidence, of the presence of the alleged perpetrators of the crime on the said days. The so called evidence with respect to the call details are to be ignored for reason of there being absolutely no proof regarding the use of such

mobiles by the so called conspirators. Neither the crime nor the conspiracy stands proved.

6. Sri.Nicholas Joseph, learned Prosecutor,

assisted by Advocate Sri.Muhammed Shaheel B., argued for the State. The inconsistencies pointed out are not material and it is trite that the FIS is not an encyclopedia of events. The details as spoken of by PW-1 cannot be treated as embellishments especially considering the fact that the FIS was given at a time soon after the trespass and murder of his father, which he witnessed. He was also subjected to violence CrI.A.Nos.1232/2014 & - 10 -

and intimidation, which would have

Magistrate being examined. The TIP, as is trite, is only in aid of investigation and cannot in manner be considered as substantive evidence. It can however be used for purposes of corroboration, for which the report alone is required to be placed in evidence.

7. It is pointed out that PW-1 had spoken of

the perpetrators of the crime having

inference drawn since they would have been emboldened by the detection and removal of the hard disk, to which is fed the visuals by the CCTV cameras affixed

in the various parts of the house

service providers. Each of the recoveries are sought to be substantiated from the evidence led by the prosecution. The case is one in which both direct and circumstantial evidence, pose no difficulty in arriving at the conclusion of the guilt of the accused. The conspirators behind the scenes are A1 & A3, which also is proved by the purchase of mobile

phones, in which the SIM card

sentence are to be upheld. LEGAL EFFECT OF REPORT OF TIP:

8. Sri.Raman Pillai with reference to Sections

3, 6(4), 20, 54A, 133, 174 & 176 of Cr.P.C challenged the contention of the Prosecutor regarding S.291A. It is pointed out that S.291A speaks of an 'Executive Magistrate' and here the identification is carried out by a 'Judicial Magistrate'. We

have to first deal with the above contention.

9. S.3 of the Cr.P.C specifies the

construction of references to various Magistrates as spoken of in the Code. It speaks of reference to a Magistrate without any qualifying words, in relation to a metropolitan area to be a Metropolitan Magistrate and outside that area to be a reference to a Judicial Magistrate. S.3(4) demarcates the functions under the Cr.P.C. exercisable by the Judicial Magistrate and an Executive Magistrate; which essentially are by virtue

of the nature of such functions, ie: judicial or executive. S.6 enumerates the Courts constituted under the Code, in which Judicial Magistrates and Executive Magistrates are referred to separately. The powers of

an Executive Magistrate also extend to the judicial where such power is conferred under the Code. We notice that identification of a person arrested on a charge, by any other person or persons; if necessary for the purpose of investigation is to be on the direction of the Court. It has to be carried out in CrI.A.Nos.1232/2014 & - 12 -

such manner the Court deems fit as per Section 54A introduced for the first time in 2005. The 1 st proviso to S.54A, introduced in 2013, insists on such process

of identification to be carried out under the supervision of a Judicial Magistrate if the person arrested is mentally or physically disabled. Hence, even the Code places the Judicial Magistrate on a higher plane. However while introducing S.291A in the year 2005, the Union Parliament used the words 'Executive Magistrate' as distinguished from 'Judicial Magistrate', which gives rise to the preliminary objection.

10. We find it necessary to examine the history of TIP, judicially recognised to be a part of

the investigation. The TIP, which establish the identity of the accused, is relevant under Section 9 of the Evidence Act. The procedure, however, is not statutorily

prescribed and many States have Manual Of

Instructions regulating the procedure;

Pradeepan v. State of Kerala] held that though TIP is part of investigation, it should be held by a Judicial Magistrate or other independent agency and not by the Police. The need to conduct TIP as soon as possible after the arrest and in conditions conducive to fair CrI.A.Nos.1232/2014 & - 13 - elucidation of truth were emphasized. It was noticed that though there are no statutory rules prescribed, useful guidelines were available in the Manual of Instructions for the Guidance of Magistrates in the Madras State issued by the High Court of Judicature at Madras; which was re-printed in Kerala with the permission of the High Court of Madras. The Kerala

Government had also issued instructions to the Magistrates and Jail authorities regarding the conduct of TIP as per G.O (MS).791/Home(A) dated 25.06.1958. The Police or the investigating agency is kept at an arms distance, in a TIP. Acharaparambath Pradeepan v. State of Kerala [(2006) 13 SCC 643] partly overruled 2005 (3) KLT 1075, but the above propositions survive.

11. The TIP in aid of the investigation is not borne out of procedure and is a rule of prudence. As

to who should conduct the TIP and

[Asharfi & Another v. State]. The theory and practice of identification was examined threadbare, to ascertain principles which could help make the appropriate law and procedure more uniform and thereby serve as a definite guide to the Bar and the Subordinate Courts in the State. Identification proceedings were held to be as much in the interest of the prosecution as in the interest of the accused. Ram CrI.A.Nos.1232/2014 & - 14 - Kishan Mittanlal v. State of Bombay [AIR 1955 SC 104] was relied on to find that identification parades are of two categories, one to identify the persons involved in the offence and the other, of properties which are its subject matter. Of all the evidence of fact, evidence of identification of a stranger was found to be the most elusive, which the Courts have to approach with considerable caution. We are not at this stage concerned

with the procedure since there is a wealth of decisions and the Manual of Instructions, noticed in Acharaparambath Pradeepan [2005 (3) KLT 1075], to regulate the issue. On the question as to who can hold a test identification, relying on Ram Kishan Mittanlal, it was declared to be possible even by panch witnesses witnesses who are ordinary citizens when all other conditions are satisfied. The Division Bench of the Allahabad High Court, however, observed that for obvious reasons it is scarcely desirable for private persons to have a hand in the investigation and noticed that in Uttar Pradesh the practice is for the TIP to be conducted by Magistrates.

12. Their Lordships then considered the legal effect of the identification memo or the report of the Magistrate, 'Judicial' on the one hand and 'Executive' on the other; in the following manner:

19. There remains to consider the legal status of an identification memo prepared on the one hand by a Magistrate of the first class or a Magistrate of the second class specially empowered, and on the Crl.A.Nos.1232/2014 & - 15 -

other by the remaining kinds of Magistrates. In the case of the former the memo, as already shown, is the record of a statement taken under the provisions of Section 164 Cr. P. C. It is therefore evidence given "before any officer authorised by law to take such evidence". In consequence Section 80 of the Evidence Act applies, where under the Court must presume the genuineness of the memo. And not only this, under the same section there is also a legal presumption as to the circumstances under which, the memo was prepared, so that it becomes evidence not only of the fact that the witness identified the suspect but also of the various steps or precautions taken by the Magistrate to ensure a fair and just identification proceeding. On the practical plane the result is that where a test identification has been held by a first class or a specially empowered second class Magistrate, it is not necessary to call him in evidence; his memo under the terms of Section 80 is evidence of everything that it contains. Incidentally, the common practice in U. P. is to summon these Magistrates at the trial for proving the contents of their

memos. This practice is a totally unnecessary one and causes needless waste of public time and money. They should be called only if it is desired to obtain clarification of doubtful matters in the memo or matters omitted therefrom. Even if a question is raised as to the identity of the witness who appeared at the identification, it is unnecessary to call the Magistrate; the doubt can be resolved by summoning the police or jail official who produced him as was held in *Sadulla v. Emperor*, 39 Cr LJ 864 : (AIR 1938 Lah 477).

20. As to the remaining kinds of Magistrates,

their memo is not under Section 164 Cr. P. C., hence Section 80 of the Evidence Act is not attracted to them, so that their deposition in Court is necessary. The same applies to ordinary citizens.

21. To sum up. Any person can conduct a test

identification, but Magistrates are preferred. His identification memo is a record of the statement which the identified expressly or impliedly made before him. The statement is a former statement of the identifier and in Court is usable not only for CrI.A.Nos.1232/2014 & - 16 -

contradicting him under Section 145 or 155 of the Evidence Act but for corroborating him under Section 155, except that if it was made before the police it would be hit by Section 162 Cr. P. C. and would therefore not be admissible for purposes of corroboration. If the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, Section 164 Cr.P.C. applies and his identification memo is admissible in evidence under Section 80 of the Evidence Act without proof. But if other Magistrates, or private persons, hold it they must be called in evidence to prove their memo. Where Section 164 Cr. P. C. operates the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned. [Underlining by us for emphasis]

13. While incorporating Section 291A in the

Code, the words 'Executive Magistrate' would have been employed keeping in mind the precedents which assign a corroborative value to TIP carried out by a Judicial Magistrate. The TIP conducted by a Judicial Magistrate makes applicable, Section 164 of the Cr.P.C and the 'identification memo is admissible under Section 80 of the Evidence Act without proof for what it is worth' (sic-para 8 of Mohanan Nair v. State of Kerala [1989

Cri.LJ.2106]. We bow to the above proposition as declared by a Division Bench of this Court.

14. Viewed in the above context, the amendments made and the intention it sub-serves, is to give a TIP held by an 'Executive Magistrate' the same

sanctity given to a TIP held by a

Sections 80 of the Evidence Act. Now by introduction of Section 291A, the same effect is given to TIP carried out by 'Executive Magistrates'. We hence reject the contention raised by the Senior Counsel and find the report of the TIP made in the case to be acceptable in evidence even without proof. If the report of a TIP carried out by an 'Executive Magistrate' can be used as evidence, definitely that

of a 'Judicial Magistrate' can also

under the Code. It is the evidentiary value conferred by the Evidence Act, on a TIP carried out by a Judicial Magistrate that is sought to be extended statutorily, to a TIP by an 'Executive Magistrate', in Section 291A.

15. Sri.B.Raman Pillai referred to Ram Sanehi

v. State [AIR 1963 Allahabad 308]. Their Lordships in the said decision took a different view from Asharfi. It was held that Asharfi did not consider the position of a presumption under Section 80, arising, only if the memorandum of identification amounted to 'evidence', within the meaning of section 3 of the Evidence Act. It was held that Asharfi did not lay down the correct law, since no reasons are given by the learned Judges for the opinion expressed. This view was also approved by a learned Single Judge in Pritam Singh v. State [AIR 1971 Rajasthan 184]. With

Crl.A.Nos.1232/2014 & - 18 - due respect, we do not agree with the reasons having not been given in Asharfi and that apart the later Bench of the Allahabad High Court was also a Division Bench. It is trite that a co-ordinate Bench cannot differ from an earlier decision as has been held in a number of decisions of the Hon'ble Supreme Court, recently by a Constitution Bench in National Insurance Co. Ltd. v. Pranay Sethi [2017 (4) KLT 662 (SC)]. We cannot but observe that the decisions of the other High Courts have only a persuasive effect on us, whereas the decisions of this Court are binding on us. Mohanan Nair we referred to above, was a Division Bench which accepted the law laid down in Asharfi. We respectfully follow the same. PROSECUTION CASE - WELL LAID PLANS GO ASKEW:

16. The prosecution sought to establish that, to obtain finance for the business ventures of A1 & A3 they conspired to loot the deceased, a relative and an

affluent person of the locality. In furtherance of such conspiracy hatched by all the accused, A1 & A3 as a measure of reconnaissance visited the house of the deceased on the pretext of inviting him to the wedding of A1's cousin. A1 & A3, being close relatives of the deceased were welcomed with open hands, when they observed and assimilated the strategic features of the

residence of the deceased. The said accu

actual commission of offence. A2 & A4 to A7, being

total strangers to the inmates, on the night of 04.08.2013, an auspicious day in the Islamic calendar, trespassed into the house of the deceased. Inside the house they unleashed violence on the deceased after binding and smothering him with masking tape. Having incapacitated the man of the house, they turned on his family, the wife and children. They bound the wife and children and threatened and assaulted them demanding money and gold. Having committed theft of ornaments, money and other gadgets from the house and person of one of them, they also removed the hard-disk to which

the CCTV cameras feed the visuals; thus d

locking up the wife and daughter in the bedroom and pushing down the son in the bathroom. The wife and children of the deceased having recovered from the shock, released themselves and sought the help of neighbours and relatives. The deceased was carried to the hospital, where he was declared brought dead. The post-mortem conducted on the body reveals a homicidal death.

17. The accused were arrested on various days starting with A3 and immediately thereafter, A1. What led to their arrest is the investigation carried on of the mobiles used in the area at the relevant time. Having detected constant calls between two SIM CrI.A.Nos.1232/2014 & - 20 - numbers, the I.O. traced them to PW-4, a resident of

Kottayam to the south of Kerala. The scene of occurrence was within Kasaragod District, the northern most district of the State, from where the SIM cards were also issued on the ID of PW-4. PW-4 was picked up and on questioning it came out that he had passed on the copies of his Passport and a photograph to A3, whom he had known in the Gulf countries. The I.O arrested A3 & A1, who were found to have purchased the mobiles, in which the two SIM cards were used; the

instruments having been identified by the IMEI numbers. A1 was also found to have called the mobiles in which the SIM cards obtained by impersonation were used. The arrest of A1 & A3 led to the arrest of others, all of whom made confession statements leading to the recovery of items used for the crime and those thieved from the house subjected to trespass. PWs.1 to

3, the son, wife and daughter of
according to the prosecution, pins the guilt on the accused, unerringly, conclusively and beyond any reasonable doubt. A HOMICIDE ?

18. There is no dispute with respect to the identity of the deceased. PW-47 is the Doctor who conducted the Post Mortem examination of the deceased and marked the report as Ext.P54 before Court. There CrI.A.Nos.1232/2014 & - 21 -

were 15 ante-mortem injuries noticed,

contusions. The 15th injury was recorded as follows:

On layer direction under a blood less field the soft tissues including muscles and thyroid gland were missing on the right side of front of neck (Surgical removal in the past). There was a contusion of the upper part and outer aspect of lower half of left sternomastoid muscle. The spine was fractured between C7 and T1 Vertebrae. The fractured site was gaping exposing the spinal chord. There was infiltration of blood into the prevertebral muscles just below the fracture. Thyroid cartilage and hyoid bone were intact.

19. The opinion as to the cause of death was expressed to be due to blunt violence sustained to the neck. Congestion of face and neck was opined to be, in the particular case, caused by strangulation. The colour of the face having changed and pinpointed haemorrhage in the eyes were suggestive of haemorrhage of neck. Injury No.1 was caused by contact with rough surface and injuries No.2 to 4 by blunt violence

applied to the mouth. Injury No.6 was opined as caused by a pointed object while injuries Nos.5, 8 and 9 could be caused by a sharp edged weapon, possibly by MO-22 knife, shown to that 'witness'. Injuries Nos.10 and 11 could be caused by pasting with tape (MO-4) and injury No.12 is a defence injury. Injury No.13 could be caused by stamping with foot and injury No.14 by reason of fall, possibly on the broken plastic chair

Crl.A.Nos.1232/2014 & - 22 - pieces of which [MO-20series] were shown to the witness. Injury 15 could be caused by strangulation. It was opined that blunt violence as indicated from injury No.15 can be produced by strangulation and spinal fractures which according to the expert was suggestive of two or more persons being involved in the incident. Injury No.15 was opined to be the fatal injury.

20. The injuries as found in the Post Mortem examination and the opinion of the expert regarding its cause is in tune with the ocular testimony of the

other inhabitants of the house especially that of PW-3, the daughter who witnessed the trespass from the start. She spoke of the aggressors having covered the mouth of her father and pushed him down causing a fall which broke the chair on which he fell. The testimony was also of hitting and kicking as also plastering of the mouth and use of the knife on the victim. The death is homicidal and medical evidence corroborates the ocular testimony. THE OCULAR EVIDENCE OF THE VICTIMS :

21. The FIS was by the son of the deceased, PW-1, who along with PW2 and 3 his mother and sister gave direct ocular evidence. We propose to first deal with the evidence led, implicating A2 and A4 to A7, who carried out the crime, as per the prosecution version. A1 and A3, even according to the prosecution remained behind the scenes; remotely controlling the Crl.A.Nos.1232/2014 & - 23 - commission. According to the FIS, Ext. P1, based on

which PW-178 FIR was lodged, there was a house trespass by six persons in which the father of PW-1 was murdered and the other householders subjected to violence. The house at that time was inhabited by the deceased, his wife (PW-2), son (PW-1) and daughter (PW-3).

22. At about 10.30 p.m on 04.08.2013 when PW-1 was in the bathroom and the others were having dinner,

PW-1 heard his sister screaming. When PW-1 emerged from the toilet he saw two persons with their face covered, in the drawing room. They caught hold of him, tied his hands, forced him to sit and asked him to take out money. When PW-1 resisted, his mouth was covered with plaster and his mobile phone was taken away. He was threatened to disclose the hard disc of the security cameras and taken to the first floor from where the hard disc was removed by the trespassers. While coming back to the ground floor he saw his father lying inert, in the hall, with a plaster stuck on his face covering the mouth. Then two others brought his mother and sister from the kitchen whose hands were also bound and mouth covered with plaster.

23. The trespassers were speaking in Malayalam

and Hindi and were demanding money and gold. PW-1's sister pointed out the briefcase kept in the bedroom and revealed the number to open the lock. One of the trespassers opened the briefcase and took UAE Dirhams; Crl.A.Nos.1232/2014 & - 24 -

more than thousand and the ornaments kept inside. They were in the house for more than one and a half hours and they checked every room and the almirahs. PW-1 was beaten on the thigh with an iron rod and there was an attempt made to stab him with a knife. PW-1 also spoke of the phone of one of the trespassers having rung and the said person having spoken on the mobile. On their

way out, the trespassers pushed him down in the bathroom near the drawing room. When they left, PW-1 released himself and came out to see his father lying inert near the main entrance. He opened the bedroom to

release his mother and sister. The neighbours immediately came and took the deceased to the Life Care Hospital, Thrikaripur where he was declared dead. PW-1 remembered having seen his father being assaulted with a weapon. PW-1 also suffered an injury and took treatment from the same hospital, proved by PW-89 and the Treatment Certificate marked as Ext.P98. He spoke of having been terrified due to which he failed to notice the dress worn by the aggressors. However, he remembered that all of them were wearing pants and shirt.

24. Sri.Raman Pillai specifically pointed out the omissions in the FIS from the deposition of PW-1 and also those contradictions from the evidence of PWs.1 to 3. In the FIS it was stated that PW-1 saw two persons with towels masking their nose and that he could not remember the dress worn by them. In Court, Crl.A.Nos.1232/2014 & - 25 -

PW-1 stated that all five wore masks over their nose with hand kerchiefs and they removed it before they left. In the deposition itself there was discrepancy and the omissions in S.161 were specifically pointed out. PW-1 also spoke of having told the Police about the identifying features of the perpetrators which was absent in the statement. PW-2 specifically spoke of

one of the trespassers having used a monkey cap revealing only his eyes. She has not stated before the Police that the monkey cap or the handkerchiefs were removed. The IO specifically stated in his evidence as PW-114 that none had told the Police that the handkerchiefs masking the face of the trespassers were removed.

25. Having read the evidence of PW-1 we are of

the opinion that he has narrated the facts with respect to the incident in consonance with that in the FIS. More details have been mentioned which cannot be considered to be an embellishment; except the fact of the removal of masks by the aggressors. Apart from this, there are no material contradictions which would

persuade us to disbelieve either the

materially affects the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case cannot be a ground to reject the evidence entirely. Marginal variations need not necessarily be improvements in the real sense. Such variations could be in elaboration of the statements made earlier. It was held to be the duty of the Court to consider the evidence in its entirety to form an opinion about the credibility of the witnesses.

26. In the present case we are called upon to form an opinion about the credibility of the deposition of PWs.1 to 3, the close relatives of the deceased.

They witnessed the entire incident,

PW-1, a twenty year old lodged the FIS immediately after the incident. Just prior to the statement made by him to the Police he was in the midst of aggressors who trespassed into his house, subjected himself, his parents and sister to violence, threats and intimidation. He was a helpless victim whose house was looted and his father killed in the process, who gave the statement immediately thereafter. The witness himself spoke of his fear and panic during and after the incident. He had also just been informed of the sad demise of his father at the hands of the aggressors. It cannot be said that he should have stated every little

Crl.A.Nos.1232/2014 & - 27 - detail in the FIS itself. Nobody who had undergone such a trauma could have recited the entire incident as it happened. True, he had in the FIS, spoke of six persons having trespassed into his house, which actually was five; not very material considering the trauma he was under.

27. Superintendent of Police, CBI v. Tapan Kr.Singh [(2003) 6 SCC 175] has held that the FIS is not an encyclopedia of incidents. We have already noticed the FIS. PW-1 in his evidence spoke of having picked up his father from the mosque on the fateful

day, an auspicious one for Muslims. He spoke of having seen a car and bike in front of his house when he first came home. Later he picked up his father in the car and when his father went for dinner, he went

for a wash. He speaks of having heard his sister screaming upon which he came out. He saw two persons standing outside the bathroom in the hall from the light in the bathroom and also that emanating from the TV in the hall. They caught hold of him and bound him with masking tape. He requested them to permit him to wear pants since he had emerged from the bathroom in a towel, which they complied with. They demanded money and gold and took away his mobile phone and again bound his hands and covered his mouth with tape. The two persons who did these acts were identified as A2 and A5, standing in the dock. He was then asked to sit on the sofa when he saw his father lying in

Crl.A.Nos.1232/2014 & - 28 - the corridor near the main entrance, facing the wall. One person was standing near his father who was identified as A7.

28. Then two persons brought his mother into the room where his sister was also sitting. He removed the tape over his mouth and asked his mother as to

what happened to his father. His mother could not reply since her mouth was covered with tape. A2 and A5 standing nearby told him in Hindi that nothing had happened to his father. The trespassers threatened his sister with a knife and demanded money and jewelry upon which she pointed out the briefcase placed on the dressing table. She also revealed the number to open the lock, upon which A5

and A6 opened the briefcase and took out foreign currency and ornaments kept in the briefcase. They were not happy with what they obtained from the briefcase and beat him asking for

more money. At that time a mobile, described as aC

mobile and on coming back he demanded that PW1 show them the place where the CCTV cameras are recorded. PW-1 was taken upstairs where A5 and A7 removed the hard disc. A2 kicked him on his face. A5 and A2 were again identified by the witness.

29. PW-1 also spoke of a second call having been received by A2 in his 'china mobile' after which he was taken to the ground floor. The Laptop lying in Crl.A.Nos.1232/2014 & - 29 -

the central hall was put in the laptop bag by A7 and PW-1 was taken to the bedroom where PWs.2 and 3 were sitting. In the bedroom A5 is said to have hit him on the thigh while A4 threatened him with a knife. The trespassers were agitated because of the nominal booty they got from the big house and they were vocal about it. They also took the ATM cards and purse from the pants hanging in the bedroom.

30. A2 received another call on his mobile and he was heard saying that they would leave soon. A2 was said to be speaking in a southern dialect. PW1 was bound by a curtain rope and a shawl. A5 then levelled

a threat that if anything is disclosed to the police, his sister would be kidnapped to Bombay. After more than one and a half hours they left the house taking with them the money, ornaments and other valuables. After they left PW-1 failed to revive his father upon which himself and his mother called a relative and a

neighbour. The neighbours took the father to

stuck to his version. In fact in cross-examination he stated about the accused having not covered their face during the entire duration of the incident. We are inclined to accept the evidence of PW-1. As to the contradiction pointed out, of the

removal of masks having not been stated before the Police, though it is material, it is not fatal, especially considering the CrI.A.Nos.1232/2014 & - 30 -

duration of the crime. The aggressors were with the victims for more than one and a half hours in close proximity and constantly interacting with them. The masking of face as stated by PW1 is also only by a kerchief and not masking the identity as such. The victims would definitely have had a chance to notice the features of each of the aggressors for the entire duration, which would have left a lasting imprint in

their minds eye. One another factor regarding the identification is that it can be safely inferred that after the hard disc was removed the trespassers were

emboldened; for they were strangers to the three inmates of the house and there could be no visuals recovered by the Police. We also would emphasise the testimony of PW3, who witnessed the entire incident from the start, to whom there was no question asked in cross-examination as to whether the aggressors wore masks or not.

31. PWs.2 and 3 spoke in tandem with the version of PW-1. PW-2 also said that there were two

calling bells one at the gate and another on the sit-out. She spoke of her daughter and husband having sat down for dinner, when the calling bell at the sit-out rang. Her husband went to answer the ring, followed by her daughter. She too came out of the kitchen hearing the scream of her daughter when she saw her husband lying on the floor. A2 who was identified is said to have covered her mouth while A5 CrI.A.Nos.1232/2014 & - 31 - demanded money in Hindi. A5 was also identified and he had a rod and knife in his hands. A6 is said to have removed the ornaments from her body. She identified the ornaments taken from the briefcase and her person. She identified A2 and A4 to A7. She also stood her ground in cross-examination.

32. PW-3 according to the prosecution is the

star witness. A child witness, who described the incidents in tune with the description of her brother and mother; but witnessed the crime from the start. PW-3 was nine years old and the trial court questioned her before her testimony and was satisfied that the minor was competent and fit to depose before Court, by the rational, cogent and convincing answers to the questions put before her testimony. PW-3 spoke of having accompanied her father when the calling bell rang. Here we have to notice that PW-1 had specifically spoken of even a person ringing the calling bell at the gate being visible to a person standing inside the house. PW-2 also spoke of the person standing in the sit-out being visible from inside the house. Obviously the father and daughter who opened the front door, saw the person standing outside before the door was opened. Definitely he would not have covered his face at that point; which would have alerted the father and daughter. There is evidence to the effect that the wires to the CCTV near the gate were cut by the trespassers. There is also CrI.A.Nos.1232/2014 & - 32 - scientific evidence that the wires on the Control Box removed from the gate, discovered under S.27, match those remaining in the gate.

33. PW-3 could definitely have identified the person standing outside, since her father would never have opened the door if his face was masked, who was A2. PW-3 also spoke of a brief conversation between her father and A2 who was standing on the sit-out, where there was enough light. He is said to have then approached with heavy steps when the deceased retreated. At that point four other persons joined the first intruder, who covered her fathers mouth. Then two pushed the deceased and he fell on the plastic chair and then on to the floor, breaking the chair. The intruders dragged her father inside

and bound him with tape, kicked him and assaulted him with a knife. It was then that the frightened girl screamed aloud upon which her mother emerged from the kitchen and then her brother from the bathroom.

This is the crucial aspect we emphasized

cross-examination is also to the effect that she did not immediately scream. She watched her father being bound, presumably shell shocked and let out a scream only when her father, bound and lying on the floor, was attacked with a knife. It is

hearing the scream Crl.A.Nos.1232/2014 & - 33 - the mother came to the hall. She also spoke of pointing out her brother PW-1 in the bathroom. PW-1 on hearing the scream of his sister would have taken some time to emerge since he was having a bath. He is said to have walked out at first with a towel wrapped around. PW-1 and PW-2 hence saw the aggressors; later

to PW-3. PW-3, we reiterate, would have clearly seen all the accused even before they masked their faces and she was not questioned, in cross-examination as to whether the aggressors had masked their face. She was also not confronted with any statement made by her to the Police about the aggressors having masked their faces. She spoke about the subsequent events as spoken of by other witnesses. The person who rang the bell was identified as A2. A6 was identified as the person who came from the car porch and covered her father's mouth with his hands. A4 and A5 pushed her father

down. All the five persons who trespassed, were identified as A2, A4, A5, A6 and A7; from the dock. The nine year old girl was also cross-examined but remained unshaken throughout. We find the direct evidence of PWs.1 to 3 to be perfectly reliable, credible and convincing. TEST IDENTIFICATION PARADE:

34. The Hon'ble Supreme Court in (2007) 2 SCC 310 [Amitsingh Bhikamsing Thakur v. State of Maharashtra] declared that identification of the accused at the trial for the first time, from its very Crl.A.Nos.1232/2014 & - 34 -

nature, is inherently of a weak character. There is no obligation on the investigating agency to carry out a TIP nor can the accused claim it as a right. But if held, it corroborates the testimony of the witness in Court and it is more of a rule of prudence. TIP is more in the nature of an aid to investigation and an assurance that it is proceeded with in the correct direction. We would first deal with the evidence led as to the TIP and then examine it with the precedents placed before us.

35. PW-98, a Judicial Magistrate carried out

the TIP of A2 and 4 to 7, wherein PWs.1 to 3 were called upon to identify the separate accused. PW-98 speaks of the identification having been carried out from among the suspects and nine non-suspects; each of the suspects being paraded separately. The TIP of A2, 4 and 6 were carried out on 09.09.2013 and Ext.P111 is the report. The Superintendent, Sub Jail was directed to provide 27 non suspects; nine each being paraded along with each of the suspects. The nine non-suspects to be paraded along with each of the suspects were chosen by the Magistrate from among the 27 supplied by

the Superintendent. The Magistrate granted three chances for identification of each suspect, to the three witnesses. After every such identification, the witness was sent out and the suspects and non-suspects were asked to change their dress and the suspect was allowed to choose his position in the line of CrI.A.Nos.1232/2014 & - 35 - non-suspects. PW-1 identified A2, 4, and 6 in all the three chances. PW-2 failed to identify A2 and A4 and though A6 was identified once, the Magistrate itself has recorded that there is room for suspicion of identification of A6 by PW-2. PW-3 identified A2 in the first chance, but failed in the 2nd and 3rd chance. She identified A4 on all the three occasions and A6 on

the first and third occasion. The identification definitely inspires confidence and it cannot be said to have been stage managed or artificial. The TIP for A7 was conducted in the very same manner on 23.09.2013 when all the accused identified A7 with PW-2 alone failing to identify him in the 3rd chance. The TIP for A5 was held on 10.10.2013, again in the same manner

when PWs.1 and 3 identified him on all the three occasions and PW-2 failed only on the first occasion.

36. It was pointed out that but for the statement in the report there is no specific affirmation of the identification made by the witnesses in the deposition of PW-98. Though it was

argued by Sri.Raman Pillai that without such affirmation in deposition it would not be substantive evidence, we accept the report by virtue of Section 80 of the Evidence Act. There is no challenge to the contents of the report and the

identification made, even when the Magistrate was cross-examined. We also notice Section 54A, which provides for identification of a person arrested, in such manner as the Court may

Crl.A.Nos.1232/2014 & - 36 - deem fit. Here PW-98 has specifically deposed that TIP was carried out on directions of the Chief Judicial Magistrate. Sri.Vijayabhanu had a contention that the Magistrate had used the services of his attendant to

summon the witnesses and the attendant could

after every instance of identification, the witness was sent out of the parade hall accompanied by the Office Attendant [O.A] to ensure privacy. It was after the witness was sent out that the persons paraded were directed to exchange their dress and the suspect chose his position. There is little chance of the O.A being aware of the identify of the accused. In any event the O.A is a staff of the Court who is not a part of the investigation team and is answerable to the Magistrate and not to the IO. There is yet another contention that persons professing Islam tie their dhoti to the left and this alone, since the accused except A5 are Muslims, would reveal their identity. We reject the contention noticing that among the non-suspects there are a number of persons professing Islam.

37. True, there were objections raised by all

the accused as to their photos having been shown to the witnesses. But for the objections raised, that too after the TIP, there is nothing to prove the same. In fact PWs.1 to 3 in cross-examination were asked whether they were familiar with the photographs of the Crl.A.Nos.1232/2014 & - 37 - accused as publicized in the media. All of them answered that after the death of the master of the house none of them were in the habit of reading newspapers or watching television. PW-2 specifically stated that she was under acute anxiety during the TIP, since it was the 'Iddah' period ie: four lunar months and ten days after the death of her husband when a Muslim widow is not expected to be in the presence of other men. This explains the failure of PW-2 to identify the accused on the various occasions. This also validates the statement of the witnesses that during the mourning period they were not exposed to the media, both the print or the visual.

A Division Bench of this Court in 2007 (2) KHC 595 [Saji v. State of Kerala] while reiterating that TIP helps the investigating agency in proceeding in the correct

direction to book the real culprits, it was also held

that the veracity of the TIP is not lost by

publication of photographs in newspapers. Another Division Bench in Rasi v. State of Kerala [2004 (3) KLT 282] however took a different view and declared a TIP held after the pictures of the accused appeared in the newspapers cannot be relied on to determine the identity of the accused. Rasi rejected the TIP in that case, also on the further grounds of accused having been questioned in the presence of the witnesses and

the allegations against the TIP condu

controversy since in the present case the news paper with photographs of the accused produced is Ext.D5 dated 15.08.2013 and the photographs were of A1 and A3 who were not subjected to a TIP by PW-1 to PW3. They were also known to the inmates of the house and even the prosecution has no case that they were present at the scene of crime. Even with respect to the identification of A1 & A3 by some witnesses there is nothing to show that their roles were specifically made aware to the said witnesses from the news paper reports.

38. Now we examine the decisions relied on by

Sri.Vijayabhanu. AIR 1968 SC 938 [Laxmipat Choraria v. State of Maharashtra] has no application since it was a case in which the witness was shown the photographs of the accused without even asking her to pick out the

suspect's photograph mixed with the photographs of others. In this case there is no evidence as to the witnesses having been shown the suspects or their photographs. The witnesses too denied of their having seen the photographs publicized in the media. Sri.Vijayabhanu has pointed out from the evidence of PW-114 that after his arrest on 03.10.2013, A5 was

taken to the scene of occurrence on 15.10.2013. However, the same is after the TIP held on 30.09.2013. As argued by the prosecution, if merely by reason of that, the identification in Court can be eschewed no direct evidence as to identification can be relied on. CrI.A.Nos.1232/2014 & - 39 - The accused would definitely be produced on multiple occasions before Court; both before and after the committal proceedings. There is nothing stopping the witnesses from seeing the accused when they are so produced before Court. The identification in Court acquires sanctity because it is not the casual sight or a fleeting glance of the accused that results in a clear identification, but the definite imprint made in the mind of the witness at the time of occurrence of the crime, which is lasting; in the present case accentuated by the gravity of the offence. We also have to pertinently observe that the occurrence in this case lasted for more than one and a half hours and there was sufficient time for the witnesses to assimilate the profile of the perpetrators of the crime, that too in close proximity. The identification in Court also stands corroborated by the TIP carried on after the arrest; before which the witnesses had little chance to see the accused.

39. AIR 1982 SC 839 [Mohanlal Gangaram Gehani v. State of Maharashtra] was a case in which no TIP was held and the accused was shown to the witness by the police at the Police Station, with whom the witness had no acquaintance before the occurrence of the crime. In AIR 1998 SC 3031 [Ravindra alias Ravi

Bansi Gohar v. State of Maharashtra] TIP was held

inside the lock up of the CID Department and witnesses were police constables attached to the concerned CrI.A.Nos.1232/2014 & - 40 - Police Station. The dictum was insofar as the TIP to be held at a place where no criticism against its legitimacy can be raised, preferably in the Jail.

(2004) 11 SCC 346 [N.J. Suraj v. State Represented by

Inspector of Police] was also a ca

40. AIR 1970 SC 1321) [Budhsen and Another v. State of U.P] and AIR 2008 SC 2343 [Mahabir v. State of Delhi] declared that TIP does not constitute

substantive evidence, which can only be the identification made in Court. We do not think that the TIP carried out in this case in any manner is vitiated for reason of it running counter to the precedents herein before cited. It offers corroboration to the direct evidence led by the prosecution, being the identification made by PWs.1 to 3 who witnessed and

were victims of the trespass, violence

adopted by the Magistrate was in consonance with the

guidelines laid down in Acharaparambath Pradeepan

[2005 (3) KLT 1075] by a Division Bench of this Court. There cannot be said to be any delay in holding the TIP since the arrest of A2 & A4 were on 29.08.2013 and A6 on 31.08.2013. Their TIP was held on 09.09.2013 CrI.A.Nos.1232/2014 & - 41 - within 11 days of the first arrest. A7 was arrested on 06.09.2013 and the TIP on 23.09.2013 within less than 20 days. A6 was arrested on 03.10.2013 and the TIP

held on 10.10.2013 within 7 days. Mahabir & AIR 1998

SC 1922 [Shaikh Umar Ahmed Shaikh v. State of Maharashtra] also emphasised the need to carry out a

TIP immediately after the arrest and before the witnesses could see the accused; which precautions are adhered to in this case. Raja vs. State [2020 Cri.L.J 1773] held that there is no hard and fast rule as to the period within which the TIP must be held. There were precedents where 10 days was considered fatal and even 40 days was accepted. Bharat Singh vs. State of U.P [(1973) 3 SCC 896] was specifically referred to wherein their Lordships held :

6. ... Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the

prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the Police Officer who conducted the investigation should have been cross-examined in that behalf.

The aspect of delay varies from case to case and it should be raised by the defence. Here, the defence Crl.A.Nos.1232/2014 & - 42 - never raised the question of delay at the trial stage and we do not find, from the dates, any delay from the arrest made. CONFESSIONS & RECOVERIES UNDER SECTION 27:

41. Apart from the identification of A2 and A4 to A7 there are other incriminating circumstances by way of recovery under S.27 and the call details

between the actual perpetrators and A1 and A3 who remained in the background. The recoveries are dealt with in seriatim here under; separately of A2 and A4 to 7:

42. (A2)-(i) Based on the confession of A2

foreign currency and gold ornaments were recovered. Ext.P35 is the seizure mahazar by which gold ornaments identified by PW-2, were pledged with PW-30. Ext.P35 indicates the confession statement regarding pledge of three rings, two pairs of earrings and bracelets. The

accused led the Police to PW-30 who

accompanying the police, having come to his shop once or twice before. Ext.P34 is the pledge form signed by A2. The pledge form indicates the aforesaid ornaments having been pledged for Rs.45,500/-. The witnesses in Ext.P35, PWs-31 and 32 failed to identify A2. But PW-30 identified A2 & A4 and also deposed on the pledge made of the ornaments, MO-12 to MO-18, identified by PW-2 as belonging to herself and her Crl.A.Nos.1232/2014 & - 43 - daughter.

43. (A2)-(ii). The further confession of A2

was with respect to the foreign currency which was exchanged for Indian money received from PW-21. PW-21 handed over 3200 Dirhams (20 notes) to the Police,

which were marked as MO-26 series. PW-21 claimed that an unknown person approached him for Indian currency offering the Dirhams as security. He is said to have taken the Dirhams and paid Rs.30,000/-. He failed to identify the person from among the accused standing in the dock and retracted from his Section 161 statement wherein he had implicated A2 as the person who brought

the foreign currency. He was cross-examined by the prosecution. Though he failed to identify A2, he accepted handing over of the Dirhams as per Exhibit P25 mahazar. PW-22, the mahazar witness, also failed to identify A2 as the person who accompanied the police at the time of seizure. There was a further confession by A2 on account of which MO-24 shoes was recovered from his father's house at Chiranelloor, Thrissur as per Ext.P22, which is of no consequence for reason of no incriminating factor coming out of the said recovery.

44. (A4)-(i).On the basis of the confession of A4, MO-22 knife and MO-23 shirt were recovered as per Ext.P21 seizure mahazar, as per confession seen from Ext.P24. PWs.16 and 17 were the mahazar witnesses. PW-106, the Assistant Director of the Regional FSL, CrI.A.Nos.1232/2014 & - 44 -

deposed that there was blood stain in item No.12 of Ext.P156 report, which is the knife. However, PWs.1 to 3 were not shown the knife when they were in the box. Nothing turns on the recovery of MO-23 shirt also.

45. (A4)-(ii).The further recovery made is of MO-25, gold ingot, from PW-19. As per Ext.P23, A4 had confessed the sale of certain gold ornaments to a Maharashtrian for Rs.1,44,000/- at Kechery, Thrissur. The Maharashtrian to whom the gold was sold, was examined as PW-19. At the time of seizure he admitted

that he had purchased gold ornaments from the two persons who accompanied the Police. He specified the ornaments to be a chain, a bangle, a ring and a small piece of another chain. He identified both A2 and A4 as having sold the said ornaments, to whom he paid

Rs.1,45,000/-. He specified the quantity of gold ornaments to be 64 grams. The ornaments were converted into gold ingot, which was surrendered by PW-19 to

the Police. The said ingot was marked and identified as MO-25. PW-20, the mahazar witness though affirmed the recovery, failed to identify A4. In any event, the identification of A2 and A4 by PW-19 and the factum of

sale is an incriminating circumstance. State Of Karnataka vs. Deja K. Shetty [1993 Supp (1) SCC 14]

held that when a goldsmith deposes that the accused

sold the ornaments and surrenders valuable gold ingot obtained by melting the ornaments purchased, there is no reason to disbelieve him. Especially since there is CrI.A.Nos.1232/2014 & - 45 - no reason why he should surrender the valuable ingot, which in that case was valued at Rs.5,465/- which here is a lot more, even considering the devaluation of currency.

46. (A5)-(i).The recoveries made on the

confession of A5 are said to be MO-6 Trimmer, MO-7 Mobile and MO-5 Watch, all of which are said to be thieved from the house of the deceased. The Trimmer and Mobile along with the ID Card of A5, according to the prosecution, were found in MO-31 Bag left by A5 in a rental accommodation which he vacated after the crime. The same was recovered as per Ext.P26 seizure mahazar based on Ext.P243 confession statement. A5 when arrested on 03.10.2013 is said to have confessed to concealment of the Trimmer and Mobile in the rental accommodation he had been using in Chengaramkulam.

Ext.P26 recovery is said to have been made on 03.10.2013 itself at 10.30 a.m. Ext.P26 was witnessed by PWs.23 and 24. PW-23 turned hostile and PW-24 spoke of recovery of the ID Card alone, which was marked as MO-27. PW-33, another witness of the prosecution, who was the brother of the friend of PW-5 also refused to speak in accordance with his Section 161 statement. Interesting, however is the evidence of PW-38, who is said to have been occupying the room at the time of seizure, earlier rented out by A5. PW-58, the house owner, confirmed the room having been first occupied by A5 and then PW-38. According to PW-38, on occupying

Crl.A.Nos.1232/2014 & - 46 - the room, he saw the bag and opened it to find the material objects above referred. However, in cross-examination he stated that on 22.08.2013 the police had searched the room after he occupied the same. The Police also opened the bag and found the material objects. These material objects, the prosecution would have us believe, were recovered on 03.10.2013, on the confession of A5, when PW-38 was not present. Obviously the presence of the Trimmer and Mobile was known to the police officers prior to the arrest of A5 and his confession. This makes the discovery to be other than one falling under Section 27 as held by another Division Bench of this Court in 2019 KHC 862 [Shinoj v. State of Kerala].

47. (A5)-(ii). The Watch was recovered by

Exhibit P52 from PW-44 on 12.10.2013. MO-5 is said to be the FOSSIL Watch, belonging to PW-1, recovered from PW-44 and witnessed by PW-45. The mahazar indicates the recovery having been made from the residence of PW-44 as affirmed by PW-45. However, PW-44 in cross-examination admitted that he had seen A5 along with the police in a lodge room attached to one 'Host Bar'. It is not clear as to whether this meeting was on

01.10.2013 or 12.10.2013, both dates having been mentioned by PW-44. In cross-examination PW-44 stated that the documents for recovery of the Watch was prepared in his house. It is also stated that 2-3 days before the recovery the Police had called him over Crl.A.Nos.1232/2014 & - 47 - telephone to confirm the possession of the Watch and its handover.

48. (A5)-(iii). More intriguing is the evidence of PW-84, a friend of PW-1. PW-84 deposed

that he witnessed PW-1 handing over the covers containing the Watch and Trimmer and a piece of the chain of a Rado Watch. He identified them as MO-3, MO-5 and MO-35. The Trimmer was identified as MO-6 and its cover as MO-36. We see from the evidence that MO-3 is the cover of a watch, MO-5 a Watch and cover, MO-35 the piece of Gold Chain and MO-36 the Trimmer cover. The said items were handed over as per seizure mahazar Ext.P92 dated 30.09.2013, prior

to the arrest of A5. The learned Prosecutor pointed out that there is a discrepancy in the deposition of PW-84 from that found in the seizure mahazar. The Trimmer and the Watch were never surrendered to the police by PW-1 and Ext.P92 only indicates the surrender of the original covers of

the Watch and the Trimmer, argues the since the evidence of PW-84 as mentioned by us, is in chief examination and no attempt was made to clarify the statements so made. We do not find any reason to place reliance on the recoveries as against A5.

49. (A6)-(i) Apart from the oral testimony as against A6, the incriminating circumstances are the recovery of MO-19 ring as per Ext.P13 and the DNA Crl.A.Nos.1232/2014 & - 48 - evidence as per Ext.P256. MO-19 ring is said to have

been pledged pursuant to the confession of A6, Ext.P22, which spoke of a pledge having been made in an establishment at Chengaramkulam. PWs.6 and 7 are the employees of the said establishment, called 'PNY Sabha Finance Limited'. PW-6 is the Manager who spoke of A6 having pledged a ring in their establishment. Though MO-19 was shown to her, she expressed difficulty in identifying the same. Ext.P12 is a Pledge Form, marked and proved by the said witness. PW-7 is an Attender, who also identified A6, but did not identify the ring. Ext.P13 is the mahazar, witnessed by PW-7, which only describes the ring by its weight and as one made of gold. We do not place any reliance on this recovery.

50. (A6)-(ii). Ext.P256 is the scientific evidence relied on by the Prosecutor to further establish the presence of A6 in the subject house. DNA typing result at Ext.P256, indicate that the cells and tissues on the piece of latex glove in item 2, recovered from the scene of occurrence belongs to A6 to whom the blood sample in item No.5(a) belongs. However, as pertinently pointed out by the learned Senior Counsel Sri.Vijayabhanu, there is no evidence of the blood sample having been taken from A6. The learned Prosecutor took us through the evidence of PW-114, the IO, which was of no avail. PW-114's deposition indicates the gloves having been taken from Crl.A.Nos.1232/2014 & - 49 -

the scene of occurrence which was sent to Court, which was also sent for FSL examination. The sampling was also permitted by the Court which was said to have been taken at the Medical College Hospital. However, there is nothing to indicate that item No.5(a) as seen from Ext.P256 is the blood sample of A6 nor does the IO speak of the sampling or the sample taken having been send to the Court and then to the FSL. We are disabled from placing any reliance on the scientific evidence available at Ext.P256.

51. (A7)-(i). There were two circumstances

pointed out against A7. The computer parts and damaged hard disc of CC TV Cameras removed from the scene of occurrence though recovered on the confession of A7, they were not marked in evidence and hence no reliance can be placed on the said circumstance. We cannot but observe that despite the Mahazar witness turning hostile there was substantiation of the recovery by the witnesses who aided the drying up of the well from which the recovery was made, in the form of PWs.11 &

12. The prosecution by its lackadaisical attitude failed to prove the recovery as was the case with MO-22 knife, which had traces of blood. One other circumstance is the recovery of MO-9 series, which are the pieces of Laptop Bag and MO-21 series of ATM Cards recovered as per Ext.P15 seizure mahazar. The confession of A7 on 06.09.2013 was that he had thrown away the same into the shrubs behind the house earlier Crl.A.Nos.1232/2014 & - 50 -

occupied by A6. The recovery was made in the presence of PWs.10 and 11, who witnessed the seizure mahazar. PW-10 affirmed the recoveries made by the Police of four ATM cards, marked as MO-21 series and the cover of the Laptop, marked as MO-9. He retracted from his statement under Section 161 and asserted that he did not see A6 or A7 recovering the concealed items and handing it over to the Police. He spoke about the

recovery of the same by the Police alone. PW-11, however recognized MO-9 and MO-21 series kept there. He identified A7. PW-11 was in fact the witness to Ext.P17 mahazar of recovery of damaged parts of the hard disc from a well in the

very same premises which is not proved. We are unable to find the evidence led of the recovery, to be in any manner incriminating A6.

52. Sri.Vijayabhanu, learned Senior Counsel

raised a contention with respect to the confession statements recorded prejudicing the accused insofar as a bias created in the mind of the Court. Many of the confessions of the accused start with taken from the house and used at the time of the incident. This is specifically against the declaration in Pulukuri Kottaya & Others v. Emperor [AIR (34) 1974 PC 67]:

...In their Lordship's view it is fallacious to treat the fact discovered within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past

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history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that I will produce a knife concealed in the roof of my house does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added with which I stabbed A these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. [Underlining by us for emphasis]

Hence, anything connecting the accused to the crime other than the concealment of what is recovered should be avoided, when recording the confession statement of witnesses. The connection with the crime, of the object recovered, is to be proved by the prosecution. However, in the present case this Court has not relied

on many of the recoveries and there is clear direct evidence as against A2 and A4 to A7. In that circumstance, we do not think any benefit accrues to those accused, though the contention is well founded. The confessions of A1 & A3 does not suffer from this infirmity, which we will notice a little later. THE MEN WITH FORESIGHT; A1 & A3:

53. According to the prosecution A1 and A3 were the puppeteers and it was their avarice that Crl.A.Nos.1232/2014 & - 52 - motivated A2 and A4 to A7 to carry out the crime. In fact they were the first to be arrested. A3 at 8.30 p.m on 13.08.2013 and A1 at 9.30 p.m on the same

day both arrest recorded at the Office of the Inspector of Police Neeleshwaram. The arrest was made purely on the basis of the call details collected from the area in which the scene of crime was located, ie, at Thrikkariapur in Kasaragod. The arrest of A1 and A3 led to the arrest of A2 and A4 on 29.08.2013, they having been taken into custody on 27.08.2013 from Allahabad. A6 and A7 were respectively arrested on 31.08.2013 and 06.09.2013 from Changaramkulam Town in Malappuram District. A5 was arrested on 03.10.2013

from Payyanad in Malappuram District. To prove the conspiracy the prosecution projected two meetings of the accused on 05.07.2013 and 01.08.2013. A1 is proved to have taken a room in one 'Happy Tourist Home' which was spoken of by PWs.60 & 61, evidenced by Ext.P65 room rent register. However, there is nothing to show that the other accused met A1 on that day. Likewise A3 is said to have arranged a meeting of the accused in one 'Safari Park Lodge' Kasaragod on 01.08.2013. The room taken by A3 was affirmed by PWs.68 to 70; evidenced also from Ext.P77 room rent register. Again

there was nothing to indicate the presence of the other accused at the said lodge.

54. Immediately after the crime and the FIR being lodged, the call details in the area were Crl.A.Nos.1232/2014 & - 53 -

checked which revealed fifteen calls between two SIM numbers before, after and at the time the crime. These are said to have been placed, starting from 21:15:47

of 04.08.2013 upto 0:21:15 of 05.08.2013. These SIM numbers were 97477 07385 and 97477 02642. Ext.P122, produced by PW105-Nodal Officer of IDEA Cellular indicates both these SIM numbers were activated on 03.08.2013 and were operated only till 05.08.2013.

Out of the sixteen calls seen

having International Mobile Equipment Identity Number

(IMEI No.).35280 90567 80000 and

35790 00548

available in Ext.P118 produced by PW-105. The tower

location of that CELLID was

recorded at the Tower with the above CELLID were at 23:55:48 on 04.08.2013, 0:02:47 and 0:18:31, both in the wee hours of 05.08.2013; with respective duration of 31, 60 and 51 seconds. The Tower location has within its area the scene of occurrence and the time approximately is of the crime, when three calls were received by A2, as spoken of by PW1. The SIM numbers were taken from the retailer Garden City Kanjangad and the distributor, Hinet communication on 03.08.2013. Crl.A.Nos.1232/2014 & - 54 -

55. The subscriber of the two numbers was found to be one and the same person; PW-4, an auto driver operating in Chengannoor. He was picked up and

he had no knowledge of the said numbers. He was confronted with the Customer Application Forms (CAF), Exts.P2 and P3 Passport copy submitted for the purpose of subscribing SIM number xxxxx 07385 and Ext.P124 and P124(a) relating to xxxxx 02642; both from an agency at Kasaragod. He remembered having sent his passport copy and photograph to A3 for arranging a VISA for Dubai. The mobile number of A3 in which PW-4 contacted him in June 2013 was revealed as 95448 98889, the CAF and ID proof of which are marked through PW105 as Ext.P134 and P135. The mobile numbers of PW-4 which PW4 was actually using were revealed as 81570 92440 and 99958 51974. The CAF and ID proof of the same were

marked as Exts.P6&P7 and P4&P5; applied for from Mavelikkara and Chengannoor, in Alleppey District. Ext.P132 shows the call details of xxxxx 92440 used by PW-4. Therein Sl.No.1724 of 14.06.2013 and Sl.954 of 18.06.2013 proved the contact between A3 and PW-4; ie: between xxxxx 98889[A3] and xxxxx 92440[PW-4]. The tower location of xxxxx 92440 used by PW-4 indicated its presence within Alappuzha and Ernakulam District between 01.08.2013 and 05.08.2013. Likewise the other number used by PW-4 xxxxx 51974 as per PW-108, the

Nodal Officer of Airtel indicated its presence

Districts between 01.08.2013 to 05.08.2013. The presence of the tower location of the SIM cards actually used by PW-4 indicated that at the relevant time PW-4 was not in Kasaragod and he stood vindicated. This obviously led to the arrest of A3.

56. The SIM cards in the name of PW-4,

purchased at Kasargod, were purchased from the mobile shop run by PW-28. PW-28 runs the shop by name Garden City, the retailer indicated in the CAF. She deposed that both the applications were submitted on the same day and that it was submitted to Hinet Communications, the distributor. She stated before Police that she had specifically queried the person who submitted the CAF as to the person shown in the photo; the response to which was that he is resting in his room. She also categorically stated that PW-4 was not the person who

submitted the CAF. We need to state that the above statements of PW-28 in the 161 statement was denied by her before Court which was marked as Ext.P31 contradiction. PW-28 turned hostile before Court and she failed to identify A3 in the TIP conducted on 04.09.2013.

57. The evidence led before Court as we noticed, indicates xxxxx 07385 having been used in the instrument with IMEI No.xxxxxx xxxxx 80000 as per Ext.P122. The call details of the instrument with IMEI No.xxxxxx xxxxx 80000 indicated SIM numbers 95269 07249 and 95268 61571 having been used in the said CrI.A.Nos.1232/2014 & - 56 -

instrument as per Ext.P128 produced by PW-105. These were taken in the name of PW-5 as per Ext.P9 CAF. PW-5 admitted to have subscribed to the above numbers and used the said numbers in a cheap mobile purchased for Rs.750/- from the shop of PW-8. She used the said numbers and also the number 99472 45786 in the instrument. This number was used by PW-5's daughter and taken in the name of one Abdul Rahiman, whose CAF is produced as Ext.P130. She deposed that she was not happy with the instrument and gave it back to PW-8 and she received Rs.500/- after its re-sale. SIM number xxxxx 07385 was used in the said instrument from 04.08.2013 as is seen from Sl.No.29 in Ext.P128.

58. PW-8 runs 'My Phone Solutions' in City Mall shopping complex. He corroborated the evidence of PW-5 to the hilt. He also deposed that on the 27th night of Ramzan (04.08.2013) at about 8.30 p.m., A3 approached him for purchasing a mobile. He showed him

a mobile worth Rs.1500/- which was not purchased. Later they came back and purchased the phone, which was returned by PW-5, for Rs.500/-. PW-8 identified A3 standing in the dock as the person who purchased the said mobile. He also identified A3 in the TIP held on 04.09.2013 by PW-99, JFCM I Kasaragod in the premises of the Jail. Deposition of PW-99 and Report Ext.P115

indicates the TIP having been carried out in accordance with the guidelines and the precedents. The use of xxxxx 07385 in xxxxx xxxxx 80000 commenced CrI.A.Nos.1232/2014 & - 57 - at 20.44.33 of 04.08.2013 corroborating the version of PW-8 and also pinning the purchase of two SIM numbers in the name of PW-4, ie: xxxxx 07385 and xxxxx 02642, on A3. The mobile instrument and the SIM cards were not recovered but the purchase stands established on A3.

59. The SIM number xxxxx 07385, established to be purchased by A3 was also used in instrument having IMEI No. xxxxx xxxxx 55200 as per Ext.P122, which instruments possession is also thus proved on A3. SIM number, xxxxx 02642, also purchased by A3,

impersonating PW-4 as per Ext.P197 was used in instrument having IMEI No. xxxxx xxxxx 55200, further establishing the purchase of that instrument on A3. The

sale of the said instrument was traced to PW-26 who runs a lottery and mobile phone shop called

'Mobile Market and Gulf Bazar' at Neeleswaram. He deposed that on 02.08.2013 he was approached by two persons for purchase of a cheap mobile phone. When they were shown a Nokia 105 instrument; the customers said they will come back with the money. This was late in the night at around 9.00 p.m. He called them after half an hour in the mobile number given to him, when they promised to come immediately. Then they came back

and purchased the mobile. MO-30 is the bill book evidencing the purchase and the bill in page 678 is marked as MO-30(a). The Counsel for A1 and A3 pointed out a different number having been spoken of by CrI.A.Nos.1232/2014 & - 58 - PW-114. PW-114 has in his deposition spoken of 1249 Nokia, which is pointed out as a discrepancy since the phone sold is Nokia 105. We verified MO-30 to find

that Nokia 105 wherever mentioned is preceded with 1249 as seen from the copies of bill No.675 and 676 in MO-30 itself. In bill No.676, the item sold is shown as 2719 Nokia 114. Hence the identification of the model takes in the number preceding and following the manufacturer's name. The description in MO-30(a) is '1249 Nokia 105'. PW-26 though did not remember the number given by A3, deposed that he called A3 from his mobile No.94477 48498. Ext.P183 CDR of Mobile No.95397

33373 [of A3] on its 61st page at 21:48:51 on 02.08.2013 shows a call from PW-26's mobile no. xxxxx 48498, corroborating PW-26 unequivocally. PW-26 identified both A3 and A1 in Court and at the TIP carried out on 04.09.2013 by PW-99, the report of which is produced as Ext.P115. The two mobile phones in which the two SIM numbers purchased impersonating PW-4, are thus successfully linked by the prosecution to A3 and through him to A1, which SIM Cards and instruments were in the location of Thrikkaripur. Sri.Sanalkumar pointed out that the alternate ID in the CAF of the two incriminating SIM numbers is 96000 08436 which belongs to one Vipin. The CAF, Ext.P168 & ID proof, Ext.P169 produced and marked by PW-108, Nodal Officer of Airtel indicates xxxxx 08436 to be in the name of Vipin, but that does not absolve A1 & A3. CrI.A.Nos.1232/2014 & - 59 - The evidence linking

him with the SIM cards through

the instruments in which they were used is very clinching and convincing. A3 is also a person with no qualms to borrow the ID of another and use a car with a fake registration number; as we will see later, who could very well fill up an alternate number that came to his mind. The CDR copy of that number produced as Ext. P170 was perused by the IO. Even the defence has no case hinging on the said call details. Vipin for all we know is a stranger who had no connection with the crime; as was PW-4.

60. Here, we recall the evidence of PW-1 as to three calls having been received by A2 during the period the perpetrators of the crime were present in the scene of occurrence. PW-1 also identified the mobile as a 'china mobile' meaning a cheap mobile which was purchased from PW-8 with IMEI No.xxxxxx xxxxx 80000 in which was used xxxxx 07385. It can be safely inferred that A1 and A3 had purchased the mobiles and

A3 had taken SIM cards in the name of PW-4 specifically in furtherance of their plans to loot the house of the deceased. A1 and A3 were relatives and familiar to the inmates of the house and hence the engagement of strangers for the actual crime. PW-2 the wife of the deceased had spoken of A1 and A3 having come to their house to invite them for the marriage of the cousin of A1, which invitation letter was marked as Ext.P67 through PW-62 a photographer assigned to

Crl.A.Nos.1232/2014 & - 60 - photograph the scene of occurrence. The two SIM cards purchased in the name of PW-4 was used in the two instruments. The said instruments with the above referred IMEI numbers were the means of communication when the crime was conducted, one in the hands of the perpetrators, presumably in the hands of A2 and the other with either A1 or A3.

61. The constant contact between A1 and A3 is

further established by the prosecution. A1 was using SIM No.86066 65556, the CAF of which is produced as Ext.P140 and the ID proof as Ext.P141 which shows the subscriber to be A3. PW-86 wife of A1 though did not clearly state the number,

spoke of her husband's number consisting of numbers 860-6-5 and the like. Further evidence as to use of the said number by A1 is from PW-85. PW-85 said that he had regular transactions in money with A1 and that A1's mobile number is xxxxx 65556. The defence in an attempt to show enmity produced Ext.D4, a notice sent by PW-85 to the wife of A1. We are of the opinion that Ext.D4 so marked by the defence only establishes the transactions between PW-85 and A1 as spoken of by PW-85. In this context it is also useful to refer to PW-86's evidence where she speaks of the business failures of A1. In cross-examination PW-86 also spoke of having issued blank cheques and signed stamp papers on the strength of which her husband borrowed money from PW-85. The mobile number of PW-86 was admitted to Crl.A.Nos.1232/2014 & - 61 - be 98959 63524, taken in another persons name.

62. There is evidence of PW-86, wife of A1,

having continuously called xxxxx 65556 the mobile used by her husband as per Sl.No.558 in Ext.P142 the CDR of xxxxx 65556. A3 from his mobile xxxxx 98889 has called xxxxx 65556 [used by A1], 170 times between 21.05.2013 and 07.07.2013. A3 has, between 01.07.2013 to 10.08.2013 called xxxxx 65556, 152 times from the mobile No.95397 33373 belonging to A3. The CAF & ID proof of xxxxx 33373 is produced as Exts.P181 and 182, proved as of A3, through PW-113, Nodal Officer of Vodafone Cellular Ltd. Hence, though xxxxx 65556 is subscribed by A3, it was used by A1.

63. A2 also has from his mobile No.97449 42687 called xxxxx 65556 (used by A1), 63 times between

01.07.2013 and 10.08.2013. The CAF of xxxxx 42687 and the address details produced respectively as Ext.P144 and 145 indicate the said SIM having been subscribed by A2. According to PW105, A2 has contacted A3's number xxxxx 33373, 152 times between 01.07.2013 and 10.08.2013. Yet another SIM owned by A2 is 98465 07668, the CAF and ID proof of which were produced as Ext.P150 and 151. Ext.P146 shows contact between the two numbers subscribed by A2 on 09.08.2013 for which no explanation is offered by A2. A5 from his mobile No.98461 19633 had frequently called xxxxx 42687 (A2) between 01.07.2013 and

11.08.2013; 21 times. There is frequent contact established of A2 with A1 and A3. Crl.A.Nos.1232/2014 & - 62 -

PW113, Nodal Officer of Airtel also proved Exts. P187 & P188, CAF and ID proof of mobile number 98461 19633, proved to be that of A5. A5 from his mobile number, as per Ext. P189 CDR has contacted A1 in xxxxx 65556 and A2 in his mobile xxxxx 42687 both on 03.08.2013 and repeatedly with A2 between 01.07.2013 and 11.08.2013; as proved by PW-113.

64. The other circumstances against A3 commences with the evidence of PW81 who runs a car

accessories shop at Neeleshwaram and is also an Artist. He deposed to have painted a number plate for A3. The number was KL-59C/6633 for a White Ritz Car, in which A3 came to his shop. He identified A3 in

Court and in cross-examination said that A3 was a frequent visitor to his shop. He also deposed that A3 asked him whether one Ravisankar had prepared a number plate of identical number. Obviously a well prepared plan, since the number actually belonged to the said Ravisankar who was examined as PW 100, who had a White Ritz car and was a resident of Payyannur in the nearby Kannur District. He also stated that though he is a frequent visitor to Kasargod, he had not been in that district on 04.08.2013. Relevant also is the evidence of PW-57 who saw A3 driving a white Ritz car with number 6633 on the night of 04.08.2013 after 11.30 p.m

coming from the direction of Mottammel to Thrikkaripur. PW-57, though a chance witness, was proceeding to the Mosque; which is probable for reason Crl.A.Nos.1232/2014 & - 63 - of it being an auspicious day for Muslims, in the month of Ramadan. He identified A3 in Court and also in the TIP carried out on 04.09.2013 by PW-99.

65. A3's own relative, a first cousin, PW-74, who resides at Thrikkarippur, two kilometres away

from the house of the deceased, spoke of his visit to their house at 11 p.m in the night. She spoke of A3 having come in a White Ritz Car; who was not his usual form, being visibly perplexed. The visit was also to

invite PW-74 and family to the marriage of A3's cousin, which is quite unlikely at that hour and day; being one auspicious. She also deposed that A3 made a phone call from the land phone in her residence which was in the name of her uncle, Mohammed Basheer. The land phone number is 0487 2301293, which was proved to be in the name of Mohammed Basheer by PW-54 Junior

Accounts Officer of BSNL. He produced and proved Report Ext. P62 and P62(a) bill of the said number. Ext.P142 CDR of SIM No. xxxxx 65556 used by A1 and belonging to A3, indicates a call from the land number of PW-74. The call is at Serial No.335 of Ext.P142 at 23:21:12. This is a very incriminating circumstance against A1 & A3. PW 86, wife of A1, deposed that A1 left home on the night of 04.08.2013 and came back on the morning of 05.08.2013 along with A3. Immediately A1 left for Kozhikkode with A3, following a call from one Ashraf is the categoric statement of PW-86.

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66. PW-86 also spoke of a remittance of Rs.49,000/- on 07.08.2013, out of which A1 withdrew Rs.40,000/- on the same day. The bank account of PW-86 in South Indian Bank was used by her husband A1 and

the remittance was from Kechery, Trichur. The prosecution case is that the remittance was A1's share of the spoils of the crime, specifically the sale of ornaments to PW-19, the Maharashtrian who was running a gold business at Kechery, Thrissur; quite convincingly linked. A1 or PW-86 has no explanation for the remittance or the source from which it was made; which unquestioningly had been permitted to be withdrawn by PW-86, his wife, whose account he was using.

THE CONFESSIONS OF A1 & A3:

67. On arrest, A1 is said to have confessed the hiding place of a box as per Ext.P203, which on his directions was recovered as per Ext.P14 Seizure Mahazar.

Ext. P14 indicates a box with wires of different colour and its cover having been recovered,

both with the inscription BENINCA. The same was recovered from the shrubs near a KSEB transformer of Periya Section at Alakode on the way to Pallikkara. The recovery was made on 14.08.2013, the very next day of the arrest and was witnessed by PW-9. The witness affirmed his signature on Ext.P14 and spoke of having witnessed the recovery of the box from the shrubs near the transformer. He identified MO8 box and A1 & A3 who

Crl.A.Nos.1232/2014 & - 65 - were present along with the Police. PW-72, Scientific Assistant in his deposition identified MO-33 wires, which were seen cut, collected from the north pillar of the gate of the house of the deceased. PW-67 is the Mahazar witness who saw the seizure of MO-33 wires and

signed on the seizure mahazar Ext.P76. PW-74, who has a business in Automation Security Systems, fixed the security system in the house of the deceased. He was called to the scene of occurrence on 05.08.2013 and had informed the Police that the Control Panel Box fixed on the northern pillar of the gate was missing. He identified MO-8 as the Control Panel Box missing from the house of the deceased which was fixed by him.

Mos.8 & 33 were forwarded to the FSL respectively noticed as item Nos.10 and 9 in Ext.P109 report. The result of examination of the two items revealed that the electric wires in both the items belonged to the same bundle of wires and the edges of wires found in MO-8 were found to match the edges of the cut wires recovered from the pillar of the gate. The recovery under Section 27 is a very incriminating circumstance against A1, which along with his close association and frequent contacts with A3, revealed from the telephone call details and the preparation for the crime along with A3, implicate him conclusively in the crime.

68. The confession of A3 as found from Ext.P204 is to the effect that he would point out the place where he abandoned the bag. By Ext.P29 the School Crl.A.Nos.1232/2014 & - 66 -

bag, Note book MO-28 and MO-29 ID all belonging to PW-3 were recovered from the low-lying shrubs on the side of Mangalapuram-Kasargode National Highway. PW-25, one of the witness of Ext.P29 seizure mahazar supported the prosecution case. He identified A3 as the person who took out the bag from the shrubs on the side of the road. He also identified each of the material objects.

In addition to the purchase of two SIM cards by impersonation, the two mobile phones and the call details enumerated earlier, the recovery further nails A3 to the crime. The recoveries, on the strength of confession statements of A1&A3 were made on 14.08.2013, immediately after their arrest and before the actual

perpetrators of the crime were arrested. This conclusively provides the link of A1&A3 to the crime. The confessions made by A1 and A3 does not suffer from the defect as noticed by us relying on Pudukuri Kottaya earlier. Exhibits P203 and P204 only speaks of the willingness of the accused to point out 'the place where the box was thrown' (Exhibit P203) and 'where the bag was abandoned' (Ext.P204). THE CONCLUSION:

69. Our conclusion in the appeals is identical to that of the trial Court and we find the accused one to seven guilty of the offences charged against them. The prosecution has succeeded in proving the guilt of the accused from the evidence led, both direct and circumstantial; the latter cleverly unearthed by the Crl.A.Nos.1232/2014 & - 67 - IO. The meticulous examination of the call details in and around the area has brought the culprits to book,

who otherwise would have eluded detection. No one would have suspected A1 & 3, close relatives of the deceased and the others were total strangers. Every crime, however well planned have certain chinks which eventually result in the truth coming out. The effort of the criminals were not only frustrated by the minimal loot, but their planning came to naught for reason of the technological aid employed by the investigator.

70. The ocular testimony of the three

witnesses, the wife and children of the deceased and the clear identification made are enough to convict A2 and A4 to A7. The recoveries made are the additional circumstances against those, whose recoveries we found proved. A2 is proved to have pledged MO-12 to MO-18 ornaments with PW-30, A2 & A4 sold ornaments to PW-19, which was melted and the ingot recovered. A2 & A4 absconded and were arrested from Allahabad, which is another incriminating circumstance against them. A7's confession led to recovery of MO-9 laptop bag pieces and MO-21 series ATM cards belonging to the deceased. As far as A1 & A3 are concerned the evidence of their having operated behind the scenes is clear from the purchase of the SIM cards, the mobile phones in which those cards were used, all of which were used just

before the crime proper and immediately thereafter CrI.A.Nos.1232/2014 & - 68 - abandoned. They were found to be in frequent communication with each other, their close association and their being together on the crucial day is a very incriminating circumstance. Coupled with this are the recoveries made on confession. A1's confession led the Police to MO-8 Control Panel Box of the security system installed in the pillar of the gate of the house of deceased. A3 led the Police to MO-8 school bag, MO-28 Note book as also MO-29 ID, all belonging to PW-3. These recoveries were made before the arrest of the others, who physically were present at the crime scene, who removed these items from the subject house. A1 and A3 also had contact with A2 and A5 as revealed from the call details. These circumstances, laid bare before us, persuades us to reasonably infer A1 and A3 having master minded the operation and controlled it, behind the scenes. Their best laid plans collapsed in the downpour of technological data just as a sand castle would in torrential rains. We dismiss the appeals, affirming the conviction and sentences passed against each of the accused. Sd/- K.VINOD CHANDRAN JUDGE Sd/- M.R.ANITHA JUDGE Vku/sp/jma. / true copy /

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