

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

MONDAY, THE 19TH DAY OF JULY 2021 / 28TH ASHADHA, 1943

CRL.A NO. 1237 OF 2016

AGAINST THE JUDGMENT IN SC 353/2010 OF SPECIAL COURT UNDER POCSO
ACT, PALAKKAD, PALAKKAD DATED 23.01.2016

APPELLANTS:

- 1 MANI @ RAJENDRAN
AGED 57 YEARS, S/O.KANTHASWAMY KOUNDER,
MANTHAMPEEDIKA KONA, PADAVAYAL,
PADAVAYAL VILLAGE, PALUR (P.O), THAVALAM, AGALI.

- 2 RAJAN @ MALLEESWARAN
AGED 52 YEARS, S/O.VELLINGIRI KOUNDER,
MANTHAMPEEDIKA, PADAVAYAL VILLAGE,
THAVALAM, AGALI.
BY ADV SRI.NIREESH MATHEW

RESPONDENT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, KOCHI -682031.

OTHER PRESENT:

SPECIAL GOVERNMENT PLEADER FOR ATROCITIES AGAINST WOMEN
AND CHILDREN SMT.S.AMBIKA DEVI

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
13.07.2021, THE COURT ON 19.07.2021 DELIVERED THE FOLLOWING:

K. Vinod Chandran & Ziyad Rahman A.A, JJ.

Crl.A.No.1237 of 2016

Dated this the 19th day of July, 2021

JUDGMENT

Vinod Chandran, J.

When public opinion influences an investigation its very course gets diverted with exasperating results. A tribal woman was murdered and the suspect was her confidant who was from the same community. The community rose in arms against the implication of their own and the Police removed him from the array of suspects and proceeded against the two other suspects from a different community with a higher caste status thus alleging offences not only under the Indian Penal Code but also under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The accused were found guilty in the trial wherein PW1 to PW39 were examined, Ext.P1 to Ext.P49 series were marked and MO1 to MO25 objects were produced. The defence marked 21 contradictions from the

161 statements of the various witnesses as D1 to D21. Two exhibits were marked as D22 and D23 through a witness examined by the defence as DW1.

3. The appellants/accused were found guilty of all the offences alleged and they were sentenced to undergo life imprisonment and pay a fine of Rs.50,000/- each under Section 302 of IPC and S.3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and to undergo rigorous imprisonment (R.I) for 7 years and pay a fine of Rs.25,000/- each under S.376 of the Indian Penal Code with default sentences.

4. Sri. Nireesh Mathew learned Counsel for the appellant/accused meticulously took us through the evidence. The contradictions and omissions were specifically pointed out to urge that the motive stated is a cooked-up story. Even the Court below observed that none of the witnesses except PW8 was reliable. The Court below misdirected itself in believing PW8 since he is the most unbelievable witness and a clear suspect. The evidence of PW26 leads to an inference that there was a cover-up, for reason of the tribal

community rising in arms from implicating one of their own for the murder. PW8's statements to the Police marked as contradictions are hopelessly incriminating. These statements could not have been taken into account if he was in the array of accused, but having not been so arrayed, it is sufficient to give rise to a reasonable doubt, to acquit the accused. The accused, both of them, deny their presence and allege false implication merely to appease the community to which the deceased and PW8 belonged. The motive having been disbelieved, it cannot be said that there is any animosity between the accused and the deceased. The narration, of the incident or rather the circumstances, by PW8 is totally unbelievable and that is the sole basis for the conviction. The subsequent conduct of PW8; of having remained with the corpse for one full night and reporting the death only on the next day morning itself throws suspicion on him. Further, he did not reveal any of the circumstances now stated and merely reported the death of the person he considered as his sister; without making any allegation of murder. He also hid in the forest when the Police came to the

scene of occurrence where the corpse was lying. These very relevant aspects of the subsequent conduct of PW8, coupled with the damaging contradictions marked through him, are to be taken note of under S. 8 of the Indian Evidence Act.

5. The accused have a specific contention that they were taken into custody, along with PW8, when the investigation commenced and their arrest was recorded much later on 09.08.2005 after more than three months. The medical examination which led to Ext.P12 and P13 reports, occurred on 04.06.2005 while they were in police custody wherein they were brutally assaulted; which explains the injuries on them. The Panchayat member who was examined as PW26 specifically spoke of seeing the accused in the Police station on 05.06.2005. There is no valid potency test carried out on PW8 who was referred to a Medical Board by the Doctor, PW20, who initially carried out the test on the accused and PW8. Despite the Investigating Officer (I.O) admitting that PW8 was taken to a higher body, the result has not been stated nor the report produced before Court. There is suppression of material facts which would enable the

court to take adverse inference against the prosecution under S.114 of the Evidence Act. The Polygraph test has been rightly disbelieved by the court below. Ext.P46 FSL report shows that the nail clipping, scalp hair and pubic hair taken from the body of the victim who is said to have been raped, brutally assaulted and throttled to death with stiff resistance; did not yield anything to support the prosecution case. The prosecution itself has contradictory statements about who carried MO19 chopper. PW8 insists that the chopper was with him while the I.O, PW34, deposes that on his investigation it was revealed that the victim had it in her hands. The DNA profile report, Ext.P24, does not conclusively prove the samples from the vaginal swabs tallying with the alleles of the accused. PW24, Asst. Chemical Examiner, categorically stated that there is no conclusive proof from the report. The report also speaks of the possibility of another suspect being involved. It is prayed that the accused be acquitted and set free forthwith.

6. Smt.S. Ambika Devi learned Special Government Pleader [Atrocities against Women and Children and

Welfare of Women and Children] points out that the entire case of the prosecution is built on the evidence of PW8. Initially, PW8 was one of the suspects but nothing has come out in the investigation to array him as an accused. Except for D11 and D12 contradictions; one, in the statement taken by the Circle Inspector (C.I) and the other, by the Dy.SP, who later took over the investigation, the evidence of PW8 is crystal clear and the place of occurrence has been established, which is only 1km away from the house of A1 as spoken of by PW27 based on Ext.P21 site plan. PW30 the expert witness has specifically pointed out that PW8 is not a suspect and his involvement can be ruled out. The trial Court has believed the testimony of PW8 which has to be given due weightage since the learned Judge had an opportunity to see the demeanour of the witness. Unless serious error is detected, the finding of the Trial Court cannot be upset as has been held in State of M.P v. Chhaakki Lal (2019 (12) SCC 326). As far as the conduct of PW8, he was disturbed by the atrocity committed on the deceased whom he considered as his own sister. The trial too was unduly delayed and occurred

after a long 8 years. It was held in Rana Pratap v. State of Haryana (AIR 1983 SC 680) that persons witnessing a murder may react differently. The fact that the murder was informed on the next day, only indicates the anguish suffered by PW8. The time gap spoken of by PW8, when he left the deceased with the accused, cannot be overemphasized since he is a rustic tribal.

7. It is pointed out that the accused have no explanation as to what transpired after they were last seen with the deceased nor did they offer valid reasons for the injuries detected on them by PW20. The defence is one of total denial especially when PW8 had seen the deceased in the company of the accused, after which she was found murdered. Amit @ Ammu v. State of Maharashtra [2003(8) SCC 93] was relied on to urge that when death occurred in close proximity to the time and place where the accused and deceased were seen last, the accused owes an explanation. The medical evidence surely indicates rape and murder; which was also perpetrated despite stiff resistance by the victim. When rape and murder were in the same transaction, necessarily the accused has to be convicted of both. Krishna alias

Krishnan v. State of Karnataka [2001 KHC 2366] of the Division Bench of High Court of Karnataka is relied on to urge that it is the very same evidence that points to the rape and murder. Reliance is also placed on another Bench decision of the very same High Court in Karbasappa v. State of Karnataka [2004 KHC 3045] to further argue that the exact time stated by the witness; as having been taken for the offence to be committed need not be overemphasized and again, he was after all a rustic tribal.

8. The death is surely a homicide as is seen from the postmortem report, Ext.P9 and the evidence of PW20, Doctor. There were 12 abrasions and contusions on the neck of the victim of which many were crescentic; below the jaw margin and outer to the midline (8 in number); evidently signs of throttling. These crescentic abrasions on the right side of the neck showed thick blood infiltration and an area of patchy infiltration was seen underneath the crescentic abrasions on the left half of the front of neck. The right horn of the hyoid bone and right superior horn of thyroid cartilage were fractured with infiltration of

blood around. In addition to these, there were 130 injuries which were abrasions, contusions, contused abrasions and crescentic abrasions all over the body. The injuries were: four on the forehead, twenty-six injuries all over the face, three on the right shoulder, two on the right chest, two each on the back of the left and right chest, five bite marks over the right nipple, abrasion over the left nipple, five injuries on the right hand and fifteen on the left hand, spread over the forearm to the fingers, one below the left collar bone, four each on the hip bone and the left abdomen, five injuries on the vagina, twenty-five injuries on the right leg from the thighs to the heel, twenty-nine injuries on the left leg again spread over the entire leg and some more. The opinion as to the cause of death was throttling. There was also evidence of recent forceful vaginal penetration with injuries on the body suggestive of active resistance from the part of the deceased. The postmortem report was marked as Ext.P9 and the final opinion as to cause of death marked as Ext.P10 after getting the chemical examination report, marked as Ext.P19. The Doctor also

took nail clippings; of which it was said he is an expert at, the scalp hair and pubic hair samples as also vaginal swabs for chemical examination. On visual examination, since human semen and spermatozoa were detected in the vaginal swabs it was requested that the swabs be preserved, if on chemical examination the test of semen is positive for purposes of DNA profiling. From the injuries and opinion of the Doctor, there can be no doubt that the death was by homicide and there can be no theory pressed of a suicide. The expert opinion was also that there was sexual intercourse with stiff resistance from the victim; suggestive of rape.

9. Ext.P1, FIS, was by PW1, the father of the deceased. In the FIS, PW1 spoke of the death of his daughter who along with her two children were staying at the tribal colony called 'Padavayal Ooru'. Her husband expired four years back after which she was staying with Selvan @ Gayan, PW10. He heard that she was seen going towards 'Therkal mala' along with PW8, on the evening of the previous day and he did not further enquire about her, thinking that she had come back. On 1.6.2005, he was informed by his wife that

Selvan, the present husband of his daughter, had spoken about her death. He went to the scene of occurrence, identified her and came to the police station to make the statement. He also stated that he harboured no doubts concerning the death of his daughter. As PW1, he marked the FIS and admitted to the statements made. But, in cross-examination he denied having stated that his daughter was living with Gayan @ Selvan after her husband's death; marked as Ext.D2 contradiction and proved through the I.O, PW36. This was a deliberate falsehood since that fact was spoken of by him in the FIS and so did many other witnesses.

10. PW2, witness to the inquest, though admitted to his signature, stated in cross-examination that he signed on two blank papers. PW3, another witness to the inquest report, denied his signature. He also denied his signature in the scene mahazar. Both PWs 2 & 3 spoke of Jungan, PW8, who had hidden when the police came. PW4 was again a witness to Ext.P2, which he admitted. However, the seizure mahazar concerning recovery based on confession statement of A1 was denied; which recovery was of an undergarment; leading

to nothing. PW5 is a resident of the tribal colony who saw the dead body and spoke of such information having been given by Gayan, PW10. He denied his having stated to the police that the deceased had enemies. PW28 is the witness of the seizure of MO15 jerry-can. PW29 denied having attested the seizure mahazar by which the undergarments of A1 was recovered. PW32 is the witness to the recovery of the undergarments of A2; which also leads to nothing.

11. PWs16 to 19 are respectively a Sub Inspector who received the vaginal swabs from PW20 for the purpose of DNA fingerprinting, the Senior Instructor of the FSL who collected hair, red fibres, soil and control sample from the scene of occurrence, the CPO who received the dress of the deceased after postmortem and another CPO who received the dresses of PW8, A1 and A2. PW22 is the Scientific Assistant of the District Hospital who surrendered the hair and nail clippings to the I.O and the belongings of PW8, A1 and A2.

12. PW6 is the niece of the deceased around whom revolves the motive. The prosecution case is that A1

wanted to marry PW6 and was constantly after her. PW6 resisted his advances and also complained to her aunt, the deceased. A1 once attempted to stab her with a knife. There were altercations involving the deceased and A1 when threats to kill, were levelled against the deceased. PW6 was staying along with her mother and PW1, her grandfather, in a house adjacent to that of the deceased. She spoke of the motive as projected by the prosecution and a specific instance, two weeks before the death, when A1 trespassed into the house of the deceased. The deceased and PW6 were inside that house and A1 threatened to kill the deceased or her daughter; (presumably meaning the niece). He specifically asked for PW6 and pulled the deceased towards him, saying that otherwise, he would take her; tearing the blouse of the deceased and she threw chilly powder into the eyes of A1. All these statements concerning A1, which provide the foundation of the motive, were put to the witness; as having been omitted to be stated to the police. PW36, the I.O affirmed that such a story was not stated to him by PW6 in the S.161 statement; thus proving it to be an omission.

13. PW7 is the mother of PW6 and the elder sister of the deceased. She spoke of the motive in the same vein, but on the specific incident in which chilly powder was thrown on A1, she said that herself and her father were present with PW6 and everyone together threw chilly powder on A1, a clear departure from what PW6 said of the incident. Further D3 to D9 contradictions were marked by the prosecution, which is very relevant. Exts.D3 to D5 were concerning the illicit liquor business engaged in by the deceased, in which she was helped by PW8 and last, the fact that the deceased was living with PW10 as wife and husband. The witness denied having said any of this; a deliberate falsehood, which facts are rather well established from the deposition of the other witnesses. Looking at Exts.D6 to 9, we discern an attempt by PW7, in the box, to exculpate PW8, Jungan. Ext D6 was her statement that she saw the deceased on the previous day proceeding to 'Therkal Mala' with PW8, which was resiled from before Court, wherein it was deposed that the deceased was seen alone. The fact that PW8 accompanied the deceased is admitted by PW8 himself. Ext. D7 is a statement that

PW7 suspected Rajendran and Jungan; A1 and PW8. Ext. D8 was her statement that nothing would happen without Jungan's knowledge and Ext.D9 is that her suspicion gathered momentum with the hiding of Jungan; when the police came. PW7 was asked about her omission to speak on the motive in the S.161 statement. The contradictions marked as Exts. D3 to D9 and the omission, regarding motive and the specific incident complained of, were proved through the I.O, PW36. PW7 is a thoroughly untruthful witness and cannot be believed at all. PW8 will be discussed last, as on his evidence hinges the entire prosecution case.

14. PW6, speaking of the incident when the deceased threw chilly powder into the eyes of A1 spoke only of the presence of herself and the deceased, while PW7 said she and her father too were present. PW9, the son of the deceased, also spoke of that incident, which he later admitted to have not witnessed. Before the police, he had stated that the said incident happened a year back, marked as Ext. D13 contradiction. PW10 is Selvan @ Gayan who was living with the deceased as her husband, even according to the prosecution. But he

denied the relationship and said that she was his aunt, which was contrary to his statement before the police, marked as Ext.D15 contradiction. The chilly powder incident as spoken of by him in Court, was one or two months back while he stated before the police that it was one year back, as per Ext.D14. He also added his presence when the incident occurred and claimed to have hit A1 with a stick, not spoken of by any other witnesses. PW10 also spoke to the Police of frequent intoxicated outbursts by Jungan and PW8 having cursed the deceased with death when she scolded him; which he denied in Court and was marked as Ext.D16. PW11, a resident of the colony, also spoke of the motive, which she had omitted to tell the police. She told the police of her suspicion about Jungan, which was denied by her in the box, marked as Ext. D17 contradiction.

15. PW12, daughter of the deceased, spoke of PW10 as her mother's second husband. She said that on that day her mother had gone to purchase arrack and Jungan accompanied her. She too narrated the motive, but when speaking of the chilly powder incident spoke of the presence of only herself and her mother; a new

version. She also spoke of an incident the just previous day when A1 in a drunken state came to their house and threatened her mother with death, literally putting a knife to her mother's throat. Before the police, she had stated that when A1 came the day before, her mother was not there and he told her that her mother will be killed, as per Ext.D19. Exts. D18 & D20 contradictions marked through her were concerning her suspicions against A1 and PW8, in the murder of her mother; which she denied in the box. She also omitted to state the story behind the motive to the police. All these contradictions and omissions were proved through the I.O. The motive as spoken of by the various witnesses was disbelieved by the trial Court, rightly so, according to us. None had a consistent story on the one incident that was spoken of by all the witnesses. The narrative took various shades cutting at the root of the story, germinating a reasonable inference that it is a cooked-up story. The prosecution story is that the deceased along with Jungan, who assists her in her business of sale of arrack, proceeded to 'Therkal Mala' on the previous evening to get arrack for their

business. This is admitted by PW8, spoken of clearly by PW12 and there are sporadic references to that by other witnesses also.

16. The witnesses now dealt with are those speaking of what transpired at 'Therkal Mala' before and after the occurrence. PW13 is the wife of Jungan's brother, with whom Jungan's son resides and which family is engaged in illicit distilling of arrack. She said that on the previous day the deceased along with Jungan had come to her house. It was deposed that they had already consumed liquor from below, meaning the colony. Both consumed arrack again at her house and then proceeded to the distilling spot to return with the stuff. PW14 is the son of PW13 who spoke in tune with what PW13 said. He further deposed that he had sold 5 litres of arrack to the deceased which she took in a Jerry-can. This can was recovered from the spot, after the death and he drained off the 3 litres which were remaining in it. PW15 is the son of PW8 who too spoke of seeing his father and the deceased on the previous day. All these witnesses heard of the death on the next day from Masilan, brother of Jungan.

17. Now we deal with what transpired the next day morning. PW21 is Masilan, the brother of Jungan. He spoke of the son of Jungan also residing with him. He saw Jungan on the next day morning when Jungan conveyed to him the death of the deceased. He and his mother proceeded to the place where the body was said to be; wherein by that time people had gathered. Masilan spoke of a new motive insofar as the deceased having always walked through the property of A1 to come to his house, which was objected to by A1. For the reason of that enmity, A1 had threatened the deceased with death; a new story. He had not spoken of that specific story regarding motive to the Police. He admitted to having carried out illicit brewing and the deceased had engaged herself in selling the brew purchased from him. PW23 is another resident of the colony who spoke of the quarrel between the deceased and A1 and also his suspicion about A1, A2 and PW8. In cross-examination, he was confronted with the omission in the S.161 statement as to the quarrel between A1 and the deceased having not been recorded by the police. PW23 spoke of Jungan who was in a drunken state, having hidden from

the Police when they arrived at the scene of occurrence.

18. PW24 is the Assistant Chemical Examiner of the Regional FSL, Ernakulam who received the items from PW20 Doctor and examined the same resulting in Ext.P19 report. Except for item No.4, the results were negative. Specifically, the contents of the stomach and intestine, liver and kidney, blood and saturated saline showed no presence of ethyl alcohol. Item No.4 vaginal swab, on analysis, revealed the presence of human semen and spermatozoa. PW25 was witness to the collection of hairs from PW8, A1 and A2. PW27 is the Village Officer who prepared the scene mahazar. PW31 is the Magistrate who recorded the S.164 statement of PW8. PW34 is the Circle Inspector who first inspected the scene of occurrence, transmitted the body for postmortem and ordered surveillance on PW8, A1 and A2; who were the suspects. PW35 is the Sub-Divisional Police Officer who received the result of the polygraph test of A1, A2 and PW8 and transmitted Ext.P32 forwarding note to the Rajeev Gandhi Centre for Bio-Technology, Thiruvananthapuram. The Polygraph test was disbelieved

by the trial Court, relying on the decision of the Supreme Court in Smt. Selvi vs. State of Karnataka [AIR 2010 SC 1974]. We do not think any challenge can be raised on the said finding, which we fully agree with.

19. PW36, Dy.SP is the Investigating Officer who was confronted with D1 to D21 contradictions marked through various witnesses which was proved as having been stated by the respective witnesses while recording their S.161 statements. The omissions which were pointed out in the cross-examination of the various witnesses were also put to the I.O who affirmed that such statements were neither made nor recorded in the S.161 statements. PWs 37 and 38 are the Tahsildar and the Village Officer who respectively produced the Community certificates of the deceased and the accused. PW39 is the Dy.SP who filed the final report.

20. We left out the evidence of PW8 and PW26 to be considered last. As we noticed, it is based on the sole evidence of PW8 that the conviction has been entered by the trial Court. What we can discern from the reliable portion of the evidence of the witnesses paraded before the Court is that, PW8 was closely

associated with the deceased in the business of illicit liquor sales. PW8 was her helper and was staying along with her in her residence where PW10, her partner and two children from her deceased husband, were also residing. The elder sister of the deceased along with her daughter and their father was residing in an adjacent house. PW21 brother of PW8 was residing at a distance from where the deceased was residing and he was engaged in illicit brewing. PW21 was supplying liquor to the deceased for sale. PW8 and the deceased on the day of occurrence, by around 3'0 clock in the afternoon, proceeded to PW21's house to purchase arrack. Arrack was purchased from where the brewing was taking place, as stated by PWS13 to 15 respectively the wife, son of PW21 and the son of PW8. PW8 and the deceased purchased 5 litres of arrack and was coming back to the colony through the forest; the brew carried in a five-litre jerry-can. The deceased was killed because of the brutal assault which was also preceded by sexual intercourse as seen from the postmortem report. The death was reported by PW8 only on the next day morning to PW21 after which PW8 went in hiding.

Hence what transpired leading to the death of the deceased was only spoken of by PW8, for which we have to look at his evidence.

21. PW8 says that PW14 and PW15 brewed the arrack and by around 6.00 p.m the deceased and PW8 started back to the colony. When they reached a pathway, the deceased wanted to rest for a while and also drink arrack. Both of them drank arrack and while resuming their way back to the colony, the accused came to the spot. They said that they had not been able to get any liquor from the morning. The deceased then offered to give them liquor and asked PW8 to walk down, obviously towards the colony. The time was around 6.40 p.m, as stated by PW8, and there was slight mist and a drizzle that impeded the descent of PW8. He narrates that he walked down for 50 meters and then retraced his steps, climbing back using MO19 weapon, he had with him. Upon which, he heard the cries of the deceased. The scream from the deceased was stated to be specifically *'Jungetta' (Brother Junga) I am being killed by two persons' (sic- translation)*. When PW8 reached the spot he saw both the accused running away.

A2 who was running behind stopped and told A1 that PW8 should be killed failing which he would raise a case against them. However, seeing MO19 weapon the accused retreated and ran away. The time was stated to be around 7.00 p.m. PW8 then states that he then lay down, on the side. He also speaks of having gone to his brother Masilan's house, to inform them of the death, which obviously, from the evidence of PW21 is on the next day morning. PW8 also says that he did not speak of who killed the deceased and despite his mother and his brother querying him as to what transpired, he only spoke of the death of the deceased. He also admits to having hidden when the police came. He came out of hiding only when the Police threatened to send their dogs in search of him.

22. We find the entire narration and the conduct of PW8 to be highly suspicious, especially looking at the contradictions he was specifically confronted with in cross-examination. The version of PW8 about the actual incident is very shaky and full of inconsistencies. PW8 states that while he and the deceased sat down near the pathway, they both drank the

arrack, they had with them. The scientific analysis of the contents of the stomach and the internal organs of the deceased does not reveal the presence of any ethyl alcohol. Then PW8 states that while they were ready to resume their descend to the colony, A1 and A2 came to them and asked for arrack. The deceased not only agreed to give them arrack but also asked PW8 to proceed back to the colony, without her. Such conduct on the part of the deceased is very unlikely if the evidence regarding motive that she was at loggerheads with A1 is believed; who had even threatened her with her life. According to PW8, he was away from the spot of occurrence only for 20 minutes because he precisely puts the time of his departure at 6.40 and the flight of the accused at 7.00 p.m. In this short period, it is highly improbable that rape by two persons was carried out and the victim subjected to the numerous injuries, as detected in the postmortem; all of which were antemortem injuries. Over the neck itself, there were 12 injuries and the crescentic abrasions were 8 in number which caused the right horn of hyoid bone and the superior horn of thyroid cartilage to be fractured; the result of

throttling. This indicates considerable pressure having been applied and the deceased, as per the medical opinion, was killed by the throttling carried out by the assailant/s. Then again there were 130 abrasions and contusions noticed all over the body from the forehead to the feet. It is impossible to imagine that rape and attack of that magnitude having been committed in the course of 20 minutes.

23. We have no quarrel with the proposition that the exact time as stated by PW8 need not be taken; on the dot. This we say, even though PW8 in chief-examination refers to the exact time, as if by the clock. The tribal people have an uncanny knack of knowing the time, as is the case with directions, without any man-made external aids like a watch or a compass; since nature's signs are a way of life for them. Anyone used to living in the forests or in its fringes are especially conscious of the time since nightfall or fading light is the time to seek safety from the wild. The Karnataka High Court in Karbasappa(supra) referred to a Supreme Court decision in Shivaji Sahebrao Bobade v. State of Maharashtra AIR

1973 SC 2622, in which it was observed that: "The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed". When travelling through forests, on the contrary, there is hence a particular reason to keep track of the time and especially the failing light. Even if we ignore the 20 minutes as spoken of by PW8, the prosecution case is of the victim having been raped by two persons and then brutally murdered. The injuries found are not caused by a sharp or blunt weapon and indicates having been caused with the hands, especially the numerous crescentic contusions, abrasions and bite marks; the last obviously with teeth. The antemortem injuries by no stretch of imagination could have been caused in the time when PW8 went down the hill and later retraced his steps, to climb back. It also would have elicited more violent cries from the victim which PW8 would have heard. The postmortem report indicates injuries caused

in a prolonged episode in which the victim was raped, subjected to torture and eventually life snuffed out, by throttling. More intriguing is the specific case of PW8 before Court that A1 & A2 desisted from harming him only because he had MO19 chopper; which he omitted to say to the police. The C.I, PW34, deposed that it was PW8's statement that the chopper was with the deceased.

24. The subsequent conduct of PW8 is also highly suspect. He does not attempt to provide help to the fallen victim, whom he considers as his sister. According to him he lay down on the side, where he continued the entire night. Only on the next morning he approaches his brother PW21 to speak about the death and even then, does not talk of A1 and A2; neither their presence nor their involvement in the death of the victim. Admittedly he also goes into hiding after the public was alerted and the police were expected. Pertinent also are his statements given to the Police which were confronted to him from the S.161 statements recorded by PW34, the C.I who commenced the investigation and then PW36, Dy.SP took over the

investigation due to a tribal uprising. Ext.D11 contradiction from the S.161 statement dated 05.06.2005, six days after the incident, proved by the C.I, PW34, roughly translates as: *'...after getting intoxicated she caressed me on my thighs and all over the body. Even though I resisted she refused to heed. She forcefully caught me and we both fell on the floor. She was very aroused then. Both of us rolled into the forest and I too got aroused. I bit on her lips, breasts and thighs. I did a lot of things and even then she refused to let go of me. Then I caught her by the neck and throttled her. I held my hands there for some time and when she became immobile I placed my fingers beneath her nose. She was immobile and I put two fingers in her 'poch' (we are unable to discern which part of the body he inserted his fingers into) and turned. Even then she did not move and hence I too lay down along with her and slept. After some time I got up and realized that she is no more. I came to the rock in which we sat initially and slept the night. That was at about 10'0 clock in the night. On the next morning I got up, had a swig of arrack and*

went to my brother's house to inform them about the death' (sic).

25. D12 is from a statement of PW8 recorded on 05.08.2005, after two months, by the Dy.SP who took over the investigation. In that, it was stated that: 'we proceeded through the property of Kanthaswami Gounder and when we came to a descend, she sat there. I also sat there. She took a teak leaf and poured arrack into it and gave it to me and she also drank. When we were drunk, she caught hold of me and started kissing me. Then we had sexual intercourse. Even before this, we used to have sexual intercourse occasionally' (sic-translation). The statements though cannot be used against PW8 if he was arrayed as an accused, it raises suspicion regarding his conduct and the narration of the incident in Court, which led to the killing of the victim. The contradictions were confronted to the witness who denied having made such statements; which, however, stood proved as having been made to the I.O, in the deposition of PWs 34 (C.I) and 36 (Dy.SP).

26. As to the scientific evidence, nothing was discernible in the analysis connecting the accused to

the crime insofar as the nail clippings, scalp hairs and pubic hairs collected from the corpse. None of these matched with the samples taken from both the accused, as is discernible from Ext.P46. The Wound Certificates of A1 and A2 are produced as Exts. P12 and P13. Ext.P12 concerning A1 shows an abrasion on front of left chest, below top of shoulder and outer to midline. There is also a healing superficial wound on the corona of the penis, on the inner aspect of the foreskin. The abrasion, it is the opinion recorded, could be caused by forceful contact with a hard or rough surface or object and the second wound too by a like contact or overstretching of the mucosa of the penis in an erect state during sexual act. Ext.P13 concerning A2 shows four abrasions on the back of left chest, below top of shoulder and outer to midline which again could be caused by forceful contact with a hard surface or object. There is no case for the prosecution that the deceased used any object to resist the advances of the rapist. The opinion of the Doctor who conducted the postmortem is that there was stiff resistance offered by the victim. The Doctor had also

painstakingly taken nail clippings which would have revealed some material on chemical analysis; which was absent. The abrasions seen on the body of the accused could have been caused even by a fall, or as the accused would allege, from physical torture. The injuries are also mere abrasions and not that would be caused by the stiff resistance offered by a rape victim. The deposition of PW36 is that the arrest of the accused was on 09.08.2005 after two months of the incident. The accused assert that they were immediately arrested after the death was reported and they were in Police custody before the wound certificate dated 04.06.2005. PW26 deposes that when she along with PWs 6, 7 & 11, approached PW34, the C.I who commenced the investigation showed them the accused who were already in custody. Even PW8 says that he was in police custody for one month after the incident and physically tortured. We do not think, the injuries on the accused offer any link to the crime and the penile injuries on A1 who was a married person cannot be termed to be suspicious or without valid cause. The undergarments of both the accused recovered from their

respective homes did not prove any connection to the crime; which were not even sent for analysis, rightly so for the time gap.

27. The fact that the victim had sexual intercourse before she was killed is very evident from the presence of semen and spermatozoa, which were found to be of human origin in Ext.P19 report. The DNA profiling was done and the samples of the accused and PW8 were sent for comparison. The DNA profile matching report Ext.P24, was marked and proved through PW30. The report is not conclusive which inconclusiveness is spoken of by PW30 who carried out the DNA fingerprinting. The DNA fingerprint pattern of the blood samples of the accused was compared with that of the vaginal swabs received. All the alleles could not be identified from the swab DNA. It was stated in the report that, while comparing the DNA profiles of the suspects, with the swab DNA it was observed that there is higher matching probability of the suspects A1 and A2 with the swab DNA. It was also observed that there were additional alleles which were not present in any of the suspects. There was a greater probability of the

accused being the real suspect and there was also a possibility indicated of an additional suspect, which could not be ruled out as per the report. Though it is stated by PW 30 that the complicity of Jungan, PW8 is ruled out because of poor DNA profile matching, there is nothing so stated in Ext. P24 report as to the mismatch of DNA fingerprint of Jungan with the swab DNA. Nor is the definite ruling out, of such a possibility, evident from the report. In cross-examination, it was specifically stated by PW30 that *'the swab sample was not properly preserved'(sic)* and *'I could not identify sufficient number of alleles to come to a conclusive finding'(sic)*. Hence no reliance can be placed on DNA fingerprinting done by the prosecution and that does not connect the accused with the crime.

28. One other pertinent aspect is that the prosecution suppressed a material piece of evidence; the result of the potency test carried out on PW8. PW8 along with the accused was a suspect and he was also taken to PW20 Doctor to ascertain his potency. PW20 merely on PW8's submission that after his wife's death

he has no erection, referred him to a team of Urologists and Psychiatrists as is seen from Ext. P14. He did not even go through the usual examination procedure to ascertain the potency of PW8. PW36 however says that PW20 directed a 'confirmation' potency test to be carried out on PW8, which is contrary to the report at Ext.P14 which does not indicate any test having been carried out for 'confirmation'. PW36 goes on to say that PW8 was then taken to the Medical College, Thrissur and examined by a team of Doctors who gave a result of the 'confirmation' potency test. But the result has not been produced before Court and even PW36, the I.O does not state as to what was the result of the potency test carried out by the higher body of experts on PW8. This has to be juxtaposed with the fact that, in the earlier statements of Jungan, PW8, he refers to regular sexual intercourse and particularly a wild one just before her death. PW8 in cross-examination also said that the deceased was a free bird and had sexual intercourse with many including himself and the accused. The prosecution would have us believe, that PW8 the companion of the deceased who was last

seen by the public with the deceased is impotent. Hence the factum of rape having been committed on the deceased leads to a reasonable inference that there were others, one or more persons, involved. The impotency of Jungan however has not been proved and the police have deliberately kept away the material evidence from Court. We agree with the learned Counsel for the appellant that it is a very strong circumstance to disbelieve the prosecution case of PW8 being impotent, under S.114, Illustration (g) of the Indian Evidence Act; for that relevant material having been suppressed. Coupled with this is the fact that Ext.P24 DNA fingerprinting report, which we already discussed, does not speak of PW8's matching having been ruled out. The statement by the Scientist, PW30, in Court that it was ruled out does not find a place in the report.

29. As held in Rana Pratap (supra) there cannot be any set pattern as to how a witness to an incident would react especially one as shocking as a murder. It was held so in Para 6:

6. "Yet another reason given by the learned Sessions

Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Everyone reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

It is not the immediate conduct of an eye-witness that is germane for consideration here. But the subsequent conduct of a person who saw three persons associating cordially, just after which, one of them was murdered and the alleged two assailants had fled from the scene of occurrence. In the next twelve hours or so, the witness who claims to have considered the deceased as his own sister does not take any steps to get help or

at least ascertain her death. It is his deposition that he informed the death to his brother the next day morning. Pertinent is also the fact that he does not tell anybody about what transpired, despite being questioned and he went hiding, anticipating the arrival of the police. We have our own suspicions, accentuated by the contradictions of PW8, marked as D11 and D12, about how the death was occasioned, fueled further by the conduct of PW8, who was last seen with the deceased, in the next few hours after death. It was not merely an unpredictable response, quite possible in the heat of the moment; which definitely could vary from person to person. The subsequent conduct of PW8, reveal a deliberate reluctance and calculated lethargy to report the death at the first instance; probably to save himself.

30. It is only Jungan who says that the accused and deceased were last seen together. Apart from that, to the whole world, be it those at the tribal colony, of 'Padavayal Ooru' or at Masilan's house and illicit brewing lair on 'Therkal Mala' it is PW8 who was last seen with the deceased. In Amit @

Ammu (supra) two grazers of buffaloes saw the accused and the deceased, together in a deserted place. The next day when they were at the same place to facilitate grazing, the body of the girl was seen inside a dilapidated building. The victim, as per the medical evidence was raped and killed in which circumstance it was held that the accused would be responsible for both since there is close proximity of the place and time; ie: between the time of their last seen together and the death. Here the last seen theory is propounded by the prosecution on the sole evidence of PW8, who even according to the prosecution itself was a suspect, originally. We have enough evidence to presume that there was a tribal strike, spearheaded by PW26, to exculpate PW8, which was spoken of by PW8 also. PW8's evidence before Court for many reasons have been found by us to be not all reliable. The last seen theory propounded by PW8, if disbelieved, then it is PW8 who was last seen with the deceased.

31. We now look at the evidence of PW26 the Panchayat member who led the protest, against arraying PW8 as one of the accused. She is a close acquaintance

of the deceased and they were schoolmates. She was the Block Panchayat Member within whose jurisdiction was situated the tribal colony. She spoke of the deceased having told her about the dispute with A1, which motive we have already found, as has the trial Court, to be not established. She speaks of having contacted the C.I of Agali on 05.06.2005; to know about the progress of the investigation, when she along with PWs 6, 7 & 11 went to his office. She deposes, the C.I told her that two accused have been taken into custody. She also adds that she was shown the two accused (A1&A2) who were in custody on 05.06.2005. On the next day, 06.06.2005 the C.I brought PW8 to the colony upon which there was an agitation against falsely implicating PW8. The Panchayat Member had taken up the matter with the Dy.SP's office who assured them that the investigation will be taken over by him. In cross-examination, she would state that the deceased neither took liquor nor was engaged in the sale of arrack and that she has only one husband, who committed suicide. This is contrary to what PW8 himself says about the deceased and what has come out from the evidence of the other witnesses.

Contrary to the deposition, in her S.161 statement, PW26 told the Police that on 05.06.2005, she was shown PW8, a suspect and a relative of the deceased, in custody, who was with the deceased at the crucial time. The contradiction was marked as Ext.P21. The various statements made by her regarding the motive, which was confronted as omissions, was asserted by her to have been stated to the Police. However, PW36 the I.O denied any such story regarding motive having been stated to the Police by PW26. He also proved the contradiction marked.

32. In Chhaakki Lal (supra) the witness was deposing about the murder of her daughter, daughter-in-law and grandchild, which occurred right in front of her eyes and it was held so:

"20. The High Court acquitted the accused merely on the ground that the evidence of Kesar Bai (PW - 1) is fraught with contradictions. Kesar Bai (PW - 1) was a rustic villager and also aged. After seeing her daughter and daughter in law and grandson being put to death, she must have been under tremendous shock. Kesar Bai (PW - 1) was deposing in the court after some time.

Naturally, there are bound to be variations from her earlier version. The trial court which had the opportunity to observe the demeanour of the witnesses found that the evidence of PWs is credible and trustworthy. While so, the High Court ought not to have recorded a finding raising doubts about the credibility of Kesar Bai (PW - 1).

21. The trial court had the opportunity of seeing and observing the demeanour of the witnesses and the views of the trial court as to the credibility of the witnesses is entitled to great weight. Unless the appreciation of evidence by the trial court was vitiated by serious error, the findings recorded by the trial court ought not to have been interfered by the High Court."

We bow to the proposition that the finding of the trial Court concerning the credibility of the witness, whose demeanour the trial Court had the opportunity to watch and observe has to be given due weightage. The afore-cited decision also lays down that if there is a serious error in appreciation of the evidence, then the Appellate Court could take a different view.

33. In the present case, the trial Court has

found that the significant evidence relied on by the prosecution is the testimony of PW8. In addition, the Wound Certificates-Exts.P12 & P13 and P24 DNA Profile Matching Report were also relied on. We have already found against these additional materials relied on by the trial Court. As far as the credibility of PW8, the trial Court noticed his opening remark in the box that PW8 was treating the deceased as his sister. It was also observed by the trial Court that even according to PW8, the deceased was a free bird. The various statements made by PW8 regarding the deceased and her character, which reveals the deceased to have practiced free sex which included PW8, was also noticed by the trial Court. We find it difficult to harmonize the finding of the trial Court with the above statements of the witness. Especially in the context of D11 & D12 contradictions confronted to PW8. The trial Court had also disbelieved the evidence of motive as spoken of by various witnesses, PW6,7,9 to 12, 21. 23 and 26. We too have already dealt with the same and disbelieved them for the reason of different versions and the story having never been stated to the Police. Despite

disbelieving the numerous witnesses, the trial Court finds PW8's evidence of enmity between A1 and the deceased to be convincing; which enmity also has been spoken of as arising from the unrequited advances made by A1 to PW6, the niece of the deceased. PW8 also spoke of his presence when the deceased threw chilly powder in A1's eye. This incident was disbelieved by the trial Court.

34. The trial Court observed that the evidence does not suggest or show that PW8 had any reason to be inimical towards the deceased or have any personal grudge against her, to cause her death. The character assassination of the deceased made by PW8 in cross-examination, however, leads us to a different conclusion. PW8 goes to the extent of saying that the deceased, even when her husband was alive and after his death, used to indulge in illicit sexual relationships with whomsoever she likes and that in the tribal colony, there was none with such relationships. PW8, who admitted to the amorous relationship with the deceased, was living in a house where another young man was housed, who was said to be living with her as a husband, by her own relatives; a fertile ground for jealousy,

intrigue, suspicion and so forth. PW8 was also disturbed by the attitudes and lifestyle of the deceased, as discernible from his cross-examination. For all the above reasons, we find very serious infirmity in the reliance placed by the trial Court on the testimony of PW8.

35. What emerges from the aforesaid discussion is that, but for the testimony of PW8, nothing connects the accused with the crime. The scientific evidence either is absent or inconclusive. The person last seen with the deceased was PW8, who himself admits to both of them having gone to his brother's house and returned with arrack. The incident is said to have occurred on the way back to the colony where the deceased and PW8 has a residence. The testimony of PW8 is that he left the deceased alone for 20 minutes when she was raped and murdered by the accused. It is his sole version, that he saw the accused last with the deceased. Both his statements under S.161, to the C.I and the Dy.SP categorically states that he had sexual intercourse just before the incident, but a complete U-turn is taken before Court. The version put forth by PW8 has

already been found by us to be highly improbable.

36. The factum of the victim having either indulged in sexual intercourse or having been raped is very clear from the presence of human semen and spermatozoa in her vagina, as detected by the Doctor and analysed in the laboratory. There is no scientific proof concerning the source of such semen and spermatozoa other than that it is sourced from a human. The DNA fingerprinting is inconclusive. The numerous injuries caused on the body of the deceased, that too antemortem, raises a very serious apprehension as to the incident leading to the death of the victim. It could not have occurred in 20 minutes as stated by PW8, or even in a larger time, when PW8 is said to have left the deceased alone in the company of the accused and come back. The subsequent conduct of PW8 germinates very serious doubts in our minds. This coupled with the possibility of another person's involvement, as revealed from the DNA fingerprinting and the contradictory statements made by PW8 to the Police; leads to no definite conclusion of the guilt of the accused.

37. PW8 who was initially the suspect, who was also suspected by the immediate family of the deceased at the stage of investigation; conducted himself in a very suspicious manner after the death. He claims to have slept the entire night in the forest, leaving the corpse as such and informing his brother only on the next day morning. He also went into hiding when the police came to the scene. We are surprised that the Police, on a protest raised by the public removed PW8 from the array of accused. We also have our own suspicions about the potency of PW8 which was said to have been examined by a higher body but, the result, never revealed or produced before Court. We find nothing to connect the accused to the crime other than the testimony of PW8, whom we suspect, as being interested in either saving himself or covering up the actual facts. The incident happened more than a decade and a half back and that alone inhibits us from ordering a further investigation, which would be futile especially in the absence of any scientific evidence. Again a woman is molested and murdered and the perpetrators are roaming free; the poor soul is not

avenged. We see absolutely no way other than to acquit the accused.

We allow the appeal acquitting the accused and directing that they be released forthwith; if not required in any other case.

Sd/-
K.VINOD CHANDRAN,
JUDGE

Sd/-
ZIYAD RAHMAN A.A.,
JUDGE

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