IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

MONDAY, THE 21ST DAY OF JUNE 2021 / 31ST JYAISHTA, 1943

CRL.A NO. 910 OF 2016

CRIME NO.803/2014 OF Nooranadu Police Station, Alappuzha

SC 1108/2014 OF ADDITIONAL SESSIONS COURT-I,MAVELIKKARA, ALAPPUZHA

APPELLANT/ACCUSED

SANJAY ORAON, C.NO.957
CENTRAL PRISON, POOJAPPURA, TRIVANDRUM.

BY ADV P.P.PADMALAYAN (STATE BRIEF)

RESPONDENT/COMPLAINANT

STATE OF KERALA
REPRESENTED BY DGP, HIGH COURT OF KERALA, ERNAKULAM.

Sr.PUBLIC PROSECUTOR SRI. ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10.6.2021, THE COURT ON ON 21.06.2021, DELIVERED THE FOLLOWING:

K. VINOD CHANDRAN & M.R.ANITHA, JJ.

Crl.A.No.910 of 2016

Dated : 21st June, 2021

JUDGMENT

M.R. Anitha, J.

1. Appellant is the accused in S.C.No.1108/2014 on the file of I Additional Sessions Court, Mavelikkara. He has been convicted and sentenced to undergo imprisonment for life and to pay fine of Rs.10,000/- in default to undergo further imprisonment for a period of two years under Sec.302 IPC.
2. Prosecution case in short is that on 18.06.2014 in between 3.45 p.m – 5 p.m accused caused the death of deceased Hafijul Mohammed @ Kaliya by beating on the right side of head and face with a wooden piece. Accused and deceased Kaliya were close friends and employees of PW1 and commenced residence in the hall situated on the rear side of the Wood Craft Industries Workshop of PW1; 2-3 days before the incident. Both of them belong to Matelli Panchayath, Jalpaiguri District in West Bengal and came to

Kerala in search of work for their livelihood. There used to be frequent quarrels between them by reason of refusal to repay money borrowed by the deceased and for not assisting the accused in preparing food. On 18.06.2014 both of them were seen together at 3 p.m proceeding to the hall with vegetables purchased, situated at a lower level to the workshop. At about 3.45 p.m accused came to the workshop to fetch a wooden piece. Thereafter, Kalia was found dead at about 5.45 p.m by PW2 inside the hall with injuries on the head and face disfigured. PW3 informed the matter to CW9 Jackson , PW1's son who in turn informed PW1, who had been to Marthandam, his native place. PW1, the employer, immediately commenced his journey back and reached Kudassanad at 11.30 p.m and saw the deceased lying dead in the hall attached to his workshop. He went to Nooranadu Police Station and lodged the F.I.S. PW11 the Sub Inspector of Police, Nooranadu recorded Ext.P1 FIS and registered Ext.P12 FIR.

3. PW13 Circle Inspector, Mannar who was in additional charge of Circle Inspector, Mavelikkara, conducted the initial investigation and arrested the accused on 21.06.2014 and

questioned the witnesses, followed by PW12 the Circle Inspector, Mavelikkara, who also conducted part of investigation and forwarded the material objects to Court with forwarding note sending the articles to the Forensic Science Laboratory. Thereafter PW14, the successor of PW12 continued the investigation completed the same and filed Final Report.

4. On the side of prosecution, PWs 1 to 14 were examined, Exts.P1 to P24 were marked and MOs 1 to 10 were identified and marked. After the closure of prosecution evidence, accused was questioned u/s. 313(1)(b) Cr.P.C. After denying the incriminating aspects put to him under Section 313, in addition, he stated that on 18.06.2014 he went alone to the Primary Health Centre, Pandalam and after that to Muttar. In the evening CW9 called him and asked him to come home. When he reached back, he was locked in a room. Thereafter police came and he was arrested. For three days he was in the police station. DW1 was examined and Exts.D1 and D2 were marked on the side of defence. Ultimately accused was found guilty u/s.302 IPC and convicted and sentenced thereunder.

5. Advocate Sri. Padmalayan P.P., State Brief was heard on behalf of the appellant/accused and Sri. Alex M. Thombra, learned Public Prosecutor was heard on behalf of respondent/State. Lower Court records were called for and examined in detail.

6. Advocate P.P.Padmalayan (State Brief) would vehemently contend that the entire investigation was tainted so as to protect the actual culprits, Pw2 and Cw9 and to falsely implicate the accused a poor migrant labourer. Accused and deceased were close friends and both of them are from the same district in West Bengal. Motive alleged is so flimsy and cannot be accepted and is not proved. PW11 the Sub Inspector of Police on getting information about the crime did not visit the spot. There is inordinate delay in registering the FIR. Wages to the tune of Rs.30,000/- was due from PW1 to the deceased. There was demand of this amount by the deceased since he was travelling home to West Bengal on that day. In connection with the same, PW2 and CW9 went to the hall and expressed helplessness to make payment of the wage dues. There was exchange of words between them, which ultimately led to their brutally

beating Kaliya to death. He was called by CW9 and as soon as he reached there, he was locked up and taken into custody on the same day itself. All these factors could have been revealed on seizing the mobile phones of accused and deceased. But that evidence was suppressed. Ext.P21 Chemical Examination Report would prove that ethyl alcohol content in the blood of deceased was very high. That fact was not investigated. Prosecution failed to prove the connecting links in the chain of circumstances pointing to the guilt of the accused and hence conviction and sentence passed against the accused are illegal and unsustainable and are to be set aside.

7. The learned Public Prosecutor Sri.Alex M. Thombra, on the other hand, would contend that the last seen together theory, motive behind the incident, recovery of MO8 pants, presence of human blood with the group of deceased etc. establish an unbroken chain of circumstances as proved by the prosecution. The accused was arrested after three days indicating that he fled the scene of occurrence thus additionally revealing his complicity in the crime. The burden upon the accused as provided u/s.106 Evidence Act

has not been discharged. Prosecution having established every link in the chain of circumstances, which would point only to the guilt of the accused, no interference is called for, contends the learned Prosecutor.

8. Delay caused in lodging the FIS and the conduct of PW11 who registered the FIS in not visiting the place of occurrence are projected as serious flaws by the learned State Brief. Mere delay in lodging the FIS is not necessarily fatal to the prosecution case always. But the fact that FIR was lodged belatedly is a relevant factor which the court must take notice **(Ramdas v. State of Maharashtra AIR 2007 SC 155)**. The fact whether FIR has been lodged belatedly is always a question of fact and the effect and consequence of such delay has to be assessed by the court bearing in mind the facts and circumstances of each case, the explanation if any offered by the prosecution and how far the explanation so offered is acceptable on the given facts.

9. Here in this case, PW1 the contractor and owner of a furniture and woodcraft industry lodged the FIS at 00.05 hours on 19.06.2014. PW2, supervisor under PW1, admitted to have gone to the place of occurrence at 5.45 pm on

18.06.2014 when he returned after work from Adoor, when he saw Kaliya lying motionless in a pool of blood. The workers in the workshop were called by him and they also saw the deceased lying in the hall. PW3 is one among them and according to him at about 3.00 pm he found accused and the deceased going to the hall and accused was carrying a kit containing vegetables. PW2 informed the matter to CW9 the son of PW1. They waited for PW1 to come and informed the police. According to PW1, his son, a Civil Engineering graduate was scared of the police being informed and hence he himself had given the complaint to the police at 12.05 a.m after he returned from Marthandom.

10. The explanation according to us is fraught with improbabilities. The police station is just 6 km away from the place of occurrence and finding a man beaten up mercilessly the prosecution would have us believe that the scene of occurrence was secured with the injured person inside and no information was passed on to the Police. No attempt seems to have been taken by any of the witnesses; all of whom were the employees of PW1, to take the injured to a hospital or at least confirm his death. PW2, the

person who is alleged to have seen the injured man first, is a gulf returnee, having worked in Saudi Arabia for ten years and proclaims to know three languages; Tamil, Hindi and Malayalam. According to the prosecution, PW2 saw the deceased lying dead at 5.45 p.m and having informed the other employees went to the employers house and waited there for his return. His explanation that he is not aware of the procedures and hence he had not informed the police cannot be swallowed without a pinch of salt. The delay in lodging the FIS, of about six hours later to sighting the injured lying in a pool of blood after being brutally beaten up, on the facts of the case strikes us as a glaring inconsistency, and definitely the delay is inordinate and fatal to the prosecution case.

11. We cannot but pertinently notice that on seeing the injured, PW2 says he informed the workers of PW1, who were in the adjacent workshop, who alone came to the spot. In cross examination however he says that he raised an alarm by crying aloud as he went up to the workshop. PW2 in his deposition says that he saw a man lying on the floor with blood draining from a strike wound causing disfigurement of

the face. He does not take any steps to ensure that the injured is dead and merely assumes that it is so. He also feigns ignorance about the number of people who gathered at the crime scene. He also states that he does not remember whether the police came to the spot at 7 p.m. While admitting that the deceased and injured were close friends and they both had mobile phones, he does not attempt to call the accused, as admitted by him in cross examination. None of the witnesses (PW2 to 4, employees of PW1) speak of any attempt having been made to take the injured to the hospital or at least ensure that he is dead. There is also nothing stated as to what were the instructions given by PW1 on being informed about the incident. PW 4 another employee of PW1 says that when he reached the spot there were ten to fifteen people gathered and he does not know the neighbouring residents except four or five. The testimonies together, indicate that a hue and cry was raised by PW2, in addition to informing his colleagues and that there were some people of the locality also gathered at the crime scene. It is very unlikely that the Police were not informed of the occurrence. In addition to the

glaring improbability in the testimonies of PWs 1 to 4, more suspicious is the conduct of the Police.

12. PW1,2, 3 and 4 admit that there are four workers from West Bengal staying in the hall, but does not speak about the whereabouts of the other two. PW3 while naming the persons who were residing in the hall also conveniently leaves out the names of the said two North Indians, who were also not questioned by the Police. None of the local residents also have been questioned by the Police or cited as witnesses. PW11 the Sub Inspector of Police, Nooranadu deposed that he had not seen the scene of occurrence. He asserts that he did not visit the crime scene, after recording the FIS at midnight, though the body of the deceased was kept in the scene of occurrence and that conduct itself is highly suspicious. That evidence of PW11 also is in contradiction to the evidence of the other witnesses. According to PW1 the Police came around 12. a.m, PW2 does not remember whether the Police came at 7 p.m on the same day, PW3 in cross states that the Police came at 1 a.m.

13. PW1 specifically stated that the Sub Inspector and two

policemen came in the police vehicle and saw the scene of occurrence. He also stated that the door of the hall was bolted from outside while the police came there. He categorically said that it is not in his vehicle that police came to the spot. PW3 also stated that police came after 12.30 night at about 1.00 am. It is crystal clear from the evidence of PW1 and 3 that PW11 and two policemen came to the scene of occurrence after the registration of crime, but PW11 the Sub Inspector wants to suppress that fact. PW 11 denies having visited the scene of occurrence which, in addition to being highly suspicious also smacks of clear dereliction of duty. From the FIR (Ext.P12) it is easily decipherable that the same was lodged at 00.35 hours of 19.06.2014, the FIS (Ext.P1) having been given at early morning 12.05 of 19.06.2014. Despite a murder having been reported the Sub Inspector who recorded the FIS has the temerity to depose before Court that he neither visited the spot or ensured the death of the person said to have been murdered despite the FIS having disclosed the body is lying in the scene of occurrence. In this context the submission of the learned State Brief that the entire investigation

was tainted on the influence exerted by PW1 assumes significance. The State Brief would argue that from the time of detection of the offence, PW1 was in contact with the Sub Inspector, which is plausible in so far as the Sub Inspector being available in the Police Station at midnight to record the FIS and lodge the FIR but not making any attempt to visit the crime scene. This has also to be read in conjunction with the statement of PW1 that his son was afraid of the police being informed. The attempt of the prosecution to suppress the facts from the inception is quite decipherable from the facts and circumstances which in turn creates serious doubts about the genesis of the crime itself and the investigation held.

14. Motive behind the incident alleged is too feeble and flimsy and not proved, is the next contention of the accused. No doubt in a case based on circumstantial evidence motive assumes greater importance **(Gosu Jairami Reddy & Another v. State of A.P (AIR 2011 SC 3147)**; which, in a case where there are eye-witnesses, is of little consequence. If motive has been put forward as a circumstance by the prosecution, in a criminal case, it has

to be clearly established like any other incriminating circumstance **(Ram Gopal v. State (AIR 1972 SC 656)** and no reliance can be placed by the Court on mere probabilities. It has come out in evidence that deceased and accused are from the same district and within the same post office limit of West Bengal. They were thick friends, were always together, had food together and the allegation is that they used to quarrel frequently for money and lack of assistance to the accused in cooking food for both. The crucial question is whether on such flimsy reasons, for a moment it can be imagined that, accused would make such fatal blows on the head of his friend ? Friendship has been spoken of by the witnesses and petty quarrels too, normal in any friendship; which definitely cannot be the motive for murder. There should be a lot more to establish a motive for murder than that spoken of by the witnesses who also vouch about the close ties between the two, quite natural in an alien place with an alien language, which they are forced to inhabit for reason of the abject poverty to which their family was exposed in their native land.

15. Evidence of PW7, Professor and Head of the Department

of Forensic Medicines, Medical College Hospital, Alappuzha, would prove that death was due to the blunt injury sustained by the deceased and it is possible to have been caused with MO2. Death of deceased was homicidal is not in dispute also. Ext.P7 postmortem certificate would show 11 lacerated wounds on the right side of head of the deceased. PW7 stated that all injuries are possible to have been caused with MO2. Except one of the injuries, an abrasion, all injuries independently or in combination, are capable of causing bleeding and oedema of brain and are sufficient in the ordinary course to cause death. It has come out in evidence that the face of the deceased had been disfigured due to the injuries inflicted. It is quite unlikely that such fatal injuries would be caused by a close friend, that too for such flimsy reasons. We are of the view that the motive projected by the prosecution is quite unbelievable and imaginary and hence cannot be accepted as sufficient to be treated as a circumstance to bring home the guilt of the accused.

16. Other links in the chain of circumstances attempted to be proved by the prosecution are the last seen together

theory, recovery of the pants (MO8) of accused and the scientific evidence. PW3 worker in the Workshop of PW1 stated that on the fateful day at 3'0 clock he saw the accused holding a carry bag containing vegetables followed by deceased, going towards the hall. At 3.45 p.m accused came to the workshop and returned with a wooden piece. Prosecution alleges that the said wooden piece has been used to beat Kaliya to death.

17. PW6 is the witness in Ext.P6 recovery mahazar and Ext.P6 (a) is the disclosure statement marked through PW13 the Circle Inspector which is alleged to have led to the recovery of MO8 pants of the accused. Ext.P22 FSL report of the articles sent for examination was relied on to establish that the articles of the deceased seized from the scene of occurrence and MO8 pants of the accused contain human blood of group 'A'. Recovery of MO8 is from an open place, the rubber estate of PW1, situated at a lower level, from near the toilet used by the workers of PW1. The spot is visible to anybody looking from the top and the place is frequented by the residents in the hall-room as also the workers in the workshop. The accused had also, even as per

the prosecution left his frugal belongings in the hall-room where he was residing with the deceased and others. There was no concealment of the object discovered. Discovery from open place by itself is not a reason to discard the evidence based on recoveries(**State of Maharashtra v. Bharat Fakira Dhiwar [AIR 2002 SC 16]**. But the crucial factor is whether there is anything to infer that MO8 was planted there by someone. In this case during examination under Sec. 313 Cr.P.C. accused did not deny that MO8 was not his pants. But his specific answer was that it was not the one worn by him on that date. So also no opportunity was given to him during questioning under Section 313 examination to explain about the presence of blood in MO8. Such a question was never put to him thus frustrating the requirement of putting the accused to notice of every incriminating circumstance.

18. In **Hate Singh,Bhagat Singh V State Of Madhya Pradesh (AIR 1953 SC 468)** it has been held by the Hon'ble Supreme Court that the statements of accused persons recorded under under S.313 of the Code are among the most important matters to be considered at trial. It was also pointed out

that the statements of the accused recorded by the committing Magistrate and the sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at trial.

19. In **Ranbir Singh V State of Bibar (2009 6 SCC 595)** it has been held that purpose of S.313 of the Code is set out in its opening words for the purpose of enabling the accused to explain any circumstance appearing in the evidence against him. It is also held that S.313 is not an empty formality. Here accused categorically stated that MO8 was not the pants worn by him on the fateful day. So he ought to have been given an opportunity to explain about the presence of human blood of Group A on it. In the absence of the same no reliance can be placed on that circumstance. Blood of the accused was also not sent for examination for determination of group. PW13 the Circle Inspector stated that at the time of arrest the blood sample of accused was collected and sent for chemical examination. Perusal of Ext.P21 report with respect to

that would go to show that it relates only to the deceased. So FSL report Ext.P22 stating the presence of human blood of Group 'A' will not take us anywhere in the absence of determination of blood group of accused. Moreover the recovery was from an open place accessible to all. In the above circumstances no evidentiary value can be attributed to recovery of Mo8 pants of accused.

20. Arrest of the accused as alleged by the prosecution is stoutly denied by the defence. The prosecution case is that accused has been arrested near to Pandalam Private Bus Stand. Ext.P18 arrest memo, Ext.P19 inspection memo and Ext.P20 arrest intimation etc. have been marked. During examination when accused was asked about arrest and Exts.P18 to P20, he specifically denied the arrest and categorically stated that he was in jail on 21.06.2014. He stated additionally that on 18.06.2014 he went to Hospital and after that he had been to Muttar. During evening Cw9 called him and asked him to return home. When he came, he was locked up in the room from where, he alleges he was taken into custody by the Police on the same day. The presence or even the visit of police though denied by the

Sub Inspector, his evidence as PW11 is under a cloud of suspicion as noticed earlier. The accused claims he was in the Police Station for three days, till his arrest was recorded. To prove that he had been to Public Health Centre, Pandalam on 18.06.2014 he examined DW1 and Ext.D1 was marked. It would show that he had been to the Hospital on that day. Though he stated that he went alone the O.P card is seen to have been issued to Kaliya also on that day. Dw1 admitted that O.P. is only upto 1'O Clock. The specific version of the accused is that from the Hospital he went to Muttar. It is in this context that the dispute regarding the arrest of accused assumes relevance.

21. On examining Ext.P18 arrest memo though it is stated that he was arrested at Pandalam Private Bus Stand at 10 am, the witnesses in the arrest memo are one SCPO and another CPO. If arrest actually was made at Private Bus Stand that too at 10.00 am there would not be any difficulty in citing independent witnesses in Ext.P18. Ext.P19 Inspection memo also shows that nothing is seized on body search. If at all the accused was arrested from the Private Bus Stand, his intention might have been to flee

from the place. So at least some money or his personal identity card, a bag or purse; something might have been with him. Nothing is seen seized from him and Pw13 has seized the Identity card and photographs of the accused at the time of inquest the description of which is available in the Inquest Report (Ext.P5); obviously seized from the hall-room where he was staying. *So the prosecution case that accused was arrested on 21.6.14 at 10am from the Pandalam Private bus stand can not be accepted as true.That would fortify the contention of the accused that he was taken into custody by the police in the evening of 18.6.14 itself at the instance of Cw9 .*

22. Even after the alleged arrest of the accused, PW13 who conducted initial and major part of the investigation, did not take any measures to seize the mobile phones of the deceased and also accused. It would have been the best evidence to prove the location and presence of the accused and contact between accused and deceased during the relevant time. Tower location would have clearly proved those facts. Even without the seizure of the instruments the number would have revealed the call details and the

location of the subscriber. According to PW13 though he enquired about the mobile phone of accused, he could not locate it. It is stated by PW2 that he does not remember the mobile number of deceased and also that of the accused. At the time of incident PW2 says he was aware of the mobile number of accused. However when police questioned him on the succeeding day of the incident he was not asked to reveal the mobile number, as stated by him in deposition. PW1 also admitted that accused has mobile phone, though he does not know the number. Suppression of mobile call data of accused and deceased can only be deemed to be willful. No attempt was also made to verify the story of PW1 that he was not in station on the crucial date. Verification of call details would have proved whether Pw1 had been to Marthandam on 18.6.14. It would also have proved whether accused and deceased together came to the the Hall at 3.pm or accused had been to Muttar from the Hospital. We do not think that the investigating officer is ignorant of all these factors. It is rank inefficiency or can only be inferred as willful suppression of material facts to aid somebody.

23. Evidence of PW3 alone can not be acted upon for sustaining the last seen together theory since all other material evidence has been suppressed by the prosecution. The 'last seen together' theory is always not reliable and the time gap has to be tested on the facts and circumstances of each case. In **Praful Sudhakar Parab v. State of Maharashtra [AIR 2016 SC 3107]** the Hon'ble Supreme Court has held that "*Last seen theory is a circumstance, which can be relied but it is well settled that only on the basis of last seen together conviction cannot be recorded. Further, if there is long time gap between last seen together and the date of incident, the evidence of last seen together looses much of its importance*" (sic para 15). Here, the witnesses deposed that they saw the accused and deceased going to the hall room at 3.00 p.m. PW-2 saw the deceased lying dead on the floor at 5.45 p.m., at which point the accused was not present in the hall room, even according to the prosecution. Though there is an indication that the persons in the workshop could see anybody going down to the drawing hall, there is also a statement that if a lorry is parked on the road side, the vision would be

hampered. In any event, the hall room is easily accessible and anybody going to the hall room would not necessarily be seen by those in the workshop. There is also the finding entered by us that the material witnesses are all employees of PW-1 and there is a concerted attempt to frame the accused with the murder of his friend. The exact time of death is also not decipherable. On the facts and circumstances of this case, we do not find ourselves persuaded to place any reliance on the last seen together theory.

24. As already observed, it has come out in evidence that all together 8 workers were residing in the hall and out of them 4 are from West Bengal. But prosecution evidence is silent about those two workers from Bengal. Investigating officers did not take any effort to question both of them. PW2 is from Marthandom and came for work under PW1 just two months prior to the incident. PW3 is working under PW1 for the past 5 - 6 years and his specific version is that PW1 considers him as a family member. PW4 the witness in Ext.P4 scene mahazar is a mason under PW1, PW6 the witness in Ext.P6 recovery mahazar of MO8 pants of the accused is

also a painter under PW1. PW5 though was the Panchayath member of Kudassana of Ward No.VI, on the date of incident he was out of station at Kottayam and according to him he was informed at 7 pm and he attempted to contact the police over phone, but in vain. Admittedly he came to the scene of occurrence only on the next day at the time of inquest. He is a person having close acquaintance with PW1 for the last several years. All the material witnesses are workers of Pw1. PW2 and 3 were questioned about the people gathered there. According to Pw2 he does not know how many people gathered there and according to Pw3 after 6.30 people might have gathered. Definitely when such unnatural death took place, people will assemble especially being a village area. Peculiar nature of the case is that all the prosecution witnesses except the official witnesses and the Panchayath member PW5, are workers of PW1, the *de facto* complainant. The specific defense of the accused is that accused has been falsely implicated to protect CW9 the son of PW1 and PW2 who are actually behind the incident. PW1 in evidence also deposed that his son was afraid of the Police knowing about the incident. By reason of which, even

according to the prosecution case a person who was brutally beaten up and was lying in a pool of blood, seen first at 5.45 p.m was left as such till next day morning. Neither those who saw him nor the Police thought of giving him medical care or in the least ensure that he is in fact dead. Non-citing of an independent witnesses of the locality and the two workers from Bengal residing in the hall amounts to suppression of facts and *malafide* intention of the prosecuting agency to frame a case as per their wish with ulterior motives.

25. The entire investigation was a farce. There is inordinate delay in lodging the FIR which remains unexplained. PW2 to 4 the workers under PW1 claimed to have seen the deceased with injuries at 5.45 pm. But no attempt was made to take him to Hospital. No material was brought out to prove how much time the deceased might have survived after sustaining the injuries. PW13 admitted to have questioned PW7 the Doctor who conducted the autopsy on the body of the deceased. But the statement of Doctor admittedly is not produced before Court. PW3 is said to have intimated CW9 the son of PW1 immediately on seeing the

deceased in the hall. But prosecution evidence is silent as to whether CW9 came to the spot or either CW9 or PW1 gave any instruction to the workers to take the injured to the Hospital.

26. We do not find any evidence to bring home the guilt of the accused and in the result Crl.Appeal stands allowed. Conviction and sentence passed against Appellant/accused is set aside and he is set at liberty. He shall be released forth with, if his presence is not required in any other case.

27. Conduct of PW11, the Sub Inspector in not visiting the place of occurrence is a serious flaw we noticed. Sec.157 Cr.P.C specifically provides that Officer in charge of Police Station upon receiving information of the commission of a cognizable offence after sending report to an empowered Magistrate to take cognizance of the offence, shall proceed to the spot or depute anybody competent as prescribed by State Govt to investigate the facts and circumstances of the case etc. PW1 admitted that Sub Inspector and two police men came to the spot after the lodging of FIR. But PW11 wants to suppress that fact. If at

all he has not visited the spot, it is a dereliction of his duty and if he had visited the spot and deposed falsely suppressing that fact, it would be perjury. His presence at the Police Station at midnight, 12.05 hours when PW1 reached the Police Station is also an indication that he had knowledge about the incident even before the registration of FIR. All the facts and circumstances lead to an inference that PW11 was lethargic and failed to discharge his official duties promptly inspite of knowing that a poor young migrant labourer had been beaten up brutally and was reported dead. We do not want to make any deprecatory remarks against him without hearing him in the matter. But we will be failing in our duty if he is not directed to face departmental enquiry for the lapses. Here we also notice that the Inquest Report specifically records at its inception that the hall-room was opened by the SHO, Nooranad, (who is also named – PW11) who was asked to take the key from the CPO deputed to guard the scene. Pw11 in his evidence twice categorically stated that he has not seen or visited the crime scene. We hereby order departmental enquiry against Pw11. A copy of this judgment

will be forwarded to the State Police Chief for follow up action. The report of the steps taken shall be placed before us within two months. Post the case on 25.08.2021 only to ensure such proceedings.

28. We have already found that the entire investigation was a farce and there existed manipulation from the inception of the registration of the crime. The accused has been acquitted on the ground of lack of evidence which is a direct result of the tainted and unfair investigation. But we cannot stop with the mere acquittal of the accused in view of the peculiar facts and circumstances of this case. We find it necessary to bring home the truth to serve the cause of Justice. Powers of appellate court in an appeal from conviction provided under Sec. 386(b) Cr.P.C. do not enable this Court to order re-investigation,de novo investigation or fresh investigation on allowing the appeal and acquitting the accused.

29. Hon'ble Supreme Court in **Vinay Tyagi v. Irshad Ali @ Deepak and others [(2013) 5 SCC 762 : 2012 KHC 4747]** held that Wherever the investigation is *ex facie* unfair, tainted, malafide and smacks of foul play, courts could set

aside such investigation and direct fresh investigation or denovo investifgation. It is also held there in that in case of fresh investigation, re-investigation or *de novo* investigation there has to be a definite order of Court and the order of the court has to state unambiguously whether previous investigation is incapable of being acted upon.

30. In **Pooja Pal v. Union of India and Ors. ((2016) 3 SCC 135)**, it has been held by the Hon'ble Supreme Court that the power of the constitutional Courts to direct further investigation or re-investigation is a dynamic component of its jurisdiction to exercise judicial review, a basic feature of the constitution and though has to be exercised with due care and caution and informed with self imposed restraint, the plentitude and content thereof can neither be enervated nor moderated by any legislation.

31. Paragraph No.56 in **Zahira Habibulla Sheikh V State of Gujarat (2004 (4) SCC 158)** is relavant in this context to be extracted which reads thus:

> " As pithily stated in Jennison v. Backer (1972 (1) All ER 1006), "The law should not be seen to sit limply, while those who defy it go free and, those seek its protection lose hope". Courts have to ensure

> that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See. Shakila Abdul Safar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr. -2003 (7) SCC 749]"

32. In this case, the accused and deceased were migrant laborers and thick friends, hailing from far off West Bengal and belonging to marginalised section of society. Kerala, with its literacy rate and the preference of youth to engage only in blue or white collar jobs is a haven for migrant labourers from the marginalized sections, who are engaged especially in jobs requiring strenuous manual labour. The contribution they make to the developmental activities of the State cannot be discounted; but they live and work under abject conditions and limited facilities.

The accused and the deceased in this case have also been residing in such a hall provided by their employer and this case show-cases a typical example of the plight of such laborers. The accused in this case has now undergone incarceration for more than five years on trumped up charges inculpating him on the murder of his own friend when he accuses others to have been the actual culprits. The real culprits in this case are still at large and the murder of a poor labourer who left his land to eke out a livelihood remains unsolved. If we just acquit the accused and stop there, such vestiges of feudalism would result in its resurgence in our society resulting in the innocent marginalized migrants being blamed for any and every crime committed in their vicinity. Hence we are of the considered view that a re-investigation of the case is an absolute necessity to avoid recurrence of such irresponsible acts from law enforcing agencies in future. A detailed discussion has already been made by us about the unfair, ineffective and manipulated manner of investigation conducted by the Police. All the circumstances attempted to be established by the prosecution viz: motive, last seen

theory, alleged recovery of the pants and the scientific evidence are all found to be inadmissible. The concocted documents created with regard to the arrest and the seizure of identity card of the accused at the time of inquest etc. have been dealt with in detail. No independent witnesses were cited and the material witnesses who were residing in the very same hall-room, also hailing from West Bengal, were purposefully avoided by the investigating agency and all the witnesses cited and examined; except the official witnesses the Inquest witness, the Panchayath member, were the workers of PW1, the defacto complainant. There is suppression of evidence by keeping aloof CW9, the son of PW1 from the whole picture. In such cases, if the court of justice concludes the proceedings by acquitting the accused, it will not serve the cause of justice. There should not be repetition of such harsh experiences for the migrant laborers who are living far away from their dear and near, in a land the culture and language of which are alien to them, just to eke out a minimum sustenance. There should be created an environment for them to work fearlessly with adequate protection to their life and

property. Want of proper, fair and effective investigation resulted in inculpating the accused in this case who is a close friend of the deceased. This Court hence invokes its plenary powers Under Article 226 of the Constitution to order re-investigation in the above case.

33. We also make it clear that a re-investigation without placing any reliance on any of the facts collected in the earlier investigation would only serve the ends of justice. For that, a special investigation team headed by a superior police officer not below the rank of Deputy Superintendent Of Police has to be constituted by the State Government to bring the truth to light. Since the incident relates back to 2014, we are of the view that the steps and the proceedings of the investigating agency should be completed at the earliest not later than the end of this year.

34. A copy of this judgment shall be forwarded to the State Police Chief for follow-up action.

Vinod Chandran, J

I perfectly agree with my learned Sister on the reasoning, regarding lack of evidence and the consequential

acquittal as also the further directions. However, I wish to add one aspect regarding the recovery effected as per the statement of the accused which would again inure to the accused. The confession so far as it is permissible under Section 27 is marked as Ext.P6(a) which is in Malayalam. The accused was a native of West Bengal and not proficient in Malayalam. So much is evident from the Section 313 questioning. Section 313 questions though recorded in Malayalam the Trial Judge has specifically noticed that they were translated in Hindi by an Advocate to enable the accused to understand the same. The answers were recorded in Hindi itself and so was the further statement made by the accused. Ext.P6(a) however is in chaste Malayalam, obviously the words of the translator and and not of the accused. The statement from Ext.P6(a) indicates that it was recorded on questioning the accused after the arrest in the presence of a Home Guard who is conversant with Hindi. In that circumstance the exact words of the accused ought to have been recorded and the translation appended. Here, in passing it is to be mentioned that the translator was also not examined, which even if done, in the present case, we are afraid would not cure the defect. On this aspect we refer to ***1942 AIR (Cal)***

593 Naresh Chandra Das vs. Emperor. ***Athappa Goundan v. Emperor MANU/TN/0455/1937*** was quoted where it was observed that "*statements made by an accused person which are or may be provable under Section 27, Evidence Act, should be clearly and carefully recorded by the police officer concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence his own words should be used and not a rendering into third person of the purport of the statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section.*" *(sic)* It was then held so :

> *44. The observations are indeed of much weight. Apart from any other consideration there is always the weakness of testimony to oral utterances. One's assertion of what another said is subject to a special weakness, viz., the risk of defective perception of words uttered orally. The specific features of weakness in such a case are : (1) the perception of the words may be imperfect, either by perceiving words*

differently from the reality, or by perceiving a part of them only; (2) the memory of them may be imperfect; (3) the narration of them may be different; (4) no data are available for determining which of these is the source of error and for checking possible error. Then there is the illusion of recollection which may confuse facts with conjecture. When a man's fate is made to depend upon a statement on the ground that it is his own statement, such a statement should be provable after excluding as much as practicable all such possible sources of error.

[Emphasis supplied by underlining]

If perception, memory and narration could fail in the case of a statement recorded in a language in which both the person uttering the same and recording it are conversant with; then the pitfalls in translation cannot be over-emphasized. We are quite aware that ***Athappa Goundan*** to the extent it held that any information under Section 27 which served to connect the object discovered with the crime/offence charged was admissible, has been overruled in **Pulukuri Kottayya vs. Emperor AIR 1947 PC 67.** So much of the statement which

evinces some or any connection with the crime has been held to be not admissible by the Privy Council; which now remains the established position. In fact in ***Naresh Chandra Das*** the said finding in ***Athappa Goundan*** was not approved and a different view was taken (Paragraph 52); as was subsequently declared by the Privy Council. However the proposition that the exact words of the accused should be recorded survives.

In the instant case what has been recorded is what has been stated by the translator and obviously even the Police Officer who recorded it does not know whether the words are an exact translation. We garner further support from ***AIR 2000 SC 591 Mujeeb & Ors. Vs. State of Kerala:*** *"Though according to Investigating Officer the recovery was made on the basis of statement of the accused but we find from the evidence that actual words in verbatim leading to recovery were not recorded by the Investigating Officer" (sic).* Therein the recorded statement was in the third person. But the principle applies squarely even when the accused speaks in a language not familiar to the person recording it, when a translation is warranted, where a third person comes in between the accused and the Investigating Officer. The person recording the

statement obviously is not aware of what the accused says and it is the translator's words that are recorded. When it comes to Court the satisfaction of the Court also stands substituted by the satisfaction of the translator. The accused is left in the dark as to how his words are reflected in the statement and in the translated form he has no chance of challenging it. We have a prevalence of such situations in India, a multi-lingual nation and this State, being a favoured destination of migrant labourers. I would also respectfully refer to the concluding portion of my learned Sister's Judgment which eloquently speaks of the sad plight of the migrant labourers who are left to the vagaries of official apathy and native scorn. These migrant labourers from marginalised sections of society are mostly illiterate and are often familiar only with their native language and dialect; pithily said, for the uninitiated, a '*peculiar tongue*'. Proof of such a statement after excluding all possible sources of error can be achieved only if the statement, as their Lordships in the fore cited decisions held; is recorded verbatim in the language spoken and a translation appended. In that event even the translator need not be examined and the Prosecution or the Court can get the services

of a responsible person, like a language teacher, to opine on the exact words spoken to verify the genuineness of the recorded translation. We also extract the further declaration of ***Naresh Chandra Das*** in Para 49:

> *...In order thus to be admissible against the accused under Section 27; (1) the information must be the one given by the accused the statement conveying the information must be his own statement in his own language and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible.' (sic)*
>
> *[underlining by me]*

Bhaskaran Nair vs. State of Kerala 1970 KLJ 151 held that it is mandatory that the statements given under Section 27 of the Evidence Act should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They shall not be paraphrased. ***Mohd. Abdul Hafeez vs. State of Andhra Pradesh AIR 1983 SC 367*** was a case in which there were four accused and the statement under Section 27 of one of them was that he along with two others had

sold the stolen property to a jeweller. Their Lordships recorded disapproval in such recording of evidence. It was held that when there are more than one accused, if evidence otherwise confessional is admissible under Section 27, it is obligatory that the Investigating Officer records who gave the information and that too in the words used by him so as to connect the recovery to the person who gives such information. We find the translation of the statement as recorded at Ext. P6(a) to be falling short of the requirement judicially warranted under Section 27 and the consequent recovery to be of no value as an inculpating circumstance against the accused.

Ordered accordingly.

Sd/-

K.VINOD CHANDRAN, Judge

Sd/-

M.R.ANITHA, Judge

Shg/Mrcs
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