IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.567 OF 2014

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/A1:

JITHESH
S/O. KUNJIKANNAN,MORKOTHE VEEDU, NEAR A.K.G. VAYANASALA, ERANJOLI VILLAGE, THALASSERI TALUK, KANNUR DISTRICT

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.V.S.THOSHIN

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM THROUGH THE ASSISTANT COMMISSIONER OF POLICE, CRIME DETACHMENT, THIRUVANATHAPURAM

SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.576/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.576 OF 2014

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/ACCUSED NO.3:

RAKHIL,AGED 26 YEARS
S/O. BALAN, SURYA VEEDU, KALTHERI IDAM,
KANDAMKUNNU VILLAGE, THALASSERY TALUK,
KANNUR DISTRICT.

BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SRI.R.ANIL
SRI.T.ANIL KUMAR
SRI.SUJESH MENON V.B.
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SRI.E.VIJIN KARTHIK

RESPONDENT/COMPLAINANT/STATE:

STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. (CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM DISTRICT).

SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.665 OF 2014

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/ACCUSED NO.4:

RAGESH @ RAKESH,AGED 23,
S/O.RAJU, KAINIKARA VEEDU, KUTTIKADU,
POOVATHIKAL CHECK POST, AATHIRAPPALLY ROAD,
PARIYARAM PANCHAYATH, CHALAKKUDY, THRISSUR DISTRICT.
BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SRI.R.ANIL
SRI.T.ANIL KUMAR
SRI.MANU TOM
SRI.M.SUNILKUMAR
SRI.SUJESH MENON V.B.
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SRI.M.VIVEK

RESPONDENT/COMPLAINANT:

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

SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.800 OF 2014

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/5TH ACCUSED:

JOSEPH,AGED 22 YEARS
S/O.JOY THOMAS,NALPATHEKKAR KOTTACKAL VEEDU,
NELLUTHIKKERI VILLAGE,SOMARPETTA TALUK,
KUDAKU DISTRICT,KARNATAKA STATE

BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SRI.R.ANIL
SRI.M.SUNILKUMAR
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SMT.S.LAKSHMI SANKAR

RESPONDENT/COMPLAINANT:

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

SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.1121 OF 2015

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/2ND ACCUSED:

AJEESH,S/O.VASU(A2),KOVUMMALVEDU,
NEAR OORATH MOSQUE,KUTTIYADI VILLAGE,
KOZHIKODE DISTRICT.

BY ADVS.
SRI.P.K.VARGHESE
SRI.P.S.ANISHAD
SRI.P.T.MANOJ
SMT.SANJANA RACHEL JOSE

RESPONDENT/COMPLAINANT:

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

SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-8-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.129 OF 2016

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/COMPLAINANT:

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

BY SR PP MR.ALEX M THOMBRA AND SR.PP MR S U NAZAR

RESPONDENT/ACCUSED (A6):

K.HARIDAS, S/O.KRISHNAN NAIR, SIVAM VEEDU, TC.VI/1100(4), KANJIRAMPARA EAST, THOZHUVANCODE, P T P WARD, VATTIYOORKAVU VILLAGE, THIRUVANANTHAPURAM DISTRICT - 695 013.

BY ADV. SRI.R.ANIL

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.A.No.609 OF 2016

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/NON PARTY:

GIRIJA MENON
AGED 51 YEARS
W/O.LATE HARIHARA VARMA, KARUN BHAVAN,
VENNAKKARA, NURANI P.O., PALAKKAD DISTRICT, PIN - 678 004.

BY ADV. SRI.C.S.MANU

RESPONDENT/COMPLAINANT AND THE PW-2:

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

2 **VIMALA DEVI,D/O.KARUNAKARAN NAIR,**
AGED ABOUT 52 YEARS
PANTHAPLACKAL VEEDU, KADAKKAVOOR P.O.,
THIRUVANANTHAPURAM, PIN - 695306.

R1 BY SR PP MR.ALEX M THOMBRA AND
SR.PP MR S U NAZAR
R2 BY ADV. SRI.P.K.MOHANAN(PALAKKAD)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

CRL.APPEAL (V).No.21 OF 2019

AGAINST THE JUDGMENT IN SC NO.550/2013 DATED 12-05-2014 OF ADDITIONAL SESSIONS COURT - VI, THIRUVANANTHAPURAM

CP NO.28/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD

CRIME NO.1399/2012 OF VATTIYOORKAVU POLICE STATION, THIRUVANANTHAPURAM

APPELLANT/PW2:

P.K.VIMALADEVI,W/O. LATE B. HARIHARA VARMA,
'PANTHAPLACKAL', KADAKKAVOOR P. O.,
TRIVANDRUM DISTRICT, PIN - 695306.

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SRI.THOMAS J.ANAKKALLUNKAL
SRI.M.DINESH

RESPONDENTS/ACCUSED NO.6 & STATE:

1 K.HARIDAS
S/O. KRISHNAN NAIR, SIVAM VEEDU, TC.VI/1100(4),
KANJIRAMPARA EAST, THOZHUVANCODE, PTP WARD,
VATTIYOORKANU VILLAGE,
THIRUVANANTHAPURAM DISTRICT - 695013.

2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682031.
R1 BY ADV. SRI.R.ANIL
R2 BY SR PP MR.ALEX M THOMBRA AND
SR.PP MR S U NAZAR

THIS CRL.A BY DEFACTO COMPLAINANT/VICTIM HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 12TH DAY OF AUGUST 2020 / 21ST SRAVANA, 1942

Crl.REVISION CASES No.5 OF 2016 (SUO MOTU)

SUO MOTU REVISION CASE REGISTERED AS PER ORDER DATED 27.06.2016 IN CRL. APPEAL NO.609/2016

AGAINST

1 **JITHESH,**
S/O. KUNJIKANNAN, MORKOTHE VEEDU, NEAR A.K.G. VAYANASALA, ERANJOLI VILLAGE, THALASSERY TALUK, KANNUR DISTRICT.

2 **AJEESH,**
S/O. VASU, KOVUMMAL VEEDU, NEAR OORATH MOSQUE, KUTTIYADI VILLAGE, VATAKARA TALUK, KOZHIKODE DISTRICT.

3 **RAKHIL,**
S/O. BALAN, SURYA VEEDU, KAITHERI IDAM, KANDAMKUNNU VILLAGE, THALASSERY TALUK, KANNUR DISTRICT.

4 **RAGESH @ RAKESH,**
S/O. RAJU, KAINIKARA VEEDU, KUTTIKADU, POOVATHINKAL CHECK POST, AATHIRAPALLY ROAD, PARIYARAM PANCHAYATH, CHALAKUDY, THRISSUR DISTRICT.

5 **JOSEPH,**
S/O. JOY THOMAS, NALPATHEKKAR KOTTACKAL VEEDU, NELLUTHIKKERI VILLAGE, SOMARPETTA TALUK, KUDAKU DISTRICT, KARNATAKA STATE.

6 K. HARIDAS,
S/O. KRISHNAN NAIR, SIVAM VEEDU, TC VI/1100(4),
KANJIRAMPARA EAST, THOZHUVANCODE, P.T.P. WARD,
VATTIYOORKAVU VILLAGE, THIRUVANANTHAPURAM
DISTRICT.

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

R4 BY ADVS. SRI.B.RAMAN PILLAI (SR.)
SRI.R.ANIL, SRI T.ANIL KUMAR,
SRI.B.KRISHNA KUMAR,SRI.A.RAJESH,
SRI.M.SUNILKUMAR,
SRI.SUJESH MENON V.B.,SRI.M.VIVEK,
SRI.THOMAS ABRAHAM NILACKAPPILLIL
R7 BY SR PP MR.ALEX M THOMBRA AND
SR.PP MR S U NAZAR

THIS CRIMINAL REVISION CASE HAVING BEEN FINALLY HEARD ON 27-05-2020, ALONG WITH CRL.A.567/2014 AND CONNECTED CASES, THE COURT ON 12-8-2020 PASSED THE FOLLOWING:

"C.R."

A.HARIPRASAD & N.ANIL KUMAR, JJ.

Crl.Appeal Nos.567 of 2014, 576 of 2014,
665 of 2014, 800 of 2014, 1121 of 2015,
129 of 2016 and 609 of 2016,
Crl.Appeal (V) No.21 of 2019
&
Crl.Revision Case No.5 of 2016

Dated this the 12th day of August, 2020

COMMON JUDGMENT

Hariprasad, J.

This batch of criminal appeals and a revision petition arise out of the judgment in S.C.No.550 of 2013 on the file of the Additional Sessions Court-VI, Thiruvananthapuram. Six accused persons were charge-sheeted for offences punishable under Sections 120B, 396, 302, 201, 328, 465 and 471 read with Section 34 of the Indian Penal Code, 1860 (in short, "IPC"). After examining 72 witnesses on the prosecution side and eight witnesses on the defence side and also after considering 244 documents exhibited for the prosecution, 25 documents for the defence, X1 series court exhibits and 143 material objects, the trial court came to a conclusion that the accused 1 to 5 are guilty of criminal conspiracy for committing murder, dacoity, forgery, using as genuine a forged document which is known to be forged, administering a stupefying drug on the deceased with intent to cause hurt and causing disappearance of evidence of the offence

committed. Apart from the above, they found to have committed grave offences of murder and dacoity pursuant to the conspiracy hatched. Imprisonment for life, other sentences for different terms and fine have been imposed on them. 6th accused was found to be not guilty of any of the offences alleged by the prosecution and he is acquitted under Section 235(1) of the Code of Criminal Procedure, 1973 (in short, “Cr.P.C.”).

2. For the sake of convenience, the appellants, who challenged the conviction and sentence, are described hereunder in their respective ranks before the trial court. 1st accused preferred Crl.Appeal No.567 of 2014 assailing the conviction and sentence. 2nd accused filed Crl.Appeal No.1121 of 2015 disputing correctness of his conviction and sentence. Similarly, Crl.Appeal No.576 of 2014 is filed by the 3rd accused, Crl.Appeal No.665 of 2014 is filed by the 4th accused and Crl.Appeal No.800 of 2014 is filed by the 5th accused. Crl.Appeal No.129 of 2016 is filed by the State, challenging correctness of the acquittal of 6th accused. For the same purpose, another appeal, bearing number Crl.Appeal (V) No.21 of 2019, has been filed by a lady, who was examined as PW2 in the trial and who claimed to be the wife of deceased Harihara Varma (in short “Varma”, hereafter). She filed the appeal under proviso to Section 372 read with Section 2(wa) of Cr.P.C. Crl. Appeal No.609 of 2016 is filed under Section 454(1) Cr.P.C. by a third party claiming to be the wife of deceased Varma. She is aggrieved by the direction in the trial court's judgment to handover movable properties to PW2, including the precious stones, belonged to

Varma on a finding that she is his legally wedded wife.

3. Though the trial court found the accused 1 to 5 guilty of murder under Section 302 IPC and also of dacoity with murder defined under Section 396 IPC, it made an observation that there need be no separate punishment under Section 302 read with Section 120B IPC. This reasoning, according to a bench of this Court, which heard the appeals at the time of admission, was clearly illegal. The bench observed that the trial court ignored the fundamental principle that every conviction should be followed by a sentence. No doubt, whether the convict should suffer the sentence consecutively or concurrently is a matter to be judiciously decided by the court. Hence this Court suo motu registered Crl.Revision Case No.5 of 2016.

4. Heard Sri.B.Raman Pillai, learned senior counsel appearing for accused 3 to 5, Sri.Sasthamangalam S.Ajithkumar, learned counsel appearing for 1st accused, Sri.P.K.Varghese, learned counsel appearing for 2nd accused, Sri.R.Anil, learned counsel appearing for 6th accused, Sri.P.Vijayabhanu, learned senior counsel appearing for appellant-victim (PW2), Sri.C.S.Manu, learned counsel appearing for appellant in Crl.Appeal No.609 of 2016 and Sri.P.K.Mohanan, learned counsel appearing for 2nd respondent (PW2) in Crl.Appeal No.609 of 2016. Learned Public Prosecutor Sri.Alex M.Thombra and Sri. S.U.Nazar are also heard. Learned counsel on both sides submitted notes of arguments. We have carefully perused the notes.

5. Prosecution case, shortly put, is thus: Deceased Varma had openly proclaimed that he was a member of Mavelikkara royal family and a trust member of Poonjar Palace. He held out himself to be the authorized person, by other family members, to deal with their ancestral properties. He was in possession of high priced gems and precious stones belonged to the family. According to the prosecution case, the precious stones and gems were worth crores of rupees. It is alleged that the accused 1 to 5, who came to know that deceased Varma was in possession of priceless gems and precious stones, conspired to murder him and rob the gems. Pursuant to a conspiracy, the 1st accused created a document by showing false identity of PW21 with a photograph of CW53 and on their behalf, the 3rd accused obtained a mobile phone sim card bearing no.7411790579, which was used by the 1st accused. Accused 2 and 3 used a mobile phone, bearing no.9961930763, which was originally issued to PW13. Later, he had lost the sim card. It is further alleged that the accused 1 and 2 purchased a mobile handset from PW15's shop on 04.11.2012. Prosecution has a further case that the 1st accused had previous acquaintance with deceased Varma and 6th accused. When contacted, PW12 evinced genuine interest in finding out intending purchasers for precious stones and gems, therefore the 1st accused introduced PW12 to the deceased. Later, there arose some disputes regarding purity of the gems and PW12 backed out from the deal. By that time, he had spent a considerable amount in furtherance of the deal. It is the prosecution case

that PW12 demanded from the 1st accused the money that he had spent. Thereafter, 1st accused along with other accused, as part of their conspiracy, made preparations for murdering Varma and robbing the precious stones. After purchasing a mobile handset from PW15, the accused contacted the deceased, in the pretext as purchasers, by using false names. As part of their conspiracy, 1st accused took a house, “Smayana”, on lease as per Ext.P31 deed at Illikkapady, Eroor on 22.10.2012. Along with some of the accused persons, PWs 10 and 11 resided in the said house. On 24.12.2012, the accused persons contacted the deceased. On the same day, at 11.15 a.m., the accused 2, 3 and 5 reached near KSEB Office, Vattiyoorkavu as informed. Deceased came to the informed place in a car belonging to and driven by the 6th accused. 5th accused was introduced to the deceased as the son of a Minister in Karnataka Government. Accused 2, 3, 5 and 6 along with the deceased went in the car to “Omkar”, a house belonged to Haripriya, who is the daughter of 6th accused. They sat down around a dining table in the house to examine the gems. At that time, the 2nd accused offered Tropicana juice, mixed clandestinely with alcohol, to the deceased. Thereafter, the accused 2, 3 and 5 left the dining hall pretending to smoke. Accused 1 and 4 were waiting in the courtyard of the house. Prosecution mentioned in the final report that the 4th accused entered the house at 1.00 p.m. He caught Varma by neck from behind, closing his mouth. 5th accused caught hold of both his hands and the 2nd accused put a cloth drenched in chloroform

covering his nostrils. 3rd accused silenced the 6th accused by threatening him with dire consequences, if alarm was raised. 2nd accused put a plaster on the mouth of deceased and thereafter the 1st accused entered the house. Accused 2 and 4 took Varma to nearby bed room, tied both his hands by using a rope and the 2nd accused throttled Varma between 1.00 and 1.20 p.m. He died due to smothering and strangulation. Afterwards, the accused robbed the gems kept in various boxes, exhibited as material objects (MOs) in the case. Prosecution contended that the 6th accused also became a consenting party to the crime and he fabricated evidence by pretending that he was also disabled with plaster and rope. It is alleged that the 6th accused handed over his mobile phone to the accused and instructed them to put front door key of the house under his car, kept in the porch. It is the allegation that the 6th accused aided escape of other accused persons by deliberately delaying to inform police about the crime. At about 2 o' clock in the noon, the 6th accused went to the house of PW3 and called PW70, who is his son. He in turn informed police about robbery. Accused persons later burnt mobile handsets containing sim cards bearing nos. 7411790579 and 9961930763 used to contact the deceased and also handsets containing nos.9447144431 and 9633254448 belonging to the 6th accused and deceased Varma. Prosecution therefore contended that the accused are liable to be punished for the offences alleged in the final report.

6. After hearing both sides, trial court framed the following

charges:

"I, ….., Additional Sessions Judge, Fast Track Court III, Thiruvananthapuram do hereby charge you.

(Name and address of all the 6 accused persons)

***Firstly**,*

That you, A1 agreed with A2 to A5 to murder deceased Harihara Varma and to rob diamonds and precious stones in his possession, and besides the said agreement, to accomplish the said object, you, A1 to A4, having seen the diamonds and precious stones, in different places, such as Dubai International Hotel, Thiruvananthapuram, Jas Hotel and Omkar House at Perrokada belonging to the daughter of A6, having convinced under the pretext to the deceased Harihara Varma, that the said invaluables will be sold through you, the 1st accused, on 22.10.2012, took a rented house at Eroor in Ernakulam, while CW12 and CW13 were residing there, A1 to A5 also having resided therein, contacted Harihara Varma from different places in Bangalore in fake names,over mobile phones obtained by illegal means, on 24-12-2012 at 11 a.m. A2, A3 and A5 having reached near K.S.E.B. office, Vattiyoorkavu, A2 and A3 introduced A5 as the son of a minister in Karnataka to Harihara Varma, A2, A3 and A5 along with A6 and Harihara Varma having reached the aforesaid Omkar House, by car with Registration No.KL 5 W 8998 owned by A6. A2, A3 and A5 along with A6 and Harihara Varma having assembled in the hall room in the ground floor of the said Omkar house, negotiated on the values of precious stones by perusing it,

caused the deceased Harihara Varma to believe that A2, A3 and A5 have been convinced of the values of precious stones and thereby you have committed criminal conspiracy for the commission of dacoity and murder, and thereby committed an offence punishable u/s.120B r/w 302 and 396 I.P.C.

***Secondly**, that you A1 along with A2 to A5, in furtherance of your common intention, forged a document by using the driving licence of CW10, pasting the photograph of CW53, and fraudulently used as genuine and thereby you, A1 to A5 committed an offence punishable u/s.465 and 471 r/w.34 I.P.C.*

***Thirdly**, that you, A2, on 24-12-2012 at a time between 1 pm and 1.20 pm, along with A1 and A3 to A5, in furtherance of your common intention, caused the deceased Harihara Varma to consume liquor mixed with tropicanes grape juice, intoxicated and made Harihara Varma unconscious by applying chloroform and thereby facilitating commission of murder of Harihara Varma and thereby you, A1 to A5 committed an offence punishable u/s.328 r/w.34 I.P.C.*

***Fourthly**, that you A6, on 24-12-2012 at a time between 1 pm and 1.20 pm agreed with A1 to A5 to murder deceased Harihara Varma and to rob the precious stones in his possession, in furtherance of your common intention, A4 caught hold of Harihara Varma around his neck with your left hand, closed his mouth with your right had, A5 caught hold of both the hands of the deceased, A2 pasted plastic tape around the mouth and head of Harihara Varma, A2 and A3 took the deceased to the cot in the bed room, A2 tied both the hands of Harihara Varma to his*

back with strand rope, thereby suffocating and strangulating the deceased Harihara Varma, committed murder intentionally causing death of Harihara Varma and thereby you, A1 to A6 committed the offence punishable u/s.302 r/w.34 I.P.C.

***Fifthly**, that you, A6, on 24-12-2012 at a time between 1 pm and 1.20 pm, along with A1 to A5, in furtherance of your common intention, caused disappearance of the evidence by making it appear that you were also attacked, by causing your hands to be tied back, causing plaster to be pasted on your mouth, entrusting your mobile phone with the other accused, instructing the other accused to lock the door of Omkar house outside, putting the key under the car in the car-porch, without informing the police, deliberately causing delay and allowing the accused A1 to A5 to escape and thereby you, A1 to A6 committed an offence punishable u/s. 201 r/w 34 I.P.C.*

***Sixthly**, that you A1 along with A2 to A5, caused disappearance of evidence by burning, three mobile phones with sim cards, which you used for committing the offences, two mobile phones with sim cards you obtained from A6, one mobile phone with sim card belonged to deceased Harihara Varma by dousing petrol, in the 1st floor of Manthanath house, in Ponnethu lane, in Ernakulam, wherein A1 was residing, and thereby you, A1 to A5 committed an offence punishable u/s.201 r/w 34 I.P.C.*

***Seventhly**, that you A1 on 24-12-2012 at a time between 1 pm and 1.20 pm conjointly with A2 to A6, robbed all the invaluable precious stones and other belongings of the deceased Harihara Varma and thereby*

committed dacoity, and murder was committed, in so committing dacoity and thereby committed an offence punishable u/s.396 I.P.C and within my cognizance.

And I hereby direct that you be tried by this Court for the said charge.

Sd/-

Addl.Sessions Judge"

7. Framework of the prosecution case is unfolded through testimonies of PWs 1 and 70 to 72.

8. PW70 is the son of 6th accused. PW70 deposed that at about 2.00 p.m. on 24.12.2012, he received a call from his father. He asked PW70 to come over to "Omkar", which belonged to the daughter of 6th accused (sister of PW70). Immediately PW70 went on a motor bike and reached at "Omkar" within five minutes. At that time, the 6th accused was sitting on steps in front of the house. PW70 deposed that he found his father in a state of utter shock and he was weary. 6th accused informed PW70 that three persons assaulted Varma and him. He demanded PW70 to inform the matter to police immediately. 6th accused further instructed PW70 to procure an ambulance. PW70 then asked where Varma was? At that time, the 6th accused gestured that he was inside the house. On seeing the front door locked, PW70 went inside through the back door, opening to the kitchen, and when entered the dining room and then a bed room, he found Varma lying on bed. PW70 tried to wake him up. But, Varma did not respond. He came out and after giving some drinking water to the 6th accused, he went to Vattiyoorkavu police station to reach there at

about 2.15 p.m. He met PW1, the Sub Inspector, and informed that three persons had caused hurt to the 6th accused and Varma. After collecting details from him, PW1 along with his police party came to "Omkar" following PW70. Immediately an ambulance was called.

9. PW1 also supported this version of PW70. It is his deposition that after confirming truth of the information furnished by PW70 and procuring an ambulance service and thereafter confirming that Varma was dead, PW1 came back to the police station and suo motu registered a crime. First information statement is Ext.P1 and first information report is Ext.P1(a). It is his version that a male nurse in the ambulance examined Varma and found him dead. It was informed by the male nurse that 108 ambulance service carried only patients and never carried dead bodies. Therefore, ambulance went back without removing body of the deceased to a hospital. Thereafter, other high ranking police officers came to the scene and investigation gained momentum.

10. PW71 started the investigation. He was the Circle Inspector of Police, Peroorkada from 24.09.2012 to 31.01.2013. He took over investigation on the date of occurrence itself, i.e., 24.12.2012. He reached the place of occurrence at about 4.00 p.m.. He procured the presence of Scientific Assistant, Forensic Science Laboratory (FSL), Scientific Assistant, DCRB, Thiruvananthapuram (PW48) and Finger Print Expert (PW38). Besides, he brought a police photographer (PW39) too. After PW48 had collected evidence from the dead body and scene of

occurrence, PW71 caused collection of chance finger prints through PW38 from various parts of the house. Thereafter, police photographer took numerous photographs of the body and scene. Then PW71 prepared an inquest report (Ext.P23) in the presence of witnesses. Dress materials and *poonul* (sacred thread) and other articles seen on the body were recovered at the time of inquest. All the items recovered were properly packed and sealed. MOs 2 to 28 recovered as per Ext.P23 inquest report are identified by PW71. Property list evidencing production of these items before the court is marked as Exts.P175 and P176. Ext.P99 is the scene examination report furnished by PW48 after inspecting the dead body and place of occurrence. As per Ext.P99, 12 items of cellophane impressions were taken from the dead body. They are marked as MOs 125, 126, 127, 128, 129, 130, 131, 132, 133, 134 and 135. Even though the 6th accused informed PW71 that the assailants administered chloroform to deceased Varma and himself and they muffled them by using plaster, after tying their hands behind, PW71 did not believe the statements of the 6th accused mainly because there was no sign on his body of fixing a plaster or tying his hands with a rope. Further, being an advocate, he should have informed police promptly and his behaviour was unnatural. It was also revealed in the course of investigation that he delayed furnishing any information to police. He called his son (PW70) and through him only the incident was informed to police. It was doubted that he might have facilitated escape of the other accused. All these actions on the part of the

6th accused evoked suspicion in the mind of the investigating officer. It is deposed to by PW71 that the 6th accused was sent to Medical College Hospital, Thiruvananthapuram accompanied by a police constable to find out whether he had suffered any injury in the incident. 6th accused informed the doctor that he had not suffered any injury and refused to subject himself to a medical examination. He did not even afford an opportunity to find out whether his saliva or other body secretions showed any traces of chloroform. Even though the 6th accused was later taken to the Department of Forensic Medicine, he could not be examined for want of time. A report submitted by police constable to that effect to PW71 is Ext.P177. Along with Ext.P177, an out patient ticket issued from Medical College Hospital, Thiruvananthapuram, pertaining to the 6th accused, is also produced. That is marked as Ext.P177(a), despite an objection raised by the defence. Ext.P177(a) reveals the name and address of the 6th accused. PW71 forwarded the dead body for postmortem examination to Medical College Hospital, Thiruvananthapuram. PW69 then was Professor, Forensic Medicine and Police Surgeon in the Medical College and he conducted autopsy on the body of deceased Varma and issued Ext.P172 postmortem certificate. In addition to the offences under Section 302 read with Section 34 IPC registered, PW71 submitted a report to the court concerned for adding an offence under Section 394 IPC too. That report is Ext.P178. Since the crime scene had to be examined in a great detail, PW71 posted police constables including, PW49, on scene guard duty. Police dog was

also brought as part of the investigation. Sniffer dog had gone towards Puthoorkonam and stopped by the side of an arch in front of Puthoorkonam temple. On a detailed search in the house, PW71 recovered three gems from floor and further, a suitcase on the dining table. Certain certificates and an album were found inside the suitcase. A conch, electronic scale, etc. were recovered as per Ext.P30 mahazar. Material objects recovered as per Ext.P30 have been identified by witnesses.

11. Subsequently PW71 questioned PWs 5,6 and 70 and others and recorded their statements. Scalp hair, body hair and nail clippings of the dead were handed over to PW71 by PW69 after postmortem examination and they were recovered as per Ext.P101. Ext.P88 certificate was also obtained by PW71. Then the 6th accused was taken to Thiruvananthapuram airport and control room for showing CCTV footage for identifying other accused. 6th accused plainly said that he could not identify anyone. Subsequently, PW71 chanced upon a car driver, who was examined as PW6, who said to have transported some of the accused to Railway station, Thampanoor after the incident. He was also taken to the control room for identifying CCTV footage on the next day of the incident. In the footage, Tata Indica taxi car driven by PW6 was found stopping in front of the Railway station and two persons were found alighting from the car. He identified his car and identified the two persons as the passengers who travelled in his vehicle on the previous day. 6th accused's behaviour raised serious suspicions in the mind of the investigating officer and that is

why later he was implicated in the case. Ext.P102 is the mahazar for taking Tata Indica car driven by PW6 into custody. Thereafter, biological remnants were collected from the car.

12. In the course of investigation, it was revealed that the two accused persons, who travelled in the car driven by PW6, abandoned a plastic carry bag on the side of a public road running through the backside of Cotton Hill Pre-primary Teachers Training School, Thiruvananthapuram. As informed, PW71 went to the place and recovered the plastic carry bag containing four paper boxes with inscription “Tropicana juice” and a bottle with a label 'Refresh liquid'. Two gloves and a towel were also kept in the plastic carry bag. These items were identified by PW6 and other witnesses. Ext.P25 is the mahazar. Various material objects recovered were also identified by this witness.

13. PW71 went to the rented house, where deceased Varma stayed with PW2. Search memorandum is Ext.P184 and search list is Ext.P29. Certain stones and other materials were recovered in the search. Ext.P186 is the report submitted by PW71 for removing Sub Inspector, Vattiyoorkavu Police Station from the position as a complainant and adding PW2 as the defacto complainant.

14. On further investigation, it was revealed that PW13 is the subscriber of mobile phone no.9961930763 to which deceased Varma last contacted. As part of investigation, it came out that calls were received by Varma from nos.9961930763 and 7411790579. Prosecution would allege

that these numbers were used by the accused 1 and 2. Investigation by PW71 revealed that PW13 had lost the sim card in the month of October 2012. Similarly, it came to light that mobile no.7411790579 stood in PW21's name. PW71 went to Kolar in Karnataka in search of PW21. When questioned, PW21 informed that he had not taken such a phone connection. Further probe disclosed that PW21's ID was falsely created by the accused 1 and 3 and they secured a sim card with the aforesaid number. Deceased Varma was having another house at Yakkara Village in Palakkad. That house was also searched and various articles shown in Ext.P187 report have been recovered. Property list is Ext.P188. Some gems and precious stones were also recovered, which were separately packed and sealed. After collecting the gems and precious stones, PW71 kept them in safe custody and they were sent up in lots for testing by the empowered officer, working in the Department of Mining and Geology. Exts.P189 and P190 would reveal this fact.

15. PW71 deposed that on examination of the call details of mobile phone no.9447972718 used by deceased Varma, it could be seen that nos. 9961930763 and 7411790579, used by the accused, were moving in the same direction at the same time and place. Along with them, admitted phone number of the 1st accused, viz., 9946938127 was also in the same location. On this basis, police started investigation against the 1st accused. It was revealed that the 1st accused was at Bangalore and therefore PW71 with his police party went to Bangalore. On enquiry, it was

understood that the 1st accused was staying in Susheela Paying Guest Accommodation. On reaching there, they found the accused 1 to 5 together in room no.116. In order to find out whether all the persons had nexus to the crime, they were brought down to Thiruvananthapuram from Bangalore on 04.01.2013. Accused 2 to 4 carried their bags when they were taken to Thiruvananthapuram. On 05.01.2013, after reaching at PW71's office, PWs 5 and 6 and the 6th accused identified accused 1 to 5 by seeing them. When the accused were questioned, their involvement in the crime was revealed and therefore at 3.55 p.m., their arrest was recorded. Arrest memos of accused 1 to 5 are marked as Exts.P192, P113, P194, P195 and P196. All the accused were identified by PW71 from the dock.

16. PW71 deposed that in the body search of the 1st accused, a Nokia mobile phone bearing no.9946938127 was recovered. Other valuable items searched out from the 1st accused are shown in Ext.P197 property list. Mobile phone recovered from the 1st accused is MO137. Other material objects are MOs 138 to 140. PW71 has a case that large items of gems and precious stones were recovered from the possession of the 1st accused. We shall deal with each of them in the succeeding paragraphs.

17. It is the case of PW71 that the 2nd accused had produced a bag for inspection, which contained the 2nd accused's dress materials and a Nokia mobile phone (MO40) bearing no.8606516539. In addition to ATM

cards and currency notes, the 2nd accused had secreted certain precious stones in his bag. All the precious stones (MO37 series and MO39 series) along with other items are described in Ext.P198 property list.

18. Thereafter, body search and search of the 3rd accused's bag revealed his possession of mobile phone (MO52) bearing no.9995225462, ATM card, PAN card, etc. 3rd accused's bag is marked as MO43. Apart from his dress materials, MO50 series stones were found concealed in MO49 white box kept in 3rd accused's bag. Property list showing the items recovered from the 3rd accused is marked as Ext.P199.

19. Then, 4th accused's body and personal belongings were searched. MO53 is the bag possessed by the 4th accused. Two mobile sim cards bearing nos.9946349097 and 9902827088 were kept in one phone by the 4th accused and the phone was recovered and marked as MO59. In addition to his dress materials and other items, the 4th accused's bag found to contain gems and precious stones marked as MO61 series and MO63 series. Property list revealing recovery of these articles is marked as Ext.P200.

20. Then body search of the 5th accused was conducted. Driving licence and identity card issued by Oxford College of Engineering, Bangalore and other documents were recovered from him. He was also using a mobile phone, bearing no.9008446019. Property list revealing recovery from him is marked as Ext.P204.

21. PW71 deposed that the precious stones, recovered from the

possession of all the accused, were kept in his custody as he had to obtain certificates from the concerned authority in the Department of Mining and Geology. Ext.P205 is the document revealing these aspects. Subsequently, he filed Ext.P207 report for adding Sections 120B, 328 and 395 IPC and for deleting Sections 394 and 34 IPC. PW71 further deposed that after arresting the accused, their finger impressions were taken as required under the Kerala Identification of Prisoners Act, 1963 and Rules thereunder. Finger impressions were sent to the Finger Print Bureau for comparison. On 06.01.2013, the accused persons were produced before court with a remand report, which is marked as Ext.P208. Later, 6th accused was implicated in the case and he was arrested as per Ext.P209 arrest memo dated 06.01.2013. After complying with necessary formalities, the investigating officer received the accused persons in police custody. Thereafter on 09.01.2013, hair samples of accused 2 and 3 were collected. Accused were identified through PW3. As confessed by the accused, they were taken to Susheela Paying Guest Accommodation, Bangalore for effecting recovery. Relevant pages of the registers and other documents showing residence of some of the accused at Bangalore, maintained by the Paying Guest Accommodation, were also recovered.

22. When 1st accused was questioned, he confessed that he had secreted certain gems, precious stones and figurines in a house at Ernakulam where he resided with his family. As handed over by the 1st accused, MO64 bag was recovered. Inside the bag, MO65 series to 68

series, 71 series to 73 series, 75 series to 79 series, 81 series to 85 series, 87 series to 91 series, 93 series to 98 series, 101 series to 104 series, 106 series, 107 series, 109 series, 110 series and 115 series to 119 series gems and stones, three Ganesh figurines (MO19 series) and MO20 green stone bar were secreted. In addition to that, 8 coins and two metal bars marked as MO121 series and MO122 series were also recovered from the 1st accused. An antique watch taken out from MO64 bag is marked as MO21. 1st accused handed over a lease agreement (Ext.P76) to PW71 while in custody. All the gems and stones recovered from the 1st accused were also sent for analysis to the Department of Mining and Geology. Property lists are Exts.P219 to P221. Ext.P222 report was filed by PW71 for adding an offence under Section 201 IPC in the charge. Thereafter the investigation was handed over to PW72, then Assistant Commissioner of Police, Crime Detachment, Thiruvananthapuram City Police. He took over investigation on 31.01.2013.

23. Ext.P223(a) is the report submitted by PW72 informing the court that he had taken over investigation. Gems sent for analysis to the Geology lab were received back and produced before the court as per Exts.P224 to P230 property lists. PW72 deposed that he conducted investigation into the whereabouts of autorickshaw in which the accused 1, 4 and 5 left the scene for Thampanoor Railway station after the incident. He found out the autorickshaw, bearing no.KL-01 BE 3128, used by the accused for escaping from the place of occurrence. PW4 was identified to

be the owner cum driver of the autorickshaw. He was questioned. Ext.P231 is the forwarding note submitted by PW72 in respect of the properties recovered by PW48 at the time of preparing Ext.P23 inquest report.

24. PW72 questioned PW29, who stayed in “Smayana” along with the accused. PW72 gave a report to PW62 for registering a crime against the accused for falsely creating documents with a view to obtain a sim card. PW72 authorized PW50, then Grade A.S.I. in the Crime Branch CID, to question PW12 and others residing in Kannur District. Thereafter PW50 submitted a report to PW72. It was understood that PW12 had come to Thiruvananthapuram and stayed in Dubai International Hotel along with 1st accused and he had seen the gems and stones belonged to deceased Varma in the presence of the 6th accused. Records kept in the hotel, where PW12 stayed, were also collected from the receptionist (PW34). Ext.P53 is the mahazar. He made arrangements for recording the statements of PWs 4 and 9 by a Magistrate under Section 164 Cr.P.C. He identified PW7, who had seen deceased Varma, carrying a suitcase, boarding the 6th accused's car. In the course of investigation, PW72 got information that many persons had seen the gems and precious stones belonged to Varma from Jas Hotel, Thiruvananthapuram in the presence of the 6th accused. In this connection PW33 was questioned.

25. PW72 got information that the accused 2, 3 and 5 had a short conversation with deceased Varma on the fateful day in front of K.S.E.B. Office, Vattiyoorkavu and thereafter all of them together went to “Omkar” in

the car driven by the 6th accused. In this connection PW8 was questioned. Mobile phone no.9995725462, used by the 3rd accused was found to be belonging to PW42, who is a relative of the 3rd accused. He was also questioned. It is the prosecution case that the 1st accused obtained chloroform from Sheeba Dental Clinic, Peralassery, Kannur run by PW14, a dentist. PW50 was deputed to question PW14. He prepared a mahazar from PW14's clinic.

26. After that, on the basis of the 2nd accused's disclosure statement, PW72 went to Sani Stores, Ernakulam and obtained a sample rope as per Ext.P51 mahazar. Again, PW72 purchased adhesive plaster as informed by the 2nd accused from Mampilly Dispensary, Ernakulam.

27. During investigation, it was revealed that accused 1 and 3 had misrepresented facts to PW9 and got a false ID proof prepared by him for securing mobile phone no.7411790579. Also, PW9 was prompted to send photos of the gems to various persons from his e-mail ID. When this fact was revealed, PW9 was called to the Office of Circle Inspector of Police, Peroorkada and thoroughly questioned. Thereafter, he was taken to Megabites Internet Cafe and his e-mail account was opened to find that messages had been sent to e-mail ID of the 3rd accused. Screen shots were taken. Ext.P5 is the mahazar signed by PW72 and witnesses. Ext.P6 series are the print out of the image shots. Exts.P5 and P6 series are seriously disputed by the defence, but they are supported by PW9 very well. According to PW72, he and witnesses have signed all the pages in

Ext.P6 series. It came to the notice of PW72 that the accused had purchased a phone from Doha Mobile run by PW15 and he was questioned. PW72 collected academic certificates of accused 3 to 5 from their respective institutions. Similarly, he had secured copies of the attendance register and studentship certificate. Ext.P10 mahazar is also proved by him. It is deposed by PW72 that Ext.P11 series attendance register pertaining to the 3rd accused would show that he was absent from college from 18.12.2012 to 28.12.2012. Similarly, 4th accused too was absent from college from 2012 January onwards as revealed from Ext.P112 series. Ext.P113 series would show that the 5th accused had not attended college after August 2012.

28. Later, PW72 questioned PW36, who sent a report from the Department of Mining and Geology Lab after examining the gems. Besides, PW72 took steps to record statements of PWs 12 and 28 under Section 164 Cr.P.C. PW72 questioned PW33, who examined the 6th accused from the Department of Forensic Medicine. PW72 asserted that the accused had fraudulently obtained mobile phone no.7411790579. Photo submitted along with the application for issuance of the sim card was found to be that of one Venugopalan, a native of Kannur and a relative of PW41. Original account opening form, kept in Canara Bank, Chirakkal branch, was examined to find out the real identity of Venugopalan. Ext.P115 is the mahazar revealing this fact. PW72 deposed that documents pertaining to the mobile phone, used by the accused and

submitted by PW59, were seized as per Ext.P114. When it was understood that application for issuing a mobile phone sim bearing no.7411790579 was actually filled up in the handwriting of the 3rd accused, a report was submitted before the court concerned for obtaining specimen handwriting of the 3rd accused. As permitted by the court, handwriting of the 3rd accused was taken from prison. Ext.P130 is the requisition for this purpose. Mobile phone bearing no.9008446019 was used by the 5th accused and its actual subscriber was PW16. It was understood that PWs 10 and 11 stayed with other accused at “Smayana”, Illikkapady, Eroor. It came out that PW10 had gone to meet Varma along with some of the accused. So, she was thoroughly questioned. On investigation, PW72 realised that the 2nd accused misled PW11 for transporting certain gems to Bangalore and therefore, she was also questioned. PW72 got reliable information that deceased Varma was married to PW2 from Velivilakom Temple, Vakkom and relevant records were seized. PW72 understood that the accused had fabricated ID proof by using driving licence issued to PW21 from Kolar Assistant RTO, Karnataka. In the course of investigation, it came out that the 2nd accused had transferred money to the account of PW11 for transporting certain gems to Bangalore.

29. PW72 collected call data record (CDR) details from various mobile phone service providers. He deputed PW52 and CW91 (members of the special investigation team) to analyse the call data. They furnished a mobile phone analysis report to PW72 and it was seized as per Ext.P125

in the presence of PW50. Report seized as per Ext.P125 is marked as Ext.P127. PW52 has signed the report. Thereafter, on closing the investigation, a charge was filed as above. In the succeeding paragraphs we shall examine in detail the oral and documentary evidence adduced to substantiate the prosecution case.

30. Narration of the actual incident of dacoity and murder, as mentioned in the final report, is thus:The incident occurred in “Omkar”, a house in Kerala Nagar Housing Colony, owned by one Haripriya, daughter of the 6th accused. It was lying vacant at the material time. On the fateful day, deceased Varma had gone to the house, in a car owned and driven by the 6th accused, along with accused 2, 3 and 5. It is also alleged that deceased Varma, as usual, carried a suitcase containing gems and precious stones. Prosecution would allege that the accused 1 and 4 joined the other accused subsequently. Further contention is that the accused 2, 3 and 5 had faked their identity. In the final report, the case is that after seeing the gems and precious stones, accused 2, 3 and 5 served Tropicana juice mixed with liquor to deceased Varma and 6th accused. Thereafter, accused 2, 3 and 5 went out of the room, under the guise to smoke and came back along with 4th accused. Then time was about 1.00 p.m. While the 6th accused and deceased Varma were seated on chairs, the 4th accused forcefully caught hold of deceased Varma from behind around his neck and with the other hand, he closed the victim's mouth. A piece of cloth wet in chloroform was forcefully pressed over his nose by the

2nd accused. 5th accused allegedly pressed hands of deceased Varma. At that time, 1st accused came to dining hall and joined other accused. 6th accused was also assaulted in almost a similar fashion by the 3rd accused. After incapacitating Varma, he was carried to nearby bedroom and laid on a cot. His hands were tied with a cotton rope. It is specifically contended that plaster was put around the victim's mouth by 2nd accused. 2nd accused smothered and strangulated Varma to death. According to the prosecution, threat to life and allurement to share the booty prompted the 6th accused to consent to be a party to the crime as and when the criminal transaction progressed. After the incident, accused 1 to 5 escaped from the house with the precious stones and other valuables found in MO10 suitcase. It is the case that the 6th accused facilitated their escape by delaying to furnish information to police about the incident. It is clearly alleged that motive for the incident was to rob the gems and other precious stones of incalculable value from deceased Varma's possession, which according to the deceased, belonged to 315 families. We are fully aware of the fact that this case solely rests on circumstantial evidence, because the only person who could have witnessed the criminal transaction, even according to the prosecution, is the 6th accused. Since he is arraigned as an accused in this case, it becomes the bounden duty of the prosecution to establish guilt of the accused beyond reasonable doubt by placing all the material circumstances, which should form an unbroken chain pointing only to the guilt of the accused and by no reasoning their innocence should be

probable.

31. Strategy adopted by the accused persons at the trial is one of total denial of their involvement. According to the accused persons, the investigation was totally unfair. Without any reliable materials, they are roped in this case.

32. As mentioned earlier, the accused 1 to 5 filed appeals challenging conviction clamped on them. State and PW2 filed separate appeals questioning acquittal of the 6th accused. There appears to be a scramble between PW2 and a third party (who claims to be the wife of Varma) for release of gems and stones involved in this case which resulted in another appeal at the instance of the third party. Besides, the illegality noticed by this Court in not awarding a sentence on the accused after finding them guilty of murder resulted in initiating a suo motu revision.

33. Points commonly arising for consideration in the appeals are thus:

I. What is the cause of death of Harihara Varma? Is it a case of homicide?

II. Whether the accused 1 to 5 conspired to murder Harihara Varma for robbing gems and precious stones as alleged by the prosecution?

III. Whether the accused 2, 3 and 5 caused deceased Varma to drink juice mixed with alcohol? Did they administer chloroform to stupefy him?

IV. Whether the accused forged documents in order to get a mobile sim card as alleged?

V. Whether the accused used forged documents as genuine?

VI. Whether the accused caused disappearance of the evidence of crime?

VII. Whether the accused persons are liable for dacoity with murder and murder? If not, for any other offence?

VIII. Whether the court below correctly appreciated the facts and circumstances borne out from evidence and also the legal principles while entering a conviction and sentence on the accused?

IX. Whether the 6th accused caused disappearance of the evidence of offences by sharing a common intention to screen accused 1 to 5?

X. Whether acquittal of the 6th accused is legally correct?

XI. Who is entitled to get an order for release of the gems and precious stones involved in the case?

34. The sole point to be decided in the criminal revision is thus:

Whether decision of the court below is legally correct when it imposed no sentence on accused 1 to 5 after finding them guilty of murder?

Point I

35. Learned prosecutor contended that the defence cannot be heard to say that death of Varma was not on account of any blunt force

applied while smothering and strangulating him. Learned senior counsel appearing for accused 3 to 5 argued that the evidence on record, especially the medical evidence tendered by PW69 Dr.N.A.Balaram, who conducted autopsy and issued Ext.P172 postmortem certificate, is not at all sufficient to make out an offence of murder. PW69 Dr.N.A.Balaram proved the recitals in Ext.P172 postmortem certificate. Postmortem certificate shows the following antemortem injuries on the body:

> *"INJURIES (ANTI-MORTEM) :-*
>
> *1. Abraded contusion 2 x 0.4 x 0.2 cm, obliquely placed on right side of face, its inner lower end 1cm outer to ala of nose.*
>
> *2. Abrasion 0.3 x 0.2 cm on the margin of right ala of nose, 0.5 cm above its attachment to face.*
>
> *3. Contused abrasion 0.5 x 0.2 x 0.2 cm on right ala of nose, 1.5 cm above its lower margin, 2.5 cm outer to midline of top of nose.*
>
> *4. Contused abrasion 0.4 x 0.4 x0.2 cm on right side of nose, 2.7 cm outer to midline of top of nose, 0.3 cm above injury no.(3).*
>
> *5. Contusion 0.4 x 0.4 x 0.2 cm on right side of nose 2 cm outer to midline of top of nose, 0.5 cm above injury no.(4).*
>
> *6. Contusion 0.3 x 0.3 x 0.2 cm on right side of nose 1cm outer to midline of top of nose, 1cm above injury no. (5).*
>
> *7. Abrasion 0.3 x 0.2 cm on left side of nose 1.5 cm outer to midline of top of nose, 2 cm above margin of ala of nose.*

8. Superficial lacerated wound 0.4 x 0.1 cm on left side of nose 0.8 cm outer to midline of top of nose, 0.5 cm above injury no.(7).

9. Superficial lacerated wound 0.3 x 0.2 cm on left side of nose 0.5 cm outer to midline of top of nose, 0.5 cm above injury no.(8).

10. Abraded contusion 1 x 0.5 x 0.2 cm on right side of face, 5.5 cm outer to ala of nose.

11. Contusion 1.5 x 1 x 0.4 cm on right side of inner aspect of lower lip, 2 cm outer to midline.

12. Contusion 0.2 x 0.2 x 0.2 cm on right side of inner aspect of lower lip, 1.5 cm outer to midline.

13. Contusion 0.3 x 0.2 x 0.2 cm on inner aspect of lower lip, in midline.

14. Contusion 0.3 x 0.2 x 0.2 cm on left side of inner aspect of lower lip, 1 cm outer to midline.

15. Contusion 0.3 x 0.2 x 0.2 cm on right side of inner aspect of upper lip, 1 cm inner to angle of mouth.

16. Contusion 0.5 x 0.4 x 0.3 cm on right side of inner aspect of upper lip, 1.5 cm inner to angle of mouth.Pallor, 2.5 x 2 cm on chin across midline, 3.5 x 3 cm on tip and adjoining sides of nose, 3.5 x 2.5 cm on right side of face just outer to ala of nose, 3 x 3 cm on left side of face just outer to ala of nose.

17. Abrasion 1 x 0.3 cm, obliquely placed on right side of front of neck, its upper inner end 4.5 cm outer to midline, 3.5 cm below lower jaw margin. Flap dissection of neck was done in bloodless field. Subcutaneous tissues, showed contusion 9 x 3 x 1 cm on right side of front of neck, horizontally placed, its inner extent 2 cm outer to midline, 5 cm below lower jaw margin.

Contusion 3 x 1 x 0.5 cm on the lower end of right sterno mastoid muscle just above its attachment. Contusion 2 x 1.5 x 0.5 cm of the subcutaneous tissues on left side of front of neck, 5 cm outer to midline, 7 cm below lower jaw margin. Contusion 2.5 x 2.5 cm involving its whole thickness, on lower part of left sterno mastoid muscle, 3 cm above its lower attachment. Fracture with infiltration of the left superior horn of thyroid cartilage. Contusion 4 x 5 x 0.8 cm on the upper part of front wall of esophagus, just below pharyx.

18. Contusion 1.5 x 0.3 x 0.3 cm on right side of forehead, obliquely placed, its outer lower end 1.5 cm outer to midline and at the upper margin of eyebrow."

PW69 expressed a clear opinion on the cause of death of Varma that it was due to the combined effect of smothering and a blunt injury sustained to neck.

36. Ext.P23 inquest report is also relied on by the prosecutor to argue that there are clear indications that the victim was smothered and strangulated to death.

37. Learned senior counsel for accused 3 to 5 contended that no attempt was made by the public prosecutor to elicit from PW69 the manner in which the injuries noted on Ext.P172 could have been inflicted. It is pointed out that no question was asked as to the substance/medium used for smothering or causing a blunt force on the victim's neck. Although the prosecution has a case that the victim's hands were tied behind his body by using a cotton rope, no corresponding injuries were noted on Ext.P172.

Plaster, allegedly fixed for covering the victim's mouth, was also not noted during preparation of Ext.P23 inquest report and Ext.P30 scene mahazar. Albeit the omissions on the part of public prosecutor to elicit from PW69 the manner in which the victim could have been smothered or the medium used for smothering, we do not find any reason to discard the reliable testimony of PW69 in this regard, coupled with the entries in Ext.P172.

38. PW69 deposed in terms of Ext.P172. He categorically deposed that injury nos. 1 to 16 could have been caused in an attempt to smother the victim. Injury no.17 could have been caused as a result of a blunt force applied on neck of the victim resulting in strangulation. Haemorrhage on the inner aspect of the victim's scalp could be due to asphyxiation.

39. This witness was subjected to searching cross-examination separately by all the counsel appearing for the accused. There was a serious attempt by the defence counsel at the time of cross-examining PW69 to show that time of Varma's death pointed out by the prosecution could be incorrect. This was argued on the basis of observations in Ext.P172 regarding establishment and disappearance of rigor mortis on the dead body. This contention shall be dealt with hereunder separately. On scanning through the entire cross-examination on PW69, we find no reason to discard the assertion by PW69 that Varma died due to smothering and blunt force applied on his neck resulting in strangulation. We see from the testimony of PW40, Joint Chemical Examiner, Chemical

Examiner's Laboratory, Thiruvananthapuram and Ext.P84 report of analysis of the viscera and other body parts of deceased Varma that ethyl alcohol and chloroform were detected in the examination suggesting smothering and stupefaction. On an over all assessment of Exts.P23, P84 and P172 coupled with the oral evidence adduced by PWs 69 and 40, we enter a definite finding that Harihara Varma was a victim of homicide. Point decided accordingly.

Points II to VI

40. These points are considered together for conveniently discussing the evidence on record and for attaining clarity in the findings.

41. Prosecution, in order to establish the above points, mainly relied on the following aspects borne out from the evidence adduced:

i. Oral evidence of chance witnesses, who happened to see the accused persons on the date of occurrence immediately prior to and after the criminal transaction.

ii. Deceased was last seen in the company of accused 2, 3, 5 and 6.

iii. Evidence adduced to prove the preparations done by accused for committing the offences.

iv. Evidence tendered by witnesses to prove a criminal conspiracy hatched by the accused persons to commit the crimes.

v. Oral evidence adduced touching the conduct of the accused after committing the crimes.

vi. Call data records (CDR) to show that the accused were moving together on the date of occurrence and their presence in and around the scene of occurrence and at Thiruvananthapuram. This assumes importance when the prosecution has raised an argument that none among the accused 1 to 5 had any special reason to come to Thiruvananthapuram on the date of occurrence.

vii. Obtainment of finger prints (chance prints) of the accused 2 and 3 from the crime scene.

viii. Recovery of gems and precious stones from possession of the accused 1 to 4.

42. Prosecution portrays the 1st accused as the kingpin in the crime. Uncommonly, the 1st accused, after filing an application before the trial court under Section 315 Cr.P.C. testified as DW2. He initially deposed before the court that he developed acquaintance with deceased Varma through PW12 Aboobacker Haji. But PW12 has a different version. He stated that he was a real estate businessman hailing from Mattannoor in Kannur District and was doing business at Sharja, UAE. He closely knew CW18 Rafeeq. Pertinent fact is that Rafeeq was not examined before the trial court. PW12 came back from Sharja and settled down at his native place five years prior to his tendering evidence in the case. PW12 knew CW18 Rafeeq after he settled down at his native place. Rafeeq was also a real estate businessman. PW12 came into contact with deceased Varma through Rafeeq. According to PW12, he had met deceased Varma five

times. Their first meeting was prior to 15.06.2012. Rafeeq introduced deceased Varma to PW12 as a member of a royal family and an agent authorized to sell gems and precious stones belonging to 315 families. Rafeeq also told him that if priceless stones were sold, they could get a decent money as commission. As PW12 knew many rich persons in UAE, he expressed willingness to make a deal. According to PW12, he clarified his position that the deal must be transparent. Further, he insisted that his company established in Sharja should be properly authorized to complete the transaction. In June 2012, PW12, Rafeeq (CW18) and the 1st accused, who is a friend of Rafeeq, went to Thiruvananthapuram to meet deceased Varma. Their first meeting was from Dubai International Hotel, Thiruvananthapuram. PW12 knew from Rafeeq that the 1st accused hails from Tellicherry.

43. 1st accused later admitted that he established acquaintance with deceased Varma through CW18 Rafeeq, deviating from his earlier version. On the basis of this aspect in the evidence, learned prosecutor argued that the 1st accused hatched a conspiracy to rob the gems and precious stones when he knew for sure that PW12 had lost interest in the deal for various reasons.

44. It is an admitted fact that the 3rd accused is the cousin brother of 1st accused. It has come out in evidence that the 1st accused was working in a shop owned by the 3rd accused's father. 2nd accused was a worker in a bakery. Accused 3 to 5 were engineering students in a private

engineering college at Bangalore. Prosecution contended that the 1st accused instigated other accused to join him in committing the crime.

45. If we go through the evidence of DW2 (1st accused), following aspects will be revealed. As mentioned earlier, he established contact with deceased Varma through CW18 Rafeeq somewhere in the month of June 2011. At that time, he was working in Surya Electronics, Koothuparamba owned by the father of 3rd accused. His wife was also working as an accountant in the shop. CW18 Rafeeq informed the 1st accused that deceased Varma was in possession of costly gems and precious stones as he belonged to Poonjar royal family. 3% commission was offered if the said items were sold for a decent price. 1st accused went to Thiruvananthapuram two times in 2011. They had occasion to see the gems from Dubai International Hotel, Thiruvananthapuram. At that time, CW35 Baiju and PW28 Praveen were present with deceased Varma. Deceased Varma informed them that he had a power of attorney from other members in the royal family and promised to give 3% commission for the deal. Exts.P180 and P181 are the certificates issued by Sathya Gem Testing Lab showing purity and price list of the gems. It was heldout that the gems were worth Rupees two thousand crores. In search of a buyer through Rafeeq, the 1st accused came into contact with PW12. 1st accused went to the house of PW12 and he was found to be a very rich man. PW12 informed the 1st accused about his business in Sharja. Thereafter both of them, along with Rafeeq, came to Dubai International Hotel,

Thiruvananthapuram again and stayed. As informed, deceased Varma, along with the 6th accused, came to the hotel and he introduced the 6th accused as his elder brother. Then deceased Varma and 6th accused explained the details about the precious stones to PW12. Deceased Varma agreed to show the stones, but in a safe place. They agreed to show the precious stones to PW12, Rafeeq and 1st accused from "Omkar" which they thought as the safest place. As agreed, 1st accused, PW12, Rafeeq, deceased Varma and 6th accused came to "Omkar". They had occasion to see the stones. PW12 was impressed about the advantage of the deal. PW12, Rafeeq and 1st accused agreed to divide the commission money in equal proportion, if the sale went through. According to the 1st accused, PW12 informed him that there was a party in Delhi who could be interested in the deal. PW12 had gone to Delhi and brought them down to Thiruvananthapuram in the next week. Again, they checked in a hotel. On the next day, the 6th accused and deceased Varma came to their hotel. All of them together went to the hotel, where the persons from Delhi stayed. They wanted the stones to be examined by an expert. It is the case of the 1st accused that when the gems and stones were examined by an expert, he found them to be fake. When PW12 realised that the stones were not worth a deal as claimed by Rafeeq and the 1st accused, he called the 1st accused to his house at Iritty. There were four unknown persons in his house. According to the 1st accused, they physically assaulted him, thinking that he tried to defraud PW12. 1st

accused pleaded for mercy, saying that he was not aware of the fact that the stones were fake. It is the case of PW12 and 1st accused that former had spent a considerable amount for inspecting the gems. 1st accused deposed that PW12 demanded money that he had expended. After this incident, the 1st accused came to Thiruvananthapuram and beat deceased Varma for trying to cheat him and PW12. He also threatened Varma that he would file a complaint to police. At that time, Varma told him that filing a complaint could yield no result and he was not in a position to repay money. It is also the version of the 1st accused that Varma confessed that he was the son of one Bhaskaran from Coimbatore and he was not a member of any royal family. Further, he said that the stones were fake. After showing lot of stones, Varma informed the 1st accused that he could arrange a fictitious certificate describing the gems as very costly and the 1st accused could find out intending purchasers like PW12 and sell them for a huge money. It is the deposition of the 1st accused that Varma, by saying so, handed over quite a number of stones to him, which were taken to his house at Tellicherry and entrusted to his wife. She, in turn, kept the same in an almirah. 1st accused deposed this aspect to explain away possession of large number of stones recovered from him during the investigation.

46. PW12, though admitted that he came into contact with deceased Varma through Rafeeq and 1st accused, did not fully support the version deposed to by the 1st accused in this regard. PW12 agreed that the gems were first shown to them from the house of 6th accused's daughter.

Gems in small boxes were shown along with three Ganesh figurines and an emerald bar. The stones were exhibited keeping atop a round dining table. Thereafter PW12 had occasion to see the stones three times more. Terms of the deal were discussed between PW12, deceased Varma and others. PW12 met the deceased on 26.07.2012. He hosted an Iftar party in Dubai International Hotel, Thiruvananthapuram. 1st accused, Rafeeq, 6th accused and deceased Varma along with two advocates by name Angel and Joy were present. When the 1st accused attempted to take photographs of Varma, latter became very angry and rebuked him for doing so without his permission. Deceased Varma questioned the 1st accused by saying that if somebody had killed him, the 1st accused would be held responsible. At that time, persons brought down from Delhi, at the instance of PW12, were also there. PW12 had given a statement to Magistrate under Section 164 Cr.P.C. (Ext.P13). PW12 identified the gems, figurines and stone bar from the court.

47. In cross-examination, PW12 admitted that Rafeeq, 1st accused and himself agreed to divide the commission money and he did not get any authorization for the deal as promised by deceased Varma. Even though the 1st accused told him that the authorization had been sent to his e-mail, PW12 did not get it. PW12 deposed that he could not have dealt with the precious stones without an authorization because he had to find a purchaser in UAE. But, deceased Varma and 6th accused promised that there would be no difficulty in the deal for want of an authorization letter.

Therefore, he agreed to proceed with the deal on the condition that authorization letter in original should be handed over when a genuine party approached him for dealing with the merchandise. Further down in the cross-examination, PW12 deposed that he brought experts from Delhi to examine the stones and on examination they found the stones possessed by Varma were of inferior quality. According to PW12, what he meant by fake gems in his previous statements was only that the gems were of lesser quality or purity than claimed. Defence has a case that in his statement to police under Section 161 Cr.P.C. and the one given by him before a Magistrate under Section 164 Cr.P.C., he has mentioned that the stones were fake. For this, PW12 offered an explanation that what he intended was only that the stones were of lesser carat value. However, he extricated himself from the deal when Varma refused to hand over some gems for testing by a competent laboratory. According to PW12, he had spent about ₹5 lakhs for arranging a party and other incidental expenses. Moreover, deceased Varma had borrowed money from him. When it was repeatedly suggested to PW12 that the stones were fake, he answered that they were not fake, but of a lesser value. Despite strict cross-examination on this aspect, PW12 stuck to this version.

48. PW12 deposed that in the month of August 2012, he understood that the stones were of inferior quality and he lost interest in the deal. It has come out in PW12's cross-examination that he had paid ₹55,000/- to deceased Varma 13 days prior to his death from a hotel at

Thiruvananthapuram partly in cash and partly by way of a cheque. That was his last meeting with deceased Varma. PW12 deposed that Varma was in financial difficulties at that time. Despite a searching cross-examination, these aspects in PW12's evidence remain credible.

49. On a conjoint reading of the depositions of PW12 and 1st accused, (DW2), it will be evident that through CW18 Rafeeq the 1st accused came to know about the gems in the possession of deceased Varma and through both of them, PW12 was introduced to the intended deal. It makes abundantly clear that among the accused persons, 1st accused is the one who developed initial contact with deceased Varma.

50. Indisputably, fate of the case will depend on quality and reliability of the circumstantial evidence. Admittedly, the incident took place in the dining room and bed room of “Omkar”. It is the prosecution case that the 6th accused was in the company of the deceased before and at the time of occurrence. But, for the reasons stated by prosecution, he was arraigned as an accused. He did not seek tender of pardon under Section 306 Cr.P.C. As he remained an accused, the prosecution became incapacitated to adduce any evidence regarding the actual incident inside the house.

51. Well settled are the principles regarding appreciation of circumstantial evidence in a criminal trial. In **Charan Singh v. State of Uttar Pradesh (AIR 1967 SC 520)** the following observations are made:

“It is well established that in cases where the

evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and the circumstances so established should be consistent only with the hypothesis of the guilt of the accused person, that is, the circumstances should be of such a nature as to reasonably exclude every hypothesis but the one proposed to be proved. To put it in other words the chain of evidence must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused person."

Thereafter, in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622)** the following propositions are laid down:

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
The circumstances concerned 'must or should' and not merely 'may be' established;
(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
(3) the circumstances should be of a conclusive nature and tendency;
(4) they should exclude every possible hypothesis except the one to be proved;
and
(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been

done by the accused."

52. Aforementioned principles have been followed religiously in many decisions. Recently in **Suresh and another v. State of Haryana (AIR 2018 SC 4045**) the following propositions are laid down:

> *"Circumstantial evidence are those facts, which the court may infer further. There is a stark contrast between direct evidence and circumstantial evidence. In cases of circumstantial evidence, the courts are called upon to make inferences from the available evidences, which may lead to the accused's guilt. In majority of cases, the inference of guilt is usually drawn by establishing the case from its initiation to the point of commission wherein each factual link is ultimately based on evidence of a fact or an inference thereof. Therefore, the courts have to identify the facts in the first place so as to fit the case within the parameters of 'chain link theory' and then see whether the case is made out beyond reasonable doubt. In India we have for a long time followed the 'chain link theory' since Hanumant Case (AIR 1952 SC 343), which of course needs to be followed herein also."*

Recently, a three Judge bench of the Supreme Court in **Umesh Tukaram Padwal and another v. State of Maharashtra (AIR 2019 SC 4279)** reiterated the settled principles that in a case based on circumstantial evidence, the circumstances relied upon by the prosecution should be proved beyond reasonable doubt and such proved circumstances should form a complete chain so as not to leave any doubt in the court's mind about the complicity of the accused. Same principles have been stated in

Baiju Kumar Soni and another v. State of Jharkhand ((2019) 7 SCC 773) and also in **State of Rajasthan v. Mahesh Kumar @ Mahesh Dhaulpuria and another ((2019) 7 SCC 678)**.

53. In the light of the aforementioned legal principles, we shall first venture to have a close look at the evidence, especially oral evidence, adduced to substantiate the prosecution case that accused 1 to 5 were present in and around the crime scene on 24.12.2012 and also touching their identity. At the outset, we may mention that the prosecution has examined a few witnesses to establish that accused 1 to 5 came to Thiruvananthapuram on 24.12.2012 and they were present in and around "Omkar" immediately prior to and after the incident. Prosecution ventured to establish that the accused escaped from the crime scene in different vehicles to reach at Railway station, Thampanoor. Prosecution also wanted to rely on mobile phone CDR details to fix the accused's location in the precincts of the crime scene. True, the prosecution has to establish that the phone numbers included in the CDRs were used by the accused persons. This aspect we shall consider in the subsequent paragraphs. First of all, let us deal with the oral evidence adduced by the chance witnesses to establish presence of the accused persons in and around "Omkar".

54. Before dealing with evidence, we shall restate the principles regarding appreciation of oral evidence adduced by chance witnesses. Learned senior counsel for accused 3 to 5 relying on **Suresh**'s case (supra) contended that testimony of chance witnesses, viz. PWs 3 to 8,

should be rejected since the infirmities in their statements can never inspire any confidence in the court's mind.

55. It can be stated as a general proposition that chance witnesses, if explain their presence in the named location at the relevant time, their testimony could be taken into account and due regard could be given to their versions. However, if the chance witnesses failed to offer any plausible explanation for their presence at the material time and place, the courts would be slow in relying on them.

56. In **Shankarlal v. State of Rajasthan ((2004) 10 SCC 632)** it has been clearly laid down that deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded. Referring to many other decisions in **Suresh**'s case, the Supreme Court held that generally the chance witnesses, who reasonably explain their presence in the named location at the relevant time, may be taken into consideration and should be given due regard, if their version inspires confidence and the same is supported by attending circumstances. Nevertheless, the evidence of chance witnesses requires a cautious and close scrutiny.

57. PW3 Geethakumari resided in "Chandralayam", which is next to "Omkar". Before and at the time of occurrence, "Omkar" was lying vacant. PW3 closely knew the 6th accused and his family members. According to her testimony, on 24.12.2012, she was present at her house. Her husband is an advocate clerk. At about 8.45 a.m. on the said day, he

had gone to work. Around 10.00 a.m., PW3 went to her uncle's house which is nearby and came back at 11.45 a.m. When she was stepping into her house, she saw a white car in "Omkar" car porch. Thereafter, she came out at 12.00 noon to go to her mother's house. She returned home at about 1.00 p.m. When she looked towards "Omkar", she found two persons standing outside that house. She identified them in the dock as accused 1 and 4. When she was watching television and having lunch, at about 2.00 p.m., somebody rang up door bell. When she peeped through a window, she found the 6th accused. PW3 opened the door. She asked him what was the matter? He wanted to make a phone call. PW3 found him very nervous and with trembling hands. She handed over a mobile phone with no.9447254165 to the 6th accused. After making a call, he returned the phone. He informed PW3 that some persons administered chloroform on him and another person and robbed cash. When PW3 asked what was the amount lost, the 6th accused went away without answering. After sometime, PW70 came on a motor bike. Thereafter, a police jeep came to "Omkar" and returned. Again the police jeep came back in a short time and 108 ambulance followed it. After ambulance had left, 6th accused's wife Ponnamma came in an autorickshaw and went inside "Omkar". After sometime, she came to PW3's house and informed that Harihara Varma was killed. PW3 had seen Varma from "Omkar" 2-3 times before. When she saw the 6th accused and Varma in "Omkar" on an earlier occasion, there were two youngsters and a lady with them. She identified accused 2

and 3 as the persons who had come there earlier, along with a lady. She testified that those accused whom she identified from the dock were previously shown to her by the investigating team.

58. This witness was subjected to a lengthy cross-examination. It is an admitted fact that PW3's husband Rajendran Nair's statement was recorded in Ext.P23 inquest report. He was not examined before the court. In the cross-examination on behalf of the 1st accused, it was suggested to this witness that she was present in the court on the previous day of her examination and she had enough opportunity to see all the accused persons. To this suggestion, she answered that the accused persons had covered their faces when they left the court room. It is evident, the attempt made by the defence counsel was to show that PW3 identified the accused only from the court and in order to unduly help prosecution, despite she had no previous occasion to see the accused, that too in the absence of a test identification parade conducted at the time of investigation, she falsely deposed about their identity. But, this case of the defence is stoutly denied by PW3, emphatically saying that she found the accused 1 and 4 on the date of occurrence in front of “Omkar” and accused 2 and 3 along with a lady in the said house on a previous occasion.

59. Another suggestion made to this witness is that since her husband was an advocate clerk attached to a criminal lawyer, he had acquaintance with police officers. And in order to unjustly support the prosecution case, she testified falsehood regarding identity of the accused.

This case is also strongly denied by this witness. PW3, in cross-examination, stated that two weeks after the incident, she had seen the accused when PW71 brought them to her house for identification. It is her case that prior to and after identifying the accused, she had given statements to police. On 09.01.2013 and 26.03.2013 she gave additional statements to the investigating officer. Admittedly, none of the accused were known to her previously.

60. When PW3 was cross-examined by the counsel for 3rd accused, she deposed that she knew the 6th accused and his family members. It has come out in evidence through records that the house “Omkar” is situated on the immediate north of PW3's house, sharing a common boundary. PW3 admitted in cross-examination that she did not inform the age, complexion or other details touching the accused persons' identity. She could not say as to who was the girl seen with accused 2 and 3 prior to the incident in “Omkar”. PW3's evidence in this regard gets support from the testimony of PW10, the lady who stated to have visited “Omkar” in the company of accused 2 and 3 on an earlier occasion. Definite case put forwarded by the defence counsel that police had pointed out all the accused by their names and ranks and that was why PW3 identified them in court has been denied by her saying that she had ample opportunity to see the accused before and on the date of incident.

61. PW3 deposed in cross-examination that her uncle was laid up and on the date of occurrence, she had spent one hour with him.

Thereafter, she came back to her house. At that time, nobody was present in her house, as her husband had gone for work. At about 11.45 a.m., she came back after meeting her uncle and at about 12 o' clock, she again went out to meet her mother. She returned at about 1.00 p.m. and at that time, she saw accused 1 and 4 in front of “Omkar”. This version remains credible despite strict cross-examination. When it was suggested to PW3 that she could not have seen accused 1 and 4 in front of “Omkar”, she stated that her house is in a higher level than “Omkar”. She testified that “Omkar” could be clearly seen from her courtyard. Possibility of PW3 seeing two persons standing in front of “Omkar” remains believable despite a tough cross-examination. Reasons stated by PW3 for remembering the accused were seriously challenged. Her versions that she saw accused 1 and 4 on the date of occurrence and accused 2 and 3, on an occasion prior to the incident are disputed by saying that she had no special reason to remember them. Still, PW3 adhered to her version that she vividly remembered the physical appearance of the accused.

62. In the cross-examination by counsel for the 5th accused, PW3 deposed that on 24.12.2012 night she gave her first statement to police. PW3 definitely answered that two persons (accused 1 and 4) were not seen by the side of the gate, but they were standing in the courtyard, right in front of “Omkar”. We find no reason per se to disbelieve PW3's version regarding identification of accused 1 to 4.

63. PW4 Anilkumar @ Sabu is an autorickshaw driver. His

autorickshaw bears no.KL 01 BE 3128. He used to park his vehicle in the auto stand at Sasthamangalam. He spoke about the trips undertaken on 24.12.2012. According to his chief-examination, he had trips to Vazhuthakadu, Thampanoor, Vellayambalam and Vattiyoorkavu. He had gone to Railway station, Thampanoor at about 1.30 hours in the noon. He reached there by 2 o' clock. He transported three youngsters from Kerala Nagar, Puthoorknonam to Railway station, Thampanoor. It is his version that there were five youngsters, out of which three boarded his autorickshaw. All the five accused were identified by this witness. The persons, who travelled in his autorickshaw, have been specifically identified by PW4 as accused 1, 4 and 5. PW4 deposed that since he could not carry five passengers in autorickshaw, he took only three persons. He demanded ₹80/- as hire charges and they gave him ₹100/-. He had given Ext.P2 statement before the learned Magistrate concerned under Section 164 Cr.P.C.

64. This witness was cross-examined at great length by all the counsel. The defence counsel wanted to establish that he was unjustly obliging police officers since he, being an autorickshaw driver by profession, always wanted help from police. This suggestion is denied by him. Learned counsel for the accused persons strenuously attempted to bring out that none of the accused persons travelled in PW4's autorickshaw on the date of occurrence. In order to establish their contention, various questions relating to his parking place and availability

of other autorickshaws in the area were put. He answered those questions by saying that it was only by chance he carried three persons in his autorickshaw to Railway station, Thampanoor. According to his testimony, he used to get trips to Puthoorkonam Kerala Nagar a couple of times in a month. It has come out in evidence that PW4 did not inform anyone, on the date of occurrence, that he had taken three persons from Kerala Nagar to Railway station, Thampanoor. It is his version that he did not attach any importance to that fact even when he came to know about Varma's death. PW4 admitted that when he saw the photographs of the accused persons through media, about 10-12 days after the incident, he could identify the persons who travelled in his autorickshaw.

65. When cross-examined, PW4 deposed that police had shown group photos and single photos of the accused persons and questioned whether they had travelled in his autorickshaw. He could identify them. This witness also stated in cross-examination that the accused had gone out from the court with covered faces. PW4 further deposed that the passengers boarded his autorickshaw, on the date of occurrence, were in a hurry to reach Railway station.

66. When cross-examined by the 5th accused's counsel, it is brought out that PW4 is also known as Sabu. He admitted that he has no documents to show his name Sabu. Contention raised by the accused that he is a henchman of police is denied by him. Despite very lengthy cross-examination on this witness, we find no reason to disbelieve his version

that he had carried accused 1, 4 and 5 from Puthoorkonam Kerala Nagar to Railway station, Thampanoor after 1.00 p.m. on the date of occurrence.

67. PW5 Renjith is another autorickshaw driver. He was driving autorickshaw bearing no.KL-01 AV 9504, belonged to him. He used to park his autorickshaw at Nettayam. In the course of investigation, police officers questioned various autorickshaw drivers in order to find out who travelled through Kerala Nagar on 24.12.2012 in the noon. He was asked to come to police station in connection with the investigation. PW5 had a trip at about 12 o' clock in the noon on 24.12.2012. It was to Veterinary Hospital, Nettayam. He went to the hospital to bring a veterinary doctor and helper to the house of a person known to him. While he was transporting said persons, he found two youngsters on the road turning back, on hearing sound of his autorickshaw. But, they did not show any signal for lift because they found passengers in his autorickshaw. After dropping veterinary doctor and helper in the hospital, he came back through the same road. While PW5 was coming back, the same youngsters, each one carrying a bag and one holding a plastic cover in hand, showed stop signal. PW5 stopped his vehicle and enquired as to where they wanted to go. They wanted to go to Railway station, Thampanoor. PW5 deposed that he was unwilling to take the trip since Thampanoor was slightly away. As he then was taking medicines for diabetes and cholesterol and if he delayed the medicines and food, he used to experience a shivering. He told them that he could not take them to Thampanoor, but could drop them

in a nearby bus stop. Nearest bus stop was Mannurkonam junction. They insisted to go to Thampanoor and wanted to reach the Railway station within 20 minutes. PW5 informed that within 20 minutes he could not take them to Railway station. Then they wanted to be dropped in a nearby taxi stand. PW5 therefore dropped them in Vattiyoorkavu taxi stand. Time then was about 1.40 p.m. They went in a taxi from the stand. He identified the two persons travelled in his autorickshaw as accused 2 and 3.

68. In the cross-examination done by the 3rd accused's counsel, this witness deposed that each one of them carried a bag and one held a plastic carry bag. Lot of questions were asked regarding the distance between Veterinary Hospital and the place where he allegedly met accused 2 and 3. It was suggested to this witness that the investigating officer falsely planted him and he unduly obliged police fearing difficulties likely to be caused by them in his job as auto driver. All these suggestions are denied by this witness. PW5 also deposed in cross-examination that photographs of the accused were seen in newspapers and television. When it was suggested to this witness that he identified accused 2 and 3 from the dock as pointed out by police and also on seeing them through media, he denied the suggestion stating that he had clearly seen them on the date of occurrence. Testimony of this witness cannot be discarded in the matter of identification of accused 2 and 3, despite extensive cross-examination.

69. There is a clear linkage between the testimony of PW5 and

PW6 Jahangeer. PW6 was driving his own taxi bearing no.KL 01 AY 8754. He used to park his vehicle in Vattiyoorkavu taxi stand. Drivers undertake trips on turn basis. PW6 deposed that between 1.30 – 1.45 p.m. on 24.12.2012 he had travelled from Vattiyoorkavu to Railway station, Thampanoor. According to him, an autorickshaw came and stopped in front of his car. It was his turn to take passengers from the stand. Two persons alighted from the autorickshaw asked PW6 if he could transport them to Railway station, Thampanoor. PW6 agreed. Both persons were having separate bags and one was holding a plastic cover. Both of them sat in the back seat. After sometime they asked PW6 to hurry up as they wanted to reach the railway station to catch a train. When they were proceeding, after Edapazhanji, PW6 heard them saying that juice bottles in the cover were spilling. PW6 turned back and told them not to spill juice inside the car. When they reached near a bus stop opposite to the Cotton Hill L.P. School and Teachers Training School, PW6 stopped the vehicle. One person got down and kept the plastic cover by the side of bus stop. Then he came back and they resumed journey. At about 2.00 - 2.10 p.m. they reached at Railway station, Thampanoor. PW6 demanded ₹400/- as hire charges. They gave a currency note for ₹500/-. When PW6 told them that he would get change and give back ₹100/-, they said it was not required. He identified the passengers as accused 2 and 3 present in court. On the date of occurrence itself police had questioned him and his statement was recorded for the first time on 24.12.2012. Thereafter, on 26.12.2012 also

he was questioned. On that day, at about 10.30 a.m., PW6 was asked to produce his car. A mahazar was prepared. Thereafter he went along with police officers to the bus stop opposite to Cotton Hill L.P. School and Teachers Training School. PW6 had shown the place where the accused 2 and 3 had abandoned the cover. PW6 took out the cover and handed over to police. Ext.P25 is the mahazar dated 26.12.2012. PW18 is the witness to the seizure mahazar. That plastic cover is marked as MO11. Three Tropicana juice paper cans and a juice bottle of another brand were kept in the cover. MOs 12 to 14 are identified. In the plastic cover, a pair of gloves and a towel (*thorth*) with violet border were also kept. MOs 15 and 16 are the towel and gloves. Cashew nut box is MO17. A green bottle kept in the cover is MO18. Ext.P3 is the kaichit executed by PW6 for receiving back his car from police custody.

70. After ten days PW6 was called again to Peroorkada police station. He was called to identify the passengers travelled in his car on 24.12.2012. Two persons (accused 2 and 3) were identified from among 10 persons lined up in police station.

71. Learned counsel for the 2nd accused extensively cross-examined this witness. During cross-examination, PW6 answered that accused 2 and 3 wanted to reach railway station before 2.10 p.m. as their train was scheduled to leave at that time.

72. Learned counsel for the 3rd accused also cross-examined this witness. PW6 deposed that trip sheet would be given to those passengers

who insisted for it. Since these accused persons did not insist, PW6 did not prepare the same. Defence case suggested to this witness is that he did not take out any cover allegedly jettisoned by accused 2 and 3 and if at all they had kept any cover by the side of a bus stop in a prominent part of Thiruvananthapuram city, it would have been removed by Municipal Corporation employees engaged in waste disposal. PW6 definitely answered that till 26.12.2012 it was not removed and the cover was available in the same place where it was placed on 24.12.2012. When it was suggested that there was waste clearance on all days, PW6 stated that waste removal was not done on a regular basis. All the accused have a case that this witness is also a henchman of police officers as he wanted support from them as taxi driver. This suggestion is stoutly denied by this witness.

73. In the cross-examination, PW6 affirmatively stated that he did not identify accused 2 and 3 merely by seeing their photographs in media, but he had spent considerable time with them and had occasion to talk to them.

74. Specific case of PW6 is that he dropped accused 2 and 3 right in front of Railway station, Thampanoor. He admitted that CCTV installations were there in front of the railway station. Besides, CCTV were available at Vazhuthacadu and Edappazhanji. There was no CCTV facility at Vattiyoorkavu. PW6 deposed in cross-examination that the investigating officer had taken him to the Police Control Room. From there he had

shown his vehicle, stopping in front of the Railway station on 24.12.2012. He was taken to the Police Control Room on 26.12.2012 at about 6.00 p.m. He clearly showed two persons alighting from his car in front of Railway station, Thampanoor.

75. Testimony of this witness gets considerable support from that of PW5 since both in unison stated that accused 2 and 3 initially travelled in PW5's autorickshaw and he dropped them at Vattiyoorkavu taxi stand. From there PW6 picked them up and dropped at Railway station, Thampanoor. Despite lengthy cross-examination, credibility of this witness was not shaken effectively.

76. PW7 Mohankumar was an employee in the Border Security Force (BSF) who had taken voluntary retirement. At the time of examination, he was an agriculturist. He knew deceased Varma. PW7 had occasion to see deceased Varma on 24.12.2012 when he went to Kanjirampara post office for buying postal stamps to send new year greeting cards. PW7 purchased fish from a vendor in the local market and when he turned back, he found deceased Varma coming on foot with a suitcase in his hand. Thereafter, he went to the opposite side of road and boarded the car belonging to 6th accused. He identified the vehicle as Honda City car. It was about 11.00 a.m. on 24.12.2012, because he had started to Kanjirampara from his house at 10.30 a.m. He knew the 6th accused as well and identified him from the dock. MO10 suit case is also identified by this witness.

77. During cross-examination by the 4th accused's counsel, PW7 deposed that between 2003 and 2012 he had developed acquaintance with deceased Varma. Both of them used to go for morning walk. PW7 knew the house where deceased Varma stayed on rent. PW7 did not know the native place of deceased Varma. In cross-examination, PW7 gave definite answers touching his acquaintance with deceased Varma. Attempt made by the defence counsel that he did not know the area where deceased Varma stayed and he had no familiarity with the deceased are denied by this witness.

78. When counsel for the 5th accused cross-examined, PW7 denied the suggestion that he was uttering lies to help the investigating officer. In spite of cross-examination on this witness, we find no reason to disbelieve his version that he had familiarity with deceased Varma and on the fateful day, he had seen deceased Varma travelling in 6th accused's car.

79. PW8 Sudarshan was helping an electrician. On 24.12.2012 he saw deceased Varma. He had gone to Kerala State Electricity Board (KSEB) office, Vattiyoorkavu to get an application form. After collecting the form, he came out of the office compound. Then three persons alighted from an autorickshaw in front of KSEB office. They went towards a car parked by the side. They were carrying three bags. They talked to deceased Varma and all of them proceeded in the same car. The car belonged to the 6th accused. He mentioned registration number of the vehicle. Accused 2, 3 and 5 were identified as the persons who came in

the autorickshaw and boarded 6th accused's car. His testimony is relied on to prove the case of last seen together theory.

80. When 1st accused's counsel cross-examined, PW8 deposed that he was working under one Babuji. He tried to elicit from PW8 that there was no reason for procuring any form from KSEB office in connection with his job, to which he answered that he went there as instructed by Babuji. PW8 deposed that for getting service connection an application form is necessary and also for changing an electric meter. PW8 deposed that he knew the 6th accused since he had seen him at Kanjirampara. PW8 admitted that he never knew that the 6th accused is an advocate and he was unaware of his phone number. PW8 further deposed that he had seen the 6th accused's son.

81. It is the admission of this witness that he had no previous acquaintance with the three accused persons whom he identified from the dock. He had seen photographs of the accused persons in newspapers prior to his examination. PW8 stated that he had no special reason to notice the autorickshaw or the 6th accused's car. He had acquaintance with the 6th accused three years prior to the incident. According to his testimony, out of curiosity, he watched movements of the 6th accused and others on that particular date.

82. In the cross-examination, it is brought out from this witness that he used to go to a temple usually at about 7.00 a.m. At that time, deceased Varma also used to come there. Testimony of this witness

relating to the presence of accused 2, 3 and 5 in the company of 6th accused and the deceased could not be effectively discredited.

83. From the evidence given by the above witnesses, it will be clear that deceased Varma had boarded the car driven by 6th accused at Kanjirampara. Later, from the front side of KSEB office, Vattiyoorkavu, accused 2, 3 and 5 also boarded the same car and they proceeded to "Omkar". After the incident, accused 2 and 3 initially got into PW5's autorickshaw from Puthoorkonam Kerala Nagar to Vattiyoorkavu and from there in PW6's car to Railway station, Thampanoor. Likewise, PW4 testified that in the noon on the fateful day, he had carried accused 1, 4 and 5 from Puthoorkonam Kerala Nagar to Railway station, Thampanoor in his autorickshaw. In spite of lengthy and drawn out cross-examination on these witnesses, we find no good reason to reject their testimony. Defence case that they testified to oblige the investigating officer's whims and fancies could not be established.

84. Learned senior counsel appearing for accused 3 to 5 and learned counsel for accused 1 and 2 seriously attacked the evidence relating to identification of the accused persons through the aforementioned witness. According to them, all the above witnesses are chance witness and their testimony regarding identification of the accused persons can never be believed. Some of the witnesses are henchmen of police officers and their testimonies are unreliable. Further, there is a long delay in questioning some of the witnesses during the course of

investigation. Planting witnesses to suit the prosecution case cannot be ruled out. Per contra, learned prosecutor contended that all the aforementioned witnesses are reliable witnesses though they happened to meet the accused persons at different places before and after the incident only by coincidence. Besides, it was only after a long drawn and spread out investigation the probable persons, who could have had knowledge about the accused were traced out. Hence, delay in questioning them is well explained. Learned prosecutor further contended that the court below rightly placed reliance on their testimony finding that despite interminable cross-examination by all the defence counsel, no worthwhile material could be elicited from them to brush aside their credible testimony.

85. It is strongly argued by the learned counsel for the accused that not conducting a Test Identification Parade (TI parade) is a serious flaw in this case, especially when the witnesses plainly admitted that they had no previous acquaintance with the accused persons. To support their contentions, learned senior counsel for the accused relied on **Laxmipat Choraria and others v. State of Maharashtra (AIR 1968 SC 938), Mohd. Abdul Hafeez v. State of Andhra Pradesh (1983 SCC (Cri) 139), Ganpat Singh and others v. State of Rajasthan (1998 SCC (Cri) 201)** and **Ravi @ Ravichandran v. State rep. by Inspector of Police (AIR 2007 SC 1729)**. Learned counsel for the 2nd accused cited **Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839), State of M.P. v. Chamru @ Bhagwandas and others (AIR 2007 SC 2400)** and **State v.**

Sait @ Krishnakumar ((2008) 15 SCC 440) and a division bench decision of this Court in **Suresh v. State (2003 KHC 216)**.

86. Apex Court in **Laxmipat Choraria**'s case considered an issue relating to Sea Customs Act, 1878 and IPC, where the facts would show that the accused persons indulged in a criminal conspiracy among themselves to smuggle gold into India. While dealing with various questions, it is observed that ability of witness to identify an accused should be tested without showing him the suspect or his photograph or furnishing him any data for identification. Showing photograph prior to identification makes the identification worthless. That observation was made in the light of Section 9 of the Evidence Act, 1872 (in short, “Evidence Act”). Admittedly in our case, no identification parade was conducted. Therefore, the principles in the above decision have no application here.

87. In **Mohd. Abdul Hafeez**'s case, the decision is to the effect that when no description of the accused was provided by the witnesses at the time of investigation, it would be essential to conduct a TI parade after arrest of the accused. In the facts and circumstances of the case, the Supreme Court found that non-conduct of a TI parade was fatal to the case. This decision can be easily distinguished on facts.

88. In **Ganpat Singh**'s case it was held that TI parade conducted at the time of investigation after showing the accused from police station has no significance. This decision also does not apply to the facts in this

case.

89. In **Ravi @ Ravichandran**'s case, the Supreme Court observed that when a case is registered against an unknown person, identification parade should be held as early as possible. There cannot be any dispute to this proposition. But, in this case the accused were arrested only on 05.01.2013, ie., 12 days after the incident. It is alleged that the accused were paraded before media. For the above reason no purpose could have served by conducting a TI parade after this, contended learned counsel. But DW6, the ADGP, who held the press meet denied the defence case that the accused were exhibited to media glare. In this context, it is relevant to note the prosecution case that they arrested the accused only after confirming their identity through the witnesses who had occasion to spot them immediately before and after the incident. We shall examine propriety of the press meet at the appropriate place.

90. We may refer to the decisions cited by the learned counsel for the 2nd accused. In **Mohanlal Gangaram Gehani**, the principle is that when the victim did not know the accused prior to the occurrence and accused was shown to victim by police before trial, then an identification parade conducted later cannot be relied upon. This principle is indubitable. However, it does not apply to the case on hand since there was no TI parade at all.

91. Another decision cited by the learned counsel for 2nd accused, **State of M.P. v. Chamru @ Bhagwandas**, laid down the same principle

that after showing a photograph of the accused, no purpose will be served by conducting TI parade. The same principle was considered in **State v. Sait @ Krishnakumar.**

92. A division bench of this Court in **Suresh**'s case held that when no TI parade was conducted and when the accused was identified by witnesses for the first time in court, the identification will have to be corroborated by other evidence.

93. Learned prosecutor relying on **D.Gopalakrishnan v. Sadanand Naik and others (AIR 2004 SC 4965)** contended that showing photographs to witnesses for the purpose of identification and witnesses giving identifying features of assailants during the course of investigation is permissible. The following observations are heavily relied on:

> *"There are no statutory guidelines in the matter of showing photographs to the witness during the stage of investigation. But nevertheless, the police is entitled to show photographs to confirm whether the investigation is going on in the right direction."*

But, in the above case the Supreme Court did not accept the identification, since the investigating officer had procured an album containing the photographs with names of the accused written and showed the album to eye witnesses to record their statements under Section 161 Cr.P.C. Apex Court observed that the procedure adopted by police was not justifiable under law as it affected a fair and proper investigation. However, authority of the police officers to show photographs of the suspects to probable

witnesses to verify whether the investigation proceeded in the correct line has been approved by the Supreme Court.

94. Learned prosecutor placed reliance on **Saji and others v. State of Kerala (2007 (2) KHC 595)** to contend that even after publication of photographs of the accused in newspapers, the veracity of TI parade will not be lost. The decision may not apply to the facts in our case as there was no TI parade conducted.

95. To conclude this debate, we hold that in a case where the accused were not known to the witnesses previously, it is always safe to conduct a TI parade to ensure that the investigation is proceeding in the right path. It is well settled that TI parade is in the realm of investigation. If a witness identifies an accused at the time of TI parade and fails to identify him at the time of trial, then no earthly purpose will be served by the parade because the legal proposition, that identification of an accused from court at the time of trial is the substantive evidence, is indisputable. Nonetheless, if a witness, who failed to identify an accused at the time of TI parade, identifies him for the first time in court, then probative value of his evidence in relation to the identity of the accused will be very less. To lend credibility to the prosecution case regarding identity of the accused, who is not known to the witnesses previously, it is always better to conduct a TI parade to ensure correct identity of the real person(s) involved in the offence. In this case, only after about two weeks, the investigating officer could zero in on the accused. Evidence shows that the accused were

shown to material witnesses before recording their arrest. Hence, chance of holding a TI parade was lost.

96. Yet, we find absolutely no reason to hold that all the above witnesses falsely testified in court to unduly support the prosecution by implicating innocent unknown accused in the crime. True, no evidence has been brought out to show that any of the witnesses had furnished identifying features of the accused before hand. However, the investigating officers, viz., PWs 71 and 72, deposed that only after thoroughly questioning the suspects and unearthing relevant incriminating evidence and also on getting them identified through some of these witnesses, they were booked. This is a case where conducting a TI parade would have become a futile act since identity of the accused were revealed immediately before their arrest. Ideally, the investigating officers could have conducted a TI parade in this case. But, the question is: Did the accused suffer any prejudice on account of non-conduct of a TI parade? On a meticulous analysis of the reliable testimony adduced by these witnesses, we do not find any reason to hold that they falsely implicated the accused in the crime. Nobody has a case that any of these witnesses had an ill-will or animosity towards any of the accused. We find no prejudice caused to the accused by non-conduct of a TI parade.

97. In our view, the witnesses referred to above have given a reliable account of the presence of accused persons on 24.12.2012 prior to and subsequent to the incident. They also convincingly spoke about

identity of the accused. Although we find no legal or factual reason to discard their testimonies, we are of the opinion that other aspects in the prosecution case also have to be looked into for arriving at a finding of guilt.

98. Another strong circumstance relied on by learned prosecutor to establish guilt of the accused is the recovery of gems and precious stones from the possession of accused 1 to 4, which, according to him, the accused failed to explain how they happened to get the same. We use the expression “recovery” in a broader sense to include the discovery of a relevant fact (here, possession of the gems and precious stones) as per the information received from an accused in custody referable to Section 27 of the Evidence Act as well as seizure of the articles at the time of arrest of the accused. Of course, the accused 2 to 4 denied the factum of recovery of gems from them and the 1st accused tried to explain it away. It is pertinent to note that prosecution has no case of recovery of any valuable articles from the possession of 5th accused. In this context, we feel it apposite to mention the relevant aspects in the deposition of PWs 11, 19, 20, 26 and 28 relating to recovery of gems and stones from accused 1 to 4.

99. PW11 Jayamol @ Pooja is a friend of PW10 Archa and they came down from Bangalore in search of a job at Ernakulam and resided in a house, “Smayana” at Eroor along with some of the accused. Testimony of this witness is strongly relied on by the prosecution to prove the alleged conspiracy, which we shall discuss later. For the purpose of this point, we

may refer to her evidence relating to transportation of some gems at the instance of the 2nd accused. According to her chief-examination, she, along with PW10, came to Ernakulam in search of job. As instructed by the 2nd accused, this witness and PW10 stayed in a house “Smayana”, taken on rent by the 1st accused, wherein accused 2 and 3 too resided. PWs 10 and 11 stayed for a couple of weeks in the house. When they got reliable information that two other persons would be coming to stay in the house, they shifted to a ladies hostel at Ernakulam. PW11 deposed that on 25.12.2012, the 2nd accused met her from ladies hostel and entrusted a bag for safe keeping. He wanted the bag to be kept there for some time as he intended to take a bus ticket to Bangalore. After two days, the 2nd accused called PW11 over phone and requested her to bring the bag to Bangalore urgently. When PW11 informed that she had no money to undertake a journey to Bangalore, 2nd accused deposited ₹1,500/- in her account. After withdrawing money from her account, PW11 went to Bangalore carrying the bag entrusted by the 2nd accused. He was waiting for her in a bus stop at Madiwala. After handing over MO23 bag to the 2nd accused, she went to the ladies hostel where she had been staying while in Bangalore. It has come out in cross-examination that PW11 had occasion to see the gems kept in the bag, which she identified from court. Prosecution case is that the gems kept in the 2nd accused’s bag were seized at the time of his arrest on 05.01.2013. Despite a tough cross-examination on this witness to show that she did not transport MO23 bag

to Bangalore as instructed by the 2nd accused and no gems were secreted in it, PW11 stuck to her version unflinchingly.

100. PW19 Vijayakumar has a case that on 29.12.2012, his friend Lithin (PW29) and accused 2 to 4 met him at his work site and had shown some gems. They requested PW19 to make arrangements to sell them through someone. Since PW19 was having no previous experience in gem trade, he returned the articles. On the next day (30.12.2012) all the above persons again met PW19 and wanted ₹1,00,000/- urgently for some business purpose of the 2nd accused. He paid ₹60,000/- which he was having in possession and ₹30,000/- borrowed from a friend. By way of security for the money, the accused 2 to 4 handed over 12 gems to him. After a couple of days, police came and recovered the gems from him. MO29 series and MO30 series gems are proved by this witness in court. Albeit a searching cross-examination, we find no reason to disbelieve the testimony of PW19 that the 2nd accused handed over MO29 series and MO30 series gems to him as security for ₹90,000/- borrowed from him in the presence of accused 3 and 4 and also PW29.

101. In this context, we may mention that the testimonies of PWs 11 and 19 are required to be analysed in detail for the purpose of considering the prosecution case relating to conspiracy as well, which we shall do in the succeeding paragraphs.

102. Evidence tendered by PW20 Jayaprakash is also relevant here. He is the brother of PW19. He is a witness to Ext.P26 seizure

mahazar prepared at the time of recovery of 12 gems from the possession of PW19. We find no dent on the credibility of this witness in spite of cross-examination.

103. PW26 Chandu is the key witness for the prosecution to prove seizure of material objects from accused 2 to 4 on the date of arrest. In the chief-examination, he deposed clearly about the seizure of material objects from the accused and he witnessed it from Police Circle Office, Peroorkada. According to his testimony, he saw the seizure on 05.01.2013. Further, the seizure was from accused 2 to 4. He identified the said accused from the dock. It is his version that the 2nd accused had MO23 bag in his possession. 2nd accused, as directed by police officers, opened the bag and took out articles kept therein. Apart from his dress materials, purse and mobile phone, he took out two jewel boxes in white and rose colours. White jewel box is marked as MO36. In MO36, 35 gems were kept. Those 35 gem stones are marked as MO37 series. Rose jewel box seized from MO23 bag belonging to the 2nd accused is marked as MO38. In MO38 jewel box, there were 37 gems. They have been identified by this witness as MO39 series. In addition to the precious stones, his dress materials, mobile phone, purse, etc, are also identified by this witness. All the personal belongings of the 2nd accused are proved through this witness. Ext.P35 mahazar evidences the seizure of articles from 2nd accused, in which he is a signatory.

104. Thereafter, PW71 examined the bag belonging to the 3rd

accused. His bag identified by PW26 is marked as MO43. He deposed that 3rd accused opened the bag which contained dress materials and two jewel boxes along with his purse, mobile phone, etc. All the items seized from MO43 bag are identified by PW26. Out of the two jewel boxes, one was in a round shape and the other rectangular. Rectangular box was white in colour and round box in meroon. Meroon jewel box is marked as MO47. In MO47, one precious stone was kept. That is marked as MO48. White jewel box is marked as MO49. In MO49, 170 stones of three different types, viz., white, ash and transparent, were kept. The stones found in MO49 box are marked as MO50 series. In the list of the personal belongings of this accused, his driving licence, ATM cards, etc. are also included. Ext.P39 is the mahazar evidencing the seizure in which PW26 had signed.

105. Thereafter PW71 examined the bag belonging to the 4th accused. PW26 identified the bag marked as MO53. PW71 caused the bag to be opened by the 4th accused. It contained his dress materials, two jewel boxes, mobile phone, purse, etc. PW26 identified wearing apparels seized from 4th accused's bag and they were separately marked. Likewise, ATM cards, cash, etc. are also marked. Thereafter he proved seizure of two jewel boxes and the contents therein. A rectangular jewel box seized from the bag of 4th accused is marked as MO60. In MO60 jewel box, there were white and colourless stones, altogether 42 in number. They are proved through this witness as MO61 series. Meroon colour jewel box seized from the 4th accused is marked as MO62. In MO62 jewel box, 16 stones having

three colours, viz., white, ash and transparent, were kept. The stones are marked as MO63 series. Mahazar prepared for effecting seizure of these items is marked Ext.P42. It is proved through PW26 and he deposed that it contained his signature.

106. This witness was extensively cross-examined by the learned counsel for the 4th accused. There is no cross-examination on him done by other accused. PW26 studied upto 10th standard. In cross-examination, marks secured by him in various subjects for SSLC examination have been elicited to test his ability to remember facts. He answered coherently all such questions. It was attempted to be proved that this witness was unduly helping the investigating agency for his personal gains, which he stoutly denied. Regarding the contradiction in mentioning his date of birth in the final report, he was cross-examined at length to show that his version of passing SSLC examination was a falsehood as going by his age, he would have passed the exam at the age of 10. He explained the incongruities regarding his address and age by saying that the informations therein were not furnished by him.

107. Clear suggestion put to this witness is that Exts.P35, P39 and P42 mahazars were signed by him without seeing any seizure and without reading them out. This suggestion is strongly denied by him. Suggestions that he was tutored by police and he was reproducing a parrot like version are also denied by him.

108. PW26 deposed that he happened to go to police station for

receiving back a registration certificate in respect of an Omni Car bearing no.KL 01 AL 582 belonging to his elder brother Subash. PW26 was running a catering service at that time. Police took the vehicle in custody since PW26's brother drove it without due licence. PW26 deposed that the vehicle was carrying food items prepared in his catering service and that was why he had gone to police station. He accidently saw seizure of the articles and signed on mahazars. According to his version, he was called to PW71's office after 3 o' clock on 05.01.2013. In cross-examination, he deposed that police officers specifically showed him the bags belonging to each accused. Despite tough cross-examination, he adhered to the facts mentioned in his chief-examination. To a specific question as to who placed the gems in the bags belonging to the accused, he answered that he was not aware. It is pertinent to note, the defence has no case that either police officers or somebody else might have planted this much quantity of gems in the bags belonging to the accused persons. We cannot discard the testimony of PW26 as his credibility has not been affected at all in the cross-examination.

109. PW28 Praveen closely knew deceased Varma. It is his case that he came into contact with deceased Varma through CW35 Baiju. PW28's acquaintance with Varma has been spoken to by the 1st accused himself when he was examined as DW2. Similarly, PW12 also spoke about the closeness between deceased Varma and PW28.

110. PW28 also assisted deceased Varma to make arrangements

for the sale of gems and stones. PW28 had met deceased Varma in the company of his friends Rajendran, Vassim, Vinod, Ravi and Baiju. Their meeting was at Jas Hotel, Thiruvananthapuram. Deceased Varma had shown the gems to PW28 and his friends. Thereafter, on another occasion, he saw the stones and gems in the presence of Sammad, a native of Nilambur, Kunhippa Hajiyar, hailing from Malappuram and the 1st accused. He identified 1st accused from the dock. At that time, the 6th accused was present along with deceased Varma. 6th accused was introduced as deceased Varma's elder brother. He identified the 6th accused from the dock. He deposed that the intended sale did not materialise. He is a witness to recovery of gems, stones, Ganesh figurines, stone bar, etc. from the house of the 1st accused at Deshabhimani Road, Ernakulam. The recovery was on 15.01.2013. As directed by PW71, this witness came to the 1st accused's house. According to PW28, aforementioned valuable articles were kept by the 1st accused in a bag concealed in an almirah. When police brought the 1st accused to his house, he took out a bag from the almirah and opened it. A box, white in colour, was taken out from the bag. It was marked as 'I'. Bag handed over by the 1st accused is marked as MO64. When white coloured box was opened, four covers were found inside. 413 stones contained in the first cover in the white box are marked as MO65 series. The cover was given a separate marking. Thereafter, another cover was taken out. It is also marked. In the second cover, 184 stones were kept. They are marked as MO66 series. Third cover taken out

from the white box was also given a mark. 18 stones recovered therefrom are marked as MO67 series. In the fourth cover, which was marked separately, 84 stones were recovered and they are marked as MO68 series. The articles were properly packed and sealed by the investigating officer.

111. Then another box, meroon in colour, was taken out from MO64 bag. It was marked as 'II'. That box is marked as MO69. In MO69, four plastic covers were placed. In the first cover, a marking was given and on opening, a chain, made with green coloured gems, was found. 65 beads are in the chain. It is marked as MO70. Thereafter the investigating officer (PW71) took out another cover from MO69 box and gave a marking. 10 stones recovered therefrom are marked as MO71 series. Later, 3rd cover was taken out and after marking, it was opened. In that cover, 52 stones were placed which are marked as MO72 series. Then, fourth cover in the box was given a marking. It was found that 20 stones marked as MO73 series were placed in that cover.

112. After putting all the covers back in the box and properly sealing it, the investigating officer took out another box in white colour and marked as 'III'. There were five plastic covers in box 'III'. That box is marked as MO74. In the first cover taken out from MO74, 16 stones, marked as MO75 series, could be found. In the second cover, 60 stones stones marked as MO76 series were placed. Third cover contained MO77 series gems (96 numbers). Fourth cover in the box was having 80 stones,

marked as MO78 series. After marking the fifth cover, it was opened. It contained 170 stones marked as MO79 series. After properly sealing the covers, they were put in the box and it was again sealed.

113. Thereafter, another box was taken out from the bag. It was marked as 'IV'. This box also contained five plastic covers. This box is marked as MO80. From MO80, first cover was taken out. After marking the cover, 29 stones marked as MO81 series were found inside. In the second cover taken out from MO80 box, 52 stones marked as MO82 series are recovered. From the third cover, MO83 series (19 gems) are recovered. Fourth cover was having 9 gems inside and they are marked as MO84 series. Lastly, fifth cover found to contain 90 stones marked as MO85 series.

114. Afterwards, PW71 took out another box, white in colour. It also contained five plastic covers. In the first cover, 75 stones marked as MO87 series were placed. Second cover when opened, found to contain 52 stones marked as MO88 series. In the third cover, 75 stones were kept, marked as MO89 series. In the fourth cover,70 stones marked as MO90 were placed. Fifth cover, when opened, found to contain 23 gems, marked as MO91 series. All the covers were properly packed and sealed.

115. Thereafter PW71 took out a white coloured box from the bag which is marked as MO92. It contained six plastic covers. From the first cover in MO92, 520 stones were found out, which are marked as MO93 series. In the second cover, three stones marked as MO94 series could be

found. Third cover, when opened, found to contain 7 stones marked as MO95 series. MO96 series (27 gem stones) were kept in the fourth cover. 8 stones, marked as MO97 series, were found in the fifth cover. In the last cover, 6 stones were placed, marked as MO98 series. All the items were properly packed and sealed by the investigating officer.

116. From MO64 bag, a rose coloured box was taken out which is marked as MO99. In MO99, five plastic covers were placed. From the first cover, MO100 series stones were recovered. In the second cover, 28 stones were kept, in three packets, which are marked as MO101 series. In the third cover, 8 stones were placed, marked as MO102 series. When fourth cover was examined, 2 stones marked as MO103 series could be found. Fifth cover taken out from the box found to contain MO104 series gems. All the material objects were properly covered and sealed. Thereafter a navy blue box was taken out which is marked as MO105. In that box, two plastic covers were placed. In the first cover, 410 stones were placed which are marked as MO106 series. Second cover found to contain 40 stones which are marked as MO107 series. As done earlier, the covers were placed in the same box, secured and sealed.

117. Thereafter from the 1st accused's bag a meroon coloured box was taken out which is marked as MO108. When it was opened, two covers were found. In the first cover, 214 stones were placed which are marked as MO109 series. On opening the second cover, it was found to contain 52 stones marked as MO110 series. Those two covers were placed

in the same box, packed and sealed.

118. From MO64 bag, another plastic cover was taken out. Inside that cover, five small covers were placed. First small cover, when opened, found to contain MO115 series gems. In the second cover, MO116 series gems could be found. From the next cover, MO117 series gems were recovered. Yet another cover found to contain MO118 series. Fifth cover contained gems marked as MO119 series. All the five covers were placed in the plastic cover and it was wrapped in brown paper. Then it was properly sealed. PW71 then took out another plastic cover from MO64 bag. It contained two covers. First cover contained a stone bar which is marked as MO20. Yet another cover was also there, in which three small Ganesh statuettes (figurines) were placed. They are marked as MO19 series.

119. Next box, meroon in colour (MO120), when opened found to contain old coins and metal bars. They are marked as MO121 series and MO122 series. A meroon coloured box (MO123) was also taken out from MO64 bag which contained an antique watch marked as MO21. After recovering all these items at the instance of the 1st accused while in custody, a mahazar was prepared. It is also deposed to by this witness that all the recovered items were properly wrapped up and sealed. PW28 deposed that the mahazar was read out and thereafter he signed. That mahazar is marked as Ext.P75. Lease agreement pertaining to “Smayana” taken on lease by the 1st accused is marked as Ext.P76 and it was recovered as per Ext.P78 mahazar. PW28 was questioned by police and

his statement under Section 164 Cr.P.C. was also caused to be recorded, which is marked as Ext.P77.

120. This witness was subjected to cross-examination ad nauseam by the counsel for accused. In cross-examination by the learned counsel for the 1st accused, PW28 deposed that he, for the first time, met deceased Varma in February 2012 and he was introduced to deceased Varma by CW35 Baiju. PW28 is a B.Sc. (Physics) graduate and during February 2012, he was working as computer mechanic. He was doing business at Kodungallur, which he closed down in 2011. He knew deceased Varma's phone number. PW28 too believed that he and CW35 Baiju could get commission, if the gems and stones were sold. In cross-examination, PW28 emphatically stated that he had shown the gems possessed by deceased Varma 2-3 times to various persons who came to Thiruvananthapuram for a deal. This witness also deposed that deceased Varma made them believe that he belonged to a royal family and the gems in his possession were very costly. When cross-examined, PW28 deposed that one Ganeshan and PW12 examined the stones and found that they were not as costly as projected by deceased Varma. Many persons had seen the gems from Jas Hotel, Thiruvananthapuram. PW28 deposed that one Rajendran and Vassim came from Bombay and examined the stones, but they did not turn up later. It has come out in evidence that at the instance of PW28 many persons had shown interest in the deal. Nowhere in the cross-examination it was suggested to PW28 that he had no

connection with the intended gem trade and no previous occasion to find the gems, now identified by him, kept in the possession of deceased Varma. Instead, what we find from cross-examination is that he also tried to dupe the prospective customers with inferior quality gems, which he denied. Suggestions that he did not witness recovery of the gems and precious stones as pointed out by the 1st accused while in custody and he was not present when Exts.P75 and P78 mahazars were prepared are strongly denied by him.

121. To a specific question, he answered that he witnessed recovery of the gems from the 1st accused and saw preparation of Ext.P77 mahazar from latter's house at Poneth Lane, Ernakulam. 1st accused was residing in that house is an undisputed case as he himself admitted the same as DW2.

122. When cross-examined by counsel for the 4th accused, PW28 deposed that he came to Ernakulam on 15.01.2013 for watching a cricket match at International Stadium, Kaloor. He could not get a ticket for the one day cricket match between India and England. It is his case that he came to the 1st accused's house because PW71 had called him for identifying the gems. PW28 deposed that he identified the gems and stones belonging to deceased Varma for the first time in front of PW71. Thereafter, he gave a statement on 15.01.2013. Later, his statement under Section 164 Cr.P.C. was recorded by a Magistrate. He was again questioned by police. When the defence counsel suggested that PW28

falsely deposed before court in respect of matters not seen by him, he asserted that he saw the recovery of huge quantity of gems and stones from the 1st accused's house. In spite of searching cross-examination, we find no tangible reason to discard PW28's testimony with regard to recovery of the gems and precious stones kept in MO64 bag secreted in an almirah in the house, wherein admittedly the 1st accused resided at the material time.

123. In this regard we may mention about the evidence of PW33 Mohammed Shah, who was the manager of Jas Hotel, Thiruvananthapuram. He knew deceased Varma because since five years before his death he used to visit the hotel frequently. He used to check in the hotel for meeting prospective customers in the gem trade. He used to carry a briefcase always. This witness identified MO10 briefcase as that of deceased Varma's. Testimony of this witness fortifies the deposition of PW28 that deceased Varma used to meet customers from the said hotel. PW33 further deposed that usually Varma was accompanied by 2-3 persons.

124. PW34 Krishnaprasad worked as the receptionist in Dubai International Hotel, Thiruvananthapuram. He produced guest registration card and room bills before police. He is a witness to Ext.P53 mahazar evidencing recovery of records from the hotel to show that deceased Varma used to stay there. His testimony also renders support to the prosecution case that there were lot of customers fancied by the gem deal.

125. On an over all assessment of the testimony of PW26, it will be convincingly clear that at the time of arresting accused 2 to 4, police had seized gems and stones from their bags. Pertinent aspect is that they offered no explanation with regard to their possession of the gems and stones. Testimony of PW28 clearly shows recovery of large number of gems and stones from MO64 bag, handed over to police by the 1st accused, while in custody, and the articles recovered therefrom. The bag was kept in an almirah in the 1st accused's house. PW28 proved that the gems and stones, recovered from the 1st accused under Section 27 of the Evidence Act, belonged to deceased Varma. The testimony of these witnesses remain credible and believable despite lengthy cross-examination.

126. Needless to expatiate the principles regarding how much information received from an accused may be proved under Section 27 of the Evidence Act as they are well covered by a catena of decisions. Still, we may make a passing reference to the relevant provisions for the sake of completion. Absolute prohibition contained in Section 25 of the Evidence Act against proving any confession made to a police officer is whittled down under two circumstances mentioned in Sections 26 and 27 of the Evidence Act. Section 26 of the Evidence Act says that a confession made by a person to a police officer, while in custody, shall be proved against him, if it is made in the immediate presence of a Magistrate. Section 27 would clearly show that it is a proviso to Sections 25 and 26 of the

Evidence Act and it provides an exception to the rule enacted in the aforementioned Sections. Section 27 is intended to govern both Sections 25 and 26 of the Evidence and to have a general application to information received from an accused person in custody of the police and to allow proof of information amounting to a confession received from such a person, whether given to a police officer or not. When any fact is deposed to as discovered in consequence of an information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to facts thereby discovered, may be proved under Section 27 of the Evidence Act.

127. In order to prove recovery of large quantity of gems and stones from a bag kept in the 1st accused's house, prosecution relied on the testimony of PWs 28 and 71. As mentioned above, PW28, despite a tough cross-examination, adhered to his versions that he witnessed recovery of the gems and stones, involved in the crime, as pointed out by the 1st accused while he was in the custody of police. Besides, PW71 at the time of examination clearly proved Ext.P75 mahazar relating to recovery of the aforementioned articles and he also proved Ext.P75(a) confession by the 1st accused, made while in custody, which led to recovery of the articles. Facts that the 1st accused was aware about secreting the gems and stones involved in the crime at a particular place and it was recovered as pointed out by him while in custody, have been

deposed to by PWs 28 and 71 with certainty. In spite of searching cross-examination, their versions remain believable. Therefore, we find no infirmity in proving this case by the prosecution against the 1st accused.

128. We may also refer to the case set up by the 1st accused regarding the manner in which he came into possession of a sizeable chunk of the gems and stones. When examined as DW2, he deposed that PW12 started pestering him for money, which he had spent anticipating furtherance of the deal. PW12, when came to know that the gems possessed by deceased Varma were fake, called the 1st accused to his house and manhandled. Thereafter, the 1st accused went to deceased Varma's house at Thiruvananthapuram and questioned him. According to DW2, he even assaulted Varma for attempting to dupe him. When the 1st accused threatened Varma of resorting to a criminal action, latter dissuaded him by handing over some gems and stones and advised him to sell them out to some buyers for realising money. We find it very hard to believe this version of the 1st accused. In our view, he failed to offer a believable explanation for possessing large quantity of gems, stones, figurines, etc. which are proved to be once possessed by deceased Varma. Going by the evidence of PW28 and the mahazars, we find that a lion's share of gems and stones should have been handed over by Varma to the 1st accused for securing a sum around ₹5,00,000/-, which we think, highly improbable and unrealistic. It is the case of the 1st accused himself that deceased Varma had projected his possession of gems worth crores. No

sensible man would have handed over a sizeable quantity of his assets merely if someone threatened him to file a case for attempting to cheat. Story put forward by the 1st accused for possessing this much quantity of gems and stones from deceased Varma's collection on mere threatening is quite unnatural and unbelievable.

129. Insofar as seizure of the gems and stones from accused 2 to 4 is concerned, learned senior counsel for the accused 3 to 5 and learned counsel for the 2nd accused raised a contention that the alleged seizure is highly artificial. To appreciate this contention, we may refer to the testimony of PW27 Chadrakala too, besides the testimony of PW26 which we had already mentioned. Prosecution case is that in search of the 1st accused, PW71 went to Bangalore with police party. On enquiry, it was revealed that the 1st accused was staying in Susheela Paying Guest Accommodation. PW27 Chandrakala was running the paying guest accommodation at Bangalore. When PW71 and party reached in the paying guest accommodation, they found accused 1 to 5 together in room no.116. After questioning them, they were brought down to Thiruvananthapuram from Bangalore on 04.01.2013. It is the prosecution case that when they were taken from Bangalore for questioning, accused 2 to 4 took their bags with them. On 05.01.2013, after reaching at PW71's office at Thiruvananthapuram and after identifying the accused persons through some witnesses, their arrest was recorded at 3.55 p.m. and their bodies and personal belongings were searched. Prosecution rightly has no case

that the seizure of articles from accused 2 to 4 could be regarded as a recovery under Section 27 of the Evidence Act.

130. PW27 deposed in chief-examination that she had handed over Ext.P43 admission register and Ext.P44 receipt book. In Ext.P43 (at page no.18), sl.nos.149 to 151 are the entries pertaining to accused 2 to 4, showing that they were staying in Susheela Paying Guest Accommodation in room no.116. It is also entered in it that they had paid ₹6,500/- towards the rental charges. PW27 identified accused 2 to 4 at the time of trial. Ext.P44 is a receipt book. Receipt no.580 was issued in the name of 3rd accused. Receipt for ₹13,000/- was given and PW27 deposed that ₹6,500/- was the rent for a month and ₹6,500/- was advance payment. That is marked as Ext.P44(a). Receipt no.581 was issued in the name of the 4th accused. Exts.P44(b) and P44(c) were also marked. Ext.P45 mahazar prepared at the time of recovery of Exts.P43 and P44 also contain her signature. She affirmed her signature on Ext.P45. It is the case of PW27 that five persons were found in the room when police came to seize the records. She identified them from the dock.

131. PW27 was subjected to a penetrating cross-examination by the counsel for 4th accused. It was suggested in cross-examination that PW27 had given accommodation to accused 2 to 4 in the fourth floor. This fact is admitted by the witness. She further deposed that anybody going to room no.116, allotted to accused 2 to 4, only could have passed through the front desk of her office in the ground floor. Susheela Paying Guest

Accommodation has a capacity to board 80 persons. When suggested to PW27 that other two persons found out by police along with accused 2 to 4 could have been brought by police themselves, she denied it. It is PW27's version that along with police party, she came and opened the door to find five persons inside the room and she became perplexed on finding some strangers. Defence case that police brought accused 1 and 5 to the room is stoutly denied by this witness. When the defence counsel asked whether police had taken all the five persons in custody, this witness deposed that since police wanted to question them, they were asked to accompany the police.

132. In this context, it is relevant to note the accused's case that if police had zeroed in on five persons from PW27's paying guest accommodation, they could have arrested the accused then and there. Prosecution has no case that PW71 effected arrest of the accused 1 to 5 from Bangalore, nor did the police produce them before any Magistrate at Bangalore. It is the version of PW71 that they brought the accused 1 to 5 along with them to Thiruvananthapuram for questioning. PW71 deposed that they were arrested only after thorough questioning, identifying them through witnesses and ascertaining their complicity in the crime.

133. Chapter V of the Cr.P.C., containing Sections 41 to 60A, deal with arrest of persons. Arrest without warrant is an extreme step to be taken by police in a case only when they gather reliable materials indicating the complicity of a person in a cognizable offence. Spirit of the

law in Section 60A Cr.P.C. is that no arrest shall be made except in accordance with the provisions of the Code or any other law for the time being in force providing for an arrest. Arrest of a person is an invasion of freedom guaranteed under Article 21 of the Constitution of India. Therefore, the accused cannot be heard to say that PW71 should have arrested them immediately when he found them in room no.116 of PW27's paying guest accommodation. We are satisfied, on going through the evidence adduced by the investigating officer, that the police officers, who went to Bangalore, had sufficient reasons to verify facts and figures to ascertain involvement of the five persons to find out whether they had any role in the crime.

134. PW27 answered that when police took them to Kerala, she did not return the advance money paid by the accused and it was handed over to the 2nd accused in the presence of police on another occasion. PW27 deposed in cross-examination that when police asked accused 2 to 4 to accompany them, the room was locked and key was handed over to PW27 for safe custody. Regarding preparation of Ext.P45 mahazar, PW27 deposed that it was prepared in her presence and the same was read over to her before signing. On an over all assessment of the testimony of PW27, it will be clear that all the five persons involved in the crime were seen together in room no.116 of Susheela Paying Guest Accommodation and PW71 and party brought them down to Thiruvananthapuram with their luggages. We agree with the defence case that what was found out from the possession of accused 2 to 4 cannot be qualified as a recovery

referable to Section 27 of the Evidence Act. However, seizures effected from accused 2 to 4 as proved by PWs 26 and 71 and probabilised by PW27's evidence remain unshaken despite a searching cross-examination. It is all the more important for the reason that no believable explanation could be given by accused 2 to 4 for keeping gems and stones in their bags. Testimony of PW11 is also relevant in this regard insofar as it relates to the 2nd accused. In short, we find that the court below is justified in relying on the recovery and seizure of gems and stones from accused 1 to 4 as a clinching circumstance against them.

135. Learned counsel for the accused 1 and 2 and also the learned senior counsel appearing for accused 3 to 5 vehementally contended that the accused persons would not have ventured to rob gems and stones from the custody of deceased Varma because the 1st accused, even according to the prosecution, came to know much prior to the incident that those items are worthless. It is therefore contended that no sensible person would have attempted to snatch away fictitious stones from Varma. So much so, nobody would have plotted to kill Varma. 1st accused when tendered evidence as DW2 asserted that persons came down from Delhi, at the instance of PW12, had verified the gems and opined that they were fake. Knowing that fact PW12 and his men manhandled the 1st accused for which he raised a protest against Varma. At that time, it is said, Varma handed over certain gems and stones to 1st accused and they were recovered from his possession by PW71. We have already found that his

plea regarding handing over of huge quantity of gems and stones by deceased Varma to the 1st accused is highly improbable and not believable. However, learned counsel argued that when 1st accused knew that the gems and stones were worthless, he would not have tried to grab them by taking recourse to an extreme step of killing Varma. If that be so, other accused also might not have had any role.

136. In this context, we may refer to the testimony of PW12, who said that what he meant by “fake” about the gems did not mean they were spurious or worthless, but articles of lesser value. PW28 deposed that the gems were found to be of an inferior quality than claimed by deceased Varma. These witnesses did not testify that the material objects exhibited in this case (gems and stones) were totally worthless.

137. Let us now consider the evidence relevant in this context tendered by PW35 Priya Mohan and PW36 Balaraman.

138. Learned counsel appearing for the accused raised a serious contention that prosecution did not take any step to send the recovered gems and stones to a Gemmologist to determine its purity, clarity and worth; instead the articles were sent to Mineralogy and Gem Testing Laboratory, Thiruvananthapuram under the Mining and Geology Department of the State of Kerala. All the learned counsel challenged the competence and know-how of PWs 35 and 36 to assess value of the gems. Per contra, learned prosecutor would contend that they have sufficient expertise in examining and finding out inherent quality of the

gems. Further, they are the Government agency authorised to examine such articles.

139. PW35 Priya Mohan was the Geologist in-charge of Mineralogy and Gem Testing Laboratory, Thiruvananthapuram. She closely examined the gems and stones sent for analysis by the investigating officer in this case. She issued a consolidated report after examining 3647 stones, seized during the course of investigation, along with one elongated stone bar and three figurines (statuettes) of Lord Ganesha. In her consolidated report, 17 test reports were also appended. Reports pertaining to each bunch of the gem stones sent for analysis have been separately marked as Exts.P56 to P72 series. Material objects referred to above were identified by PW35 from court at the time of her examination. She deposed that Corals, Natural Emerald, Ruby, Sapphire, Yellow Sapphire, Pearl, etc. were included in the items scrutinized by her.

140. From the reports annexed to Ext.P55, it can be seen that Kyanite, Synthetic Star Sapphire, Pearl (probably cultured), Aquamarine, Moonstone, Lolite, Corundum, Zircon, Grossular Garnet, Glass Filled Ruby, Synthetic Ruby, Natural Ruby, Natural Sapphire, Aventurine Quartz, Chrysoberyl Cat's eye, Malachite, Artificially coloured Yellow Sapphire, Natural Quartz, Natural Spinel, Peridot, Sphene, Glass, Natural Amethyst (Quartz), Diopside Cat's Eye, Chalcedony, Synthetic White Sapphire, etc. were present in the articles forwarded for analysis. All the items are specifically identified by this witness at the trial.

141. When cross-examined by learned counsel for the 1st accused, PW35 deposed that she was not competent to decisively mention the price of each item. Defence case is that the articles examined by PW35 are ordinary stones, commonly available at a cheap rate in Indian markets. When suggested by the defence counsel that these stones are usually used for decorating inside the aquariums, PW35 answered that Moon Stones are treated as gems. She also deposed that there are different varieties of Moon Stones having varied prices. PW35 admitted that cost of the gems could be determined only by an expert gem appraiser. She asserted that there was no qualified gem appraiser working in the Government service. To a specific question put by the counsel for 1st accused, PW35 answered that in gem trade, there is a possibility of committing cheating on a buyer. It is her version that whether a man could be duped or misled will depend upon his intellectual capacity and common sense.

142. When PW35 was cross-examined by the learned counsel for accused 2 and 4, she answered that she had prepared a worksheet at the time of examination. It is contended that non-production of the worksheet will weaken PW35's evidence. We are unable to accept this defence contention in the light of her reliable testimony based on scientific data furnished in the reports. She stated that Refracto Meter, Polariscope, UV Lamp, Geological Microscope, Prism Spectroscope, etc. were used for examining each of the stones. Despite a searching cross-examination on

this witness, we do not find any aspect to infer that her examination was either unscientific or imperfect. At the time of cross-examination, she asserted that she was appointed by the Government as Geologist and she was given an additional charge of the Gem Testing Department under the Mining and Geology Department.

143. In the re-examination, difference between Gemmologist and Geologist is brought out. According to PW35, a Geologist is a person who studies about various earth progress, which includes formation of minerals and their identification. Branch of Geology deals with formation of minerals; their identification is Mineralogy. All gem stones are minerals. Gemmology is just a branch of Mineralogy. On an evaluation of evidence tendered by PW35, we are convinced that she was competent to examine the materials sent up for analysis and to find out the nature and character of the gems and stones. However, she has no case that she had any expertise in fixing value for the gems and precious stones.

144. PW36 Balaraman was the Director, Mining and Geology Department. During his tenure, Deputy Director was Shri D.P.Sreekumar and Additional Director was Shri Prabhakumar. As Director, PW36 sent reports to the police officers. He identified his signatures on Exts.P55 to P71. He identified the signatures of Shri D.P.Sreekumar and Shri Prabhakumar. Forwarding letters signed by these officers are included in Ext.P72 series (15 nos.). PW36 deposed that he did not conduct any test. According to his testimony, Gemmology is a specialised branch of science

dealing with identification and categorisation of stones. He stated that the Department had no official valuer. PW36's testimony supports the version of PW35.

145. When the evidence given by PWs 35 and 36 are considered together, it will be clear that the articles recovered and seized from the accused were properly analysed and they are not worthless glass pieces as contended by the accused. This also weakens the defence case that the 1st accused would not have ventured to plunder them. It has come out in evidence that accused 2 to 4 were possessing quite a number of gems and stones, which were in the custody of deceased Varma. To sum up, recovery and seizure of the material objects from the possession of accused 1 to 4 are properly proved. Besides, the defence case that the gems and stones exhibited in this case are completely worthless is also rendered unacceptable by the testimony of aforementioned witnesses.

146. Another important circumstance against the accused pointed out by the learned prosecutor is obtainment of finger impressions of accused 2 and 3 from the crime scene. PW71, during examination-in-chief, deposed that at about 4.00 p.m. on 24.12.2012 he brought the Scientific Assistant, FSL, the Scientific Assistant, DCRB, Thiruvananthapuram (PW48) and the Finger Print Expert (PW38) to the crime scene. Besides, a police photographer (PW39) was also arranged.

147. PW38 Shri L.S.Lohi was the Finger Print Expert in the Single Digit Finger Print Bureau, Thiruvananthapuram City. He deposed that on

24.12.2012 he visited the crime scene and developed 30 chance prints from the scene of occurrence. PW65 Shri S.Anil, Tester Inspector in the Bureau gave Ext.P79 preliminary report to the investigating officer. That was produced before the Magistrate concerned on 10.01.2013. In Ext.P79, PW65 has mentioned that PW38, Shri Shiburaj (Finger Print Expert) and Shri V.V.Vivekanandan (Finger Print Searcher) of the Single Digit Finger Print Bureau, Thiruvananthapuram City had inspected the crime scene and developed 30 chance prints. Ext.P79 would show that out of 30 chance prints obtained, 15 prints were found unfit for comparison. From the remaining 15 chance prints, four were found identical with the finger impressions of Rakhil (3rd accused) and one chance print was found identical with the right index finger print impression of Ajeesh (2nd accused). Ext.P79 shows that the 3rd accused's left middle finger impression, left ring finger impression and left thumb impression were found matching with the four chance prints taken from the crime scene. Nobody can dispute that analysis of finger print is a well developed science.

148. Learned counsel appearing for the accused strongly objected to Ext.P79 report saying that it was not properly proved. It appears from the deposition that the same contention was taken at the time of trial as well. But, that may not hold good. Author of Ext.P79 was examined as PW65 to prove the same. Apart from that PW38 testified that Shri S.Anil (PW65) was working in his team and he knew his signature.

149. We may now refer to the Kerala Identification of Prisoners Act,

1963 (in short, “Act of 1963”). Section 3 speaks about taking measurements, etc. of convicted persons. No doubt, this Act applies to persons apprehended at the crime stage as well. “Measurements” according to Section 2(a) of the Act of 1963 includes finger impressions and foot print impressions. Section 4 may be relevant for our purpose, which reads as follows:

> ***“Taking of measurements, etc. of non-convicted persons.***- *Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner.”*

150. After apprehending the accused persons on 05.01.2013, during the course of investigation, their finger impressions were taken. Ext.P80 letter issued by PW38 to the Assistant Commissioner of Police, Crime Detachment, Thiruvananthapuram City dated 15.03.2013 would show that he inspected the crime scene along with other persons named above and developed 30 chance prints from various articles likely to have been handled by the culprits, which includes plastic water bottles, plates, glasses, tables, chairs, briefcase, doors, windows, car found parked in the porch, etc. It is mentioned in Ext.P80 that police photographer had photographed the chance prints on the same day. Further, the finger impressions of accused 2 and 3, taken after their arrest and provided in the finger print slips, were found matching with some of the 15 chance prints identified from the crime scene. What is mentioned in Ext.P79 has been

reproduced in Ext.P80 which was properly proved through PW38. In Ext.P80, PW38 clearly mentioned the reasons for his opinion for matching the chance prints with that of accused 2 and 3. Exts.P81 series and P82 series are the enlarged photo impressions of the finger prints subjected to analysis. Ext.P83 is the submission of photographic enlargements by the Tester Inspector to the Assistant Commissioner of Police, Thiruvananthapuram City. These documents, coupled with the testimony of PW38, would show that 15 chance prints, out of 30 obtained from the crime scene, were found matching with that of the accused 2 and 3.

151. When cross-examined by counsel for the 1st accused, PW38 deposed that only five chance prints could be matched with that of accused 2 and 3. Stated precisely, four prints matched with the 2nd accused's impressions and one with the 3rd accused. Lot of questions were asked regarding remaining 10 chance prints. PW38 answered that remaining 10 chance prints did not tally with anyone. All the prints were compared with the records kept in the Finger Print Bureau, but he could not find any of them tallying with the recorded finger prints.

152. When cross-examined for the 5th accused, PW38 affirmed that he had gone to the place of occurrence and he was very much involved in the process of taking finger impressions. One of the main contentions raised by the learned senior counsel for the accused 3 to 5 is that no contemporaneous report was submitted by PW38 to show that he had collected finger impressions on 24.12.2012 itself. It is pointed out that

Ext.P79 is dated 09.01.2013 and Ext.P80 is dated 15.03.2013. According to the learned counsel, chance of the investigating officer manipulating finger impressions after arresting the accused persons on 05.01.2013 cannot be ruled out. Such a possibility is multiplied for the reason that on 09.01.2013 the accused were in police custody. It has come out in evidence that after apprehending the accused, they were taken to the crime scene and to the nearby house of PW3. For these reasons, the learned counsel argued, the chance prints said to have been obtained on 24.12.2012 should have been mentioned in a report promptly made and absence of such a report would cast a serious doubt in the prosecution case.

153. According to PW38, he received finger print slips of the accused only on 09.01.2013. It is common knowledge that without taking finger print of the suspect, the chance prints obtained from a crime scene could not be compared. If we go by PW38's evidence, the chance prints taken on 24.12.2012 could be analysed for the first time on 09.01.2013 because he received the finger print slips of the accused only on 09.01.2013. To a specific question, he repeated his stand that finger print slips of the accused reached in the Finger Print Bureau only on 09.01.2013. Therefore, we cannot discard the testimony of PW38 and the materials in Exts.P79 to P83 series for the reason that there is no contemporaneous report to show that finger prints were collected from the scene of occurrence on 24.12.2012 itself. This is all the more clear from

reliable testimony of PWs 71 and 38.

154. Another line of cross-examination is that the report did not show from where the chance prints were obtained. According to PW38, chance prints were taken from various parts inside the house and they did not specifically state as to which chance print was taken from which particular place. In our view, that may not be a reason to discard the testimony of PW38 and contents of the reports which are found to be reliable otherwise. Possibility of police officers manipulating finger prints of the accused is also denied by this witness.

155. PW65 S.Anil is the Tester Inspector, Single Digit Finger Print Bureau, Thiruvananthapuram City. He has no case that he inspected the crime scene along with PW38, Shri Shiburaj (Finger Print Expert) and Shri V.V.Vivekanandan (Finger Print Searcher). They collected 30 chance prints and PW65 examined them. He prepared Ext.P79 preliminary report. It bears his signature. He also deposed that 15 chance prints were found unfit for comparison. PW65 agreed with the opinion of PW38. PW65 forwarded a report to the Assistant Commissioner of Police, Crime Detachment, Thiruvananthapuram City. Ext.P83 is the report. Although the chance prints were collected on 24.12.2012, their detection could be done only after receipt of the finger prints of the suspects. Testimony of this witness, along with that of PW38, would support the prosecution case that 15 out of 30 chance prints collected from the crime scene were closely examined with the finger impressions of the accused persons obtained

after their arrest and the finger impressions reached the Finger Print Bureau only on 09.01.2013. On the same day, PW65 submitted Ext.P79 report. Therefore, we find no infirmity in not submitting a contemporaneous report any day before 09.01.2013 as contended by the defence. Presence of the accused 2 and 3 in “Omkar” on the date of occurrence is fortified by the testimony of these two witnesses and reports mentioned above. It is true, the prosecution has a case that some of the accused persons had visited “Omkar” on earlier occasions as well. However, the defence has no such case. Accused 2 and 3 do not admit that they ever went to “Omkar”. In the light of these materials, we are not inclined to accept the arguments that the chance prints might have developed at various places in “Omkar” on account of the accused's previous visits. Therefore, presence of accused 2 and 3 in the house on 24.12.2012 is largely probabilised by recovery of the chance prints from the crime scene.

156. Learned senior counsel for the accused 3 to 5 drew our attention to Kerala Police Circular No.15/99 (No.D12-13079/88 dated 11.07.1988) and Circular Memorandum issued from the Office of the Additional Director General of Police, Modernisation, States Crime Records Bureau, Thiruvananthapuram dated 05.06.1996. In Circular No.15/88, details regarding functioning of Single Digit Finger Print Bureau has been delineated. As per Clause 17, as and when a print is identified at Single Digit Finger Print Bureau, a report of identification should be sent to court immediately. This shall be followed by expert's opinion with

photographic enlargements of the relevant prints within a fortnight. In this case, we have seen that the directions in Circular No.15/88 have been complied with by PWs 38 and 65.

157. From Circular Memorandum dated 05.06.1996, it is pointed by the learned senior counsel that if finger print impressions are not identical the reasons for non-identity (difference in pattern, ridge characterisation, etc.) should be noted in the written opinion. On this basis, it is argued that no valid reason has been mentioned by the experts for discarding 10 chance prints out of 15 selected for examination. PWs 38 and 65 have clearly mentioned that despite their earnest efforts, they could not unearth identity of the maker of those prints. For these reasons we are not inclined to accept the defence case relating to procedural violations in collecting and examining the finger prints from the crime scene.

158. Now, we may move on to another important circumstance brought out against the accused. Prosecution heavily relied on the CDRs to connect the accused with the crime. Evidence tendered by the prosecution witnesses in this regard was accepted by the trial court. In fact, the prosecution has a case that accused 1 and 3 have made preparations for committing the offences by forging documents to secure a mobile phone connection bearing no.7411790579. Call data pertaining to this number from 11.12.2012 to 31.12.2012 has been produced (Ext.P141). It is duly certified under Section 65B of the Evidence Act. Ext.P142 series are the reports showing call details in respect of the aforementioned phone

number. Ext.P114 is a mahazar prepared by PW71 for recovering call details relating to mobile phone nos.9902827088, 7411790579 and 8891553507.

159. In view of Section 40 IPC, an attempt to commit an offence constitutes an offence and in the absence of an express provision as to punishment for attempt, it is punishable with the aid of Section 511 IPC. But, preparation, except when it is a dacoity, simplicitor is not an offence. Dividing line between preparation and attempt is really thin. It has to be decided with reference to the facts and circumstances in each case whether an act would amount to a mere preparation to commit an offence or an attempt. Prosecution has a case that the accused had made lot of preparations before committing the offence and securing a mobile number by perpetrating forgery is one of the instances of preparation. Other instances shall be dealt with in the succeeding paragraphs.

160. 1st accused plainly admitted that at the material time he was using two mobile phones bearing nos.9946938127 and 9447952699. He strongly denied any connection with mobile phone no.7411790579.

161. In order to prove that the 1st accused secured mobile no.7411790579 through the help of the 3rd accused by perpetrating forgery, prosecution examined PW9 Praveen, PW21 Viswanathan and PW30 Remesh M.K.

162. PW9 at the relevant time was residing in a house at Poneth Lane, Near Deshabhimani Junction, Ernakulam. He was working as DTP

operator in an internet cafe by name “Net Master”, Kaloor. Said business concern used to undertake DTP works and other works relating to scanning, printing, photostat, spiral binding, etc. There was facility for sending e-mails as well. PW9 deposed that he had three mail IDs, viz., praveen2671981@gmail.com., praveenc.1981@gmail.com. and praveenc.1981@yahoo.com. According to him, praveen2671981@gmail.com. was created by him for his official purposes and other two are his personal mail IDs. He was questioned by police as he had acquaintance with the 1st accused prior to the incident. PW9 deposed that the 1st accused used to come to his internet cafe for sending e-mails and photos of gems and diamonds. 1st accused used mobile nos.9946938127 and 9447952699 to contact him. On one day, 1st accused and another man came to his internet cafe with a driving licence and a passport size photograph. Photo pasted on the driving licence was indistinct and hazy so that holder of the licence was not identifiable. Hence the 1st accused and the other person demanded PW9 to paste the passport size photo in the place of the unclear photograph. According to PW9, the 1st accused told him that the blurred photo was that of the person seen in the passport size photograph and he wanted to have a proper licence. Believing his words, PW9 scanned the photograph and pasted it on the driving licence. He created an image file by scanning the photograph and imprinted date of birth shown in the driving licence and then it was sent to an e-mail ID, viz., rekhilsurya@gmail.com., as instructed by the 1st

accused. Prosecution case is that the above e-mail ID is that of the 3rd accused. PW9 testified in the same manner before a Magistrate under Section 164 Cr.P.C. which is marked as Ext.P4.

163. Later, police officers from Vattiyoorkavu Police station came to his internet cafe, along with the 1st accused. The computer hard disk which was used by PW9 was seized. A mahazar was prepared for that purpose and his signature was obtained. PW9 was directed to appear for giving a statement before Dy.S.P., Peroorkkada. On 06.03.2013 he appeared and he was taken to an internet cafe by name “Megabite”, Peroorkkada. At that time, Dy.S.P. and Cyber Cell Officers were present. PW9's mail box was opened by using password given by him and screen shots of the mails that he had sent were taken. 14 pages were taken as screen shots. A mahazar was prepared for seizing the screen shots. That mahazar is Ext.P5. 14 screen shots taken at the instance of PW9 as above is marked as Ext.P6 series. PW9 emphatically deposed that the photographs seen on Exts.P6(a), P6(c) and P6(d) are the same as the photograph brought by the 1st accused. Ext.P7 image file was also identified by this witness.

164. Learned counsel for the 1st accused extensively cross-examined this witness. When suggested that police might have threatened to arrest and detain him unlawfully, he denied the suggestion and said that he had no fear of retribution by police. Defence case that PW9's conduct amounted to forgery cannot be accepted when we consider his evidence in its entirety. PW9 asserted that he was misled by the 1st accused and he

never intended to create a false document. He has gone to the extent of saying that he landed in trouble only because of the misrepresentations by 1st accused. Suggestion that PW9 is an accomplice to the alleged forgery is stoutly denied by him.

165. When cross-examined by counsel for the 3rd accused, he denied the suggestion that police threatened him to create a false document and Ext.P6 series are falsely created by him. Despite lengthy cross-examination, no material could be brought out to impeach his credibility.

166. PW21 Viswanathan was a tractor driver hailing from Karnataka. Prosecution case is that through some dubious means, the 3rd accused obtained a photocopy of PW21's driving licence and the accused 1 and 3 together pasted photo of K.N.Venugopalan, mentioned in Ext.P48, to create a false ID proof. PW21 deposed that his date of birth is 18.05.1985. His driving licence was issued in the year 2009. It was issued from Kolar District in Karnataka. He was questioned by Karnataka police as well as Kerala police. PW21 stated that the person seen on the photographs affixed on Exts.P6 series and P7 was not known to him. But, address shown in those documents was that of PW21. Date of birth shown in Ext.P7 did not tally with his.

167. In cross-examination, PW21 deposed that his original driving licence was not lost and only a xerox copy of the original licence was found missing. Since he was in possession of the original licence, he did not file

any complaint to police. PW21 deposed that his lost xerox copy of the driving licence was having a black and white photo. In spite of tenacious cross-examination, testimony of this witness remains credible and it shows that the screen shots of driving licence included in Exts.P6 series and P7 did not belong to him though they showed his address. Prosecution has a definite case that these false documents are used by the accused 1 and 3 for securing mobile phone no.7411790579.

168. PW30 is the Senior Manager, Canara Bank, Kannur. He was cited to prove the account opening form pertaining to K.N.Venugopalan, whose photograph was used by the accused 1 and 3 to forge a driving licence in order to furnish as ID proof for taking a mobile phone connection. PW30 proved Exts.P47 and P48. Account opening form and statement of accounts including ID proof pertaining to K.N.Venugopalan were proved through this witness. When Ext.P6 series were shown to this witness, he deposed that the photographs in Exts.P47 to 49 looked similar to those in Ext.P6 series.

169. Even though this witness was searchingly cross-examined, no material could be elicited to discard his testimony.

170. PW41 Sujith is the son-in-law of K.N.Venugopalan, whose photograph was seen affixed on Ext.P6 series. When Ext.P6 series were shown to PW41, he identified K.N.Venugopalan's photo. PW41 further deposed that his father-in-law was maintaining an account with Canara Bank, Kannur. Photographs seen on Exts.P48 and P49 were also identified

by this witness as that of K.N.Venugopalan. As per Ext.P85 mahazar, a ration card pertaining to K.N.Venugopalan was seized by the investigating officer. In spite of cross-examination, credibility of this witness could not be shaken.

171. Learned prosecutor relied on the testimony of these witnesses and the documents referred to above to contend that there are clear indications of perpetrating forgery by accused 1 and 3 for falsely creating documents to secure a mobile connection. As mentioned above, despite lengthy cross-examination, the allegations came out through these witnesses, supported by documents, remain unshaken.

172. We may make a mention of Ext.P129 series and testimony of PW54 for the sake of completion of this discussion. Ext.P129 series would show that two sheets of questioned documents (Q1 to Q5) and 18 sheets of standard documents (S1 to S18 and A1 to A6) were sent for examination to the FSL, Thiruvananthapuram. PW54 Dr.Sumi Mitra S., who was working as Scientific Assistant (Documents) submitted Ext.P129 report. It is the prosecution case that the prepaid customer application form submitted for obtaining mobile connection bearing no.7411790579 was filled up in the handwriting of the 3rd accused. Specimen standard writings were obtained from him on 16.03.2013, while he was in custody, on separate sheets marked as S1 to S18. Questioned handwritings on the application form were also examined by PW54. Result of examination is the following:

"2. The person who wrote the blue enclosed standard writings stamped and marked S1 to S18 probably also wrote the red enclosed questioned writings similarly stamped and marked Q1 and is subject to the verification of the original writings.

3. It has not been possible to arrive at a conclusion regarding the nature of alteration on the red enclosed questioned item stamped and marked Q2 in comparison with that of the blue enclosed standard items similarly stamped and marked A1 & A2 although the date of birth appears as 18/05/1965 and valid till date appears as 10/03/2028 (NT) in the questioned item stamped and marked Q2 and is subject to the verification of the original questioned document.

4. It has not been possible to express any definite conclusion regarding the production of the red enclosed questioned item stamped and marked Q3 in comparison with that of the blue enclosed standard items similarly stamped and marked A3 & A4.

5. It has not been possible to arrive at any definite conclusion regarding whether the photographs in the red enclosed questioned items stamped and marked Q4 and Q5 and the blue enclosed standard items similarly stamped and marked A5 & A6 are of same person or not."

In the report, reasons for her findings are substantiated.

173. When PW54 was examined, she proved the report. When it was suggested to PW54 in cross-examination that the writings on Ext.P129(c) series and the sample writings S1 to S18 are different and

therefore they could not be by a common author, she answered that in the standard writings, reasonable variations alone were noticed. True, examination of handwriting cannot be said to be a perfect science. Evidence tendered by this witness may not be conclusive, but it probabilises the prosecution case.

174. Now, coming back to the question, whether the 1st accused used mobile phone no.7411790579?. When examined, PW11 Jaimol @ Pooja deposed that her phone number at the material time was 9947134421. Mobile phone used by PW10 Archa was bearing no.9656967625. PW67 Ramachandran worked as Nodal Officer, Idea Cellular Ltd, Kerala Circle. He deposed after looking into the call details pertaining to mobile phone no.9947134421 from 24.10.2012 to 31.12.2012. ID proof given for securing this number by PW11 is marked as Ext.P10. CDR is proved through this witness and marked as Ext.P163. He asserted that the CDR has been certified under Section 65B of the Evidence Act (Ext.P163(a)).

175. PW67 deposed that at the relevant time, Airtel mobile phone subscribers had no 3G facilities because the company had no licence. Therefore, 3G subscribers of Airtel used Idea net work. When Ext.P86(a) was shown to this witness, he deposed that one Sajith had submitted an application for Airtel prepaid connection. He was examined as PW42. At the time of chief-examination, he deposed that he submitted Ext.P86 series application along with a copy of driving licence as ID proof for getting an

Airtel connection. It is his case that 9995225462 was the mobile number allotted to him as per Ext.P86 series. He used the said number only for a short period. Thereafter he kept the sim card in his house. Later, it was given to the 3rd accused. According to the prosecution, PW42 lost the sim card and it was somehow obtained by the 3rd accused. But, this prosecution case was not supported by PW42.

176. PW67 proved Ext.P165 series showing the call details pertaining to mobile no.9526752380.

177. Prosecution case that the 3rd accused used mobile no. 9995225462, subscribed by PW42, is probabilised by the testimony of these witnesses and records.

178. It has come out through the testimony of PW67 that one Libin George was the subscriber in respect of mobile phone no.9961930763. Call details pertaining to this number from 11.10.2012 to 31.12.2012 is produced and marked as Ext.P166. This call details had been certified under Section 65B of the Evidence Act and marked as Ext.P166(a). Ext.P14 is the application form for the mobile connection submitted by Libin George to Idea Cellular Ltd. Prosecution case is that this number was used by the 2nd accused. Libin George is examined as PW13. He admitted that he had an Idea Cellular connection bearing no.9961930763. But, he lost the sim card in respect of the above connection. He came to know of that fact only when police questioned him on the Christmas day in 2012. He made the last call from 9961930763 on 21.10.2012.

179. Prosecution wanted to establish that the said phone connection subscribed by PW13 came into the hands of the 2nd accused.

180. PW67 proved further that mobile no.9656967625 was subscribed by PW10 Archa. Ext.P167 series are the documents pertaining to this phone number. PW67 deposed that mobile no.8606516539 stood in the name of the 2nd accused Ajeesh. This fact is spoken to by PW10 as well. Ext.P168 series are the documents pertaining to this phone number.

181. In the cross-examination, this witness, relying on the materials produced, adhered to the versions spoken in the chief-examination and therefore, we find no reason to disbelieve him.

182. PW16 Aji Mathew Varghese was questioned by police in connection with this case. He was the room mate of the 5th accused. In the chief-examination, this witness testified that by using his ID card, 5th accused had taken an Airtel connection bearing no.9008446019. 5th accused was using a Tata Docom mobile connection too. According to him, the service provider charged the 5th accused exorbitantly and therefore he decided to take another connection for which he obtained ID card from PW16 since he had no document to prove his identity. This witness identified the 5th accused from court. PW16 deposed that he met the 5th accused lastly 4-5 days before Christmas in 2012. When enquired, PW16 understood that the 5th accused had gone to his native place. PW16 knew the accused 3 and 4 as they were his senior students. This witness also gave a statement under Section 164 Cr.P.C. Despite cross-examination on

this witness, his testimony that the 5th accused was using mobile phone no.9008446019 taken in his name could not be effectively challenged. This case is supported by PW29 Lithin, who is said to be a friend of 5th accused.

183. PW45 Sanal was the Nodal Officer in Vodafone Cellular Ltd. at the material time. He produced the call details and application form including ID proof pertaining to mobile phone no.9946938127 (used by the 1st accused) and 9946349097(used by the 4th accused). These documents relate to a period between 11.10.2012 to 31.12.2012. This witness proved Ext.P90 series. Ext.P90 is a letter given by this witness to the District Police Chief. The call details are also certified under Section 65B of the Evidence Act which is marked as Ext.P90(a). PW45 deposed that 9946938127 is the number subscribed by the 1st accused. Application form, identity form, subscription form, etc. are proved through this witness and marked as Ext.P91 series. Mobile phone no.9946349097 was issued to the 4th accused. Ext.P93 series are the customer application form and other documents submitted by the 4th accused. Call details pertaining to the 4th accused's phone is marked as Ext.P94 series.

184. When asked, PW45 answered that in order to co-relate the cell ID shown in Ext.P94 with tower name in Ext.P95, one will have to look into the 15 digit code number indicating the tower location where the subscriber was located at a given point of time. This witness answered that each tower has a unique cell ID code. Those cell ID codes, decoded with reference to the corresponding location, are shown in Ext.P95. During

examination he deposed that mobile phone no.9946938127 (used by the 1st accused), shown in Ext.P92, was at Eroor-Ernakulam on 17.10.2012 between 10.57 to 11.02 a.m. as per the cell ID location. To a specific question, PW45 answered that mobile number used by the 1st accused was at Eroor between 7.49 to 7.53 a.m. on 24.10.2012. Likewise, he proved various entries in Exts.P94 and P95 pertaining to the mobile number of the 1st accused to show that he was moving from one location to another on various dates. Important answer elicited from this witness is that on 24.12.2012, mobile phone used by the 1st accused was moving from one place to another covered by various towers. From 10.03 a.m. to 11.12 a.m. the 1st accused's mobile phone was moving from one place to another in Thiruvananthapuram. At 10.03 a.m. on 24.12.2012, the 1st accused's phone no.9946938127 was within the area of a tower at Pettah, Thiruvananthapuram. At 10.40 a.m. the phone reached within the range of Capital tower. At 10.44 a.m. the phone was at General Hospital Junction, Thiruvananthapuram. Again at 10.57 a.m. the mobile phone went to a location near Capital towers, Thiruvananthapuram. From 10.59 a.m. to 11.12 a.m. the said phone, as per Ext.P95, was within Pulimoodu tower. PW45 stated that in order to verify the IMEI number in a mobile phone and IMEI number in the CDR, one has to refer to the 14 digits in the 15 digits number and the last digit is irrelevant because it will always be zero.

185. This witness was subjected to strict cross-examination. Learned counsel for the 1st accused elicited answers from this witness that

the 1st accused's mobile number was moving between Thiruvananthapuram Airport, Veli, Mannarkonam, Kanjirampara and M.G.Road, Thiruvananthapuram on 27.11.2012. This witness stated that when commissioning each tower, 15 digit cell ID (mobile switching centre) will be updated. As per Ext.P92, on 24.12.2012, the first outgoing call emanated from the 1st accused's phone no.9946938127 was at 12.15 a.m. (night) and it was dialled to 8606516539 (2nd accused's number). The call was made from Jewel Plaza, Kochi. Various calls received and sent out of this mobile number was put to this witness by the learned counsel for the 1st accused during cross-examination for which he gave satisfactory answers explaining the location of the phone. At 7.03 p.m. on 24.12.2012 the 1st accused's mobile was within the range of Raiban, Alleppey. Defence suggestion that certain calls received by the 1st accused during a long time interval were intentionally omitted from listing is denied by this witness.

186. Learned counsel for the 4th accused also cross-examined this witness to bring out a possibility that the entries in the above documents could be wrong. But, after cross-examination, we find no material elicited either to disbelieve him or to find the CDR undependable.

187. PW59, Marshal D'cunha was the Nodal Officer in Tata Tele Service Ltd. He produced the call details pertaining to three mobile phones bearing nos.9902827088, 7411790579 and 8891553707. It is pertinent to note that 9902827088 was used by the 4th accused. 8891553707 was used by PW15 Roshan. Documents pertaining to mobile no.9902827088 (used

by the 4th accused) are marked as Exts.P135 and P136 series. Ext.P137 series are the CDR pertaining to the above number used by the 4th accused. Cell ID list relating to this phone is marked as Ext.P138. This number was last used on 29.11.2012. It was seen that the number was roaming in Kerala circle. Thereafter, the connection became live again on 26.12.2012. At that time, it was within Karnataka circle from where it was issued. In Ext.P137, it is mentioned that when cell ID was decoded, the said number used by the 4th accused was located at Kaloor, Ernakulam. Same phone was found active on many days within Eroor-Ernakulam as well. Said phone number could be located near Penta Menaka and Jawahar Lal Nehru Stadium, Ernakulam. Phone used by PW15 bearing no.8891553707 was issued to him as per the records produced. Those documents are marked as Ext.P139. CDR relating to this phone is Ext.P140. Customer application copy is Ext.P20. This witness certified the CDR pertaining to mobile no.7411790579. That is marked as Ext.P141. Ext.P142 series are the call details regarding phone no.7411790579.

188. This witness was cross-examined thoroughly by the defence counsel. But, no material could be elicited to show that the documents produced and explained by him are unreliable. Though questions were put regarding his competence to certify the entries under Section 65B of the Evidence Act, we find no reason to doubt his authority.

189. In this context, we may refer to the testimony of PW15. He was working as salesman in Doha Mobiles, Penta Menaka, Ernakulam.

According to his testimony, they were dealing with cheap mobile phones, viz., some brands of Nokia and some handsets manufactured in China. He deposed that two persons purchased mobile phones from his shop in 2012 and they purchased two phones, one a base model manufactured by Nokia and the other one manufactured in China. He identified accused 1 and 2 from the dock and deposed that they were the persons who purchased the phones. According to him, he did not issue any bill for the purchase, but he entered the details of sale in a note book. Ext.P19 is the mahazar pertaining to seizure of this note book. This witness admitted that his phone number, at the material time, was 8891553507 as stated by PW59.

190. When cross-examined, this witness mentioned that so many customers used to come to his shop and he had no special reason to remember accused 1 and 2. It would be impossible for him to identify all the customers who purchased phones in November, 2012. As pointed out by the learned counsel for the accused, it may be difficult to rely on his testimony to find that the accused had purchased phones from him and he remembered their identity even without any special reason. Even if we discard his testimony, it may not affect the strength of prosecution case relating to use of the mobile numbers referred to above.

191. PW60 worked as Deputy General Manager, BSNL during the relevant period. While he was working as the Nodal Officer, as directed by the District Police Chief, he produced certified CDRs pertaining to 9447254165 (subscriber - Rajesh Kumar and used by Geetha (PW3)),

9447952699 (subscriber - Sreejith and used by 1st accused), 9447144431 (subscriber - Dr.Bharath Chandran and used by the 6th accused) and 9447972718 (subscriber and user - deceased Harihara Varma). Documents pertaining to mobile phone no.9447254165 is Ext.P143 series. Certificate attached to CDR relating to mobile phone no.9447952699 (1st accused's phone) is Ext.P144. CDR is Ext.P145 series. Certificate pertaining to mobile no.9447972718 is Ext.P148 and CDR is Ext.P149 series. Despite cross-examination, nothing could be brought to discard his oral and documentary evidence.

192. PW64 Vasudevan was Nodal Officer, Bharathy Airtel Ltd., Kerala Circle. As directed by the District Police Chief, he produced subscribers details and CDR pertaining to three mobile phone nos.9995225462 (subscriber - Sajith P.V. and user 3rd accused), 9633254448 (subscriber and user Haridas, 6th accused) and 9008446019 (subscriber - Aji Mathew Varghese and user 5th accused). This witness also proved Ext.P86 series in respect of mobile no.9995225462 used by the 3rd accused. The documents pertaining to this mobile phone are marked as Ext.P154 series. Documents relating to mobile no.9633254448 are marked as Ext.P155 series. Documents relating to mobile no.9008446019 are Ext.P156 series. Call details in respect of this phone is marked as Ext.P157. Certification under Section 65B of the Evidence Act attached thereto is Ext.P158(a).

193. This witness was subjected to a tough cross-examination by

the counsel for the 5th accused. Even though it was attempted to bring out from this witness that the 5th accused's phone was not covered by the CDR, he denied the suggestion. Similarly, after cross-examination by the accused 4 and 6 also, no reason could be brought out to discard his testimony.

194. To buttress the prosecution case that CDRs and other documents produced will reveal movements of the accused together days before, on the date of incident and after the incident, the prosecution heavily relied on the testimony of PW52 Manikantan. He was a Civil Police Officer working in the Special Investigation Support Team constituted by Thiruvananthapuram City Police. As directed by the investigating officer, PW52 and CW91 prepared a mobile phone analysis report and produced it before the investigating officer. At the time of trial, marking this report was seriously opposed by the defence counsel. Nonetheless, the trial Judge, after overruling the objections, marked the report as Ext.P127. It can be seen from Ext.P127 that 14 phone numbers, including the controversial no.7411790579, were analysed. PW52 deposed that call data records pertaining to 14 phone numbers mentioned by the investigating officer were closely examined. For preparing Ext.P127, the decoded tower location was also verified. Ext.P145 series would show the tower locations in respect of mobile no.9447952699 from 11.10.2012 to 31.12.2012. Tower locations in respect of mobile no.9447144431 could be seen in Ext.P147 series. Tower locations relating to mobile no.9447972718 are contained in

Ext.P149 series. Similarly, Ext.P159 certificate issued would show the tower locations in respect of Airtel mobile phone nos.9995225462 and 9633254448 and Karnataka mobile no.9008446019. These phone numbers were issued in the names of Sajith P.V. (PW42), Haridas K. (6th accused) and Aji Mathew Varghese (PW16) respectively. Ext.P169 is the decoded list relating to Idea Cellular Ltd. phone numbers.

195. According to this witness, he only compiled the data contained in the documents and submitted it before the investigating officer.

196. Learned counsel for the accused strongly objected to this document by contending that PW52 was neither an expert in cyber forensics nor had the authority of an investigating officer. Refuting these contentions, learned prosecutor, relying on Section 168 Cr.P.C., contended that the investigating officer is empowered to direct any subordinate police officer to do any act relating to the investigation under Chapter XII of the Cr.P.C. and in that event, the subordinate officer shall report the result of such investigation to the investigating officer. Viewing from this angle, Ext.P127 cannot be said to be one prepared by PW52 without any authority. When cross-examined, he deposed that he is a graduate in Sociology and passed some computer courses. As part of police training, he had undergone telecommunication training as well. He further deposed that Ext.P127 is prepared in the computer installed in the Office of the Circle Inspector, Peroorkada. True, prosecution has the responsibility to prove the relevance of entries in Ext.127, but the investigating officer's

authority to entrust a portion of the investigation to PW52 and his compilation of data from various records collected during the investigation cannot be questioned.

197. PW52 deposed that Ext.P127 contains details pertaining to locations of mobile phone nos.9008446019, 9633254448, 9995225462 (Bharati Airtel Ltd.), 9447952699, 9447972718 (BSNL), 8606516539, 9526752380, 9656967625, 9947134421, 9961930763 (Idea Cellular Ltd.), 7411790579 (Tata Tele Ltd.), 9946938127 and 9946349097 (Vodafone Cellular Ltd.). Besides, he had examined the locations of phone no.9995225462 which was drawing 3G service from Idea Cellular Ltd.

198. In chief-examination, this witness deposed that from Ext.P127 which are the phones found within the coverage area of a particular tower at a given time could not be found out. One of the obvious reasons is that call details scrutinised were in respect of various mobile phone services provided by different companies. Secondly, at a particular area, there can be signal overlapping from two adjacent towers. It is also argued for prosecution that if signal from a particular tower was weak and the same from a distant tower happened to be strong, then a phone might pick up signal from the stronger tower and for that reason there could be approximation in locating the position of a subscriber at a given point in time.

199. Questions relating to locations of various phones at various dates and times were put to this witness. What is most relevant is the

presence of the phones, said to have been used by the accused, together on 24.12.2012 and whether they were present in the same area at a given point of time. With reference to Ext.P127, PW52 deposed that on 17.10.2012 between 10.57 to 11.05 a.m. mobile nos.9946938127 (used by the 1st accused) and 8606516539 (used by the 2nd accused) were within Eroor tower location. On 24.10.2012 between 6.50 and 16.31 hours, mobile phone numbers used by accused 1 and 2 along with 9656967625 (used by PW10 Archa) and 9947134421 (used by PW11 Jaimol @ Pooja) were within Eroor tower location. This probabilises the evidence tendered by PWs 10 and 11 that they resided in “Smayana” at Eroor, a house admittedly taken on lease by the 1st accused.

200. Similarly, on 03.11.2012 between 11.07 and 17.25 hours, the mobile phones of accused 1 and 2 and PWs 10 and 11 were also located within Eroor tower. On 04.11.2012 between 21.51 and 23.49 hours, mobile phone no.7411790579, 2nd accused's admitted number, PW10's number and PW11's number were found within Eroor tower location. Prosecution has a case that one of the places from where conspiracy to commit the crime was brewed is the house by name “Smayana” at Eroor, Ernakulam. Conspiracy angle of the case will be discussed separately.

201. Admitted mobile numbers of the 2nd accused and PW11, along with mobile no.7411790579, were found within a tower at Pathirappally in Alappuzha between 15.45 and 16.35 hours on 05.11.2012. Another important evidence tendered by this witness is that on 07.11.2012 between

10.25 and 12.24 hours, mobile no.7411790579, 1st accused's admitted mobile nos. Viz. 9447952699 and 9946938127, 2nd accused's admitted mobile no.viz. 8606516539, PW10's admitted mobile no. viz. 9656967625 and PW11's admitted mobile no.viz. 9947134421 were again within Eroor tower. PW52 deposed that the 1st accused's admitted mobile numbers and the disputed mobile no. viz.7411790579, which the 1st accused said to be using, along with the mobile numbers of other accused could be seen on various dates moving together under the same tower locations. In this context, it is to be remembered that the witnesses mentioned above and the documents referred to earlier would show that the accused 1 and 3 together secured mobile no.7411790579 by submitting forged documents. Movements of mobile no.7411790579 along with the admitted numbers of the 1st accused and other accused persons probabilise the prosecution case that fraudulently obtained number was also used by the accused for camouflaging their identity.

202. On 27.11.2012, between 8.03 and 9.16 hours, the disputed no.7411790579 could be seen along with the admitted numbers of the accused 1, 3 and 4, deceased Varma and that of PW10 Archa. At that time, mobile no.9961930763 alleged to have been used by the 2nd accused was also present under the tower locations at Kaniyapuram, Veli, Sankumugham Beach, Vanchiyoor, Kochuveli and Thiruvananthapuram Airport. On various dates, the mobile phone numbers used by the accused persons were located within various parts of Thiruvananthapuram City,

according to the testimony of PW52.

203. PW52 stated that on 23.12.2012 between 11.20 and 19.14 hours, mobile nos.9961930763 (said to have been used by the 2nd accused), 8606516539 (2nd accused's admitted number), 9946349097 (4th accused's number), 9008446019 (5th accused's number) and 9526752380 (admitted number of PW29) were within Eroor tower location. This probabilises testimony of PW29 asserting his presence at "Smayana" and conspiracy contrived between the accused, which we shall deal with later.

204. On the above mentioned day, between 20.23 and 21.55 hours, mobile no. viz. 9961930763 (said to have been used by the 2nd accused), admitted mobile number of the 1st accused, viz. 9946938127, admitted mobile number of 2nd accused, viz. 8606516539, admitted mobile number of 3rd accused, viz. 9995225462 and 9008446019 (5th accused's mobile number) were found within the area of a tower at Kaloor, Ernakulam. On 24.12.2012 at 4.36 a.m., mobile no.7411790579 could be seen located within Kaloor Stadium tower. On the same day between 10.17 and 11.13 hours, the aforementioned mobile number was located near Ayurveda College Junction, Thiruvananthapuram and also at Vanchiyoor North, Thiruvananthapuram. On 24.12.2012 between 8.55 and 10.44 hours, the mobile number said to have been used by the 2nd accused, viz.9961930763 was located at Veli, Statue, Pulimoodu and Museum tower at Thiruvananthapuram. On 24.12.2012 between 10.03 and 11.12 hours, the 1st accused's admitted mobile no.9946938127 was found within Pettah,

Capital tower, General Hospital Junction and Pulimoodu at Thiruvananthapuram. On the same day at 10.37 hours, the 3rd accused's mobile no. viz, 9995225462 was within a tower at Statue, Thiruvananthapuram. On that day, between 11.43 and 13.53 hours, mobile no. viz, 7411790579 was found moving between Kanjirampara, Vattiyoorkavu, Mannarkonam, Nettayam, Maruthamkuzhi and Sasthamangalam, all places adjacent to Thiruvananthapuram City and close to the crime scene.

205. Between 10.59 and 13.53 hours on the same day, the number said to have been used by the 2nd accused, viz.9961930763 was travelling from Mannarkonam, Nettayam and Kanjirampara. On that day, between 11.38 to 13.53 hours, admitted mobile number used by the 3rd accused, viz.9995225462 was also found moving between Mannarkonam and Kanjirampara. 5th accused's mobile no. viz., 9008446019 was found at Vattiyoorkavu. 6th accused's mobile no. viz., 9447144431 was found between 9.04 and 9.52 hours at Kanjirampara. On 24.12.2012 between 9.04 and 12.23 hours, the phone number used by deceased Varma, viz.9447972718 was found moving from Kanjirampara to Vattiyoorkavu, Vattiyoorkavu Poly, Nettayam and Kachani. Between 13.04 and 13.46 hours on the same day the 6th accused's another mobile no.viz,9633254448 was within the tower of Nettayam. On that day, between 9.01 and 12.43 hours, mobile phone number used by PW29 was at Eroor, Ernakulam.

206. PW52 deposed that movement of the aforementioned mobile phones, used by the accused, at various places in Thiruvananthapuram would suggest that they reached at Railway station, Thampanoor around 14.00 hours after the incident. Mobile phone no.7411790579, after travelling through Edapazhinhi and Oottukuzhi ultimately reached within Thampanoor tower at around 2.00 p.m. Mobile no.9961930763 (allegedly used by the 2nd accused) also reached Thampanoor Railway station at about 14.00 hours. Thereafter, the phones moved through various places in Kollam and Alappuzha districts and ultimately they reached at Ernakulam. Evidence tendered by PW52 is relied on by the prosecution to show that the accused were engaged in a long drawn conspiracy, spread over for a period of time, and on 24.12.2012, the accused 1 to 5 reached at Thiruvananthapuram. After committing the crime, they came back to Ernakulam. According to the testimony of PWs 4 to 6, accused 1 to 5 hurriedly reached at Thampanoor Railway station to catch a train scheduled for departure around 14.00 hours.

207. When cross-examined by counsel for the 1st accused, PW52 stated that he prepared Ext.P127 towards the end of March, 2013 as directed by PW72. As mentioned above, his authority to prepare Ext.P127 report cannot be questioned as PW72 himself authorized him to prepare the report, by invoking power under Section 168 Cr.P.C. To sum up, it can be stated that testimony of PW52, coupled with the entries in Ext.P127, would probabilise the prosecution case of contriving a conspiracy between

the accused from “Smayana” at Eroor, Ernakulam and also their movements together at various places. It accounts for the presence of accused 1 to 5 in and around the crime scene on 24.12.2012 before noon and their presence at Thampanoor Railway station at about 14.00 hours. This is also one of the links in the prosecution case, which, according to us, has been satisfactorily established.

208. In this context, we may refer to the explanation offered by the 1st accused, when examined as DW2, that he came to Thiruvananthapuram on 24.12.2012 along with his wife and child on a pilgrimage to Sree Padmanabha Swami Temple. In his chief-examination, he deposed that on 23.12.2012 it was “*swargavathil ekadasi*” and that is an auspicious festival in Sree Padmanabha Swami Temple. Since DW2 could not take up a journey to attend the function, he along with his wife and child boarded a train on 23.12.2012 from North Railway station, Ernakulam at 11.30 in the night. DW1 (brother-in-law of 1st accused) also stated so. During the journey, his wife menstruated and therefore he could not take her to the temple. So, he left her at Railway station, Thampanoor. Thereafter, he along with his daughter went to the temple. At that time, his two mobile numbers, viz.9946938127 and 9447952699 were with him. DW2 deposited ₹10,000/- in the account of one Purushothaman from State Bank of Travancore, near Railway station, Thiruvananthapuram. It was at 11.00 a.m. DW2 would say that thereafter he, along with his daughter, went to Sree Padmanabha Swami Temple. After *darshan*, they came back

to Railway station at 1.30 p.m. After his wife had finished her lunch, they went to Museum for sight seeing and they returned at 5.00 p.m. by train and reached at Ernakulam at about 9.30 p.m., This version of DW2, according to the prosecution, was adduced to explain his presence at Thiruvananthapuram on 24.12.2012. It is interesting to note that the case put forward by DW2 (1st accused) was not suggested to any of the prosecution witnesses. If he had a consistent case, certainly it would have been put to the investigating officers at least. Moreover, except his *ipsi dixit*, there is no material available to show that he along with his family had gone to Thiruvananthapuram on 23.12.2012 during night and visited Sree Padmanabha Swami Temple on 24.12.2012. No explanation is furnished by the 1st accused for not revealing such a case at the time of examining the prosecution witnesses. Therefore, we find no merit in the contention raised by the 1st accused that he had gone to Thiruvananthapuram with his family on a pilgrimage.

209. Encapsulating the points discussed above, we state that the prosecution has succeeded in proving that accused 1 and 3 forged documents and by using forged documents, they obtained mobile phone connection no.7411790579. Evidence discussed above will clearly show that the accused 1 to 5 were present in and around Thiruvananthapuram city in the morning on 24.12.2012 and at 14.00 hours they left the city, probably by a train. Entries in the CDRs also probabilise a conspiracy hatched between the accused 1 to 4.

210. Before dealing with evidence relating to conspiracy, we shall consider two other instances relating to the alleged preparations by the accused for committing the crime. If proved, they may fall under Section 8 of the Evidence Act.

211. Prosecution examined PW69 to prove Ext.P172 post-mortem certificate. In the post-mortem certificate, it is mentioned that when PW69 examined the dead body, he noticed small remnants of cotton, sticking to moustache, lips and chin of the deceased. Prosecution has a case that the accused persons closed mouth and nostrils of Varma by a cloth drenched in chloroform. It is the consistent prosecution case that deceased Varma was stupefied by administering chloroform and then immobilised by tying his hands behind.

212. PW14 Dr.Jayadeep V., was cited to prove that the 1st accused had obtained a bottle of chloroform from his dental clinic a couple of months prior to the incident. PW14 deposed that he was running Sheeba Dental Clinic at Peralasseri in Kannur district. On 03.03.2013, police officers from Thiruvananthapuram came to his clinic and asked whether he knew the 1st accused, Jithesh. He answered in the affirmative. Thereafter he was asked to produce the documents and licence pertaining to his dental clinic. A mahazar was prepared on which he signed. PW14 had acquaintance with the 1st accused prior to the incident. He was PW14's patient. Besides, PW14 used to buy electronic goods from the shop where the 1st accused worked as Manager. According to his chief-examination, in

the month of August 2012, 1st accused came to PW14's clinic and demanded a bottle of chloroform for his cousin sister, who was said to be studying in a Medical College at Bangalore. At that time, PW14 had a bottle of chloroform, which he had bought 4-5 years before and kept unused because better drugs were available at that time. PW14 handed over chloroform bottle to 1st accused and he took it away. He identified the 1st accused from court. Ext.P16 mahazar is also proved by this witness. He gave a statement to Magistrate under Section 164 Cr.P.C. which is marked as Ext.P18. PW14 deposed that during yesteryears, chloroform was used in dentistry and thereafter "Xyline" is being used. This chemical is used for root canal treatment and bleaching teeth. When there was inadequate supply of "Xyline" for a short period, distributors informed him that chloroform could be used in its place. PW14 used chloroform only in a couple of cases. When "Xyline" supply was restored, he stopped using chloroform.

213. When cross-examined at the instance of the 1st accused, PW14 stated that he is not related to him. According to his statement in the cross-examination, 1st accused received Chloroform from him during August-September, 2012. Suggestion made by counsel for the 1st accused that PW14 might have handed over unreactive and ineffective chloroform, he answered that chemical property of the compound was not tested by him. Nothing is available on record to show that chloroform kept in a bottle for 4-5 years will be rendered unreactive. Although he was cross-examined

extensively relating to various aspects touching the proceedings in Dentistry, we find no reason to disbelieve his relevant version that the 1st accused had obtained a bottle of chloroform from this witness prior to the incident. Defence suggestion, that if at all the 1st accused had received a bottle of chloroform from PW14, it would have been rendered useless by efflux of time, is not substantiated by any scientific data. This is one of the instances of preparation proved by the prosecution. We cannot discard the testimony of PW14.

214. It is the prosecution case that the accused persons smothered Varma by covering his nose and mouth with a cotton fabric wet with chloroform. In the police report, it is mentioned that the accused held Varma from behind before smothering him. After enfeebling and debilitating him, he was laid on bed in a bedroom adjacent to the dining room from where he was dragged and then throttled him. Investigating officers have a case that cotton cloth and plaster were used for suffocating deceased Varma. Besides, the accused tied his hands by using a cotton rope. These aspects have been deposed to by PW71, the investigating officer. PW71 is the author of Ext.P23 inquest report. There also presence of cotton rope and wrinkled plaster has been mentioned. Dimension of rope is described in Ext.P23.

215. These materials were sent to FSL for analysis. Ext.P132 is the report submitted by the Assistant Director (Physics), FSL, Thiruvananthapuram. PW56 Arya B. was the Assistant Director, FSL and

she proved Ext.P132. As per Ext.P132, along with the ropes and adhesive tapes (plaster) collected from the crime scene, sample rope and adhesive tape (plaster) were also sent for analysis. PW56 deposed that all the rope pieces were similar in nature. But, she opined that it was impossible to say whether the adhesive tapes (plaster) collected from the crime scene were similar to the sample sent.

216. It is the prosecution case that the accused purchased ropes and plaster from Ernakulam with a view to use it upon the deceased. To substantiate this contention, PW31 Saji and PW32 Anoop were examined. PW31 is a witness to Ext.P51 mahazar. As per this mahazar dated 02.03.2013, 2nd accused purchased a piece of rope from Sani Stores, Palarivattom where PW31 worked at that time. On 02.03.2013, a police jeep stopped in front of his shop and a person in handcuffs pointed his fingers towards his shop. That man, accompanied by police, came and asked him whether any other person worked in the shop earlier. PW31 stated that another man was working in the month of December and he joined for job only after the other man had left. Among various ropes kept for sale, the accused pointed out a particular rope. Length of 2 metres from that roll was cut and handed over to police. ₹24/- was given as price for the rope. The rope purchased from him is marked as MO111. Cash bill issued by him is marked as Ext.P50.

217. This witness was subjected to strict cross-examination. PW31 deposed in cross-examination that on 02.03.2013, owner of the shop was

hospitalised. According to his evidence, Sani Stores was a small shop and there was no computer billing system. In cross-examination, it was elicited that it is an ordinary shop with no modern accounting system for sales. True, PW31 did not depose any cogent reason for remembering the customer on 28.09.2013, the date of his deposition, who came to his shop along with police officers on 02.03.2013. Moreover, the prosecution has no case that PW31 is the person from whom the 2nd accused had purchased rope prior to the incident. This rope, along with the pieces of rope obtained from the crime scene, was examined by PW56 and found out similarities.

218. PW32 was working as a part time employee in Mampilly Medical Shop, Ernakulam. During March 2013 he worked in the medical shop. He is a witness to Ext.P52 mahazar. It is his version that one day police brought the 2nd accused to the medical shop and enquired about a particular plaster that the 2nd accused said to have purchased earlier from the shop. PW32 informed police officers that the kind of plaster stated by 2nd accused was not available and within two days he expected delivery of the same. PW32 did not hand over plaster to police. But, later he came to know that somebody in the shop had given a piece of plaster to police. This witness was also subjected to searching cross-examination. We do not attach much significance to testimony of PW32 because he has no case that another piece of plaster of the same kind, as the one recovered from the crime scene, was sold to police in the presence of 2nd accused. Ext.P132 report also shows the dissimilarity in the plasters recovered from

the crime scene and purchased later.

219. These are other instances of preparation, according to the prosecution, done by the accused before committing the crimes. Learned counsel appearing for the accused strongly contended that these are all artificial evidence adduced by the prosecution to fill up lacunae in the prosecution case. Statements on oath given by PWs 31 and 32 do not definitely prove the prosecution case of 2nd accused purchasing plaster and rope. PW31 deposed to the effect that he sold on 02.03.2013 another piece of rope from the same roll. In the case of plaster, there is no reliable material.

220. Further case of the prosecution is that the accused persons' abscondance is a circumstance against them. PW71 deposed that after the incident, accused 1 to 5 left to Bangalore and they were found together in PW27's Paying Guest Accommodation. For a detailed questioning, they were taken to Thiruvananthapuram on 04.01.2013 evening and reached at PW71's office on the next day morning. This aspect is undeniable in the light of overwhelming evidence.

221. As stated above, preparations like fraudulent obtainment of mobile phone bearing no.7411790579, getting a bottle of chloroform from PW14, etc. are pertinent aspects relevant under Section 8 of the Evidence Act. Likewise, the accused fleeing away to a distant place after the occurrence is also a circumstance established to attract the said provision.

222. Another important circumstance alleged and proved against

the accused is the conspiracy hatched by them to commit the crimes. Prosecution heavily relied on the testimonies of PW10 Archa and PW11 Jaimol @ Pooja to prove this contention. It is an admitted fact that the 1st accused, with his family, was staying in a house on rent as per Ext.P76. This house is situated at Poneth Road, Kaloor, Kochi. This fact is deposed to by DW1, Saneesh (brother-in-law of the 1st accused). 1st accused, as DW2, too reaffirmed this fact. Besides, it has come out in evidence that the 1st accused had taken another house on lease, which belonged to PW74 Chandrasekharan as per Ext.P31 lease agreement. This house is "Smayana" and it is situated at Illikkapady, Eroor. DWs 1 and 2 deposed that the house "Smayana" at Eroor was taken on lease for conducting a social organization called "Live Malayalee". 1st accused admitted that the 3rd accused is his first cousin. He had developed friendship with the 4th accused through the 3rd accused. There is no dispute regarding this aspect. According to the testimony of the 1st accused, he had no acquaintance with the 5th accused.

223. PW10 is a Diploma holder in aviation and air-port management. PW10 knew PW11, as she was junior to her by one year in the same institute. They were staying in the same ladies hostel and both were room-mates. Both of them went to Bangalore in search of job. They could not find out a suitable job. They had to work in many firms. At that time, PW10 came into contact with the 2nd accused, who is a friend of PW11. 2nd accused claimed to have been conducting a job consultancy

during the time when PWs 10 and 11 were searching for opportunities in Kerala. As instructed by the 2nd accused, PWs 10 and 11 came down to Ernkulam. PW10 deposed that the 2nd accused called her from mobile no.8606516539. Her phone number was 9656967625. PW10 deposed that on 24.10.2012 both these witnesses came to Ernakulam. 2nd accused was waiting for them in railway station and they were taken to “Smayana” at Illikkapady. After keeping their luggage in the house, on the next day PWs 10 and 11 went to their houses at Vakkom and Ottappalam respectively. She identified the 2nd accused from the dock. From “Smayana”, 2nd accused introduced the 1st accused as his business partner. It was informed that he was engaged in real estate and antique business. She identified the 1st accused at the trial. It is the version of PW10 that the 1st accused frequently visited the house for discussing matters relating to their business. When enquired, accused 1 and 2 informed PW10 that one Harihara Varma at Thiruvananthapuram had precious stones and gems and if there could be a deal, they might get a hefty commission. PW10 admitted that on three occasions she also had gone to Thiruvananthapuram for meeting deceased Varma. On 02.11.2012, PW10 and accused 2 and 3 had gone to Thiruvananthapuram and after reaching at Railway station, they went to Thiruvananthapuram airport. From the airport, 2nd accused called deceased Varma and informed about their arrival. It is significant, the prosecution has a case that the accused persons, except the 1st accused, had been dealing with Varma through

false identities. Prosecution case is that the accused called Varma from airport to impress upon him that they had come from outside the State by a flight. At that time Varma asked them to come to Dubai International Hotel. From there, they met Varma and 6th accused. In a Honda City car, the 6th accused, along with others, had gone to "Omkar" house. On the way, the car was stopped and Varma alighted. After 15 minutes, he came back with a suitcase and then proceeded. On reaching at "Omkar", he showed all the jewels in the suitcase. MO10 black suitcase was identified by this witness.

224. Next time, PW10 along with accused 1 to 4 went to Thiruvananthapuram and again from the airport, they contacted Varma. Thereafter, they were taken to the same house by Varma and 6th accused. All the accused were identified by this witness from the dock. On the second occasion also, Varma showed the stones. Three Ganesh figurines and a green colour stone bar were also shown. By using an electronic weighing machine, the stones were weighed. She identified the material objects, exhibited in the case, as those possessed by Varma. According to her testimony, on the third time, she along with accused 1 to 4, again went to "Omkar". At that time, the 1st accused did not enter the house. 4th accused was introduced as the son of a minister in Tamilnadu Government. PW10's real name was changed and she was introduced as Nikhitha. 3rd accused was introduced in the name, Yogesh. 2nd accused told his name as Premraj. PW10 and 3rd accused were represented to be the staff members of Rangarajan, said to be a relative of a minister in Tamilnadu

Government. It is clear from PW10's testimony that there was a conscious attempt by the accused to fake their identity.

225. PW10 deposed about the phone numbers of accused persons. According to her testimony, 3rd accused was using a mobile no.9995225462. 4th accused was using mobile no.9946349097. 1st accused's mobile number was 9946938127. It has come out in evidence that she also gave a statement under Section 164 Cr.P.C. which is marked as Ext.P8.

226. PW11 supported the testimony of PW10 to a considerable extent. PW11 affirmed that PW10 was her senior when she studied aviation and airport management course at Ernakulam. And they were room-mates. When both of them could not find a suitable job at Bangalore, they decided to come down to Kochi and through PW11's friend Surya, she established contact with the 2nd accused. PW11 testified that phone number in which she contacted the 2nd accused was 8606516539. Her phone number is 9947134421. As instructed by the 2nd accused, PWs 10 and 11 came down to Ernakulam. It is her further version that the 2nd accused deposited ₹10,000/- in her account for defraying their travel expenses. On 24.10.2012, both PWs 10 and 11 reached at Ernakulam and the 2nd accused picked them up from railway station and dropped at “Smayana”. Both PWs 10 and 11 deposed that they resided in the said house. 1st accused was introduced to them by the 2nd accused as his partner. She also deposed alike PW10 that accused 1 and 2, along with

others, were involved in dealing with real estate and antique items business and they came to know about deceased Varma. PW11 further deposed that for their business purposes PW10 had been taken to Thiruvananthapuram. For about 1 ½ months both PWs 10 and 11 stayed at "Smayana". It is the version of these witnesses that by the first week of December, 2012, they shifted to a ladies hostel by name "Lissy Hostel", Ravipuram, Kochi. According to them, they shifted to the ladies hostel since accused 3 and 4 and one Lithin (PW29) came to reside in "Smayana". These two witnesses identified accused 3 and 4 from the dock. PW11 deposed that her last meeting with the 1st accused was during first week of December 2012 when they decided to shift to a ladies hostel and thereafter she did not meet him.

227. She deposed that on 25.12.2012 in the morning the 2nd accused came to her hostel and handed over a bag. He wanted PW11 to keep it in her safe custody. He told her that he was going to get a bus ticket to Bangalore. After two days, 2nd accused called PW11 over phone and informed that he urgently needed the bag. He asked PW11 to bring the bag to Bangalore. PW11 informed him that she had no money to travel. At that time, 2nd accused deposited ₹1,500/- in her account. Thereafter PW11 went to Bangalore and handed over MO23 bag to the 2nd accused from a bus stop at Madiwala. She went to the ladies hostel where she stayed earlier and returned in the next morning. ₹1,500/- was deposited by the 2nd accused in the name of PW11 in an account maintained by her in Punjab

National Bank, Kulappully branch. Account opening form pertaining to PW11 is Ext.P9 series. Ext.P10 is the ID proof for opening the account. The relevant entry for deposit of the said sum is also proved. She also gave a statement under Section 164 Cr.P.C.

228. Testimonies of these witnesses are seriously challenged in cross-examination on behalf of all the accused persons. It was elicited from these witnesses that they knew about Varma's death. PW10, when cross-examined, stated that she was called to Peroorkada police station during first week of January, 2013. She did not remember the date on which she went to police station. Thereafter in the month of March 2013, PW72 questioned her. In cross-examination, PW10 admitted that she had impersonated as Nikhitha when she met deceased Varma. Learned defence counsel put questions to PW10 suggesting that police was about to implicate her too in the crime since her conduct was bordering criminality. She denied it by saying that at no point of time police had suspected her. PW10 had informed her parents that she was going with the accused for a business deal, but she was not aware that she would be presented before deceased Varma with a falsified identity. Even though questions were asked in cross-examination regarding identity of the gems, precious stones, statuettes, bar, etc. produced before the court, PW10 adhered to her version in the chief-examination. In other words, no dent or discredit could be made to her testimony to hold that the articles did not belong to deceased Varma.

229. PW11 stated during cross-examination that in the month of December, 2012 there was only one credit to her account and that was ₹1,500/- on 27.12.2012 deposited by the 2nd accused. On reading through the deposition of PWs 10 and 11, it is clear that these two ladies were frantically in search of job opportunities. It is the prosecution case that their desperate situation was exploited by the accused promising them job. PW11, in the cross-examination by the 1st accused, stated that ₹5,000/- was the salary offered by the 1st accused and it was not acceptable to her. It is also suggested to these witnesses that they were coerced to give a statement before Magistrate under Section 164 Cr.P.C.,which they stoutly denied.

230. It is brought out from PW11 that when she went to Magistrate's court, Nedumangad for giving a statement under Section 164 Cr.P.C., she stayed in the house of a police officer by name Sunil Lal, who was a member in the special investigation team constituted for this case. Suggestion by the defence that she was taken to Magistrate from Sunil Lal's house in the company of a woman police constable is denied and PW11 deposed that she gave the statement at her free will.

231. Likewise, during PW10's cross-examination too it was suggested that Sunil Lal used to talk to her for a long time during night. She admitted that Sunil Lal had called her and one Udayakumar, ASI, Peroorkada had also called her. Similarly, Mrs.Raji, a woman police constable, too had called her. The trend of cross-examination would

suggest a defence case that these two witnesses deposed before the learned Magistrate, under Section 164 Cr.P.C., and testified before the trial court fearing that they would be implicated in the case as accused. It is forcefully argued by the learned counsel for the accused that conduct of these witnesses is amounting to impersonation and cheating. According to PWs 10 and 11, they had no intention to cheat anyone and they were only rendering help to the accused, who promised to find out a suitable job for them in Kerala.

232. PW11, when cross-examined, admitted that she developed contact with the 2nd accused through phone conversations one month prior to her meeting him for the first time at Ernakulam railway station. At his instance, PWs 10 and 11 started residing at "Smayana". PWs 10 and 11 had admitted in cross-examination that Sunil Lal had called them from Muscat and London during progress of the investigation. PW11 deposed that though they stayed in Sunil Lal's house at Thiruvananthapuram, when they went to give statements under Section 164 Cr.P.C., Sunil Lal's sister dropped them in a nearby bus stop and thereafter both of them went to the Magistrate's court on their own. Main thrust at the time of cross-examination was that these two witnesses were aiding the investigation team out of fear of arraigning them in the case. This contention has been denied by them.

233. PW11 deposed that death of Varma was known to them at about 9.30 a.m. on 25.12.2012. After that she went to Bangalore carrying

the bag entrusted by the 2nd accused. When she asked the 2nd accused about Varma's death, he answered that it was unfortunate. In the cross-examination by counsel for the 2nd accused, PW11 clearly stated that she was aware, when she got custody of the bag, that it contained gems and precious stones. She did not move the bag out of her room. PW11 deposed that when enquired about the jewels kept in the bag, 2nd accused informed her that they were purchased by the 1st accused from Mysore.

234. On an evaluation of the evidence of PWs 10 and 11, we are of the view that certain vital aspects relating to the events transpired prior to commission of the crime tending clearly to indicate a conspiracy and certain other events happened immediately after the incident have come to light. Despite a searching cross-examination on these witnesses, they testified that at the instance of the 2nd accused they came down to Ernakulam and started residing at “Smayana”. How they came into contact with accused 1 to 4 have been revealed through their testimony. Accused persons meeting deceased Varma in PW10’s presence and PW11 carrying MO23 bag to Bangalore as entrusted by the 2nd accused are aspects clearly established. However, as contended by the learned counsel for the appellants, it will be desirable to look for corroboration from other sources too in respect of the allegations relating to conspiracy.

235. PW29 Lithin, at the time of trial, was a student in civil engineering diploma course. Earlier, he studied in a technical institute at Bangalore. While he was studying at Bangalore, accused 3 to 5 became

his close friends. He had other friends as well. He identified the accused persons from the dock. According to his testimony, 3rd accused was using a mobile phone with no.9995225462. 5th accused's mobile phone number was 9008446019. While studying, he had worked during vacation as salesman in Surya Electronics, owned by the father of the 3rd accused. While so working, he had developed acquaintance with the 1st accused. 1st accused had two phone numbers, ie., 9447952699 and 9946938127. 1st accused was identified by this witness in court. After dropping out from Bangalore institute, this witness joined the education consultancy run by the accused 1 and 2 at Tellicherry. 3rd accused was also involved in the consultancy. Thereafter, PW29 went back to Bangalore. 1st accused told PW29 that he would inform him when job openings were available. According to PW29, he came to Ernakulam as instructed by the 1st accused during the first week of December, 2012. After reaching at Ernakulam, PW29 waited for the 1st accused in a shopping mall and from there he was taken to “Smayana” at Eroor. At that time, accused 2 to 4 were also present with the 1st accused. Apart from accused 2 to 4, PWs 10 and 11 were also residing in the house. In this context, it is pointed out by the defence that this part of his evidence is contrary to that of PWs 10 and 11, who said that they moved out to a ladies hostel before PW29's arrival. On a comprehensive evaluation, we do not find any reason to judge this witness as a person devoid of credibility, especially based on such an insignificant contradiction. After 25th December, 2012, the 5th accused also

came there. Although there was no job consultancy office opened by the 1st accused at Ernakulam, he promised that it would be started soon. Further, PW29 was informed that the accused were into real estate business and gem trade. PW29 deposed that he heard them talking over phone about one Varma who was a gem merchant. During the first week of December, 2012, accused 2 to 4 packed up their bags and went out in a car. He saw them keeping a plaster and rope in a bag. These items are MOs 24 and 25 and he identified them. By that time, PWs 10 and 11 had shifted to a ladies hostel. On 25.12.2012, PW29 and 5th accused went back to Bangalore from "Smayana". Till then he stayed in that house. Replying to a court question, PW29 deposed that all the five accused persons went to Thiruvananthapuram on 24.12.2012 to meet Harihara Varma. PW29 met them, after their return from Thiruvananthapuram, from the house of 1st accused. 1st accused instructed PW29 to get some petrol in a bottle. Prosecution case is that the mobile phones used by the accused and those of the 6th accused and deceased Varma were burnt to cause disappearance of evidence. After returning to Bangalore on 25.12.2012, PW29 met accused 2 to 4 there on 26.12.2012. They called him over phone when they reached at Bangalore. He met the 1st accused on 27.12.2012 at Bangalore. PW29 had previous acquaintance with PW19 Vijayakumar. He was a real estate businessman. He was working as manager in a private firm. PW29 testified that on 30.12.2012 he met PW19 Vijayakumar in the presence of accused 2 to 4. PW29 deposed that the 2nd

accused handed over some gems to PW19 Vijayakumar and received ₹90,000/-. Later, PW29 came down to his native place for treatment when kidney stone was detected. Thereafter, he knew through television that Harihara Varma was killed and the accused persons were arrested in connection with the case. Ext.P46 is the statement given by this witness under Section 164 Cr.P.C. It is pertinent to note that through this witness, some activities of the accused persons prior to the incident and those immediately after the incident were revealed. 2nd accused dealing with gems in the company of other accused persons and his borrowing money from PW19 are spoken to by this witness. It also came out that PWs 10 and 11 were staying with other accused persons at “Smayana” and they shifted to a ladies hostel to the knowledge of PW29.

236. This witness was subjected to a strict cross-examination by the counsel. When learned counsel for the 1st accused cross-examined, this witness deposed that at the time of giving statement, he was aware of the phone numbers used by the 1st accused. He did not furnish phone number of the 1st accused to police, as they did not ask for it. But in his additional statement, he has furnished the same. It is also brought out in cross-examination that while the 1st accused was working as manager in Surya Electronics, belonged to the 3rd accused’s father, this witness was working as a salesman. It is elicited from this witness in 1st accused’s cross-examination that PW19 Vijayakumar was known to him as he was staying in a Malayalee settlement area at Bangalore. Despite cross-

examination, his acquaintance with PW19 Vijayakumar could not be effectively challenged. He testified in cross-examination about the educational consultancy run by accused 1 and 2. Suggestions to this witness that he was a drug peddler and for that reason he was sent out from college are denied by him. PW29 in cross-examination stated that he found the accused 1 and 2 keeping plaster (MO24) and rope (MO25) in a bag and placing the bag in a Maruthi Swift car bearing no.KL58 D 243 belonged to the 1st accused. He had seen MOs 24 and 25 two times thereafter. Despite a searching cross-examination, PW29 stuck to his stand.

237. When cross-examined by the 4th accused, he denied the suggestion that after 2010 PW29 had no reason to stay at Bangalore and he was planted by the prosecution to speak falsehood. At the time of cross-examination, PW29 deposed that PW19 Vijayakumar owns a house at Ernakulam. All the details about PW19 elicited from this witness at the time of cross-examination would show that he had a longstanding relationship with PW19. Despite very lengthy cross-examination, PW29 clung to his original versions.

238. Learned counsel for the 5th accused cross-examined him to bring out answers that he lost his original pass certificate for plus two course. Since he dropped out from college, the authorities did not release the certificates as he did not pay the entire course fee. PW29 in cross-examination deposed that the accused 1 and 2 advised him to make a

publication in a newspaper that he lost his certificates irrecoverably. For that purpose, he had gone to the Judicial First Class Magistrate Court, Koothuparamba and sworn to an affidavit stating that he lost his certificates. According to PW29, the 1st accused arranged an advocate for getting an affidavit attested by the Magistrate. He also filed another affidavit swearing that he lost his SSLC book too. Both the affidavits were filed together. Learned senior counsel and counsel for other accused contended that PW29 has no regard for truth as he had filed false affidavits in respect of certificates which were actually not lost. They argued that testimony of such a person has to be discarded. It may be true that he must have found out a devious method to get duplicate certificates issued by the authorities when they refused to return the same. That cannot be taken as the sole reason to brand him a liar, especially when PW29 has a case that the accused 1 and 2 were his advisers for resorting to file a false affidavit.

239. In cross-examination, PW29 repeated his version that the 2nd accused, in the presence of other accused persons, handed over gems and precious stones to PW19 and received ₹90,000/-. We find no reason to disbelieve his versions regarding this aspect.

240. PW29 deposed in cross-examination that he did not see the accused persons starting a journey either on 23.12.2012 night or on 24.12.2012 morning. He deposed that on 24.12.2012, he made calls to the phone numbers used by accused 1 to 5, but all of them were switched off.

When he sent a message, they called him back and informed that they were at Kollam. That was the reason for PW29 to say that the accused had gone to Thiruvananthapuram. PW29 stated that on 24.12.2012 night, the 1st accused asked him to come to his house at Deshabhimani Road, Kochi. PW29 went to his house. He was not present there, but other accused persons were present. 1st accused came home after sometime.

241. PW29 stated that he did not hear complete conversations between the accused and deceased Varma. When they received calls from deceased Varma, they used to handover phone to one another.

242. On an objective assessment of his testimony, we find that the evidence tendered by PWs 10 and 11 get considerable support from this witness regarding the alleged conspiracy to commit the crimes.

243. PW19 also supported the testimony of PW29 to a great extent. According to his chief-examination, PW29 is a close friend of PW19. On 29.12.2012, PW29 called this witness at about 10.30 a.m. and wanted to meet him urgently. At that time, PW19 was at his work site. As informed, PW29 came to his work site at about 12.30 p.m. in the company of accused 2 to 4. 2nd accused had shown a few gem stones to PW19 and wanted to sell them out. PW19 informed them that he was unaware of the nuances of gem business as he was only a real estate businessman. He returned the stones to them. On the next day (30.12.2012) again they came to PW19 and informed him that they were in pressing need for some cash. It was represented that ₹1,00,000/- was urgently needed for the 2nd

accused for a business purpose. When all of them requested for help, PW19 handed over ₹60,000/- in cash kept in his house and ₹30,000/- borrowed from his friend. 2nd accused received a total sum of ₹90,000/- from PW19. By way of security, the stones previously shown were handed over to PW19, although he did not insist for the same. Later, on 12.01.2013, police officers brought the 2nd accused for recovering the stones. After questioning PW19's identity, Circle Inspector of Police asked whether he knew the 2nd accused. When he narrated the whole incident, police officers wanted PW19 to hand over the stones to them as part of investigation. Ext.P26 mahazar was prepared and 12 stones were recovered. PW20 is a witness to the mahazar. PW19 identified accused 2 to 4. 2nd accused handed over 12 stones to PW19. They were in oval shape. MO29 series were identified by this witness from the dock.

244. In cross-examination, PW19 deposed that he had a close contact with PW29 for about 2 to 2 ½ years prior to the incident. He used to borrow money from PW19. He emphatically stated that the 2nd accused showed the stones in the presence of PW29 and other accused. Although questions were asked about his source for ₹90,000/-, he adhered to his statements in the chief-examination. On going through the entire testimony of this witness, we find no reason to disbelieve him.

245. If we consider the testimonies of PWs 10, 11, 19 and 29 together, there are enough materials to clearly infer the fact that accused 1 to 4 had laid out definite plans to deal with deceased Varma and their keen

interest was in the gems possessed by him. Also, after his death, the accused came into possession of large number of stones, once kept in custody by the deceased. Needless to point out that things done by a conspirator in reference to common design is a relevant fact falling under Section 10 of the Evidence Act. According to this Section, where there is a reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by anyone of such persons in reference to their common intention, after the time when such intention was first entertained by anyone of them, is a relevant fact as against each of such persons believed to be so conspired as well as for the purpose of proving the existence of conspiracy. It is also relevant for the purpose of showing that any such person was a party to it. When we analyse the testimonies of the aforementioned witnesses, the representations, utterness and actions of accused 1 to 4 clearly spell out a conspiracy to commit the crimes.

246. We shall briefly state the legal principles regarding conspiracy. Two Sections falling within Chapter V-A of IPC deal with criminal conspiracy. They are Sections 120A and 120B. This Chapter was inserted in the Penal Code by Act of 1913. Section 120A gives the definition of "criminal conspiracy". It reads thus:

"S.120-A. When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means,

such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

247. The important facet of law relating to conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. This principle is well settled in a catena of decisions. Criminal conspiracy in terms of Section 120B IPC is an independent offence. The ingredients of the offence of criminal conspiracy, as laid down by the Supreme Court in **R.Venkatkrishnan v. C.B.I. ((2009) 11 SCC 737)** are as follows:

"(i) An agreement between two or more persons;

(ii) the agreement must relate to doing or causing to be done either

(a) an illegal act;

(b) an act which is not illegal in itself but is done by illegal means."

248. Indisputable legal proposition is that the most important ingredient of criminal conspiracy is the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing

the same end or they came together to pursue the unlawful object. In the former case, it does not render them conspirators, but the latter does.

249. It is a settled legal principle that it is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such an intention was first entertained by anyone of them and some others may quit from the conspiracy as well.

250. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the relevant statute so required, no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by proving such an agreement (see **Sushil Suri v. C.B.I. - ((2011) 5 SCC 708**). This principles was lucidly laid down by a Constitution Bench in **Lennart Schussler and another v. Director of Enforcement another (AIR 1970 SC 549)** in the following words:

> *"The first of the offence defined in Section 120A, Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the*

conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement."

251. Another important aspect is that in order to prove a criminal conspiracy punishable under Section 120B IPC, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. It may be futile to expect in all cases direct evidence regarding conspiracy as mostly it would be done secretly.

252. Indeed, where the agreement is to commit an offence, no overt act need be proved. Overt acts raise a presumption of agreement, knowledge of the purpose of conspiracy and properly looked at, they evidence the existence of a concerted intention. Conspiracy in many cases is a matter of inference largely from the facts and circumstances established in the case. These propositions are unassailable.

253. Learned senior counsel appearing for accused 3 to 5 relying on **Vijayan v. State of Kerala (1999 SCC (Cri.) 378)** contended that to

bring home the charge of conspiracy within the ambit of Section 120B IPC, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. True, in the same decision, the Supreme Court has held that it will be difficult to establish conspiracy by direct evidence and therefore from the established facts an inference could be drawn; but there must be some material from which it would be reasonable to establish a connection between alleged conspiracy and the act done pursuant to the said conspiracy. We have already mentioned the circumstances appearing in the evidence which clearly indicate a criminal conspiracy.

254. Learned prosecutor based on **Firozuddin Basheeruddin v. State of Kerala (2001 (3) KLT 189)** argued that for the crime of conspiracy, it is the unlawful agreement and not its accomplishment which is the gist of the crime. Even though there is no agreement as to the means by which the purpose is to be accomplished, the evidence of criminal conspiracy is complete.

255. The accused persons stood trial for the charges framed by the court below inter alia for commission of dacoity and murder. Stated precisely, the charge framed against the accused is a single general conspiracy to commit dacoity and murder. In the succeeding paragraphs we will be stating the reasons for finding that the accused could not be held liable for a charge of dacoity with murder; instead, they should be held liable for an aggravated form of robbery and murder. Notwithstanding that

fact, we find from the charge framed by the trial court and the materials on record that the accused are alleged to have hatched a single general conspiracy to commit robbery and murder. According to the decision in **Mohd.Hussain Umar Kochra v. K.S.Dalipsinghji and another (AIR 1970 SC 45)**, essentials of a single general conspiracy have been stated thus:

> *"Criminal conspiracy, as defined in Section 120A, is an agreement, by two or more persons, to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their*

separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only."

256. Principles relating to single conspiracy, in a different set of facts, are enunciated in **S.Swamirathnam v. State of Madras (AIR 1957 SC 340)** in the following words:

"Where the charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy and that is to cheat members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies."

257. Keeping the above principles in mind and on a conjoint reading of the depositions of PWs 10, 11, 19 and 29, we can legitimately deduce an agreement forged between accused 1 to 4 to covetously acquire the valuable gems and stones from deceased Varma's custody by taking any extreme step. In the light of other evidence discussed above relating to commission of the crime, we have no hesitation to hold that the unlawful agreement between accused 1 to 4 was translated into action by perpetrating the offences established by evidence.

258. Now, we may move on to the allegation that the accused had stupefied Varma by making him drink alcohol and inhale chloroform. For

considering merit of the prosecution case that the accused 2, 3 and 5 made deceased Varma to drink juice mixed with alcohol and thereafter they administered chloroform to stupefy him, the testimony of PW40 Jose M.Philip and his report (Ext.P84), oral evidence tendered by PW66 Prameela S. and her reports (Exts.P160 to P162) and also the testimony of PW69 Dr.N.A.Balaram will be relevant.

259. PW40 was working as Joint Chemical Examiner, Chemical Examiner's Laboratory, Thiruvananthapuram. On 17.01.2013, ten sealed bottles involved in the crime were received in his office through a senior Civil Police Officer. The bottles contained deceased Varma's viscera and its contents. The samples were forwarded by PW69 Dr.Balaram after conducting autopsy on the dead body.

260. PW40 deposed that the samples were examined under his personal supervision. Ext.P84 is the report of analysis. PW40 meticulously proved its contents. It can be seen from Ext.P84 that the 1st sealed bottle, with a specific label, contained stomach and part of intestine with contents taken from dead body of Harihara Varma. 2nd sealed bottle was containing liver and one kidney of the deceased. 3rd sealed bottle was containing blood sample of the deceased. In the 4th sealed bottle, lungs of the deceased were sent for analysis. 5th sealed bottle was containing saturated saline. 6th sealed bottled was containing brain of the deceased and the 7th sealed bottle contained cerebro spinal fluid. 8th sealed bottle contained swab from around his nose. 9th sealed bottle was containing swab from his

mouth and 10th sealed bottle was containing cotton remnants seen around his mouth. All the items were subjected to various tests as detailed in Ext.P84. The conclusion of the report reads thus:

> *"Ethyl alcohol was detected in numbers I, II and III. The sample of blood under item No.III contained 23mg (twenty three milligram) of ethyl alcohol in 100 ml blood. No other poison was detected in item numbers I, II and III. Chloroform was detected in item no.IV (lungs) and item no.X (cotton remnants around mouth). No poison was detected in item nos.VI, VII, VIII and IX. No poison including ethyl alcohol was detected in item No.V, the sample of preservative."*

261. PW40 lucidly proved the observations made in the report. He was subjected to serious cross-examination. Various questions relating to procedural formalities were put to this witness, to which he answered that he meticulously complied with the manual of procedure for chloroform analysis. Since PW40 was not asked to report the stage of digestion of food particles found in the stomach content, he did not specifically state those details in Ext.P84. During cross-examination, it was suggested that since PW40 detected only a small quantity of ethyl alcohol in blood, it could be due to heavy drinking by the deceased on the previous day. However, PW40 did not agree to this suggestion. His answer is that ethyl alcohol will reach kidney of the person consuming it within half an hour and this will

indicate that traces of alcohol seen could not be due to the previous day's drinking. To a specific question, PW40 answered that he did not detect chloroform in the nasal swab. But, the report clearly reveals presence of chloroform in the deceased's lungs. When the defence counsel put a specific question whether chloroform could be detected in blood, urine and body tissues, PW40 answered that if chloroform was consumed through mouth, it could be detected. If chloroform was inhaled, it would be difficult to detect it in blood and tissues. Despite tough cross-examination, we find no reason to discard his evidence and contents in Ext.P84 report. It clearly reveals the presence of chloroform in the lungs of the deceased and presence of ethyl alcohol in the samples sent for analysis.

262. PW66 was working as Assistant Director (Chemistry), FSL, Thiruvananthapuram and she submitted three reports, viz. Exts.P160 to P162. Ext.P160 is relating to 23 items involved in the crime. It includes a shirt worn by the deceased, a bed sheet spread on the cot where the body was found lying, cellophane impression taken from neck region of the dead body, swab collected from mouth region and dark brown stain taken in cotton gauze from nose region along with control samples of various items. Item nos.11 and 14 are towels suspected to be used for smothering the deceased. Scalp and body hair of accused 2 and 3 were also sent for analysis.

263. In Ext.P160, PW66 has mentioned that shirt worn by the deceased, bed sheet mentioned above, swab collected from mouth region

of the deceased, dark brown stain taken in cotton gauze from the deceased's nose region, tape found in the scene of crime and bath towel with violet border contained traces of chloroform. It is also reported that no narcotic or psychotropic substance could be detected in the material objects sent for analysis. Likewise, sedative-hypnotic drugs could not be detected in the objects given for analysis.

264. As per Ext.P161, Tropicana apple juice paper box, Tropicana grape juice paper box and Minute Maid juice paper box were given for analysis. It is reported that ethyl alcohol was detected in Tropicana grape juice packet. Other two paper boxes did not test positive for ethyl alcohol.

265. Ext.P162 report is pertaining to cellophane impressions taken from both hands of the deceased. When analysed, chloroform, food particles or any adhesives could not be detected in the said items.

266. During cross-examination, PW66 answered that the time interval within which chloroform may remain on cotton materials will depend on how they were preserved. She further answered that she is not an expert to specify how long chloroform will stay on a material. It appears that the defence wanted to establish that chloroform, being a volatile substance, could not have been detected in the materials sent for analysis. But, PW66 cogently and clearly answered that she detected the presence of chloroform in the aforementioned objects forwarded to the laboratory. Her answers are justified by the findings in Exts.P160 to P162. PW66 further testified that material objects forwarded to her during the month of

March, 2013 were scientifically preserved in airtight packets. It is the answer given by PW66 that although chloroform is a volatile compound, when compared to other organic compounds, it is less volatile. Despite a searching cross-examination on this witness, we are unable to find any reason to hold that the aspects covered in Exts.P160 to P162 and testimony of PW66 cannot be taken to find that chloroform was administered on deceased Varma. In other words, prosecution case that the deceased was stupefied by using chloroform is satisfactorily established by the testimony of PW66 and her reports (Exts.P160 to P162).

267. Deposition of PW69 Dr.Balaram is also relevant since he had noticed small remnants of cotton sticking to moustache, lips and chin of the dead body. Actually, this must have prompted him to probe deep into the matter. So, he sent the body parts of the deceased for chemical analysis when he found that death was due to combined effects of smothering and blunt injury sustained on the victim's neck. To sum up, we are of the definite view that the deceased was subjected to smothering and a towel soaked in chloroform, mentioned in Ext.P160, must have been used to smother him. Prosecution contention that the deceased was made to drink grape juice mixed with alcohol is also established by the testimony of PW40, supported by Ext.P84 report.

268. In order to fully appreciate gamut of the defence case, we may also refer to other evidence adduced on the defence side. DW3 Ramesh

Kumar was news editor, Mathrubhoomi Daily, Thiruvananthapuram, DW7 G.Govind was chief reporter, Malayala Manorama, Thiruvananthapuram Bureau and DW8 Arunkumar K. was senior reporter, Asianet News. On going through their testimonies, we see that the defence counsel wanted to establish that distorted news items about the incident appeared in the print and electronic media and they were published without properly verifying the truth. Mathrubhoomi and Malayala Manorama News Papers are produced and marked on the defence side to show that news relating to death of Harihara Varma was published on 25.12.2012. DWs 3 and 7 deposed that their local reporters furnished information about the incident. DW8 also deposed that through Asianet News, this news item was telecast. It has come out in evidence that there was a press meeting conducted by police officers on 05.01.2013 after arresting accused 1 to 5. DW6 Hemachandran was the Additional Director General of Police (ADGP), South Zone and he conducted the press briefing. DW6 admitted in chief-examination that he held a press meeting in the City Police Commissioner's Office although he did not remember the date. DW6 testified that the press meeting was after taking some of the accused persons into custody. DW6 further deposed that the accused were not exhibited in the press briefing. Defence case is that print and electronic media published news items with ornamentations and embellishments to the accused's prejudice. To substantiate this contention, many questions were put to the aforementioned witnesses. When we go through the

testimony of DW6, we do not get a definite answer to the question why such a press meeting was conducted? Notwithstanding that, we find no prejudice or disadvantage caused to the accused by holding a press meeting.

269. We have serious reservations about police officers conducting press meetings in respect of criminal investigations, which they and media consider to be sensational. In our view, on many occasions holding press meetings would spoil the quality of evidence collected during the investigation. It is our considered opinion, no police officer conducting investigation into a crime shall be authorised to divulge the facts ascertained during investigation through media. They should remember that a criminal case has to be finally decided in a court of law. Police officers should refrain from airing their personal views in respect of a case under investigation. They are not expected to reveal before media the facts ascertained in the course of investigation by questioning material witnesses or confession made by the accused. It is a common knowledge that recently the practise of police officers rushing to media with speculative informations about on going investigations is on the increase.

270. Section 31(3) of the Kerala Police Act, 2011 specifically says that no person in custody shall be paraded or allowed to be photographed and no press conference shall be conducted without permission of the State Police Chief for the purpose of publishing the same in newspaper or in any visual media. State Police Chief certainly cannot grant such a

permission mechanically and for a mere asking. He is bound to exercise his discretion judiciously before granting permission. It is the complaint of the accused in this case that all such precautionary measures have been flouted here.

271. We may refer to certain executive directions issued by the Directors General of Police (DGP) from time to time. Executive directive No.13/2004 dated 26.03.2004 issued from Police Headquarters, Thiruvananthapuram by the DGP, considering the provisions in Rules 6 and 9 of All India Services (Conduct) Rules, 1968 and Rules 62 and 63 of Kerala Government Servants (Conduct) Rules, 1960, would show that it was noticed that many officers of and above the rank of Superintendent of Police and State Service Police Officers have fallen into the habit of airing their personal views through media. Expressing anguish over their conduct, the executive directive was issued.

272. Circular No.9/2008 issued by the DGP on 31.12.2008 permits interaction with media where considerations of public safety or bolstering public confidence in security arrangements or getting co-operation from the public in a policing task, which is to be carried out with the support of the public, or a matter in which public participation is required are involved.

273. Next circular is Circular No.15/2010 dated 14.03.2010 which again depreciates divulging details of an on going investigation and intelligent inputs through media. Tendency to give piecemeal informations on a daily basis on the progress of investigation is frowned upon. Instead,

it is suggested, a press release in the form of a statement should be given on completion of the investigation, if the same is actually warranted by the circumstances, that too after getting permission from competent authority and without discussing the evidence. Spirit of this circular is laudable.

274. Circular No.24/2014 cautioned police officers that no press conference shall be conducted without permission of the State Police Chief for the purpose of publishing the same in the newspaper or in any visual media.

275. Latest executive directive No.29/2018 is dated 24.09.2018. It is mentioned inter alia that no officer other than a designated officer shall have the authority to speak about cases under investigation. If any police officer of any rank is invited or wishes to participate in a show or discussion or programme on any media platform, he should get permission of the State Police Chief by routing a request through proper channel. No doubt, now a days all directives in these circulars are often flouted with impunity.

276. We may now refer to some of the pronouncements by apex Court in this regard. In **Rajendran Chingaravelu v. R.K.Mishra ((2010) 1 SCC 457)**. The Supreme Court held thus:

> *"But the appellant's grievance in regard to media being informed about the incident even before completion of investigation, is justified. There is a growing tendency among investigating officers (either police or other departments) to inform the media, even before the completion of investigation, that they have caught a criminal or an offender. Such crude attempts to claim credit*

for imaginary investigational breakthroughs should be curbed. Even where a suspect surrenders or a person required for questioning voluntarily appears, it is not uncommon for the investigating officers to represent to the media that the person was arrested with much effort after considerable investigation or a chase. Similarly, when someone voluntarily declares the money he is carrying, media is informed that huge case which was not declared was discovered by their vigilant investigations and thorough checking. Premature disclosures or "leakage" to the media in a pending investigation will not only jeopardise and impede further investigation, but many a time, allow the real culprit to escape from law. Be that as it may."

277. A bench consisting of three learned Judges in **Romila Thapar and others v. Union of India and others (AIR 2018 SC 4683)** held thus:

".....The use of the electronic media by the investigating arm of the State to influence public opinion during the pendency of an investigation subverts the fairness of the investigation. The police are not adjudicators nor do they pronounce upon guilt. In the present case, police briefings to the media have become a source of manipulating public opinion by besmirching the reputations of individuals involved in the process of investigation. What follows is unfortunately a trial by the media. That the police should lend themselves to this process is matter of grave concern."

However, in this case we have already found that the material witnesses examined on the prosecution side clearly identified the accused not based on any media publicity. They have furnished valid reasons for developing

acquaintance with and obtaining chances for meeting the accused prior to commission of the offences and afterwards. On account of the aforementioned reasons, we find no prejudice caused to the accused by holding a press conference after arresting accused 1 to 5, especially when DW6 with responsibility deposed that the accused were not paraded before the media.

278. DW4 Mani was cited to prove that at the material time, there was no practice of issuing any application form from KSEB Office, Vattiyoorkkavu. In fact, this witness was examined to disprove the evidence adduced by PW8 that he had gone to KSEB office to collect a form and at that time, he had occasion to see the accused 2, 3 and 5 going along with the deceased and 6th accused in a car. On a close scrutiny of the deposition of DW4, we do not find any reason to disbelieve PW8. This witness was confronted with Ext.D18 and asked whether any application form was purchased by a person by name Sudarshan (PW8). He answered that name of the party could not be seen entered as daily, on an average, about thousand persons could be coming to KSEB Office, Vattiyoorkkavu. Evidence given by DW4 does not belie the testimony of PW8.

279. DW5 Dr.Savitha Vijayan was cited to prove that PW4's evidence is a falsehood. But no material could be elicited through this witness to doubt the credibility of PW4.

280. In the foregone paragraphs we have mentioned the defence

case regarding approximation in the time of death. From Ext.P172 postmortem certificate, it is discernible that when the postmortem examination started (10.15 a.m. on 25.12.2012) rigor mortis was fully established and retained all over the dead body. Further, postmortem staining was at back, bluish red in colour with postmortem blotches, not fixed. There was no sign of decomposition. It is specifically mentioned therein that the body was kept in a cold chamber. According to the prosecution case, the incident happened between 1.00 and 1.30 p.m. on 24.12.2012.

281. Learned senior counsel for accused 3 to 5 and the learned counsel appearing for accused 1 and 2 vehementally argued that the time of death suggested by the prosecution is not established from the observations in Ext.P172. We may refer to some aspects from "**A Text Book of Medical Jurisprudence and Toxicology**" by **Modi** (24th Edition, 2011). In Chapter XIV, "Post-mortem changes and time since death" have been dealt with by the learned author. Under a sub-heading "Late signs of death", the learned author classified cadaveric changes in the muscles into (i) primary relaxation or flaccidity, (ii) cadaveric rigidity or rigor mortis and (iii) secondary relaxation.

282. In the matter of cadaveric rigidity or rigor mortis, it is opined by Modi that it comes on immediately after the muscles have lost the power of contractility and is due the irreversible changes in the muscles of the body, both voluntary and involuntary. Indisputably, rigor mortis generally occurs

whilst the body is cooling. Owing to the setting in of rigor mortis, all the muscles of the body become stiff, hard, opaque and contracted. Rigor mortis first appears in the involuntary muscles and then in the voluntary muscles. In the heart, it appears as a normal rule within an hour after death. In the voluntary muscles, rigor mortis follows a definite course. We shall quote the relevant passage from the text book (see page 343):

> *"In the voluntary muscles, rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities, and lastly extends downwards to the muscles of the abdomen and lower extremities. Last to be affected, are the small muscles of the fingers and toes. It passes off in the same sequence."*

283. Regarding its time of onset and duration, the learned author expresses his views as follows:

> *"Time of onset.- This varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climates, and it may take two to three hours to develop. In India, it usually commences in one to two hours after death.*
>
> *Duration.-In temperate regions, rigor mortis usually lasts for two to three days. In northern India, the usual duration of rigor mortis is 24 to 48 hours in winter and 18 to 36 hours in summer. According to the investigations of Mackenzie, in Calcutta, the average duration is nineteen hours and twelve minutes, the shortest period being three*

hours, and the longest forty hours. In Colombo, the average duration is 12 to 18 hours. When rigor mortis sets in early, it passes off quickly and vice versa. In general, rigor mortis sets in one to two hours after death, is well developed from head to foot in about twelve hours. Whether rigor is in the developing phase, established phase, or maintained phase is decided by associated findings like marbling, right lower abdominal discolouration, tense or taut state of the abdomen, disappearance of rigor on face and eye muscles. If on examination, the body is still, the head cannot be fixed towards the chest, then in all probability, the death might have occurred six to twelve hours or so more before the time of examination."

284. Learned author further says about the condition simulating rigor mortis. According to him, heat stiffening, cold stiffening and cadaveric spasm or instantaneous rigor are the conditions which simulates rigor mortis. Deceased Varma's body was kept in a cold chamber as is evident from Ext.P172. In this context, following observations from Modi's text book may be relevant:

"Cold Stiffening.- The stiffening of the muscles occurs in a body from solidification of its fat when it is exposed to a freezing temperature. In infants, the stiff skin folding round the neck due to exposure to cold may simulate a ligature mark of strangulation, but they are not associated with any evidence of injury such as abrasion or peteche. On forcibly flexing the joints, the frozen synovial fluid exhibits crackling of ice. If the body is moved to a warmer atmosphere, the stiffening rapidly disappears and normal

rigor mortis develops, but it lasts only for a short time."

285. Learned author opined that cadaveric spasm or instantaneous rigor could be found in a sudden asphyxial death, but nothing of that sort is seen here because of the time gap between the death and post-mortem.

286. Going by the opinion expressed by **Modi** in his text book, the observation in Ext.P172 that rigor mortis was fully established and retained over body of the deceased could only be due to the fact that it was moved from a cold chamber to a warmer atmosphere. In that case, stiffening would rapidly disappear and normal rigor mortis would develop, but it could last only for a short time.

287. PW69, when cross-examined, deposed that the time of death could be minimum of four hours before his body was placed in the cold chamber. When it was put to PW69 that during winter the average time for the onset of rigor mortis could be three to four hours, he answered that he had not conducted any study on that subject. Despite a lengthy and searching cross-examination done by the defence counsel on PW69, we find no valid reason brought out to accept the defence contention that the time of incident could not have been between 1.00 - 1.30 p.m. on 24.12.2012. Moreover, the answers elicited from PW69 are totally insufficient to discard the reliable oral evidence of the witnesses referred to above.

288. We have already dealt with the substantive contentions raised by the learned counsel for the accused. We shall now look into some other

contentions raised by them before conclusion of the points under discussion.

289. Learned counsel for the 1st accused contended that there is no evidence to show that the same chloroform obtained by the 1st accused from PW14 was used on deceased Varma. True, there is no material to hold so. But, undeniable aspect revealed through the testimony of PW14 is that the 1st accused sometime in August-September, 2012 took away a bottle of chloroform from his clinic on the pretext that it was needed for his niece studying in a Medical College. As seen from the testimonies of PWs 40 and 66, chloroform was administered to the deceased in order to stun him. Whether chloroform taken from PW14 itself was used or not is immaterial in this case. Collection of chloroform from PW14 could be taken as a preparation by the 1st accused for committing the crime. We, therefore, hold that absence of evidence regarding which chloroform was used for the crime is not a reason to discard the prosecution case.

290. Another contention raised by the learned counsel for the 1st accused that non-examination of CW18 Rafeeq is fatal to the prosecution case cannot be accepted for the simple reason that the 1st accused, when testified as DW2, himself admitted that he came into contact with deceased Varma through CW18. He had no other role except introducing the 1st accused to deceased Varma. Therefore, his non-examination is not material.

291. Yet another argument raised by the learned counsel that the 1st

accused or anyone at his instance would not have attempted to rob fake stones is also not acceptable for the reasons that we have already seen from the testimony of PW35 and the records produced by her showing that the stones were not fake or totally valueless. They were only of lesser value than claimed by deceased Varma. Even PW12 has no case that the stones kept by deceased Varma were mere glass pieces. Therefore, this contention we have already rejected in the earlier paragraphs referring to the evidence on record.

292. Competence of PW35 to assess the gems is seriously challenged by the learned counsel for the 1st accused. We have scrutinized her evidence and came to a conclusion that she is competent to ascertain the nature and character of the gems and stones notwithstanding her lack of expertise in determining market value of the articles.

293. Learned counsel for the 2nd accused raised disputes regarding obtainment of chance finger prints pertaining to accused 2 and 3 from the scene of crime. We have considered these contentions in detail in the previous paragraphs and entered a finding that chance prints lifted from the scene of occurrence revealed the presence of accused 2 and 3 on the date of occurrence. So, we find no merit in the arguments raised on behalf of the 2nd accused about the inaccuracy in identification of the finger prints collected from the crime scene.

294. Learned counsel for the 2nd accused seriously challenged the prosecution case that the deceased was last seen together in the company

of accused 2, 3, 5 and 6 and for proving this the prosecution's reliance on testimony of PW8. In the previous paragraphs, we have considered the credibility of this witness and found no reason to hold that he could not have seen the accused persons boarding the car in which the 6th accused and deceased arrived in front of K.S.E.B. Office, Vattiyoorkavu. PW8's previous acquaintance with the deceased could not be effectively challenged. Even though he had not seen accused 2, 3 and 5 prior to the date of occurrence, his version that they travelled together with the 6th accused and deceased cannot be discarded.

295. Another contention raised by the learned counsel for the 2nd accused is regarding seizure of the gems from the accused persons on 05.01.2013. 2nd accused was carrying MO23 bag. We have discussed the evidence of PWs 26 and 71 touching this matter and the manner in which the seizure was effected. Argument raised on behalf of the 2nd accused that none of the witnesses could identify the gems taken from the possession of accused 2 to 4 as those belonged to deceased Varma is also fallacious. Testimony of PW28 would clearly show that the gems seized from accused 2 to 4 were in the custody of deceased Varma. In this context, it is relevant to note that none of the accused has any explanation for keeping possession of a considerable quantity of gems and stones in their bag, which fact has been clearly established by the testimonies of PWs 26 and 71. In the absence of any valid explanation for possessing gems and stones, accused 2 to 4 cannot be heard to say that it did not belong to

deceased Varma, especially in the light of PW26's testimony. Not only this, testimony of PWs 19 and 28 also support the prosecution case in this regard.

296. Ext.P208 is the first remand report submitted by PW71 before the Judicial First Class Magistrate Court-II, Nedumangad. In Ext.P208, details about recovery of stones from the 2nd accused's bag (MO23), 3rd accused's bag (MO43) and 4th accused's bag (MO53) have been stated. It is pointed out by the learned senior counsel for accused 3 to 5 that though the seizure was reported as per Ext.P208, the stones were produced only later. Prosecution has an explanation that the stones were sent for testing and after getting reports only they were produced. This explanation is quite satisfactory.

297. Learned senior counsel challenged PW3's testimony, that she saw the accused 1 and 4 in the courtyard of “Omkar”, and contended that it cannot be believed as she herself admitted that she could have seen them only if she had come out of her house. We have elaborately considered the testimony of PW3 and found that she had went out and returned home two times before 1 o' clock in the noon. On an evaluation of the testimony of PW3, we do not find any merit in the contention raised on behalf of the accused that there was no chance of her seeing accused 1 and 4 standing in the courtyard of “Omkar”.

298. Arguments raised by learned senior counsel regarding absence of a contemporaneous report by PW38 for collecting finger prints

from the crime scene on 24.12.2012 itself cannot hold good for the reasons mentioned by us in the earlier paragraphs. This contention is also unacceptable in the light of the proved facts. PW65 promptly filed a report on 09.01.2013, the date on which the finger impressions of the accused were received in the Single Digit Finger Print Bureau, Thiruvananthapuram. There is no delay casting doubt on the correctness and regularity of the reports submitted by PWs 38 and 65.

299. Learned senior counsel raised an argument that since the actions on the part of PWs 9, 10 and 11 border criminality, they are totally unreliable. PW9 is the person who pasted photo of K.N.Venugopalan (CW53) to create a fake driving licence in the name of PW21 which was used by the 1st accused for getting mobile no.7411790579. PWs 10 and 11 are ladies who stayed with some of the accused at “Smayana”, Eroor, Ernakulam and PW10 had gone to meet Harihara Varma, along with accused 2 to 4, projecting a false identity. It is therefore argued that if the prosecution case is taken to be true, then they should have been implicated in the case. We are unable to accept this contention for many reasons. PW9 has convincingly mentioned that he was misled by the 1st accused with whom he had previous acquaintance and he pasted a photo in the driving licence by creating an image file fully trusting the words of the 1st accused. PWs 10 and 11 deposed that they were frantically in search of job and believing the representations of the accused 1 to 4, they obliged to their demands without any bad intention. We do not find any reason to

disbelieve these witnesses.

300. Learned senior counsel further contended that there are inherent improbabilities in the prosecution case. He also contended that investigation was not fair and honest. According to him, PWs 4 to 6 are unreliable witnesses because they were unduly supporting the investigating agency out of fear that police might cause difficulties in their pursuit as drivers. This contention was considered by us and repelled in the earlier paragraphs.

301. We may refer to some of the relevant decisions cited by the learned defence counsel. Learned senior counsel relying on **Ganesh Bhavan Patel v. State of Maharashtra ((1978) 4 SCC 371)** contended that powers of the High Court to reassess evidence and reach its own conclusion are extensive. But, if evidence of the material prosecution witnesses were found to be unsafe to be acted upon, the court should interfere in the conviction. This legal proposition is well settled. Contention raised by the learned senior counsel that there is inordinate delay in recording statements of the material witnesses and therefore the prosecution story is redolent of doubt cannot be accepted. We have already seen that only after a roving enquiry, details about the links connecting the crime could be unearthed and without any further delay, the material witnesses were questioned. Therefore this contention of the accused cannot be accepted.

302. Based on **Balakrushna Swain v. The State of Orissa (AIR**

1971 SC 804), learned senior counsel for accused 3 to 5 contended that unjustified and unexplained long delay on the part of the investigating officer in recording the statement of material witnesses will render evidence of such witnesses unreliable. On going through the facts in that case, we find the above said observation was made by the apex Court in respect of unexplained delay on the part of the investigating officer in recording the statement of material eye witnesses. The principles therein cannot be mechanically applied to this case which rest on circumstantial evidence alone. Only after casting a wide net, the accused could be nabbed in this case. It is to be borne in mind, the accused persons are strangers to the locality where the incident had taken place. Accused 1 to 4 hail from north Malabar area and the 5th accused from Coorg in Karnataka. Their presence at the crime scene and surrounding area had to be ascertained by randomly questioning various persons. This includes autorickshaw and taxi drivers. Of course, other chance witnesses could also be there. Considerable time might have been taken to unravel the identity of the persons who could have seen the assailants, especially when they are strangers to the place where the incident had happened. In this context, the ratio in the above decision may not help the accused.

303. Learned counsel for the 2nd accused placed reliance on **Boban v. State of Kerala (1992 KHC 130)**. It is held, merely on the basis that the accused's finger print was found on the door handle along with other finger prints, it cannot be taken as a strong evidence. That proposition may be

true in a different factual setting. But, here testimonies of PWs 38 and 65 coupled with their reports would show that collection of chance prints from the scene of occurrence and meticulous comparison were done in this case. Factual situation in **Boban**'s case is different from the facts in this case. Hence the said decision has no application.

304. Learned counsel for the 2nd accused relying on **Tomaso Bruno and another v. State of U.P. (2015 KHC 4047)** argued that the Supreme Court has attached great value to the CCTV footage and it was held to be the best evidence to prove identity of the accused. It is contended that no attempt was made by the prosecution to produce the CCTV footage collected from Thampanoor Railway station to show that accused 2 and 3 alighted from PW6's car at about 2.00 p.m. on 24.12.2012. PW6 stated that he was questioned by police on the next day of incident and he could identify the two passengers alighting from his car in front of the Railway station. It is to be remembered that PW6 could have developed some sort of an acquaintance with accused 2 and 3 during their journey to the Railway station, but he could not have described them by name or other details. It has also come out in evidence that the images were not very clear. We also agree that if clear CCTV footage, showing images of the accused persons, could be produced in a case, certainly that will be the best evidence to dispel any possible doubt regarding their identity. But, in this case, we find justification for the prosecution in not producing it on the ground that it was hazy.

305. Learned prosecutor placed reliance on Ext.P88 and the testimony of PW43 Dr.Sheik Shakeer Hussain to contend that the 6th accused on 25.12.2012 narrated history of the case in detail and this narration was made by him at a time when he was not an accused in the case. 6th accused was arraigned in the case only on 06.01.2013. Ext.P88 medico-legal certificate is proved by PW43. This witness was extensively cross-examined. We cannot attach any importance to the recitals in Ext.P88 and testimony of PW43 for the reason that maker of the alleged statement had been later made an accused in this case. If the person medically examined by PW43 was a witness in the case, the position would have been different. Since maker of the statement is implicated in the case as the 6th accused, other accused persons are denied of an opportunity to cross-examine him for testing the credentials of his version. Albeit PW43 narrating history of the case, as seen from Ext.P88, we are of the view, legally this narration by a person, who later becomes an accused, will be downgraded to a statement given by a co-accused. In other words, in the absence of any right or opportunity to the other accused persons to cross-examine the maker of the statement in Ext.P88 for the reason that subsequently he was implicated in the crime, we find it impossible to rely on the testimony of PW43 and Ext.P88 to substantiate the prosecution version of the incident.

306. Another aspect relied on by the learned prosecutor is the detailed statement submitted by the 6th accused under Section 313 Cr.P.C.

We have no hesitation to hold that looking into the 6th accused's written statement under Section 313, we cannot decide this case either way. Object of examining an accused under Section 313 Cr.P.C. after closing the evidence is to give him an opportunity to explain any circumstance appearing in the evidence which may tend to incriminate him and thus to enable the court to examine the evidence from his perspective. It is evident from the Section itself that the object of questioning an accused by the court is to give an opportunity of explaining the circumstances that appear against him in the evidence. Giving the accused an opportunity to explain the circumstances borne out from the evidence adduced against him is concomitant with the principles of natural justice and an essential ingredient in a fair trial. It is for fulfilment of the sublime *audi alteram partem* principle.

307. On a reading of Section 313(1)(a) Cr.P.C., it will be clear that the court is empowered to put questions to an accused at any stage of the proceedings without previously warning him. Section 313(1)(b) Cr.P.C. mandates that the court shall, after the witnesses for the prosecution have been examined and before the accused is called on for his defence, question him generally on the case. Only exception provided is that where the court has dispensed with the personal attendance of an accused in a summons case, it may also dispense with his examination under Clause (b) of Section 313(1) Cr.P.C.

308. Sub-section (2) of Section 313 Cr.P.C. clearly says that no

oath shall be administered to an accused when he is examined under Sub-section (1). Sub-section (3) of Section 313 Cr.P.C. explicitly states that an accused shall not render himself liable to punishment for refusing to answer such questions or by giving false answers to them. Under Sub-section (4), it is specifically stated that the answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into or trial for any other offence which such answers may tend to show that he has committed the offence. It is a well settled principle that no lengthy or complicated question shall be put to an accused as it may defeat the purpose of the Section. Answers given by an accused while questioning under Section 313 Cr.P.C. cannot have the legal sanctity of oral or documentary evidence adduced at the trial. Judicial pronouncements are available to the effect that the answers given by an accused at the time of examination under Section 313 Cr.P.C. also can be taken into consideration for appreciating the prosecution case although it can never be the sole basis for a conviction.

309. Lengthy written statement submitted by the 6th accused contains so many allegations against some of the accused. However, we cannot look into the allegations made by the 6th accused against other accused persons to convict them since they did not get an opportunity to challenge the versions of the 6th accused. Therefore, we have no hesitation to hold that guilt of other accused cannot be decided by looking into the written statement submitted by the 6th accused. We are aware of the view

taken by the Supreme Court in **Sanatan Naskar v. State of W.B. ((2010) 8 SCC 249)** which reads thus:

> *"21. The answers by an accused under Section 313 CrPC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. .....*
>
> *22. As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. ..... Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.*
>
> *23. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other*

> *offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.*
>
> *24. Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence."*

Nevertheless, no precedential law is brought to our notice to show that the statement of an accused under Section 313 Cr.P.C. can be relied on to find the guilt of a co-accused. In our view, such a line of thinking is impossible in law as it will grossly violate the legal and natural rights of an accused. Obvious reason is that the co-accused gets no right or opportunity to contradict the accused who made the insinuations against him.

310. Learned senior counsel and other counsel for the accused strongly contended that there is no basis for the conviction entered on the accused under Section 201 IPC. Prosecution case is that the accused did not use their identifiable personal phones for plotting the crime and on the date of occurrence, but they used some other phones, which did not reveal their identity. That was intentionally done to camouflage their identity. Further case of the prosecution is that the phones used on the date of

incident and the phones belonging to the deceased and 6th accused were burnt by the accused after the incident. True, the investigating officer could not recover the mobile phones found to have been used by the accused during the progress of criminal conspiracy and commission of the crime. Without any reliable evidence we may not hold that the accused could have destroyed the evidence of crime by burning the phones. We find no worthy material to uphold this case advanced by the prosecution. We, therefore, agree with the learned counsel for the accused that the court below erred in convicting the accused persons for an offence under Section 201 IPC.

311. Learned senior counsel argued that the prosecution evidence against the 5th accused stands on a different footing and the court below convicted him without any incriminating material. According to him, there is no proof of recovery of gems and stones from the possession of the 5th accused. Prosecution has no case that the 5th accused took part in any manner in creating false documents to secure a mobile phone connection with no.7411790579. Further, going by the testimonies of PWs 10, 11 and 29, the 5th accused was not residing at “Smayana” when PWs 10 and 11 stayed there along with other accused persons. In fact, they left before 5th accused came to Eroor. Learned senior counsel forcefully argued that there is no evidence and therefore there cannot be any valid reason to infer the 5th accused's role in the alleged conspiracy. Another aspect pointed out is that PW3 has no case that she had ever seen the 5th

accused, either before or on the date of occurrence, in “Omkar”. Going by the allegations in the police report, the 5th accused met deceased Varma and 6th accused for the first time on the date of occurrence, ie. 24.12.2012. Nobody has a case that he had been to Thiruvananthapuram on any day prior to the incident. With reference to the CDRs, it is contended by the learned senior counsel that none of the entries therein indicate the 5th accused's involvement in the conspiracy or crime.

312. Although learned prosecutor contended that the 5th accused's involvement in the incident could be inferred from the testimony of PW4 who took accused 1, 4 and 5 from Kerala Nagar to Railway station, Thampanoor, we are of the view that solely based on this evidence we cannot judge the involvement of 5th accused in the crime. As pointed out by the learned senior counsel, prosecution has no case that any gems or stones were recovered from the possession of 5th accused. Similarly, when we consider the testimonies of PWs 10, 11 and 29, we find enough materials to accept the prosecution case that accused 1 to 4 developed a stratagem to commit the crime. Even if we accept the prosecution case against the 5th accused, as borne out from oral and documentary evidence, what we find is the probability that the 5th accused could have been present at the crime scene on the date of occurrence. In the final report submitted under Section 173 Cr.P.C., the allegation made against the accused is that while deceased Varma and accused 2, 3, 5 and 6 were examining the gems and stones and discussing about worth of the gems, the 2nd accused

offered fruit juice mixed with alcohol to deceased Varma. Thereafter, accused 2, 3 and 5 went out on the pretext to smoke. At that time, 4th accused, who was waiting along with the 1st accused in the courtyard of "Omkar", gained entry into the house and he caught hold of deceased Varma from behind who was unmindfully engaged in a discussion with the 6th accused. Thereafter, the 2nd accused, who was keeping chloroform procured by the 1st accused, poured it on a towel and smothered deceased Varma. At that time, the 5th accused held his hands from behind. 3rd accused intimidated the 6th accused and demanded that he should co-operate with them. After stupefying Varma by causing him to inhale chloroform and throttling, he was dragged to nearby bed room by accused 2 and 4. Role played by each accused, as narrated in the final report, could not be proved in the absence of any witness to speak about the actual criminal transactions happened inside "Omkar". If at all the 5th accused's presence is found, we find no reliable material to hold that he had any intention to kill Varma and rob gems and stones. Moreover, there is no material to hold that he also conspired to commit the crime. Further, 5th accused's presence at the crime scene is not revealed from the finger prints collected. We have already found that the finger impressions of accused 2 and 3 could be found out from the chance prints collected. There is no material to show that the 5th accused had made any preparation, either singly or along with other accused, for committing the crime. In the absence of any cogent material against the 5th accused, either

in the killing of Varma or robbing gems, we find it difficult to sustain the conviction and sentence imposed on him by the trial court. He is certainly entitled to get the benefit of doubt.

313. We have already found from the oral and documentary evidence that the testimonies of chance witnesses, who happened to see the accused persons in and around the crime scene on the date of occurrence, prior to and after the criminal transaction, are believable and the trial court is justified in relying upon them. Likewise, we are fully satisfied that the evidence tendered by the prosecution witnesses establish the preparations made by the accused to commit the offences. Testimonies of the aforementioned witnesses prove the conduct of accused 1 to 4 after committing the crime and they are also relevant to infer their guilt. Our discussion relating to CDRs would clearly indicate that the accused 1 to 4 were moving closely together before the incident and on the date of occurrence and their presence at the scene of crime and its periphery is also well established. As mentioned above, this is significant when the accused 2 to 4 have no explanation for their presence near the place of occurrence and in Thiruvananthapuram City on the date of incident. The explanation offered by the 1st accused was found to be highly improbable. Similarly, the prosecution has succeeded in fixing the presence of accused 1 and 4 in the courtyard of “Omkar”, at a time when the incident could have occurred, through the reliable testimony of PW3. Their journey to Railway station, Thampanoor, after the incident, is also established through the

testimony of PW4. Further, testimonies of PWs 5 and 6 along with obtainment of finger prints of accused 2 and 3 from the crime scene lend support to the trial court's findings against them. Most importantly, recovery of a huge quantity of gems and precious stones from the possession of 1st accused under Section 27 of the Evidence Act and seizure of considerable number of gems and stones from the possession of accused 2 to 4 at the time of their arrest have been clearly established and these are clinching circumstances against them. It is pertinent to note that though the 1st accused tried to account for his possession of large quantity of gems and stones by saying that they were handed over by deceased Varma for a claim of ₹5,00,000/-, we are unable to accept his hypothesis for the reason that deceased Varma would not have done so, if he had valued the gems in terms of crores of rupees. So, we find the explanation offered by the 1st accused for possessing large number of gems is repulsive to common sense. Accused 2 to 4 have offered no explanation as to how they came into possession of the gems and stones belonged to deceased Varma. Seizure of the articles from accused 2 to 4 have been satisfactorily proved and they utterly failed to explain their lawful possession of the same.

314. For the above reasons, we find that the trial Judge was right in finding the involvement of the accused 1 to 4 in the crime. But roping in the 5th accused in the crime is not justifiable. Points under discussion are thus concluded.

Points IX & X

315. Before we examine the nature and gravity of the offences proved by the prosecution against accused 1 to 4, we shall scrutinize the correctness and legality of the trial court's decision to exonerate the 6th accused from criminal liability.

316. By invoking Sub-sections (1)(b) and (3) of Section 378 Cr.P.C. the State preferred the appeal against acquittal of the 6th accused. Taking resort to the proviso to Section 372 Cr.P.C. PW2, who claims to be the wife of deceased Varma and therefore a victim as defined in Section 3(wa) Cr.P.C., has also filed another appeal challenging 6th accused's acquittal. Importantly, none of the accused or the prosecution challenged PW2's claim that she is the widow of deceased Varma. We heard the learned counsel on both sides elaborately.

317. Learned senior counsel appearing for the victim and learned Public Prosecutor challenged acquittal of the 6th accused on the ground that evidence adduced by the prosecution witnesses vividly revealed his complicity in the crime. Order of his acquittal passed by the learned trial Judge, according to them, cannot be justified.

318. We have already mentioned in the foregone paragraphs the essence of prosecution case that when 4th accused held deceased Varma by neck from behind and 2nd accused smothered and strangulated him to death, 3rd accused intimidated, incited and stirred up the 6th accused to join the team of accused by offering a share in the loot. According to the

prosecution, he agreed to the proposal put forward by other accused and intentionally delayed passing on the information relating to the crime to police, thereby facilitated escape of other accused persons from the crime scene. Gist of the allegations against him is that he became a consenting party to the crime on account of a threat initially made by other accused and the subsequent allurement to share the booty.

319. Stand taken by the 6th accused is one of total denial. According to him, he is another victim in the incident. He submitted a written statement at the time of examination under Section 313 Cr.P.C. narrating his versions of the incident. In the written statement, he claimed that he was 69 years old and hails from a respectable family. He practised as lawyer during 1970. Since 13 years before the incident he was working as Administration and Legal Manager of SUT group of hospitals, Thiruvananthapuram until his retirement in November, 2012. It is also contended that he was the Secretary, Bar Association, Thiruvananthapuram and an active member of various professional, social and cultural organizations. He knew deceased Varma since May, 2012. Initially, his wife and deceased's wife (PW2) established a contact through yoga classes. Thereafter, he came into contact with deceased Varma and became friends. They used to pay social visits to each other's house. PW2 introduced deceased Varma as a member of Mavelikkara royal family and trust member of Poonjar Palace.

320. 6th accused contended that since deceased Varma had no

regular job, he used to visit former almost every day either in the morning or evening. 6th accused came to know that deceased Varma had valuable antique gems and stones belonging to the royal family worth crores of rupees intended to be sold. Deceased Varma showed a letter of authorisation from Poonjar Palace trust. Tenor of the letter indicated that deceased Varma was authorised to negotiate and sell the gems and stones. 6th accused admitted that he, on the request of deceased Varma, used to allow him to entertain his prospective buyers at “Omkar”, a house belonging to his daughter. It is his version that accused 1 to 5 had visited “Omkar” on various dates for inspection of the stones. He clearly incriminated the other accused persons in his statement under Section 313 Cr.P.C. However, we cannot enter a finding of guilt on them based on the recitals in the written statement submitted by 6th accused. He has a case that police without any rhyme or reason arraigned him as an accused in the case. He had co-operated with the police officers at all times. On 06.01.2013, when he went to police station, he was detained and later implicated in the case. According to his written statement, he never had any criminal antecedents..

321. Learned senior counsel appearing in the victim’s appeal contended that testimony of all the material prosecution witnesses would show that the 6th accused was following deceased Varma like a shadow wherever he had gone. Some of the witnesses have deposed that deceased Varma introduced the 6th accused as his elder brother. PWs 7

and 8 testified that on the date of occurrence, deceased Varma travelled in the car driven by 6th accused, that too in the company of accused 2, 3 and 5. Above all, the incident happened inside a house belonging to 6th accused's daughter and undisputedly he was its custodian. It is also argued that strange behaviour of 6th accused after the incident, as spoken to by PWs 3 and 70, would cast serious doubts about his claim of innocence.

322. Learned Public Prosecutor also contended that testimony of material witnesses would clearly indicate the presence and involvement of the 6th accused in all the meetings where prospective customers had inspected the gems. He vehementally contended that immediately after the incident, 6th accused acted in a strange manner and his unnatural behaviour did not behove to the standards expected of an advocate or a senior citizen. Facts and circumstances revealed at the time of investigation prompted the police officers to infer his complicity in the crime. The investigating officer for proper and justifiable reasons implicated him in the crime.

323. A sublime principle, in respect of the law restricting the right of appeal against a judgment of acquittal, stated in **Deputy Legal Remembrancer v. Karuna Baistobi ((1894) 22 Cal 164)** is that it prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeals. It is presumed that the Government will interfere only where there is a grave miscarriage of justice. True, the right

of appeal against acquittal of an accused has been enlarged by introducing a proviso to Section 372 Cr.P.C.

324. Needless to mention, the High Court has full power to review at large the entire evidence, giving due weight to the views of the trial Judge, as to credibility of the witnesses, the presumption of innocence in favour of the accused, the presumption marginally increased by the fact that he has been acquitted at the trial, the right of accused to the benefit of doubt and the slowness in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses in an order of acquittal (see **Bansidhar Mohanty v. State of Orissa - AIR 1955 SC 585 and Samson Hyam Kemkar v. State of Maharashtra – AIR 1974 SC 1153)**. It is equally settled that an order of acquittal normally will not be interfered with because the presumption of innocence of the accused is further strengthened by the acquittal (see **Syed Peda Aowalia v. Public Prosecutor, High Court of A.P. Hyderabad - AIR 2008 SC 2573**). In **State of Kerala v. Jayesh @ Jaabar @ Babu (ILR 2020 (2) Kerala 239)**, a division bench, after considering all the binding precedents, speaking through us, held thus:

> *"We succinctly enumerate the following propositions usually coming up for consideration in appeals against acquittal:*
>
> *(i) A Judge does not preside over a criminal trial merely to see that no innocent man is punished; he also presides to see that a guilty man does not escape and one is as important as the other.*

(ii) In law, there is no fetter on the plenary power of the appellate court to review, re-appreciate and reconsider the whole evidence on which an order of acquittal is founded.

(iii) Provisions in the Cr.P.C., especially Section 386(a), put no restriction or condition on the exercise of such power and an appellate court, on evidence before it, may reach at its own conclusion both on questions of facts and law.

(iv) Various expressions such as "substantial and compelling reasons", "good and sufficient grounds". "very strong circumstances", "glaring mistakes", etc. usually mentioned as grounds for interference are not at all intended to curtail the extensive powers of an appellate court exercisable in an appeal against acquittal.

(v) In an appeal against acquittal, unless the judgment of the trial court is found to be perverse, the appellate court would not be justified in substituting its own view and reversing the judgment of acquittal. ……..

(vi) The appellate court must bear in mind the double presumption in favour of the accused in an appeal against acquittal. Firstly, the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court is available in favour of the accused. Secondly, a competent court having tried and acquitted the accused, the presumption of his innocence is further reaffirmed and strengthened by the judgment.

(vii) If two reasonable conclusions are possible in a case on the basis of evidence on record, the appellate court should not substitute its own view to

disturb the finding of acquittal recorded by the trial court ignoring the fact that the trial court had an opportunity of recording and marshalling the evidence and the advantage of noting demeanour of the witnesses.

(viii) Danger of exaggerated devotion to the rule of benefit of doubt at the cost of social defence based on a misplaced sentiment that all acquittals are always good, regardless of the justice to the victim and community, negates the public accountability of the justice delivery system. If unmerited acquittals become a general rule, they tend to lead to disregard of the law."

325. Learned authors, **Ratanlal and Dhirajlal** in their commentaries on **"The Code of Criminal Procedure**" (20th Edition, page 1593) have narrated the principles, which govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court, as follows:

"(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence, and come to its own conclusion and findings in place of the findings recorded by the Trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for

not accepting those grounds and not subscribing to the view expressed by the Trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court had to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the Trial Court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the Trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

(8) Unless the High Court arrives at a definite conclusion that the findings recorded by Trial Court are perverse, it would not substitute its own view on a totally different perspective.

(9) The appellate court in considering the appeal against judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably

eliminated in the process, it is a compelling reason for interference."

326. Meaning of the word "perverse" is also considered in **State of Kerala v. Jayesh @ Jabar @ Babu** (supra) as follows:

> "..... *Standard English dictionaries ascribe meaning to the word "perverse" as showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable or deliberately departing from what is normal and reasonable. In Gaya Din v. Hanuman Prasad ((2001) 1 SCC 501), the expression "perverse" has been explained to mean the findings of a subordinate authority not supported by evidence brought on record or those are against law or those suffer from a vice of procedural irregularity. Such findings are liable to be interfered with in an appeal against acquittal.*

On the basis of the above principles, we re-appreciated the evidence to examine correctness of the 6th accused's acquittal.

327. In the foregone paragraphs, we have discussed the oral evidence of all the material prosecution witnesses examined to prove the preparation done and conspiracy devised by the accused to commit the crime, presence of the accused at the crime scene and their fleeing from the place of occurrence after the incident. Evidence pertaining to seizure and recovery of the gems and stones which were in the custody of deceased Varma were also discussed. It has come out in evidence that deceased Varma was stupefied by administering chloroform. Medical evidence also showed that he had consumed alcohol before death,

substantiating the prosecution case that some of the accused, who had come to “Omkar” along with the deceased and 6th accused, had given the deceased Tropicana juice mixed with alcohol, Learned senior counsel pointed out that there is no material to show that the 6th accused was also forced to consume alcohol. In fact he refused to submit himself for a medical examination. Testimony of PW43, the doctor who examined the 6th accused, and Ext.P88 proved by him cannot be relied on. In the earlier paragraphs, we have found that testimony of PW43 and Ext.P88 cannot be taken as the basis for finding guilt of accused 1 to 4. It is said to be a self-serving document intended to support the 6th accused’s case. Learned senior counsel contended that the reasoning mentioned in the trial court’s judgment for his acquittal, starting from paragraphs 494 to 502, are unsustainable.

328. On going through the materials on record and also examining the reasoning adopted by the learned trial Judge, we find no valid reason to hold that acquittal of the 6th accused was based on any perverse appreciation of evidence or misapplication of legal principles. Prosecution case that during the course of transaction, the 6th accused developed and shared a common intention with other accused to commit the crime on account of intimidation, allurement, etc. has not been established by oral or documentary evidence adduced in this case. In reality, none of the material prosecution witnesses except PW43, tendered any evidence to inculpate the 6th accused. Testimony of PW43 cannot be relied on to find the 6th

accused guilty for the reasons above mentioned.

329. Learned Prosecutor contended that if the 6th accused was a dutiful citizen, he should have taken deceased Varma in his car to a nearby hospital or atleast he should have informed police directly, instead of sending a message through his son (PW70). Learned counsel for the 6th accused argued that testimony of PW3, who had occasion to see the 6th accused shortly after the incident, would substantiate his case that he was physically weak and in a state of tremendous shock. According to the learned counsel for the 6th accused, no one can expect a normal behaviour from a 69 year old person who witnessed a violent attack on his close associate, that too from his daughter's house when they were engaged in a chat, totally unaware of the impending danger. Learned counsel further contended that in such a situation, a person losing his self-control or reasoning or power to act cannot be faulted. It is to be remembered in this context that the prosecution has no case, nor they attempted to adduce any evidence, that the 6th accused had conspired with other accused either to kill Varma or to rob his gems. Even according to the prosecution, only during the course of the transaction, at the spur of a moment, the 6th accused developed a common intention to join the accused and decided to share the loot. In the absence of any evidence adduced by the prosecution to show that the 6th accused had any liaison with any other accused at any time, we are unable to accept the prosecution case and also the case of the victim that the 6th accused is also complicit in the crime. Reasonings

mentioned by the learned trial Judge in this regard are sustainable and they go well with the evidence on record. We find no error in the appreciation of evidence by the learned trial Judge necessitating an interference in the finding that the 6th accused is not guilty of any offence. Hence we confirm the acquittal of the 6th accused.

Points VII and VIII and point in Crl.Revision

330. We have entered definite findings taking into consideration the trustworthy evidence that accused 2 and 3, with a motive to rob the gems and stones kept in the custody of deceased Varma, came to "Omkar" along with him and the 6th accused in the morning on 24.12.2012. Even though it is tried to be established by the prosecution that the 5th accused also was in the company of accused 2 and 3, we have extended benefit of doubt to him for the aforementioned reasons. Since the presence of accused 1 and 4 at the scene of crime is established by acceptable evidence and their complicity is revealed from the evidence adduced to prove conspiracy, recovery and seizure of material objects from them, preparations made by them, etc. we attach no importance to the fact that prosecution did not adduce any evidence to show how they reached "Omkar" prior to commission of the crime. Thereafter, between 1.00 -1.30 p.m., the accused stupefied the deceased initially by making him drink a juice mixed with alcohol and suffocating him by using a towel soaked in chloroform. Postmortem report (Ext.P172) would reveal that he was smothered and strangulated to death. We entered a further finding that the accused

afterwards accomplished their motive of robbery. On the basis of evidence we discussed above, unhesitatingly we hold that the accused 1 to 4 are criminally liable for robbery as well as causing the death of Varma. Now, the point to be answered is whether they are liable for dacoity with murder, provided under Section 396 IPC, and also for murder, under Section 302 IPC.

331. Before going further, we may extract the definition of "dacoity" in Section 391 IPC for clarity.

> *"**391. Dacoity**.- When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".*

On a plain reading, it will be clear that to attract an offence of dacoity defined under the Section, five or more persons must conjointly commit or attempt to commit a robbery. Also, where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present aiding such commission or attempt, amount to five or more, every person so attempting, committing or aiding is said to commit dacoity. Essential element of the offence of dacoity is that five or more persons must be there in the commission of robbery or in the attempt to commit it.

332. Evidence adduced in this case show that the complicity of 5th accused could not be established beyond reasonable doubt and therefore,

he is entitled to get the benefit of doubt. We have given him the benefit for the reasons aforementioned. We have clearly found the accused 1 to 4 as the preparators of the crime. In that view of the matter, dacoity defined under Section 391 IPC will not be attracted in this case simply for the reason that only four persons are found to have been involved in the criminal transaction. Hence, we find that Section 396 IPC has no relevance in this case. For the same reason, we declare that conviction of the accused 1 to 4 for dacoity with murder under Section 396 IPC is unsustainable.

333. We are now bound to decide whether the accused should be held liable for robbery and murder.

334. In order to resolve the legal question as to nature of the offences proved against accused 1 to 4, we have to look into the definition of robbery mentioned in Section 390 IPC. In the opening words of the Section, it is mentioned that in all robbery there is either theft or extortion. So, before going further, we may extract the definition of “theft” in Section 378 IPC and “extortion” in Section 383 IPC.

> *“**378. Theft**.- Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.*
> *Explanation 1.- A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.*

Explanation 2.- A moving effected by the same act which affects the severance may be a theft.

Explanation 3.-A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.- A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.- The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

***383. Extortion**.- Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".*

335. For attaining clarity and to conclude these points convincingly, we may extract the definition of “robbery” in Section 390 IPC with its illustrations.

*“**390. Robbery**.- In all robbery there is either theft or extortion.*

***When theft is robbery**.- Theft is "robbery" if , in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person*

death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

***When extortion is robbery**.- Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.*

Explanation.- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has, therefore, committed robbery.

(b) A meets Z on the high roads, shows a pistol, and demands Z's purse. Z in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has, therefore, committed robbery.

(c) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(d) A obtains property from Z by saying – "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

336. In the academic interest, we looked into **Lord Macaulay**'s **Report** quoted in the commentary on **Indian Penal Code** by **Ratanlal and Dhirajlal**(33rd Edition, page 2652).

"There can be no case of robbery which does not fall within the definition either of theft, or of extortion. But in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft, or an extortion. A large proportion of robberies will be half theft, half extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquires by extortion. It is by no means improbable that Z's right arm bracelet may have been obtained by theft, and left arm bracelet by extortion, that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this

> *should be ascertained. For though in general the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought therefore to be made known to the Court, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial."*

Essence of the offence of robbery is that the offender in the end of committing theft, or carrying away or attempting to carry away the looted property, voluntarily causes or attempts to cause to any person death, hurt or wrongful restraint or fear of instant death or of instant hurt or of wrongful restraint. The use of violence will not *ipso facto* convert the offence of theft into robbery unless violence is committed for one of the ends specified in Section 390 IPC.

337. Extortion is robbery, if the offender at the time of committing extortion is in the immediate presence of the person put in fear of instant death, or of instant hurt or of instant wrongful restraint. The inter-relation between extortion and robbery arises when there is coerced delivery of property to another.

338. On a careful scrutiny of the material prosecution evidence, we are sure that the offence proved against accused 1 to 4 will certainly fall within the first limb of Section 390 IPC, dealing with theft amounting to robbery. There is overwhelming evidence to hold that after stunning Varma, he was laid on bed and the gems in his possession were plundered. Whether the 6th accused was also befuddled in the course of robbery is not

very material in determining the guilt of accused 1 to 4. Cogent oral and documentary evidence adduced by the prosecution unerringly and pointedly show the covetous lust entertained by accused 1 to 4 to grab the gems from deceased Varma and also the course adopted by them for achieving their objective. Fact remains that Varma met his fate at the hands of accused 1 to 4. Almost the entire gems and stones were recovered from the accused 1 to 4 and in the absence of any valid explanation offered by them to account for their possession of the same, we have no doubt in holding that the allegation of robbery has been clearly established by believable evidence tendered in this case.

339. We have already mentioned in the earlier paragraphs that Varma died on account of combined effects of smothering and blunt injury sustained on neck. We have considered the testimony of PW69 and Ext.P172 postmortem report along with the evidence tendered by PW40, the Chemical Examiner and Ext.P84, his report to arrive at the above conclusion.

340. We may now refer to some decisions rendered by the Supreme Court pertaining to robbery and murder. In **Gulab Chand v. State of M.P.((1995) 3 SCC 574)** the following observations are made in a case where murder and robbery are alleged against the accused:

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

depend on the facts and circumstances of the case and the nature of evidence adduced. In the present case it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the offences of murder and robbery can be drawn against the accused. Excepting an assertion that the ornaments belonged to the family of the accused, which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of the case, it appears that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

In the same lines, the Supreme Court held in **Mukund alias Kundu Mishra and another v. State of M.P. ((1997) 10 SCC 130)**. In that case the accused was called up to answer charges under Section 449, 394/397 and 302/34 IPC. Allegation against the accused is that in the night intervening January 17th and 18th, 1994, the accused trespassed into the residential house of one Anuj Prasad Dubey and committed murder of his wife and two children. Thereafter they looted their ornaments, other

valuable articles and cash. Learned trial Judge convicted the accused and imposed death penalty and other sentences. An appeal was preferred before the High Court, but it was dismissed confirming the death sentence imposed on the accused persons. Accused therefore took up the matter to the Supreme Court. After considering the prosecution case and evidence on record, the court held thus:

> *".....…... Mr.Jain next submitted that even if it was assumed that the articles stolen from the house of Dubeys were recovered from the appellants it could at best be said that they committed the offence under S.411, IPC but not the offences for which they stood convicted. We do not find any substance in this submission of Mr.Jain also, if in a given case as the present one the prosecution can successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a Court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. In drawing the above conclusion we have drawn sustenance from the judgment of this Court in Gulab Chand v. State of M.P., 1995 (3) SCC 574 : (1995 AIR SCW 2504). We hasten to add that the other incriminating circumstances detailed earlier reinforce the above conclusions, rightly drawn by the Courts below. We therefore find no hesitation in upholding the convictions as recorded by the Trial Court and affirmed by the High Court."*

341. Quintessence of the legal pronouncements relating to cases of robbery and murder is that even if there is no direct evidence regarding how murder was committed, if robbery is clearly established by evidence and if the fact that in the course of committing robbery murder also took place, then it can be legitimately presumed that the robber himself is the murderer, if no material is available on record to infer his innocence. In this case, we have no hesitation to hold that the accused plundered almost the entire gems in the custody of deceased Varma and they offered no acceptable explanation for keeping them. Moreover, their presence at the crime scene on the date of occurrence and at the probable time of death have been clearly established by reliable evidence. Medical evidence, including the post-mortem certificate unambiguously show that Varma was a victim of murderous death. Therefore, we affirmatively hold that accused 1 to 4 are liable to be convicted for voluntarily causing hurt in the course of committing robbery under Section 394 IPC. We shall separately state the reasons why they are liable for murder too.

342. Although the learned senior counsel and other counsel argued that accused 1 to 4 cannot be held liable for murder, we are not impressed about their contentions for the following reasons.

343. Learned counsel for the 1st accused contended that even if PW3's testimony is relied on in its entirety, there is no material to show that the 1st accused ever entered the house, "Omkar" for committing the offences of stupefying the deceased and smothering him. We are clear in

our mind that all the accused had done their part in the crime in furtherance of their common intention. Section 34 IPC clearly says that when a criminal act is done by several persons in furtherance of a common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

344. Peculiarity of Section 34 IPC is that it is a deviation from the normal rule that ordinarily every man is responsible criminally for a criminal act done by him and no man can be held responsible for an independent act and wrong committed by another. In other words, the basic principle relating to criminal liability is that the person who commits an offence is responsible for that and he alone can be held guilty. Nevertheless, Section 34 IPC makes an exception to this principle. It lays down a principle of joint liability in doing of a criminal act. The essence of that liability is founded on the existence of a common intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of their common intention. In that situation each person is liable for the result as if he had done that act himself (see **Goudappa v. State of Karnataka – (2013) 3 SCC 675 and Satyavir Singh Rathi v. State – AIR 2011 SC 1748**).

345. It is trite, Section 34 IPC is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all (see **Girija Shankar v. State of**

U.P. – AIR 2004 SC 1808). According to judicial precedents, the reason why all the accused are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the person actually committing the act. True contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in **Asok Kumar v. State of Punjab (AIR 1997 SC 109)**, the existence of a common intention amongst the participants in a crime is the essential element of application of Section 34 IPC.

346. Principles relating to manifestation of a common intention have been lucidly put in **Surendra Chauhan v. State of M.P. ((2004) 4 SCC 110)** in the following words:

> *"Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N - (1976) 3 SCC 779). The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common*

intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra - (1999) 8 SCC 428) To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

347. We have seen in the earlier paragraphs that accused 1 to 4 devised a plan by engaging themselves in a criminal conspiracy to grab gems from the custody of deceased Varma. Moreover, they have made enough preparations for committing any sort of a crime to achieve their objective. Ultimately, they gained entry into "Omkar" along with deceased and the 6th accused and smothered Varma to death. Even if the 1st accused had not entered "Omkar", we find no reason to hold that he did not share a common intention with other accused. In fact, entire chunk of the evidence would go to show that he is the mastermind of the crime. Whether he had gone inside the house, where the crime took place, or not is of no

consequence when dependable evidence on the records indicate that he had shared a common intention with other accused who actually committed the offence of murder and robbery. Our view is fortified by a celebrated decision in **Barendra Kumar Ghosh v. Emperor (AIR 2005 PC 1)**(commonly known as Postmaster's murder case). This case reached Privy Council by way of an appeal from a decision rendered by a Full Bench of Calcutta High Court consisting of five learned Judges. Relevant facts narrated by the Privy Council read thus:

> *"On August 3rd 1923, the Sub-Postmaster at Sankaritolla Post Office was counting money at his table in the back room, when several men appeared at the door which leads into the room from a courtyard, and, when just inside the door, called on him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places, in one hand and near the armpit, and died almost at once. Without taking any money the assailants fled, separating as they ran. One man, though he fired his pistol several times, was pursued by a post office assistant and others with commendable tenacity and courage, and eventually was secured just after he had thrown it away. This man was the appellant; the others escaped. The pistol was at once picked up and was produced at the trial."*

348. There was evidence for the prosecution, such as jury was entitled to act upon, that three men fired at the postmaster, of whom the appellant was one. He wore distinctive clothes by which he could be and was identified. While some men were inside the room, another was visible

from the room through the door, standing close to the others, but just outside on the doorstep in the courtyard. This man was armed, but he did not fire. According to the appellant, he was the man outside the room. He argued that he stood in the courtyard and was very much frightened. The prosecution had left his purpose to be inferred from his position and action. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance in the case. According to the prosecution, what was singular was the appellant's own reticence on these matters. Accordingly, evidence was called by the prosecution that the man outside was close to the men inside and being visible by those within would also see what went on within. This evidence was never challenged. Repelling the arguments raised by the appellant, that Section 34 IPC only applied to cases where several persons (acting in furtherance of a common intention) did some fatal act, which one could have done by himself, and criminal action, which took the form of acts by several persons, in their united effect producing one result, must be caught under some other Sections, except in the case of unlawful assembly, they should be caught under attempt or abetment, the Privy Council held thus:

> *"This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough; there must be proved an act which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several person cannot do the*

same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another, or the same as that other's act. The result is that S.34, construed thus, has no content and is useless. Before the High Court the appellant's counsel put an illustration of their own, which may be taken now, because, the whole range of feasible illustrations being extraordinarily small, this one is equally exact in theory and paradoxical in practice."

349. Law laid down by the full bench, that when a series of acts involving or resulting in a crime to wit the destruction of the postmaster is done by several persons in furtherance of common intention of all, each of such persons are liable for that series of acts in the same manner as if the acts were done by him alone, has been affirmed by the Privy Council and endorsed the view adopted by the full bench on Section 34 IPC. We, therefore, unhesitatingly hold that even if the 1st accused did not enter "Omkar" at the time of commission of the offences, he cannot be exonerated from criminal liability since bulk of the evidence unmistakably establish his deep involvement in the crime and sharing of a common intention to commit the crime.

350. viewing the evidence on record in its entirety, we are of the definite view, there are enough and more materials to validly infer the common intention of accused 1 to 4 to commit robbery and, for achieving that object, to go to any extent. Therefore, we find that the accused 1 to 4 are criminally liable, jointly and vicariously, for all the acts of each one of

them since they had shared a common intention to rob the gems from deceased Varma. Our finding, that minimum number of persons required to attract an offence of dacoity with murder, punishable under Section 396 IPC, did not participate in the criminal transaction, will not affect stability of the prosecution case in any manner. Overwhelming evidence is available in the records to show that accused 1 to 4 entertained a common intention to rob the gems and to attain that objective, they caused death of Varma. In the facts and circumstances established, we have no hesitation to hold that accused 1 to 4 could be legally held responsible for the crime by invoking the principle in Section 34 IPC as we find that all of them entertained a common intention to commit the offences.

351. For the aforementioned reasons, we find that accused 1 to 4 cannot be held liable for an offence under Section 396 IPC dealing with dacoity with murder because we found that only four accused persons are responsible for the heinous offences. This reasoning prompts us to conclude that the said accused persons are to be held criminally responsible for an offence under Section 394 IPC dealing with voluntarily causing hurt in committing robbery.

352. A question raised by the learned senior counsel and other counsel is that the accused 1 to 4 cannot be held liable for murder as defined under Section 300 IPC. According to them, going by the evidence accused 1 to 4 could not have entertained any intention to commit Varma's murder. If that be so, they would have carried some lethal weapons.

Prosecution case is that they possessed only rope, plaster, chloroform and fruit juice adulterated with ethyl alcohol. Learned counsel therefore argued that the prosecution case, if accepted in toto, will not establish that they came to “Omkar” on the fateful day with an intention to finish off Varma. This argument, though attractive at first blush, is fallacious if we consider the materials on record and the pertinent legal principles. Evidence adduced by the prosecution established that the accused administered juice mixed with ethyl alcohol to the victim and afterwards he was smothered by using chloroform. Postmortem certificate and other medical records, supported by oral testimony of the material witnesses, would show that his death was on account of smothering and strangulation. Ext.P172 clearly says the reasons for PW69 to form such an opinion. His version supported by material records remain completely reliable despite lengthy cross-examination done. For the above reasons, we entered a definite finding that Varma’s death was a homicide. In our view, the reliable evidence in the case would clearly indicate the culpability of accused 1 to 4 under thirdly and fourthly to Section 300 IPC. We shall hereunder elucidate the reasons therefor.

353. It is axiomatic that homicide is either lawful or unlawful. Lawful homicide or simple homicide includes several cases falling under the general exceptions, provided in Chapter IV of IPC. Unlawful homicide includes culpable homicide not amounting to murder (Section 299 IPC), murder (Section 300 IPC), rash and negligent homicide (Section 304A IPC)

and suicide (Sections 305 and 306 IPC).

354. In Section 300 IPC, the definition of culpable homicide appears in an expanded form. Each of the four clauses in Section 300 IPC requires that the act which causes death should be done intentionally or with the knowledge or means of knowing that death is a natural consequence of the act. An intention to kill is not always necessary to make out a case of murder. A knowledge that the natural and probable consequence of an act would be death will suffice for a conviction under Section 302 IPC (see **Santosh v. State – (1975) 3 SCC 727** and **Sehaj Ram v. State – (1983) 2 SCC 280**).

355. Points of distinction between murder and culpable homicide not amounting to murder have been clearly spelt out in **State of A.P. v. Rayavarapu Punnayya and another (AIR 1977 SC 45)**. Paragraphs 12 to 16 are excerpted hereunder with profit:

> *"12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally 'culpable homicide' sans 'special characteristics of murder' is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is*

punishable under the Ist part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part of Section 304.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be keep in focus the key words used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death caused is done -
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the	(2) with the

intention of causing such bodily injury as is likely to cause death; or	*intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or*
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEDGE	
(c) with the knowledge that the act is likely to cause death.	*(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of*

	causing death or such injury as is mentioned above.

14. Clause (b) of Section 299 corresponds with cls(2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the intentional harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death

or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In Clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Sec.299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury …. sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature."

356. Relying on **Rajwant v. State of Kerala (AIR 1966 SC 1874)** it is observed in **Rayavarapu Punnayya** (supra) that for cases to fall within clause (3) to Section 300 IPC, it is not necessary that the offender intended to cause death so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.

357. Yet another decision relevant in this context is **Virsa Singh v.**

State of Punjab (AIR 1958 SC 465). Appellant Virsa Singh was tried along with five others under Sections 302/149, 324/149 and 323/149 IPC. He was also charged individually under Section 302 IPC. Others were acquitted of the murder charge by the first court, but they were convicted for lesser offences. The appellant was convicted by the first court and the High Court under Section 302 IPC. Thrust of the argument before Supreme Court was relating to the application of "thirdly" to Section 300 IPC. In that context, the Supreme Court held thus:

> *"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under S.300 "thirdly" ;*
> *First, it must establish, quite objectively, that a bodily injury is present ;*
> *secondly, the nature of the injury must be proved; These are purely objective investigations.*
> *Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended.*
> *Once these three elements are proved to be present, the enquiry proceeds further and,*
> *Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.*
>
> *13. Once these four elements are established by the prosecution (and, of course, the burden is on the*

prosecution throughout) the offence is murder under S.300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."

The decision in **Virsa Singh** was considered and followed in **Rayavarapu Punnayya**.

358. It has come out in evidence that the accused, who gained entry into "Omkar", have forcefully caused Varma to inhale chloroform and thereby he was stupefied. Medical evidence suggests that he was strangulated either at the time of smothering or afterwards. It is a common knowledge that chloroform is an organic compound employed as an anaesthetic long time before. Noticing the adverse effects of chloroform on human body, safer anaesthetics have been invented and use of

chloroform, as an anaesthetic, was discontinued. At present, chloroform is used as a solvent in various manufacturing processes. Also, it is used in building, paper and board industries and for pesticide production. It is used as a solvent for lacquers, floor polishes, resins, adhesives, alkaloids, etc.

359. **Mosby**'s **Medical Dictionary (2006)** enlists the following properties of Chloroform at page 229:

> *"Chloroform, a nonflammable, volatile liquid that was the first inhalation anesthetic to be discovered. Because of ease of administration – often just a medicine dropper and a handkerchief face mask – it is still the principal general anesthetic in many underdeveloped countries, where anesthesia equipment for the newer agents is not available. Chloroform is a dangerous anesthetic drug : A difference of only 10% in drug-plasma levels can result in hypotension, myocardial and respiratory depression, cardiogenic shock, ventricular fibrillation, coma and death. Delayed poisoning, even weeks after apparently complete recovery, can occur, and serious ocular damage is frequently reported."*

360. It is said that chloroform was first used as an anaesthetic in the year 1847. It is scientifically proved that effects of chloroform exposure on a human being increase proportionately to its dosage. In a small amount chloroform makes a person lethargic and disoriented. If dosage increases, one can quickly become unconscious, unable to feel any pain or sensation. In more severe dosages, it can cause strained breathing, complete muscular relaxation and paralysis of chest muscles. It can often

be fatal. Scientific study revealed that chloroform effects on human body largely depends on its dosage and method of administration.

361. There is a good reason why chloroform is no longer used as an anaesthetic today because it is a challenging task to determine the right dosage that would render a person unconscious without impinging other vital nerve functions. To put it shortly, chloroform shall not be administered to a person without a medical advice. Convincingly it has come out in evidence that the towel recovered at the time of investigation tested positive for chloroform despite expiration of a considerable time. It indicates that a large quantity of the chemical could have been used for smothering the deceased. It also shows the accused persons' clear knowledge that chloroform could be used to stupefy the victim. Further, they never bothered about the out come of their act. Unmindful, callous and intentional use of chloroform, coupled with strangulation of the stupefied victim, will certainly fall within thirdly to Section 300 IPC.

362. Looking into fourthly to Section 300 IPC, we find that accused 1 to 4 are liable for murder thereunder also as the evidence in the case satisfy the requirements of that limb of the Section as well. As we pointed out earlier, deceased Varma was held from behind, smothered with a towel soaked in chloroform and he was forcefully throttled. Besides, his hands were tied by using a rope and he was muffled by fixing plaster on mouth. All these acts would clearly indicate that the accused while committing the crime very well knew that it was so imminently dangerous that it must, in all

probability, cause death or such bodily injury as is likely to cause death of Varma. They have done such acts without any excuse for incurring the risk of causing death. Therefore, we have no hesitation to hold that the accused are liable for murder by virtue of operation of fourthly to Section 300 IPC as well.

363. Trustworthy evidence on record would show that the accused, who gained entry into “Omkar”, administered chloroform, indisputably a stupefying substance, with an intent to cause hurt to Varma. Their intention to commit robbery is clearly evident from the facts and circumstances established in the case and to facilitate their end, they stupefied Varma. Evidence unequivocally show that administration of chloroform caused a serious hurt to the victim. Therefore, all the ingredients under Section 328 IPC are also satisfied by reliable evidence on record.

364. Upshot of the above discussion is that accused 1 to 4 shared a common intention to cause bodily injury to the victim and they actually caused the intended injury and the bodily injury inflicted on him was sufficient in the ordinary course of nature to cause death. And knowingly that it was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death of Varma, they committed such acts without any excuse for incurring the risk of causing death. Therefore, we, for definite reasons, find that the accused are liable for murder falling within thirdly and fourthly to Section 300 IPC. Besides, for

the reasons mentioned above, they are criminally liable under Section 328 I.P.C too.

365. Let us deal with the issues involved in the criminal revision. We are astounded to find the observations in the operative portion of the trial court's Judgment that since all the ingredients of Section 302 IPC are included in Section 396 IPC and accused 1 to 5 have been sentenced for offences punishable under Section 396 IPC, no separate sentence need be imposed on them for offences punishable under Section 302 read with Section 120B IPC. Modestly saying, the above observations are fundamentally wrong. Such observations should not have been made by a Sessions Judge because it is an inviolable and unchallengeable proposition in law that every conviction should be followed by a sentence.

366. This principle can be seen from the scheme and arrangement of provisions in Chapter III of IPC dealing with punishments. Section 53 speaks about the punishments imposable under provisions of the Penal Code. After substituting transportation for life as a mode of punishment with imprisonment for life in clause secondly to Section 53 IPC and after deleting a clause thirdly in the above Section in 1949, the said provision, as on today, prescribes five punishments, viz., death, imprisonment for life, imprisonment (which is two descriptions - (i) rigorous, ie. with hard labour and (ii) simple), forfeiture of property and fine. Remaining provisions in the above Chapter shows the manner in which punishments will have to be imposed on a convict.

367. Observation by the learned trial Judge that all the ingredients of Section 302 IPC are included in Section 396 IPC is incorrect. In order to attract an offence under Section 396 IPC, court will have to see that the accused persons conjointly committed dacoity, as defined under Section 391 IPC, and in the course of committing dacoity, they have committed murder too. It is to be borne in mind that in a case involving allegations of dacoity with murder and murder, if dacoity is not established and murder is well established, then there could be no punishment for murder, if the court takes a view that no separate sentence need be imposed for murder. This is not only a fallacious, but a preposterous line of thinking. It will be more evident if we look into the sentence prescribed under Sections 302 and 396 IPC. When murder is proved, options available to a court, in the matter of punishment, are between death and imprisonment for life. From the wording employed in the Section, it is extremely clear that in either case, fine shall be an integral part of the sentence. In other words, the courts have no discretion to avoid imposition of fine when it sentences an offender under Section 302 IPC.

368. As stated above, the substantive punishment prescribed under Section 302 IPC are death or imprisonment for life and no other sentence can be imposed by a court after convicting an accused for murder. Whereas, a close look at Section 396 IPC would clearly show that sentences prescribed for dacoity with murder are death or imprisonment for life or rigorous imprisonment for a term, which may extend to 10 years.

Here also fine is a mandatory part of the sentence. Yet, the provision gives three options to a court when it finds an accused guilty for dacoity with murder so as to punish him either with death or imprisonment for life or rigorous imprisonment for a term which may extend to 10 years. This kind of a third option is conspicuously absent in Section 302 IPC. Therefore, in the matter of sentence imposable also, there is a distinction between Sections 302 and 396 IPC.

369. Another aspect to be pointed out is that observation by the trial Judge that all the ingredients of murder are included in dacoity with murder may not be fully correct for the reason that to attract Section 396 IPC, it must be established that dacoity has been committed and in the course of dacoity, murder also took place. In other words, if only these two aspects are clearly established, Section 396 IPC can be invoked. If either dacoity or murder alone is established in a case, then the Section has no application. As they operate under two different situations, it cannot be loosely said that all the ingredients in Section 302 IPC are included in Section 396 IPC because it is trite, no two provisions exist in the Penal Code are for the same purpose.

370. For the aforementioned reasons, we are sure in our minds that the above observations by the trial Judge are legally unacceptable. Regarding the requirement of a sentence for each conviction, we may place reliance on **Jayaram Vithoba and another v. State of Bombay (AIR 1956 SC 146)** rendered by three learned Judges. Although the facts

therein are not relevant for our purpose, the dictum in paragraph 6 is very much relevant.

> *"The question still remains whether apart from section 423(1)(b), the High Court has the power to impose the sentence which it has. When a person is tried for an offence and convicted, it is the duty of the court to impose on him such sentence, as is prescribed therefor. The law does not envisage a person being convicted for an offence without a sentence being imposed therefor. When the trial Magistrate convicted the first appellant under section 5, it was plainly his duty to have imposed a sentence."*

371. We may refer to two decisions rendered by division benches of this Court in **Varghese v. State (1986 KLT 1285)** and **Thampi Sebastian v. State of Kerala (1988 (1) KLT 247)** wherein the learned Judges have clearly held that law does not envisage a person being convicted for an offence without a sentence being imposed. It is further held that failure to impose a sentence is illegal.

372. Another division bench in **State of Kerala v. Aboobacker (2006 (3) ILR (Ker) 672)** held thus:

> *"The failure to impose punishment for the conviction under Secs.376, 377 and 201 I.P.C is also not proper. The law does not envisage a person being convicted for an offence without a sentence being imposed. Every conviction should be followed by a sentence. The proper course should have been to impose separate sentences for each of the offences and to direct that those sentences would lapse*

upon the execution of the death sentence."

We may mention here that certain interpretations placed by the division bench in **Aboobacker**'s case (supra) on Sections 232 and 233 Cr.P.C. are partly overruled by a full bench in **Moidu v. State of Kerala (2009 (3) KHC 89)**. But the observations in **Aboobacker**'s case relating to the necessity of imposing a sentence after each conviction is not disturbed by the findings in **Moidu**'s case. Obviously it cannot be touched because the law has clearly been laid down by a three Judge bench of the Supreme Court in **Jayaram Vithoba** (supra).

373. By way of summing up, we hold that looking at the scheme of the provisions in the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973, all the criminal courts are bound to take a view that every conviction should be followed by a sentence. Section 31 Cr.P.C., which is interlinked with Section 71 IPC, leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having regard to nature of the offences, attending, aggravating or mitigating circumstances. Of course, if the court does not order the sentence to run concurrently, one sentence may run after the other in such order as the court may direct. Section 31 Cr.P.C. relates to sentences in cases of conviction of several offences at one trial.

374. Spirit of Section 57 IPC is that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as imprisonment for 20 years. It is to be understood that Section 57 IPC does not in any way

limit the punishment of imprisonment for life to 20 years. Imprisonment for life means imprisonment for rest of the whole life, but it can be commuted by the competent authority. Taking note of the definition of the expression "life" in Section 45 IPC, that the word "life" denotes the life of a human being unless the contrary appears from the context, and also considering Section 53, a Constitution Bench of the Supreme Court in **Union of India v. V.Sriharan ((2016) 7 SCC 1)** has held that life imprisonment, in terms of the above provisions, means imprisonment for rest of the life of the convict till his last breath. We need not elongate the list of authorities on this point since it is an unchallengeable proposition.

375. Section 57 IPC is limited in its scope and application and this Section has to be used only for the purpose of calculating the fractions of term of punishment and no other purpose.

376. We are cognizant of the fact that if accused are convicted for murder and also for dacoity with murder, necessarily two terms of life imprisonment will have to be imposed on them. A question then may arise, how can a person undergo two life imprisonments when every human being has only one life? There is no difficulty to answer this question because Penal Code and Code of Criminal Procedure confer a lot of discretion on a Judge while sentencing an accused. Court can direct as to how the sentences should run, ie. whether consecutively or concurrently. Logically, it is impossible for any court to sentence an accused for two terms of life imprisonment consecutively. Reckoning the very nature of

human life, two life imprisonments can only be concurrent. We, therefore, find no tangible reason deterring the learned Sessions Judge in awarding separate life imprisonments under Sections 302 and 396 IPC. Hence, we are of definite view that the trial court egregiously erred in not imposing separate sentences for murder and dacoity with murder. Nevertheless, that issue may not directly arise here in the wake of our finding that the accused 1 to 4 are not guilty of dacoity with murder. Even then one must be clear about the legal principles in the matter of imposing punishments.

377. We have kept in view the limitation provided under Section 386(b)(iii) Cr.P.C. that the appellate court shall not alter the finding, alter the nature or the extent or the nature and extent of the sentence in an appeal from a conviction so as to enhance the same. In the previous points we have found that accused 1 to 4 are not guilty of an offence of dacoity with murder punishable under Section 396 IPC, but they are independently liable for murder and voluntarily causing hurt in committing robbery. From the records, it is discernible that all the convicted accused persons have been heard by the trial Judge in detail regarding the question of sentence in compliance with the provision in Sub-section (2) of Section 235 Cr.P.C.. It is clear that the accused were heard on the sentence for murder also. We only rectify a mistake committed by the trial court in not imposing a sentence on accused 1 to 4 after finding them guilty of murder. Moreover, the accused persons have been clearly put to notice about the illegality by initiating a suo motu revision. Therefore, we find no necessity to hear

accused 1 to 4 on the question of sentence for the offence of murder over and again, especially when we do not find any reason to impose the maximum punishment provided under Section 302 IPC, viz., death sentence. No prejudice will be caused to accused 1 to 4 by imposing the minimum sentence for murder and altering the sentences to their benefit.

378. We may summarise the points under discussion. The accused 1 to 4 are criminally liable for hatching a conspiracy for committing robbery and murder. It is seen that they have committed the offence of robbery. It is also seen that they have committed murder in the course of committing robbery. Therefore, they are liable to be punished under Sections 120B, 394 and 302 IPC. Besides, they are liable for an offence of causing hurt by administering chloroform, a stupefying substance, with an intent to commit an offence, punishable under Section 328 IPC. That apart, accused 1 and 3 are liable for an offence of forgery punishable under Section 465 IPC and also for using as genuine a forged document, punishable under Section 471 IPC.

Point XI

379. Heard the learned counsel for the appellant in Crl.Appeal No.609 of 2016. Learned Senior Public Prosecutor and the learned counsel appearing for the 2nd respondent (PW2) are also heard. Appellant herein is not a party in the case. She is aggrieved by following directions in the trial court's judgment relating to disposal of property under Section 452 Cr.P.C. It reads thus:

"MOs 8 to 10, 19 series to 22, 29 to 33(a), 36 to 39 series, 47 to 50 series, 60 to 63 series, 65 series to 110 series and 112 series to 122 shall be given to PW2".

According to the averments in the appeal memorandum, appellant is the wife of deceased Varma and therefore, she is entitled to get the valuable items belonged to deceased Varma. Direction in the trial judgment to hand over aforementioned items to PW2 is legally unsustainable because the court below without any valid reason assumed that PW2 was the legally wedded wife of deceased Varma. It is also contended that the learned trial Judge, without deciding as to who was the legally wedded wife of the deceased, ordered return of valuable items to PW2.

380. Before dealing with evidence on record, we shall make it clear that in a proceedings of this nature, ie., trial of a criminal case, right or title to a property involved therein cannot and shall not be decided. Question as to who is the title holder of a particular property, involved in a criminal case, is a matter to be decided in an appropriate civil proceeding. Section 452 Cr.P.C. does not enable a criminal court to decide question regarding title to property. We shall examine the provision in detail.

381. For clarity, we shall extract the Section:

*"**452. Order for disposal of property at conclusion of trial.**- (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any*

property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

Sub-section (1) to Section 452 Cr.P.C. clearly says that the Section applies only when any property or document was produced before court or was in its custody after it was produced or regarding which any offence appeared to have been committed or which has been used for commission of the offence. Needless to mention, the Section operates only on conclusion of an inquiry or trial before a criminal court. The Section refers four classes of property or document – (i) produced before the court or (ii) in its custody or (iii) regarding which any offence is committed or (iv) which is used for committing any offence. It further shows that such property can be disposed in any of the following four ways: (i) destruction (ii) confiscation (iii) delivery to person entitled to its possession or (iv) otherwise, ie., in an appropriate manner depending on the facts in each case.

382. The term “property” means not only the property in its original form, but also that into which it is converted or for which it is exchanged. On a careful reading of the Section, it will be clear that an order passed thereunder, at the conclusion of a trial, only concludes an immediate right to possession and it does not conclude a right or title of any person to the ownership of the property. Phrase “person claiming to be entitled to possession” certainly does not mean the owner. A person who came into possession in a lawful manner of the articles seized from his custody is therefore entitled to get them back under this Section. As we have mentioned earlier, there is no claim raised by accused 2 to 4 about the gems and stones recovered from them. Although the 1st accused offered an

explanation for possessing huge quantity of gems and stones, that they were handed over by deceased Varma to him, we have rejected that contention stating reasons in the foregone paragraphs. Therefore, we have to proceed on the basis that the rival claimants for material objects mentioned above are only PW2 and the appellant in this appeal.

383. It is a settled proposition that for passing an order of disposal of the property, the trial court is not bound to examine witnesses and hold an elaborate inquiry. Obvious reason is that there is no adjudication of right or title in respect of the articles ordered to be handed over to a particular person. Since the order passed under the provision do not conclude a right or title to the property, the trial Judge is not to decide intricate questions of ownership of property which is in the domain of a competent civil court.

384. Now we shall look into evidence on record to find out whether the direction by the learned trial Judge could be sustained or not.

385. PW2 Vimala Devi asserted that she is the wife of deceased Varma. She was working as Deputy Commissioner in the Commercial Taxes Department. It is her assertion that on 04.03.2001 she was married to deceased Varma. Their marriage was solemnised at Velivilakom Devi Temple. PW2 deposed that her husband was a businessman dealing in real estate and antique items. When it was suggested to PW2 during cross-examination that deceased Varma married Girija Menon (appellant) during the subsistence of PW2's marriage with Varma, she denied the suggestion saying that there was no marriage between Varma and Girija

Menon. According to PW2, they were unhappy for having no offspring in their marital relationship.They had no interest in adopting a child. Instead, they were in search of a surrogate mother. In fact, they were about to go to Gujarat to find out a suitable woman. When this fact was informed to a close friend of Varma, he told him that a lady at Palakkad was willing to undertake surrogacy. According to PW2, appellant was that lady who agreed to undertake surrogacy. Since her mother insisted that there should be a ceremony of marriage, even if it be a pseudonymous one, between Varma and the appellant to avoid public criticism during her pregnancy, such a course was adopted. According to the learned counsel, during the subsistence of PW2's marriage with Varma, there could not have been a valid marriage between appellant and the deceased because of the prohibition contained in Section 5 of the Hindu Marriage Act, 1956.

386. In the entire cross-examination, we do not find any challenge against this version of PW2.

387. PW72, the investigating officer, deposed that he seized documents relating to marriage between the appellant and deceased Varma as per Ext.P118 mahazar dated 21.03.2013. From Ext.P118 it can be seen that a civil police officer was sent on duty for collecting ownership certificate pertaining to a residential building bearing door no.416 in Ward XVII of Palakkad Municipality and also certificates issued by NSS Karayogam, Vennakkara and Sree Emur Bhagavathi Devaswom, Palakkad showing that deceased Varma had married Girija Menon (the appellant) on

21.01.2010. These documents are marked as Exts.P119 and P120 series.

388. PW72 further deposed that he sent another civil police officer to collect the records relating to marriage between deceased Varma and PW2 solemnised at Vakkom Velivilakom Temple. Mahazar relating to this seizure is Ext.P121. Ext.P122 series would show that Secretary, NSS Karayogam, Vakkom Velivilakom Sree Bhagavathi Temple has certified that deceased Varma married PW2 (2nd respondent) on 04.03.2001. Ext.P122 series contain relevant extract of the register. If we consider Ext.P122 series and the testimony of PW2 that deceased Varma had married her on 04.03.2001, certainly going by the personal law applicable to the parties, marriage between deceased Varma and appellant could not be regarded as valid in the eye of law, especially when the marital relationship between Varma and PW2 had not been dissolved prior to his marriage with appellant. Nobody has such a case. Even if we discard the contention of PW2 that deceased Varma established a relationship with the appellant for acting as a surrogate mother through artificial insemination, we find that the court below is justified in allowing PW2 to receive back the gems and stones after trial of the case. It has come out in evidence that at the time of death, Varma was residing with PW2. Viewing from any angle, we are of the opinion that PW2 has a better claim for possession of the articles than the appellant. Therefore, we find no merit in the appeal. Hence it is dismissed.

We dispose of the appeals and criminal revision case in the

following manner based on our findings on the specific charges framed against the accused.

I. Crl.Appeal Nos.567 of 2014, 1121 of 2015, 576 of 2014 and 665 of 2014 filed by accused 1 to 4 respectively are allowed in part as follows:

(i) Accused 1 to 4 are found guilty of an offence of criminal conspiracy for commission of voluntarily causing hurt in committing robbery and murder, punishable under Section 120B read with Sections 394 and 302 IPC. Each one of them shall undergo imprisonment for life and pay a fine of ₹50,000/- (Rupees fifty thousand only); in default of payment of fine, each accused shall undergo imprisonment for a further period of one year.

(ii) Accused 1 to 4 are also found to be guilty of an offence punishable under Section 394 read with Section 34 IPC for voluntarily causing hurt in committing robbery and therefore, we sentence each one of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹50,000/- (Rupees fifty thousand only); in default of payment of fine, each one of them shall undergo imprisonment for a further period of one year.

(iii) Further, we find accused 1 to 4 guilty of murder punishable under Section 302 read with Section 34 IPC. We sentence each one of them to undergo imprisonment for life and to pay a fine of ₹50,000/-(Rupees fifty thousand only); in default of payment of fine, each one of them shall undergo imprisonment for a further period of one year.

(iv) Accused 1 to 4 are convicted for causing hurt by means of a stupefying substance punishable under Section 328 read with Section 34 IPC. Each one of them shall undergo rigorous imprisonment for a period of five years and pay a fine of ₹10,000/- (Rupees ten thousand only); in default of payment of fine, each one of them shall undergo imprisonment for a period of three months.

(v) Accused 1 to 4 are acquitted of charge under Section 201 IPC.

(vi) Accused 1 and 3 are found guilty of forgery and sentenced under Section 465 read with Section 34 IPC and each one of them shall undergo rigorous imprisonment for a period of six months.

(vii) Accused 1 and 3 are further convicted for using as genuine a forged document and punished under Section 471 read with Section 34 IPC and they shall undergo rigorous imprisonment for a further period of six months.

(viii) We make it clear that all the substantive sentences imposed on accused 1 to 4 shall run concurrently.

(ix) Accused 1 to 4 are entitled to set off the period of detention undergone as undertrial prisoners in this case subject to the provisions of Section 433 A Cr.P.C., provided the competent authority passes an order under Section 432 or Section 433 Cr.P.C. as the case may be.

(x) Accused 2 and 4 are acquitted of charges under

Sections 465 and 471 IPC.

II. Crl.Appeal filed by the 5th accused, viz. Crl.Appeal No. 800 of 2014 is hereby allowed. He is acquitted of all charges. He shall be set free forthwith, if not wanted in any other case.

III. Crl.Appeal No.129 of 2016 and Crl.Appeal (V) No.21 of 2019 filed challenging the acquittal of 6th accused are found to be devoid of any merit and hence dismissed, confirming his acquittal.

IV. Crl.Appeal No.609 of 2016 filed under Section 454(1) Cr.P.C. by a third party is also found to be unsustainable and hence dismissed.

V. Crl. Revision Case is disposed of as mentioned in the judgment.

A.HARIPRASAD,
JUDGE.

N.ANIL KUMAR,
JUDGE.

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