IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

WEDNESDAY, THE 3RD DAY OF JULY 2024 / 12TH ASHADHA, 1946

DSR NO.5 OF 2018

CRIME NO.1230/2013 OF KUNDARA POLICE STATION, KOLLAM
ARISING OUT OF THE JUDGMENT DATED 05.07.2018 IN SC NO.353 OF 2015
OF ADDITIONAL SESSIONS COURT - IV, KOLLAM

COMPLAINANT:

STATE OF KERALA

BY ADV.SMT.AMBIKA DEVI.S., SPECIAL PUBLIC PROSECUTOR

ACCUSED:

GIREESH KUMAR
AGED 38 YEARS
S/O.GOPALAKRISHNAN CHETTIAR,
KOLAYIL PUTHEN VEETTIL,
PARIPPALLY VILLAGE, KOLLAM

BY ADV. SRI.M.RAJESH

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 06.06.2024, ALONG WITH CRL.A.NO.1241/2018, THE COURT ON 03.07.2024 DELIVERED THE FOLLOWING:

2024:KER:48580

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ARISING OUT OF THE JUDGMENT DATED 05.07.2018 IN SC NO.353 OF 2015 OF ADDITIONAL SESSIONS COURT - IV, KOLLAM

APPELLANT/ACCUSED:

GIREESH KUMAR,
AGED 38 YEARS
S/O GOPALAKRISHNAN CHETTIAR, KOLAYUL PUTHEN VEETIL,
PARIPPALLY VILLAGE, KOLLAM DISTRICT.

BY ADV M.RAJESH

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, KOCHI-31 THROUGH DY. SUPERINTENDENT OF POLICE, KOTTARACKARA(KOLLAM DIST) PIN 691001

BY ADV.SMT.AMBIKA DEVI.S., SPL.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06.06.2024, ALONG WITH DSR NO.5/2018, THE COURT ON 03.07.2024 DELIVERED THE FOLLOWING:

'C.R.'

JUDGMENT

Dated this the 03rd day of July, 2024

Syam Kumar V.M., J.

This appeal is filed by the sole accused in SC No.353 of 2015 challenging the judgment dated 05.07.2018 of Additional Sessions Judge IV - Kollam, convicting and sentencing him to death under Section 302 of the IPC. The learned Additional Sessions Judge IV - Kollam has on the other hand forwarded the case records in SC No.353 of 2015 to this Court for confirmation of the death sentence as provided in Section 366 (1) of the Code of Criminal Procedure, 1973. We proceed to consider both the appeal and the reference together.

Prosecution case:

2. Prosecution case is that on 11.06.2013, at 3.00 P.M., the appellant had trespassed into the house of Alice Varghese @ Ponnamma, aged 57 years, with the intention to commit rape and robbery and that after committing those crimes, caused her gruesome death and decamped with articles worth Rs.6,00,000/-.

The investigation:

3. Based on the FI statement of PW1, who is a nephew of the deceased, Crime No.1230 of 2013 was registered at Kundara Police Station at 11.00 A.M., on 13.06.2013. Preliminary

investigation and inquest were conducted by PW16 (S.I. of Police) and MOs 11 to 32 were recovered. Investigation was then taken over by PW19, C.I. of Police, Kundara Police Station. He arrested the accused on 25.06.2013 and seized MOs 1 to 10. Subsequently PW21, Dy.S.P., Kundara completed the investigation and laid the final charge.

Proceedings before the Trial Court:

4. After the submission of the final report before the Judicial First Class Magistrate Court-I, Kottarakkara, the case was committed to the Sessions Court, Kollam, under Section 209 Cr.P.C. and then made over to the First Additional Sessions Court, Kollam, for trial. Since the accused was not defended by a lawyer, a counsel to defend him was appointed through the concerned Legal Services Authority. Though a crime punishable under Section 376 IPC was alleged, the appellant was not charged under the said Section.

5. Prosecution examined witnesses PW1 to PW23. Exts.P1 to P36 were marked and MOs 1 to 32 were identified. Accused was examined under Section 313 (1)(b) of Cr.P.C. He denied the charges levelled against him and submitted that he had no connection whatsoever with the crime and that he had been falsely implicated by the police. No defence evidence was adduced from the side of the accused.

Judgment of the Trial Court:

6. The trial court found the accused guilty under Sections 449, 461, 394 and 302 of the IPC. He was sentenced to death under section 302 IPC and to undergo imprisonment for life for the offence under Section 449 IPC, to rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default, undergo simple imprisonment for six months under Section 394 of the IPC, as well as rigorous imprisonment for one year under Section 461 of IPC. In compliance with Section 366 Cr.P.C., the records were directed to be forwarded to this Court for confirmation of death sentence.

Appeal before us:

7. We have heard Sri.M. Rajesh, the learned counsel appearing on behalf of the appellant and Smt.Ambika Devi, learned Public Prosecutor appearing for the respondent/State.

8. The submissions of the learned counsel for the appellant are summarised as follows:

Prosecution has not succeeded in putting forth any evidence to connect the appellant to the alleged crime. No incriminating material has been recovered from the scene of occurrence pointing to the involvement of the appellant.

No witnesses have been examined or any evidence tendered to prove the presence of the accused at the place of occurrence or

anywhere in the vicinity at the relevant time or even prior to the same.

There is no reliable evidence to show that, MOs 1 and 2 viz., the chain and bangle, which were purportedly recovered from the jewellery shop based on the disclosure statement of the appellant, belonged to the deceased.

Recovery of MO10 SIM cards from the jeans/ pants of the appellant from a barbershop purportedly based on the disclosure statement of the appellant was not credible or reliable. Such a recovery from an open place which was easily accessible to all does not have any probative value so as to lead to a conviction.

No scientific evidence has been put forth to prove the involvement of the appellant in the crime. MO31 knife stated to be the weapon of attack has not revealed any fingerprints. Identity of the said knife has not been convincingly proved. Statements vary regarding the nature and length of MO31 thus making its identification unreliable.

Testimonies of the witnesses examined by the prosecution, especially PW1 (who gave the FI statement), PW4 (regarding recovery of MOs 1 and 2), PW6 (regarding recovery of MO10 SIM cards from the barbershop), PW7 and PW9 (regarding the presence of the appellant in the bar and his taking into custody by the police) and PW18 (that she was approached the appellant with ulterior

motive offering assistance) do not substantiate the prosecution version and justify the conviction and sentence.

No legally reliable evidence like CDR details or consumer number of the SIM cards used in MOs 18 and 19 mobile phones used by the deceased have been recovered or produced to identify the calls to the same.

Though blank cheques, blank papers with revenue stamps affixed and stamp papers recovered from the house of the deceased substantiate the fact that the deceased used to engage in money lending practice and might have had acquired enemies in the process, investigation did not proceed on the said lines.

MO10 SIM cards and MOs18 and 19 Mobile phones recovered do not reveal any evidence to incriminate the appellant. An incoming call registered in one of the mobile phones on 18.06.2013 ie., much after the body was found on 13.06.2013 and while the phones and the SIM cards were lying seized and sealed separately, point towards the slipshod manner in which evidence was handled.

None of the first responders other than PW1 who had arrived at the place of occurrence on 12.06.2013, including the police personnel from Kallada Police Station or neighbour Mr.Justin, have been questioned or examined by the prosecution. Construction workers admittedly employed by the deceased at her shop room adjacent to the house, who were working there till the day before

the incident were not questioned by the police nor examined.

Since the prosecution case is based solely on circumstantial evidence, an uninterrupted chain of circumstances leading to the sole conclusion of the guilt of the accused ought to have been brought out in evidence. Prosecution failed in establishing such a chain.

No evidence for a conviction under any of the sections charged was made out by the prosecution in the trial.

Capital punishment was imposed by the learned Sessions Judge without following the peremptory mandates.

Thus the learned counsel for the appellant submits that the conviction and sentence imposed on the appellant are only to be set aside and the appellant acquitted.

9. *Per contra,* defence put forth by the learned Public Prosecutor can be summarised as follows:

MOs 1 and 2 (chain and bangle) stolen from the body of the deceased and recovered from the jewellery where the appellant had sold it for Rs.70,000/- based on his disclosure statements reliably connects the appellant to the scene of occurrence and to the crime.

Recovery of MO10 (SIM cards) from the jeans/pants pocket of the appellant which was left at the barbershop based on his disclosure statements, implicates the appellant in the crime.

Recovery of MOs 11 to 30 which included MOs 18 and 19 mobile phones used by the deceased and her husband from the place where it was kept concealed by the appellant, outside the house of the deceased points to the involvement of the appellant in the crime.

Testimonies of PWs 2, 4 and 6 incontrovertibly connect the appellant to MOs 1, 2 and 10 and thus proves his involvement.

Appellant had just been released from the prison prior to the incident and he is a habitual offender. Deposition of PW18 proves that he targets lone elderly women, as his choice victims.

The nature of injury No.1 on the neck of the deceased which has been stated in the Post Mortem Certificate as an incised wound 15.5.x4.5 cm upwards horizontal across the neck caused with MO1 knife reveals the gruesome and heinous nature of the murder as well as the character of the appellant.

Death sentence imposed on the appellant is well founded in law and his conviction deserves to be confirmed.

Discussion and Conclusion:

10. Since the prosecution case hinges solely on circumstantial evidence and upon recoveries based on disclosure statements of the appellant, we deem it relevant to examine the law pertaining to the same before proceeding to examine the appreciation of evidence by the trial court.

Proof by circumstantial evidence:

11. Sufficiency of proof by circumstantial evidence has been a vexed question. The *lex classicus* on the point is the judgment of the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra**, [(1984) 4 SCC 116)] wherein the Court surveyed the decisions rendered on the point and succinctly laid down the law as follows:

> *"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]*
>
> *It is well to remember 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 all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all*

> *human probability the act must have been done by the accused.*
> *153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
> *(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.*
> *154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."*

The above summarisation in ***Sarda***'s case of the "*panchsheel"* of the proof of a case based on circumstantial evidence, was quoted

with approval by the Supreme Court in **Ramanand @ Nandlal Bharti v. State of Uttar Pradesh** ([2022] 5 S.C.R. 162) and the law on the point was further elaborated by the Supreme Court therein as follows:

> *"PRINCIPLES OF LAW RELATING TO APPRECIATION OF CIRCUMSTANTIAL EVIDENCE*
>
> *In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special inference. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered:*
> *a) The Factum probandum, or say, the principal fact (the fact the existence of which is supposed or proposed to be proved; &*
> *b) The Factum probans or the evidentiary fact (the fact from the existence of which that of the factum probandumis inferred).*
>
> *46. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as follows:*
> *1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
> *2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused and must be conclusive in nature;*
> *3. The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
> *4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the*

> *accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved."*

The Supreme Court has in **Ramanand @ Nandlal Bharti** *(supra)* also referred to the *Essay on the Principles of Circumstantial Evidence by William Wills by T. and J.W. Johnson and Co. 1872* and has *inter alia* quoted therefrom the following proposition on proof of circumstantial evidence with approval:

> *"The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum."*

It is thus trite that in a case involving circumstantial evidence, the Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

Recovery made based on disclosure statements:

12. Section 27 of the Indian Evidence Act, 1872 constitutes a partial removal of the ban placed on the reception of confessional

statements under Sections 25 and 26 of the Evidence Act. Section 27 of the Evidence Act reads as follows:

> *"27. How much of information received from the accused may be proved. — Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

This Section if founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer is tainted, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted in so far it distinctly relates to a fact thereby discovered. The statement which is thus admissible under Section 27 is the one which is the information leading to discovery.

13. While considering the question whether the prosecution has been able to prove and establish the discoveries in accordance with law as envisaged under Section 27, it is relevant to reproduce the observation of the Supreme Court in **Subramanya v. State of Karnataka** (2022 SCC OnLine SC 1400) wherein the process, stages and procedure to be complied with while recording disclosure statements as well as the manner as to how it should be placed before a court by the prosecution has been elucidated by the

Supreme Court.

> *"The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.*
>
> *If, it is the say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place*

> *anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."*

14. In **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh** (supra) the Supreme Court discussing the reliability of recovery based on disclosure statements under Section 27 of the Evidence Act has held as follows:

> *"If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused*

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15. The Supreme Court in **Babu Sahebagouda Rudragoudar and others v. State of Karnataka** [2024 SCC OnLine SC 561] has further elaborated on the manner in which the the Investigating Officer should give a description of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements. It was held that the disclosure statements cannot be read in evidence and if that is all what has been done by the prosecution then the recoveries made in furtherance thereof are non est in the eyes of law. When the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself

and the accused which has been taken down into writing leading to the discovery of incriminating fact(s).

16. Having thus reminded ourselves on the norms governing the proof of circumstantial evidence and the reliance that could be placed on discoveries made based on disclosure statements to the police, we now proceed to examine the evidence put forth in the case at hand and the conviction and sentence arrived at by the learned Sessions Judge based thereon as hereunder. :

(i) **Evidence connecting the appellant to the crime:**

17. The incriminating circumstance that had led the police to suspect the appellant in the crime is spoken of by PW 19 (C.I. of Police). He has deposed that as the investigating officer, he had, after completion of preliminary enquiries, collection of MOs and forwarding them to the court, toward identifying the perpetrator held discussions with officers of the Special Squad about the presence in the locality of any habitual offenders or persons recently released from prison. He was informed that the appellant, who resides near the ESI Hospital, Parippally had been recently released from prison. The said information, according to PW19 triggered a suspicion in his mind regarding the involvement of the appellant. Accordingly, he submitted a report (Ext.P20) before the jurisdictional Magistrate stating that the appellant is suspected of

being involved in the crime. After filing Ext.P20 report, PW19 commenced enquiries about the appellant. In the said process, on 24.06.2013 at around 11 P.M., appellant was located near the 'Kaveri' Bar at Kundara. He was taken into custody and upon questioning it was revealed that he had committed the crime. Based on his disclosure statement, PW19 proceeded to make recoveries.

18. The above said deposition of PW19 is the sole explanation that the prosecution has put forth as the reason to suspect and implicate the appellant in the crime. This deposition of PW19 suffers from some inconsistencies. Ext.P20 report spoken of by PW19 is dated 25.06.2013. The said report was filed nearly 14 days after the incident. In Ext.P20, it has been specifically stated that the appellant is the accused. He has not been termed as a suspect in the said report. This contradicts the deposition of PW19 that the said report was filed terming the appellant to be a suspect. PW19 had further specifically stated that the appellant was taken into custody on 24.06.2013, at night 11.00 P.M., from the bar and was questioned which later led to his arrest on 25.06.2013. The date of arrest as per Ext.P21 arrest memo and the date of Ext.P20 report thus coincides. This reveals that the exercise spoken of by PW19 viz., that of first suspecting the involvement of the appellant and then endeavouring to gather tangible material to confirm such

suspicion, never actually happened. Beyond the deposition of PW19, there is nothing in evidence to show any tangible material or valid reason to suspect the appellant's involvement in the crime. No incriminating material connecting him to the crime scene or any reason to *prima facie* suspect his involvement has been presented by the prosecution. The sole explanation put forth through PW19 is that since the appellant had recently been released from the prison, he might be habitually inclined to commit such crime. This gives credence to the contention put forth on his behalf that the crime was foisted on him merely based on a hunch and baseless suspicion and that recoveries that followed thereafter were all planted by the police. Confronted with this scenario, the learned public prosecutor submits that it is normal and routine as part of investigation to suspect habitual offenders and persons recently released from the prison and to look for their involvement in the crime. The said course adopted as part of the investigation process, the learned public prosecutor submits cannot by itself be termed as one motivated by desperation or as one done with malice.

19. There is *prima facie* merit in the said submission by the learned public prosecutor. It is relevant to ascertain whether any positive evidence has subsequently been collected and tendered revealing the involvement of the appellant in the crime thus justifying the initial suspicion that was cast upon him, which albeit,

was without any reliable material evidence. This calls for a close scrutiny of the prosecution evidence, which is exclusively circumstantial and primarily hinges on the recovery of MOs 1 and 2 and MO10.

(ii) Recovery of MOs.1 and 2 under Section 27 of the Evidence Act:

20. MOs1 and 2 are a chain and a bangle respectively which were missing from the body of the deceased and were recovered from S.M.Jewellery, Kannanellore on 06.07.2013 based on the disclosure statement of the appellant. This recovery is put forth by the prosecution as a crucial evidence incriminating the appellant in the crime. On the other hand, the learned counsel for the appellant submits that there is no evidence to prove that the said MOs even belonged to the deceased. Hence before proceeding to appreciate the evidentiary value of the recovery, it would be relevant to examine whether there exists any reliable evidence to connect the said MOs as belonging to the deceased. PW19 has in his deposition stated that the said MOs were shown to PW2 (husband of the deceased) and he had duly identified them as the chain and bangle of his deceased wife. PW2 has in his deposition made further statements with respect to the missing gold ornaments. He has deposed that upon being informed of his wife's murder he had returned from the Gulf and had inspected the house

in the presence of the police. He had noticed that ornaments and jewellery including those worn daily by his wife were missing. According to him, his wife had 25 sovereigns of gold and while at home she used to wear a chain, a bangle, a finger ring and a stud earring. It is relevant to note here that this statement of PW2 regarding his wife's daily wear jewellery is contradicted by the last person who saw her alive viz., Justin a relative living nearby who stated that when he saw deceased Alice on 10.06.2013, at 5.30 pm, on the terrace of the house, she was not wearing any precious ornaments on her. That being so, of the 25 sovereigns of gold said to have been missing from the house by PW2, only MOs 1 and 2, which together constitute only around 25 gms. were recovered by the police. The finger ring and stud earring spoken of by PW2 was also not recovered. The discrepancy in the quantity of gold spoken of by PW2 is referred to by PW21 (Dy.S.P.) while answering a question put to him during cross examination. He has stated that only deceased Alice can explain as to how many ornaments were there and he further added that though PW2 had stated that around 25 sovereigns were present in the house only around 25 grams of gold were recovered. Thus the statement of PW2 that there were 25 sovereigns of gold in the house and that his wife used to wear a chain, a bangle, a finger ring and a stud earring daily are not only unsubstantiated, but is also contradicted by the

statement of Justin and that of PW21. Now coming to the evidence concerning the identification of MOs 1 and 2 by PW2, the same too is not convincing and beyond doubt. PW2 had been shown MOs 1 and 2 while he was examined in court and he had identified them as his wife's missing ornaments. However, in his cross examination, PW2 has deposed that MOs 1 and 2 were not purchased by him and that after he had left abroad, the deceased had exchanged the chain and bangle purchased by him and had brought new ones. He also added that he left for the Gulf on 20.04.2013 and that the exchange of the said jewellery was done by the deceased before his return in 2013. PW2 had thus never had an opportunity to closely observe MOs 1 and 2 jewellery so as to be able to recognise and confirm their identity. Thus the affirmation by PW2 that MOs 1 and 2 belong to his deceased wife is not reliable. Since it was not him who had purchased those, he had no occasion to observe it on the said count also. He has further deposed that he had not noted the fashion of the chains worn by his wife. We note that even if he had an occasion to see MOs 1 and 2 at any point of time before its being shown to him in the court, his statement in identification cannot carry much credibility as he had after its seizure by the police, already obtained possession of the said MOs from court on an undertaking that he shall return it to the court during the time of trial. MOs 1 and 2 thus identified by PW2 in court were all along in

his custody. Further the contradictions regarding the date of his seeing MOs 1 and 2 make his statement even more unreliable. PW2 had in his deposition first stated that the police had shown him MOs 1 and 2 on the very date on which the appellant was apprehended, ie., on 25.06.2013. However, later he stated that it was after the appellant was taken to the jewellery at Kannanellore and after the recovery effected therefrom that he was shown MOs 1 and 2, in which case, the date of his seeing MOs 1 and 2 would be on or after 06.07.2013. This contradiction in the statements of PW2 assumes significance, since if MOs1 and 2 were already seen by PW2 on 25.06.2013 as shown to him by the police, then the recovery of the very same ornaments from S.M.Jewellery, Kannanellore on 06.07.2013 purportedly on the basis of the disclosure statement of the appellant, becomes suspicious and unreliable adding credence to the allegation of planting of the MOs to enable its later recovery based on disclosure statement as alleged by the learned counsel for the appellant. Now coming to the veracity and reliability of the recovery of MOs 1 and 2 effected from S.M.Jewellery, Kannanellore, the owner of the said jewellery who was examined as PW4, has deposed that he has not seen the MOs being sealed at his jewellery after its recovery and that his jewellery shop has no licence. He has also submitted that his jewellery shop has not been opened after the seizure of MOs. The

avocation of PW4 has been stated in the deposition as 'Construction' and not as a jeweller or businessman, which also necessitates the statement of PW4 to be approached with caution.

21. It can be seen from the above manner in which the disclosure statement was purportedly recorded and the recovery effected pursuant to the same that the mandates as prescribed by the Supreme Court as reproduced above in **Subramanya v. State of Karnataka** (supra) and in **Babu Sahebagouda Rudragoudar and others v. State of Karnataka** (supra) have not been complied with at all. This assumes pivotal importance because the culpability of the appellant in this case largely hinges on the identification of the gold ornaments recovered.

22. Further the practice followed by the investigating agency in this case of displaying the recovered articles directly to the witness and seeking their outright confirmation, is not reliable or trustworthy. Identification of gold ornaments must be done by mixing them with similar articles and the witnesses should be asked to identify them. Such a course of action will ensure the veracity of the identification and also makes the statements emanating therefrom more reliable. Though the Kerala Police Manual 1969 envisages such a course, the same has apparently not been adhered to by the police to the detriment of the prosecution case (**Dakkata Balaram Reddy and another v. State of Andhra**

Pradesh [(2023) SCC OnLine SC 474] and **Makrand Singh and others v. State of Madhya Pradesh** [(2019) 3 SCC 770].

23. From the above discussion of the evidence tendered with respect to the recovery of MOs1 and 2, we conclude that the prosecution has not been able to convincingly prove beyond doubt that MOs 1 and 2 belonged to the deceased and that the recovery from jewellery based on the disclosure statement of the appellant is beyond doubt or *per se* reliable.

(iii) <u>Recovery of MO10 SIM cards from the appellant:</u>

24. That takes us to the second crucial recovery put forth as incriminating the appellant viz., the recovery of two SIM cards (MO 10) from the pocket of the jeans/ pants of the appellant in a plastic bag recovered from a barbershop. Subsequent to his arrest, as per the disclosure statement of the appellant, a Section 27 recovery had been made from a barbershop in Bharanikkavu. A plastic bag was recovered from the shop which contained within, MOs 3 to 10. The owner of the said barbershop was examined as PW6. He deposed that on 22.06.2013, the appellant had come to his shop for a haircut along with two other persons and after the haircut, he left a plastic bag in the barbershop promising to collect it later. Three days later the police came to his shop and asked about the bag. He showed them the plastic bag and the police opened the said bag within which was found the articles identified

as MOs 3 to 10. The said recovery assumes relevance due to the presence of two SIMcards (MO10), purportedly found in the pants of the appellant inside the bag left at the barbershop. The said MO10 SIM cards as per the prosecution belonged to the deceased and her husband (PW2) and were stolen from their two mobile phones (MOs 18 and 19) from the scene of occurrence. Thus as per the prosecution case, the said SIM cards recovered from the appellant's pant pocket connects the appellant to the crime. He had after the murder of the deceased, removed the SIM cards from the phones. The said phones viz., MOs 18 and 19 were recovered from another plastic bag outside the house of the deceased from underneath a slab covered with coconut husks along with MOs 11 to 30. Connecting thus the recovery of the mobiles phones from the house and the SIM cards from the barbershop, the prosecution seeks to corroborate the evidence against the appellant. Here too the prosecution case flounders for more than one reason.

25. Though the recovery was made as per Section 27 of the Evidence Act, no portion of the disclosure statement regarding recovery has been prepared or marked. Neither has the investigation officer (PW 19 - CI of Police) given a description of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements [**Babu Sahebagouda Rudragoudar and others v. State of Karnataka**

(supra)]. Further, PW19 had in his deposition stated that in furtherance of the confession statement, appellant had lead PW19 to the barbershop at Bharanikkavu and MOs 11 to 30 including the MO10 SIM cards were recovered therefrom by the appellant himself. Ext.P2 recovery mahazar notes the presence of the appellant at the barbershop. However, when examined as PW6 the owner of the barbershop who is the witness in Ext.P2 has not stated the presence of the appellant or that the appellant had taken the plastic bag from the location in the barbershop. He has on the contrary stated that the police had come to his shop asking for the bag and that it was the police who had taken the bag and displayed its contents. Further the bag and its contents were taken away by the police. He has further deposed that the mahazar was prepared by the police at the police station. As regards the very same SIM cards, viz., MO10, PW2 (husband of the deceased) had in this deposition stated that the police had informed him that they had recovered two SIM cards kept over a luggage in the house where the body was found. Being a hearsay statement no value could be attached to the said statement. However, the deposition of the witness to the seizure PW6 does not state that the appellant was present at the place of recovery when the police seized MO10 from this barbershop. This read along with the fact that a disclosure statement regarding recovery has not been prepared or marked

makes Ext.P2 doubtful.

26. It is trite law as laid down in **Ramanand @ Nandlal Bharti** (supra) that the requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the recovery panchnama/ mahazar. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence.

27. **In Dakkata Balaram Reddy and another v. State of Andhra Pradesh** (supra), it was held that recovery of the stolen property from the accused would not be sufficient in itself to convict them for murder. The weight of evidence on record taken cumulatively must unerringly point to the guilt of the accused leaving no room for second thoughts. It cannot be said that the said mandates have been satisfactorily complied with or achieved in this case.

28. The evidence tendered by the prosecution does not meet the aforesaid principles of law and the recovery affected of MOs 10 SIM cards cannot hence be termed as legally reliable.

(iv) Evidentiary value of a recovery made from an open place

accessible to all:

29. MO10 SIM cards were recovered from the barbershop based on the disclosure statement of the appellant on 25.06.2013. The murder of Alice, which as per PW19 C.I. of Police was committed on 11.06.2013 between 3.15 P.M. and 4.15 P.M. That the appellant would have carried around MO10 (which were two SIM cards one of which was totally damaged) and waited till 22.06.2013 to leave the bag containing the same at a barber's shop defies logic. Compared to the same, the contention that the police had after the arrest of the accused on 25.06.2013 planted the bag with appellant's clothes including his pants containing MO10 SIM cards at the barbershop inspires more confidence. This contention though has been strongly refuted by the learned public prosecutor, relying on the recovery mahazar (Ext.P15) and the deposition of PW15, a closer scrutiny of his deposition as explained above reveals major chinks in the prosecution case. The added fact that the recovery is from an open place which is accessible to all makes the recovery of MO10 and the conviction based on the same more precarious. The reliance placed by the learned counsel for the appellant on the dictum laid down by the Supreme Court in in **Manjunath and others v. State of Karnataka** [2023 SCC Online 1421] and **Jaikam Khan v. State of Uttar Pradesh** [(2021) 13 SCC 716] assumes relevance in this juncture. In the latter case, the Supreme

Court has held as follows:

> *"One of the alleged recoveries is from the room where deceased Asgari used to sleep. The other two recoveries are from an open field, just behind the house of deceased Shaukeen Khan i.e. the place of incident. It could thus be seen that the recoveries were made from the places, which were accessible to one and all and as such, no reliance could be placed on such recoveries."*

30. On similar lines, in **Nikhil Chandra Mondal v. State of West Bengal** [(2023) 6 SCC 605], the Supreme Court has held as follows :

> *"The trial court disbelieved the recovery of clothes and weapon on two grounds. Firstly, that there was no memorandum statement of the accused as required under Section 27 of the Evidence Act, 1872 and secondly, the recovery of the knife was from an open place accessible to one and all. We find that the approach adopted by the trial court was in accordance with law. However, this circumstance which, in our view, could not have been used, has been employed by the High Court to seek corroboration to the extrajudicial confession."*

In the light of the facts as revealed in evidence and the legal precedents on the point, the recovery of the plastic bag containing MOs3 to 10 and MOs 10 SIM card to fix culpability on the appellant are not sustainable in law. We hence conclude that the recovery of MOs 3 to 10 from the barbershop is not reliable enough to prove the case put forth against the appellant and that the prosecution has failed in proving the connection of MO10 SIM

cards with the appellant.

(v) <u>Absence of scientific evidence to connect the accused with the telephones/ SIM cards recovered from the mobile phones belonging to the deceased</u>.

31. As per the deposition of PW22, who is the Senior C.P.O. in the Cyber Police Station, the last call attended on MO10 SIM card was on 10.06.2013, at 10:06:37 hours, basing on Annexure 2 and Annexure 3 downloaded by him. There was a call on 10.06.2013 evening at 06.34:30 which lasted for 28 seconds and was attended to. On the same day i.e., 10.06.2013 there was another call at 05.57:49 which was an incoming call of six second duration. More importantly PW22 also deposed that as per Annexure 3 downloaded by him, there was an incoming call on 18.06.2013 morning at 09.37:12 which was not attended. It follows therefrom that if a call could be received into the mobile phone (MO18 and MO19) which had already been recovered by the police, the same would have had a SIM card within it and this shows that either of the phones which were recovered by the police were being manipulated by the police. It has been specifically deposed by PW22 that of the two SIM cards recovered (MO10), one SIM, which was of vodafone make, had been damaged and hence its authenticity could not be tested. MO18 and MO19 mobile phones were also inspected by PW22 and he had submitted that he had

used a tool by the name U-fed for the purpose of accessing physical memory of the phone and the saved details therein. PW22 has very specifically stated that there were no SIM cards in MO18 and MO19 mobile phones when he received them. MO18 and MO19 mobile phones though stated by PW16, to have been forwarded to the court vide Ext.P17 property list dated 13.06.2013, the said property list does not state the said two MOs as being forwarded to the court on that date viz., 13.06.2013. Actually MOs 18 and 19 were only forwarded to the court vide Ext.P24 which is the list of properties sent to the Magistrate dated 25.06.2013. The said list also contains the two SIM cards marked as MO10 one of which was of idea and the other was of vodafone make. Thus it can be seen that the SIM cards reached the court only on 25.06.2013 and this explains how an incoming call happened to be registered in the SIM on 18.06.2013. This evidence shows the misuse of the MOs 10, 18 and 19 while they were in the hands of the police. PW22 the Sr. C.P.O. in the Cyber Police Station has deposed that the MO10 SIM cards and MO18 and 19 mobile phones were handed over to him by the SHO. This statement of PW22 buttresses the contention that the call on 18.06.2013 could have registered while the phones and SIM cards were with the Police. Ext.P31 report submitted by PW22 specifically stated that MO10 SIM cards comprised of one each of Idea and Vodafone make of which the Vodafone SIM was physically

damaged and hence could not be subjected to any scientific analysis. As regards the other SIM card of Idea make Ext.P31 report stated that the ownership details of the said SIM till 13.06.2013 could not be collected from the service provider. The report stated that no documents concerning the said SIM cards like copies of the application form, ID proof or Call Data Records were collected from the service provider. It was also stated in the report that the IMEI numbers of the telephones in which the SIM cards were used were not recovered from the SIM card memory. Thus the deposition of PW22 and his report viz., Ext. P13 does not reveal anything that incriminates the appellant in the crime alleged. Though PW23 nodal officer of Idea Cellular Ltd. was examined, nothing to clarify the call on 18.06.2013 ie., after the phones were seized by the police, had been deposed by him. Though the discrepancy regarding the call that was received in the Mobile phone while it had no SIM card in it could have been resolved by producing the call data records of the concerned SIM card, no steps in the said direction were taken by the prosecution. Exts.P31 and P34 are the reports of the forensic examination of MO10 SIM cards and MOs 18 and 19 mobile phones. The same are of not much help as the Call Data Records for the period 01.06.2013 to 15.06.2013 are not available and that IMEI numbers of the phones in which MO10 SIM cards were used had not been revealed in the

reports. Further, even the consumer numbers of the SIM cards had not been recovered. All these points towards the total lack of scientific evidence to implicate the appellant in the crime and the benefit of doubt arising from the same should accrue to the appellant. The learned Session Judge had in the judgment while elaborating on the defects in the investigation of the case, after opining that PW 19 had not taken any efforts to see that a fair investigation is carried out and that the investigation was done by him in a most careless manner, proceeded to state that the most important defect in the investigation was the failure to send MO 10 SIM cards to the cyber cell to verify their ownership. The learned judge however erroneously concluded that the said defect had been rectified by the prosecution by examining PW22 and PW23. As discussed above the depositions of PW 22 and PW23 do not reveal the culpability of the appellant in any manner whatsoever.

(vi) <u>Character of the witness and deposition of PW18</u> :

32. An intriguing piece of evidence is the deposition of PW18 examined by the prosecution. The evidence of this witness had apparently swayed the learned Sessions Judge to impose capital punishment on the appellant. PW18 is a lady who is totally unconnected with the crime and was examined by the prosecution in an attempt to prove that the appellant was a person of doubtful character and was a sexual predator who was on look out for lone

vulnerable women as his targets. PW18 had deposed that she happened to meet the appellant on 18.04.2013 when she had come to the Kollam District jail to see her husband who was lodged in remand being involved in an abkari case. PW18 had further deposed that the appellant had made acquaintance with her in front of the jail by making her believe that he is a relative of her husband and he had in the pretext of helping and assisting her even stayed in her house overnight and she had out of good-will not only permitted him to stay back for the night but also had served him food. She had stated that subsequently upon being told by her husband that he had no such relative, she had asked the appellant to leave. Taking note of the discrepancies in the statement of PW18 regarding the dates on which she had met the appellant and the date on which police met her to enquire about him, her testimony is not reliable. We find that there was nothing legally reliable in the deposition of PW 18 that could have persuaded the learned District and Sessions Judge to accept the same and to rely thereon to convict the appellant much less to deem it as one justifying the imposition of capital punishment upon him.

(vii) **Failure to examine witnesses who had last seen the deceased:**

33. The deceased was an elderly lady staying alone in her house since her formerly estranged and later reconciled husband

(PW2), was employed in a Gulf country. Some evidence to prima facie show that she was engaged in money lending practice is available from the prosecution evidence. Prosecution witnesses have deposed that the workers engaged by the deceased to do some work on the shop rooms adjacent to her house were around on the dates immediately prior to her murder. The last person said to have seen the deceased alive on 10.06.2013 at 5.30 P.M. is one Justin, son of Sebastian, her next door neighbour living on the western side of her house. He had reportedly (as per Ext.P3 inquest report) seen her on the terrace of her house on the said date and time. It has also been reported in Ext.P3 as stated by Justin that when he saw her on the terrace, the deceased was wearing her usual dress and had no valuable ornaments on her. The said Justin has not been arrayed as witness nor examined by the prosecution. Though workers were engaged in the work of the shop room adjacent to the house during the days immediately prior to Alice being found dead, no such workers were identified by police nor examined by the prosecution. The prosecution case put forth without examining the said persons cannot be termed as one sufficient enough to prove the culpability of the appellant.

(viii) Discrepancy with respect to MO 31 Knife:

34. The Postmortem Certificate was marked as Ext.P14 through PW13 doctor who conducted the postmortem. She had in

the findings stated the cause of death as neck injury No.1 and that such injury is possible by using MO31 Knife which was recovered from the right hand of the deceased. MO31 was stated to have a length of 23 cm and the blade part as having a length of 13 cm. PW13 had deposed that the injury to the neck is not self-inflicted and that she cannot rule out the possibility of more than one person in the death of the deceased. PW16 who had recovered MO31 had in his deposition stated that the knife handle had a length of 11 cm and the blade portion had a length of 10 cm. He had added that the blade portion had length of more than 11 cm. There is no clarity in the evidence put forth regarding the length of MO31. It is relevant to note that MOs 11, 12, 13, 14 and 15 are also knives said to have been recovered from a plastic bag outside the scene of occurrence. The divergence in depositions raise a genuine doubt as to whether MO 31 knife produced in the court is the knife that was originally recovered from the scene. The deposition of PW14 Scientific Assistant, DCRB Kollam, had deposed that she couldn't collect any chance print from the knife and that she had not collected the knife though she saw one with blood stains at the scene. Though it has been contended by the learned public prosecutor that there is no confusion or lack of clarity regarding the identity of MO31 knife and since PW16 has though earlier stated its length of 21 cm he has later clarified that the same has

23 cm length and that the discrepancy if any in the statements tendered is trivial and of no consequence, the said contentions cannot be countenanced. It is the duty of the prosecution to prove as to which injury was caused by which weapon. [**Kartarey and others v. State of U.P.** (AIR 1976 SC 76)]

Observations of the trial judge regarding the investigation :

35. We note that the learned sessions judge had in the judgment scathingly criticized the investigation carried out by PW 19 and *inter alia* had opined that *"It is true that PW 19 had not taken so much pain to see that a fair investigation is done. He had done the investigation in a most careless manner."* With respect to the MO10 SIM cards, the learned sessions judge had opined that *"When the prosecution is relying upon the circumstantial evidence it is the best piece of evidence to connect the accused. But unfortunately, PW19 did not understand the evidentiary value of the MO10. So this is a major defect in the investigation."* The learned Judge further proceeded to state that *"I am forced to say that the Investigating Officer PW 19 had done the investigation in a most careless manner without knowing the basic principles of criminal law and investigation."* The learned Sessions Judge then basing himself on the dictum laid down by the Supreme Court in **Sukhvinder Singh and others v. State of Punjab** [AIR 2014 SC (Supp.) 1522] which held that defects in investigation are not fatal

to the prosecution except when the defects are so grave that the whole investigation can be doubted as dishonest and tainted investigation, concluded that the prosecution was able to establish that the appellant *"trespassed to the house through the back grill of the house with an intention to commit offense which is punishable with death."* and that *"...he opened the receptacle containing the valuable property which is evident from the Ext. P3 inquest as well as the scene mahazar."* The learned Judge also held that the appellant had *"committed robbery of valuable articles from the house including MOs 1 and MO 2"* and that *"He committed murder of Alice."* The learned Judge thus found the appellant guilty under Sections 449, 461, 394 and 302 of the IPC.

36. From the evidence on record there was no material before the learned trial Judge to arrive at any of the above said conclusions regarding culpability of the appellant. After having correctly concluded that the investigation in the case was slipshod and totally unprofessional, the learned judge erred in concluding that the chain of circumstances are complete and pointed towards the only one hypothesis, that is the guilt of the appellant. Basing on the dictum in **Sukhvinder Singh**'s case (supra) the learned Judge ought to have noted that the defects in the investigation are so grave that the whole investigation was fit to be termed as dishonestly conducted and as a tainted investigation.

Conclusion:

37. The failure of the prosecution to put forth legally tenable evidence to prove any of the charges laid against the appellant is thus clearly discernible from the discussion herein above. The endeavor of the prosecution to forge a chain of circumstantial evidence pointing to the guilt of the appellant has not reached its fruition. None of the *Panchsheel* requirements as mandated in **Sarda**'s case have been satisfactorily met as against the appellant. The dictum laid down by the Supreme Court that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and that such circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused have not been met with [**Trimukh Maroti Kirkan V. State of Maharashtra** [(2006) 10 SCC 681)]. The circumstantial evidence tendered fails to unerringly point towards the appellant as the perpetrator of the crime. The contention put forth by the counsel for the appellant that witnesses as well as evidence were planted by the police and that the purported recoveries based on disclosure statements were sham and concocted, cannot be brushed aside. Not only does the evidence put forth by the prosecution fail to buttress the hypothesis of guilt of the appellant, the botched up investigation leads us to conclude that appellant

could even have been falsely incriminated in the crime. There was no evidence whatsoever before the learned Sessions Judge to convict the appellant under any of the sections of the IPC under which he was charged, much less to sentence him to capital punishment under sec. 302 of the IPC. To top it all, there has been a total absence of any semblance of objective enquiry by the learned Sessions Judge towards ascertaining whether the case at hand was one that qualified under the categorisation 'rarest of the rare' justifying the imposition of capital punishment. The mandates laid down by the Supreme Court as in **Bachan Singh v. State of Punjab** [(1980) 2 SCC 684] and as reiterated in the case of **Machhi Singh and others v. State of Punjab** [1983 SCC (CRI) 681] though were reproduced by the learned judge in his judgment, there was no endeavor on his part to earnestly apply them to the facts and circumstances of the case or to test their applicability. Mere reiteration of the legal principles without applying them to the facts at hand is only to be deprecated.

38. For the reasons stated above, we allow this criminal appeal and set aside the conviction and sentence imposed on the appellant vide judgment dated 05.07.2018 in S.C. No.353 of 2015 of the Additional Sessions Judge IV - Kollam. The said judgment is set aside and the appellant is acquitted of all charges. He shall be set at liberty at once, unless required in any other case.

39. DSR No.05/2018 from SC No.353 of 2015 is answered in the negative.

Post Script:

40. Before parting with the matter, we note that appellant in this case has already undergone imprisonment for a period of over 10 years from his arrest on 24.06.2013. He was sentenced to capital punishment on 05.07.2018 and all through his long incarceration the imminence of death had been looming upon him. Now that we have found that there was no evidence whatsoever to even arraign him as an accused in the first place, whether the ends of justice would be served by merely acquitting him is a question that piques our conscience. Can we close our eyes to the fact that he had to suffer incarceration for around a decade, that too a major part of it under a looming death sentence, before being acquitted on finding him innocent of the crime alleged?

41. The liberty and freedoms guaranteed to a citizen under the Indian constitution cannot be rendered so fragile, flimsy and trifling that they could be taken away by quixotic incrimination in criminal offenses which is followed up with a slip shod investigation and an improper appreciation of evidence which imposes the highest of all punishments, of death upon him. The faith that the general public reposes on the system is not only eroded by such incidents but it strikes at the very root of the edifice of rule of law

on which this republic rests. This is true even with respect to a citizen with allegedly doubtful antecedents.

42. The process of compensating a person whose fundamental rights have been infringed by state action is not alien to Indian jurisprudence. In **Rudul Sah v. State of Bihar** [(1983) 4 SCC 141] : (AIR 1983 SC 1086) and **Neelabati Behra v. State of Orissa** (1993) 2 SCC 746) the Supreme Court had fixed liability on the State for a public wrong. In **Neelabati Behra** (supra) which was a case of death in police custody, the Supreme Court had held as follows:

> *"The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under private law but in the broader sense of providing relief by an order of making 'monetary amends' under public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen."*

43. In **D.K. Basu V. State of West Bengal**, [(1997) 1 SCC 416] the Supreme Court holding the actions of the police as malicious and resulting in abridgement of the fundamental rights of the citizen held that the victim could be compensated for such infringement. The Supreme Court had therein opined as follows:

> *"Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and*

interests shall be protected and preserved."

44. In **Nambi Narayanan v. Siby Mathew** [(2018) 10 SCC 804] the Supreme Court had awarded compensation to the former ISRO scientist who was indicted by the Kerala Police and exonerated by the Central Bureau of Investigation, who had in the course of investigation spent around fifty days in custody as an undertrial.

45. We note that the High Court of Madhya Pradesh had in **Chandresh Marskole v. State of Madhya Pradesh** [I.L.R. 2022 M.P. 1594 (DB)] followed the dictum laid down by the Supreme Court in the cases mentioned above and after acquitting the accused who was an MBBS student sentenced to rigorous imprisonment for life, taking note of the fact that he has spent thirteen years in jail till the acquittal by the High Court, awarded an amount of Rs.42,00,000/- (Rupees Forty Two Lakh only) as compensation on account of violation of his fundamental right to life under Article 21 of the Constitution of India.

46. In a case such as the instant one wherein the appellant was forced to undergo incarceration for around ten years that too on a death row only due to the systemic failure of the different limbs of the state apparatus including the investigation agencies as well as the judiciary, ends of justice will be met only if we direct the State to compensate him for the violation of his fundamental right

to life under Article 21 of the Constitution of India. This we conclude by taking note of the unique factual circumstances in the appellant's case whereby he has been acquitted after finding him not only innocent of all charges leveled against him but also holding that there was no reason whatsoever to even array him as an accused in the first place. We have also taken note of the fact that the ignominy of over 10 years incarceration suffered by him was compounded by the trauma of living through the said period with the ever present threat of death sentence, which made life even more miserable and despairing to the appellant. Accordingly, we deem it fit to direct the State Government to pay to the appellant an amount of Rs.5,00,000/- (Rupees Five Lakh only) towards compensation on the above count, which amount shall be paid to him within a period of three months from the date of this judgment. Thereafter, it shall attract an interest of 9% per annum till the date of payment.

Criminal Appeal is disposed of as above.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
SYAM KUMAR V.M.
JUDGE

csl