IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN

THURSDAY, THE 23RD DAY OF DECEMBER 2021 / 02ND POUSHA, 1943

CRL.A NO.828 OF 2020

AGAINST THE JUDGMENT IN S.C.NO.1109/2011 DATED 16.10.2020 OF THE COURT OF THE ADDITIONAL SESSIONS JUDGE, NEYYATTINKARA.

APPELLANT/ ACCUSED:

BIJU KUMAR, AGED 40 YEARS, S/O.SREEDHARAN NADAR,
PULICHYMAVUNINNA VEEDU (ON RENT),
MANJAKODE, VENPAKAL DESOM, ATHIYANNOOR VILLAGE.

BY ADVS.
SRI.RENJITH B.MARAR
SMT.LAKSHMI.N.KAIMAL

RESPONDENT/ STATE & COMPLAINANT:

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

BY SMT.S.AMBIKADEVI, SPECIAL GOVERNMENT PLEADER [ATROCITIES AGAINST WOMEN & CHILDREN AND WELFARE OF WOMEN & CHILDREN].

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16.12.2021, THE COURT ON 23.12.2021 DELIVERED THE FOLLOWING:

"C.R."

K.Vinod Chandran & C.Jayachandran, JJ.

Crl.Appeal No.828 of 2020

Dated, this the 23rd December, 2021

JUDGMENT

Vinod Chandran, J.

A septuagenarian spinster, a retired teacher, residing alone was murdered. The prosecution alleged that the perpetrators of the crime were the two accused, one a neighbour and the other a resident of the locality, who trespassed into her house, through the roof, in the night of 02.04.2005 smothering her to death and decamping with her ornaments and cash. The first accused was arrested and stood trial twice, since the earlier conviction was set aside and *de novo* trial ordered. The conviction and sentence from which the present appeal arises is after the *de novo* trial. The second accused has given the slip and has not yet been traced. The prosecution makes an assertion, through the Investigating Officer that it was the second accused who removed the tiles on the roof of the house and climbed down into the inside of the house on the night of the 2nd of April, 2005.

2. The prosecution examined PW1 to PW24 as witnesses, produced Exts.P1 to P33 documents and marked MO1 to MO14 material objects. For the defence, the wife of the accused was examined and four documents were marked as Exts.D2 to D5. Two contradictions Exts.D1 and D1(a) were marked from the prior statement of PW7. The accused who stood trial was found guilty of offences under S.457, 392, 201 and 302 of the Indian Penal Code [for brevity, 'IPC']. Under S.302 IPC imprisonment for life and fine of Rs.25,000/- was imposed and five years rigorous imprisonment [R.I.] with fine of Rs.10,000/- was imposed, each under Ss.392 & 457. A further sentence of three years R.I. with fine of Rs.5,000/- was imposed under S.201 IPC.

3. Sri.Renjith B. Marar, learned Counsel appearing for the accused, argued that the charge set up by the prosecution is based only on circumstantial evidence and there is not even one circumstance established to find the accused guilty. The witnesses of all the recoveries turned hostile and there is no scientific evidence linking the recovered items to the crime proper. According to the accused, he was summoned from the hospital, where his wife was admitted for delivery and kept in custody from the very next day of detection of the crime. A cooked up arrest was

stage managed on 14.02.2005, after about 11 days in custody. The recoveries under S.27 were of an iron rod, a lungi from the scene of occurrence and one chain with a locket and some currency. The iron rod was recovered from a public pond and there is only an inference that it could have been used to pry open the lock on the grill at the front entrance. The lungi, recovered from under the cot, the prosecution allege, was used to smother the deceased. The Doctor has merely opined that the lungi could have been so used to cover the nose and mouth of the victim. But the Doctor also opined that there would be froth and blood on smothering, the evidence of which is not found in the cloth. More importantly, the lungi has been recovered from the scene of occurrence, where a sniffer dog was brought on the very next day and the Police also would have necessarily carried out a search of the premises. MO1 ornament said to have been recovered was taken by the Police from the house itself, as deposed by PW1. There is nothing connecting the currency to the victim and the place where the booty was hidden is alleged to be the construction site of the accused; for which no evidence is offered. The scientific evidence regarding finger print and the fabric found on the hands of the victim, tested as identical to the fabric of the pants recovered from the house

of the accused cannot at all be believed. The manner in which the recoveries were made is suspect and the materials sent for scientific examination have not been immediately submitted to Court. The entire case is set up on surmises and conjectures and the accused ought to be acquitted.

4. Smt.S.Ambikadevi, learned Special Government Pleader [Atrocities against Women & Children and Welfare of Women & Children] argues that there is an unbroken link from the chain of circumstances proved before Court. The prior conduct of the accused have been spoken of by a friend of the accused, which clearly indicates the intention to rob a lady. Though PW5 prevaricated, his statement recorded under Section 164 corroborates his testimony. Reliance was placed on ***Ansar v. State of Kerala*** [*2020 KHC 4035*] to press this point. Under cover of night, the accused, through the roof dropped down into the house of the victim, committed murder by smothering and thieved the ornaments of the victim. Though the witnesses to the recovery mahazars turned hostile, the I.O. spoke of the recoveries and so did the police man (PW17) who was in the investigation team. The evidence of the I.O as to recoveries were relied on by another Division Bench in ***Ansar*** (supra). The I.O and PW17, corroborate each other and they are credible witnesses. The fingerprint was taken by the

expert from the lock, which was pried open by the accused, to come out of the house. The chance print on the lock was developed and compared with the sample print taken from the accused, which matched unequivocally. The scientific evidence regarding the fabric found on the palm of the victim, which was identical to the dress recovered from the house of the accused, is a clinching circumstance proving the guilt of the accused. More importantly the stolen ornament identified by the relatives of the deceased was recovered under S.27, Evidence Act; which is a relevant fact as held in *K. Chinnaswamy Reddy v. State of A.P* [*1963 (3) SCR 412*]. The collection of scientific evidence was above board and the mere delay in submitting to Court cannot result in the same being totally eschewed as held in *Prasad v. State of Kerala* [*2019 KHC 4682*]. The close acquaintance of the accused with the deceased, his residence in the neighbouring house, the presence in the locality spoken of by PW4 & PW5, the fact of the accused having absconded, the recovery of the dress from the house of the accused as also the iron rod, the lungi used for smothering and the necklace, all based on the confession of the accused, under Section 27 and the scientific evidence of fingerprint and the fabric of the pants of the accused, recovered from the palm of the victim provide the unbroken

chain of circumstances linking the accused to the crime. The Trial Court has entered the finding of conviction on valid grounds and proved circumstances. The sentence imposed is also proper. There is nothing to be interfered with and the appeal ought to be dismissed.

5. The medical evidence regarding the postmortem is offered by PW18, the Doctor who conducted it. PW18 marked Ext.P17 Postmortem Certificate and spoke of 9 injuries, contusions, lacerated wounds, abrasions and one healing wound. The blood group of the deceased was tested as A^{+ve}. Opinion as to the cause of death was stated to be as follows:

> ***"Postmortem findings are consistent with death due to effect of blunt force applied around nose and mouth. The mode of death is due to asphyxia that due to the effect of blunt force obstructing mouth and nostrils. Postmortem findings like patechial haemorrhages, oedema, congestion are the effect of asphyxia. Injury No.1 is a blunt force injury. Injury Nos.2,3 & 4 are also blunt force injuries due to the obstructions of mouth. Injury No.5 is a blunt force injury by forcefully obstructing the nose. Injuries No.6 & 7 can be caused when the knee portion came in contact with rough surface or object. Injury No.9 can be caused by restraining force. If a rough object come in contact with that particular portion injury No.9 can be caused. whether injury No.9 can be caused when a bangle like object is forcefully removed from the***

hand (Q) Yes (A). Injury Nos.2,3,4 and 5 are sufficient in the ordinary course to cause death because the above injuries can be caused by the application of blunt sustained force around mouth and nostrils resulting asphyxia and death."

The indication is that the victim was pinned down to the bed while being smothered and the bangles removed forcefully. MO9 lungi was shown to the witness, who opined that injuries No.2, 3 & 4 could be caused by using the lungi. The said injuries are lacerated wounds on the inner aspect of middle of lower lip, left angle of lower lip and inner aspect of right side of upper lip indicating pressure applied on the face, covering the nose and mouth, with the garment. The death is by homicide and the *modus operandi* as projected by the prosecution indicates the perpetrators having climbed down through the roof to commit the crime and escape through the front door after prying open the lock.

6. PW1 is the first informant, the brother of the deceased, who marked Ext.P1 First Information Statement [FIS]. He also received the dead body after postmortem, evidenced by Ext.P2. He was informed of the murder by PW2, his niece. He spoke of another niece, by name Mary, having kept the company of the deceased sister during the nights,

since she was living alone. Mary was no more, when the *de novo* trial was carried out. However, PW1 and the other witnesses, who are the relatives of the deceased, affirmed the fact that Mary, on that particular day had not gone to her aunt's house since she was scolded for not being punctual. PW1 identified MO1 chain with a locket and MO2 envelope with currency notes, which were shown to him at the Police Station, along with the accused. PW1 also said that the accused with his family was residing in the house of Mary, on rent.

7. PW2 is the niece of the deceased, who informed PW1 about the crime committed, on being so informed by PW7. She spoke of the circumstances of her aunt's life in tandem with PW1 and identified the ornament recovered as also the accused, who was living nearby. She spoke of other ornaments owned by her aunt, which were absent on the body of the deceased. The body of the deceased had only two earrings when she saw it. She also spoke of the deceased having told her about Rs.50,000/- kept in her hands, about two months back. The accused, his wife and mother used to frequent the house of the deceased, to watch television. PW7 is the nephew of the accused, who was first informed of a possible house trespass, by persons returning from the Church, who saw the

tiles removed and kept on the roof. He informed PW2 and went to the house, to see the body of his aunt lying inside the room through the grill at the entrance. He spoke of the Police having prepared a mahazar at Mary's house in the presence of Mary, the accused and his family. He attested the mahazar as Ext.P6 and the pants and shirt as MOs.7 & 8.

8. PW3 is the witness to the inquest report. PW4 runs an automobile spare-parts shop in the locality, wherein one Pramod, the absconding 2nd accused, was employed as a Salesman. Pramod had also taken a room on rent, on the first floor of the building in which the spare parts shop was run, from the father of PW4; PW9. He deposed that the friends of Pramod frequented his shop and the accused-appellant was one of them. He saw Pramod and the accused together on the evening of 02.04.2005 at about 04.00 p.m. He witnessed Ext.P4 mahazar, by which the police seized the rent agreement between Pramod and his father and identified the accused. PW9 marked Ext.P9 rent deed executed with Pramod. PW5 was another friend of Pramod, who saw both the accused on 02.04.2005 at 03.30 p.m, sitting inside the shop of PW4. He deposed that when he was sitting in front of the shop, Pramod asked; whether he was coming with them. When he queried where they were going, Pramod said he need not join them. When PW5

persisted, Pramod answered that they were going to pick some money and gold from a lady. He identified the accused as the person who was sitting along with Pramod when the said conversion took place.

9. In cross-examination PW5 admitted that he was apprehended by the police in connection with the investigation of the murder and later he was released. Though he admitted the statement under Section 164 before the Magistrate, he deposed that he made it in accordance with the directions of the police. The police had searched for him and since he was not available, his brother was apprehended. Later he was produced before the police by party workers to get release of his brother. He was detained at the Police Station for 2-3 days. According to him, while he was at the station, Pramod was brought to the Police Station. It was also his statement that PW4 and one Chandran came to the Police Station to get Pramod released on bail. PW5 was released on bail only after his parents stood surety. Even after that, he was directed to report before the Police Station every day morning and he would be released only after somebody approached the police on his behalf. He speaks of being very depressed, which even made him contemplate suicide. He said the police threatened to book him for the

crime, if he does not give evidence in accordance with their directions. Though there was re-examination, there was nothing asked, touching upon the threats levelled by the police. Obviously the above witnesses were examined to prove the connection between the two accused and their presence in the locality. Their friendship or their presence in the locality, being residents therein, does not offer any incriminating circumstance against the accused. The conversation between the absconding accused and PW5, we will deal with a little later.

10. PW6 saw the accused in front of his shop at 5.00 a.m on the next day, but PW8, who is said to have given a lift to the accused at 05.45 a.m, on 03.04.2005, turned hostile. PW12 witnessed the arrest of the accused and seizure of Rs.425/- from his person. Ext.P12 is the seizure mahazar and Ext.P13, the arrest memo. The arrest is said to have been made on 14.04.05 at 8.00 p.m. But the witness, in cross-examination stated that the arrest was at about 06.00 p.m. He was returning from a tea shop when the police saw him and told him about the arrest and asked him to sign on the mahazar. He also said that when the mahazar was recorded and signed, the accused was inside the jeep. He identified the accused from the dock as the person who was sitting inside

the jeep on the date on which the mahazar was signed. There is two hours difference in the time seen on the Arrest Memo and the time spoken of by PW12. PW12 also does not speak of having seen the arrest. His deposition is only to the effect that the accused was seen inside the Jeep.

11. After the arrest of the accused, on 15.04.2005, there was first, a recovery of a gold ornament and some cash at 8.00 a.m witnessed by PW13, who turned hostile to the prosecution. PW14 is a goldsmith, who weighed the gold ornaments recovered and recorded the weight to be 24.5 grams. The next recovery was at 10.30 a.m under Ext.P10 on the strength of Ext.P10(a) confession statement, of an iron rod, MO11, which was witnessed by PW10. Ext. P6 mahazar of recovery at 11.30 a.m, was of the dress worn by the accused. A lungi, MO9, allegedly used to smother the deceased, was recovered by Ext.P11 mahazar at 12.30 p.m, on the strength of Ext.P11(a) confession statement of the accused.

12. PW15 is the fingerprint expert of the District Crime Records Bureau. He was present in the scene of occurrence on 03.04.2005. He detected a chance print from the lock pried open and left in the premises, which was developed by a police photographer. This was compared with the fingerprint sample sent from the Circle Office,

Neyyattinkara. He found the chance print in the lock to be matching with the sample print taken from the accused, which report was produced at Ext.P15. He also spoke of having lifted the print from the lock and developed it after which, the photograph was taken. He deposed that usually the fingerprint slip is brought to the DCRB by police personnel and the forwarding letter will accompany the fingerprint. Ext.P15 report is dated 19.04.2005, obviously after the arrest. He admitted that the report does not contain the details of the similarities between the chance print and the sample print. The chance print, taken from the lock found at the scene of occurrence was specifically challenged in cross-examination.

13. PW16, is the Village Officer, who prepared the scene plan and PW17 is the CPO, who was part of the investigation team. PW17 speaks of having accompanied the I.O and the accused when the gold chain and currency were recovered from a heap of sand, kept covered inside an envelope. On the directions of the C.I, PW17 went in his jeep and brought PW14, a goldsmith, to verify whether the chain was infact a gold chain. He identified MO1 chain and 20 numbers of 100 rupee currency notes as MO2. The packet in which MO1 and MO2 were produced was marked as MO10. He also

spoke of the accused having confessed about throwing the iron rod into a pond, called 'Chirakkulam'. He dipped into the pond as per the directions of the I.O and recovered the iron rod from the place pointed out by the accused, which was marked as MO11. Later the dress worn by the accused was recovered from his house which were identified as MO7 pants and MO8 shirt. The recovery of the soiled lungi from the scene of occurrence was the last of the recoveries made on the said date, which was identified as MO9. He also identified the accused standing in the dock as the person who had pointed out each of the material objects recovered, in his presence.

14. PW19 is the Assistant Director of Forensic Science Laboratory, who examined the scene of occurrence and picked samples from the spot. He saw the body and according to him, he took cellophane tape pressings from both palms, neck, face, front side of the blouse, right forearm and abdomen of the deceased. He also took pressings from the floor near the dead body, lungi worn by the deceased, rafter on the ceiling and marks on the wall below as also collected hairs on the floor. He packed, labelled and sealed the above items and handed it over to the I.O, for forwarding it to the FSL Lab. However, no seizure mahazar is seen recorded by the

I.O for seizure of the above items. A report of what occurred at the scene of occurrence was marked as Ext.P18. PW19 spoke of having received a parcel consisting of 16 sealed packets from the JFCM-I Court, Neyyattinkara, in which 29 items were found. The report issued by him after examination was marked as Ext.P19. He also said that there was delay in sending Ext.P18 report due to other pressing engagements in his workplace. PW20 received the dead-body for postmortem examination and later handed it over to PW1. PW21 registered the FIR and PW22, Magistrate, recorded statements of Mary, one Binu (PW5?) and PW8, under Section 164. PW23 is the I.O who carried out the investigation and PW24 laid charge-sheet. DW1 is the wife of the accused.

15. We will deal with the circumstances relied on by the prosecution, one by one. At first, the presence of the accused in the locality; which requires no proof, because he is admittedly a resident of the locality. PW4 to PW6 and PW8 are proffered by the prosecution to speak on the presence of the accused in the locality before and after the crime. PW4 speaks of having seen his employee Pramod and the accused, at 4.00 p.m, when they came to his shop and then went to Pramod's shop, which was in the first floor of the building. He also categorically deposed that, after that he had not

seen Pramod and the accused either in his shop or Pramod's shop. PW5, on the other hand, speaks about having come to PW4's shop at 3.30 p.m on the same day, when he saw Pramod and the accused sitting inside the shop. The conversation between Pramod and PW5 occurred, with PW5 sitting outside the shop. There is incongruity in the evidence of PW4 and PW5, since the latter does not speak of the presence of the former. The evidence of PW4 also is that at 4 p.m, when he was in his shop, both the accused came together and went to Pramod's shop; while PW5 says that at 3.30 p.m they were both inside the shop of PW4. In this context, quite pertinent is the fact that PW5, specifically stated in cross examination; which we already referred to, that he was speaking under threat of the police. PW5, hence, cannot be believed and in that context, the conversation between himself and Pramod also would have to be disbelieved. Section 164 statement, as argued by the Special G.P, can be used for corroboration. But when the witness states before Court that he was threatened to toe the line of the prosecution, that cannot be ignored to rely on the prior statement made. We also observe that the name shown in Ext.P5, section 164 statement, is Binu, while that declared by PW5, before Court is Binish. We already observed that after the cross-examination of PW5, the

prosecution remained silent.

16. PW6 speaks of having seen the accused at 05.00 a.m at a place 3 kms. from the scene of occurrence. He identified the accused in chief-examination. But, in cross-examination, he said that during the period, when the murder occurred, there was no streetlight available near his shop. At 5.00 a.m during March-April, it was dark and he used to put off the lights in his shop when he closed the shop at night. He deposed that there were 4-5 persons standing in the junction waiting for the bus. He saw a person near his shop when he was approaching the shop for opening it, in the early morning. He categorically stated that since it was dark he could not see the face clearly and even now he is not definite whether the person standing in the dock was the person he saw at the junction on that day. PW8 was brought by the prosecution to speak of having given a lift to the accused in his bike. PW8 turned hostile. The deposition of PW4 to PW6 and PW8 puts forth no incriminating circumstance against the accused.

17. The next circumstance spoken of, is the arrest of the accused by PW22, witnessed by PW12. PW12 in his deposition said that he signed the mahazar at 6.00 p.m on 14.04.2005 and he saw the accused sitting inside the jeep.

The arrest memo Ext.P13 shows the same having been recorded at 8.00 at night on 14.04.2005. This seriously puts to peril the arrest as projected by the prosecution, especially in the context of the accused having stated that he was picked up by the police on 04.04.2005 from the hospital, where his wife was admitted for delivery. That the wife of the accused was admitted for delivery on 03.04.2005 at 5.00 p.m, at the Taluk Hospital, Neyyattinkara, was proved by Ext.D5 Case Sheet, marked by DW1, the wife of the accused. Ext.D5 indicates that the patient was taken to the labour-room at 05.15 p.m. The evidence of PW12 raises a serious apprehension about the arrest, especially when there is inconsistency in the evidence of the I.O and this probabalises the defence version of the accused having been apprehended long before the proclaimed arrest. We cannot but observe that this casts a cloud of suspicion over the further circumstances, especially of the recoveries made under Section 27.

18. Now we come to the recoveries. *Prasad (supra)* found credible the evidence of the I.O, in the facts and circumstances of that case; not of universal application. After arrest, on interrogation, the accused confessed to the concealment of the ornaments and currency thieved. The confession was that those were concealed, by digging a hole

in the construction site of his residence. The recovery is found to be made from a one-room building under construction, as spoken of by the I.O, PW23. The place of concealment is the sand heaped on the northern wall of the building. The confession speaks of a house construction by the accused while the I.O speaks of the recovery from a one-room building, under construction, in a puramboke. The confession and the place of concealment differ drastically and there is nothing produced to prove the ownership of the property or the construction carried on. Ext.P14 is the recovery mahazar, which was not admitted by PW13, the witness to such recovery, who was declared hostile. One other aspect is the summoning of the appraiser, PW14, who is a traditional goldsmith. PW14 said that he came to the spot of recovery in an autorickshaw. PW17, the police officer who accompanied the I.O, states that the appraiser was brought to the recovery spot in his jeep as per the direction of the I.O.

19. Another crucial aspect is the evidence of PW1 in cross-examination. PW1 states that he and his wife were staying with his deceased sister, till a child was born to them. He said that he does not remember whether he had told the police about the ornaments which were robbed from his sister's residence. The gold, according to PW1, was kept by

his sister in a 'kalpetti', which in the vernacular means a box with legs. He also said that if he remembers correctly, MO1 chain was taken by the police from the box and handed over to one Narayani. He recanted that though he cannot say from where the police took the chain, it was in their hands when they came out of the house. This seriously puts to peril the recovery under Section 27 of the chain and currency; especially when the statement is made by a prosecution witness; who in other aspects fully supported the prosecution. The recovery does not qualify as an incriminating circumstance against the accused. The cash, ofcourse, has not been connected to the deceased.

20. The next recovery under Section 27 is the iron rod. The I.O, based on the confession [Ext.P10(a)], as per Ext.P10 mahazar recovered the iron rod from a nearby pond. MO10 was the iron rod and but for an apprehension that it was used to pry open the lock, there is no proof offered of the same, to find the said recovery to be an incriminating circumstance. It is also relevant that PW1 deposed of police having brought a dog to the scene of occurrence, which had gone to the pond. In that circumstance it is difficult to believe that the pond was not searched by the police for more than ten days till the recovery was made on 14.03.2005.

21. The further recovery is of a lungi, MO9, by Ext.P11, based on the confession at Ext.P11(a). The recovery of MO9 lungi was by Ext.P11 mahazar based on Ext.P11(a) confession. The lungi was recovered from a room on the north-western side of the scene of occurrence, the house of the deceased. The same is recovered from under a sheet laid on a cot. The witness to the said recovery, PW 11, specifically says that there was only a sheet on the cot and from underneath the said sheet, MO9 lungi was recovered. Again it has to be noticed that a sniffer dog was brought to the premises and the police also searched the premises thoroughly, when the lungi was not seen. The specific cot and room is mentioned by PW19, the scientific expert who combed the crime scene for evidence. The recovery of the lungi was from the north western room of the house in which the murder occurred, which was inhabited after the detection of the murder. Ext.P18 report of the Asst, Director of the State FSL, records so:

> "The bedroom at the northwest corner of the house was found in an open condition with disturbances on the cot and also the wooden almirah in this room. A wooden chair was found placed over the cot".

This fact was specifically deposed by PW19, the author of Ext. P18 report in his testimony before Court. Hence the cot

was subjected to scrutiny long before the arrest of the accused and there is no sanctity in the recovery alleged under Section 27 of the Evidence Act. Further in the FSL report, Ext.P19, even saliva was not detected from the lungi, which is item no.29 in the said report. It is also very pertinent that the I.O and PW1 have different versions as to whether the house of the deceased was inhabited after the murder. The I.O asserts that it was in police custody, while PW1 in cross-examination says that he was residing in the said house, after the murder was detected, for about seven days. The recovery made on the 14th from that premises is very suspicious. The next recovery is of the pants and the shirt, which the accused says, was in his house. There is no concealment and the recovery is made from a clothes-line in the rented accommodation of the accused. Much has been argued, on the fabric of the pants having been tested similar to that found in the cellophane tape pressing taken from the palm of the deceased; which we will come to later.

22. Now we have to deal with the scientific evidence as proffered by the prosecution. The medical evidence as discussed, clearly indicates a homicide by smothering. The scientific evidence we now deal with, is the chance fingerprint detected by PW15, the Fingerprint Expert, from

MO3 lock which was developed with the help of the police photographer and compared with the sample print of the accused, send from the Circle Office, Neyyattinkara. PW15 specifically spoke of the development of the chance print and the photograph taken, in which event the proper procedure would have been for the police to seize the same on a mahazar and forward it to the Court and wait for the apprehension of the accused to compare it. The chance print, admittedly was taken by the Fingerprint Expert on 03.04.2005 in the presence of PW21, the Circle Inspector. PW22 speaks of the sample fingerprint of the accused having been taken by him, which the prosecution justifies under the Identification of Prisoners Act, 1920. The Trial Court has also justified the action of the I.O relying on the decision of the Hon'ble Supreme Court in *Shankaria v. State of Rajasthan* [*AIR 1978 SC 1248*].

23. The law on the point of finger print evidence has been dealt with by the Hon'ble Supreme Court, time and again. At the outset we refer to the following passage from *Prem Sagar Manocha v. State (NCT of Delhi)*, [*(2016) 4 SCC 571*] which puts expert opinion in the correct perspective, as distinguished from a witness of facts:

> *"20. Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts, but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion".*
>
> *[emphasis supplied by underlining]*

The testimony of an expert is at best an opinion, which has to be given due weight by the Court. However, the conclusion has to be arrived at by the Court itself, based on the opinion of the expert. We are here, concerned with whether there was any material before Court to arrive at a conclusion; other than the report of the finger print expert at Ext.P15, which itself is sketchy. The conclusion of the Court has to be arrived at, based on the opinion of the

expert regarding the similarities and how the chance print can be treated as identical to the sample taken from the accused. The satisfaction so arrived at by the Court cannot be substituted with the opinion of the expert.

24. *Prakash v. State of Karnataka* [*(2014) 12 SCC 133*] was a case in which the prosecution relied on fingerprint evidence as taken from the crime scene, tallied with the sample print. A negative of the photograph of the Bank passbook belonging to the deceased, containing the fingerprint of the accused was produced in court. But no positive print or photograph was developed from the negative. The photographer, who was examined in Court, could not say if the fingerprint in the negative was that appearing on the passbook. It was hence found that there was nothing in the negative to relate it to the passbook. The testimony with regard to the fingerprints of the accused on the Bank passbook was held to be inconsequential. The finger print expert stated that he obtained from the scene of occurrence a hand print on a plastic cover, which was marked before Court and so was marked an enlarged photograph of the said print. The expert compared the fingerprints on the photograph with the sample fingerprint, again marked in Court, to depose that it tallied. But how the sample print came into existence was

not deposed to, even by the I.O. The reliance placed on a 313 statement that the Inspector had given a cover to the accused to hold, was held to be improper since the date on which this occurred as stated by the accused was prior to his arrest. In the instant case the chance print developed from the lock or the photograph taken was neither produced before Court, nor was the photographer examined.

25. As to the sample finger print to be taken from the accused, in ***Prakash*** *(supra)* it was held : *"To avoid any suspicion regarding the genuineness of the fingerprint so taken or resort to any subterfuge, the appropriate course of action for the investigating officer was to approach the Magistrate for necessary orders in accordance with Section 5 of the Identification of Prisoners Act, 1920.* ***In Mohd. Aman v. State of Rajasthan*** **[***(1997) 10 SCC 44***]** *this Court referred to the possibility of the police fabricating evidence and to avoid an allegation of such a nature, it would be eminently desirable that fingerprints were taken under the orders of a Magistrate".* It was held so:

> *"29. The Karnataka High Court has taken the view* ***ILR 2013 KAR 3156 State v. B.C.Manjunatha*** *that it is not incumbent upon a police officer to take the assistance of a Magistrate to obtain the fingerprints of an accused and that the provisions of the Identification of Prisoners Act are not mandatory in this regard.* ***However, the issue is not one of the***

provisions being mandatory or not—the issue is whether the manner of taking fingerprints is suspicious or not. In this case, we do not know if Prakash's fingerprint was taken on 7-11-1990 as alleged by him or later as contended by the investigating officer, or the circumstances in which it was taken or even the manner in which it was taken. It is to obviate any such suspicion that this Court has held it to be eminently desirable that fingerprints are taken before or under the order of a Magistrate. As far as this case is concerned, the entire exercise of Prakash's fingerprint identification is shrouded in mystery and we cannot give any credence to it".

26. Ashish Jain v. Makrand Singh [(2019) 3 SCC 770]

reiterated the position thus:

"36. However, as affirmed recently by this Court in Sonvir v. State (NCT of Delhi) (2018) 8 SCC 24, Section 5 is not mandatory but is directory, and affirms the bona fides of the sample-taking and eliminates the possibility of fabrication of evidence. The Court also relied on various judgments on the point, including Shankaria v. State of Rajasthan (1978) 3 SCC 435, a three-Judge Bench decision of this Court to reach this conclusion. While discussing the decision of this Court in Mohd. Aman v. State of Rajasthan (1997) 10 SCC 44, the Court observed at paras 60-62 as follows: (Sonvir case, SCC pp.45-46)

"60. This Court observed that the prosecution has failed to establish that the seized articles were not or could not be tampered with before it reached the Bureau for examination. Further the following was stated in para 8: (Mohd. Aman case, SCC p.49)

'8. … Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also casts a serious mistrust as to genuineness of the evidence. Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before

or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate'.

61. The above observation although clearly mentions that under Section 4 police officer is competent to take fingerprints of the accused but to dispel as to its bona fide or to eliminate the fabrication of evidence it was eminently desirable that they were taken before or under the order of the Magistrate.

62. The observation cannot be read to mean that this Court held that under Section 4 police officers are not entitled to take fingerprints until the order is taken from the Magistrate. The observations were made that it is desirable to take the fingerprints before or under the order of the Magistrate to dispel any suspicion."

27. It is deposed by PW23, the I.O that the sample prints were taken from the accused, after his arrest and send to the expert, PW15. This action is justified under The Identification of Prisoners Act. The sampling however, is shrouded in mystery and the I.O does not even speak of the date on which the sample was taken and send to PW15. As in the case of the chance print developed from the lock, the sample is also not stated to be photographed nor is it produced in Court; but Ext.P15 report alone is seen produced.

Ext.P15 blandly declares the chance print and the sample print to be identical; without explaining the similarities and without offering the photograph of the prints to the Court for arriving at a definite conclusion.

28. In *Mohan Lal v. Ajit Singh* [*(1978) 3 SCC 279*] reference was made to B.L.Saxena's "*Identification of Handwriting, Disputed Documents, Finger Prints, Foot Prints and Detection of Forgeries*", 1968 Edn., p.247, Walter R. Scott's "*Fingerprint Mechanics*" p.62, and M.K. Mehta's "*The Identification of Thumb Impressions and the Cross-Examination of Finger Print Experts*" 2nd Edn., p.28 to hold so:

> **"45. … While referring to the old practice of looking for a minimum of 12 identical characteristic details, Saxena has admitted that the modern view is that six points of similarity of pattern are sufficient to establish the identity of the fingerprints. Walter Scott has stated that "as a matter of practice, most experts who work with fingerprints constantly satisfy themselves as to identity with eight or even six points of identity". Mehta has also stated that in the case of blurred impressions the view of some of the Indian experts is that if there were three identical points, they would be sufficient to prove the identity.**
>
> **46. There is no gainsaying the fact that a majority of fingerprints found at crime scenes or crime articles are partially smudged, and it is for the experienced and skilled fingerprint expert to say whether a mark is usable as fingerprint evidence. Similarly it is for a competent technician to examine and give his opinion whether the identity can be established, and if so whether that can be done on eight or even less identical characteristics in an appropriate case. As has been pointed out, the opinion of the Director of the Finger Print Bureau in this case**

> is clear and categorical and has been supported by adequate reasons. We have therefore no hesitation in accepting it as correct".

Even if the sample fingerprint taken by the I.O was legally permissible, again the sample should have been transmitted to the Court with a property list and the chance print as also the sample print ought to have been sent to the Fingerprint Bereau through Court, with a forwarding note. This procedure was not followed in the case of the chance print also. PW15 has taken the chance print developed from the lock and the photograph taken of the same and on receipt of sample print, has compared it and sent a report to the Circle Inspector of Police, Neyyattinkara as per Ext.P15 dated 19.04.2005. The report merely states that on comparison the chance print developed from the scene of crime is identical, to the left ring finger impression of the accused. The developed chance print, the sample print and the photographs should have been produced before Court. Further the specific similarities which persuades the expert to form an opinion, has to be detailed, for the Court to compare the prints and come to a conclusion. The procedure followed is grossly inadequate to inspire confidence of the court and the report is inadmissible in evidence. The Court below erred egregiously

in having relied on the evidence of fingerprint as an incriminating circumstance.

29. The other scientific evidence strongly relied on by the prosecution is the fibre found in the palm of the deceased which tallies with the fibre of the pants recovered from the house of the accused. Ext. P19 report of FSL indicates that Item No.s 9 & 10, cellophane tape pressings from the right and left palm of the deceased are similar to that found on item 27, pants worn by the accused. Definitely there cannot be a conviction entered on the sole finding of similarity of fibres. Especially the opinion being of a similarity as distinguished from an opinion of being identical. Here too, the scientific analyst does not speak on how the fibres are similar, without which the Court is unable to satisfy itself. As observed earlier the prosecution would have the Court blindly accept the opinion of the expert; even when there is no material offered before Court to satisfy itself that, in fact the fibres are similar. The expert has to point out the similarities, based on which he forms the opinion, which should also satisfy the Court. Further, it has to be noticed that the prosecution allege that the accused absconded after the crime and the defence assert that he was picked up by the police after two days and kept in custody

till a formal arrest was made on the 14th, which arrest we found to be not credible. Either way, the police would have searched the rented accommodation of the accused and there was no concealment of the dress said to have been recovered, which we have noticed hereinabove. We also find serious infirmities in the manner in which the samples were dealt with after collection from the scene of occurrence; by PW19, the Assistant Director (Biology) of the FSL, Thiruvananthapuram. The cellophane tape pressings, from the body of the deceased and the scene of occurrence, were packed, labelled, sealed, and handed over to the I.O, as deposed by PW19. This is for transmitting it to Court and onward forwarding of the same to FSL Lab, Thiruvananthapuram. But there is no mahazar drawn up seizing the above materials. The report of examination of scene of occurrence is marked as Ext.P18, which the defence objected as inadmissible under Section 162 Cr.P.C. Ext.P18 is a report dated 11.04.2005, sending the cellophane tape pressings collected from the scene of occurrence on 03.04.2005 at 11.00 a.m. Hence, the cellophane tape pressings collected by the Assistant Director was not immediately handed over to the police nor sent to the Court. The Assistant Director only sent the materials collected, by Ext.P18 report which throws a suspicion on the

cellophane tape pressings. On receipt of the cellophane tape pressings on 11.04.2005, it was sent to the Court by Ext.P31, property list, dated 03.04.2005; received again, on 11.04.2005. The seal of the Magistrate's Court and the thondi number endorsed as seen from Ext.P32 indicates the same having been received in the Court only on 11.04.2005, eight days after the collection. We find no reason to place any reliance on the scientific evidence of fingerprint and the cellophane tape pressings. We have already found that the recovery of the pants and the lungi cannot be an incriminating circumstance, both of this being very suspicious.

30. We find none of the circumstances as pointed out by the prosecution having been established to pin the crime on the accused. The presence of the accused in the locality is an admitted fact, he having resided in the neighbouring house belonging to the niece of the deceased. The conversation between PW5 and the co-accused Pramod has been disbelieved by us. PW5 has also categorically stated that his evidence is coerced and tutored. Even the arrest of the accused is suspicious and this, in fact, puts into peril the recoveries made almost twelve days after the incident, when the police would have searched the scene of occurrence and

the nearby premises at the initial stage itself. The collection of scientific evidence did not follow the procedure, which alone would inspire the confidence of the Court to rely on the results based on the examination of materials collected from the scene of occurrence and the body of the deceased. Neither the fingerprint comparison report nor the chemical analysis result of similar fibres can be relied upon. The materials with respect to fingerprint comparison was never produced before Court and that collected by the Assistant Director, FSL was produced after eight days delay, during which period also it was not in the custody of the police and was in the custody of the Assistant Director. The recovery of a stolen ornament (chain), cannot be believed since PW1, the brother of the deceased, speaks of the chain MO1 having been taken by the police from a box in which the deceased kept her gold ornaments and handed over to one Narayani, on the day of detection of the crime. There are no circumstances proved against the accused and he has to be given the benefit of doubt only due to the sloppy manner in which the collection of evidence was carried out by the I.O. We allow the appeal and acquit the accused and he shall be released forthwith if his continued detention is not warranted in any other case.

31. Before leaving the matter, we cannot but notice the opening statement made by the learned Trial Judge in paragraph 62, which is extracted hereunder:

> "Though there is no materials to show the involvement of the other person by name Pramod kumar @ Pramod, the involvement of the accused in the commission of the offence as alleged by the prosecution is clearly proved through the circumstances established by the prosecution".

We cannot but observe that A2 was not standing trial and such observations would jeopardize the trial, if and when he is apprehended at a later point. Trial Judges should be very careful not to make such observations and we expunge the above extracted statement from the Trial Court judgment. Registry to forward a copy of this judgment to the officer, if he is still in service.

Sd/-
K. Vinod Chandran
Judge

Sd/-
C. Jayachandran
Judge

vku/-