

(2009) 11 KL CK 0044
In the High Court Of Kerala
Case No : Criminal A. No. 2137 of 2005

Ali Jishan @ Jishan Chawhan

APPELLANT

Vs

State of Kerala and Manoj Kumar

RESPONDENT

Date of Decision : 26-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 232, 313
Evidence Act, 1872 — Section 114, 27, 8
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 34, 394

Citation : (2009) 11 KL CK 0044

Hon'ble Judges : P. Bhavadasan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : P. Vijaya Bhanu, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P. Bhavadasan, J.—Two persons, the appellants in these criminal appeals, were sought to be prosecuted for the offences punishable under Sections 394, 302, 201 and 120B read with Section 34 of the Indian Penal Code. They were found guilty of the offences alleged against them. They were therefore convicted and sentenced to suffer imprisonment for life for the offences punishable under Sections 120B and 302 read with Section 34 of the Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for seven years for the offences punishable under Sections 120B and 394 read with Section 34 of the Indian Penal Code. They were also sentenced to undergo rigorous imprisonment for four years for the offences punishable u/s 120B and 201 read with Section 34 of the IPC.

2. P.W.1 and P.W.37 are the paternal uncles of Pintu aged 19 years, who was the unfortunate victim in this case. The deceased, P.W. 42, his brother, P.W.1, paternal uncle of the deceased and P.W.6 together occupied Rajadhani Buildings at Gopalaprabhu Road in Ernakulam. P.W.37 who was residing in Asoka Flat was

doing business in gold ornaments. Both Pintu and the first accused used to undertake distribution of gold ornaments given by P.W.37 to various jewellery shops in the State. Pintu and the first accused used to supply gold to customers on their demand and receive the price for the same. As usual, on 21.12.2001 also, Pintu met P.W.37 and received the gold ornaments to be supplied to Thekkekara Jewellery at Changanacherry. After taking lunch, he set out to Changanacherry. By about 5 p.m. on the same day P.W.42 contacted Pintu over phone. Pintu told him that he had managed to collect amounts from various jewellery shops at Changanacherry. By 7.30 p.m. Pintu informed him that he was able to collect Rs. 6,00,000/- and that he would return soon. Unfortunately Pintu did not return as promised. P.W.42 tried to contact Pintu as night advanced and Pintu did not return. But he was unable to get Pintu. P.W.42 got in touch with P.W.37 and conveyed that though Pintu had called him at about 7.30 p.m. and told him that he was returning home at Ernakulam, he had not come home. P.W.37 asked P.W.42 to get in touch with the friends of Pintu. P.W.42 got in touch with several friends of Pintu, but he got negative replies. He had called the first accused also. But the first accused did not respond. P.W.42 and P.W.30 enquired in the Railway Station and Bus stand. On the next day one Suresh Bhai and P.W.30 went to Changanacherry by about 10.30 a.m. Meanwhile P.W.2 came to the house of Pintu. When news about Pintu was conveyed to him, he said that he had on the previous day contacted Pintu from Mavelikkara Railway Station to ascertain whether Pintu was coming by train to Ernakulam. P.W.2 told P.W.42 that Pintu told him that he was not coming by train but in a Maruti Van along with two of his friends. On 23.12.2001 by about 5 p.m. in the evening P.W.5 Anil Kumar had come to the house of Pintu and told P.W.42 that he had occasion to see Pintu getting into a blue Maruti car with Goa registration by about 7.45 p.m. on 22.12.2001. P.W.5 also told him that he had seen first accused sitting in the rear seat of the car. There was yet another person in the car whom he could not recognize. Jagadeesh and Suresh Bhai went in search of first accused and found his house locked. In the meanwhile, on 23.12.2001 by about 1.30 p.m. P.W.1 had laid First Information Statement before the police. A crime was registered under the caption "man missing".

3. On 26.12.2001 Jagadeesh happened to see a news item about a dead body found within the jurisdiction of Mulanthuruthy Police Station. P.W.42, Jagadeesh and Praveen Bhai went to the Mulanthuruthy Police Station to ascertain whether the dead body was that of Pintu. They were told that the body has been buried. If they so wanted, they can get the body exhumed. P.W.37 made a formal request and the same was allowed. Meanwhile, they had identified M.Os. 1 to 3 recovered from the body of Pintu when his body was found in a canal. When the body was exhumed, it was confirmed that it was Pintu.

4. On 26.12.2001 on getting information P.W.48, the Sub Inspector of Police Changanacherry Police Station reached Mulanthuruthy Police Station. As it was revealed that the body was that of Pintu, a crime was registered as Crime No. 372 of 2001 in Mulanthuruthy Police Station. P.W.48 handed over the files in his

office to P.W.53, the Circle Inspector of Police, Changanacherry.

5. P.W.53 took over the investigation of the crime. On 27.12.2001 P.W.50 informed P.W.53 that a suspect in the case had been kept under surveillance in the Central Police Station at Ernakulam. P.W.53 immediately reached the Station. The person was none other than the first accused in the case. His interrogation and the investigation of P.W.53 revealed the story of a gruesome murder, by the accused, of Pintu for money. Several incriminating articles in the possession of first accused were recovered. Ext.P41 report was filed by P.W.53 before the Changanacherry Magistrate Court furnishing details of the accused and also sought to have offences punishable under Sections 394, 302 and 201 read with Section 34 incorporated. He also filed Ext.P40 report before the R.D.O., Fort Kochi requesting that records of the case may be called for. Later he had Section 120B also incorporated.

6. P.W.53 conducted a search in the house taken on lease by the second accused. He found M.O.24 almirah. He had forcibly opened the almirah and was able to recover M.Os. 14, 15, 16, 18, 19, 23, 25, 26, 27, 36 and 37, which are bundles of currency notes of various denominations. He also had the clothes of second accused seized. On the basis of the information furnished by the first accused and as led by him, M.O.28 chopper was recovered as per Ext.P14 mahazar. On searching the house of the first accused, M.Os. 44, 45 and 46, which were bundles of currency notes of various denominations were found. They were seized. M.O.47 air pistol and the currency bundles were seized as per Ext.P31 search list. As per Ext.P32 mahazar M.Os. 48 and 49 belonging to first accused were seized. P.W.53 had utilised the services of P.W.46, who was then working as Scientific Assistant attached to Mobile Laboratory of Kottayam District. On a search conducted in Room No. 30 of the Tourist Home where second accused had resided, he was able to recover M.Os.34, 35 and 36 as per Ext.P17 search list. Accused No. 2 was not available in station. Enquiry made revealed that he is in prison in connection with an Abkari Case in Meerut. After obtaining a production warrant from the JFCM, Changanacherry, the police officers proceeded to Meerut and got custody of second accused. He was produced before JFCM, Changanacherry and police custody was obtained from court. P.W.53 recorded the statements of witnesses, completed investigation and laid the charge before court.

7. JFCM, Changanacherry took cognizance of the offence as C.P. 5 of 2003. On appearance of the accused before the said court, all legal formalities were complied with. Finding that the offences were exclusively triable by a court of Sessions, the learned Magistrate committed the case to Sessions Court, Kottayam. The said court made over the case to Additional Sessions Judge (Special), Kottayam for trial and disposal.

8. The latter court on receipt of records issued summons to the accused and they entered appearance. After hearing both sides, charge was framed for the offences punishable under Sections 120B, 302, 201 and 394 read with Section 34

Indian Penal Code. The accused pleaded not guilty and claimed to be tried. Therefore prosecution had P.Ws. 1 to 54 examined Exts.P1 to P44 marked. M.Os. 1 to 76 were identified and marked. After the close of the prosecution evidence, the accused were questioned u/s 313 of the Criminal Procedure Code. They denied all the incriminating circumstances brought out against them and maintained that they are innocent. First accused stated that from 1999 onwards he was dealing in gold ornaments. On every Sunday he collects gold ornaments from Praveen Bhai and distributes to various jewellers in various places. He collects the amounts due and hands it over to Praveen Bhai. On 22.12.2001 he claims to have gone to the "Highranges" (high altitude places in Idukki District) for business purpose. He returned in the evening. He was given to understand that Mukesh Bhai had visited his house. It appears that Mukesh Bhai had conveyed to the mother of first accused that the son of the sister of his mother was seriously ill. His mother insisted that she should be taken to her house at Kozhikode. On 23.12.2001 at about 5.30 in the morning he and his mother left for Kozhikode. On 26.12.2001 he claims to have returned to the house at Ernakulam. His mother returned with him. While he was watching T.V at about 6 p.m., according to him Praveen Bhai, Anil Metha, Jagadeesh along with two other persons came to his house. They invited the deceased to go out as they wanted to have some conversation with him. Even though first accused promised that he would follow in the motor bike, they asked him to go along with them. According to him, he was directly taken to the police station and entrusted to the police. He would complain that he had been falsely implicated.

9. The second accused in his reply has stated that he conducts business in textile along with his brother at Ernakulam. On all days, except Sundays, he goes to various customers and takes orders. Since he was informed that his father was ill, he left for Meerut on 30.12.2001. He returned by 19th of January. After he returned from Meerut he paid the rent to the landlord. While he was carrying on his employment, he would say that on 20.2.2002 he was informed that his father was ill. He left for Meerut on 20.2.2002. He would say that he was nabbed by the police at Meerut. He would say that he has been falsely implicated by manipulating the documents and other records.

10. Finding that the accused could not be acquitted u/s 232 Cr.P.C., they were asked to enter on their defence. Except for marking Exts.D1 to D10 at the earlier stage, the accused chose not to adduce any evidence. On an appreciation of the materials before it, the court below found that the prosecution has succeeded in establishing the case against the accused and accordingly conviction and sentence already mentioned followed. The said conviction and sentence are assailed in these appeals.

11. The question that arises for consideration is whether the court below was justified in convicting the accused and sentencing them as already mentioned.

12. The prosecution case is that on 22.12.2001 Pintu, who got into the vehicle owned by accused No. 2 to return home was done away with by the accused,

who hatched a conspiracy for the same. The court below has enumerated sixteen circumstances which the prosecution sought to prove in order to substantiate the allegations against the accused persons. On an evaluation of the evidence, the court below found that all the circumstances have been convincingly established and held the accused guilty.

13. Heard the learned Public Prosecutor and the counsel for the appellants.

14. Learned Counsel appearing for the appellants pointed out that the significant circumstances on which the prosecution relies to prove the case against the accused are as follows:

- i) Purchase of the Maruti vehicle by Accused Nos. 1 and 2.
- ii) Deceased Pintu had collected amounts from various jewellers at Changanacherry and Thiruvalla and kept in M.O.4 bag.
- iii) Pintu was seen getting into the Maruti van belonging to accused Nos. 1 and 2.
- iv) Pintu did not return thereafter.
- v) Recovery of the chopper, which is said to have been used to attack Pintu.
- vi) Recovery of the money, which Pintu had collected from the places where accused Nos. 1 and 2 resided.
- vii) Recovery of M.Os. 5, 6 and 7, the ornaments said to have been worn by late Pintu from one Suresh Bhai at the behest of accused No. 2.

15. Learned Counsel appearing for the appellants unleashed an attack on the findings of the court below. It is pointed out that even assuming that the accused had purchased a Maruti van, there is nothing to indicate that the said Maruti van was used for the offence. There is no evidence at all in this case, according to learned Counsel for the appellants to show that Pintu was taken on the ill-fated day in the Maruti car owned by accused Nos. 1 and 2. Even assuming that he had been taken in the Maruti car belonging to accused Nos. 1 and 2, there is nothing to indicate that the Maruti van produced before the court was the vehicle owned by second accused. There is nothing to show that there was anything special with the van which made it possible to identify it easily. There was only one Maruti van in the compound of the court at the time of trial and the witnesses simply said that that was the vehicle into which Pintu had got in.

16. It was also contended that the Scientific Assistant noticed blood stains all over the places including the Maruti van. But he is not able to collect enough blood for the purpose of grouping. It is difficult to believe his version and this is a deliberate attempt on the part of the prosecution to aid the real culprits. If blood grouping was done, according to the learned Counsel for the appellants, it would have revealed that the accused had no role to play in the incident. Emphasis was laid on the fact that the Doctor, who conducted autopsy states that when an injury as the one suffered by late Pintu is caused, there will be spurt of blood and

it will splash all around. Here the roof of the car had no blood stains. Going by the medical evidence, it was pointed out that, it could easily be seen that the entire prosecution version is untrue. The definite case of the prosecution is that the murder took place inside the van. If that be so, there should have been pools of blood inside the vehicle, which could have been easily detected and collected by the Scientific Assistant. The failure on the part of the prosecution to ascertain the group of blood stains collected shows that the prosecution wants to conceal more than what it reveals.

17. As far as the recovery of money is concerned, it is true that a few jewellers and certain Bank officials have been examined. But there is nothing to show that the respective bundles were given to late Pintu by any of the jewellers. Of course, one witness says that one of the bundles given by him contained a particular sign. The Bank officer, who is said to have given the bundles was examined. He has stated that the alphabet shown on that particular bundle related to a customer of the Bank and all the bundles of notes deposited by him contained those alphabets. In short, according to the learned Counsel, there is nothing to establish the identity of notes. The court below has also found that the mode of recovery of M.O.4 bag and M.Os. 5, 6 7 etc., cannot fall u/s 27 of the Indian Evidence Act, so also u/s 8. Holding so, the court should not have relied on those items of evidence to hold against the accused.

18. It was contended by the learned Counsel for the second accused that even assuming that the second accused had taken a house on rent and also brought an almirah to the building, the same does not lead to the conclusion that the currency notes recovered from that almirah were kept by the second accused. It is stated that by the learned Counsel that the almirah was brought into the rented house soon after it was taken on rent and thereafter the evidence is to the effect that the accused had not come there till the date of arrest. If that be so, it is not possible to understand as to how he could have kept the notes in the almirah. These are sufficient to show that the entire evidence regarding recovery of notes was a stage managed one.

19. It was also contended by the learned Counsel for the appellants that the evidence revealed that the accused persons were also business men, first accused was doing the same business as Pintu and they were considerably rich. It is ridiculous to suggest that they would think of murdering Pintu for a paltry sum of Rs. 5 to 6 Lakhs.

20. Learned Counsel pointed out that the above aspects have been omitted to be noticed by the court below and that has resulted in miscarriage of justice.

21. Per contra, learned Public Prosecutor chose to support the judgment of the court below. It was pointed out by him that none of the contentions urged by the learned Counsel for the appellants before this Court have any basis or foundation. There is clinching evidence to show that Pintu got into the van owned by accused No. 2 and thereafter he was found missing. The evidence is also to

the effect that the various articles seized during investigation were in the possession of the accused persons or were recovered at their behest. The recovery of M.O.4 bag is clinching enough to show the culpability of the accused persons. The bag contained apart from various other things M.Os. 5, 6 and 7, which were the jewellery usually worn by Pintu. According to learned Public Prosecutor, even assuming that Section 27 of the Indian Evidence Act could not be taken aid of, the fact remains that the bag was recovered from one Suresh Bhai at the behest of the second accused. In fact the second accused had knowledge that the bag had been entrusted to Suresh Bhai by the first accused. This item of evidence, according to learned Public Prosecutor could not be ignored as suggested by the appellants. Equally fallacious is the contention based on identity of notes. The jewellery owners from whom Pintu had collected amounts had deposed before court about the payment of money. The respective Bank officers have also been examined. But the identification by various witnesses of the respective bundles and also the fact that one of the jewellers has been able to identify the bundles of notes given by him to Pintu as those bundles contained the wrappers with letters "TJ" goes in favour of the prosecution. The learned Public Prosecutor pointed out that the recovery has to be viewed in the facts and circumstances of the case and not in isolation. There is nothing to indicate that the amounts so recovered by the investigating officer belong to the accused persons.

22. It was pointed out by the learned Public prosecutor that the vehicle was recovered a few days after the incident and therefore it is idle for the accused persons to contend that as the vehicle did not show pools of blood in it, the evidence should be discarded. Learned Public Prosecutor pointed out that the evidence by the Scientific Assistant and the mahazar concerned will clearly show that the Scientific Assistant was able to trace blood stains from several portions of the vehicle as well as the room occupied by 2nd accused. To take an answer in isolation and then generalizing it would be preposterous. Learned Public Prosecutor also pointed out that the contention based on the almirah taken by the second accused is only to be rejected. There is convincing evidence to show that the house in which M.O.24 almirah was found was taken on rent by the second accused and also that the almirah had been recently purchased by him. Attention was drawn by the learned Public prosecutor to the fact that the key of the almirah was not available and it had to be broken open. According to the learned Public Prosecutor, it is ridiculous to suggest that the notes would have been planted by the investigating agency in the almirah to manage false recovery.

23. There can be no dispute regarding the fact that the case is built on circumstantial evidence. In a case built on circumstantial evidence, direct proof of the culpability of the accused is often lacking. When the case rests on circumstantial evidence, the circumstance must be cogently and firmly established. The circumstance must point inescapably towards the guilt of the accused and the accused only, forming an unbroken chain of evidence ruling out a reasonable likelihood of the innocence of the accused. Where any link in the

chain is missing, the accused is entitled to benefit of doubt. In a case of circumstantial evidence, the prosecution must establish different circumstances beyond reasonable doubt and all those circumstances taken together must lead to no other inference except the guilt of the accused. When the circumstances lead to two equally possible inferences, the inference that goes in favour of the accused is usually accepted. The graver the offence, stricter the proof. When a case rests on circumstantial evidence, such evidence must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively, must 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, in other words the circumstances must be incapable of explanation on any reasonable hypothesis other than that of the guilt of the accused; and
- (4) such evidence must not only be consistent with the guilt of the accused but must be inconsistent with his innocence.

24. There is a plethora of decisions in this regard. It is unnecessary to refer all of them. In the decision reported in *Chattar Singh v. State of Haryana* AIR 2009 SC 378, the Apex Court held as follows:

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh Vs. State of Rajasthan*, ; *Eradu and Others Vs. State of Hyderabad*, ; *Earabhadrapa v. State of Karnataka* : AIR 1983 SC 446; *State of U.P. Vs. Sukhbasi and Others*, ; *Balwinder Singh alias Dalbir Singh Vs. State of Punjab*, ; *Ashok Kumar Chatterjee Vs. State of M.P.*, . The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram Vs. State of Punjab*, , it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy and Others Vs. State of Andhra Pradesh*, , wherein it has been observed thus:

In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved

and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...." In *Padala Veera Reddy Vs. State of Andhra Pradesh and others*, , it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, 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 and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

In *State of U.P. v. Ashok Kumar Srivastava* 1992 Cri.L.J 1104, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

Sir Alfred Wills in his admirable book "Wills" Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

25. In the decision reported in *Ujjagar Singh v. State of Punjab* (2009) 1 SCC 272, it was held as follows:

We have considered their arguments very carefully. In *Mahmood v. State of U.P.*, it has been observed that in a case dependent wholly on circumstantial evidence,

the court must be satisfied-

- (a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;
- (b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and
- (c) that the circumstances, taken collectively, are incapable of explanation of any reasonable hypothesis save that of the guilt sought to be proved against him.

In this case this Court held that the omission of the prosecution, inter alia, to have the fingerprints found on the alleged murder weapon was fatal to the prosecution story.

In *Sharad Birdhichand Sarda v. State of Maharashtra*, this Court discussed the ratio of the judgments in *Hanumant Govind Nargundkar v. State of M.P.*, *Tufail v. State of U.P.*, *Ram Gopal v. State of Maharashtra* and *Shivaji Sahabrao Bobade v. State of Maharashtra* and observed thus:

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 proved" and must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* where the following observations were made:

19. ...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.

Mr. Goburdhun has also cited *Mahmood v. State of U.P.*, *Shankarlal Gyarasilal*

Dixit v. State of Maharashtra, Sharad Birdhichand Sarda v. State of Maharashtra, Omwati v. Mahendra Singh, Sudama Pandey v. State of Bihar and Ramreddy Rajesh Khanna Reddy v. State of A.P. In support of his plea relating to the evaluation of circumstantial evidence. These judgments have broadly followed the principles laid down in the judgments referred to above and need not therefore be dealt with by us in extenso. It must nonetheless be emphasised that whether a chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted. It is in this background that we must examine the circumstances in the present case.

26. In the decision reported in Vinay D. Nagar Vs. State of Rajasthan, it was held as follows:

The principle of law is well established that where the evidence is of a circumstantial nature, circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and the facts, so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and they should be such as to exclude hypothesis than the one proposed to be proved. In other words, there must be chain of evidence so 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.

27. One would notice that in the various decisions it had been held that the accused is entitled to benefit of doubt unless all the relevant circumstances are firmly established. Often it is said that the prosecution has to prove the case beyond reasonable doubt. The burden is on the prosecution to adduce such evidence to exclude any reasonable doubt of the accused. It is well settled that an accused cannot be convicted on the basis of conjectures and surmises. Where a reasonable doubt arises in the mind of the court after taking into consideration the entire materials before it regarding the complicity of the accused, the benefit must go to the accused. It has been held that the reasonable doubt must be a real and substantial one and "well founded actual doubt arising out of the doubt existing after consideration of all the evidence."

28. The doubt must be of a reasonable mind. But one must remember that he is entitled to only a reasonable doubt, that is a doubt which a rational thinking man will reasonably, honestly and conscientiously entertain. One may say that when the incident is not proved, then certainly the accused is entitled to benefit of doubt. When the evidence is probable and reasonable, and its consideration creates a doubt in the credibility of the prosecution case, then again the accused is entitled to benefit of doubt. It will be useful to refer some of the decisions in this regard.

29. In the decision reported in Gangadhar Behera and Others Vs. State of Orissa,

it was held as follows:

It is submitted that the benefit of doubt should be given on account of the co-accused's acquittal. It was submitted that the evidence is inadequate to fasten guilt, and therefore the prosecution cannot be said to have established its case beyond doubt. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See *Gurbachan Singh v. Satpal Singh*) Prosecution is not required to meet any and every hypothesis put forward by the accused. (See *State of U.P. v. Ashok Kumar Srivastava*). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (See *Inder Singh v. State (Delhi Admn.)*). Vague hunches cannot take the place of judicial evaluation.

30. The evidence in this case is clear to the effect that Pintu, accused Nos. 1 and 2 were friends and knew each other very well. In fact, first accused and late Pintu were engaged in the same business. First accused was fully aware of the movements of Pintu. Prosecution has adduced sufficient evidence to show that Pintu was found missing. The evidence indicates that P.W.42 and others went to the house of the first accused, which was found locked. They tried to reach him over mobile phone, but he did not respond. The prosecution has adduced evidence to show that the claim of the first accused that he was at Kozhikode at the relevant time was not true. The evidence is to the effect that during the relevant period, he had taken a room in an Inn in Mangalore.

31. Before going further into the facts, the cause of death of Pintu may be ascertained. The body of Pintu was found floating in Mullackal Canal in Amballoor Village a few days after he was missing. Since the police officers were unable to identify the person, the body was buried. However, the news was published in newspapers. That attracted the attention of the relatives of late Pintu. After reading the news, they reached the police station concerned. On seeing the articles recovered from the body and also the photographs of the body, they were convinced that the person whose body was retrieved was none other than Pintu. The relatives of late Pintu after following the necessary procedures had the body exhumed. P.W.41 is the Forensic Surgeon, who conducted autopsy on the body and furnished Ext.P29 report. Ext.P29 report gives the details of the findings of the Forensic Surgeon. Ext.P30 is the chemical analysis report. There were three injuries noticed by the Forensic Surgeon and they were all incised

wounds. Death was on 22.12.2001 and autopsy was conducted on 26.12.2001. The body had started to decompose. The opinion of the Forensic Surgeon was that the death must have occurred 3 to 5 days prior to 26.12.2001. Based on Exts.P29 and 30 P.W.41 had given a definite opinion that the cause of death was injury No. 1 shown in Ext.P29. He also deposed before court that use of a weapon like M.O.1 can cause injury No. 1. It is also pointed out by the said doctor that injury Nos. 1 and 2 would be the result of a single act. In cross-examination, he deposed that if the victim occupies the left front seat of the Maruti van and the miscreant occupies the rear seat and then used the weapon, injury Nos. 1 and 2 can be caused. A reading of Ext.P29 and the evidence of P.W.41 leave one in no doubt that the death of Pintu was the result of the inflicted injury and it was a case of homicide.

32. M.O.17 is the Maruti van involved in this case. In order to prove that it was acquired by the accused persons, prosecution relied on the evidence of P.W.11, who is an auto consultant, P.W.8, broker of automobiles, P.W.9, workshop owner and P.W.12, who affixed sun control film in the vehicle. The evidence of P.W.8 would show that when he was doing business at Ayyappankavu, on 18.12.2001 the accused had approached him and told him that they wanted to buy a Maruti Van. He immediately took them to Thammanam and showed them a car. They did not like it. P.W.8 was able to get down another vehicle by evening and it was shown to accused Nos. 1 and 2. They agreed to purchase the same. Price offered was Rs. 1,07,000/-, which was accepted by P.W.11, who was the owner of the vehicle. He deposed regarding the payments agreed to by the parties. The evidence shows that the vehicle was registered at Goa. He also speaks about the execution of Ext.P7 agreement. After making the initial payment, according to P.W.8, accused No. 2 drove the vehicle away. He then says about the subsequent developments.

33. The version of P.W.11 is similar to that of P.W.8 regarding the sale of the vehicle and the purchase of the same by accused Nos. 1 and 2. P.W.9, the workshop owner says that the first accused had come to his workshop on 18.12.2001 itself and told him that he would like to do some repairs to the vehicle and would come on the next day. They came only on 24.12.2001. P.W.12 had stated that he was asked to affix sun control film to the vehicle. All these witnesses have identified the vehicle in court and so also the accused.

34. Before the court below, it is contended by the defence that Ext.P7 is a concocted document. The court below has rejected the said contention by giving cogent reasons. We find no reason to differ.

35. Before this Court it was contended that there was no evidence at all to show that the blue Maruti van purchased by accused Nos. 1 and 2 was the van into which Pintu had got in on the ill-fated day.

36. The contention is least attractive. The tone of the contention is that the vehicle ought to have been placed along with the similar vehicles and got

identified. Here one needs to refer to the evidence of P.W.4. He runs a jewellery shop at Changanacherry. He had taken Pintu on his request in his motor bike and dropped him near Sangeetha Gift House. He had stated that he had seen Pintu getting into the car. Going by the evidence of P.W. 4, P.W.5 was standing by the side of the Maruti van. But after Pintu had got into the car, P.W.4 says that P.W.5 remained outside and the vehicle was driven away. It is interesting to note that though P.W.5 was declared hostile, he had deposed that he had been at Changanacherry on the very same day. He also says that he had occasion to see Pintu getting into the Maruti van. He also admitted that he had occasion to see Pintu there. Then he deviated from his earlier stand and deposed that he had not seen anybody else in the van. He also admits that he reached Ernakulam by about 5 p.m. on 23.12.2001. He deposed that P.W.2, Suresh Bhai and Praveen Bhai had enquired about Pintu to him and he had told them that he had seen Pintu at Changanacherry. It is also significant to note at this point that P.W.4 has categorically stated that the Maruti van into which Pintu had got in had Goa registration. The evidence is therefore convincing enough to show that M.O.7 vehicle purchased by Accused Nos. 1 and 2 was the vehicle taken to Changanacherry on 22.12.2001, and it was that vehicle in which Pintu had got in. One must notice here that even though P.W.5 has resiled from his earlier statement, quite a few of his statements go in favour of the prosecution. The court is fully justified in law in taking into account those statements in aid of the prosecution case. It is well settled that the principle *falsus in uno falsus in omnibus* is not applicable in India. In the decision reported in *Prem Singh and Others Vs. State of Haryana*, it was held as follows:

It is now a well settled principle of law that the doctrine "*falsus in uno falsus in omnibus*" has no application in India. In *Jayaseelan v. State of Tamil Nadu* 2009 (2) SCALE 506, this Court held: "The maxim "*falsus in uno falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence." (See also *Mani @ Udattu Man and Others Vs. State rep. by Inspector of Police, .*" In the decision reported in *Rajendra and Another Vs. State of Uttar Pradesh*, it was held as follows:

It is now well settled that in India, the principle *falsus in uno, falsus in omnibus* has no application. Thus, only because she deviated from her statement made in the FIR in respect of Richhpal, her evidence cannot be held to be totally unreliable. It is, therefore, not possible for us to accept the submission of Mr. Sushil Kumar that on these grounds alone, we should reject the testimonies of P.W.1 and P.W.4. It is trite that a judgment of conviction can also be recorded on the basis of the statement made before the Court by a solitary witness, indisputably, for the said purpose, witness must be held to be trustworthy. The Court may, for the said purpose in given cases, make endeavour to find out

corroboration in material particulars.

37. Therefore from the evidence of P.Ws.4 and 5, it is clear that the Maruti Van, which was standing in the name of accused No. 2, though purchased with joint fund of first accused, was at Changanacherry on the relevant date and that Pintu had got into the same.

38. The evaluation of the evidence would show that the death of Pintu was caused after he had got into the vehicle. The evidence of P.W.4 shows that there were two other persons in the vehicle. His evidence also shows that Pintu had occupied the front seat. As already noticed, there is clear evidence to show that the vehicle at the relevant time was owned by accused Nos. 1 and 2. It is also clear that there were other persons in the vehicle other than Pintu. Accused Nos. 1 and 2, being the owners of the vehicle, ought to give an explanation as to who were in the vehicle, if they were not in it. We shall come to this aspect little later.

39. Another circumstance heavily relied on by the prosecution was the recovery of money from accused Nos. 1 and 2. For the purpose of proving this fact, the prosecution has examined P.Ws. 3, 4, 6 and 7, who are the owners of jewellery shops from where Pintu had collected money on the particular day. P.Ws. 14, 19, 20, 21 and 22 are officers of various Banks from where the money was drawn by various persons. The prosecution also relies on the evidence regarding the recovery of M.O.4 bag also. The evidence of P.W.3 shows that on the day on which Pintu had come to Changanacherry, he had paid a sum of Rs. 2,14,000/-. His evidence also disclose that Pintu had put the currency notes in M.O.4 bag. P.W.4, the owner of Thoppil Jewellery at Changanacherry would say that he had paid Rs. 2,46,510/- as price of the gold ornaments purchased by him and Pintu had kept the same in the said bag. P.W.4 was also able to identify the currency notes given by him because they contained their wrappers with letters "TJ". P.W.6 is the salesman of Vettikkattumattom Jewellery at Changanacherry, who says that Pintu had come to the jewellery shop on 22.12.2001 at about 5.30 p.m. and received Rs. 10,000/- from him. P.W.7 was running a jewellery in the name and style Rajan Jewellery at Thiruvalla. He would depose that on 22.12.2001 at about 4 p.m. Pintu had come to his shop and received Rs. 1,12,535/- from him. All these persons have been able to identify the bundles of notes given to Pintu. It is also interesting to note that these witnesses have been able to identify M.O.4 bag and M.Os. 5, 6 and 7, which are gold rings and bracelet usually worn by Pintu. Evidence of these witnesses are sufficient to show that Pintu had more than Rs. 5,00,000/- in his bag on that day. It has come out in evidence that the second accused had taken the house belonging to C.W.19, Sankaran on lease. It has also come out in evidence that he had purchased an almirah and kept it in the house. Ext.P17 search list prepared by P.W.53, which is attested to by P.W.29 shows the seizure of M.O.24. The evidence of P.W.29 shows that on 3.1.2002, the police had come to the house of Sankaran. They were able to open the lock of the house taken on rent by accused No. 2 using a duplicate key. However, since the key of the almirah was not available, it was broken open.

The inner cabin of the almirah when opened revealed M.O.14, 15, 16, 18, 19, 23, 25, 26, 27, 36 and 37 bundles of currency notes. They were seized as per Ext.P18 mahazar. Various other articles were also recovered from the almirah. M.Os. 14, 15, and 16 seized from M.O.24 almirah was identified by P.W.4 Shaji, who was running a jewellery at Changanerry. Likewise M.Os. 18 and 19 were identified by P.W.7 Pradeep Kumar. It is significant to notice that the Bank Officers, who were examined before the court below also gave evidence to the effect that the respective bundles were released from the respective Banks, and they were able to identify the bundles so released from the Bank. The evidence also discloses that a sum of Rs. 2,00,000/- was recovered from Sankaran, which is said to have been paid by second accused to him in pursuance of lease agreement. It appears that in the court below the signature of second accused in the said document was disputed. But the court below has undertaken the task of comparing it with the admitted signature of accused No. 2 and found it to be similar. P.W.27, who is a neighbour of Sankaran, is an attester to Ext.P16 mahazar for the recovery of Rs. 2 Lakhs. He identified the currency notes also.

40. P.W.53 had deposed that he had conducted a search in the house, wherein accused No. 1 was residing and was able to recover M.Os. 44, 45, 46 bundles of currency notes. He also deposed of having seized M.O.47 air pistol, M.O.21 pair of chappals as per Ext. 31 search list.

41. A contention was raised that Accused Nos. 1 and 2 were affluent enough and there is nothing surprising if they were found to have kept money. There is nothing to indicate that the notes so recovered were the ones received by Pintu, it is pointed out.

42. First of all, there is no claim by accused Nos. 1 and 2 that the money belongs to them. As regards the identity of the notes is concerned, the evidence has already been discussed. May be there are slight infirmities in the identification of the notes. However, the evidence of P.W.4 is clinching in this regard. But the fact remains that several jewellers had paid money to Pintu and Pintu had kept those amounts in M.O.4 bag. There is no reason as to why they should speak falsehood before court. It is too much to believe that the investigating officer would have placed those bundles of currency notes in the respective places and made a mock recovery. The amount comes to more than Rs. Six Lakhs. It is inconceivable that the investigating officer would have ventured to place the notes recovered from the M.O.24 almirah and then make a show of recovery.

43. We are not forgetting the fact that there is a contention by the second accused that after he had taken the house on rent he had bought an almirah and placed it inside the house, he had left the place much before 22.12.2001. Thereafter there is nothing to indicate that he had come back to that house and therefore it is contended that the money could not have been placed by him.

44. There is no merit in the above contention. There is nothing to indicate that accused No. 2 had no access to the house at any point of time after 22.12.2001.

At any rate, it is too far fetched to believe that somebody else would have kept the money in the almirah and the recovery was effected.

45. Another important item of evidence is the recovery of M.O.4 bag and other articles. Though the prosecution attempted to prove the recovery as one in furtherance of the confession statement said to have been given by the 2nd accused, they failed in their attempt. The statement given by accused No. 2 was that the first accused had given the bag to one Suresh Bhai and that if he had been taken to that place, he would show the bag and Suresh Bhai. As rightly noticed by the court below, the recovery based on the confession statement cannot fall u/s 27 of the Indian Evidence Act. But the fact remains that M.O.4 bag and other articles were recovered from Suresh Bhai as indicated by accused No. 2. In fact, M.O.4 bag, which contained M.Os. 5, 6 and 7 and other articles such as M.Os. 8, 9, 9(a), 10, 11, 13, 57 and 58 were recovered from the house of C.W.42 Suresh Bhai. P.W.33, witness to the seizure speaks about the same and he is a signatory to Ext.P22 seizure mahazar. As already noticed M.Os. 5, 6 and 7 are gold ornaments usually worn by Pintu and they were identified even by the owners of jewellery shops at Changanacherry and Thiruvalla, so also M.O.4 bag. Accepting that the recovery cannot fall within the ambit of Section 27 of the Indian Evidence Act, it cannot be contended that the recovery effected is of no relevance at all. At any rate, the recovery has been effected at the behest of accused No. 2 and that is certainly a relevant fact, which goes against the accused.

46. Now two aspects need to be considered. It has been found that on 22.12.2001 by about 7.45 p.m. Pintu had got into a Maruti Van at Chanaganacherry from the place in front of Sangeetha Gift House. The accused have taken up a contention that there is no evidence at all to indicate that they were in the vehicle at that time. The claim of the accused persons that there is no evidence to show that the Maruti Car into which Pintu is alleged to have got in is not the car produced before court has already been rejected. The fact that the belongings of Pintu were recovered from the possession of accused Nos. 1 and 2 cast an obligation on them to explain their possession. When it is found that the belongings of Pintu were in their possession, one may go back to the incident on 22.12.2001. Pintu got into the Maruti van and the Maruti Van drove away from Changanacherry. It could thus be seen that Pintu was last seen entering the Maruti van, which, as already found, had been purchased by the second accused along with the first accused. Since there is dearth of evidence to show that accused Nos. 1 and 2 were in the Maruti van at the relevant time, it may not be possible to say that Pintu was last seen in the company of these two persons.

47. But the above fact is of no help to the accused persons. The evidence clearly shows that the articles belonging to Pintu, namely, (i) M.O.4 bag, (ii) M.Os.5, 6 and 7 ornaments, which Pintu usually wears and (iii) the currency notes, which were given to Pintu by various jewellers at Changanacherry and Thiruvalla found to be in the possession of the accused persons soon after the murder cast an

obligation on the accused to explain their possession. It might be remembered that among the various jewellers, at least P.W.4 was able to specifically identify the notes he had handed over to Pintu on 21.12.2001.

48. When the accused persons are found to be in possession of the stolen articles soon after the death of the person, it is presumed that the accused had a role to play in the death of the victim. True, the illustrations to Section 114 of the Indian Evidence Act may not go that far. But it has been held that u/s 114 of the Indian Evidence Act it can be presumed that in such cases the murder was caused by the person who is found to be in possession of the stolen articles. The issue as to whether they were found to be in possession of the stolen articles soon after the death as contemplated u/s 114 of the Act will depend upon the facts and circumstances of each case. There is no fixed formula to ascertain as to what one means by "soon after".

49. In *Limbaji v. State of Maharashtra* 2001 (8) SC 722, it was held as follows: "In the light of the above discussion, in the instant case, the presumption u/s 114 illustration (a) could be safely drawn and the circumstance of recovery of the incriminating articles within a reasonable time after the incident at the places shown by the accused unerringly points to the involvement of the accused. Be it noted that the appellants who were in a position to explain as to how they could lay their hands on the stolen articles or how they had the knowledge of concealment of the stolen property, did nothing to explain: on the other hand, they denied knowledge of recoveries which in the light of the evidence adduced by the prosecution must be considered to be false. By omitting to explain, it must be inferred that either they intended to suppress the truth or invited the risk of presumption being drawn. Thus, the presumption as to the commission of offence envisaged by illustration (a) of Section 114 is the minimum that could be drawn and that is what the trial court did."

50. In the decision reported in *Sanjay @ Kaka Vs. The State (NCC.T. of Delhi)*, it was held as follows:

In the instant case also, the disclosure statements were made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. To the same effect are the judgments in *Mukund v. State of M.P.* And *Ronny v. State of Maharashtra*. In the latter case the court held:

Apropos the recovery of articles belonging to the Ohol family from the possession of the appellants soon after the robbery and the murder of the deceased (Mr. Mohan Ohol, Mrs. Ruhi Ohol and Mr. Rohan Ohol) which possession has remained unexplained by the appellants, the presumption under Illustration (a) of Section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore, be that the appellants

and no one else had committed the three murders and the robbery.

51. In the decision reported in *George Vs. State of Kerala*, , it was held as follows:

So far as the conviction of the appellant u/s 302 IPC is concerned, the High Court has placed reliance upon a decision reported in *Baiju v. State of M.P.*. It has been held in this case that where the prosecution succeeds in proving beyond any doubt that the commission of the murder and the robbery form part of one transaction and recent and unexplained possession of stolen property by the accused-appellant, it could also be presumed that the appellant and none else would be liable for committing the murder also.

52. Therefore the contention regarding the identity of the vehicle and such other ancillary matters cannot be accepted. True that none of the witnesses have spoken to the fact that when Pintu got into the car, he had taken the bag with him. But it must be noticed that the jewellers who had paid the money to Pintu had specifically stated that he had kept the money in the bag. The evidence of P.W.4 shows that Pintu was carrying the bag when he was dropped near the Maruti car and the presumption is that he continued to carry M.O.4 bag.

53. The prosecution has adduced evidence to show that M.O.28 chopper has been recovered on the basis of the confession statement given by the first accused. The relevant mahazar is Ext.P14 and the evidence of P.W.53, the investigating officer P.W.25, an independent witness shows that the recovery was made at the behest of the first accused. In order to attract Section 27 of the Indian Evidence Act, the statement relied on must disclose the authorship of concealment.

54. In the decision reported in *Suresh Chandra Bahri Vs. State of Bihar* with *Gurbachan Singh*, it was held as follows:

The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence, and (2) he must also be in police custody. In the present case it cannot be disputed that although the essential requirements existed on the day when Gurbachan Singh led P.W.59 and others to the hillock where according to him he had thrown the dead body of Urshia but instead of the dead body the articles by which her body was wrapped were found. The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. In the present case as discussed above the confessional statement of the disclosure made by the appellant Gurbachan Singh is confirmed by the recovery of the incriminating articles as said above and, therefore, there

is reason to believe that the disclosure statement was true and the evidence led in that behalf is also worthy of credence.

In the light of the facts stated above, we are afraid that two decisions mentioned above and relied on by the learned Counsel for the appellants have no application to the facts of the present case and do not advance the case of the appellants challenging the discovery and seizure of the incriminating articles discussed above. In *Nari Santa and Others Vs. Emperor*, the accused of that case was charged for the theft and it is said that in the course of investigating the accused produced certain articles and thereafter made a confessional statement and it was in these facts and circumstances it was held that there was no disclosure statement within the meaning of Section 27 as the confessional statement was made only when the articles were already discovered having been produced by the accused. Similarly the decision rendered in *Abdul Sattar Vs. Union Territory, Chandigarh*, also does not help the appellants in the present case. In the case of *Abdul Sattar* recovery of wearing apparels of the deceased is said to have been made at the instance of the accused of that case more than three weeks after the occurrence from a public place accessible to the people of the locality and therefore, no reliance was placed on the disclosure statement and recovery of the wearing apparels of the deceased. But in the present case it was soon after the arrest of appellant *Girbachan Singh* that he took the Police Officer while in custody to the place where according to him he had thrown the dead body of *Urshia* wrapped by the incriminating articles. Those articles were not found lying on the surface of the ground but they were found after unearthing *Khudgraha* dumping ground under the hillock. Those articles were neither visible nor accessible to the people but were hidden under the ground. They were discovered only after the place was pointed out and it was unearthed by the labourers. No default therefore could be found with regard to the discovery and seizure of the incriminating articles.

55. On going through the portion of the confession statement in the case on hand, which is extracted in the judgment of the court below, it can be seen that the statement does not disclose authorship of concealment. In other words, it does not mention that it was the author, who had concealed the chopper. Three conclusions are possible. They are

- i) it was the accused, who had concealed the weapon, or
- ii) he had seen somebody else concealing the weapon, or
- iii) he has knowledge about somebody else concealing the weapon in that place.

In such a case it has been held that the benefit of doubt should go to the accused. Therefore, it may not be possible for the prosecution to take the aid of Section 27 of the Indian Evidence Act in the case on hand. But nevertheless it is well established that even assuming that Section 27 is not attracted, the fact that M.O. 28 chopper was recovered at the instance of accused No. 1 qualifies to be a conduct relevant u/s 8 of the Indian Evidence Act.

56. The chemical analysis report, namely Ext.P39 shows that there were human blood stains on M.O.28 chopper.

57. Prosecution also relies on the fact that M.Os.40 and 49 which are the dress said to have been worn by the first accused at the relevant time, which were seized at the instance of first accused. They were recovered from the residence of first accused. Ext.P32 is the relevant mahazar and P.W.43 is the independent witness, who supported the prosecution regarding the seizure. Likewise, in the case of M.O.28, in this case also the chemical analysis report showed blood stains on M.Os.40 and 49.

58. The motive alleged by the prosecution is that accused Nos. 1 and 2 wanted to rob the money which Pintu had gone to collect. It has already been noticed that there is evidence to show that Pintu had got into the Maruti van owned by second accused. Later it was found that the personal belongings of Pintu including M.O.4 bag and the cash collected by him were recovered from the residence of the accused/their friend. Prosecution has succeeded in its effort to prove the motive.

59. One may now have a look at the case put forward by the accused. According to the first accused he had nothing to do with the incident. He would claim that on 22.12.2001 he had gone to the "Highrange" for business purpose. He returned home by about 7.30 p.m - 8 p.m. He was given to understand that his nephew at Kozhikode was ill. His mother insisted that she be taken to Kozhikode. On the next day early morning they left for Kozhikode. He would claim that he returned to Ernakulam on 27.12.2001. Thereafter while he was watching TV P.W.42, Pradeep Bhai etc. came there and asked him to accompany them. Then he was taken to the police station. As far as second accused is concerned, he had gone to Meerut on getting information that his father was sick. He would depose that the police had come to Meerut and taken him into custody. He would state that he has been falsely implicated.

60. It is significant to notice that no evidence has been adduced by the defence to get over the effect of the facts proved by the prosecution. We are aware of the fact that it is not necessary for the accused to adduce evidence in their favour and they can rely on the evidence adduced by the prosecution to show that the prosecution has not succeeded in establishing the case beyond reasonable doubt. In the case on hand, the entire evidence has already been discussed and it has been found that the circumstances relied on by the prosecution have been established. It has to be noticed that the claim of first accused that he was at Calicut on 23.12.2001 cannot be accepted in view of the fact that there is evidence adduced by the prosecution that he had been at Mangalore. Either the non-explanation or the false explanation given by the accused person is yet another circumstance which go against them.

61. The lower court has also considered in detail the evidentiary value of the forensic report relating to the blood stains found in the Maruti van and other

articles sent for chemical examination.

62. Of course the defence has been able to show some pit holes in the prosecution case. One has to keep in mind that the case is based on circumstantial evidence. If two views are possible, one in favour of the accused should be accepted. But perfect proof is virtually impossible. Prosecution cannot be called upon to do what is impossible. In the decision reported in *Trimukh Maroti Kirkan v. State of Maharashtra* 2006(4) KLT 638(SC), wherein it was held as follows:

The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position.

The proper approach would be not to start with the presumption that the testimony and the evidence are false, but to find out if they are sufficient to establish the facts in support of the prosecution case. Minor inconsistencies, contradictions etc., in the evidence of witnesses are bound to arise. Apart from the fact that human beings are bound to error, the power of reception, retention and re-production varies from person to person. In the case on hand, the witnesses have only stated what they have actually seen. The reasonable approach would be to read the evidence of all the witnesses and see whether there is any material contradiction or inconsistency in the evidence. The evidence of each witness should be read as a whole and it may be ascertained whether there is a ring of truth. The mere non-examination of a witness or non-production of a document cannot by itself be fatal. The question as to what degree of probability is necessary to establish the prosecution case is a question not of logic but of prudence. It is well established that there are no precedents in the matter of

evaluation of evidence. Each case will have to be decided on the basis of the evidence adduced before court. The standard to be employed is that of a reasonable and prudent man. A fact is said to have been proved when after considering the matters before it the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances to act upon the supposition that it exists. Therefore two conditions of mind are required. First that in which a man feels absolutely certain of a fact, or in other words, he believes it to exist and secondly that in which although he may not feel absolutely certain of a fact he thinks it so probable that a prudent man would under the circumstances act on the assumption of its existence. It has already been observed that the benefit of doubt to which the accused can claim is only a reasonable doubt and not the doubt of a vacillating mind or of fleeting nature. The prosecution, in the case on hand, has succeeded in proving the circumstances, which led to the irresistible conclusion that the offences were committed by the accused and the accused alone. Men may lie, but circumstances do not.

63. There is no reason to believe that the accused have been falsely implicated in this case. No such suggestion was made to the witnesses or to the investigating officer. It is rather inconceivable in a case of this nature either the witnesses or the investigating agency would enable the real culprit to escape and rope in innocent persons. All the circumstances relied on by the prosecution have been proved and they form a chain which leads to the only conclusion that the offence must have been committed by the accused persons.

The result is that these appeals are without merits and they are liable to be dismissed. We do so, confirming the conviction and sentence passed by the court below.