IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

WEDNESDAY, THE 16TH DAY OF DECEMBER 2020 / 25TH AGRAHAYANA, 1942

CRL.A.No.617 OF 2017

AGAINST THE ORDER/JUDGMENT IN CP 117/2012 OF JUDICIAL MAGISTRATE OF FIRST CLASS ,IRINJALAKUDA

AGAINST THE ORDER/JUDGMENT IN SC 656/2012 DATED 09-07-2015 OF ADDITIONAL SESSIONS COURT -IV, THRISSUR

CRIME NO.1943/2011 OF Irinjalakuda Police Station , Thrissur

APPELLANT/ACCUSED NO.2:

LIJO JOY @ JOSEPH
AGED 27 YEARS, ERATTAYANIKAL HOUSE,
KELANGALAM,POOTHADY VILLAGE, WAYANAD.

BY ADVS.
SRI.TONY THOMAS (INCHIPARAMBIL)
SRI.P.THOMAS GEEVERGHESE
SRI.E.S.FIROS
SMT.AMRUTHA K.P.

RESPONDENT/COMPLAINANT:

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-11-2020, THE COURT ON 16-12-2020 DELIVERED THE FOLLOWING:

JUDGMENT
Dated : 16th December, 2020

M.R.Anitha, J.

1. This appeal has been filed by the 2nd accused in S.C.656/2012 on the file of IV Additional Sessions Judge, Thrissur.
2. The case against the accused has been charge-sheeted by the Inspector of police, Coastal Security police station, Azheekkode in crime No.1943/2011 of Irinjalakuda police station.
3. Prosecution case is that on 21.11.2011, 1st accused along with the appellant/2nd accused (hereinafter be referred as 2nd accused) got acquaintance with the deceased C.R.Immanual Das during their travel in Trivandrum Express train from Tirur railway station. All of them alighted at Irinjalakuda. They hired the autorikshaw of PW2 from Kallettumkara to Irinjalakuda, Tana and reached new Al Ameen lodge (hereinafter would be referred as the 'lodge') at about 11.50 p.m. PW1 who was the employee of the lodge allotted BE, BC and BF room to deceased and accused persons

respectively. On 22.11.2011 at about 1.00 am the accused persons strangulated him to death at room No.X1/586 and robbed MO7-gold chain weighing 16.54 grams, MO6-wrist watch of golden colour, MO12-mobile phone (Nokia Express mobile phone) and brown shoe Mo2 (series)and currency note of Rs.2600/-etc.. and committed the offence punishable offence under Sec 394 and 302 r/w 34 IPC.

4. PW1 came to know about the death of the deceased only on the next day at about 6 pm while he went for checking the rooms. In the meantime in the early hours at 4.00 am both accused checked out from their respective rooms and entrusted the key with him and they informed him that the deceased is lying fully drunk. When he found that the deceased was lying motionless, he intimated the owner of the hotel, PW6, who also rushed to the room and found the deceased lying dead. Thereafter PW1 went to the police station and lodged the FIS which is marked as Ext.P1.
5. A special team was constituted by the District Police Chief,Thrissur Rural, for the investigation of this crime and the order of the District Police Chief is marked as Ext.P33. PW30 who was one of the Circle Inspectors in

the Special Investigation team along with party went to Kalpetta in search of the accused persons and they searched several hotels and finally they found the accused at 'By the Way' lodge and PW1 who accompanied the police party for identifying the accused persons, properly identified them and they were arrested at 12.15 pm on 23.11.2011. Ext.P10 is the arrest memo prepared at the time of arrest of the 2nd accused. First accused was also arrested on preparing Ext.P9 arrest memo. There he prepared Ext.P6 seizure mahazar for seizing the mobile phone found in the pocket of the 1st accused , MO8 and the mobile number is 9847796451. Thereafter from MO10 bag kept in their room, MO25 series-Rs.980/-, MO7-gold chain, MO6-watch and MO9-cigarette butts etc. were seized by describing in Ext.P7 seizure mahazar. He seized the register describing the details of the inmates and it is marked as Ext.P12 which was seized by describing in Ext.P8 seizure mahazar.

6. PW30 entrusted the accused persons and the properties with the investigating officer, PW31. In the meantime, PW31, took charge of the investigation on 23.11.2011 and prepared the inquest of the deceased

which is marked as Ext.P11. PW6 is a witness in Ext.P11. He seized MO14-office ID card, MO16-SBI ATM card, MO15-PAN card, MO17-bus pass card, MO26 comb, MO27 series socks, MO28-plastic bottle, MO21-bath towel found on the body, MO29-bath towel found in the brief case, MO24-bath towel found on the table, MO30 series- three shirts found in MO18 brief case, MO31- underwear found on the body and MO32-underwear found inside the brief case, MO33-soap, MO34- a strip of Big Fun 100 pills, MO36-lottery ticket, MO11- the plastic rope found under the cot, MO35- the reservation railway ticket from Thiruvananthapuram to Kozhikode found in MO19-purse, MO36-lottery ticket, MO37(a) loan application, MO37(b)-Pay slip, MO38 white dhothi with rose border, seen on the body, MO39-black pant etc., as per the inquest. He stated that MO11 is the plastic rope used for strangulating the deceased and MO24 is the bath towel used for gagging him and MO21 is the bath towel used for tying his hands MO37 series is the loan application and pay slip addressed to Co-operative society. MO20 is the shirt worn by the deceased. Those were also seized by describing in the inquest report.

7. He prepared Ext.P31 seizure mahasser for seizing item Nos.1 to 10 collected by the Scientific Assistant from the place of occurrence. Ext.P3 is the register kept in the lodge. MO40 and 41 yellow plastic ropes found in the room occupied by the 1st accused, have been seized by him by describing in the scene mahazar,Ext.P16. Pw29 the Grade ASI attached to Irinjalakkuda Police Station is the scribe of Ext.P11 Inquest. Ext.P16 scene mahasser is prepared by PW31.
8. PW31 seized the items received after postmortem on the body of the deceased by describing in Ext.P34 seizure mahazar. PW25 ASI, Azeekkode Coastal Police Station aided PW31 for preparing the seizure mahasser for seizing the articles collected by the scientific assailant,seizing photographs and nail clippings collected by the doctor.
9. On 24.11.2011, PW31 seized the dresses of the accused persons by describing in Ext.P2 seizure mahasser. Ext.P35 is the report filed by him adding Sec.394 and Ext.P36 is the report filed stating the name and address of the accused. Ext.P37 is the mahazar by which he seized the nail clippings and other articles of the accused persons collected by the doctor.

After arresting the 1st accused, he questioned him and recorded his disclosure statement with respect to the sale of mobile phone of the deceased, the details of which will be discussed later. He collected mobile call details of the deceased and 1st accused from the Nodal Officer. PW19 is the village officer who prepared the sketch Ext.P17 on the basis of the scene mahasser. PW21 was the revenue Superintendent attached to Irinjalakkuda Municipality during the relavant time who issued ownership certificate with respect to Door No.11/584,586,587 of New Al-Ammen Lodge to the effect that it stands in the joint ownership of four persons including Pw6 Abdul Latheef. Ext.P41 is the copy of forwarding note for sending the items to FSL PW31 questioned the witnesses and completed the investigation and filed the charge against the accused.

10. PW1 to 31 were examined and Exts.P1 to P58(b) were marked and MO1 to 41 were identified and marked from the side of the prosecution. After the closure of the prosecution evidence, accused persons were questioned under Sec.313 (1) (b) Cr.P.C. They denied the incriminating facts and circumstances put to them. DW1 examined and Exts.D1 to D7 marked from the side

of the defence. Thereafter on hearing both sides, the court below found both the accused guilty under Sec.394 and 302 r/w 34 IPC and sentenced them to undergo imprisonment for life and to pay fine of Rs.10,000/-each in default to undergo imprisonment for one year under Sec.302 r/w 34 IPC and further to undergo rigorous imprisonment for ten years each and to pay fine of Rs.10,000/-each in default to undergo imprisonment for one year each under Sec.394 r/w 34 IPC.

11. Aggrieved by the conviction and sentence passed by the court below appellants came up in appeal. Notice was issued to the respondent. The learned senior public prosecutor appeared on behalf of the respondent. Lower court records were called for. Heard both sides. The learned counsel for the appellant filed argument notes also.

12. According to the learned counsel for the accused, the guilt against the accused persons were arrived at by the court below on the basis of last seen theory, recovery of MO7 gold chain, MO6-watch belonging to the deceased from the accused persons, recovery of MO12 mobile phone, belonging to the deceased based

on the confession of 1st accused, tower location of 1st accused and the deceased, a 4 second call from the mobile phone of the 1st accused to the phone of the deceased at 00.44 morning and the forensic detection of clothe fibre of accused persons from the nail clippings of the deceased (though not completely accepted by the court below). According to the learned counsel, none of the above links could be accepted legally in view of the material discrepancies and contradictions and the court below went wrong in accepting the above pieces of evidence as connecting link of the accused with the offence.

13. There is no dispute that the death of the deceased occurred in room No.XI/586 of the lodge. PW1, the watchman attached to the lodge allotted the rooms to the deceased and two other persons. Of course, accused dispute occupation of the rooms in the lodge.

14. PW10 who was the sweeper in the lodge stated about the death of the deceased inside the lodge. PW11 is another staff of the lodge who used to attend duty occasionally.

15. The body of the deceased was forwarded for post-mortem through Pw26 CPO attached to Irinjalakuda

Police Station to Medical College Hospital, Trissur. PW23 is the doctor who conducted the autopsy and issued Ext.P20 post-mortem certificate. As per Ext.P20 the doctor noted the following neck findings :

> "Pressure abrasion 24 cm long on front and sides of neck. 5 cm below centre of chin 3 cm width transverse, 4 cm below right angle of mandible 2.5 cm width, 3cm below right ear, 2 cm width, 4cm below left angle of mandible, 2 cm width and 4cm below left ear, 1cm width. Mark was absent for 20 cm on back and sides of neck.
>
> Flap dissection of neck showed infiltration of blood underneath the ligature mark in the subcutaneous tissue. Both sternohyoid muscles showed contusion near thyroid cartilage. Thyroid cartilage found fractured at midline. The cricoid cartilage also showed fracture. Both horns of thyroid cartilage were fractured inwards with infiltration of blood. Back of neck was also dissected and was devoid of any injury."

16. Opinion as to cause of death stated by the Doctor is due to ligature strangulation. The doctor was not cross-examined also. The doctor reported the time of death was more than 18 hours and less than 72 hours before conducing the autopsy. Autopsy was conducted on 23.11.2011 commenced from 1.45 pm and concluded at 3.20 pm. Prosecution allegation is that the death was caused at 1 a.m. So in view of the clear, cogent and

unchallenged evidence of PW23 the doctor who conducted autopsy that death was due to ligature strangulation, without further discussion, the finding made by the court below that the death of the deceased was homicide can very well be upheld.

17. According to the learned counsel for the accused this is a case solely based on circumstantial evidence and the prosecution has to prove each link of circumstances pointing to the guilt of the accused without any missing link for finding the guilt against the accused.

18. The learned counsel placed reliance on Satpal v. State of Haryana (2018 ICO 495) : (AIR 2018 SC 2142) wherein it has been held that to sustain a conviction on the basis of circumstantial evidence, it is necessary that all links in the chain of circumstances must be complete leading to the only hypothesis of guilt of the accused. If there were any missing link in the chain of circumstances and the possibility of innocence cannot be ruled out, the benefit of doubt must be given by acquittal to the accused. It is also held that any recovery on the basis of confession, under Section 27 of the Evidence Act, cannot form the basis for conviction.

19. That was also a case in which prosecution banked upon last seen theory. But on going through the entire decision, it is seen that the evidence of Pws 7 and 9 in that case was that the deceased was seen going along with the appellant on a bicycle at 9 p.m on the previous evening and the deceased did not return home at night. Subsequently the bicycle was recovered on the confession of the appellant which was identified by PW7 and recovery of milk-can with the name of PW7 inscribed on it and further the fact that appellant was absconding after the incident till arrest etc. were taken as incriminating factors which complete the links in the chain of circumstances and ultimately the conviction was upheld and appeal was dismissed.

20. It is relevant in this context to quote Bodh Raj Alias Bodha & Ors. v. State of Jammu and Kashmir [AIR 2002 SC 3164] wherein the Apex Court held that circumstantial evidence can be the sole basis for conviction if all the conditions are satisfied. The conditions to be satisfied have been reiterated therein which reads as follows:

"1) The circumstances from which the conclusion of

guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established.

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

3) The circumstances should be of a conclusive nature and tendency;

4) They should exclude every possible hypothesis except the one to be proved; and

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

21. So the point to be decided is whether the prosecution could establish the chain of circumstances leading only to the hypothesis of the guilt of the accused and not any reasonable conclusion consistent with the innocence of the accused. The sequence of events attempted to be established by the prosecution can be discussed chronologically.

22. Deceased had gone to Vadakara to attend the

marriage of the daughter of PW17. PW17 deposed that deceased participated in the youngest daughter's marriage on 21.11.2011 at his house at Vadakara.

23. PW15 Sarathchandra Das an employee in VSSC and has been working as Draftsman during the relevant time, deposed that the deceased participated in the marriage of the daughter of PW17 at Vadakara. He stated to have met the deceased on the day of his arrival at Vadakara and also at railway station while returning from Vadakara and according to him, he along with other employees were in the reserved coach. The deceased was in general compartment since he has to alight at Irinjalakuda.

24. PW18 is the staff to whose house deceased intended to go after alighting at Irinjalakuda. She deposed that she had been working as Junior Personal Assistant in VSSC and the deceased was the Attender in their office. Deceased informed her that on return from Vadakara he will go to her house. Accordingly she informed her mother about the visit of the deceased. But subsequently when she contacted the mother it was informed that deceased had not been to her house.

25. PW14 is the wife of the deceased. She deposed

that deceased had been to Vadakara to attend the marriage of the daughter of PW17. According to her he had taken a suitcase with wearing apparels, ATM card, bus pass card, Rs.5000/-, mobile phone etc. Deceased told her that he would return only after going to the house of the staff at Irinjalakuda. The deceased contacted her from Vadakara in the evening. So the prosecution case that the deceased had been to Vadakara to attend the marriage of the daughter of PW17 and on return, he had a plan to alight at Irinjalakuda is proved.

26. PW2 is the autorikshaw driver cited by the prosecution to prove that the deceased travelled from the railway station to the lodge. But apart from admitting that he is an autorikshaw driver and used to go for trip from railway station to Tana, bus stand area etc., he was not prepared to admit the hiring of autorikshaw by the deceased and two others.

27. PW3 is a worker in the hospital canteen, Tana, Irinjalakuda and he was cited to prove that the accused persons had been to the canteen on 21.11.2011 after they checked in to the lodge. He was also not prepared to support the prosecution case. So his evidence also

will not help the prosecution. In short, the evidence of PW1 alone is there to prove the last seen theory brought in by the prosecution.

28. So the question is how far the evidence of PW1 could be relied on to prove that the deceased was seen last in the company of the accused persons. In this case, though both the accused were convicted and sentenced, no appeal has been filed by the 1st accused and the 2nd accused alone is now before the court challenging the verdict.

29. PW1 the watchman of the lodge stated about the allotment of rooms to deceased along with accused 1 and 2 on 21.11.2011 during night at around 12.O' clock. He stated that after alighting from the autorikshaw they enquired about a room in the lodge and accordingly he gave three single rooms BC, BE and BF and deceased wrote the address and signed the register. The register is marked as Ext.P3. Sl.No.319 in page No.46 in Ext.P3 is stated as the writing of the deceased. The relevant entry is marked as Ext.P3(a). He stated that it would reveal the allotment of three rooms, BC, BE and BF and the time is also stated at 11.50 pm on 21.11.2011 and the purpose is also stated as marriage. The phone

number of the deceased is also stated therein.

30. The learned counsel for the accused raised serious objection with regard to the entries in Ext.P3. He would contend that it would not prove that these accused persons occupied the rooms and their names did not find a place in Ext.P3. He pointed out the discrepancy with regard to the time of check in, in the register as 11.50 pm, where as in Ext.P16 scene mahazar by which Ext.P3 register was seized, the time of arrival is stated as 11.40. He would contend that in Ext.P3 register the check out time of BC and BF rooms are not mentioned, though prosecution case is that accused persons check out at 4 am. He would contend that there is a signature in Ext.P3 corresponding to the entry of the deceased. So according to him, Ext.P3 will not in any way help the prosecution to prove that the 2nd accused was present along with the 1st accused. He would also went to the extent of contending that no other persons were actually present with the deceased while he check in to the lodge and that is the reason why only one entry has been made in Ext.P3.

31. On perusing Ext.P3 register kept in the lodge, it could be seen that the corresponding entry in Sl.No.319

is marked as Ext.P3(a) dated 21.11.2011. It would also show that the name and address of the occupants is filled up as of the deceased with his mobile number and the purpose of visit is also stated as marriage. The number of persons is shown as total three (1+1+1). The time of arrival is stated as 11.50 pm .But in Ext.P16, the scene mahazar, the time of arrival is stated as 11.40 pm. That obviously would only be a mistake since Ext.P3 clearly shows that the time of arrival is 11.50.

32. The contention of the learned counsel that there is nothing to show that these accused were the persons who occupied BC and BF rooms corresponding to the entry in Sl.No.319 in Ext.P3(a) is in fact true. But Ext.P3(a) would clearly show that number of persons occupied with respect to Ext.P3(a) is in total three and rooms are BC, BE and BF. On verifying Ext.P3 register in full, it is seen that in page No.42, Sl.No.293, on 16.11.2011 it is seen that room Nos. BC and BF are seen to have been allotted in the name of a single person Jishnu V., and number of persons shown are also two. That would indicate that there is a practice of giving the rooms together under one serial number in the name of single person. So the evidence of PW1 that

in the name of the deceased these three rooms were allotted and he has paid advance in total with respect to these three rooms is appear to be true.

33. So whether prosecution has succeeded to prove that the accused are the persons who occupied those rooms is the next question to be determined. In this regard, prosecution adduced evidence by collecting the call details of the deceased and also another mobile number which alleged to be of the 1st accused.

34. The mobile number of the deceased is alleged to be 9961252765. The prosecution case is that the mobile number in use of the 1st accused is 9847796451 and the mobile number of the 2nd accused is 9526327734. The learned counsel for the 2nd accused has also got a contention that no tower location or mobile data has been collected by the prosecution with respect to mobile No.9526327734 which is the alleged mobile phone of the 2nd accused.

35. Prosecution has got a specific case that at about 00.44 hours there was a call of 4 seconds from the mobile phone of the 1st accused to that of the deceased and it is after that, this murder has been committed. In order to substantiate the call details, prosecution

examined PW24 who is the Nodal Officer of Idea Cellular Mobile Company, Kerala Circle, through whom Ext.P22 and P23 the incoming and outgoing call details and SMS details pertaining to mobile Nos. 9847796451 and 9961252765 have been brought in evidence. He also produced the list containing the tower code decode and it is marked as Ext.P25.

36. He stated that as per Ext.P22 on 22.11.2011 at 12.44 am a call with a duration of four seconds has gone from 9847796451 to 9961252765. At the time of that call, those mobile numbers were under Irinjalakuda town-A tower. Further he stated that on 22.11.2011 at about 8.17 hours, mobile No. 9847796451 was under Malappuram Chakuvetti 2 tower. In between 9.07 and 9.22 that mobile was under Arya Vaidyasala tower in Malappuram district. On the same day in between 19.58 to 20.14 hours the said mobile number was under Kalpetta 2D tower. On 23.11.2011 in between 6.44 and 6.53 that mobile number was under Kalpetta 3-A tower and at 9.34 it was under Kalpetta B tower, at 9.38, 10.16 and 11.09 hours, it was under Kalpetta New Bus Stand-D tower.

37. During evidence PW31, the investigating officer

would depose that the owner of MO8 mobile number seized from the first accused is one Vasantha. He produced certificate issued by the Village Officer Parappa,(Ext.P41) to prove that the said Vasantha is the mother of first accused. Ext.P41 was marked subject to objection since PW31 is not competent to prove the said document. But no attempt was made by the prosecution to examine the Village Officer, who issued Ext.P41 certificate. However the fact remains that the prosecution case that this MO8 mobile-phone was seized from the first accused at the time of his arrest. The evidence of PW24 which we have already referred to would go to show that by tracking this mobile number the investigation team proceeded to Kalpetta. The evidence of PW24 discussed above would show that on 22.11.2011 at 8.17 hours the tower location of MO8 mobile number pertaining to first accused is at Chakuvetti-2 in Malappuram district.

38. PW31 deposed that, on questioning the first accused, he has given Ext.P38 disclosure statement wherein he has stated that he would show the mobile shop and the person who purchased the mobile phone if he was taken and accordingly he was taken to

'Mobile Plus' shop situated nearby K.S.R.T.C. Bus-stand, Malappuram. PW31 further deposed that, on reaching there, PW7 produced MO13 mobile phone stating that it is the mobile phone given in exchange by PW8-Vinish while purchasing MO12 mobile phone belonging to the deceased. Thereby he seized Ext.P13 book containing the details regarding the sale of mobile phone by the first accused. The mahazar, by which MO13 was seized, is marked as Ext.P15. To corroborate with the above fact, prosecution examined PW7, who is conducting the mobile shop in the name and style “Mobile Plus” in Malappuram. He deposed that he is conducting retail sale of mobile sets as well as second set sale. Further he stated that he know the first accused and he purchased Nokia Express Music Mobile set from the first accused and he gave Rs.1,400/- as the price of the mobile. That is in the afternoon of 22.11.2011 and he identified MO12 as the mobile set. Ext.P13 is the note book containing the details of the sales and purchase of the mobile sets. He would state that in the second page of Ext.P13 the details given by the first accused has been entered by him and that particular page is marked as Ext.P13(a). He also stated

that the two mobile numbers as stated by the party has been noted and address also has been written. The name was stated as 'Sathees K, Punnanil House, Pombala, Pallipadi, Malappuram'. Of course it is not the address of 1st accused. But nobody can expect that a person selling a looted article would give the correct address. He also noted two mobile numbers given by the first accused and that include the mobile number of MO5 alleged to that of the second accused, 9526327734. He also stated that subsequently he sold that mobile set to PW8 Vinish and MO13 is the mobile set obtained by him in exchange from Vinish. He stated that at the time when the mobile set MO13 was seized and mahazar was prepared, the neighbouring shop owner Nazeem Hamsa, PW9 and staff Marshoo were present. Ext.P15 is the seizure mahazar prepared at his shop in which he had signed.

39. PW9 is conducting a medical shop. His evidence is that he was having in acquaintance with PW7 and the 'Mobile Plus Shop' of PW7 is just near by his medical shop. He stated that in the shop of PW7 police had come and PW7 produced 'Nokia 3100' mobile phone to police on 02.12.2011 and police prepared a mahazar

and he identified MO13 as the mobile phone and he has signed in Ext.P15 mahazar also.

40. PW8 is Vinish who purchased the mobile phone of deceased from PW7. He deposed that he is residing at Thayandi, Kozhikode and is a Cook at Manorama Canteen. He is in acquaintance with PW7 and his shop near KSRTC stand Malappuram in the name and style 'Mobile Plus'. He would state that he purchased a 'Nokia Express Music' mobile second hand set from PW7 and he identified MO12 as that mobile and he had purchased the same on 24.11.2011 at about 3 - 3.30 p.m. He also stated that his old mobile phone and Rs.1,450/- was given and he identified MO13 as his old 'Nokia 3100' mobile phone. Further he stated that later PW7 told him and accordingly he produced MO12 mobile set at Irinjalakuda police station. So the disclosure statement given by the first accused which is marked as Ext.P38 leads to the discovery of the fact that first accused sold the mobile phone of deceased, MO12 to PW7 on the same day of the incident.

41. The evidence of PW24 the Nodal Officer would prove that as per the call details the mobile phone MO8 which was taken from the custody of the first accused

was within the limits of Malappuram district from 8.17 hours of 22.11.2011 upto 9.22 hours and only at 19.58 to 20.14 hours, on 22.11.2011 the said mobile phone was found to be within the tower location of Kalpetta 2 D. So that would connect with the evidence of PW7 that on 22.11.2011 in the afternoon first accused sold the mobile set MO12 to him.

42. So the discovery of fact that MO12 mobile phone was sold by the 1st accused immediately after the incident on the same day to PW7 is relevant though MO12 mobile-phone could not be recovered directly through the accused since PW7 had sold the same to PW8. It is well settled that the recovery of an object is only one such cause recovery or even production of object by itself need not necessarily result in discovery of fact. In this context it is relevant to quote Pulukuri Kottaya and Ors. v. Emperor (AIR 1947 PC 67) wherein Sir. John Deaumont said "it is fallacious to treat the 'fact discovered' within the Section as equivalent to the object produced. The relevant portion in para 10 reads as follows :

"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 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 information to his knowledge, and if the 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".

43. The above decision was followed in Bodh Raj v. State of jammu and Kashmir (AIR 2002 SC 3164) wherein also it has been categorically held that the information permitted to be admitted in evidence is confined to that portion of the information which distinctly relates to the fact thereby discovered. Here 1st accused while in polilice custody gave Ext.P38

disclosure statement and accordingly he led PW31 to the shop of PW7 where he sold MO12 mobile belonging to the deceased. So the discovery of that fact as per the disclosure statement given by the 1st accused while in police custody will amount to the fact discovered coming within the purview of Sec.27 and is admissible in evidence.

44. The learned counsel for the accused on the other hand would contend that MO12 mobile set and MO7 gold chain wore on the body of the deceased at Irinjalakuda lodge while conducting inquest. He would contend that PW13 - a relative of the deceased, who was present at the time of inquest, deposed that he identified the chain and mobile phone of the uncle (deceased) at the time of inquest and he identified MO7 and MO12. So according to him, that would belie the case of prosecution regarding the alleged disclosure statement given by the first accused and subsequent seizures of MO13 and MO12 at the instance of PWs 7 and 8. But the evidence of PW13 when we analyse closely, will not given any such inference that the chain and mobile phone have been identified by him at the time of inquest. That is more so because even though

he stated that inquest was conducted at 9 a.m and he identified the body of the deceased, in the very next sentence, he would state that police has questioned him and took his statement and he identified the gold chain and mobile phone of the uncle. So it would only give an indication that the gold chain and mobile phone i.e MOs 7 and 12 have been identified by the witness PW13 at the time of questioning. That would be more clear when during cross-examination he stated that he does not exactly remember when his statement was taken. Further a leading question was put whether it was on 28.11.2011, he would answer in the affirmative and further stated that if statement is seems to have been recorded on 28.11.2011, it would be correct. So the attempt made by the learned counsel to contend that MO12 mobile phone was there at the time of inquest and PW30 identified the same at the time of inquest is only an attempt to twist the prosecution case so as to suit his defence, which cannot be accepted as per the records produced before the court.

45. The learned counsel would contend that MO12 is alleged to have been surrendered by PW8 as per Ext.P14 seizure mahazar on 17.12.2011. As per Ext.P14,

PW8 purchased the phone at 8 p.m. on 24.11.2011. But during evidence, PW8 stated that he purchased the phone in between 3 - 3.30 p.m on 24.11.2011. He would also contend that PW8 deposed that while he purchased MO8 mobile phone from PW7 his name and address was not taken down. So the alleged surrender of Mo12 by PW8 is suspicious, learned counsel contents. So that according to him would indicate that the phone was with the police and it is a planted recovery. It is contended that Ext.P13 book seized from PW7 did not contain the address of PW8 who alleged to have purchased the phone on 24.11.2011. So, according to him, Ext.P13 is a fabricated document and not reflect the actual transaction and it does not contain the name of first accused and the name written therein is Satheesh. He would contend that Ext.P13 book was seized as per Ext.P28 seizure mahazar. But Ext.P28 mahazar would not reveal where it was prepared and Ext.P13 is titled “District Level Tourism Camp for Tourism Clubs 27.11.2010” and not 'Mobile Plus', Malappuram. So according to him Ext.P13 book is a fabricated piece of evidence.

46. Though the learned counsel expressed doubt how

the police found out PW8 Vineesh and got MO12 phone surrendered, on evaluating the evidence of PW8, the doubt expressed by the learned counsel is found to be baseless. PW8 categorically deposed that he is in acquaintance with PW7. He also is quite familiar with the shop of PW7. During cross examination he categorically stated that it is from the shop of PW7 that he used to recharge phone and purchase coupons. So it would indicate that PW8 is a customer of PW7 and they are in close acquaintance with each other. That is why he stated that while purchasing the mobile phone from PW7, he had not written down his name. So their evidence can very well be relied on. So the contention of the learned counsel that how MO12 was got surrendered by PW8 is not explained and is suspicious etc., is not sustainable.

47. On examining Ext.P13 the name and address of first accused does not find a place in it. But, as stated earlier, nobody can expect that a person who looted the property of another after committing the murder would give the correct details of himself while selling that looted property. Even then the name and address given by the first accused written in Ext.P13 has got much

similarity to that of first accused. So also, on verifying Ext.P13 book, it is seen that it is not a book which is kept in the regular course of the business of the shop. Full details of the whole purchase and sale is not seen entered in the book. So the fact that Ext.P13 book does not contain the clear details of the transaction of sale and purchase of cell phone by PW7 in his shop will not in anyway efface the oral testimony of PWs 7, 8 and 9 coupled with the disclosure statement given by the first accused to PW31 and recovery of MO13 and subsequent connecting evidence of PW8 and production of MO12 by PW8 at the police station. All of them are independent witnesses and we do not find any reason why they come before the court and depose falsehood ?

48. PW25 during evidence stated that on 02.12.2011 he prepared Ext.P28 seizure mahazar as directed by the investigating officer and he had signed in that mahazar and he identified the note book seized as per Ext.P28 as Ext.P13. During cross-examination he had categorically stated that he had aided the investigating officer and he is aware of the four seizure mahazars prepared by him. But no question was put to PW25 with regard to the place where the mahazar was prepared.

So at this stage the learned counsel cannot be heard to contend that the place where Ext.P13 was seized is not stated in Ext.P28 seizure mahazar. So the evidence of PW24 coupled with the evidence of PWs 7, 8 and 9 and the disclosure statement Ext.P38 given by the accused would clearly connect the first accused with the offence.

49. The main contention of the learned counsel as stated earlier is that the recovery of MO12 or the disclosure statement of the first accused will not in anyway connect second accused with the offence. But the remaining part of the evidence of PW24 directly connect the second accused. As pointed out earlier, PW24, the Nodal Officer would categorically state that the tower location of the mobile number of first accused (MO8) in between 19.58 hours to 20.14 hours was under Kalpetta 2 D Tower. On 23.11.2011 in between 6.44 to 6.53 hours the said mobile number is under Kalpetta 3-A Tower. At 9.34 hours, it was under Kalpetta B Tower and at 9.38, 10.16, 11.09 hours, the said mobile number is under New Bus-stand D Tower. So it is by tracking the call details of mobile MO8 seized from the first accused the investigation seems to have progressed. From the same mobile number, on 22.11.2011 at 00.44 a.m, an

incoming call has come to the cellphone of the deceased as per the call details produced by PW24. The prosecution further examined PW4 and PW5 to prove the arrest and seizure of MO6 gold colour quartz watch and MO7 gold chain etc., from the bag which was kept in the room booked in the name of the second accused.

50. PW5 is the owner of 'By the Way' Lodge, Kalpetta situated near new Bus-stand,on the main road side. His evidence is that on 23.11.2011 at 12.00 noon first accused was arrested by the police and a mobile-phone was taken from his pocket. He identified MO8 as the mobile-phone took from the pocket of first accused. He has also signed in Ext.P6 mahazar prepared for seizing the mobile-phone of first accused. He would further state that on the same day in between 12.10 to 12.15 hours, at his lodge, police took a bag from the B Room occupied by first and second accused and they opened the bag and showed to the police and police prepared seizure mahazar and took a mobile (MO5), gold chain (M07), watch (M06), cigarette packet (M09) from the bag and that bag is identified by him as MO10. He also stated that he produced 'guest arrival register' to the

Circle Inspector and got it back on kychit and he had signed in the seizure mahazar - Ext.P8 prepared for seizing the guest register. He further signed in Ext.P9 arrest memo of the first accused and Ext.P10 - the arrest memo of the second accused.

51. PW4 is conducting a shop in the name and style 'Olives' at Kalpetta. According to him, he had signed in Ext.P6 mahazar which was signed at 'By the Way' Lodge. He states about the presence of both the accused, PW5 and the gold appraiser at the time of signing in the mahazar. Taking of mobile-phone from the pocket by accused No.1 and handing over to the police is also spoken to by him. He had signed in Ext.P7 mahazar also. He also speaks about the seizure of gold chain, watch and currency.

52. PW16 is the Gold Appraiser attached to Indian Overseas Bank,Kalpatta, holding licence of appraiser. He would depose that he had gone to 'By the Way' Lodge owned by PW4 as called by the police and the gold was appraised by him and he identified MO7 as the gold ornament appraised by him and he had signed in Ext.P7 seizure mahazar. The weight of the gold ornament also stated by him as 16 grm. 54 ml.gm. He

also stated that both the accused were present and shown to him at the lodge.

53. The main attack of the learned counsel with regard to Ext.P7, the seizure mahazar is that it is a planted evidence since Gold Appraiser, PW16 was taken by the police for arresting the accused and seizing the gold. It is also contended that a Gold Appraiser cannot be a witness in seizure mahazar unless it is a premeditated arrest and recovery. He would contend that Ext.P6 mahazar was prepared at 12.30 p.m in front of 'By the Way' Lodge, Kalpetta as per Ext.P6 and MOs 6, 7 and 9 were recovered from Room 'B' of By the Way lodge as per Ext.P7 seizure mahazar at 01.30 p.m. The learned counsel also point out the evidence of PW30, the Circle Inspector who seized the articles and arrested the accused. According to him, he arrested the accused at 12.15 and thereafter from the pocket of first accused for taking mobile-phone Ext.P6 mahazar was prepared. Further he stated that thereafter he seized MOs 5, 6 to 10 from the room occupied by them and for that Ext.P7 mahazar was prepared at 01.30. But during cross-examination PW30 stated that they were arrested inside the room and while the police party went there they

were present in the room and both Exts.P6 and P7 were prepared at the same place. So according to him, during chief examination the evidence of PW30 was that initially they took MO8 mobile-phone from the pocket of first accused and thereafter they went to the room and recovered MOs 5 to 10. So it is not clear whether MO8 phone was seized first or MOs 5 to 7 and 9.

54. He also took our attention to the evidence of PW4 who had signed in Ext.P6 and Ext.P7 mahazars. PW4 stated that he signed Ext.P7 at the veranda of the By the Way lodge and he had not read the contents and he has signed Ext.P7 at around 12.30 to 12.45. He also stated that Nokia Phone was given at the corridor and the chain and watch were seen in the room. But he has no case that he has signed anything inside the room. He would also contend that PW5, the owner of By the Way lodge would state that at the time when first accused was brought he handed over a mobile-phone from his pocket and it was at about 12 morning on 23.11.2011 in between the reception and entrance of his lodge. He also said to have signed in the mahazar at 12.10 and 12.15 at 'B' room. Whereas PW16, the Gold Appraiser would state that he has signed in Ext.P7 mahazar and

he has appraised gold chain. But he did not note in which part of the lodge, room 'B' is situated. He appraised the gold chain at the reception room and he had not seen from where police had taken the chain and further he stated that he reached there at 01.00 p.m. So the evidence of PW16 would make it clear that it is after the arrest and seizure of the article that he has been called to the By the Way lodge for appraisal of the gold. It has come out from his evidence that he had been working at Indian Overseas Bank, Kalpetta and he had got licence of appraiser also. So the contention of the learned counsel that the presence of the appraiser at the time of seizure makes the whole seizure of the articles from the accused makes the case improbable and unbelievable etc. is not at all sustainable since it has come out in evidence that he has been called to the By the Way lodge after arrest and seizure of the articles from the accused. That is the reason why he had categorically stated that he did not seen from where police had taken the gold.

55. With regard to the difference in time in the mahazar and the evidence of PWs 4 and 5 as 12.05 to 12.45 according to PW4, and at 12 noon according to PW5,

are not at all much material especially because they were examined after a lapse of three years of the incident. The inconsistency with regard to the time of preparation of seizure mahazar and arrest came out from their evidences would only show that they were not tutored witnesses and are describing the incident from their memory. Apart from mere suggestion to PW4 that he had not seen the seizure of the articles and himself and PW5 had come to Irinjalakuda and signed the mahazar which he stoutly denied, there is nothing to suggest that these witnesses PWs 4, 5 and 16 have got any special interest in the matter so as to depose falsehood. So the evidence of PW5 the owner of By the Way lodge, PW4 the nearby shop owner and PW16 an employee of the Indian Overseas Bank who is a Gold Appraiser would prove the prosecution case regarding the arrest and seizure of MO8 from the custody of first accused and seizure of MO6, gold colour quartz watch, MO7 gold chain of the deceased from the bag in the room occupied by the accused persons.

56. Apart from the above, the register kept by PW5 in the lodge has been seized as per Ext.P8 seizure mahazar. That register is marked as Ext.P12, in which,

in page No.82 there is an entry that on 22.11.2011 Lijo Joseph, Erattayanikal, Kelamangalam had occupied a room at 8.40 p.m, number of persons is mentioned as two and the mobile number of the second accused which is seized from the bag is also mentioned in Ext.P12.

57. It is true that the learned counsel would contend that two mobile numbers entered in the column had been striken off and the number of the second accused has been written. He would also contend that the checkout time is seen to have been corrected from 11.10 a.m to 14.10 p.m.

58. But it is to be noted that during evidence PW5 deposed that the entry as room 'B' in the first column indicating number has been written by him for remembrance. None of the other entries contained any specific room number also. So it appears that the checkout time also has been simply written by him because it has come out in evidence that at around 12.00 noon police has reached the lodge and thereafter they have been arrested and the articles were seized and they were brought under custody by the police team to Irinjalakuda. So there might not have any chance for

check out. But the entry in Ext.P12 (a) would convincingly establish coupled with the mobile call details Ext.P22, 23 and 24 and the evidence of PW24 that the accused persons were at Kalpetta and took the room on 22.11.2011 at 8.40 p.m and they have been arrested from that lodge. So the entry with regard to the checkout time can simply be ignored. So the arrest of the accused persons from the By the Way lodge by PW30, the Circle Inspector, Valappad who was the member of the Special Team is clearly proved through the corroborative evidence of PWs 4, 5 and 16.

59. After arrest and seizure of the properties - MOs 5, 6, 7, 9 etc, PW30 and party returned from Kalpetta to Irinjalakuda and entrusted the items and the accused with PW31, the investigating officer. Immediately on the next day at 8.00 a.m PW31 the investigating officer seized the shirt and pants worn by the accused persons at the time of incident by describing in Ext.P2 seizure mahazar at Irinjalakuda police station. PW1 deposed that he had signed in Ext.P2 mahazar.

60. The main attack of the learned counsel with regard to Ext.P2 mahazar is that PW1 deposed during cross-examination at the instance of the second accused that

he along with police party returned from Kalpetta on 24.11.2011 at 1 p.m. So according to the learned counsel, at the time when he alleged to have signed in Ext.P2, he is at Kalpetta. So the learned counsel would content that Ext.P2 is a concocted document.

61. Though the argument so advanced seems to be appreciable on a first blush, on going through the records produced before the court and the evidences of the other witnesses including PWs 30 and 31, the argument so advanced is not seems to be acceptable. It is true that PW1 during cross-examination on one occasion stated that they returned from Kalpetta at 1 p.m on 24.11.2011. But it is to be noted that Exts.P9 and P10 arrest memos prepared at the time of arrest of first and second accused is seems to have been initialed by the Judicial First Class Magistrate Court, Irinjalakuda on 24.11.2011 itself. The arrest memos were also seems to have been prepared on 23.11.2011 at about 12.15 hours on 23.11.2011. So if at all they have returned from Kalpetta at 1 p.m on 24.11.2011 as has been stated by PW1 it would not have been possible to the investigating officer to produce the arrest memo and the accused persons before the court on 24.11.2011 at 1.30pm and

get it initialed by the court on the same day.

62. In view of the argument advanced by the learned counsel, we have perused the remand report also. It would also go to show that the accused persons have been produced before the court on 24.11.2011 at 1.30 p.m. Sanctity of remand application is not questionable also. The Apex Court in Surinder Kumar V. State of Punjab AIR 1999 S.C. 215 placed reliance upon the remand application with regard to a confession made by the accused to the investigating officer. So, at any rate, the evidence of PW1 during cross-examination that they returned from Kalpetta at 1 p.m on 24.11.2011 seems to be a mistake. He has categorically stated in chief examination that the police brought A1 and A2 after arrest to Irinjalakuda on 24.11.2011 and he has signed in Ext.P2 mahazar. He also stated that a black pant, half sleeve shirt, a blue jeans pant, green T-shirt, shoes etc. were the articles seized by describing in Ext.P2 seizure mahazar. So a stray statement by PW1 that they have returned from Kalpetta at 1 p.m on 24.11.2011 alone cannot be based upon to discredit the authenticity of Ext.P2 seizure mahazar. PW31 the investigating officer before whom PW30 produced the accused and the

articles seized during evidence stated that he seized the clothes worn by the accused persons. He stated that the old black pant and maroon colour half sleeve shirt is belonging to the first accused and the old blue jeans pants and green colour full sleeve banyan belonging to the second accused and MO2 series is a shoe worn by the second accused. Those were identified as MO1 as the black colour pant of the first accused, MO2 series the shoes, MO3 the green colour T-shirt of the second accused, MO4 is the maroon colour half sleeve shirt of the first accused. MOs 1 to 4 were identified by Pw1 also.

63. It is PW28, the ASI attached to Irinjalakuda police station who is the scribe of Ext.P2 mahazar. He deposed that at the time when PW31 seized the clothes of the accused persons at 8 a.m on 24.11.2011 he wrote the mahasser.

64. With regard to the dresses worn by the accused persons at the time of incident, the learned counsel raised serious objection and according to him though the blue jeans, green coloured T-shirt, maroon colour half sleeve shirt and black colour pant were alleged to have been seized by describing in Ext.P2 seizure

mahazar, in arrest memo, Ext.P10 with respect to the second accused, the description of the dress is black T-shirt and black pants and brown shoe. But on a scrutiny of Ext.P2 it could be seen that in the body of the mahazar there is description with regard to the dresses worn at the time of incident and also at the time of arrest. So the black T-shirt and black pant described in Ext.P10 would be the one that might have been worn by him at the time of arrest and old blue jeans pant and green T-shirt are the dresses which have been worn by him at the time of incident. So the contention advanced by the learned counsel with regard to the discrepancy with respect to the dresses worn by the second accused is not seems to be acceptable. That is more so because no specific question in that regard has been put to Pw31 who prepared Ext.P2 mahasser.Pw28,the ASI of Irinjalakuda Police Station who is the scribe of Ext.P2 mahazar. He was not cross-examined at all.

65. Ext.D1 was marked during cross-examination Of Pw1 where in it has been stated that first accused has been wearing black pants and maroon shirt. That exactly is the description of the dress of first accused in Ext.P2 and evidence of Pw1 during chief-examination

also. No question with regard to Ext.P2 has been asked to Pw1 or Pw31 also. So Ext.P2 mahazar has been proved to have been prepared on 24.11.2011 at 8 am at Irinjalakuda Police Station.

66. The learned counsel would further contend that though the dresses worn by the accused persons and also that of the deceased and other articles seized by the Scientific Assistant etc. have been sent to FSL, the report will not in anyway connect the accused persons with the crime. According to him, the court below also entered into a finding in that regard.

67. In paragraph 57 of the judgment the learned Additional Sessions Judge has found that the report by itself would not help to connect the accused with the crime since there is some discrepancy in evidence regarding the colour of fibre found in the nail-clippings of the deceased and the clothes referred. But it appears that no detailed study of the FSL report is seems to have been made by the learned Additional Sessions Judge to arrive at such a conclusion.

68. PW22 is the Scientific Assistant who visited the scene of occurrence and collected the materials. Her evidence is that on 23.11.2011 while she was working as

Scientific Assistant Documents, Vigilance FSL, Thrissur she examined the place of occurrence in this crime and collected the following items:

"1. Cellophane pressings, lifted from around the neck of deceased -1 packet.

2. and 3) Cellophane pressings lifted from both hands of the deceased 2 packet.

4. Cigarette butts collected from the floor of the room - 1 packet.

5. Hairs like materials collected from the white dhothi found spread partially on the dead body - 1 packet.

6. Hairs like materials collected from the dead body - 1 packet.

7. Hairs like materials collected from the pillow on the bed - 1 packet.

8. Hairs like materials collected from the plastic coir found in the scene of occurrence - 1 packet.

9. One oval shaped comb having hairs in it found on the table.

10. A portion of dark brown stains in the pillow cover - 1 packet."

69. She collected, packed, labelled and sealed the items and handed over to the investigating officer and Ext.P19 is the report prepared by her. Though a suggestion was made to her during cross-examination that the certificate has no value since it is like a certificate issued by a person without MBBS Degree, her categoric answer was that at present there is no person in the laboratory having degree in Forensic Science. So the authenticity of the collection of materials from the scene of occurrence by PW22 is not questionable and PW31 the investigating officer deposed that ten items collected by the Scientific Assistant (PW22) has been produced before him along with a covering letter and he seized the same as per Ext.P31 seizure mahazar. Ext.P41 is the copy of the forwarding note proving the sending of the properties to the FSL and Ext.P58 and Ext.P58(a) the FSL report and Ext.P58(b) the correction report have also marked.

70. DW1 the Scientific Director (Biology) at Regional Forensic Science Laboratory, Kannur was examined

from the side of the defence. She deposed that the cellophane in items Nos.11, 12 and 13 contained fibre similar to those in items Nos.7, 8, 27, 28 and 30. She also deposed that nail-clippings in item Nos.21 and 22 contained fibre similar to those in item No.8 and 28. It is also stated by her that in the report submitted on 02.06.2015 instead of item No.28 she had mistakenly noted item No.30 and that was corrected by Ext.P58(b) erratum report.

71. On perusing the report, it could be seen that item No.11, 12 and 13 are the cellophane tapes collected from the body of the deceased and the evidence of PW22 and Ext.P58 FSL report would state that the fibres contained in the cellophane tapes 11, 12 and 13 are similar to those in item Nos. 7, 8, 27, 28 and 30. Item No.7&8 are bath towels seized by the investigating officer at the time of inquest belonging to the deceased. Item 27 is the black pants (Mo1) belonging to the first accused. Item No.28 maroon colour shirt of the first accused(Mo4) and item No.30 is the green full sleeve Baniyan(Mo3) worn by the second accused. Item Nos.28 and 30 were seized as per Ext.P2 mahazar alleged to be worn by them at the time of incident.

Exts.P58(a) and (b) conclusively prove that the fibres in the cellophane tapes contained the fibre similar to that of the shirt worn by the first and second accused. Report would further say that the nail-clippings in item No.21 and 22 which pertains to the deceased contained fibre similar to those in item Nos.8 and 30. That has been subsequently corrected by Dw1 by erratum report stating that it is not 30 but it is 28. So that would show that the nail-clippings of the deceased contained fibres similar to those in item No.8 pertaining to the deceased and also that of first accused. So the above incriminating materials could be proved through the FSL report connecting the accused persons. So the finding of the Additional Sessions Judge that the FSL report by itself would not help to connect the accused with the crime is without a proper evaluation and understanding of of Ext.P58 and P58(a)FSL report and the evidence of Dw1.

72. It is true that during cross-examination of DW1, she deposed that no test was conducted to conclude that the fibres found in item Nos.12 and 13 are one and the same which is found in item No.30 and she also stated that in fibre examination they cannot say that they are

the same and they can only say that they are similar. She would further state that so as to find whether they are same they have to conduct DNA finger print test and DNA test was not being conducted in their laboratory. So the report of the Scientific Assistant coupled with the evidence of DW1 would probabilise that the fibres detected in item Nos.11, 12 and 13 cellophane tapes are similar to those of items belonging to the deceased as well as first and second accused, though DW1 would depose that she cannot say it is one and the same. So it can very well be taken as a corroborative piece of evidence coupled with other evidence connecting the present accused.

73. The learned counsel would contend that MO11 plastic rope alleged to be used for strangulating the deceased. MO40 and MO41 are the plastic ropes which were recovered from the room of the first accused and it was alleged to be part of MO11 plastic rope. But case of the prosecution is not supported by any scientific evidence. The argument so advanced by the learned counsel is not seems to be fully acceptable as per Ext.P58 report of the FSL and evidence of DW1. In Ext.P58 it has been stated that item Nos.9 (MO11), 25

and 26 are similar. It is true that further it is reported that contour matching could not be found on the cut ends of the rope contained in those items. But at the same time it is reported that the rope pieces are similar.

74. The learned counsel would contend that MO11 alleged to be used for strangulating the deceased did not contain any human cell or particle linking to deceased or accused. But in Ext.P58 report itself there is clear answer to the said contention. In page No.12 with regard to the experiment for testing the transfer and retention of fibres it has been stated that since fibres similar to those of plastic ropes in item no.9 were not detected in the cellophane tapes in item no.11, an experiment was conducted to test whether the fibres of item No.9 were transferable on contact. It is further stated the plastic rope in item No.9 handled for ten minutes with clean palms to effect transfer of fibres. Cellophane tapes pressing were collected from the palms after handling of the plastic rope and examined under microscopes to detect whether there were any transfer of fibres to the palms due to handling. Fibres were not transferred to the palms due to handling of plastic rope. So that would leads to an inference that the

fibres in item No.9 (MO11) is not transferable on contact. So the fact that no fibres of item No.9 (mo11) in the cellophane tape item No.11 by itself will not leads to an inference that item No.9 was not used for the commission of the offence. That is more so because the FSL report would further go to show that item NOs 11, 12 and 13 cellophane tapes contained fibre similar to that of the shirts item No.28 and 30 of accused Nos. 1 and 2 respectively and the bath towels of the deceased.

75. Next argument of the learned counsel is that Ext.P22 and P23 call details do not have proper certification as provided under Section 65(B) of the Indian Evidence Act. The certificates do not explain how the information was derived or reproduced and which software was used or which kind of computer was employed. Hence they are invalid certificates and inadmissible in evidence.

76. PW24 was examined from the side of the prosecution and through whom Exts.P22 and 23 were proved. On perusing Exts.P22 and 23 it could be seen that the call data have been duly certified as contemplated under Section 65(B) of the Evidence Act. So also while the documents were marked no objection

whatsoever was raised from the side of the accused. As stated earlier the documents also contained a certificate that the print out was produced by the computer (server) operator using I comply, the company's mobile transmission system software during the period over which the computer was used regularly to store/process information for the purpose of the mobile transmission activated carried on over the period by the person having lawful control over the use of computer and further that the information of the said kind was regularly fed into the computer in the ordinary course of the mobile transmission activities of the company during the said period etc. So the contention that Exts.P22 and P23 do not have proper certification contemplated under Section 65(B) of the Evidence Act is not sustainable. So also though it is contended by the learned counsel that the original Nodal Officer who provided the information was not examined on perusing Exts.P22 and 23 it is seen certified by Sri. Rajkumar Pavothil, who is the Nodal Officer and Person in charge of the computer system of Idea Cellular Ltd. Mobile Company, Kerala Circle.

77. Even though the learned counsel would contend

that the original Nodal Officer providing the information was Sri.Ramachandran (CW34) was not examined, no question in that regard seems to have been put to PW24. So at this stage the accused cannot question the authority of PW24 in proving Exts.P22 and 23.

78. The learned counsel also contend that Exts.P26 and 27 ie. the application forms showing the ownership of mobiles numbers pertaining to the first accused and also the deceased were marked subject to objection and no further proof is adduced by the prosecution in that regard and hence Exts.P26 and 27 cannot be taken as a proof to connect the first accused with the offence and that the mobile number 9961252765 is that of the deceased. But it is to be noted that the objection raised with respect to Exts.P26 and P27 is due to the late production. Moreover Ext.P25 which is issued by PW24 the authorized signatory for Idea Cellular Ltd certifying the address with respect to 9961252765 as that of the deceased coupled with the copy of the application form with the copy of the election identity card Ext.P27 containing the full name and address of the deceased will leave no room for doubt to conclude that mobile number 9961252765 is pertaining

to the deceased. Moreover the wife of the deceased PW14 categorically deposed that MO12 is the mobile phone of her husband. So also as per the disclosure statement, Ext.P38 given by the first accused the investigating officer recovered MO13 from the shop of PW7 and the evidence of PW7 would prove that the mobile purchased by him from first accused was sold to PW8 Vineesh and at that time he received MO13 mobile-phone and Rs.1,400/-. Subsequently PW7 produced MO12 mobile-phone at Irinjalakuda police station before the investigating officer and that mobile-phone has been identified by the wife of the accused as that of him. Corresponding call details of the mobile-phone has also been collected and produced and brought in evidence. So the evidence adduced from the side of the prosecution has proved beyond any reasonable doubt that MO12 is the mobile-phone of the deceased.

79. As per the document Ext.P26 which was marked subject to proof, the mobile number 9847796451 has been issued to Vasantha, Kundil House, Parappur Panchayath, Tirur. Though PW31 produced Ext.P40 the certificate of the Village Officer, Parappur certifying that

the mother of first accused is Vasantha, Kundil House, since the Village Officer was not examined, it can not be said as proved. So in effect the fact that Vasantha referred in Exts.P25 and P26 is the mother of the 1st accused is not conclusively proved. But MO8 mobile-phone belonging to the first accused has been seized from him at the time of arrest and that has been seized by describing in Ext.P6 seizure mahazar at 'By the way' Lodge, Kalpetta. In that mahazar itself the IMEI No, HLRI number and mobile number have been clearly stated. The witnesses in Ext.P6 mahazar clearly deposed in corroboration with the prosecution case regarding the seizure of mobile-phone from the first accused. So the fact that the first accused was in possession and control of the mobile-phone has been proved beyond any reasonable doubt. So the above circumstances would lead to a reasonable inference that first accused has been in use of the mobile-phone with number 9847796451. So the non examination of the Village Officer who issued Ext.P40 certificate stating that the mother of first accused is Vasantha, Kundil House will not efface the prosecution case. More over 1st accused has not filed any appeal also challenging the

conviction and sentence.

80. The learned counsel also advanced an argument that none of the call details concerning the second accused has been collected by the prosecution though his mobile has been seized and produced as MO5. The learned counsel also would contend that the prosecution willfully suppressed the call records and tower location of MO5 phone and according to him that phone number belongs to one Muhammed Rafeeq (CW13) but he was not examined in order to save somebody. He would also point out the evidence of PW23 (seems to be mistake since PW23 is the doctor who conducted the autopsy; it may be PW24) in page No.8 of his cross-examination wherein he stated that on 22.11.2011 there is an outgoing call from 9837796451 to 9526327734. But the tower location of the said call is not discernible from Ext.P22. He also would contend that on 22.11.2011 in between 19.58 and 20.14 hours there is a call extending to 7 seconds and 15 seconds. On 23.11.2011 at 11.09 hours from the same phone, call has been gone. So that according to the learned counsel would indicate that both the accused were not together but at different places.

81. The evidence of PW24 would show that on 22.11.2011 in between 19.58 and 20.14 hours this mobile is within the limits of Kalpetta II D tower. It has come out in evidence that the house of the second accused is at Kalpetta. So the possibility of himself going away from first accused being his native place cannot be ruled out. So during that time a call from the cellphone of first accused might have been gone to his mobile number. So the contention to the contra is not acceptable.

82. Admittedly, by the learned counsel the mobile number 9526327734 stands in the name of Mohammed Rafeeq and not that of second accused. No call is seems to have been gone from that mobile to mobile number of the deceased. That may be the reason why the call details of MO5 mobile number was not taken by the prosecution. Anyway that will not affect the prosecution case in view of the other evidences adduced by the prosecution connecting the offence with the second accused.

83. The learned counsel also would contend that a junk number 6030729961252765 has gone from the mobile of A1 as per Ext.P22 at 0.44 hours on 22.11.2011 and

the second number is that of the deceased. So according to him, the dialing of a junk number which has the same ending as the phone of the deceased gives an impression that the call from that of A1 was an accidental call and both calls are of short duration of four seconds.

84. It is true that the call from MO8 to MO12 is of a short duration at 0.44 a.m on 22.11.2011. But the fact remains that though the accused persons would contend that they have no connection or contact with the deceased and have been falsely implicated in this case, from the mobile number of first accused a call has been gone to that of the deceased that too at 00.44 hours. It has come out in evidence that they have vacated the Al Ameen lodge at about 4 a.m. So such a call from the mobile number of the first accused to that of the deceased have got much relevance in this particular case. So probably by that call at such an odd hour accused persons might have got opened the door by the deceased and thereafter this brutal act might have been committed by them and left the place also at 4 a.m. So the contention of the learned counsel that dialing junk number which has the same ending as of the deceased

and the subsequent call to the mobile number of the deceased would indicate that it is an accidental call is not at all acceptable. Moreover, the evidence collected by the investigating officer in this case also would give a clear indication that they could locate the accused by tracking the mobile number of the first accused and on the second day they could arrest the accused persons with the robbed articles from the deceased.

85. Under Section 114 of the Indian Evidence Act, 1872, the Court may presume existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

86. Illustration (a) of Section 114 is relevant in this context to be extracted, which reads thus:

> "(a) The Court may presume-
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

87. In this case, as discussed above, the articles

belonging to the deceased i.e. MO5 watch, MO6 gold chain etc. were seized from MO10 bag in the room occupied by the accused persons at the 'By the way' lodge. But they could not offer any satisfactory explanation for the possession of those articles. So the presumption u/s. Section 114(a) of the Indian Evidence Act can be drawn against the accused persons in this case.

88. It is relevant in this context to quote Saji v. State of Kerala (2007 (3) KLT 151). That was a case in which a charge u/s.302, 392 and Section 201 IPC laid against the accused. The robbery was with respect to an Indica car, which was hired by the accused as has been proved through the evidence of PWs 2, 3, 6, 7 and 8 in that case. The evidence of Pws 4, 5, 9 and 24 establish the possession of the car by the accused soon after the death of the deceased. In the said context it was held that the act of the accused in committing murder for the purpose of committing robbery of the car is clearly established. The accused also had no satisfactory explanation for the possession of the Indica car.

89. In the above case, Sathyansesan v. State of Kerala [1984 KLT 774] has been quoted and the relevant

paragraph reads as follows:

> "the possession of the property of the deceased with the appellant soon after the occurrence is thus a strong circumstance against the appellant. This is a case where murder and robbery are proved to have been integral parts of one and the same transaction. Therefore, it can be reasonably presumed that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction, in the absence of satisfactory explanation for the appellant as to how the property was transferred from the deceased to the accused."

90. In Gulab Chand V State of M.P. (AIR 1995 SC 1598) while dealing with Sec.114 and Sec.3(a) of the Evidence Act 1872, in a case of robbery and murder it has been discussed in para 4 as follows :

> "..... It is true that simply on the recovery of stolen articles; no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the acts and circumstances of the case and the nature of evidence

adduced. It has been indicated by this court in Sanwat Khan v. State of Rajasthan (AIR 1956 SC 54) that no hard fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this court by indicating that suspicion should not take the place of proof. It appears that the High court in passing the impugned judgment has taken note of the said decision of this court. But as rightly indicated by the High Court the said decision is not applicable in the facts and circumstances of the present case. The High placed reliance on the other decision of this Court rendered in Tulsiram v. State (AIR 1954 SC 1). In the said decision, this Court has indicated that the presumption permitted to be drawn under S.114 illustration (a) of the Evidence Act has to be read along with the important time factor. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption

cannot be permitted to be drawn having regard to the circumstances of the case..... It may be indicated here that in a later decision of this Court in Earadharappa v. State of Karnataka (1983 2 SCC 330 = AIR 1983 SC 446) this Court has held that the nature of the presumption and illustration (a) under Sec.114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time limit can be laid down to determine whether possession is reasoned or otherwise and each case must be judged on its own facts....."

91. So in this case recovery of stolen articles from the bag kept in the room occupied by second accused along with first accused on the second day of the incident would leads to a presumption that the second accused along with first accused not only committed the murder of the deceased but also committed robbery of the articles of the deceased which form part of the same transaction,in the absence of any satisfactory explanation from both the accused.

92. The learned counsel also advanced an argument that the deceased had a gold ring as per Ext.P11 inquest report and it has not been produced and there is no clue regarding the same. But the wife of the

deceased did not refer about a gold ring in her evidence. She would only say that her husband was in the habit of wearing a gold chain and watch. PW12 the brother of the deceased who was present at the time of inquest was also not questioned in that regard. So also no question seems to have been put to the investigating officer in this regard. So at this stage accused cannot be heard to contend about the gold ring.

93. A strange argument also advanced by the learned counsel that the accused has no motive to kill the deceased. But the robbed articles seized from the possession of the accused persons itself would prove that their intention was robbery and murder was committed for effecting robbery. He would contend that prosecution has not given any proper motive for the accused to kill an ISRO officer. He would contend that the deceased has got high connection with higher officials including CBI officials and so many top ranking officers of ISRO has been murdered without any clue and the deceased might have had many enemies and no investigation in that regard has been conducted.

94. But no such question in that line has been put to any of the witnesses. So also it has come out in

evidence that deceased was only an office attender. What high connection expected to have to an office attender! No such connections with higher ups has been brought out in evidence also. So we don't find any merit in that argument.

95. The learned counsel would also contend that PW14 the wife of the deceased suspected PW15 and his friends in the murder of the deceased. He would contend that PW15 during evidence admitted that he did not attend the funeral of the deceased fearing backlash from the relatives of the deceased. He would also contend that Ext.P23 the call details of the deceased would show that it is PW14, who had contacted the deceased on several occasions on the date of incident and also on the previous day. So the family members have got a real suspicion regarding the involvement of PW15 in the incident.

96. It is to be noted that PW14, the wife of the deceased did not make any such allegations against PW14. No question was put to her during cross-examination in that regard at the instance of the accused. What is stated by her during cross-examination is only that she had talked to one

Surendran who had worked with the deceased. So nothing to indicate regarding the suspicion of the relatives of the deceased about PW15 in the murder of the deceased is seen brought out during the evidence of PW14. On evaluating the evidence of PW15 also, what could be gathered is that the relatives of the deceased had a suspicion about the co-workers who attended the marriage. PW15 denied the suggestion that the relatives had such a suspicion. Contradictory version given by him to the police is marked as Ext.B7. So also when a question was put to him as to why he has not participated in the funeral of the deceased, he categorically stated that the wife of the deceased told that they knew the cause of death of the deceased and it is out of that mainly that he had not gone to see the dead body. With regard to the contention of the learned counsel that there was repeated phone calls in between the deceased and PW15, there is clear explanation from PW15 and that is substantiated by Ext.P23 call details also. He had stated that after getting into the train from Vadakara at 6.20 pm on 21.11.2011 deceased called him over phone and asked him to inform when the train reaches at Irinjalakuda. He replied that he do not know

Irinjalakuda. The call details, Ext.P23, would show that there were calls from the mobile of PW15, ie, 9496996039 to that of the deceased at 19.14 hours, 19.52 hours and 19.58 hours and thereafter there is no phone call from the cell phone of Pw15 to deceased. The death of the deceased alleged to have taken place at about 1.00 am on 22.11.2011. So the call details only would indicate that as stated by PW15 after getting into the train the deceased might have asked him to intimate when the train reaches at Irinjalakuda. So also it has come out from the evidence of PW15 that on 20.11.2011 when they reached at Vadakara deceased had been to their room and he slept in their room on that day though a separate room was booked to him in another lodge. Though the learned counsel attempted to establish that the deceased had some clandestine dealings and that is why he did not travel with PW15 and other employees of VSSC to attend the marriage and resided in a separate lodge, Balan, PW12, deposed that deceased did not intimate him earlier that he would be coming to attend the marriage and that is why room was not booked along with others to the deceased. So the fact that a separate room was booked to the deceased by Balam

by itself would not create any suspicion regarding the conduct of the deceased. As discussed earlier, no specific question was put to PW14 the wife of the deceased regarding any suspicion of the involvement of PW15 in the incident. Hence contention so advanced is also not acceptable.

97. Though the learned counsel also argued about the suspicious visit of the deceased at Irinjalakuda as has been discussed in the previous paragraph, it has been stated by Smitha (PW 18) that she was informed by the deceased about his visit to her house and she intimated about his visit to her mother also. The wife of the deceased also stated that deceased had intimated her about the visit to a co-worker at Irinjalakuda. So there is nothing to indicate any unusual conduct on the part of the deceased in alighting at Irinjalakuda for visiting the co-worker's house.

98. Yet another contention advanced by the learned counsel is that there are no injuries on the body of the accused as per Ext.P57 series which are certificates issued on examination of the body of the accused persons by the doctor at the time of arrest. So according to him,if it is a murder by strangulation it is quite

impossible to not to have any finger nail marks on the body of the assailants and that would indicate that the accused are innocent. But it is to be noted that accused persons after making a phone call entered into his room and both the accused are young and energetic aged about 22 and 23 years of old and dead body was also lying with face downwards on the cot and both his limbs were tied up. So the deceased might not have got any time to make any resistance when there was attack by these two young assailants and there are also evidence to show that when there was attempt by the deceased to make alarm, the accused persons gagged him inserting bath towel in his mouth. The FSL examination report also would show the traces of saliva in one of the bath towels which alleged to have been used for gagging him. So there is nothing unusual if in such a situation the body of the assailants did not have any nail markings or scratches. So that cannot be taken as a circumstance by the accused to contend that he has no connection with the incident.

99. Contention also raised by the learned counsel in the attitude of the deceased in booking two rooms in a lodge for strangers and that according to him is highly

suspicious and no reasonable man would get down from the train at midnight with two strangers. It is to be noted that the deceased was travelling from Vadakara and the prosecution case is that the accused persons got into the train from Tirur. There would be time of not less than three hours to get them acquainted before alighting at Irinjalakkuda. The prosecution case itself is that accused got befriended with the deceased during the travel in the train together. The accused appeared to have travelled with such a motive and with that specific intention they might have shown more closeness to the deceased and that might have led the deceased to book the room in his name for them also. Whatever it be, Ext.P3 register and the evidence of PW1 would prove beyond any reasonable doubt that these accused had come to the lodge with the deceased and rooms were allotted to all of them by PW1 and the deceased had written the name and address with mobile number in the register. The fact that deceased booked the room in his name to these two strangers is not an unbelievable fact though the deceased could have avoided such an act on his part which ultimately led to his death also.

100. So also when MO7-gold chain and MO6- watch of

the deceased seized from the bag kept in the room which was occupied by the accused persons in 'By the way' lodge at Kalpetta how can the accused be heard to contend that they have no contact with the deceased?.

101. The learned counsel also contended about the improbability of the involvement of the 2nd accused since he had given his correct name and address in the 'By the way' lodge at Kalpetta. According to him, a person fleeing from murder will not give the true name and address like the way in which the 2nd accused has given at the 'By the way' lodge. But it is to be noted that the 1st accused while fleeing from the scene through Malappuram as has been discussed earlier, he sold the mobile of the deceased and he has given a different name and address .It is pertinent to note that when the room was taken at Kalpetta it was in the name of the 2nd accused and the mastermind behind the incident might have been of the 1st accused. The 2nd accused during that time is seems to be about 22 years. So he might not have been aware of the consequences in booking the room in his name and that also might have been taken place at the instance of the 1st accused who wanted to conceal himself. The mobile number given in the 'By the

way' lodge is also of the 2nd accused. It is very relevant in this context to note that in Ext.P3 register at the time of admission two mobile numbers have been written and struck off and the way in which they filled up the the columns also would reflect their state of mind. They are not in a position to note the purpose of visit. What actually has been written there is not at all could be read and understood by anybody. So the argument of the learned counsel that name and address of the 2nd accused has been truly and correctly given in the 'By the way' lodge at Kalpetta is an indication of his innocence cannot at all be accepted.

102. It is contended by the learned counsel that the accused alleged to have checked out from the lodge at 4 am on 22.11.2011 and admittedly by PW1 he found the deceased lying dead at about 6 pm. It has come out in evidence that the room in which the body was found is on the second floor and hence the possibility of anybody other than accused committing the offence after they checked out from the lodge cannot be ruled out.

103. It is true that PW1 during cross-examination admitted that other business establishments are functioning in the 1st floor and ground floor of the lodge.

There is access for the persons coming to the first floor to the 2nd floor. He also admitted that from 7.00 am upto 6 pm on 22.11.2011 how many persons had come and gone to the rooms,he can not say. PW1 during cross-examination admitted that he is also a watchman of a jewellery, spare parts shop and a shop of selling foreign goods at Tana. Though the above factors have been brought in during the cross-examination there is nothing brought out to infer that anybody else had entered into the 2nd floor of the lodge and committed this brutal act. So the fact that there is access from the ground floor and 1st floor to the 2nd floor where the room occupied by the deceased is situated by itself cannot be taken in aid by the accused to contend that anybody other than the accused had done the act.

104. The learned counsel also has got a contention that even if the whole prosecution evidence is admitted, everything is connecting the 1st accused alone. The phone call went from the phone of the 1st accused. The pieces of rope were recovered from the room of the 1st accused. The confession given was also by the 1st accused. So there is no admissible incriminating circumstance proved against the 2nd accused. Though

MO10-bag is alleged to be that of 1st and 2nd accused, there is no proof regarding the same. So according to him, there is no evidence adduced by the prosecution to prove that 1st and 2nd accused together committed the crime. The investigating officer also has not stated that there was common intention or friendship between 1st and 2nd accused and they are total strangers and have nothing in common. So according to him, Sec.34 IPC is conspicuously absent in this case to inculpate the 2nd accused.

105. Needless to say that Sec.34 is not a penal provision and does not create a substantive offence. It is only a rule of evidence. So whether there was common intention in the act alleged by the prosecution is a fact to be discerned from the facts and circumstances and evidence adduced in the case. In this case, prosecution case itself is that these accused persons befriended with the deceased while travelling together to Irinjalakuda and alighted there. It has also come out that thereafter the deceased booked three rooms in the lodge and two were allotted to the accused persons. PW1, watcher of the lodge who allotted the room categorically stated about the fact that these accused

persons came along with the deceased and room was taken in the name of the deceased. Subsequently they vacated the lodge at 4.00 am on 22.11.2011 intimating PW1 that the deceased is lying fully drunk. They were together arrested from the 'By the way' lodge and arrest and seizure of the looted articles from the deceased have been seized from the bag kept in the room occupied by the accused persons. It is pertinent to note that the room in By the way' lodge has been taken in the name of the 2nd accused and it contains his address and mobile number. PW5 the owner of 'By the way' lodge also identified the accused persons and produced Ext.P13 register and he is a witness in the arrest and seizure of the articles from the room and he identified MO10 as the bag from which MO7, MO6 and MO9 etc., have been seized. He produced Ext.P12 register kept in the lodge and he proved Ext.P12(a) entry in the register which pertains to the occupation of the room by these accused persons and entry in Ext.P12 (a) is in the name of the 2nd accused. All these facts and circumstances point to the fact that 2nd accused has been moving along with the 1st accused all along and the stolen article from the deceased have also been seized from the bag kept

in their room. Though 2nd accused was asked about the seizure of MO6 and 7 from the bag kept by them, he has no explanation to offer apart from a flat denial. Ext.P10 arrest memo would show that MO10 bag is that of 2nd accused. So the involvement and active participation of the 2nd accused along with the 1st accused is quite evident from the facts and circumstances and evidence brought in by the prosecution. Since the incident had taken place in the BE room occupied by the deceased during mid night at about 1.00 am on 22.11.2011, nobody could witness the incident.

106. It is relevant in this context to quote Girija Sankar v. State of U.P. (2004 (3) SCC 793 = AIR 2004 SC 1808) wherein while dealing with Sec.302 and 34 IPC it has been held that the extend of a common intention amongst the participants in a crime is the essential elements. It is not necessary that the acts of all the accused must be the same or identically similar. It is also held that when an accused is convicted under Sec.302 r/w 34 IPC in law, it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. Para No.9 of the said decision is relevant in this context to

be extracted which reads as follows :

> “Sec.34 has been enacted on the principle of joint liability in the doing of a criminal act. Section is only a rule of evidence and does not create a substantive offence. Distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Sec.34 if such criminal act is done in furtherance of a common intention of the persons who joint in committing the crime. The direct proof of common intention is seldom available and therefore such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Sec.34, be it prearranged or on the spur of moment, but it must be necessarily be before the commission of the crime. True the concept of section is that if two or more persons intentionally do an act jointly, the

position in law is just the same as if each of them as has done it individually by means. As observed in Ashok Kumar V. State of Punjab (AIR 1977 SC 109), the extends of a common intention amongst the participants in a crime is the essential elements available of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character but must have been activated by one and the same common intention in order to attract the provision."

107. This court also recently in Rajesh v. State of Kerala/MANU/KE/2507/2020: 2020(2)KLD 751, examined the scope and ambit of Sec.34 IPC in a murder case. That was a case in which 1st accused died before filing the final report and 2nd accused alone was convicted with the aid of Sec.34 IPC though the charge was filed involving the offence under Secs 143, 147, 148 r/w 149 IPC. Since the first accused expired, the overt act with respect to him was not challenged at all during the cross-examination . In that context, in paragraph 57 of the judgment this court quoted Krishna Govind Patil v. State of Maharashtra (MANU/SC/0054/1963 = AIR 1963

SC 1413) which reads as follows :

> "It is well settled that common intention within the meaning of S.34 implied a prearranged plan and criminal act was done pursuant to the prearranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under S.302 r/w S.34 IPC it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence."

108. So it was held that unless it is established from the evidence that accused suffered any prejudice by invoking the principle and joint criminal liability under Sec.34 IPC they cannot have any complaint. So in this case also there are clear materials proving the common intention and plan and preparation of the 2nd accused with the 1st accused which culminated in the murder of the deceased and subsequent robbery of the articles belonging to the deceased by the accused persons.

109. It is also relevant in this context to quote Bharwad

Mepadana and Another v. State of Bombay (AIR 1960 SC 289). paragraph 19 is relavant which reads thus:

> "…..... The section is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention by committing a crime, one such participation is established, Sec.34 is at once attracted....."

110. In the present case, in view of the factual matrix which has already been discussed, there are material in abundance to prove the common intention and participation of the present accused along with the 1st accused in committing the murder of the deceased and robbing the valuables belonging to him. So the contention of the learned counsel that there is absence of proof regarding the common intention is only a futile exercise and is only to be negatived.

111. Though the learned counsel would contend that the investigation was prejudicial since in the FIR it has

been stated that two persons aged 25 years are suspects believing the FIS of PW1. The FIR was lodged on 22.11.20202; one hour after the discovery of the death.

112. On going through the evidence of PW1 and the FIS and FIR it could be seen that immediately on PW1 knowing about the death of the deceased inside the room in the lodge at 7 O clock, he went to the police station and gave the FIS. In that he has clearly stated the age of the assailants as around 25 years. He also stated that at about 4.00 am on the same day the persons who occupied BE and BF room, vacated the room and intimated that they are vacating the room and further told that the occupant in BE room is lying fully drunk. The accused persons are aged 23 (A1) and 22 Years (A2) with the identifying marks given by PW1, sketch was also drawn. Though the learned counsel would contend about the prejudice caused to the accused due to the non production of the drawing of the accused, it is not at all relevant at all. It is only an identifying feature in order to get the clue regarding the assailants to the investigating team. So the non production of the drawing of the accused persons will

not cause any prejudice to the accused and the final report is also seen to have been filed on 15.9.2012. But the argument advanced by the learned counsel was that within two days the entire investigation was conducted and charge-sheet was filed. But that is proved to be false. As per the court seal the date of receipt of final report is 15.9.2012.

113. Finally the learned counsel would contend that the investigation was conducted and charge-sheet was filed in this case by a person who has no jurisdiction or authority to conduct the investigation. The investigating officer, PW31, is the Inspector of Police, Azeekode coastal, Thrissur rural whereas the murder happened at Irinjalakuda. It is contended that Coastal Security police, Azhikode is a special wing constituted under G.O.MS. 23/2010/Home. dated 23.1.2010 to the Police coastline of Kerala. Its jurisdiction is 12 nautical miles of Azhikode sea from the shore of Azhikode (Thrissur to Alangadi (Malappuram) covering a coast line of 94 Kms. The Coastal Security Police station are governed by the Central Government though it is under the DGP of Kerala police.

114. In this case as per Ext.P33, the District police

Chief, Thrissur Rural constituted special investigation team to investigate this crime. Among them Pw31 Inspector Coastal Police Station conducted main part of the investigation.

115. According to the learned counsel as per Sec.11(vi) of the Kerala Police Act, 2011 (hereinafter would be referred as the 'Police Act'), only the State Police Chief has power to entrust additional/special responsibilities upon the Special wings and not the District Police chief. According to him, the District Police Chief is not a superier officer of the Coastal Security police as its hierarchy is different.

116. Ext.P33 and the evidence of PW31 would prove that the District Police Chief, Thrissur Rural constituted a special investigation team consisting of PW31, PW30 and others for investigation of the above crime. It is also stated that over all supervision of the case will be done by the Dy.SP, Irinjalakuda. The fact that PW31 the Investigating officer was the Inspector of Police, Azhikode coastal, Thrissur (Rural) is borne out from Ext.P33 itself.

117. Sec.11(6) of the Police Act relied on by the learned counsel says about the powers of the Government to

establish special police station in any area for a particular period or purpose and Sub.s.(6) provides that the State Police Chief may by special order, exempt the Station House Officer of a Special Police station from any responsibility associated with a regular police station and may also entrust him with additional or special responsibilities or that are not assigned to the Station House Officer of a regular police station.

118. Sec.21 of the Police Act provides that -

> "Special Wings, Units, Branches, Squads – (1) Government may, in order to assist the State Police Chief or other Police functionaries or District Police Chiefs or to assist the police in general in their duties and functions, by general or special order, create and maintain any Wing or Special Unit, Specialized Branch or Special Squad, etc, of such strength, internal units, powers duties, jurisdiction and internal or external supervisory structure as may be fixed by the Government by order.
>
> (2). The Government may create units or make special arrangements inter alia, for the following matters, namely :-
>
> (a).....

(b).....

(c).....

(d) police service related to coastal, river and backwater areas and police service for the protection of tourists and pilgrims.

119. Sec.17 of the Police Act deals with -

"District Police Chief – (1) The police and the Police Stations of a Police District shall, subject to such orders as may be issued by the Government and subject to the supervision and lawful command of the State Police Chief, function under the supervision and control of a District Police Chief of such rank as may be fixed by the Government and such Police Officers of such rank as may be fixed by the Government shall assist him in the matter.

(2). The District Police Chief shall not be an officer lower in rank than a Superintendent of Police."

120. So Sec.17 makes it clear that the police and police stations of a Police District shall, subject to such orders as may be issued by the Government and subject to the supervision and lawful command of the State Police Chief, function under the supervision and control of a

District Police Chief of such rank as may be fixed by the Government. Anneuxre-P33 the proceedings of the District Police Chief Thrissur (Rural), would show that the Inspector of police, Azhikode coastal comes under District police chief, Thrissur (Rural). So as per Sec.17, the Inspector of police, Azhikode Coastal would also come under the District Police Chief, Thrissur (Rural), though it has been constituted as a special wing under Sec.21 by the Government. Sec.21 of the Police Act also makes it clear that the Special wings are constituted to assist the State Police Chief or other police functionaries or District Police Chief or to assist police in general in their duties and functions.

121. So their functions are inter-related and the fact that he has been posted as the Inspector of police, Azhikode will not take away the power of Superintendence or control of District Police Chief, Thrissur (Rural). Sec.11(6) of the Police Act only says about the power of the State Police Chief by special order, exempt the Station House Officer of a special Police Station from any responsibility associated with a regular Police station and to entrust him with additional or special responsibilities or that are not assigned to the Station

House Officer of a regular Police station. That power conferred upon the State Police Chief under Sec.11(6) of the Police Act will not in any way take away the power conferred upon the District Police Chief Under Sec.17. Both the provisions have to be construed harmoniously. So the argument of the learned counsel that the Inspector of Police Coastal Police station has no jurisdiction or authority to investigate this crime and file the final report and hence the investigation and charge-sheet filed by him is vitiated etc., are appear to be baseless .

122. Based on the above discussion, we are of the considered view that the prosecution could prove the various limbs of circumstances including the last seen together theory, the seizure of the robbed articles immediately after the commission of the crime within two days from the room in occupation by the 2nd accused along with 1st accused at 'By the way' lodge, Wayanad. mobile call records, tracking the movement of the accused persons through Malappuram to Wayanad, discovery of the fact regarding the sale of MO12 mobile phone belonging to the deceased by the 1st accused on the date of the commission of the crime at

Malappuram etc., would constitute various links of circumstances leading to an irresistible conclusion that it is the 2nd accused along with the 1st accused who are responsible for the murder of the deceased and the robbery of his valuables. Accordingly murder with intention of committing robbery is proved beyond any reasonable doubt. So we do not find any reason whatsoever to interfere with the findings entered into by the learned Additional Sessions Judge against the appellant/2nd accused.

123. In the result Crl.Appeal dismissed confirming the conviction and sentence passed against the appellant/second accused.

A.HARIPRASAD
Judge

M.R.ANITHA

Judge

Mrcs/Shg/9.11x.