

Krishna @ Chandrakanth Vs. State

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Court : Kerala

Decided On : Apr-13-2012

Judge : R. Basant & V. Chitambaresh

Appeal No. : Crl.A. No. 1346 of 2007

Appellant : Krishna @ Chandrakanth

Respondent : State

Judgement :

R. Basant, J.

- i) In a criminal case resting entirely on circumstantial evidence, is the prosecution bound to prove the circumstances beyond doubt?
- ii) Is it sufficient that the circumstances are proved by the prosecution on the test of balance of probabilities as in a civil case?
- iii) Is the burden on the prosecution in a criminal case to prove guilt beyond doubt confined only to proof of inferential facts and not to primary or basic facts?
- iv) Can the insistence on proof beyond reasonable doubt in a criminal case be justified by the definition of the expression "proved" in Section 3 of the Evidence Act? Is such insistence alien to such definition and justified (or imported into Indian Criminal Law) only by binding precedents of superior courts?

v) Does not the definition of the expression "proved" in Section 3 of the Evidence Act (the Act hereinafter) apply to all facts - facts in issue and relevant facts, whether sought to be proved by direct evidence or circumstantial evidence?

vi) Do the observations of the Constitution Bench in para. 18 of **M.G. Agarwal Vs. State of Maharashtra, AIR 1963 SC 200** negate or obliterate altogether the distinction between proof of circumstances in a civil trial and criminal trial? If not, why and under what circumstances were those observations made in M.G. Agarwal (supra) by their Lordships?

vii) What is the ordinary way of judging evidence referred to in para. 18 of M.G. Agarwal (supra)? By those observations did their Lordships of the Constitution Bench refuse to recognise and accept the classic and well entrenched distinction in the Indo Anglo Saxon jurisprudence between appreciation of evidence in a civil case and a criminal case?

2. These interesting questions of law are raised for consideration in the course of discussions at the Bar in this appeal. The questions were raised by Advocate Blaze K. Jose, the learned counsel appearing for the appellant. The counsel submitted that a lot of doubts and confusion do exist in the minds of grassroot level functionaries in the criminal justice delivery system and the earlier the same is clarified, the better it shall be for the system. Sri Blaze submitted that these questions are of crucial relevance in the facts of this case as he wants to advance an argument that the circumstances relied on by the prosecution have not been proved beyond doubt. According to him, every circumstance relied on by the prosecution has got to be proved beyond doubt in a criminal case to enable the court to reckon the same as a legally cognisable circumstance. Half baked proof of circumstances (meaning thereby proof of circumstances by balance of probabilities as in a civil case) is insufficient in a criminal trial and proof to the hilt - by the onerous standard of proof beyond reasonable doubt, is essential before any circumstance can be taken cognizance of by a criminal court in the adjudication of guilt, argues the learned counsel.

3. Sri. Blaze points out the scholarly opinion (with which he respectfully disagrees) of Hon' ble Justice U.L. Bhatt, the former Acting Chief Justice of this Court, former

Chief Justice of the Guwahati and Madhya Pradesh High Courts, Honorary Professor of the National Judicial Academy, Bhopal and a great jurist of our times on the manner in which M.G. Agarwal (supra) is to be understood and applied. He submits that in the light of such opinion, the position deserves to be clarified. We found the questions to be interesting. We solicited assistance from the Bar. Whoever was willing to contribute to the thought on the subject in the course of the discussions at the Bar was given an opportunity to be heard. We place on record our appreciation for the competent assistance from the members of the Bar including senior advocates Sri. M.K. Damodaran, B. Raman Pillai, S. Sreekumar, P. Vijaya Bhanu and Director General of Prosecution Sri Asif Ali. We do particularly record our appreciation and gratitude for the inspired assistance and research support that we received from two counsel Advocate S. Rajeev, who canvassed the view in favour of the indictee and Advocate Sri Bechu Kurian Thomas, who canvassed the view in favour of the prosecution. The sense of dedication, commitment and interest shown by these two young counsel and the amount of time that they devoted deserve special mention. They led the arguments and consolidated the arguments of others who support their view. In the course of the discussions we shall refer to their names only while adverting to the arguments canvassed in support of the respective positions.

4. We shall deal with the questions of law raised above initially. Thereafter we shall proceed to consider the specific facts and the controversies raised in this appeal.

5. The precise legal controversy, to put it in a nutshell, is the manner in which circumstances have to be established by the prosecution in a case resting entirely on circumstantial evidence. There are two schools of thought. The first school of thought is represented before us by Advocate Sri. S. Rajeev. He contends that the burden is heavy on the prosecution to prove all circumstances beyond doubt. The indictment is to be proved beyond doubt. All facts have also got to be proved beyond doubt. All circumstances have also hence got to be proved beyond doubt. According to Sri. S. Rajeev, the position is too well settled and does not now deserve to be altered or varied.

6. The other school of thought represented before us by Sri. Bechu Kurian Thomas takes the view that it is enough even in a criminal case, if circumstances are proved by the test of balance of probabilities as in a civil case. The doctrine of benefit of doubt, according to them, has no application whatsoever when the criminal court considers whether circumstances are proved or not. From this, they sail to the conclusion that it is enough, even in a criminal trial if the circumstances are proved satisfactorily as in a civil case, by the test of balance of probabilities. It is their contention that the position has been well laid down by the decision in M.G. Agarwal (supra). That decision of the Constitution Bench, according to them, concludes the issue. That decision has stood the test of time. The validity of the proposition has not been doubted or questioned by any subsequent decision of the Supreme Court. Courts now have got to implicitly follow the dictum in M.G. Agarwal (supra) which, according to Sri. Bechu Kurian Thomas, lays down conclusively that the circumstances need not be proved beyond doubt and need only be proved by the test of balance of probabilities. It is, in this context, that the controversy has arisen before us.

7. We will now go to the most fundamental rule of appreciation of evidence in India. Section 3 of the Evidence Act occupies the field. Under Section 3, the expressions "proved", "disproved" and "not proved" are-defined. This is the bible of a court of facts in India. We shall extract the definition of the expressions "proved", "disproved" and "not proved" below:

"Proved".- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. **"Disproved"**.- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. **"Not proved"**.- A fact is said not to be proved when it is neither proved nor disproved."

(emphasis supplied)

8. Both schools are in agreement that Section 3 must be considered by any court in India before it answers the crucial question, after appreciation of evidence, whether a fact has been proved or not. Both agree that the definition of the expression "proved" is to apply to all trials - whether civil or criminal. The definition of the expression guides and controls appreciation of evidence in both civil trials and criminal trials. To ascertain whether a fact has been proved, disproved or not proved, Section 3 offers the real guideline.

9. We shall briefly refer to the details of the definition. It is sufficient if we consider the definition of the expression "proved". The other two definitions follow the definition of the expression "proved". It mandates that the court must consider the matters before it. It is not only the evidence or pleadings that have to be considered. The court has to consider all matters before it.

10. After considering the matters before it, two consequences may follow. The court may:

(i) either believe that the fact exists or(ii) consider its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists.

11. There is a controversy as to whether this represents two levels of satisfaction or whether the latter explains the former. The question has been adverted to in **Jose Vs. State of Kerala, 2010 (2) KLT 163** rendered by another Division Bench of which one of us was a member. It has been held that the section theoretically contemplates two levels of satisfaction. The consideration of matters before it must induce in the mind of the court either the satisfaction that it can believe the fact to exist or that it can, adopting the standards of a prudent man, consider its existence so probable as to proceed on the supposition that the fact exists.

12. The use of the conjunction "either or", according to us, is eloquent. Surplusage on the part of the legislature has to be avoided unless unavoidable. If it were to be held that the latter part only explains the former part, one fails to understand why the expression "proved" could not have been simply defined as follows:

"a fact is said to be proved when after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

13. We should also note that Section 3 has occupied the field from 1872 and no part of the definition has so far been held to be an unnecessary surplusage by any court.

14. Actually that controversy is of no crucial consequence as it makes no difference even if the two parts are taken to be alternatives or the latter is held to be explanatory of the former. We find no reason to disagree with the view earlier taken in Jose (supra) that they represent two distinct levels of satisfaction.

15. This is not to say that there is no overlapping at all. Both parts of the definition must substantially cover the same area. The Judge must also be a prudent person and before he believes a fact to exist or not to exist, he would certainly have considered the matters before him as a prudent person. It appears to us that the legislature obviously wanted to recognize that the trained, experienced and qualified Judge can safely be attributed with something more than the mere faculties of a prudent person. To accommodate that additional faculty of the Judge of his trained intuitions, (which every Judge is assumed or deemed to possess), it appears, that the two levels of satisfaction are specifically recognized in the expression "proved" and "disproved" in Section 3 of the Evidence Act.

16. It is now well settled that though the definition of the expression "proved", is the same in Section 3 for both civil and criminal trials, the law unquestionably and indisputably demands that there must be proof beyond doubt in a criminal case; whereas proof by the test of balance of probabilities is sufficient in a civil trial. On this aspect also there is no question or dispute at all. Both schools of thought accept that in a criminal case there must be proof beyond doubt; whereas in a civil case proof by the test of balance of probabilities is sufficient.

17. How can this distinction in the matter of proof be justified in view of the identical language used in Section 3 of the Evidence Act. Sri. S. Rajeev contends that the definition in Section 3 accommodates this difference in approach in a civil

case and in a criminal case. A prudent person insists on superior (higher) quality of evidence considering the nature of the consequences. In a criminal trial the consequence of a finding of fact has a reflection/bearing on the life and liberty of an individual which is recognized as sacrosanct in all refined systems of law. Considering the nature of the consequences that may flow from a finding of fact a prudent person (and consequently a court) justifiably insists on a higher degree of proof in a criminal trial. In a civil case such higher degree of proof may/need not be insisted considering the nature of consequences that are likely to follow.

18. Sri. Bechu Kurian Thomas, on the other hand, contends that Section 3 of the Evidence Act does not admit any distinction between proof in a civil case and in a criminal case. Identical standards must apply both in a civil case and in a criminal case considering the language of the definition. The difference in the nature of proof exists not because the definition affords elasticity but merely because binding precedents of the English courts earlier, and the Indian courts subsequently, demand such higher degree of proof i.e., proof beyond reasonable doubt in a criminal case. In short the argument is that this insistence is not a consequence of the definition of the expression "proved" in Section 3; but it is only reverence to the binding precedents that has led the courts to insist on such higher degree of proof in a criminal case.

19. Sri. Bechu Kurian Thomas argues that in 1872 when Sir James Stephen drafted the Indian Evidence Act he did not contemplate any distinction between proof in a civil trial and proof in a criminal trial and that is why the definition does not separately provide for proof in a civil case and in a criminal case. From this it is argued that Section 3 does not admit any different standards in a civil trial and in a criminal trial and the distinction which has admittedly come to stay must be attributed solely to binding precedents of superior courts.

20. We are unable to persuade ourselves to accept this contention of Sri. Bechu Kurian Thomas. Before Article 20 and 21 of the Constitution came into existence, before the universal declaration of human rights was adopted by mankind and even before the magna carta was signed, all refined civilizations had accepted that proof beyond reasonable doubt ought to be insisted in a criminal trial before a

person is deprived of his life, and liberty. It would, according to us, be impermissible to assume that insistence beyond reasonable doubt in a criminal trial is the exclusive prerogative or the product of the Anglo Saxon system of law. That insistence is of the refined conscience of every human being at whatever point of time or geography he existed on the planet.

21. Sri. S. Rajeev quotes from "India of Vedic Kalpasutras" by Ram Gopal page 201 to contend that even under the ancient system of administration of criminal justice, the benefit of doubt was always given to the accused. So Apastamba laid down that "the king should not punish any person in case of doubt" (see page 201 - Note 57 - Na cha sandehe dandam kuriat).

22. We are dealing with a principle recognized by the civilized man all through history. It mandates that in a criminal trial, before a person is deprived of life or liberty, there must be insistence on proof beyond doubt. This higher degree of proof is insisted from time immemorial. Even prior to the Indian Evidence Act of 1872, the common law of England had recognized the duty of the court to insist on proof beyond doubt in a criminal trial. Even before Sir James Stephen started drafting the Indian Evidence Act, that principle of insistence on higher degree of proof in a criminal trial, had come to be well accepted and entrenched in the Anglo Saxon law as also other refined systems.

23. We deem it absolutely safe and easy to assume that Sir James Stephen, the eminent jurist of the 19th century did know that the definition of the expression "proved" in its application to criminal trial must insist on proof beyond doubt. It would hence be idle, according to us, to assume that Section 3 of the Evidence Act was drafted without perceiving the need for proof beyond doubt in a criminal case as distinguished from proof by balance of probabilities in a civil case. The English law in 1872 itself demanded proof beyond reasonable doubt in a criminal case. When the expression "proved" was defined in the Act, it is only reasonable to assume that the definition was so drafted as to accommodate this insistence on higher degree of proof in a criminal trial. It would be totally unrealistic to assume contra. It is unnecessary to trace the history in theology of the concept of benefit of reasonable doubt. The Judges and Jurors were searching for a valid defence to be

urged before the Creator on the date of final judgment. Theology assured them that if they were satisfied beyond reasonable doubt of the culpability of the indictees, they will have the approval of the Creator for extinguishing the gift of life given by the Lord to the indictee. It was that doctrine, enunciated to protect the professional Judges and Jurors that ultimately came to the protection of the indictee in the administration of criminal justice. (See *The Origins of Reasonable Doubt - Theological Roots of the Criminal Trial* James Q. Whitman).

24. All we intend to note is that Section 3 of the Evidence Act is elastic enough to include the higher degree of proof that is precedentially demanded in a criminal trial. That insistence is not alien to the definition of the expression "proved" in Section 3. Section 3 offers elasticity to justify insistence on higher degree of proof in a criminal trial. Proof beyond reasonable doubt in a criminal trial and proof by the test of balance of probabilities in a civil trial are both justified by the language of Section 3. To us, it appears to be idle and even puerile to assume that any judicial precedent, enunciated originally or followed subsequently, can be understood divorced of the statutory context. Judicial precedents are aids to interpretation. No principle could ever be laid down by any precedent which is inconsistent with the language used in the statutory instrument it appears to be, easy to assume. Judicial interpretation has always got to be harmonized with the language of the statutory instrument. Even in a constitutional republic, where courts have the power of judicial review of statutory instruments, ordinarily and normally a judicial precedent helps to understand a statutory provision. In that view of the matter, it is difficult to assume that the doctrine of benefit of doubt in criminal cases is a precedential importation unjustified by the legislative language. We concur with and repeat the observations in paragraph 85 of Jose (supra) which we extract below:

"85. Human nature being what it is and response of a prudent person being what it is, he may certainly insist on a higher degree of proof in a criminal indictment. In this context it may be possible to note that though it is not strictly necessary going by the definition, a prudent person is likely to insist on a higher standard of proof in a criminal indictment to hold that the fact is proved. Here comes the concept of benefit of doubt. A benefit which may not be readily conceded in a civil case may

be conceded in a criminal case by a court adopting the standards of a prudent person considering the graver nature of the consequences to follow ie. deprivation of life and liberty. It is in this context that courts have always held that the degree and extent of proof required in a criminal case is higher. We make it clear that the difference is only regarding the degree and not species. The latter part of the definition of 'proved' and 'disproved' in Section 3 inherently accepts that there can be insistence on a higher degree of proof in a criminal case. This concept inheres in the definition as the standard to be adopted is that of a prudent person and every prudent person is likely to insist on a higher degree of proof considering the graver consequences to follow. The higher standard in a criminal case is inbuilt in and is justified by the definition itself. The latter half of the definition inheres in itself the elasticity which justifies insistence on higher degree of proof in a criminal case. That is what a prudent person would do and the latter half of the definition permits adoption of the prudent man's standards. We repeat that the distinction is one only in the degree and extent of probabilities and is not a different satisfaction in species. The law permits by definition of Section 3 (the latter part) that the court can insist on higher degree of proof in a criminal trial as any prudent person would insist. This and this alone is the justification for the insistence by courts on a higher degree of proof in a criminal indictment."

25. Under Section 3 of the Evidence Act balance of probabilities is most crucial. The proof in a criminal case and proof in a civil case are both decided on the test of probabilities. The adjudicator has no magic wand with him to resolve factual controversies. He employs the faculty of reason, logic and commonsense. He evaluates matters before him. He considers human probabilities to decide whether facts are 'proved', 'disproved' or 'not proved' in every case. A higher degree of probabilities is insisted by him in a criminal trial. This is the only difference. This difference, we repeat, is one only of degree and not of species. When it comes to a criminal trial, the court as a prudent mind insists on a higher degree of probabilities. Both in a civil trial and in a criminal trial proof of a fact is determined by the test of probabilities. A higher degree of probability beyond doubt, is insisted in a criminal trial; whereas the test of balance of probabilities is employed in a civil trial.

26. We may hasten to observe that in the criminal trial there is no magical insistence on absolute certainty. Absolute certainty remains in the realm of fiction and in human affairs such absolute certainty may not be capable of achievement. It has often been repeated that in a criminal trial proof does not have to measure up to the concept of absolute certainty; it is enough if reasonable human certainty is achieved.

27. In this context Sri. S. Rajeev brings to our attention the observations of Lord Denning in **Bater Vs. Bater, 1950 All England Law Reports 458** Vol.2. Lord Denning in that decision considered the expression beyond reasonable doubt and the different levels of satisfaction insisted by the courts as prudent men for the proof of facts under various circumstances. We think that it will be appropriate to extract below the entire relevant portion for the purpose of clearer understanding:

"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt but there may be degrees of proof within that standard. **Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.** So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. **The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.** Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter. I do not think the matter can be better put than SIR WILLIAM SCOTT put it in **Loveden Vs. Loveden** (3) (2 Hag. Con. 3):"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion "The degree of probability which a reasonable and just man would require to come to a conclusion - and likewise the degree of doubt which

would prevent him from coming to it - depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be and if he was left in real and substantial doubt on the particular matter, he would hold the charge not to be established. He would not be satisfied about it. What is a real and substantial doubt? It is only another way of saying a reasonable doubt, and a "reasonable doubt" is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. So the phrase "reasonable doubt" gets one no further. It does not say that the degree of probability must be as high as ninety-nine per cent, or as low as fifty-one per cent. **The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter.** In some cases fifty-one per cent, would be enough, but not in others. When this is realised, the phrase "reasonable doubt" can be used just as aptly in a civil case or a divorce case as in a criminal case, and, indeed, it was so used by BUCKNILL, L.J., in **Davis Vs. Davis (2)** and **Gower Vs. Gower (1)**. **The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal courts which would not be so in the civil courts."**

(emphasis supplied)

28. We have taken pains to extract the entire relevant portion in our anxiety to show that insistence on a higher degree of proof in a criminal trial is absolutely justified by the definition of the expression "proved" in Section 3 which incorporates the response of a prudent man into the definition. The concept of proof beyond doubt inheres in the plain and simple language employed by the legislature in Section 3.

29. We must hasten to observe that 'proof, 'proof beyond doubt' and 'proof beyond reasonable doubt' are only different expressions for conveying the idea of the need of a higher degree of probability in a criminal trial. Proof and proof beyond doubt are virtually the same as it cannot be held that a fact is proved if a court has a real doubt about its existence still surviving in its mind. In that event the fact will have to be held to be not proved. In the line AD, which has been referred to in Jose

(supra), the case would then fall within BC and certainly not within AB (which represents proved) or within CD which represents disproved. A doubt which is not reasonable cannot be reckoned as a doubt at all and therefore doubt and reasonable doubt appear to be synonymous. All that we intend to take note of is that the expression "proof beyond reasonable doubt" only insists that a higher degree of satisfaction on probabilities can and ought to be insisted by the criminal court considering the consequences of an adverse finding in a criminal trial.³⁰ It will be apposite to refer to paragraph 5.25 of the Report of the Committee on Reforms of Criminal Justice System, Volume-I dated March, 2003 which considers the historical background of the principle of "proof beyond reasonable doubt". We extract the same below:

"5.25. The principle "proof beyond reasonable doubt" was evolved in the context of the system of jury trial in the UK. The verdict on the guilt of the accused was the responsibility of the jury. The jury consisted of ordinary citizens in the locality. As they are not trained Judges they may jump to conclusions without due care and concern for the rights of the accused. Therefore standard of "proof beyond reasonable doubt" appears to have been evolved for the guidance of the jury. That principle which was originally meant for the guidance of the jury is being followed by all the courts of the countries which follow common law."³¹ The geometric representation accepted in Jose (supra) is reiterated by us: A-----B1--
B-----C-----D
Note: AD - represents the range of the level of satisfaction in the mind of the court after considering the matters before it. A - The point of deemed absolute certainty of existence of a fact B - The point of deemed absolute certainty of non-existence of a fact AB - The range of satisfaction answering the definition of proved in Section 3. CD - The range of of satisfaction answering the definition of disproved in Sec.3. BC - The range of satisfaction answering the definition of not proved in Section 3. B1B - The narrow range of satisfaction, which ordinarily falls within the definition of 'proved' but in which considering the consequences the court may concede the benefit of doubt to an indicttee in a criminal case.

32. If the definition of the expression proved in Section 3 would cover and justify the insistence on a higher degree of proof in criminal cases, we now have to

consider whether Section 3 can be limited in its operation only to inferential facts. That is the contention laboriously advanced by Sri. Bechu Kurian Thomas. According to him, proof beyond reasonable doubt which is imported initially by precedents in England, and followed later in India, is applicable only to inferential facts and not to primary or basic facts or circumstances.

33. Primary fact as distinguished from ultimate fact is not specifically adverted to in the scheme of the Indian Evidence Act. Black's Law Dictionary defines the expression primary/basic fact as one which is capable of proof by direct evidence. Ultimate fact is the factum probandum which flows from the proof of primary facts.

34. We look at the language of the expression "proved" in Section 3. It refers only to the proof of a fact. There may be facts in issue and relevant facts. The definition in Section 3 must certainly apply to facts in issue and relevant facts. It is impossible to spell out from the language of Section 3 that the definition will apply only to primary or basic facts and not to inferential facts. Such an approach appears to be impermissible going by the language in Section 3. There is, going by the statutory definition, no separate definition for the expression proved for primary or basic facts and inferential facts. All will have to satisfy the same definition in Section 3. The argument that proved beyond doubt can be insisted only in respect of inferential facts is found to be totally unjustified by the language of Section 3. Section 3 mandates that all facts must be proved or insisted by that provision.

35. In logic and rationality also, the argument does not appear to be well founded. It appears to be an elementary proposition of logic that one cannot be satisfied beyond reasonable doubt of the truth of an inference, if such inference is drawn from facts about the existence of which a conclusion beyond doubt has not already been reached. The superstructure cannot be stronger or different essentially than the foundation. If the foundation is built on facts not proved beyond doubt it would be idle to assume that the ultimate conclusion of inferential facts can pass the superior test of "proved beyond reasonable doubt". In that view of the matter also, we feel that the very proposition canvassed does not rhyme well with reason, logic and commonsense. It appears to us to be a syllogism to conclude that an

inferential conclusion beyond doubt can be reached on the basis of primary and basic facts proved not beyond doubt. In that view of the matter also we are not persuaded to accept the contention of Sri. Bechu Kurian Thomas.

36. Sri. Bechu Kurian Thomas heavily relies on the decision in M.G. Agarwal (supra). He particularly relies on the observations in paragraph 18 of the said judgment. We extract the relevant portion below:

"It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons' conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If, the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. **But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Courts has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt.** The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved; the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the evidence in the present case has to be appreciated."

(emphasis supplied)

37. The arguments with the help of the above observations go like this. The theory of benefit of doubt applies wherever a fact is to be proved beyond doubt. In a case resting on circumstantial evidence, the circumstances have to be proved. Later, the circumstances have to be considered to decide whether the inferential

conclusion of guilt is established beyond doubt. The passage in M.G. Agarwal (supra) extracted above lays down that the theory of benefit of doubt applies only at the latter stage. Therefore at the preliminary stage of establishment of primary/basic facts the doctrine of benefit of doubt has no application. Since it is held that the doctrine of benefit of doubt has no application at that stage, the primary/basic fact need not be proved beyond doubt. The primary/basic fact need only be proved in the ordinary way. The ordinary way of proof is stipulated in Section 3. Section 3 applies identically to proof of facts in civil cases as well as criminal cases. Therefore in a criminal trial resting on circumstantial evidence circumstances need be proved in the ordinary way, meaning thereby in the manner in which facts are proved in a civil case i.e., by the test of balance of probabilities. Therefore the circumstances (i.e., primary or basic facts) need be proved only as in a civil case. But the inferential conclusions must be established beyond doubt. This obviously is the argument that is advanced with the help of the above observations.

38. We have read and re-read the above observations in M.G. Agarwal (supra). We are unable to agree that the learned Judges of the Constitution Bench had occasion in that case to consider whether the primary/basic facts or circumstances relied upon by the prosecution need be proved beyond doubt or merely by the test of balance of probabilities. That question was not raised or considered in that decision. The said question did not arise for consideration in that case as can be seen clearly from the discussion of facts to which we shall later advert to. According to us, it would be imprudent to jump to the conclusion that the above observations of the Supreme Court had obliterated or abandoned the insistence on proof of all facts beyond doubt in a criminal case. By the above observations, the well entrenched position of law that all facts ought to be proved beyond doubt in a criminal case to justify a conclusion beyond doubt on the inferential question of guilt is not given up or diluted by the Supreme Court. That position of law appears to us to be too basic and non-negotiable in the administration of criminal justice in this country. Lot of unlearning of fundamentals that have come to stay in our system, will have to be indulged in for us to assume that circumstances in a criminal trial need not be proved beyond doubt and only the inferential facts need be proved beyond doubt in such criminal trial. The ordinary way contemplated in

M.G. Agarwal (supra) does itself admit the traditional distinction between proof in a civil case and in a criminal case which has come to stay in our system. The ordinary way referred to in paragraph 18 does not, according to us, do away with the fundamental requirement of proof on a higher degree of probability of all facts in a criminal case.

39. We wanted Sri. Bechu Kurian Thomas to point out to us any previous decision in which it has been held or even suggested that circumstances need not be proved beyond doubt in a criminal case before reliance is placed on such circumstances to come to ultimate inferential conclusion beyond doubt about the guilt. No specific precedent laying down such a proposition has been brought to our notice. Such a proposition appears to be unjustifiable, according to us, as it is now well established that every person has a constitutional fundamental right in India (recognized in international law as a human right) to insist on proof beyond reasonable doubt before he is deprived of his life and liberty. Such an inference that circumstances in a criminal trial need not be proved beyond doubt, cannot lightly be assumed. Unless compelling and inescapable indications are there in any binding precedent, we must be slow to accept such an extreme proposition of law. An approach stultifying and frustrating fundamental principles of criminal law assiduously built up over generations cannot be readily accepted unless compelling indications are there. To accept the proposition that the circumstances need be proved only by the test of balance of probabilities while insisting that the inferential conclusion of guilt must be established beyond doubt, a lot of unlearning of the first principles will have to be resorted. The position appears to be too well settled and fundamental in criminal law that the circumstances have to be established beyond doubt and from circumstances so established the safe inference of guilt beyond doubt must also be possible. At both levels proof beyond doubt must zealously be insisted, we hold.

40. What exactly did their Lordships intend to convey by the observations extracted above in the said paragraph 18. This question will certainly have to be answered by us. For this purpose, we wanted the counsel to take us through the entire fact scenario in M.G. Agarwal (supra). That was a case where three accused persons were found guilty, convicted and sentenced. They were found

guilty of conspiracy. As against A2 and A3 direct evidence was available. As against A1 only circumstantial evidence was available. He (A1) was an Income Tax Officer and A2 and A3 were lower officials acting under him. It was contended by the prosecution that they were conspirators and the conspirators had allegedly, in furtherance of their conspiracy, siphoned out amounts from the public exchequer by issue of unjustified refund orders. The trial court acquitted A1. The High Court reversed the acquittal and convicted them. While considering the challenge against the conviction of A1 by the High Court, the above observations were made in paragraph 18.

41. Before jumping to a conclusion that M.G. Agarwal (*supra*) dispenses with the requirement of proof beyond doubt of circumstances relied on by the prosecution in a case resting on circumstantial evidence we have to consider the precise fact scenario which came up for consideration in that case.

42. A reading of paragraphs, 46, 47, 48, 49 and 50 reveal the circumstances that were relied on by the learned Judges. Paragraph 46 starts with the statement that the learned Judges of the Supreme Court were recapitulating the circumstances relied on. Earlier in paragraphs 27 and 28 of the judgment their Lordships had dealt with the explanations for the proved circumstances offered by the appellant/A1. He had at one stage taken up the contention that A3, a subordinate of his, must have fabricated all the relevant papers supporting the claim for refund made by the assessee and the only fault of A1, if any, was that he did not discover that the supporting papers in the files were documents fabricated by the co-accused. That explanation if accepted may have taken away the incriminatory relevance of some of the circumstances relied upon. The learned Judges did not accept the contention that A1 was the victim of the misdeeds of A3.

43. In paragraph 28 of the judgment the learned Judges of the Constitution Bench considered the substantially altered plea before the High Court that A1 could at worst be held to be guilty only of negligence. That plea if accepted would have taken away the incriminatory relevance of some other circumstances relied on by the prosecution. That defence was also not ultimately accepted by the learned Judges. While discussing the second circumstance in paragraph 47 their

Lordships noted that theoretically it was possible to conceive of such explanation offered by the appellant/A1.

44. It is in this fact scenario that the above observations appeared in paragraph 18. What we particularly note is that in M.G. Agarwal (supra) the question whether the primary/basic fact/circumstance need be proved beyond doubt or not did not specifically arise for consideration. We have gone through the length and breadth of the decision. The constitution Bench was not called upon to consider, and did not consider, whether the circumstances relied upon (which, according to us, are referred to as primary or basic facts) ought to be proved beyond doubt or whether they need be proved only by the test of balance of probabilities as in a civil case. We note specifically and emphatically that the said question did not arise for consideration before the Constitution Bench. That conclusion is inescapable if we carefully go through the fact scenario in the said case, the nature of the contentions raised, the nature of the contentions considered as also the conclusions reached.

45. The learned Judges of the Constitution Bench, according to us, were concerned with a totally different question. Each circumstance/link proved may lead to varied and different conclusions. Some of such conclusions may even rhyme well with the innocence of the accused. While deciding whether the circumstance (i.e., the primary or basic fact) is proved or not, the doctrine of benefit of doubt can have no application. What was evidently meant, according to us, was that notwithstanding the fact that a proved circumstance may lead to different and varied conclusions, some of which may even be consistent with the innocence of the accused, that circumstance cannot be eschewed from consideration. Merely because such conclusion in favour of the accused may also be possible on the basis of that individual circumstance taken in isolation, that circumstance (primary/basic fact) cannot be held to be not proved. The learned Judges were evidently speaking of the application of the doctrine of benefit of doubt which arises for consideration at the second stage of consideration after all the circumstances are proved satisfactorily. The efficacy or availability of a circumstance against an accused is not lost merely because that circumstance by itself may suggest or lead to various conclusions including the innocence of the

accused. As we understand the observations in paragraph 18, all that has been intended to be laid down is that every circumstance must be proved in the ordinary way. That ordinary way according to us admits the difference in the standard of proof in a civil trial and in a criminal trial. Such circumstance in a criminal trial has to be proved beyond doubt. That is the ordinary way of proof. Section 3 itself takes in the different standards of proof applicable in a civil case and in a criminal case. **Bater Vs. Bater (supra)** does also take note of the difference in the nature of proof of facts to be insisted considering the nature of consequences. The mere fact that the circumstance so proved by itself may lead to different conclusions including a conclusion in favour of the accused does not justify a criminal court rejecting that circumstance or not considering that circumstance. While deciding whether a circumstance has been proved beyond doubt, it is impermissible for the court to conclude that the circumstance has not been proved merely because that circumstance taken by itself may not lead to a safe inference of guilt. That proved circumstance is not to be squandered at that stage solely for the reason that a conclusion in favour of the indictee may be possible if that circumstance by itself were taken into consideration. This, according to us, is all that was intended to be laid down by the passage extracted in paragraph 18.

46. Argument by analogy may be uninspiring. We hate to indulge in the same. But to explain our understanding of the dictum we are constrained to resort to the same. Assume that in a murder case there are five circumstances.

A. Motive/strain in the relationship. B. That the accused and the deceased had quarreled a little prior to the incident. C. That the accused was seen running away from the room where the deceased was lying with injuries. D. Dying declaration made by the deceased implicating the accused. E. Extrajudicial confession by the accused.

47. Circumstances A and B may not by themselves be conclusive on the question of guilt even if established convincingly. Conclusions consistent with innocence of the accused may be possible even if circumstances A and B are proved convincingly. Even with such motive, murder need not be committed. After initial quarrel they could have separated without further incidents. At the stage of

ascertaining circumstances, circumstances A and B cannot be rejected (or held to be not proved) on the ground that those circumstances are not inconsistent with the innocence of the accused. That a circumstance by itself is not incompatible with the innocence of the accused is irrelevant when one considers whether that circumstance is proved. While considering whether the individual circumstance is proved, the possibility that the said circumstance is by itself not inconsistent with the innocence of the accused is irrelevant. That circumstance (which must be proved beyond doubt) is certainly one circumstance that can be taken into consideration while considering the inferential conclusions, notwithstanding the fact that the said circumstance may not be conclusive by itself on the question of guilt. According to us, this alone is intended to be conveyed by the observations in paragraph 18 of M.G. Agarwal (supra) extracted above.

48. It is true that the M.G. Agarwal (supra) has not been doubted or disagreed with during the past five decades. But all these cannot persuade us to conclude that the observations in paragraph 18 dispense with the fundamental rule of administration of criminal justice in our country that in a criminal trial all facts have to be proved beyond doubt. We are tempted to agree with the observation that the judgments are not bible for every line to be venerated. Context in which the observations appear is of paramount importance. Judgments cannot be read as legislative instruments. When we are convinced that the precise question as to whether every circumstance in a criminal trial need be proved beyond doubt and whether it is sufficient to prove such circumstance on the test of balance of probabilities as in a civil case, did not arise for consideration in the facts of M.G. Agarwal (supra), we are unable to agree that such a proposition of law was laid down or intended to be laid down by the Supreme Court by the said observations.

49. We pointedly requested counsel including Sri. Bechu Kurian Thomas to explain whether M.G. Agarwal (supra) in the sense in which it has been canvassed before us has been followed by any other decision of the Supreme Court or other High Courts.

50. Sri. S. Rajeev has placed before us the details of as many as 32 cases in which reference is made to M.G. Agarwal (supra) by the subsequent decisions of

the Supreme Court. The Constitution Bench in M.G. Agarwal (supra) was primarily concerned with the principles that ought to be followed by a court while considering appeals against acquittals. The law on that aspect is laid down in paragraph 17 of M.G. Agarwal (supra). The learned counsel Sri. S. Rajeev points out that in as many as 27 subsequent decisions of the Supreme Court M.G. Agarwal (supra) has been specifically referred to only for relying on the principle laid down in paragraph 17 regarding the jurisdiction of the appellate court in an appeal against acquittal. In 5 decisions which we extract below:

1. Abdul Ghani Vs. State of U.P., AIR 1973 SC 2640

2. Sharad Biridhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622

3. Kanhai Mishra alias Kanhaiya Misar Vs. State of Bihar, AIR 2001 SC 1113

4. Balu Sonba Shinde Vs. State of Maharashtra, AIR 2002 SC 3137

5. Alamgir Vs. State (NCT, Delhi), AIR 2003 SC 282

alone this decision of the Constitution Bench has been referred while discussing circumstantial evidence. In not one of those decisions has M.G. Agarwal (supra) been understood or followed by the Supreme Court in support of the proposition that circumstances in a criminal trial resting on circumstantial evidence need not be proved beyond doubt and need be proved only by the test of balance of probabilities. Our attention has been drawn to some decisions of the Supreme Court in which without specifically referring to M.G. Agarwal (supra) the passage in paragraph 18 has been quoted by the learned Judges. In particular, our attention has been drawn to:

(1) Kishore Chand Vs. State of HP., AIR 1990 SC 2140

(2) G. Parshwanath Vs. State of Karnataka, AIR 2010 SC 2914

None of these decisions also, we do note, had specifically considered the question whether M.G. Agarwal (supra) dispenses with the requirement of proof of circumstances in a criminal trial resting on circumstantial evidence beyond doubt and whether it is sufficient to prove the same by test of preponderance of

probabilities as in a civil case. The observations in the **State (NCT of Delhi) Vs. Nanjot Sandhu, AIR 2005 SC 3820, Liyakat Vs. State of Uttaranchal, AIR 2008 SC 1537** and **Venketasan Vs. State of Tamil Nadu, AIR 2008 SC 2369** appear to have taken the contra view. Long after M. G. Agarwal (supra) a two Judge Bench of the Supreme Court has taken the view in **Mahmood Vs. State of U.P., AIR 1976 SC 69** that the circumstances must be established by unimpeachable evidence beyond doubt. We extract paragraph-9 of the said decision below:

"9. It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis there for must be firmly satisfied- (a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt:(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him."(emphasis supplied)

51. Long earlier a three Judge Bench of the Supreme Court in **Hanumant Vs. State of M.P., AIR 1952 SC 343** which is reckoned as a classical decision on the point had referred to the requirement of proof in a case resting on circumstantial evidence as follows:

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

(emphasis supplied)

52. We find yet another incongruity in the argument advanced by Sri. Bechu Kurian Thomas. If the view canvassed with the help of the observations in M.G. Agarwal (supra) were accepted that primary/basic facts need not be proved beyond doubt, all cases which do not rest on circumstantial evidence and rely on direct evidence (or at least substantial portion of such cases) would go out of the sweep of the doctrine of proof beyond reasonable doubt and benefit of doubt would virtually be not available to cases of direct evidence which rest primarily on proof of direct/primary/basic facts. That in turn would lead to the consequence that in the matter of appreciation of oral evidence of an eye witness, there can be no place for benefit of doubt. The argument that even in a direct evidence case benefit of doubt would operate only in the domain of inferential conclusions does not commend itself for our acceptance. That would be re-writing the criminal law in this country, we feel.

53. To sum up, according to us, M.G. Agarwal (supra) does not lay down the extreme proposition that in a criminal trial resting entirely on circumstantial evidence the circumstances need not be proved beyond doubt. It does not lay down that the circumstances need be proved only by the test of balance of probabilities as in a civil case. M.G. Agarwal (supra) does not, according to us, obliterate the distinction in the burden of proof in civil trials and criminal trials regarding proof of circumstances/primary/basic facts. We do not accept that an inference beyond doubt of culpability can be built on facts/ circumstances not proved beyond doubt. The Constitution Bench did not hold so. Their Lordships did not intend to lay down such a proposition, it appears to us. They did not even consider the acceptability of such a proposition. To hold contra, according to us, would be the classic and gross indiscretion of assuming that summer has arrived even before ascertaining whether the sole bird that has come is a swallow or not. We disagree respectfully with the position of law canvassed by the protagonists of the school of thought represented by Sri. Bechu Kurian Thomas.

54. Lest, unintended inferences may follow, we may hasten to observe that proof and proof beyond reasonable doubt do not belong to different species and proof in a criminal case need only offer further and surer assurance on probabilities. As held by Lord Denning in Bater Vs Bater (supra) because of the high regard of

liberty of the individual a doubt may be regarded as reasonable in the criminal courts which would not be so in the civil courts. A higher degree of probability alone need be insisted and proof beyond doubt does not at all involve any magical insistence of absolute certainty or super human probability.

55. We may reiterate our understanding of the law thus:-

(1) The burden in a criminal trial is always on the prosecution to prove the indictment beyond doubt. This burden (unless modified by legislative interference) continues on the shoulders of the prosecution from the beginning to the end of every criminal trial, whatever be the nature of evidence direct or circumstantial and whatever be the defence taken up by the accused.(2) In a criminal case resting on circumstantial evidence the prosecution must prove all circumstances relied on by it beyond doubt by the higher standard of probabilities adopting the standards of a prudent man, which in turn is permitted and demanded by the language of the definition of the expression "proved" in Section 3.(3) The circumstances proved must be relevant, cogent and of a determinative character. The circumstances proved must constitute strong links in a chain of circumstances. While considering the strength of the links of this chain it is well to remember that the total strength of the entire chain is nothing but the strength of the weakest link in the chain.(4) Every link may itself be insufficient ipso facto to prove the guilt of the indictee conclusively. The fact that the individual circumstance (the link) may point to different and varied conclusions (including a conclusion pointing to the innocence of the indictee) is no reason for a court not to reckon the same as a relevant circumstance. The doctrine of benefit of doubt cannot be invoked to reject a circumstance proved beyond doubt for the mere reason that the said circumstance even if accepted, by itself, does not rule out the innocence of the accused.(5) The links together must constitute a strong chain which clinchingly, unerringly and convincingly points to the guilt of the indictee.(6) The strong chain of circumstances must effectively exclude and rule out all theories and hypothesis consistent with the innocence of the indictee. One circumstance taken individually may lead to various conclusions including innocence of the accused; but what is of relevance is whether the completed chain of circumstances still throws up any reasonable hypothesis of innocence of accused. In that event the accused will be

entitled to the benefit of doubt.

56. Having thus come to the above conclusions of law, we shall now proceed to consider the specific controversies raised in this appeal.

57. The sole appellant/accused challenges the verdict of guilty, conviction and sentence imposed on him under Sections 302 and 394 I.P.C. He was acquitted of the charge under Section 452 I.P.C. He faces substantive sentences of imprisonment sentences of fine and default sentences under the impugned judgment.

58. The crux of the charge against the appellant is that at 3.30 p.m on 04-11-2004 he caused the death of deceased Karthianamma, a woman aged 65 years, in the courtyard of her house by manual strangulation, smothering and by hitting her on the head with a brick (MO.7). This was allegedly done by him to facilitate the theft and forcible removal of MOs.1 and 2 gold ornaments which the deceased was wearing at the relevant time.

59. Investigation commenced with the registration of Ext.P1(a) F.I.R by PW9 on the basis of Ext.P1 F.I statement lodged by PW1, the son of the deceased. Investigation was completed and final report was filed by the Investigating Officer before the learned Magistrate. The learned Magistrate committed the case to the court of session. Consequent to the plea of not guilty raised by the appellant against the charges framed by the learned Sessions Judge, the prosecution examined PWs 1 to 20 and proved Exts.P1 to P18. MOs.1 to 68 were also marked.

60. The appellant in the course of cross examination of prosecution witnesses and later when examined under Section 313 Cr.P.C took up a defence of total denial. The appellant did not adduce any oral evidence. Ext.D1 was marked in the course of cross examination of the prosecution witnesses.

61. The learned Sessions Judge on an anxious evaluation of all the relevant inputs came to the conclusion that the prosecution has succeeded in establishing all ingredients of the offences alleged against the appellant. Accordingly the learned

Sessions Judge proceeded to pass the impugned judgment.

62. Before us, the learned counsel for the appellant Sri Blaze K. Jose and the learned Public Prosecutor have advanced arguments in this appeal. Sri Blaze argues that the circumstances have not been proved by the prosecution satisfactorily. The proved circumstances are insufficient to instill in the mind of the court a safe inference regarding the complicity of the appellant. The appellant is, in these circumstances, at any rate, entitled to the benefit of doubt. He may be acquitted, submits the learned counsel for the appellant.

63. The learned Prosecutor, on the contrary, contends that the prosecution has succeeded eminently in proving all the circumstances relied on by the prosecution. Proof beyond reasonable doubt has been offered for these circumstances relied on by the prosecution. From the proved circumstances, inference is irresistible that the appellant is guilty of the offences alleged against him. The appellant is not entitled to the benefit of any reasonable doubt. The impugned judgment may be upheld and this appeal may be dismissed, it is prayed.

64. An appellate judgment is; is intended to be read and must be read in continuation of the impugned judgment. In that view of the matter, we deem it unnecessary to renarrate the oral and documentary evidence placed before the learned Sessions Judge. Suffice it to say that, the counsel have taken us meticulously and in detail through the oral evidence of PWs 1 to 20. We have also been taken through the contents of Exts.P1 to P18 and Ext.D1. We have also been taken through the charges framed by the learned Sessions Judge against the appellant and the answers given by the appellant in the course of examination under Section 313 Cr.P.C. Since we wanted certain clarification/verification, we called for some relevant material objects from the court below and inspected the same also. We shall refer to relevant materials wherever necessary in the course of the discussions to follow.

65. We have already in the earlier part of this judgment attempted to remind ourselves of the law and reiterate the same. We shall now proceed to narrate the circumstance relied on by the prosecution. We shall then consider whether these circumstances have been proved satisfactorily. Thereupon we shall proceed to

consider whether the proved circumstances do establish the guilt of the appellant convincingly and whether he is entitled to the benefit of any reasonable doubt.

66. The prosecution wanted to rely on the following circumstances.

i) That the deceased met with a homicidal death;ii) That all indications reveal that it was a case of murder for gain ie. theft and removal of MOs.1 and 2 gold ornaments worn by her;iii) The police sniffer dog from the scene of the crime went straight to the house of the accused;iv) The accused was in dire need of money at the relevant time;v) The accused was seen in the locality near the scene of occurrence, by various persons at about, prior to and subsequent to the probable time of commission of the offence;vi) On interrogation after his arrest, MO. 17 shirt was recovered under Ext.P7 on the basis of information furnished by the appellant during his interrogation in custody;vii) That shirt MO.17 was stained with B group blood (the blood group of the deceased was also B group) and a button MO.64 which was found at the scene of the crime was found to be identical to the other button in MO.17;viii) On interrogation of the accused after his arrest, on the basis of information furnished by him, MOs.1 and 2, thieved gold ornaments of the deceased, were recovered under Ext.P8 from their place of concealment by the Investigating Officer;ix) Bite marks on the person of the deceased, as per the expert evidence, could have been caused by a person having dental formation as the appellant;x) No explanation was offered by the appellant for the circumstances proved against him.

67. We shall now proceed to consider whether the circumstances have been firmly and satisfactorily proved by prosecution.

Circumstances Nos.(i) and (ii)

68. These circumstances are considered together. We have evidence of PW7 doctor and Ext.P6 postmortem certificate issued by him in support of the prosecution version the deceased died a homicidal death. We are not adverting other pieces of evidences available in support of this theory. The evidence of PW7 and Ext.P6 clearly, unambiguously and beyond that the deceased had died on account of manual strangulation, smothering and hit with a brick on her head. We

find no reason not to concur with the conclusion of the court below that it was a homicidal death. We need only note that even the appellant/accused has raised no challenge against this aspect of the case of the prosecution. Indications are galore to suggest that there was an attempt by the deceased to resist the assault on her. The bite injury suffered by her suggests the conclusion emphatically that the miscreant, whoever he was, had caused a bite injury on the deceased (see injury No. 18 in Ext.P6).

69. MOs.1 and 2 (gold chain and ear stud) usually worn by the deceased were found missing at the scene of the crime. A sandalwood neck chain MO.5 which she was wearing at the relevant time was seen broken and both pieces were available at the scene. MOs.3 and 4 parts of the ear studs that she was wearing at the relevant time was found available at the scene of the crime. MO.64 button was also available at the scene of the crime indicating a struggle that had taken place between the deceased and the miscreant. Totality of circumstances, according to us, can convincingly and beyond doubt persuade a prudent mind to come to a safe conclusion that the deceased had met with a homicidal death in the course of an attempt to commit theft of her ornaments which she resisted and which led to the assault on her and infliction of fatal injuries leading to her death. We are satisfied that these circumstances can safely be held to be proved beyond doubt.

Circumstance No.(iii)

70. We have the evidence of PW8 dog handler and PW9 Investigating Officer to suggest that the police dog, which was brought to the scene of the occurrence and deployed to gather clues had run from the scene of the crime straight to the house of the accused. The learned counsel for the appellant argues and we agree that this cannot certainly be reckoned as a safe circumstance against the appellant which can be legally taken note of as a cognizable circumstance by the court. In **Dinesh. M. N (S.P) Vs. State of Gujarat, (2008) 5 SCC 66** the Supreme Court had considered this question in paragraphs 39 and 40. Reference was made to two earlier decisions in **Abdul Rajack Murtaja Dafedar Vs. State of Maharashtra, (1969) 2 SCC 234** and **Gade Lakshmi Mangaraju @ Ramesh Vs. State of Andra Pradesh, (2001) 6 SCC 205**. The canine faculties cannot safely

be trusted for various reasons, it was held. The basis on which the dog behaved in the manner in which did, cannot be rationally analysed or subjected to cross examination. Dependence on hearsay evidence of the dog handler was held to be untrustworthy. There is little knowledge and great uncertainty as to the precise faculties which enable police dogs to track and identify criminals, it was observed. Life and liberty of a human being should not depend on such inadequate and unconvincing canine inferences, it was held. We need not delve deeper into this aspect. It is settled, as held in Dinesh (supra) that while the services of a sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused. We therefore eschew this circumstance altogether in the attempt, to ascertain guilt of the appellant. The relevance of this circumstance lies only in the fact that it explains why the needle of suspicion was directed against the appellant. The Investigating Officer's conduct of riveting his attention on the accused and ascertaining details about him was prompted by this initial canine response, it is evident. This circumstance is relevant only to the above extent. We eschew this circumstance.

Circumstances No.(iv)

71. According to the prosecution, the appellant was in need of money. The prosecution examined PWs 17 and 18 in support of this circumstance. They tendered evidence. We do not find any reason to approach the evidence of PWs 17 and 18 with any amount of doubt suspicion or distrust. Their evidence suggests that the appellant was in need of money. He had sought financial assistance from PWs 17 and 18. He had allegedly sold one kuri which he had. He had taken money from PW17 to whom he sold the kuri. He was bound to return the amount to PW18. He had not returned the amount. In short, the appellant the evidence of PWs 17 and 18 indicates, was in need of money. Continuing our earlier discussion on the question of law it has to be noted that this circumstance by itself is insufficient to prove guilt convincingly. Many persons may be in need of money. They all do not resort to commission of murders and theft to raise such money. In that view of the matter, this circumstance is not convincing in itself. But that is not to say that this circumstance can be rejected for the reason that this circumstance may suggest several inferences, some of which do not necessarily help in

establishing the guilt. A benefit of doubt cannot be granted at this juncture and the court cannot reject or throw overboard this circumstance merely because benefit of doubt about the commission of crime can be claimed even if this circumstance is accepted in toto. The circumstance is relevant. It does not by itself convincingly establish the guilt. But that certainly is a circumstance pointing to the probability of commission of the crime of the appellant. In short, this circumstance cannot now be rejected or squandered for the reason that more than one possibility emerge even after satisfactory proof of this circumstance. This circumstance will have to be considered along with other circumstances established in the case. The cumulative effect of all these circumstances will have to be considered. We hold that this circumstance that the appellant was in need of money, has been held satisfactorily and beyond doubt.

Circumstance No. (v)

72. It is the case of the prosecution that the appellant was seen near the scene of the crime. In short, the evidence is that he was locally available. If there is other evidence to indicate that he had committed the crime, his presence in the locality is certainly one such circumstance affording assurance for the other circumstances. The relevance of this circumstance is limited to that extent only. PW10, a neighbour, who along with his father was proceeding along the road, had seen the appellant at 4 p.m coming in the opposite direction from the direction of the house of the deceased. The circumstance by itself is not convincing. M.G. Agarwal (supra) applies. The doctrine of benefit of doubt cannot hence be applied and at this juncture the circumstance cannot be thrown overboard.

73. The evidence of PW11 shows that at 2.30 p.m he had also seen the appellant. The deceased had gone to the house of PW11. While they were talking to each other, the deceased and PW11 had seen the appellant outside the house. It was about 2.30 p.m then. That spot is close to the scene of the occurrence.

74. PW13 had also seen the appellant at about 3 p.m at a spot close to the house of the deceased. In fact the evidence of PWs 10, 11 and 13 is primarily relied upon by the prosecution to show that the appellant was available near the scene of the occurrence at about the time of occurrence. It was hence possible that he could

have committed the crime. This circumstance again is not by itself convincing. It is only one circumstance which along with the other circumstances can point to the guilt of the appellant. That circumstance by itself may be capable of many other explanation. That does not mean that the doctrine of benefit of doubt can apply straightaway and conceded to the appellant while appreciating the acceptability of this circumstance. This circumstance cannot be thrown overboard for the reason that even if this circumstance is accepted in toto, the appellant will be entitled to the benefit of doubt. This circumstance is proved satisfactorily. It has got to be considered along with other circumstances to decide whether the circumstances cumulatively establish the guilt of the appellant beyond doubt and whether the circumstances together throw up any inference incompatible with such inference of guilt.

75. The evidence of PW11 is relied on by the prosecution for one more purpose. The evidence of PW11 indicates that when the deceased and PW11 were together in the house of PW11 at about 2.30 p.m and saw the appellant outside, the deceased told PW11 that the appellant had gone to the house of the deceased on that morning with enquiry as to whether coconuts were available for sale. The deceased allegedly told PW11 that she did not appreciate the looks and expressions (nottavum bhavavum) of the appellant when he so came in the morning. This is a statement of the deceased. It shows that the appellant had gone to her house on that morning. It further shows that the deceased entertained reservations and suspicions about the motivations of the appellant when he went to her house on that morning enquiring as to whether coconuts were available for sale. According to the prosecution, this indicates that the appellant with questionable motive had gone to the house of the deceased on that morning. It is the case of the prosecution that the culpable offence was schemed and contemplated in the morning itself. The statement of the deceased, of which PW11 has tendered evidence, is thus admissible under Section 32(1) of the Evidence Act inasmuch as it throws light on the circumstances of the transaction leading to the death of the deceased.

76. We extract relevant part in Section 32(1) of the Evidence Act below under which the statement of a dead person is relevant and hence admissible.

"When it relates to cause of death:- When the statement is made by a person **as to the cause of his death, or as to any of the circumstance of the transaction which resulted in the death**, in cases in which the cause of that person's death comes into question."

(emphasis supplied)

77. A controversy was there in law as to whether the statement of the deceased about the motive for commission of crime is admissible under Section 32(1) of the Evidence Act. In **Fr. Benedict Vs. State of Kerala, 1967 KLT 466** a Division Bench of this Court took the view that such evidence of motive is inadmissible. It does not come even within the sweep of the expanded expression "as to any of the circumstances of the transaction which resulted in his death", it was held. However, a later Full Bench decision of this Court in **State Vs. Ammini, 1987 (1) KLT 928 FB** has, relying on the earlier (subsequent to Fr. Benedict (supra) decision of the Supreme Court in [AIR 1984 SC 1622], taken the view that the expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "cause of his death". Motive factor available in the statement of the deceased cannot hence be discarded as a remote circumstance if it is otherwise intimately connected with the circumstance of the transaction which resulted in the death of the deceased, it was held.

78. We have no hesitation to agree that the expression "any of the circumstances of the transaction which resulted in his death" must be held to be wider in its sweep than the expression "cause of his death". We are further convinced that the assessment and response of the deceased about the conduct of the appellant on that morning, conveyed in the statement made by her on that very afternoon at 2.30 p.m to PW11 throws light on the circumstance of the transaction which resulted in the death of the deceased at about 3.30 p.m later on that very date.

79. We, therefore, find it safe to concur with the conclusion of the court below that the evidence of PWs 10, 11 and 13 can be accepted to conclude that the appellant was available at/near the scene of the crime at about the time when the offence was committed. We do further take the view that the statement of the deceased to PW11 spoken to by PW11 about the conduct of the appellant on that morning and

the response/assessment of the deceased about such conduct of the appellant can certainly be admitted under Section 32(1) and reckoned as a circumstance against the appellant. This circumstance is also thus clearly established by the prosecution.

Circumstance Nos.vi to viii

80. These circumstances are relied on as crucially important circumstances. On the basis of the suspicion aroused against the appellant he was watched. He was arrested and he was interrogated. In the course of investigation, he furnished Exts. P7(a) and P8(a) information to the Investigating Officer. On the basis of Ext.P7(a) information and as led by the appellant, the Investigating Officer proceeded to the latrine in the house of the appellant and there the appellant produced MO. 17 shirt from the place where it was kept concealed by him. It was seized under Ext.P7 by PW19. PW14 is an attester to the same.

81. Ext.P8(a) information was also furnished by the appellant to PW19. On the basis of that information and as led by the appellant, PW19 reached the spot where after removing soil the appellant took out Mos.1 and 2 from the place of concealment and handed over the same to the Investigating Officer. He seized the same under Ext.P8. PW15, the goldsmith was present to weigh and appraise Mos.1 and 2. He also spoke of recovery of MOs.1, 2 and 17 by the police on the basis of the statements of the accused. PW14 had attested Ext.P8 also.

82. We have no hesitation to agree that the oral evidence of PW19 and PW14 duly supported by the contents of the contemporaneous Exts.P7 and P8 seizure mahazars can safely be accepted. Their evidence is further supported by the evidence of PW15. The alleged inaccuracy between the contents of Ext.D1 on the one hand and Exts.P7(a) and P8(a) on the other does not in any way arouse any serious doubts in our mind about the acceptability of evidence regarding Exts.P7(a) and P8(a) and the recovery of MOs.17, 1 and 2 under Exts.P7 and P8.

83. The argument that the appellant had not in first person singular stated to PW19 that he had concealed those articles there does not appear to be too relevant now after the decision of the Full Bench in **Ajayan Vs. State of Kerala**,

2010 (2) KLT 542 Disclosure of authorship of concealment is no longer sine qua non to entitle/justify admission of information, under Section 27 of the Evidence Act. At any rate, we have convincing evidence that the appellant knew of the fact that these articles were kept concealed at the places from where they were recovered. He has significantly not offered any explanation as to how he knew of such concealment. The inference is irresistible, in the absence of better explanation, that the appellant who knew of the fact of concealment was also responsible for such concealment.

84. Recovery of MO.17 is particularly significant and relevant. It had blood stains on it. The evidence shows that the bloodstain was of B group. The other evidence in this case indicates convincingly that the deceased was of blood group B. The presence of blood stains on MO.17 shirt of the appellant is a crucially relevant circumstance and that circumstance, we note, has not been explained at all.

85. MO.64 is a button which was recovered from the scene of the crime under Ext.P2 Inquest Report. MO. 17, when it was recovered, it was noticed that a button was not available in that shirt. It was missing. The Investigating Officer therefore wanted the MO.64 button recovered from the scene to be compared by the expert with the other buttons available in MO. 17. The expert in Ext.P11 has opined that both buttons came from the same source. They were identical. We reckon this to be a crucial, formidable and vital circumstance against the appellant.

86. So far as MOs.1 and 2 are concerned, it is the case of the prosecution that those ornaments belonged to the deceased. Those ornaments were found missing when her dead body was found. The evidence of PW1, the son of the deceased as also PWs 4 and 12, the frequent acquaintances / neighbours of the deceased, confirmed that Mos.1 and 2 were ornaments that belonged to the deceased. There is not a semblance of doubt about the acceptability of the oral evidence of Pws 1, 4 and 12 that those ornaments were used by the deceased usually. The fact that Mos.2, 3 and 4 are parts of the same ear studs further enhances the value of recovery of MO.2 under Ext.P8.

87. We are, in these circumstances satisfied that these circumstances have been convincingly established by the prosecution.

Circumstance No.(ix)

88. According to the prosecution, there was bite mark on the deceased. This is evident from Ext.P6 postmortem certificate. The doctor who conducted the postmortem certificate had taken pains to preserve that bite mark. Investigator carefully and cautiously had wanted the dental configuration of the appellant to be taken. PW6 compared the bite marks on the body of the deceased with the dental configuration of the appellant taken on mould by PW5. The evidence of PW6 and Ext.P5 show that the appellant may have been responsible for the bite. Of course PW6 was careful to clarify that the said opinion cannot be reckoned as hundred percentage accurate. He would only say that the appellant could have caused the bite. An authentic assertion that the appellant alone could have caused that bite mark was not given by PW6. If such opinion were there, that would have been convincing and inescapable. But, evidence now given by PWs 5, 6 and 7 can only show that if the appellant had bitten the deceased, such bite mark was possible. This cannot be reckoned as a crucial circumstance conclusively establishing the guilt of the appellant. But this circumstance is certainly one in tandem with the case of the prosecution and can be reckoned as another circumstance along with the other circumstances proved in this case. As held in M.G. Agarwal (supra), this circumstance cannot altogether be excluded from consideration on the ground that this circumstance even if accepted cannot by itself exclude or overrule conclusions in favour of innocence of the appellant.

Circumstance No. (x)

89. The prosecution finally relies on the circumstance that the appellant has not offered any explanation. It is trite that absence of explanation for proved circumstances and even falsity of the explanation offered can be reckoned as a further circumstance relevant in the adjudication of culpability. In the instant case no specific explanation is offered for the presence of blood stains on MO. 17 shirt of the appellant. No explanation is offered about his knowledge of concealment of Mos.1 and 2 which were recovered under Ext.P8. No explanation is offered for the presence of MO.64 at the time of occurrence. The accused has only denied and disputed the recoveries.

90. We are satisfied, in these circumstances, that this circumstance has also been proved and can be reckoned as a circumstance against the appellant.

91. We have thus considered all the 10 circumstances relied on by the prosecution. What remains to be considered is whether these circumstances together are sufficient to enable a prudent mind to sail to a safe conclusion that the appellant was guilty of the murder of the deceased. Unexplained possession of gold ornaments belonging to a deceased person immediately after her death is certainly a formidable circumstance against an indictee. That it was a homicidal death is proved. That the homicide must have been for gain is convincingly indicated. The Investigating Officer was justified in entertaining doubts and suspicions about the complicity of the appellant from the earliest input available - ie. the sniffer police dog running to the house of the appellant. On verification it was found that the appellant was badly in need of money at the relevant time. It was found that he was available at or near the scene of the crime. The deceased, a 65 year old woman, was residing alone in her house though her son PW1 was residing in an adjacent house away from the house of the deceased. The deceased had entertained doubt, suspicion and reservations against the conduct of the appellant on that morning and had conveyed the same to PW11 on that very afternoon about an hour prior to the alleged time of occurrence. The deceased who used to wear costly gold ornaments Mos.1 and 2 usually was found lying dead without those ornaments. Those ornaments were recovered shortly thereafter from their place of concealment on the basis of the information furnished by the appellant. The appellant offers no explanation for his knowledge of concealment of those ornaments at such place of concealment. MO. 17 shirt belongs to the accused. It was found blood stained. It was recovered on the basis of the confession statement of the accused. The blood stain corresponds to the blood group of the deceased. There is no explanation for the presence of blood stains on MO. 17 shirt of the appellant. A button was found available at the scene of the crime and the same was recovered under Ext.P2. Expert evidence shows that that button came from MO.17 shirt. Accused has no explanation for presence of a button from MO.17 shirt at the scene of the crime. The bite mark seen on the deceased could have been (though that is not conclusive), caused by the appellant.

92. Absolute certainty is not in the realm of human attainment normally. But the above circumstances, according to us, can certainly and beyond any reasonable doubt and to the human level of attainment of safe certainty, persuade the court to come to the conclusion that the appellant is responsible for causing the fatal injuries on the deceased. We find it absolutely safe to concur with the conclusion of the court below on that crucial aspect. Appellate challenge must, in these circumstances, fail.

93. No other contentions are raised. Whoever had caused the injuries found on the person of the deceased in Ext.P6 must certainly be assumed to have intended to cause the death of the deceased. Forcible removal of Mos.1 and 2 from the possession of the deceased is also convincingly indicated by the totality of circumstances. Conviction entered against the appellant under Sections 302 and 395 is thus perfectly justified. The sentences imposed are also fair, just reasonable and modest. No appellate interference on any count is therefore warranted.

94. In the result:

a) This appeal is dismissed;b) The impugned judgment is upheld in all respects.

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