

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 7<sup>TH</sup> DAY OF SEPTEMBER 2023 / 16TH BHADRA, 1945

CRL.A NO. 281 OF 2017

AGAINST THE JUDGMENT IN SC 12/2013 OF THE ADDITIONAL DISTRICT

AND SESSIONS COURT-III, PALAKKAD

APPELLANTS/ACCUSED 1 AND 2:

- 1 KOMISHAN BAG, AGED 22/2012 YEARS,  
S/O.THOYILO BAG, PAIKKUPAKKAL,  
MEIKKANJA, KAGIPUR,  
RAYAGADA DISTRICT, ORISSA
  
- 2 LAZMANASUNA ONURAI, AGED 24/2012 YEARS,  
S/O.SANIYAMUNA, PAIKKUPAKKAL, MUKKANJA,  
KAGIPPUR, RAYAGADA DISTRICT, ORISSA

BY ADV. VISHNUPRASAD NAIR

RESPONDENT/COMPLAINANT:

STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM, PIN 682031

BY PUBLIC PROSECUTOR SRI. E.C.BINEESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
22.08.2023, THE COURT ON 07.09.2023 DELIVERED THE FOLLOWING:

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**P.B.SURESH KUMAR & C.S.SUDHA, JJ.**

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**Dated this the 7<sup>th</sup> day of September, 2023.****J U D G M E N T****P.B.Suresh Kumar, J.**

Accused 1 and 2 in S.C.No.12 of 2013 on the files of the Additional District and Sessions Court-III, Palakkad are the appellants in this appeal. The appellants stand convicted and sentenced for the offences punishable under Sections 120B, 302, 397 and 201 read with Section 34 of the Indian Penal Code (IPC).

2. On 16.06.2012, at about 9 a.m., body of a male was found lying on the banks of Bharathapuzha at Pattambi by one Riyasudheen. A crime was registered by Thrithala Police on the basis of the information furnished by Riyasudheen under Section 174 of the Code of Criminal Procedure (the Code). In the autopsy of the body conducted thereafter, it was revealed that the body is that of the victim of a homicide. Consequently, a report was filed by the police to the jurisdictional Magistrate to convert the case as one under Section 302 IPC. In the investigation conducted

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thereupon, it was revealed that the body is that of one Vikram Naik, a native of Orissa, and that the accused who are also natives of Orissa and working in a crusher unit namely Shalimar Granites near Shornur, caused the death Vikram Naik and robbed him in furtherance of a conspiracy. A final report was accordingly filed on that basis against the accused in the case. It was alleged in the final report that the accused induced Vikram Naik to come to Kerala by giving a false promise that they will make arrangements for him to go abroad; that Vikram Naik accordingly arrived at Shornur on 13.06.2012 with a sum of Rs.38,000/-; that the accused received Vikram Naik, took him to various places and then to a desolated place on the banks of Bharathapuzha and caused his death by stabbing with knives and attacking with broken pieces of a beverage bottle and robbed the money carried by him at about 9:30 p.m. on the same day. It was also alleged in the final report that the accused threw away the belongings of the deceased thereafter to the nearby bush and thereby caused disappearance of the evidence of the crime.

3. On committal, the accused denied the charges framed against them by the Court of Session and faced the trial. The evidence let in by the prosecution thereupon consists of the oral evidence of PWs 1 to 29 and Exts.P1 to P31 documents. MOs 1

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to 25 are the material objects in the case. Ext.D1 is a document proved by the second accused during the cross-examination of PW18 and Ext.C1 is a document taken on record by the court. On culmination of the evidence of the prosecution, the incriminating circumstances brought out were put to the accused. The accused denied the same and maintained that they are innocent. In addition, the first accused also filed a statement stating, among others, that the deceased was a person who was brought to Kerala by PW24 for work and that there was some dispute between PW24 and the deceased in connection with the wages payable to the deceased. It is also stated by the first accused in the statement that the photographs claimed to have been discovered by the police based on the information furnished by the accused are photographs brought by the relatives of Vikram Naik. A similar statement has been filed by the second accused, stating that a sum of Rs.19,000/- has been sent by his relatives to the account of a police officer as directed by PW18 who arrested him. As the Court of Session did not find the case to be one fit for acquittal under Section 232 of the Code, the accused were called upon to enter on their defence. The accused did not adduce any evidence.

4. On an appraisal of the materials on record, the Court of Session found the accused guilty of the offences

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punishable under Sections 120B, 302, 397 and 201 read with Section 34 IPC and sentenced them to undergo imprisonment for life and to pay fine for the offence punishable under Section 302 IPC; to undergo rigorous imprisonment for ten years and to pay fine for the offence punishable under Section 397 IPC and to undergo rigorous imprisonment for ten years and to pay a fine for the offence punishable under Section 120B IPC. Default sentences were also imposed on the accused. Separate sentence was not awarded for the offence punishable under Section 201 IPC. The accused are aggrieved by the said decision of the Court of Session and hence, this appeal.

5. Heard the learned counsel for the accused as also the learned Public Prosecutor.

6. It is seen that the case on hand is a case built on circumstantial evidence. The prosecution has attempted to prove through its evidence various circumstances. The following are the circumstances which the Court of Session found in favour of the prosecution:

- 1) Deceased had a homicidal death.
- 2) Accused 1 & 2 and deceased are natives of the same village at Rayagada Orissa state.
- 3) Both accused were employees of a metal crusher unit viz 'Shalimar Granites" Cherukodu, Vallapuzha and on 13-6-12 both accused took leave from their workplace by stating that they are proceeding to Thrissur and they reached back only at midnight.

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- 4) Accused and victim were seen together at around 5 p.m. by PW4.
- 5) Accused and victim Vikram Naik were last seen together on 13-06-2012 at around 9.30 Pm in the river banks of Bharathapuzha at Njangatiri kadavu near the place where the dead body of victim was found?
- 6) Recovery of belongings of the victim Vikram Naik pursuant to the disclosure statement of the accused.
- 7) Recovery of a portion of the robbed amount pursuant to the disclosure statement of the accused.
- 8) Purchase of knife by A1 from the shop of PW12 at Shornur on 13-06- 2012 at around 3.00 p.m.
- 9) Purchase of knife by A2 from the shop of PW11 at Shornur on 13-06-2012 at around 3.00 p.m.
- 10) Recovery of MO11 knife from the scene of occurrence.
- 11) Recovery of MO10 knife pursuant to the disclosure statement of A2.
- 12) When the victim Vikram Naik reached at Shornur railway station on 13-06-12 he had made a phone call to the mobile phone of A2 from a public telephone booth at Shornur Railway station platform No.II.
- 13) Blood stains found on MO11 knife and the clothes of A1.
- 14) Abscondence of accused after commission of crime.

It is based on the aforesaid circumstances that the Court of Session came to the conclusion that the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt.

7. After taking us through the evidence adduced by the prosecution, the learned counsel for the accused contended that all the circumstances stated to have been established by the prosecution on the basis of which the accused are convicted, have

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not been conclusively established in the case and that circumstances, if any, brought out against the accused are not sufficient to establish the guilt of the accused beyond reasonable doubt. The learned counsel has advanced various arguments also to substantiate the said contentions. *Per contra*, the learned Public Prosecutor supported the impugned judgment, pointing out that the fourteen circumstances as found to have been established by the prosecution would prove the guilt of the accused beyond reasonable doubt.

8. In the light of the submissions made by the learned counsel for the parties, the points that arise for consideration are (1) whether it is a case of homicide and (2) if so, whether the conviction and sentence imposed on the accused are sustainable in law.

9. Points 1 and 2: PW16 is the doctor who conducted autopsy of the body of the deceased on 17.06.2012. The autopsy commenced at 10.30 a.m. and concluded at 1.30 p.m. Ext.P9 is the autopsy certificate. The cause of death of the victim, according to PW16, was due to the incised wound sustained to the neck and the incised penetrating wounds sustained to the chest and abdomen. PW16 deposed in his evidence that injury Nos. 9, 10 and 13 were fatal. The said ante-mortem injuries deposed to have been suffered

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by the deceased are the following:

“9. Incised wound 13x0.5cm and 6.5cm deep transversely placed on the front of neck across midline extending 2cm below the right angle of mandible to the left mastoid bone cleanly cutting through the soft tissue and thyroid laminae 1cm below its superior border and for a distance of 4cm and cutting the right superior horn cutting the oesophagus and blood vessels and making an incised wound 2 x 0.3 x 0.2cm over the periosteum of the anterior part of body of 4<sup>th</sup> cervical vertebrae. The carotid vessels and jugular veins of both sides were cleanly cut. Hyoid bone was intact. The cut end of the thyroid lamina and superior horn was found inside the injury.

10. Incised penetrating wound 6 x 5cm obliquely placed on the right side of trunk its inner lower end 18cm outer to midline and 12cm above the top of hip bone. The wound was seen piercing the chest muscles making an incised wound 6x2.5cm obliquely passing through the 9<sup>th</sup> intercostal space and cutting the upper border of 10<sup>th</sup> rib for a length of 1cm, its inner end 16cm outer to midline and 12cm below the supra sternal notch, its upper outer blunt end was 13cm below the axilla and 18cm outer to midline. The injury was seen passing through the right pleural cavity and making an incised wound 5.5 x 0.5cm on the right dome of diaphragm and entering into the superior surface of right lobe of liver underneath and ending inside liver making an incised wound 3.5 x 0.4 x 1.5cm deep. The right lung was collapsed. The right chest cavity contained 250ml of fluid blood .The minimum depth of the wound was 6cm.

x x x x x x x

13. Incised wound 9x5.5cm entering into the peritoneal cavity on the left side of front of trunk, its inner end at midline and 26cm below the suprasternal notch. The wound showed two sharp ends over the superior and medial portion and a blunt end at the outer lower portion. The wound was seen passing through the muscle

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plane and piercing the anterior wall of stomach making an incised wound 5.5 x 0.3cm. The wound was seen cutting the transverse colon at the splenic flexure and ending there. Portions of stomach and small intestine was not seen inside the abdomen.”

PW16 deposed that the said injuries could be caused with MOs 10 and 11 knives and Injury No.1 could be caused by MO21 series broken pieces of the beverage bottle. During cross-examination, PW16 deposed that there were decomposition changes on the various parts of the body and the approximate time of death could be three days prior to the date on which the autopsy was conducted and may extend even to five days from the said date also. The learned counsel for the accused did not seriously challenge the fact that the death of the victim is a homicide. On the other hand, the learned counsel was focussing seriously on the time of the death of the victim to contend that the death did not occur at the time, as alleged by the prosecution. In the circumstances, we find no infirmity in the finding rendered by the Court of Session that the case on hand is a case of homicide.

10. The next aspect to be considered is whether the prosecution has proved beyond reasonable doubt that it is the accused who caused the death of the victim. The prosecution relies on the oral and documentary evidence to prove the said fact. PW1 is a public activist who, on receiving information about the dead

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body lying on the banks of the Bharathapuzha river, informed the matter to the police, after visiting the place. The evidence let in by PW1 is only that he informed the matter to the police. Ext.P1 is the First Information Statement given by PW1. PW2, a resident of the locality and a loading and unloading worker, deposed that when he went to Bharathapuzha river for fishing along with his friend Noushad on 13.06.2012 between 9 and 9.30 p.m., they saw three persons coming down towards that area and proceeding towards west through the river banks; that they were conversing in Hindi; that as the conduct of the three persons were found to be suspicious, they lit the torch to see them; that they left from that place after fishing by about 12.30 a.m. and that they did not see the three persons thereafter. PW2 deposed that the accused were two among the said three persons and a person with long hair was the third person. PW2 deposed that the third person was carrying a bag and the police had shown to him the photograph of that person. He deposed that MO4 is the photograph of that third person shown to him by the police. In cross-examination, PW2 testified that the accused and another were proceeding to the banks of the river before them. PW2 thereafter added that they walked together almost a furlong. PW2 also testified in cross-examination that one who goes further to the western side of the

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place where they were fishing, has to come back through the same route and that they did not see the accused and third person coming back. PW3 is an autorickshaw driver. PW3 deposed that on 13.06.2012 at about 10:45 p.m., the accused called him for a ride at Mele Pattambi and he dropped them off at Puthiya Road. He deposed that since the accused were talking in Hindi during the ride, he noticed them. PW4 is the Manager of a photo studio situated at Mele Pattambi. He deposed that he was acquainted with the accused as they visited his studio many a times earlier. He further deposed that on 13.06.2012, at about 5 p.m., the accused came to his studio along with another person with long hair. He deposed that they came there for the copy of a passport size photograph which the first accused took earlier and for the purpose of making a joint photo of the first accused with a girl. PW4 deposed that the police showed him the photograph of the person who accompanied the accused to the studio. PW4 deposed that MO4 is the photograph of the third person shown to him by the police.

11. PW6 is the owner of a mobile shop in the vicinity of the Pattambi Bus Stand. He deposed that on the morning of 13.06.2012, the accused visited his shop and purchased a second-hand mobile phone. PW10, Santha is the cook of Shalimar Granites

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where the accused were working. She deposed that the first accused had entrusted to her a sum of Rs.13,000/- on the understanding that the same shall be returned to him on 14.06.2012. She also deposed that she entrusted the said money later to the police. PW11 is the owner of a stationery shop at Shornur. PW11 deposed that the second accused purchased MO10 knife from his shop on 13.06.2012 at about 3 p.m. In cross-examination, PW11 deposed that he could identify the knife as the price tag was still visible on the knife. PW12 is the owner of another stationery shop at Shornur. PW12 deposed that the first accused had purchased MO10 knife from his shop on 13.06.2012 at about 3 p.m. In cross-examination, PW12 deposed that he could identify the knife as the knife was one manufactured by the company named Polyguard.

12. PW15 is the Manager of Shalimar Granites. PW15 deposed that accused were his employees in the crusher unit; that the accused were residing in the premises of the crusher unit itself; that on 13.06.2012, both the accused were on leave; that they left the premises of the crusher unit on that day in a lorry; that the accused came back to the crusher unit only by about 12 a.m. midnight; that he was there at the quarry when the accused came back; that although the first accused worked on the following day,

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the second accused took leave and that on 15.06.2012, the second accused left to his native place. PW15 also deposed that when the police came to the crusher unit seeking help of persons who hail from Orissa to identify the dead body found on the banks of the river as the same was found to be that of a person from the State of Orissa, the first accused and one Kuppulal were sent along with the police. PW15 deposed that the first accused and Kuppulal returned after sometime and informed him that they could not identify the body. PW15 deposed that thereafter, the first accused absconded.

13. PW17 is the Nodal Officer of Vodafone Cellular Limited. He produced the call details of mobile number 9946592663 for the period from 10.06.2012 to 20.06.2012. Although he produced a photocopy of the Customer Application Form in respect of the said mobile number, the document being a photocopy, the same was not admitted in evidence. PW18 is the sub inspector of police who conducted the inquest. PW18 deposed that he seized MO18 pants and MO19 shirt from the body of the deceased as also MO20 series chappals, MO21 series broken pieces of beer bottle, MO22 series train tickets and three bits of paper containing three different phone numbers from the place where the body was found. In cross-examination, though PW18

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admitted that he went to Orissa to arrest the second accused, he denied the suggestion put by the learned counsel for the accused that the relatives of the second accused deposited Rs.19,000/- in the bank account of a police constable, K.S.Mani attached to Thrithala police station.

14. PW19 is the accountant of Shalimar Granites. PW20 is the JCB Operator of Shalimar Granites. PWs 19 and 20 deposed more or less on the same lines as deposed by PW15. PW21 is the driver attached to Pattambi police station. He deposed that it is he who translated the statement of the witnesses hailing from Orissa to the investigating officer. In cross-examination, PW21 deposed that he does not know the language Odia. He also deposed that all the witnesses were not conversant with Hindi and that the father of Vikram Naik did not know Hindi. PW23 is the Nodal Officer who produced the call details of the mobile number, 8606074666 which was obtained from the body of the deceased. It belonged to one Janaklime who was an employee of a granite quarry at Kannur.

15. PW24 is one Kuppulal. PW24 and the accused hail from the same village in Orissa. PW24 was also an employee of Shalimar Granites. PW24 deposed more or less on the same lines of the evidence tendered by PW15. In addition, PW24 deposed that

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the accused were residing next to his room in the crusher unit and that the accused took leave on 13.06.2012 in the pretext of meeting a friend. PW24 deposed that when he contacted a person named Ballu Naik, he was informed that Vikram Naik left for Kerala as required by the accused with Rs.40,000/- in Dhanbad - Alleppey train at 5.45 a.m. on 12.06.2012. It is PW24 who has initially gone along with the first accused to identify the body of the deceased based on the request of the Police and informed PW15 thereafter that he could not identify the body.

16. PW25 is the step father of the deceased. He deposed that Vikram Naik is his son; that the accused who are the friends of his son called him to Kerala; that his son left Rayagada by train on 12.06.2012; that he had with him Rs.40,000/-, clothes, a passport, ID card and the mobile numbers of the accused and that the belongings of his son were shown to him at the police station. PW25 identified MOs 1 to 9 and 15 to 20. In cross-examination, he stated that he saw only the money in the form of cheque. He also identified MOs 1 to 9 and MOs 15 to 20 as the belongings of the deceased.

17. PW27 is the investigating officer who conducted the investigation and laid the final report in the case. He deposed that the dead body found on the banks of the river was identified

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as that of Vikram Naik by his father on the basis of his belongings. PW27 also deposed that based on the information furnished by the second accused, he discovered and seized MO1 series photographs and MO2 series photocopies of ID cards as per Ext.P4 mahazar, MO10 knife as per Ext.P6 mahazar and MO14 pants, MO15 shirt, MO16 perfume bottle and MO17 cover in which MOs 14 to 16 were kept, as per Ext.P7 mahazar. Similarly, PW27 deposed that on the basis of the information furnished by the first accused, he discovered and seized MO22A pants, MO23 shirt and MO24 towel as per Ext.P12 mahazar, a sum of Rs.13,000/- from PW10 as per Ext.P8 mahazar and MO3 bag, MO4 photo, MO5 full shirt, MO6 series pant, MO7 series banyan, MO8 socks and MO9 towel which were kept inside MO3 bag, as per Ext.P5 mahazar. In cross-examination, PW27 deposed that it was PW18 who brought down the accused from Orissa and entrusted their custody to him on 25.06.2012. When confronted with Ext.D1 counterfoil of the Bank indicating payment of a sum of Rs.19,000/- in the account of the police constable, N.S.Mani, PW27 deposed that instructions were given to the Bank to return the said money. On further cross-examination, PW27 deposed that there is no material in the case diary which would show that the said amount has been returned. PW27 also denied that the amount seized as per Ext.P8 mahazar is

not part of the amount covered by Ext.D1 counterfoil.

18. Before appreciating the evidence, it is necessary to keep in mind the settled principles as regards the requirements of law in a case built on circumstantial evidence namely, that the circumstances from which the conclusion of guilt is drawn must be fully established; that the circumstances should be of a conclusive nature and tendency; that the facts so established must be consistent only with the hypothesis of the guilt of the accused, that is to say, there should not exist any other hypothesis except the guilt of the accused; that the circumstances must exclude every possible hypothesis except the one to be proved and that there must be a chain of evidence so complete as to not leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show in all human probability, that it is the accused who must have done the act. Inasmuch as the offence alleged is one punishable with death, according to us, the principles aforesaid will have to be scrupulously followed and the benefit of even the slightest doubt should be extended to the accused, for the principle is that "fouler the crime, higher the proof."

19. In order to prove the guilt of the accused, the prosecution relies mainly on the last seen theory. It is the case of

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the prosecution that the accused are persons who were last seen together with the deceased. The case is attempted to be proved on the said basis by the prosecution placing reliance on the evidence tendered by PW2 and PW4. The contention raised by the learned counsel for the accused in this regard is that the evidence of PW2 and PW4 are not reliable and trustworthy. As noted, PW2 deposed that when he went to Bharathapuzha for fishing along with his friend Noushad on 13.06.2012 between 9 and 9.30 p.m., they saw three persons coming down towards that area and proceeding towards the west through the river banks and as the three persons were conversing in Hindi, they lit the torch to see them; that they left from that place after fishing by about 12.30 a.m. and that they have not seen the said three persons thereafter. PW2 also deposed that the accused were two among the said three persons and a person who had long hair was the third person and that he identified the said person based on MO4 photograph claimed to have been seized from MO3 bag. Admittedly, the accused and the deceased were not persons with whom PW2 had any prior acquaintance. There is also no dispute to the fact that a source of light sufficient to identify even a person with whom PW2 could have had previous acquaintance was not available at the place, for otherwise, it was unnecessary for PW2 to light the torch to ascertain

the identity of the said persons who stated to have approached towards them. The evidence of PW2 therefore raises two questions namely, whether PW2 could note the features of the persons concerned so as to enable him to recognise them at a later point of time and whether it is possible to identify one among them based on a photograph. According to us, it is very difficult for a person placed in the background of PW2, to recognise persons whom he had seen for a few seconds in the background of a torch light where there was no other source of light, at a later point of time. Even if it is held that it is possible for a person to recognise such persons at a later point of time, it is difficult to recognise them on the basis of a photograph, especially when there is nothing on record as to the time at which MO4 photograph was taken. We take this view also for the reason that the evidence tendered by PW2 is that the third person found to be in the company of the accused was a long-haired person. In other words, it is the said feature of that person which enabled PW2 to recognise him based on MO4 photograph. It is seen that the person who is seen in MO4 photograph is not a long-haired person. Be that as it may, PW2 who deposed in chief examination that he saw three persons coming down towards them while they went for fishing on the relevant day after they reached the place, changed his stand in

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cross-examination initially by deposing that the accused and another were proceeding to the banks of the river before them and later, by deposing that they walked together almost a furlong. That apart, going by the prosecution case, the accused caused the death of the deceased at about 9.30 p.m. on the banks of the river and left the scene by about 10.30 p.m. Under normal circumstances, in the brutal manner in which injuries were inflicted by the assassin/assassins on the body of the deceased, the victim would certainly make noise out of pain and the alleged time of occurrence being 9.30 p.m., such cries would be heard by people in the surroundings, especially when the surrounding was the banks of a river. Even assuming that the assassin/assassins could prevent noise from being heard by others in some manner, going by the version of PW2, he and his friend remained at that place till 12.30 a.m. and they did not see the accused returning from that place until they left, when they have a specific case that one who proceeds towards the direction to which the accused and the third person proceeded, cannot go back without passing them. The specific case of the prosecution is that the accused left the scene by about 10.30 p.m. and caught the autorickshaw of PW3 by about 10.45 p.m. In the aforesaid circumstances, according to us, it is not safe at all to place any reliance on the evidence tendered by PW2

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in support of the last seen together theory relied on by the prosecution to prove the guilt of the accused. We come to this conclusion having regard to the fact that the statement of PW2 has been recorded only after the arrest of the accused. The accused were arrested on 25.06.2012 and it has been categorically deposed by PW2 that he went to the police station only on 27.06.2012.

20. True, PW4 deposed that he was acquainted with the accused as they visited his studio many a times earlier; that on 13.06.2012, at about 5 p.m., the accused came to his studio along with another person with long hair and that the said person is the person in MO4 photograph. It is seen that the feature of the person who accompanied the accused as spoken to by PW4 is that he had long hair. We have seen MO4 photograph. In MO4 photograph, Vikram Naik does not have long hair. PW4 did not speak of any other feature of the third person who accompanied the accused to his studio on 13.06.2012. There is nothing on record to indicate as to the time at which MO4 photograph was taken. MO4 photograph appeared to us to be one of a youngster aged around 25 years. As noted, the impression PW1 had while looking at the dead body was that it is the body of a person aged 50 years. Similarly, the impression PW18 had while looking at the body was that it is the

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body of a person aged 30 years. In the above circumstance, we are of the view that it is not safe to place reliance on the evidence tendered by PW4 that it was Vikram Naik who accompanied the accused to his studio on 13.06.2012.

21. Be that as it may, let us assume that PW2 and PW3 saw the accused together with the deceased as claimed by them. PW16, the doctor who conducted autopsy did not state in Ext.P9 autopsy report, the time since death. During cross-examination, PW16 deposed that the approximate time of death could be three days prior to the date on which the autopsy was conducted and may extend even to four or five days also from the said date. PW16 did not disclose in his evidence as to the scientific basis on which he gave evidence as regards his opinion on the said aspect. One of the arguments advanced by the learned counsel for the accused is that PW16 opened three windows of time, of which one namely, that the death might have occurred within five days prior to the autopsy would not tally with the prosecution case as Vikram Naik, going by the prosecution case, did not arrive in Kerala on the fifth day prior to the autopsy. It was argued by the learned counsel that it is possible to ascertain exactly, the time of death after collecting a full-sized live maggot seen on the body and sending the same for forensic entomology examination, as it is

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stated in Ext.P9 autopsy certificate that maggots were seen crawling all over the body at the time of autopsy. The learned counsel has relied on a decision of the Madras High Court in **M. Sakthivel v. State**, 2016 SCC OnLine Mad 1917, in support of the said argument.

22. The argument aforesaid of the learned counsel for the accused, according to us, is not one to be ignored. As noted, the case on hand is one of circumstantial evidence and the prosecution relies heavily on the theory of 'last seen together' to prove the guilt of the accused. When a case is built on the said theory, the time of death assumes great importance. It is obligatory in such cases for the prosecution to place on record satisfactory evidence as to the time of death to rule out the hypothesis of guilt other than that of the accused. The fact that it is possible now to estimate the time of death by conducting an entomology study by ascertaining the age of the oldest maggot found in the body, cannot be disputed. In this context, we find it apposite to refer to the following observation and finding rendered by the Madras High Court in **Sakthivel (supra)** :

“8. The learned counsel for the appellant would submit that the deceased would have died long prior to 22.08.2009 and not on 22.08.2009 as it is projected by the prosecution. This argument is founded on the fact that the dead body of the deceased was

highly decomposed and maggots were crawling all over the body, peeling of skin was seen all over the body, tooth loosened and other symptoms found on the body. We find some force in the said argument of the learned counsel, though we are not able to fully agree with the said argument.

9. In this regard, we may only refer to an article authored by Messers Ruchi Sharma, Rakesh Kumar Garg and J.R. Gaur under the title "Various methods for the estimation of the post mortem interval from Calliphoridae: A review" published in Egyptian Journal of Forensic Sciences, March 2015.

10. In the said article, the experts have stated that insects play the fundamental ecological role in the decomposition of organic matter. It is the natural tendency of sarcosaprophagous flies to find and colonize on a food source such as a cadaver as a natural means of survival. Sarcosaprophagous fly larvae are frequently encountered by forensic entomologists during postmortem investigations. The most relevant colonizers are the oldest individuals derived from the first eggs deposited on the body. The age of the oldest maggots provides the precise estimate of the postmortem interval. With advancement in technology, various new methods have been developed by scientists that allow the data to be used with confidence while estimating the time since death. Forensic entomology is recognised in many countries as an important tool for legal investigations. Unfortunately, it has not received much attention in India as an important investigative tool. The maggots of the flies crawling on the dead bodies are widely considered to be just another disgusting element of decay and are not collected at the time of autopsy. They can aid in death investigations (time since death, manner of death, etc.). The authors have further observed that the correct estimation of the postmortem interval is one of the most important aspects of legal medicine. The authors have dealt with various methods to estimate the time of death. For illustration, one of the methods stated by the

authors is the calculation made from the stage of the insect present on the cadaver by using the formula:  $T = A + B \times C$ , where 'A' is the stage of invasion, 'B' is the stage of the life cycle and 'C' represents the climatic factor correction. At the end of the study paper, the authors after having dealt with so many methods which are available in Indian conditions for establishing the time of death based on the presence of maggots have concluded that a new approach for estimating time since death seems more reliable and can be used with confidence in medico-legal cases given the inherent difficulties in generating a precise postmortem interval estimate are considered. The authors have expressed their hope in the following words:

“The study will make the officials and the criminal investigation team aware of and familiar with forensic entomology, a step which may initiate future studies and interest in the application of insect evidence in legal investigations in India.”

11. They also expressed their anguish that the maggots are not collected and used for estimation of the time of death.

12. The case on hand is yet another illustration where, though maggots were crawling all over the body, there was no attempt made by the investigating agency to collect the maggots by engaging the services of an entomologist to get precise opinion regarding the time of death. Had it been done, in the instant case, there would have been no scope for the learned counsel for the appellant to advance an argument disputing the time of death and in such event, this Court also would have, with confidence come to the conclusion regarding the reliability of the evidence of the prosecution as to whether the deceased was lastly found alive on 22.08.2009 or not. We only state that the best scientific proof of the time of death had been lost by the prosecution because of the inadequate investigation done.”

As in the case dealt with by the Madras High Court, it has come out that maggots were crawling all over the body at the time of the autopsy. There was no attempt to collect the maggots by engaging the service of an entomologist to get the precise opinion regarding the time of death. Had it been done in this case, there would have been no scope for any argument that the possibility of somebody else being the assassin of the deceased cannot be ruled out, and the court would have repelled the said argument confidently. The upshot of the discussion aforesaid is that the last seen together theory relied on by the prosecution fails.

23. The prosecution relies on the facts discovered based on the disclosures stated to have been made by the accused also to prove their guilt. It is settled that if a disclosure is made in a language not known to the police officer to whom it is made, the statement is to be recorded in the same language in which it was made and its translation also shall be recorded thereafter, otherwise it cannot be ensured that the discovery is based on the disclosure made by the accused. True, in a given case where the disclosure is not recorded in the language in which it was made, it cannot be said that it is not admissible, if the person who has translated the disclosure to the investigating officer is examined in the proceedings and his evidence, that it is he who translated the

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disclosure to the police officer, is not discredited in any manner by the accused. It is seen that the disclosure statements made by the accused in the case were marked only provisionally since the same were not recorded in the language in which they were made. The admissibility of the same, however, is not seen considered in the impugned judgment. We do not find any reason why the said disclosure statements should not have been admitted in evidence by the court, for the fact that the same were not recorded in the language in which the same were made is not a reason affecting the admissibility of the documents. Ext.P19 series are the disclosure statements claimed to have been made by the second accused and Ext.P22 series are the disclosure statements claimed to have been made by the first accused. The said disclosures are seen recorded only in Malayalam. There is some confusion as to whether the accused or at least one among them were conversant with Malayalam. Be that as it may, the stand taken by PW27 was that the disclosure statements were made by the accused in Hindi and the same were translated into Malayalam by PW21. There is nothing on record to indicate that the disclosures made by the accused have been recorded in Hindi. When PW27 was questioned on this aspect, though he deposed that he had with him the original versions as also the translated versions of the disclosures,

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he conceded that the said fact will not be revealed from the records of the case. Be that as it may, PW21 deposed that it is he who translated the statements given by the witnesses interrogated by the police. PW21 has no case that he translated the statements, if any, given by the accused. In other words, there is no satisfactory evidence that Exts.P19 and P22 series are disclosures made by the accused. No reliance can be placed, therefore, on the evidence tendered by the prosecution as regards the disclosures alleged to have been made by the accused, and consequent seizures of the material objects.

24. Let us assume that the disclosures were recorded in the language spoken to by the accused themselves and that the same are admissible. One common factor which we noticed in all the discoveries is that the material objects discovered and seized based on disclosures made by the accused, were not forwarded promptly to the jurisdictional Magistrate. In the case of MOs 1 series, 2 series, 3 to 9 and 14 to 17 seized as per Exts.P4 and P5 mahazars, those were sent to the court only after almost fifteen days and in the case of MO10 knife seized as per Ext.P6 mahazar, it was sent to the Court only after 38 days. There is nothing on record to show that the seized materials were properly packed, labelled and sealed. It is settled that when there is a delay in

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producing the material objects to the jurisdictional Magistrate, the prosecution has to explain the delay as also adduce evidence to show as to how and in what condition the material objects were kept, till they were produced before the court. In short, there is no evidence to show as to how and in what condition the material objects were kept in the police station during the interregnum.

25. Be that as it may, as noticed, PW27 deposed that based on the information furnished by the second accused, he discovered and seized MO1 series photographs and MO2 series ID cards as per Ext.P4 mahazar. The delay in sending the material objects in this case assumes importance in the light of the stand taken by the first accused while offering his explanations to the evidence let in under Section 313 of the Code that the torn off photographs of the deceased relied on by the prosecution are the photographs brought by the relatives of Vikram Naik. The seizure is seen effected on 25.06.2012. The materials indicate that the father of the deceased arrived in the State and it is thereafter that Ext.P16 report has been filed indicating the name of the victim. Ext.P16 report was filed on 21.06.2012. In other words, before the alleged discovery, the relatives of the deceased had come to Kerala. That apart, it is seen that the torn off pieces of the photograph discovered are the enlargement of MO4 photograph

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found in the bag claimed to have been discovered and seized based on the disclosure made by the first accused as per Ext.P5 mahazar. The photocopies of the ID cards claimed to have been discovered are ID cards of the father of the deceased himself. The discovery and consequent seizure of the said material objects, after the arrival of the father of the deceased for identifying the deceased, looks artificial. Even assuming that the said material objects namely a few torn off photographs of the deceased and photocopies of the identity card of the father of the deceased were discovered based on the disclosure made by the second accused, information based on which the same were discovered by itself may not be sufficient to connect the second accused with the crime. PW27 also deposed that based on the information furnished by the second accused, he discovered and seized MOs 14 to 17 pants, shirt, a perfume bottle and a cover respectively as per Ext.P7 mahazar. The aforesaid material objects are belongings of the second accused himself and we wonder as to how the prosecution could connect the second accused with the crime on the basis of the discovery and seizure of the said material objects. Similarly, PW27 deposed that based on the information furnished by the second accused, he discovered MO10 knife with wooden handle as per Ext.P6 mahazar. As in the case of the material

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objects covered by Ext.P7 mahazar, nothing was found in the forensic examination on MO10 knife to connect the second accused with the crime.

26. PW27 deposed that based on the information furnished by the first accused, he discovered and seized a few clothes of the first accused namely, MO22A pants, MO23 shirt and MO24 towel as per Ext.P12 mahazar. True, human blood was found in MO22A pants which is item No.1 in Ext.P30 report of the Forensic Science Laboratory. It is on that basis that the prosecution attempts to connect the discovery of the said material objects with the crime. The argument advanced by the learned counsel for the accused in this regard is that the blood stains found on MO22A pants by the Forensic Science Laboratory was absent, when the said material object was seized. The learned counsel placed reliance on the recitals in Ext.P12 mahazar, in support of the said argument. Even though it cannot be presumed merely for the reason that blood stains in MO22A was not noted in Ext.P12 mahazar that MO22A did not contain blood stains, in the absence of any other material, it is difficult to connect the first accused with a crime of this nature solely based on the fact that human blood was found on one of his clothes, for human blood stains can appear in clothes on account of other circumstances and reasons

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as well. Similarly, PW27 deposed that on the basis of the information furnished by the first accused, he discovered and seized a sum of Rs.13,000/- from PW10 as per Ext.P8 mahazar. As noted, the occurrence is one alleged to have taken place on 13.06.2012. PW10 does not state in her evidence as to when the said entrustment was made. She of course, admitted that the amount was entrusted to her on the understanding that the same shall be returned on 14.06.2012. In other words, the entrustment should have been prior to 14.06.2012. There is absolutely no occasion for the first accused to entrust any money to PW10 any time prior to 14.06.2012, as going by the evidence tendered by the Manager and the Accountant of the crusher unit, the accused who left early in the morning from the crusher unit, came back only late in the night on that day. The said circumstance creates doubts as to the genuineness of the alleged discovery. As noted, the specific case of the accused during the cross-examination of PW18 who went to Orissa to arrest the accused and PW27, the investigating officer is that PW18 directed the relatives of the second accused to deposit some money in the account of a police constable attached to Thrithala Police Station namely, K.S.Mani, and they accordingly deposited a sum of Rs.19,000/- in his account. Even though PW18 denied having made any such instructions to the relatives of the

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second accused, the fact that the amount was received in the account of the police constable, K.S.Mani has been admitted by PW27. Though PW27 took the stand when he was confronted with the above situation that he instructed the bank to return the money to the depositor, he admitted that there is nothing on record to indicate that the amount was returned. The aforesaid circumstance also, creates doubt as to the genuineness of the discovery stated to have been made on the same day on which a sum of Rs.19,000/- was deposited in the account of the police constable. It is all the more so since Ext.P24 series indicates that even though cash was seized on 26.06.2012, the same was forwarded to the court only on 12.07.2012. Again, as noted, PW27 deposed that based on the disclosure made by the first accused, he discovered MO3 bag containing MO4 photo, MO5 full shirt, MO6 series pants, MO7 series banyan, MO8 socks and MO9 towel as per Ext.P5 mahazar. The said material objects are seen to have been identified by PW25, the father of the deceased as the belongings of the deceased. It is on that basis, the prosecution attempts to connect the first accused with the crime. The argument raised by the learned counsel for the accused in this regard is that the evidence tendered by PW25, the father of the deceased as regards the identification of the belongings of the deceased is not reliable.

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It is seen that since PW25 is a person who only knew Odia, deposed in the said language and the same was translated to the court by PW24, Kuppulal. It is doubtful whether PW24 Kuppulal is a person who was fully conversant with Malayalam, as it is seen that there is an endorsement beneath the deposition of PW24 that he deposed in Hindi as also in Malayalam and that his deposition was translated into Malayalam by a person called Muhammed Hashim, an LD Clerk attached to the Court of Session. No doubt, there are materials to indicate that Kuppulal knew Odia. If Kuppulal is not a person who was fully conversant with Malayalam, according to us, it is not safe to rely on the evidence of PW25 recorded by the court as regards identity of the said material objects. In short, according to us, the discovery of various facts based on the disclosures made by the accused does not in any manner help the prosecution to prove the guilt of the accused.

27. Another material which the prosecution relies on to prove the guilt of the accused is MO11 knife stated to have been seized by the police at the time of holding the inquest. The inquest on the body of the deceased was held on 16.06.2012. The case of the prosecution is that, it is using the said weapon that the accused caused the death of the victim. As in the case of the other material objects, MO11 though seized on 16.06.2012, the same

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was forwarded to the jurisdictional Magistrate only on 12.07.2012. The inordinate delay in forwarding the said material object has not been explained. Though MO11 was forwarded for forensic examination and it was reported that it contains blood stains, it is stated in Ext.P30 that the stain was insufficient to determine the origin of blood. In other words, it is difficult to connect MO11 also with the occurrence.

28. Yet another material the prosecution relies on to prove the guilt of the accused is that the deceased, on reaching Shornur Railway station on 13.06.2012 had called the second accused in his mobile number, 9946592663. It is in order to establish the said fact, the prosecution examined PW17, the nodal officer of Vodafone Cellular Limited. As already noticed, although PW17 produced a photocopy of the Customer Application Form in respect of the said mobile number, the same was not admitted in evidence. In other words, the prosecution failed to prove the mobile number, 9946592663 is one issued to the second accused. That apart, it was also found by the court below that the photocopy of the identity card of the second accused which is claimed to have been produced by the second accused for obtaining the above mobile connection, is a fake one. In short, the prosecution has failed to establish that the deceased had called the second

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accused on 13.06.2012.

29. One of the serious arguments raised by the learned counsel for the accused is that the prosecution has not established the identity of the dead body. No doubt, the identity of the dead body is to be established by the prosecution to infer the factum of murder by adducing convincing evidence. The case of the prosecution is that the relatives of the deceased affirmed that the dead body found was that of Vikram Naik. It is not disputed that by the time the relatives of Vikram Naik arrived, the body was cremated. The evidence tendered by PW27 in this regard is that the relatives identified the dead body found as that of Vikram Naik on the basis of photographs of the dead body and the belongings of Vikram Naik. In this context, it is relevant to mention that PW24 is a person who had previous acquaintance with the deceased and it has come out that even PW24 could not identify the dead body on account of the decomposition of the body. The materials indicate that only the step father of Vikram Naik namely, PW25 arrived for the purpose of identification as required by the police and as the body was already cremated by the time, the prosecution maintains that the body was identified by PW25 based on the photographs of the dead body and the belongings of Vikram Naik. In a case of this nature, according to us, the investigating

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agency should have certainly attempted to prove the identity of the dead body by adducing better scientific evidence.

30. In the light of the discussion aforesaid, it can be seen that the circumstances established in the case by the prosecution are only that the deceased had a homicidal death, that the accused and deceased are natives of Orissa from where Vikram Naik also hails, that the accused were absent in the place of work on 13.06.2012, that the accused purchased two knives from two different shops on 13.06.2012, that blood stains were found on MO11 knife and the clothes of the first accused, though the blood stain in MO11 knife is not that of human origin and that the accused absconded after the occurrence. The aforesaid, do not establish, according to us, the guilt of the accused beyond reasonable doubt.

31. Before parting with this case, it necessary to note that Ext.P9 reveals that the penis and scrotum of the victim were found cut off at the time of autopsy. There was no investigation in the case as to the reason for assassins to commit such a brutal act, if their intention was only to cause the death of the victim for committing robbery on him. When questioned on this aspect during cross examination, the investigating officer made a casual reply that it might have been done by the assassins for ensuring

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the death of the victim. We are not convinced. According to us, as it is not necessary to commit such a brutal act to ensure death, there is serious doubt as to the genuineness of the case set out by the prosecution as regards the motive of the crime also.

32. Needless to say, for all the aforesaid reasons, we are of the view that the accused are entitled to the benefit of doubt.

33. In the result, the Criminal Appeal is allowed. The conviction of the appellants and the sentence imposed on them are set aside and they are acquitted. They shall be set at liberty forthwith and released from custody, if their continued detention is not required in connection with any other case.

Registry is directed to communicate the above order forthwith to the concerned prison, where the appellants are undergoing incarceration.

Sd/-

**P.B.SURESH KUMAR, JUDGE.**

Sd/-

**C.S.SUDHA, JUDGE.**

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