

(1993) 11 KAR CK 0009

In the Karnataka High Court

Case No : Criminal Appeal No"s. 217 with 221 of 1992

State of Karnataka

APPELLANT

Vs

Rajan and others

RESPONDENT

Date of Decision : 16-11-1993

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, 396, 449

Citation : (1994) 1 ALT(Cri) 464 : (1994) CriLJ 1042 : (1994) ILR (Kar) 318 : (1994) 1 KarLJ 237

Hon'ble Judges : D.P. Hiremath, J;B. Jagannatha Hegde, J

Bench : Division Bench

Advocate : T.J. Chouta, Spl. Public Prosecutor and B.R. Nanjundaiah, for the Appellant; A. Sambamurthy and S.G. Bhagavan, Amicus Curiae, for the Respondent

Judgement

Hiremath, J.—Five accused took trial in the Sessions Court for offences under sections 449, 396 & 307 I.P.C. and all of them were convicted under sections 449, 396, 307 & 395 IPC and each of them sentenced to suffer imprisonment for life and to pay a fine of Rs. 250/- in default to suffer R.I. for three months. Though conviction was recorded u/s 395 IPC as well no separate sentence was passed. While the appellants A-2 to A-4 have challenged their conviction in Cr. A. No. 221-92 the State has sought enhancement of sentence in Cr. A. No. 217/92. A-1 Rajan has not challenged his conviction or sentence. In Cr. A. No. 217/92 however he is respondent No. 1 and Sri S. G. Bhagawan, a Senior Counsel, was appointed Amicus Curiae to defend him whereas other accused-respondents were represented by their Counsel who represents them in other appeal filed by them.

2. The case presents a gory incident of two murders and injury to some of the witnesses on the evening of 21-9-1988 in the house of Savitridevi alias Janaki Bai, 60 years of age, living in the second-floor of "Savitri Nivas" a three storey building bearing No. 106, Railway Parallel Road, Kumara Park West of Bangalore. The said building has a cellar, ground-floor and three other floors over it. In

September 1988 when this incident occurred, in the cellar portion were living three tenants, the ground-floor was vacant and the first-floor was occupied by PW-36 Gopal N. Chug son of the said Savitridevi and his family. His father Neechal Dass had died in the year 1977. PW-36 Gopal and PW-34 Muralidhar are the two sons of the said Savitridevi, PW-34 being the younger between them. After her husband's death Savitridevi made some arrangement regarding the occupation of this building. In the year 1984 the ground-floor was allotted to PW-34 who was then living in B.D.A. quarters, Austin Town. In 1982 he embraced Islam and changed his name to Gulam Mohamed. P.Ws.-34 & 36 were doing business from 1977 to 1985. In 1985 however PW-34 became a partner in Bangalore Roadlines along with two others by name Imthiaz and Ayoob. Though the ground-floor was allotted to him in 1984 it appears till about 1990 he did not change his residence but continued to live in the B.D.A. quarters. Thus at the time of this incident the ground-floor of Savitri Nivas was vacant. In the first-floor lived PW-36 with his wife and children. PW-36 has two sons by name Sanjay (PW-2) and Amith. Vandana and Sangeeta are the two daughters of the said Savitridevi. Vandana was living at Tiptur with her husband and children. Sunil one of the deceased persons was the son of the said Vandana and though the third-floor was allotted to sangeeta that was also vacant. In addition to the wife and two sons of PW-36, Yashodha & Vijaya maid-servants were also living in that house. The second-floor was occupied by Savitridevi and Bhagya (PW-3) was her maid-servant. Sunil had come from Tiptur to learn business and was living with Savitridevi as a member of her house-hold. Thus in brief when this incident occurred there were living in the first-floor PW-36, his wife, his two sons and their two maid-servants whereas in the second-floor were living Savitridevi, Sunil and her maid-servant Bhagya. There were separate telephones in the first-floor as well as the second-floor.

3. A-1 who is a painter by profession was well acquainted with Savitridevi and used to visit her house frequently for three years before. She knew Sindhi, Hindi, Kannada and Tamil languages well. In 1985 deceased Savitridevi and PW-34 her another son started a school and wanted the name-board of their school painted. It was at that time that P.W.-32 Palani a carpenter introduced A-1 to them. This A-1 in turn was introduced to PW-32 by a washerman or Dhobi by name Umapati. A-1 did paint the board for the school as instructed by PW-34 and his mother. Six months later Gopal PW-36 got painted a scenery for this house by A-1 through the intervention of PW-32. A-1 had in fact did such work for one Murthy in the neighbouring bylane. In fact the work done by A-1 found appreciation of PW-36. That scenery was painted in the bed-room of the residence of PW-36. It appears the school did not make any progress, it was closed about six months before this incident and the deceased was on the lookout for a tenant for the building in which the school was functioning. PW-32 was asked to look for a good tenant by the deceased.

4. A-2 and A-3 were introduced to PW-32 by A-1 about a week prior to this incident. The deceased expected rent of Rs. 5000/- for the school building which

she intended to let out and advance of Rs. 1,50,000/-. When A-1 came to know that the school building was intended to be let out he met PW-32 in the house of the deceased and according to them he took A-2 and A-3 to the deceased and introduced them as cardamom estate owners of Kerala and also told that they were interested in striking a deal in this behalf with the deceased. The accused did not turn-up to take the building on lease. This is how A-1, A-2 & A-3 came in contact with the deceased and familiarised themselves with the residents of PW-36 and deceased Savitridevi.

5. According to the prosecution, in a Sindhi Hall in which the deceased had some interest there was a Shiva temple. PW-32 was employed to carry out some repairs to that temple. The previous day of this incident when A-1 had approached PW-32 he was asked whether he would decorate the dome of the temple with a flower painting. A sketch of the flower to be so painted was asked to be furnished by him and accordingly on that fateful day at about 6.30 or 6.45 p.m. when PW-32 was in the house of the deceased, A-1 took the sketch of the flower as desired, the deceased approved it and asked A-1 to meet her the following morning to receive advance money towards executing the work. A-1 then left the house leaving the sketch with the deceased. A-1 parted company saying that his wife and child were not well and while coming down from the second-floor Sunil who was living with Savitridevi met PW-32 and asked whether he had secured licence for him to drive a two-wheeler as promised earlier and PW-32 replied the he would make arrangements to get it shortly. MO-30 was seized from the house of the deceased and is identified as the sketch prepared by A-1 and left with the deceased that evening.

6. When PW-32 and A-1 so left the house of the deceased there were in the house of PW-36 in the first-floor PW-2 Sanjay, Amith and their maid-servants. At that time PW-2 was studying for the IXth Standard and Amith for the Vth standard. Having returned from the school by about 4 p.m., PW-2 had lunch with his mother, Amith and Sunil in the second-floor of the house. His father had left the house at 5.15 p.m. The same day Gopaldass Thakur, husband of Vandana had also come from Tiptur. PW-2 was being given tuition in Kannada. His tutor engaged him till about 6.45 p.m. and Sunil who had left the house earlier returned to the second-floor at 6.55 p.m. and the mother of PW - 2 left the house for shopping instructing PW-2 and his brother to attend to their studies. Thus round-about 7 p.m. there remained in the house of PW-36, his son PW-2, another son Amith and the two maid-servants. They watched T.V. till about 7.30 p.m. PW-2 also saw A-1 and Sunil coming down from the second-floor the same time. When he talked to Sunil he told that he was going to drop A-1. Having entered into his house he bolted it from inside and sat in the hall. He then saw A-1 going alone to the second-floor. At about 7.40 p.m. he received a call from Gopaldass on phone whether Sunil had reached the house. He was then asked by Gopaldass to enquire with his grand-mother as to when he would be returning. This is how PW - 2 went to the second-floor.

7. PW-3 Bhagya was working in the kitchen when the accused entered the house. She was instructed by Savitridevi to start cooking. All the three accused, namely, A-1 to A-3 had gone to their house by about 7 p.m. and when A-1 and Sunil went down A-2 and A-3 remained in the house. They requested Savitridevi to get some water. When Savitridevi asked PW - 3 to get water for them she brought the same in two tumblers and sought from Savitridevi articles to prepare the night meal. Having given her the required articles Savitridevi went back to the hall. When she was mixing wheat-flour to prepare Chapatis A-3 entered the kitchen, gagged her mouth with a cloth holding her neck and dragged her behind the dining hall. Two persons entered the Pooja room. Her hands were tied by A-3 behind her back. Her neck was tied with a towel. When she regained consciousness she saw Savitridevi lying in the passage dead. she also saw A3 removing the jewels from her body. A-2 was near her and A-1 was standing at the passage near the door of the verandah. It was at that time PW-2 went there shouting for Savitridevi.

8. When PW-2 reached the second-floor climbing the staircase, he found the doors open, lights and T.V. were on and the T.V. was on with high volume. Having stood in the room-cum-verandah he called his grand-mother Savitridevi shouting "Mummy-Mummy" and found to response. He then entered the front-room from the passage. At that time A-1 came in front of him, pushed him back with his shoulder and when he tried to enter again he caught hold of him by mouth with one hand and rolled him to the ground and also caught his neck with the other hand. He started dragging him towards the passage and at that time he saw his grand-mother fallen on the floor of the bed-room. He saw another person standing next to his grand-mother with a cloth bundle in his hand and he was identified as A-2. He was removing jewellery from the person of Savitridevi. Another person identified as A-3 was standing next to his grand-mother. They wore Lungis & shirts. When he tried to extricate himself from the clutches of A-1 the latter dragged him towards the dining hall. His head was banged against a show-case. He was also pushed into the Pooja room by A-1. Two other persons were found in the Pooja room. A-1 sat on his stomach but he hit him on his groin with his knee. A-1 continued to squeeze on his neck and the two persons in the Pooja room were identified as A-4 and A-5. Being so squeezed at the neck by A-1 PW-2 lost his consciousness.

9. Amith the brother of PW-2 went to the second floor out of curiosity when PW-2 who had gone to the second-floor on receipt of phone call had not returned for long. He came down and told to PW-12 that Sunil had fallen down and even so Savitridevi. Having gone to the second-floor she saw Savitridevi and sunil Lying unconscious. Amith went to bring a doctor. She saw the hands of PW-3 and Sunil tied. At that time PW-2 came to the dining hall from Pooja room. Sunil however was dead. She untied the hands of PW-3 and PW-2 was exhausted. She went back to the first-floor and returned to the ground-floor with Rajani one of the tenants. PW-4 Dr. M. R. Baliga who has his clinic on Kumara Park Railway Parallel Road at No. 111 was their family doctor for about 15 years. At about 8 or 8.10

p.m. on the request of Amith who was frightened and perturbed he went to the house of Savitridevi, he saw Sunil's, body was warm and still bleeding slightly. He also examined Savitridevi who had marks on her neck, had bleeding through her nose and mouth and pronounced her dead. He assessed that they might have had their death about 10 or 15 minutes earlier. PW-2 approached him at that time and when questioned as to what had happened he told that painter by name Rajan and others had tried to kill him, the maid-servants and others. While coming down he saw the Police arriving at the building.

10. PW-41 who was the Sub-Inspector of Police (Law and Order) of Seshadripuram Police Station received a message at 8-14 p.m. from the Police Control Room that by a phone call received from House No. 106, Railway Parallel Road, Kumara Park West, it was informed that there was some killing in that house. He was asked to visit the spot and report back to the Control Room. Having made entry of the message in the Station House Diary he went to the spot at about 8.30 p.m. along with two others. At the same time PW-2 came down, introduced himself and took him to the second-floor. He had also some injuries on his person. Having seen the state of things in the second-floor he reported back to the Control Room and a few minutes later PW-37 a Police Official Photographer arrived at the spot and he was asked to take the photographs of the dead-bodies and also the scene of offence from different angles. The parents of Sanjay and the father of Sunil came to the spot at 10.50 p.m. The Official Finger Print Expert PW-22 also came to the spot and started examining the scene of offence Between 9.00 p.m. and 9.45 p.m. he recorded the statements of PW-2, treated it as the First Information, sent PWs-2 and 3 to the hospital for treatment and then went to the Police Station at 9.55 p.m. and registered a case in Crime No. 337/88 under sections 302, 394 and 34 of the Indian Penal Code and despatched the F.I.R. to the jurisdictional Magistrate through PW-40. He then went back to the spot and held mahazer of the scene of offence.

10A. Among other things that were seized from the spot were dried blood-stains scraped from the floor of the house, towels (M.Os. 24 to 26) etc. PW-22, who was then the Finger Print Expert attached to the Finger Print Bureau of the State Government, went to the house of the said Savithri Devi at 9-15 p.m., examined three steel big tumblers and a telephone, the chord of which was cut, and developed a partial finger print on a steel tumbler and made an identification mark "A" on it. He also developed seven other finger prints on some other articles. At his request, PW-37, an official photographer, was also summoned by PW 41. He was asked to take the photographs of the articles marked by him. PW-41 also held inquest over the dead bodies of Savithridevi and Sunil and handed over the investigation of PW-42, the Circle Police Inspector.

11. Efforts were being made by him to search for the accused especially for Accused No. 1 whose criminal antecedents were noticed in Banaswadi Police Station. They kept track over the movements of A-1 who had fled to Kerala from

the information available from the Banaswadi Police Station. He went to Kerala along with his staff. On 23-9-1988 at about 1-00 p.m. they were at Thrivattar village in Kerala and there they visited the house of the father-in-law of A-1 and on collecting information, the search was on for him in that State. Till 6-10-1988 no progress could be made in the matter of securing the accused. On that day, however, A-2 was taken into custody at the Ponnagundam bus-stand and after arresting him, his voluntary statement was recorded. A diamond ear stud (M.O. 6) was found in his pant pocket which was seized under a mahazar. A-3 was arrested on 7-10-1988 at 4-30 am at Kannupurali village and thereafter A-4 at Thakalavedu and immediately thereafter A-5 was arrested at a place about two K.Ms. away from there. From the person of A-5 a gold ring (M.O. 7) was seized. A Citizen watch (M.O. 8) was seized from the person of A-4 and before such search was made, their voluntary statements were recorded. Thereafter, A-3 produced four silver coins (M.O. 10) from the roof of his house and after producing A-2 to A-5 before the II Class Judicial Magistrate, Kancharapalli, a remand for their detention was obtained. Thereafter A-5 produced a knife (M.O. 39) from behind a photo hung on the wall of his house. A-2 then took them to the house of his father-in-law Gopala Pillai and got produced two gold bangles (M.Os. 1 & 2) from his wife. A-2 also got produced a pair of bangles and a pair of chains from P.W. 14 and they are M.Os. 3, 4, 5 and 9. Having produced A-2 to A-5 before the jurisdiction Magistrate at Bangalore, a requisition was given to him to address a letter to the Taluka Executive Magistrate to conduct a test identification parade. Information was collected at Bangalore with regard to the movement of the accused persons prior to the commission of this offence. Samples of hair were taken from the heads of A-2 to A-5 in the presence of the Panchas. Lastly, A-1 was taken into custody on 28-11-1988 at about 7-00 p.m. in Periyapalandoor village of Nayattikara taluka in Kerala State. His voluntary statement was recorded and the finger-prints of all the accused were taken for comparison. On 30-11-1988 A-1 took the police and Panchas to the Railway parallel road near the police quarters compound and pointed to a bush. From that bush four video cassettes (M.O. 29) and ten gramophone records (M.O. 28) were seized under a mahazar in the presence of the Panchas. Test identification parade was held by P.W. 11 on A-1 to A-5 on 21-10-1988 in which P.Ws. 2 and 3 participated. While P.W. 2 identified all the four accused persons, P.W. 3 could identify only A-2, A-3 and A-5. During investigation, reports of the experts were collected and after due investigation, charge-sheet came to be filed against all the accused persons for the aforesaid offences.

12. The prosecution relied on eye-witness account given by P.Ws. 2 and 3, the circumstantial evidence, evidence of discovery of the articles robbed from the house of Savithridevi, the test identification parade and the movement of the accused prior to the incident. The trial Court accepting the evidence found the accused guilty as aforesaid, convicted and sentenced them.

13. Though A-1 has not challenged his conviction or sentence, in the State Appeal for enhancement of sentence, the learned Amicus Curiae challenged his

conviction as well as he entitled to. The learned counsel for the appellants in the appeal against conviction as well as the learned Amicus Curiae, have contended that this is totally a cooked up case and none of the witnesses are credit worthy. Even the evidence of P.Ws. 2 and 3 regarding identification of A-2 to A-5 is wholly unreliable and the seizure of the articles on the information said to have been furnished by the accused persons is only make believe. Material omissions and improvements in the evidence of prosecution witnesses were not properly appreciated by the trial Court. The test identification parade has exposed the futility of the prosecution to get identification of the accused. Even the seizure of articles like the video cassettes and gramophone records from the bush in the locality where the house of Savithridevi is situate smacks of artificiality. Though evidence has been given by some of the hotel people, the same does not inspire confidence with regard to movement of the accused persons. Ex.P.-7 ought not to have been used by the trial Court to satisfy itself that the articles seized tally with the description of the articles given in it. The learned State Public Prosecutor has supported the judgment of the trial Court as far as conviction is concerned.

14. We have reappraised the evidence in the light of the arguments advanced. If the evidence seeking to establish complicity of A-1 is believed, then it would be a clear instance where a person, who gained confidence of the inmates of the house of Savithridevi, betrayed the same for material gain, and that A-1 came in close contact with Savithridevi is apparent from the evidence of substantial number of prosecution witnesses.

15. P.W. 35, the younger son of deceased Savithridevi, has deposed that though he was doing business in fruit vending along with his elder brother P.W. 36 from 1977 to 1985, he started a school in the year 1985 along with his mother in the building at Devasandra near M.S.R. Nagar, Bangalore. They wanted the name-board to be painted and, therefore, they requested the carpenter - P.W. 32 - to get someone to paint and write it. Accordingly, P.W. 32 introduced one Rajan to his mother. In the cross-examination he admitted that he had not seen A-1 at any time and that he had no acquaintance with him. P.W. 32, who is a carpenter by profession, residing in Devasandra layout deposed that about three years prior to her death Savithridevi and P.W. 34 wanted to get the name-board painted for the school and they also gave in writing as to what was to be painted. Through one Umapathy, a washerman, he came in contact with A-1, who was doing this work and when A-1 agreed to do the job, he was taken to Savithridevi and introduced him to her. Later, Gopal - P.W. 36 - also got painted scenery in his bed-room and P.W. 36 and his wife were impressed by the painting that A-1 had done in the house of one Murthy. This painting went on in the house of P.W. 36 for about one week, and he was duly paid the charges. Later another scenery in the hall of his residence was repaired at a cost of Rs. 80/-. A-1 was working at Sapna Book Stall near Shivananda nanda Stores, Seshadaripuram before and used to meet him frequently. P.W. 36 has also deposed that about 2 1/2 years prior to the incident A-1 had painted on a wall of his house and had also repaired another painting. Though an omission was elicited with regard to the time that

A-1 took to paint the scenery in the house of P.W. 36, in the cross-examination of P.W. 32, no such omission in the statement before police was suggested with regard to the very act of A-1 painting such a scenery. He also asserted that when the painting in the bed-room of Gopal, P.W. 36, was in progress, he used to visit his house often. There is no challenge in the cross-examination of P.W. 32 about the introducing A-1 to Savithridevi. P.W. 3 Bhagya, a maid servant of the deceased, has fully corroborated the evidence of P.W. 32 by deposing that she knew Rajan A-1 for the past about three years as he was visiting their house. Similar is the evidence of P.W. 2, who has deposed that A-1 knows English, Hindi, Kannada and Tamil, that he was visiting their house for about three years prior to the incident and that he had done some painting work in their house.

16. M.O. 30 is a sketch of the flower prepared by A-1 for consideration of the deceased for being painted in the dome of Shiva Temple in Sindhi Hall. This was on the previous day of the incident on which he agreed to prepare a sketch of the flower and show it to the deceased for her approval. He got prepared the sketch accordingly and took it to the house of the deceased on the very next day (sic) of the incident and the deceased agreed to have the flower painted by A-1 in the dome of Shiva Temple and the sketch was left with her by both of them. Even P.W. 32 has deposed that at about 6.30 p.m. on the date of this incident he had taken A-1 with him. He had brought a sketch of a design for the purpose of painting in the temple. Savithridevi talked to both of them in this behalf and thereafter A-1 and P.W. 32 left the house leaving the design there itself. The only suggestion made to her is that she saw M.O. 30 for the first time only when the spot mahazar was prepared. Her evidence about the visit of accused No. 1 along with P.W. 32 and both of them talking to Savithridevi regarding the painting to be done in the dome of the temple were challenged in one question by stating that she is stating falsely about M.O. 30. P.W. 41, the Sub-Inspector of Police, has deposed about his seizing M.O. 30 from the verandah of the house while conducting the spot mahazar. It is not in challenge that P.W. 32 used to attend to the carpentry work in the construction under-taken by Savithridevi. It appears, A-1 sought the help of P.W. 32 even with regard to getting work for him and about 16 days prior to the incident in question he told P.W. 32 that he had gone to Madras, learnt painting pictures and banners and requested him to secure a place on rent to start his painting work. When he was in the Shiva Temple on the previous day of the incident, A-1 approached him there and told him about A-2 and A-3 coming from the native place to strike a bargain with regard to taking on rent the building where Savithridevi had started her school earlier and closed it later. There is practically nothing elicited in the cross-examination to falsify his testimony. A very material omission was sought to be elicited from his evidence by suggesting that he did not state before the police in his statement under S. 161, Cr.P.C. that he and A-1 had left M.O. 30 in the house of Savithridevi. The investigating officer, P.W. 42, while admitting that no such exact words were used by P.W. 32 in his evidence, he added that P.W. 32 stated that the deceased Savithridevi kept the sketch M.O. 30 to go through it and make payment on the

next day. Thus, there is no omission with regard to the very act of himself and A-1 leaving the sketch with Savithridevi. This has assumed importance inasmuch as A-1 had access to the house of Savithridevi till the very day of her murder and dacoity in her house. Similarly, though there was an omission as to P.W. 32 stating before the police that A-1 had approached him about six months before the incident to secure him a place on lease, P.W. 42 stated that he has stated before him that such an approach was made only two months prior to the recording of his statement. In our view, therefore, the evidence of these witnesses has established in clear terms that A-1 was frequenting the house of Savithridevi during that period of three years prior to the incident and P.Ws. 2 and 3 as well were very much familiar to him.

17. A-2 and A-3 also coming in contact with the deceased has been spoken to by the same P.W. 32. As already stated during the resume of this judgment, about six months prior to the incident P.W. 34 and the deceased had closed the school and were intending to let out the building. For this reason the deceased had requested P.W. 32 to secure a tenant and she expected monthly rent of Rs. 5,000/- together with an advance of Rs. 1,50,000/-. Earlier, when P.W. 32 was approached by A-1 with a request to secure a place for his painting work, P.W. 32 had told him about availability of the school building of the deceased. The following morning A-1 met P.W. 32 in the house of the deceased and told both of them that two persons had come from a place in the neighbourhood of his own native place they were cardamom estate owners and sought his permission if they could be introduced to Savithridevi. After taking his consent, he went out and took A-2 and A-3 to the 2nd floor residence of Savithridevi and A-1 told them that A-2 and A-3 were intending to sell their cardamom estate at their native place, come to Bangalore and start business along with A-1 in painting banners, boards, etc. He further told them that having brought the money, they would deposit about Rs. three or four lakhs with the deceased and would take the same as and when required. The deceased, however, replied that she was not interested in such deposit from them, but would only expect an advance of Rs. 1,50,000/- for the school building to be given on lease and out of deference to P.W. 32, the rental could be brought down to Rs. 4,000/- per month. Having so talked with the deceased, A-1 to A-3 left her house informing her that they would be returning with the money from their native place and enter into an agreement. At that time was present P.W. 3 as well. Thus, this negotiation took place about 16 days prior to the incident or at least two months before if the statement of P.W. 32 made during the investigation is considered. In this behalf an omission was elicited in the evidence of P.W. 42 that P.W. 32 did not state before him that P.W. 3 was also present when he and A-1 to A-3 had conversation with the deceased that evening. If P.W. 3's evidence could be believed, then the omission in his evidence in this behalf becomes insignificant. Afterall, undisputedly, P.W. 3 was the maid servant working in the household of the deceased for nearly three years before this incident. She asserts that while A-1 was visiting their house for about three years, A-2 and A-3 had visited them

about 15 days prior to the incident in the company of A-1. She does not, however, depose about the negotiations that the deceased had with A-2 and A-3 along with A-1 for leasing her building. It is quite likely that being a maid servant P.W. 3 could not have been present when such talks went on between the deceased and the three accused persons in the presence of P.W. 32. It is quite likely that P.W. 32 might have told the Court that in the house P.W. 3 was also present then. This could not be unnatural or improbable by any stretch of imagination. In our opinion, therefore, even A-2 and A-3 became acquainted with the deceased at least 15 days earlier to this incident and P.W. 3 had occasion to see them earlier and to know them.

18. This takes us to the actual incident of dacoity by committing murder of two persons in the house of Savithridevi. Here again, the evidence of P.W. 3 is most material as she, deceased Savithridevi and deceased Sunil were the three persons present in the house when the incident occurred. That was in the evening time at about 6-30 p.m. when Palani - P.W. 32 - went to their house along with A-1 with a sketch M.O. 30 to take the approval of Savithridevi. Earlier, at about 4-00 or 4-30 p.m. Savithridevi had taken food with P.W. 36 and was in the verandah-portico. At about 5-00 p.m. Gopaldas, her son-in-law, living at Tiptur, had gone there and at about 5-30 p.m. he went out along with Sunil. At 6-00 p.m. P.W. 32 alone had approached Savithridevi and talked to her. Thereafter he came along with A-1 at 6-30 p.m. after P.W. 32 and A-1 went out leaving the sketch with Savithridevi. Sunil returned at about 7-00 p.m. The TV was tuned for Chitrahara programme. After this programme was over, A-1, A-2 and A-3 came to their house and at that time A-2 and A-3 were wearing lungi and shirt each with a towel on. All time three of them talked to Savithridevi and later A-1 went out along with Sunil. A-2 and A-3 remained there and requested Savithridevi to get some water for them. Savithridevi called her and asked her to get some water for them. She went inside and brought water in two steel tumblers. Both of them took water and then P.W. 3 asked Savithridevi to get her provision for preparing the night meals. Savithridevi, who was wearing chappals, got up for this purpose, went to the kitchen and gave her one egg and came back to the verandah. P.W. 3 kept the egg for boiling so also milk over the stove. She was mixing flour to prepare chapatis and at that time A-3 went into the kitchen, gagged her mouth with a cloth, held her by her neck and dragged her to the dining hall. At the same time two persons entered the Pooja room. One of them had a fat nose and fat lips. She was not able to see the other person since he had already entered the room. She identified A-1 as one of the persons who had entered the Pooja room and her hands were tied at her back by A-3 and she was made to fall near the bath-room in the dining-hall. Her neck was also tied with a towel. She became unconscious and after regaining consciousness she came to the dining hall crawling, and saw in the passage Savithridevi lying on the floor near the door of a room. She also saw A-3 removing jewels from her person and A-2 was also near her. A-1 was standing at the passage near the door of the verandah. It was at that point of time that P.W. 2 came from the first floor

shouting "mummy" "mummy" and that there was a phone call for her. A-1, however, held P.W. 2 by his neck dragged and took him to the dining hall. He also dashed the head of P.W. 2 against the show-case kept in the dining room. P.W. 2 attempted to get himself extricated from A-1, but could not. A-1 then dragged P.W. 2 to the Pooja room. Having seen all this, she again lost consciousness. When she regained consciousness for the second time, P.W. 12 another maid servant who was in the first floor united her hands, but none of the accused were there. As usual, they had switched on all the tube-lights in the house at 6-00 p.m. and in that light she saw the entire incident. After her hands were untied, she also saw Sunil lying in the dining hall unconscious with bleeding from his nose and mouth. The ornaments worn by Savithridevi were missing from her person and so also the wrist watch and gold chain that Sunil was wearing.

19. The evidence of P.W. 2 is equally graphic as to what happened that evening when he went to the house of his grand-mother - Savithridevi. He speaks about Gopaldas and Sunil going to the workshop from the house at about 6-00 p.m. He attended to his tuition in Kannada till about 6-45 p.m. and again he saw Sunil going to the 2nd floor; that Sunil had come from Tiptur to stay with his grand-mother to learn business. His mother had left for shopping around 6-15 p.m. and at about 7-30 p.m. he saw Sunil and A-1 coming down from the 2nd floor and the fact that he talked to Sunil and the reply given by Sunil that he was going to leave A-1 clearly establishes A-1's presence in the house of Savithridevi even a little earlier to the actual incident. He also says about his seeing sometime later A-1 going to the 2nd floor and then he went to his room and sat for his studies. At 7-40 p.m. he received a call from Gopaldas to find out whether Sunil had reached the house. He was asked by Gopaldas to enquire from his grand-mother about Sunil's presence in the house. This is how he went to the 2nd floor and called his grand-mother addressing her as "mummy" "mummy" as usual. When there was no response, he found the doors of the second floor open, the lights and TV were on and the TV volume was in a high pitch. He stood near the chairs in the portion called "room-cum-verandah" of the house and again shouted for his grand-mother. Since he did not get any response, he entered into the house through the passage and at that time A-1 came opposite to him and pushed him back with his shoulder and when he tried to enter again A-1 caught hold of his mouth with one hand, rolled him and caught him by his neck with the other hand. He was being dragged through the passage. He then saw his grand-mother lying on the floor at the opening of the bed-room and in the passage. He saw A-2 next to his grand-mother having a cloth bundle in his hand and was removing the jewellery from the person of his grand-mother. A-3 was standing next to his grand-mother. Both of them were wearing lunges and shirts. A-3 was standing with a cloth bundle and A-2 was by the side of A-3. When he wanted to get rid of the clutches of A-1, he could not, as he was dragged towards the dining hall and A-1 banged his head over the show-case. The lights in the Pooja room as well as in the dining hall were on and then A-1 pushed him into the Pooja room where he saw two persons and he identifies them as A-4 and A-5. A-1 pushed him on

the cot and then sat on his stomach and tried to squeeze his neck. He then hit A-1 on the grain with his knee, but could not extricate himself and then he became unconscious. When he regained consciousness, he saw A-4, A-5 and A-1 in the Pooja room. Having gone to the dining hall from the Pooja room, he found Sunil lying on the ground. He also saw their maid servant Yeshoda untying P.W. 3 Bhagya and saw bleeding through the nose of Sunil. Bhagya's mouth was found gagged and Sunil had injuries on his neck. On the stove in the kitchen milk had spilled and the eggs were completely burnt. He walked slowly to his grandmother and found bleeding injuries on her neck and he himself was having pain. He also felt that his grand-mother had become breathless. None of the accused were present. From her grand-mother's person were missing the gold-chain, diamond ear studying, one diamond ring, one gold ring and two gold bangles. Having gone into his grand-mother's room, he found all the cup-boards open and things scattered. He then went to the verandah to send a phone message to the police, but found that the telephone wire was cut. Leaving P.W. 12 at the 2nd floor, he went down to the 1st floor and dialed 100 to inform the police at the Control Room. He gave information that A-1 and others had killed his grandmother, his cousin and robbed the house. Yeshoda was still present there and a little later Dr. Baliga P.W. 4 arrived at the spot and declared both Savithridevi and Sunil dead. When police arrived at the spot he made a statement as per Ex. P-5.

20. P.W. 12 Yeshoda has deposed about P.W. 2 going to the second floor on receipt of phone-call and after sometime Ameeth, his brother, also went to the 2nd floor and Ameeth having come down shortly thereafter told that P.W. 3 and Sunil and fallen on the floor and so also Savithridevi and then she went to the 2nd floor to see as to what it was. Ameeth went to inform the doctor-P.W. 4 who was running a clinic in the neighbourhood.

21. Thus, these three witnesses have deposed as to what exactly happened in the house of Savithridevi that evening and the evidence of P.Ws 2 and 3 of believed, would directly connect the accused with this ghastly crime. The attention of P.W. 2 was drawn to Ex. P-5 in which the presence of two persons in the Pooja room was not stated. However, on the very next day i.e., 2-9-1988 his further statement was recorded and he deposed that in his further statement he did state this fact. It was the second day that he gave the list of missing articles as per Ex. P-7. Whether Ex. P-5 could be treated as a first information and so also Ex. P-7 as a part of it, could be considered at a later stage. suffice it to note here that P.W. 2 did make a statement later about two other persons being also present at the Pooja room at the earliest opportunity even before the culprits, according to police, were apprehended later. He admitted to have not stated before police that it was 6-00 p.m. when he put on all the lights in the house and at the stair-case, that this Kannada teacher had gone there and he took tuition in Kannada, that he saw Sunil going to the 2nd floor after his teacher left and that at 7-30 p.m. A-1 and Sunil coming down from the 2nd floor. There is also an omission with regard to the lights being on in the 2nd floor and the TV set being in high volume. He also did not give description of the two persons in the

statement. P.W. 41 was not confronted with the statement of P.W. 2 to prove the omission that he found two more persons in the Pooja room. But he only stated that the statements of P.Ws. 2 and 3 recorded by him only disclose that the number of culprits was 3.

22. In this context it is necessary to examine if Ex. P-5 could be looked into as the first information under S. 154, Cr.P.C. to corroborate the testimony of P.W. 2. This was recorded by P.W. 41 between 9-00 p.m. and 9-45 p.m. soon after he reached the spot on receiving information from the Control Room. In that P.W. 2 stated that when he went into the residence of Savithridevi A-1 suddenly closed his mouth with one hand, squeezed his neck with another, pulled him into the dining hall and at that time he saw his grand-mother lying on the floor of the passage near the bed-room. Another person was having a cloth in his hand in which he had covered something. Yet another person was standing near the door. A-1 then took him from the dining hall to the Pooja room and pushed him on the floor and again having gone over him started pressing his neck. He became unconscious and when he regained the same he saw Sunil lying on the floor in the dining hall. The hands of their servant-girl P.W. 3 were tied and her mouth was gagged. It also ended by saying that Rajan A-1 had done some painting work in their house and he would identify two others who had participated in the crime along with him. It could thus be seen in Ex. P-5 P.W. 2 has attributed over acts to three persons, namely, A-1 and two others and did not state about the seeing two other persons in the Pooja room. In the evidence in chief itself he has stated that the following day i.e. 22-9-88 when Ex. P-5 was read over to him by the Sub-Inspector it occurred to him that it did not contain anything about he seeing the two persons in the Pooja room and therefore he gave his further statement mentioning about it. This means even at the earliest opportunity he did make mention of two other persons also being present and participated in the crime and they were in the Pooja room. Another omission which was highlighted was about he not stating before police that when he went up second floor the lights were on and the TV was it full volume. He also did not remember whether he stated before police that all the lights of the house were on, on the night of the incident. The statement of P.W. 3 was recorded at about 6 a.m. in the first instance as stated by her and at the that time she had still pain, she was frightened and was not capable of speaking properly. Even on the pervious night she had lot of pain in the neck and was incapable of speaking properly. Her further statement was recorded at 4 p.m. the same day. The evidence of these two witnesses has a close bearing on the test identification parade held by P.W. 11 the Taluka Executive Magistrate. The accused were arrested in Kerala State and after recovery of properties on the information furnished by them they were brought to Bangalore and thereafter a requisition was given by the Investigating Officer on 10-10-1988 to hold such a parade. A-2 was arrested on 6-10-1988 whereas A-3 to A-5 were arrested on 7-10-1988. Only A-2 to A-5 were paraded in the identification parade as according to the two material witnesses A-1 was quite familiar to them, they had given his name and hence his parading before

them was unnecessary. A-2 to A-5 were brought to Bangalore on 10-10-1988 and produced before the Jurisdictional Magistrate for judicial custody remand. Having obtained remand till 22-10-1988 P.W. 42 lodged them at the Central Prison having taken them to the prison with their faces covered and in the remand application itself he had made a request to the Metropolitan Magistrate II Court to send a letter to the Taluka Executive Magistrate to conduct identification parade of A-2 to A-5. Ex. P-17 is another independent letter sent by him to the Executive Magistrate. In Ex. P-141 the remand application itself P.W. 42 stated that he had brought them to Bangalore with their faces covered so that they were not exposed to any of the witnesses.

23. P.W. 11 has deposed about he receiving the letter from the Metropolitan Magistrate's Court dated 11-10-1988 to hold T.I. parade. According to P.W. 2 he had received notice two days prior to 21-10-1988 to identify the culprits in the jail premises on 21-10-1988 and even P.W. 3 deposed about she receiving the summons from the Tahsildar to go to the Central Jail for identifying the accused persons. According to them both of them were present in the Central Jail, Bangalore for this purpose. Thus when P.W. 11 went to the Central Jail to hold this parade at 11.30 a.m. P.Ws. 2 and 3 present there and amongst 30 under-trial prisoners of the same age, height and sex who were made to stand in semi-circle all the four accused were mixed up and according to him P.W. 2 identified all the four accused persons, i.e. A-2 to A-5. He was sent to an adjacent room and P.W. 3 was called. Having gone about the parading persons she identified A-2, A-3 and A-5. Thereafter the accused were asked to change their dress which they did, they were again mixed up among the same number of persons and even on the second occasion identification of the accused took place. Even the second time while P.W. 2 identified all the four accused persons P.W. 3 struck to only A-2, A-3 and A-5. Thus A-4 was not identified by P.W. 3. The proceedings were completed at 1-15 p.m. and Ex. P-8 the report to that effect came to be prepared. According to the learned counsel for the accused persons the parade does not inspire confidence as P.W. 11 himself did not choose the prisoners that were to participate in the parade and secondly none with flat-nose was secured. Thirdly there is reason to believe that the witnesses were showed the photos appearing in a certain Malayali daily "Malayalam Manorama" and that it was P.W. 42 the Investigating Officer who permitted the correspondent of the said newspaper to take photographs of these four accused persons on 14-10-1988. The witness denied to have shown these photographs so printed in the said news daily to the witnesses at the time of identification parade. In this behalf the accused have examined D.W. 1 Abubekar the Editor of the said new daily to prove that on 14-10-1988 the news item was published in their daily with a title "Bangalore Double Murder Case" and that four Malayalis were arrested in that case and the names of the four accused persons were also printed in it. He however could not say who their reporter who took the photographs was and where he had taken their photos. This news daily has the largest circulation and they were selling at that time 70,000 copies daily and even Malayali people of

Bangalore were getting their news papers. It was also elicited that these papers are available with local news paper agents in Bangalore. One copy of such news paper was produced at Ex. D-4 and Ex. D-4(a) is the relevant news item. He admitted in the cross-examination for the State that he has no idea regarding the number of Malayalis stay-in Karnataka State and also at Bangalore. He was not aware of the number of copies that were being sent to this State and more particularly to Bangalore. He also did not know how many agents are at Bangalore to sell their news paper. He also could not say how the photographs were sent to their office for publication. It was suggested that such photographs could be taken by keeping the photos side by side, but he pledged ignorance. It was suggested to P.W. 2 that after 6-10-1988 the police had taken all the accused to his house and showed them to him and also to P.W. 3 to help them identify the accused before the Magistrate and that their photographs were also shown prior to T.I. parade. Suggestion was denied. But it is pertinent to note that a copy of "Malayalam Manorama" paper was not shown to him but only a vague suggestion that photographs were shown was made. A similar suggestion was made to P.W. 3 that photographs were shown to her of these four accused persons and that she was also taken to the police station to show A-2 to A-5 for the purpose of identifying them in the jail later. She denied that their photographs had appeared in the Malayalam language news paper much earlier to their identification parade. A further suggestion was also made that all the accused were taken to their house to fix up the identity before the identification parade. Firstly there is nothing to show that these witnesses known Malayalam and even P.W. 2 did not state that either the deceased or they known Malayali language. They are Sindhis and became acquainted with Kannada at Bangalore. Secondly the fact that P.W. 3 did not identify A-4 rules out any possibility of the photographs having been shown to these witnesses earlier and much less the accused being shown to them either at the police station or near their house. If at all it had so happened P.W. 3 could not have hesitated to identify all the four accused persons. It is pertinent to note that suggestion was made to her that on as many as three occasions the accused were shown to her, namely, in the police station, near their house and even before going to participate in the parade. It may be that the photographs were published in the Malayalam news paper as all the accused hail from Kerala State and the incident had created some sensation as two persons were murdered in a residential house and when Malayali persons were taken into custody that became a news for Malayali news paper. The test identification parade only gives some guarantee of truth of identification in Court but ultimately it is identification in Court of the accused persons that should weight with the Court. Whether there was opportunity for the witnesses to see the accused at the time of incident, whether they could remember by face the accused persons and whether they could identify them by such memory in Court is the relevant consideration.

24. Needless to say that the test identification parade has to be held at the earliest before there is scope for the witnesses to acquaint themselves with the

identity of persons whom they are called upon to identify in test parade. As we have pointed out earlier even according to PW-42, A-2 to A-5 were produced before the jurisdictional Metropolitan Magistrate's Court on 10-10-88 at 2 p.m. and remand to judicial custody was obtained, at the same time a request was made to make arrangements for conducting identification parade. The remand application Ex. P-141 given on that date makes mention of this prayer. Thus 11 days thereafter the parade was arranged. Therefore there was no delay in taking steps to hold such parade. They were again taken into Police custody soon after the parade was over for the purpose of continuing investigation. Though A-3 was questioned about he being identified by PWs-2 & 3 in the test identification parade he only denied it saying that it is false, but none of the accused stated that they were shown to these witnesses earlier. Even if there is some infirmity in the matter of test identification parade the Court has to see if he witnesses had occasion to identify the accused persons at the time the offence was committed. It is very pertinent to note that PW-3 had occasion to see A-2 and A-3 when they had visited their house about 15 days before in the company of A-1 and she had even given them water a short while before the incident at their request and when asked by Savithridevi to get water for them. A-2 & A-3 according to her took water given by her in two steel tumblers and kept them by their said after drinking water. As far as A-1 is concerned there is sufficient material as already referred to above about his being closely acquainted with the family. She then admitted that she had not seen A-5 earlier but had seen him only at the time of the incident. When A-2 and A-3 had visited their house that evening they were wearing Lungi, Shirt and had a towel each with them. She also distinctly identified that A-3 had gone to the kitchen when she was attending to cooking and gagged her mouth with cloth holding her neck. A-5 also was seen by her distinctly when he entered the Pooja room. Her hands were tied by A-3. Thus these over tacts attributed to the respective accused persons amply make it clear that she had occasion to see them clearly and distinctly when dacoity was committed in their house. Though specifically PW-2 did not state about all the lights having been switched on and PW-3 did not state that she had put on all the lights as usual, it cannot be considered as an omission if common course of events in the house hold are borned in mind. None of the witnesses including the Police Officers were suggested that there were no lights at all when they went to the house and that they were put on only after they went there. Even apart from such suggestion what they deposed in the matter of lights cannot be ignored. Though PW-3 did not identify A-4, there is ample material on record in the evidence of PW-2 that he did see A-3 and A-4 in the pooja room and from the manner in which PW-3 was treated and held and then dragged in might have been not possible for her to distinctly See A-4. She did stick up to this version of hers throughout and even at the time of identification parade. In our view there is clear and unmistakable identification of all the five accused as participants in this ghastly dacoity.

25. Ex. P-5 no doubt to come to be given after the Police arrived at the spot and

it was PW-2 who had informed the police at the Control Room that murder had taken place in their house. He even stated that he dialled phone No. 100 and told the Police that A-1 and others had killed his grand-mother and cousin and had robbed the house. Even according to PW-41 the Sub-Inspector of Police the message from the Control Room was that an information was received from House No. 106 that there was some killing in the said house, the information was of a cognizable offence as required u/s 154 Cr.P.C., the same was noted in the Station House Diary and PW - 41 the Officer-in-Charge of the Police Station left it to take up investigation. Therefore Ex. P-5 is hit by Section 161 Cr.P.C. That however could be used for the purpose of corroboration of PW-2 if it was admissible in evidence u/s 154 Cr.P.C. Ultimately it is evidence given in Court by these two witnesses that should be available for appreciation. Though the phone message received by PW-41 was cryptic it did disclose the cognizable offence. In the case of Raberi Karsan Cova and Others Vs. The State of Gujarat, the High Court took such a view in respect of a phone message. In that case the telephonic message was that in a quarrel one person had received grievous injuries. In the instant case as well even according to PW - 41 the message was received that there was a killing in House No. 106. Ex. P-5 therefore is not available for the prosecution as an information u/s 154 Cr.P.C. to corroborate PW-2. If other evidence is believed that presents no infirmity in the prosecution case.

26. The next circumstance is one of movement of the accused persons at Bangalore before this incident. PW-25 Sandeep kumar son of the proprietor of Hotel Kailash Bhavan on Hospital Road, Bangalore consisting of ten rooms had employed a room-boy by name Suvarna since 1985 and according to him all the five accused stayed in their hotel from 17-9-1988 to 21-9-1988 both days inclusive. Having taken room No. 2 at 8 a.m. on 17-9-1988 they vacated it at 9 p.m. on 21-9-1988. A-2 approached him in the first instance and told that he and four others had come to Bangalore from Trichi and they are tourists to see Bangalore and having so allotted Room No. 2 an entry came to be made in Ex. P-77 the Hotel Register at Ex. P-77(a). A-2 is said to have signed his name as Murugan in it as per Ex. P-77(b). It was on 25-10-88 that A-2 to A-5 had gone to the hotel along with Police. He admitted in the cross-examination that about hundred customers stay in their hotel in a month and in the bills issued the number of persons who stayed in the hotel would be stated. He admitted that against Room No. 2 the number of persons who stayed in that hotel was not mentioned though the conditions of licence required them to write these particulars. He then admitted that all the ten rooms in the hotel were single rooms and if more than one person were to stay they were providing extra beds. He also admitted that in a room they were allowing only one person to sleep. There was a correction made in Ex. P-77 to show that the occupants vacated the room at 7 a.m. and the correction was by changing it to "9 a.m.". Though the suggestion was denied this correction could be easily noticed. He admitted that except showing that one Murugan had occupied the room nothing else was

written therein. The witness gave evidence on 31-12-1990 and he was so specific about all the accused having occupied the room. PW-27 the room-boy by name Suvarna also deposed that about two years three months before the date of his evidence the accused had taken Room No. 2 and later he saw A-2 and A-5 in company of Police. He also admitted that in the register the names of persons coming to the hotel and going away would be written and he further admitted that it was the owner alone who was writing the entire in Ex. P-77. PW-26 is only a panch witness for the seizure of Ex. P-77 the Hotel Register. The signature purporting to have been put by A-2 as Murugan was not subject to expert's opinion. Secondly excepting the oral testimony of PW-25 there is no other evidence to show that as many as five persons stayed in a single room for five days. PW-25 himself admitted that there used to be only one cot in each single room and it is rather unthinkable that five persons could have slept in one room for four days. Bill book was not produced to show what were the charges realised and for how many persons the bill was prepared. He does not state what were the charges for extra bed and whether four beds could have been accommodated in a single room has become anybody's guess. There is also no evidence to show what were the lodging charges per room and for five persons what was the amount paid. Under these circumstances it becomes very difficult to accept on face value the evidence of PW-25 & PW - 27. There is no special reasons for these two witnesses to remember the four accused persons. It is not the evidence of PW - 25 that these accused were frequent and constant visitors to their hotel so as to put up with whatever space was available and secondly there was no reason for them to somehow squeeze themselves within the available space in the room. It is therefore not possible to rely on the evidence of these PWs-25 & 27 to hold that the accused occupied a room in the Kaliash Bhavan Hotel on the dates stated by these witnesses. The trial Court also considering the infirmity in this evidence did not rely on this evidence and rightly so. Thus this circumstance of the accused occupying the hotel at Bangalore is not available to the prosecution.

27. The Finger Print Expert PW-22 had given evidence about he finding on some of the articles in the residence of Savithridevi finger-prints similar to those of A-2, A-3 & A-4. He gave evidence that he had developed 12 chance finger-prints at the scene of occurrence, the same were go photographed by the Police Photographer and on 31-12-1988 he compared and the chance prints with the finger-prints of the inmates as well as of the give accused persons and while comparing he found that the finger-print mark S-1 tallied with that of A-2, one marked as S-2 in Ex. P-54 tallied with the right thumb print of A-3 and the one in Ex. P-53(a) was found identical to one in Ex. P-32. The trial Court examined this evidence in depth as also the reasons given by PW-22 in support of his opinion and the evidence clearly established that some of the articles in the house had finger marks of A-2, A-3 & A-4. A suggestion was made that after the accused were arrested they were made to touch some of the articles and thereafter impressions were taken for comparison. It is pertinent to note that none of these

three accused and especially A-4 did not make any such statement, namely, that they were made to touch the articles in question taken from the house of the deceased to create evidence against them. Similarly A-2 & A-3 also did not state about this fact. They simply stated that the evidence given by the Finger Print Expert is false.

28. Nextly according to PW-42 he collected the sample hair of A-2 to A-5 after they were arrested as per MOs-41 to 44 and PW-24 deposed that Mos-42 & 44 A-4 & A-3 were morphologically similar in structure with those found in item No. 6 marked as MO-35 collected from the dining hall of that house and similarly item No. 4 was found to be similar to item No. 23 marked as MO-41 and in fact the hair of all these four accused persons A-2 to A-5 were found by the trial Court to have been seized from the house of Savitridevi. MOs-41 to 44 were respectively the hairs of A-5, A-4, A-2 & A-3 made available for comparison. Emphasis was laid during arguments that even according to PW-24 the cut hair will not have the presence of medulla which is quite essential for comparison. Most of the items of hair taken as samples for comparison were non-medulated. Cut hairs will have bulbs. He denied that thickness, medulla and pigmentation would be similar in the hairs of different persons. However he had not conducted any research in the filed of hair analysis but had sufficient experience. He then admitted that compared to cut hairs the pulled out hairs are best samples for comparison and it is not stated in his report as to which part of the body the hair analysed by him belonged. He also admitted that he did not apply or adopt the advanced technique in the matter of comparison of the hairs. He also admitted earlier that Neutron Activation Analysis and Blood Typing of hairs hold promise for more definite conclusion about the similarities of the hairs, but in their laboratory no such facility was available. He also denied that non-availability of plucked or pulled hair as sample for comparison affects his opinion. MOs-24, 25 & 26 are the three towels seized from the dining hall of the house. According to PW-3 while MO-24 was the towel used by the inmates of the house of Savitridevi she had seen MOs-25 & 26 with A-2 and A-3 when they had visited the house about 15 days earlier and they had also these two towels with them when they had gone to their house that evening. Apart from the expert evidence of PW-24 it is imperative to see of collection of hair of A-2 to A-5 from the spot of incident is proved satisfactorily. We have carefully scrutinised the evidence in this behalf given by PW-41 the Sub-Inspector who drew mahazer of the spot and also of PW - 5 the mahazer witness. After registering the case PW-41 started inspecting the spot for incriminating circumstances and also to seize some of the article that were found necessary for the purpose of investigation at 0.05 hours of 22-9-1988. PW - 5 was one of the mahazardars secured by them. It would be enough to confine at this stage to the relevant evidence of these witnesses for seizure of the hair or clothes to which hair was stuck and that were lying in the house. As we do not find unanimity in the evidence of these two witnesses and also in the evidence of PW-24 to whom the hairs were sent it would be useful to produce their respective evidence. PW-41 deposed thus :

"Thus, in the presence of panchas I seized MO-27 from the waranda, MO - 30 from the waranda, dried blood stains which were scraped and taken from near the legs of the deceased Savitridevi Mo-31, dried blood stains from near the dead body Mo-33, MO-26 from the dining hall, MO-35 from the dining hall, MO - 32 from near the legs of the deceased Sunil, MOs-24 and 25 from the dining hall, Mos-22 and 23 and 21 from the person of PW-3, MO-20 from the pooja room, Mos-18 and 19 from the person of PW-2, MO-37 from the kitchen, MO-47 from the bedroom of the deceased Savitridevi, MO-36 from the dining room. All these items were packed in the respective containers, they were sealed with a letter "M" and then they were seized under a mahazer Ex. P-6."

PW-5 and called at 11.45 p.m. on the night of 21-8-1988 to examine the spot. Having given description of various apartments in the house and also account of the inspection made he speaks about photos being taken by the Finger Print Experts. They saw the dead body of the boy Sunil in the dining hall, there were bloodstains near the head on the floor, near the legs and a white towel was lying stained with blood near the head of the body. The towel had certain hairs and there were also some hairs on the floor. Another towel was lying 4 or 5 feet away from the dead body with stains of blood on it and wheat-flour sticking. After making a survey of the condition of the various apartments they started seizing necessary articles from the premises. Scrapings of blood were taken from different places on the floor of the house. He then testifies with regard to the seizure of hair as follows :

"The Police scraped and removed the blood clots found on the floor, packed them in a plastic box, sealed and seized it as MO-33. The Police also collected the hairs lying there, packed them in a plastic box, seized and sealed it as MO-34. The Police seized the white towel lying near the dead body with hairs affixed to it with blood mark and the said towel was seized and sealed as Mo-26. The hairs which were sticking on with MO - 26 were removed, put it in a plastic box, packed and sealed as MO-35. At a distance of 5 of 6 feet there was another towel with bloodstains and the Police seized it as per Mo-25."

He than swears about seizing a coloured bed-sheet stained with blood from a cot in the Pooja room, going into the kitchen, seizing scattered wheat-flour from the floor of the kitchen and seizure of bloodstained cloths from the person of PW-3 and then drawing up the mahazer Ex. P-6. It could thus be seen that PW-5 testified about the seizure of hair from two places and they are MOs-34 & 35. PW-41 however does not depose about the seizure of hair in MO-34 at all. It may be clarified here that MOs-34 and 35 are the two plastic boxes containing hair seized from different places. The annexure to the Judgment shows that MOs-34 & 35 are the plastic boxes containing hair and so also MOs-41 to 46. These eight plastic boxes containing hair were tendered in evidence. Out of these according to the prosecution MOs-41 to 44 are the sample hair taken by cutting those from the heads of A-2 to A-5 on 28-10-1988. MO-41 contains the hair from the head of A-5, MO - 42 that of A-4, MO-43 that of A-2 and Mo-44 that of A-3. There is

absolutely no evidence from where the hair in Mos-45 & 46 the plastic boxes were taken. As already stated PW-41 the P.S.I. himself speaks about the hair in MO-35 while PW-5 swears about hair in two boxes MOs-34 & 35. With this evidence of seizure of hair this premises we proceed to consider the evidence of PW-24 the expert.

29. He is only a Scientific Officer in the Forensic Science Laboratory at Bangalore being a Graduate in Science and having undergone a course in Forensic Biology including Serology at New Delhi. Apart from his competence to examine the niceties involved in examination of hair, with regard to the receipt of the incriminating hair and sample hair for comparison has evidence does not find support from the evidence of PWs-41 and 5. With regard to the material objects that he received for comparison he says :

"The fourth item I opened was MO-34 containing hairs. Item No. 5 was MO-26 a towel, contained the marks S-1 and S-2. The 6th item was MO-35 containing hairs Item No. 18 containing hairs and it is MO-45. Items No. 19 was also a paper packet containing hairs which is MO-46. Item No. 20 was a cloth packet containing hairs which is MO-43. Item No. 21 was a cloth packet containing hairs which is MO-42. Item No. 22 was a MO-44 containing hairs. Item No. 23 was cloth packet containing hairs MO-41."

Having given evidence regarding blood group found on various articles with regard to report on hair his evidence is very cryptic and short and is as follows :

Items 4, 6, 18, 20, 21, 22 and 23 are human hairs. The hairs in Items 19, 20, 21, 22 and 23 are morphologically similar in structure with that of few hairs in Item 4. Hairs in Items 21 and 22 are morphologically similar in structure with that of a few hairs of Item No. 6. Hairs in Item 18 are not similar to morphological structure with that of few hairs in Items 4 and 6. The 16 hairs found in Item 4 and they are individually packet and numbered in the laboratory. 6 hairs found in Item No. 6 were individually packed and numbered in the laboratory."

While stating grounds for this opinion he states that he observed the nature of pigmentation in the shaft of the hairs and the tips of hairs. Those were found similar in Item as aforesaid. In case of struggle or pulling out of hairs, the bulbs (root) will be found. This is all the evidence tendered by him regarding comparison of hairs. Apart from the sufficiency of the grounds to arrive at this conclusion his evidence shows that he examined some hairs which are not shown to have been seized from the sport at all. Item Nos. 4, 6, 18 & 19 which he was asked to compare consist of plastic boxes containing hairs and marked MOs-34, 35, 45 & 46 respectively. Item 20 to 23 even according to the prosecution were the hairs of the four accused persons as already pointed out above. A scrutiny of the evidence of PWs-41 & 5 does not indicate from where the hairs in MOs-45 & 46 were taken and as already stated from where the hair in MO-34 came as PW-41 does not speaks at all about it and only PW-5 speaks. It could be seen

from the evidence that hair in MO-19 was morphologically similar in structure with that of hair in Item MO. 4, i.e. MO-34 and Item No. 19 refers to MO-46. However he states that hairs in MO-19 and hairs taken from four accused persons are similar in structure with few hairs in Item No. 4 i.e. MO-34. Similarly hair in Item Nos. 21 & 22 i.e. those of A-3 & A-4 were similar to the hair collected in MO-35. This makes his expert evidence self-contradictory in as much as all the hairs in MOs-46, 41 to 44 were of one person and if that he so the same i.e. hair at MOs-42 & 44 could not be that of the person whose hairs were collected from the spot in MO - 35 (Item No. 6). The trial Court completely missed the connecting link when it made a casual sweeping observation that the hairs of A-2 to A-5 were found in the house of Savitridevi. It must therefore be said that there is no necessary connecting link in the hairs seized from the house.

30. Though now it becomes unnecessary to go deep into the expert evidence of PW-24 reference to the opinion of John Glaister and Edgar Rantoul the learned authors of Medical Jurisprudence and Toxicology, 12th Edition at page 98 points out what should be the mode of examination of hairs from medico-legal point of view. They say thus :

"From the medico-legal point of view, the examination of hairs should include the following particulars : (1) colour to naked eye and on microscopic examination; (2) length, ascertained by actual measurement; (3) texture; (4) approximate breadth, by micrometer; (5) hair-tip or hair-end characters, whether intact, cut, or torn; (6) condition of bulb if present, whether forcibly pulled out, degenerated, or cut across by a sharp instrument or crushed by a blunt instrument; (7) character of cuticle, extent and character for cortex, presence or absence of medulla and, if present, the character and breadth; (8) whether hairs are dyed or undyed; (9) contour of transverse sections in respect of points set down in No. 7."

Learned authors of Taylor's Medical Jurisprudence at page 159 of 12th edition observed that the question that the examiner must be prepared to answer are :

- (i) Is the material hair or some other fibre ?
- (ii) If the material is hair, is it human or animal ?
- (iii) If human, from what part of the body did it originate ?
- (iv) If human, is it male or female ?
- (v) If human, what is the age of the individual ?
- (vi) Are the hairs identical with those of the victim or suspect ?
- (vii) Are there any special features ?
- (a) Ethnic, (b) How and when cut, (c) Presence of dyes, etc.

The test applied by PW-24 are too meagre to rely on this circumstance. Though he speaks of similarities in respect of particular hair examined by him the

grounds for the same are not given. In our view therefore it is not possible to place conclusive reliance on the evidence of PW-24 that the hair sent to him for examination and said to have been seized from the spot are proved to be those of A-2 to A-5 or any of them. It is also note worthy that PWs-41 & 5 have deposed about hairs collected at the spot of incident being put in plastic containers or boxes. Though PW-41 only stated that they were collected in a container and then sealed PW-5 specifically states that plastic boxes were used to put the hairs so collected. Even according to PW-42 the sample hairs taken from the dead of A-2 to A-5 were put in containers and then sealed. The articles so seized by PW-41 were handed over to PW-42 the Investigating Officer without any loss of time, but PW-42 did not send them to Forensic Science Laboratory till 5-11-1988. Thus from 22-9-88 till 5-11-88 they were with Police and PW-24 the expert states that he received Item No. 19 in a paper packet and it contained hairs marked as MO-46. Similarly the sample hairs of A-2 to A-5 were in cloth Box, but there is nothing to show when these cloth packets or the paper packets, as the case may be, were prepared and that creates a doubt regarding the preservation of the hairs, if any, collected at the spot intact till; they were examined by PW-24. The trial Court was not justified in giving a finding in this behalf in favour of the prosecution. We thus reject this circumstance relied upon by the prosecution.

31. The next material circumstantial evidence is that of seizure of the valuable articles like jewellery and other articles said to have been robbed either from the house of Savitridevi or from the persons of deceased Savitridevi and Sunil. These articles are MOs-1 to 4 four gold bangles MO-5 a gold chain, MO-6 diamond ear studying, MO-6 gold ring, MO-8 wrist watch, MO-9 gold chain, MO-10 four silver one rupee coins, MO-28 gramophone records and MO-29 four video cassettes. According to PW-42 on 22-9-88 itself he came to know that A-1 Rajan is a native of Keralapura in Nagarkoil District on the border of Tamil Nadu - Kerala States. He went to Trivattar village on 23-9-88 and moved from place to place in Kerala State till 6-10-88 and search was made for them in bars, restaurants bus-stands and other places and even various jewellery shops were checked. There was a break-through on 6-10-88 when he came to know that A-2 was in the bus-stand of Ponnagundam at 8.30 p.m. Having arrested him he recorded his voluntary statement Ex. P-127 and also made a search of the person of A-2 in the presence of panchas. Having taken a search of A-2 he found the diamond ear studying MO-6 in his right side pant pocket. The same was seized under mahazer Ex. P-80. The same day A-3 to A-5 were also taken into custody and arrested at Kannupurali village and Thakalavedu. All the accused were taken to Ponnagundam Police Station and taking a search of A-5 he found the gold ring MO-7 in his shirt pocket which was seized under mahazer Ex. P-81. Having taken a search of A-4 he recovered a Citizen watch which he had tied to his left wrist and it is MO-8. The seizure mahazer is Ex. P-82. Individual voluntary statements of A-3 to A-5 u/s 27 of the Evidence Act were recorded as per Exs. P-128 to P-130 respectively. In Ex. P-127 given by A-2 the information that he would

show the person to whom articles were sold and that he would also get produced a pair of bangles from his wife living with her mother is admissible in evidence. Ex. P-128 the information that he would hand over four silver coins and also show the person to whom he sold gold bangles are admissible, but not the later part of it that he would show the hotel where they lived and the spot of offence. From Ex. P-129 given by A-4 there is nothing that could fall u/s 27 of the Evidence Act and so also from Ex. P-130 given by A-5. In the statements of these two accused persons the information is that they would show the person to who, the articles were sold which information was already given by A-2.

32. Thereafter A-3 took the Police and panchas to his house about two miles away from Ponnagundam Police Station by the side of the main road, removed four silver coins which were kept concealed under the roof of his house and produced them. They are at MO-10 and sized under mahazer Ex. P-24. PW-17 the mahazer witness Thanyappan Achari a resident of Elaikulam deposed about he and another panch accompanying the Police and A-3 and A-3 taking all of them to his house and producing four silver coins. The only suggestion made was that he is a receiver of stolen properties and has deposed to oblige the Police. That is denied. Nothing of consequence was elicited in this behalf in the cross-examination of PW-42 either. The coins so seized were put in a box and packed. Having produced A-2 to A-5 before the Judicial Magistrate Second Class of Kancharapalli in Kottayam District and having obtained remand to Police custody he followed A-5 to his house at a distance of 2 Kms from Ponnugondum Police Station and collected two panchas including PW-16 on the way. He produced a knife from behind a photo-frame hung on the wall of the house and the same is MO-39. That was seized under Ex. P-23. Thereafter A-2 again took them to the house of his mother-in-law and PWs-18 & 19 were the panchas picked up on the way. The wife of A-2 was present in the house and on being asked by him handed over two gold bangles worn by her and marked as MOs-1 & 2. PW-18 a goldsmith of Ponnugondum and PW-19 Bhasker of Charuvalli were present and both of them have deposed about they being present when the two bangles were produced by the wife of A-2 at his instance. Here again there is not much of cross-examination worthy of mention. According to PW-18 about two years before he was examined in Court which was in December 1990, A-2 approached him and asked if he would prepare bangles urgently out of gold that might be given to him. Thereafter he handed over two gold coins of one sovereign each which he melted and prepared the gold bangles MOs-1 & 2. Within either days thereafter the accused accompanied by Kerala and Karnataka Police approached him and asked him to handover the two bangles prepared by him. He delivered the same to the Police. He admitted that he did not state before Police the weight of the two coins. He is licensed goldsmith, but did not give bills to the accused. He does not deal in gold but only prepares ornaments if gold is given. He also identifies the slip attached to the two bangles bearing his signatures. The same day all the accused took them to Changenacheri and then to the house of PW-14. PW-14 was also running a shop in that house and on being asked by A-2

to produce a pair of gold chains and a pair of bangles, he produced MOs-3 to 5 and 9 which are two gold bangles and two golds chains respectively. PWs-13 and 15 were the panchas that were present when PW-14 produced them. Ex. P-22 was the mahazer drawn. The suggestion that the mahazers were drawn in his hotel room with the assistance of the local P.S.I. was denied. According to PW-13 James Methew of Changannacheri village when he was talking to his friends in front of his shop where he was working, he was asked by the Police to accompany them and he and another panch accompanied the accused persons and then A-2 led them to the house of PW-14 Uddosait whom this witness knew earlier. On being asked by A-2 he handed over two gold bangles and two gold chains by bringing them from inside his house. They weighed 33 grams. He identifies MOs-3 and 4 & 5 and 9 as the bangles and chains respectively. He was cross-examined by the prosecution because he was unable to identify A-3, A-4 & A-5 as the three other accused being present along with A-2. For this reasons PW-15 Devendaprabhu an Accountant of the same village was also examined and he deposed that all the four accused i.e. A-2 to A-5 were present in Police custody and it was A-2 that took them to the house of PW-14 and got produced the four articles stated above. According to PW-14 who is goldsmith, about 8 to 10 days prior to 7-10-88 these four accused had gone to his shop at midday time and asked if he would purchase some gold articles. Then A-2 removed from the pocket of this drawer or chaddi two gold bangles and two gold chains and the gold bangles bore the initial "S". A-2 wanted Rs. 15000/- against them but ultimately it was settled that he should pay Rs. 10000/-. Accordingly he paid Rs. 10000/- and purchased the four articles. It was at about 6 p.m. on 7-10-88 that Karnataka and Kerala Police approached him in his shop along with A-2 to A-5 and A-2 asked him to give back the gold articles sold to him. This is how he handed over all the four articles to him. An omission was elicited from his statement recorded by PW-42 that he did not state before Police that it was actually A-2 who sold them and that he demanded Rs. 15000/- in the first instance. After the seizure of these articles as referred to above the accused were brought to Bangalore.

33. A-1 could not be traced till 28-11-1988. On 25-11-88 PW-42 received information about the whereabouts of A-1 and he went to Periyapalandoor village in Nayattikara Taluka in Kerala State. Having searched for A-1 on 26th & 27th they could locate A-1 on 28-11-88 at about 7 p.m. at Periyalladoor village near the bus-stand. Having taken him to Nayattikara Police Station he was interrogated by PW-42 and he gave voluntary information as per Ex. P-144 in which he stated that he would show the place where the suit case was thrown. He was then taken to Bangalore, produced before the jurisdictional Magistrate and Police custody remand obtained. On 30-11-88 A-1 led them to a place near Railway Parallel Road near Police quarters and pointed out to a bush. From the bush four video cassettes MO-29 and ten gramophone records MO-28 were seized. PW-18 and another were the panchas and the mahazer recorded for seizure is at Ex. P-79. PW-28 Amalraj has deposed about he being present when

A-1 showed the place where these articles were thrown. The suggestion that these articles were visible to the public passing nearby was denied. This according to the prosecution almost all the articles that were robbed away from the house of Savitridevi after committing dacoity by these accused persons were recovered by the Police.

34. The only persons competent to identify these articles were PWs-2, 3 & 36. It should be noted that Savitridevi was a widow living with the maid-servant PW-3. her son PW-36 and his family were living in the first-floor. Therefore there was no other person who was competent to identify these articles and if identification made by these witnesses is reliable, would be the material point. PW-2, deposed that his grand-mother was wearing a white blouse and a white saree, she had injuries on her neck and he noticed that her neck chain, diamond ear studying, a diamond ring, one gold ring and two gold bangles were missing from her person. Deceased Sunil was wearing a coloured shirt and striped pant. From his person were missing a wrist watch, a gold chain and a platinum ring. He then identifies MOs-1 to 4 as the four gold bangles of deceased Savitridevi, MO-5 her gold chain, MO-6 her diamond ear studying and MO - 7 her gold ring. MO-8 is the wrist watch worn by deceased Sunil and Mo-9 is the gold chain. He also identifies four silver one rupee coins MO - 10. The only suggestion made to him in the cross-examination was that these MOs-1 to 10 did not belongs to his grand-mother and his cousin Sunil. These articles were also shown to him at the Police Station earlier during investigation. An omission was pointed out from his evidence that he did not state before Police in his statement u/s 161 Cr.P.C. that a wrist watch, gold chain and a platinum ring were missing from Sunil's persons.

35. PW-3 deposed that he could identify the jewels of both the deceased persons and accordingly identified MOs-3 and 4 as the bangles of Savitridevi, MO-5 her chain, MO-9 the gold chain of Sunil, MO-6 ear studying of Savitridevi, MO-7 her gold ring and MO-8 the wrist watch of Sunil. The only material suggestion made to her in this behalf is that she is deposing falsehood about these ornaments.

36. PW-36 her own son deposed that his mother used to wear diamond ear studyings, gold chain, diamond ring, gold chain ring and four bangles. Sunil used to wear a gold chain, platinum ring and a Citizen wrist watch. She had also kept two gold coins, two platinum rings, two platinum ear rings, two platinum hair chains, 12 gramophone records and 4 video cassettes in a suitcase. She had also Rs. 850/- and had four silver coins. He then identifies the valuable articles now produced and also MOs-28 and 29 the gramophone records and video cassettes. According to him in the year 1986-87 his mother got the gold articles prepared by PW-29 out of her old ornaments. On 1-12-88 these articles were also shown to him at the Police Station. The suggestion that the gramophone records and video cassettes MOs-28 & 29 were given to the Police after arrest of the accused was denied. The letter "S" inscribed on MOs-3 & 4 indicate the initial of his mother. Similarly MO-9 also having same initial.

37. Lastly PW-29 the goldsmith who has been working as such at Pillappana

Lane, Nagarthpet, Bangalore for the last 15 years knew Savitridevi for about 3 to 4 years prior to her murder. During that period she got prepared a pair of bangles, a pair of diamond studies, two chains, one ring and other articles from him and got the letter "S" inscribed over the jewels prepared by him. He identifies gold bangles MOs-3 & 4, two gold chains MOs-5 & 9, ear studies MO-6 and MO-7 the ring. He runs this shop under the names Pahalraj which is the name of his grand-father. He could be in a position to identify the articles prepared by him. He admitted that they maintain books showing the jewels prepared by them and also they pass receipts. But during evidence he had nothing in writing to show that MOs. 3 to 7 & 9 were prepared by him.

38. If the evidence regarding the identification of these articles is given for the first time in Court and the witnesses had not given what all were the articles missing from the house earlier, then some force could be found in the argument on behalf of the accused that the witnesses are trying to fix up identity only because they were secured after they were arrested at their instance. We have come to the conclusion that even before Ex. P-5 was recorded by PW-41 on reaching the spot the Police had already information of murder in the house of Savitridevi and therefore Ex. P-5 cannot be considered as the F.I.R. falling u/s 154 Cr.P.C. PW - 2 also deposed that on 22-9-88 i.e. the very next day of the incident Police asked him to give a list of missing articles and accordingly he gave Ex. P-7 under his signature. It is dated 22-9-88 and states that it was given in continuation of his complaint dated 21-9-88 PW-2 had furnished the following particulars with regard to the articles missing and in the letter addressed to the Sub-Inspector he says as follows :

"In continuation of my complaint dated 21-9-88 I wish to furnish the following particulars :

- (1) Two diamond ear studies
- (2) One gold chain
- (3) Two gold bangles
- (4) One diamond studded gold ring
- (5) One gold ring

which were on the person of my granny

- (6) One gold chain
- (7) One platinum ring
- (8) One Citizen watch

which were on the person of my cousin brother Sunil.

- (9) A suitcase belonging to my granny containing four video cassettes (two Hindi) two Sindhi cassettes, 12 gramophone records and one remote controle.

some platinum jewels.

(10) Cash about 850/-

(11) Two gold coins

(12) Four silver coins.

All the items belonging to my granny. The above articles have been stolen from the persons of my granny and cousin Sunil and from the house by culprits who killed my granny and Sunil."

This was also forwarded to the Magistrate stating that this report was received at the spot and the same may be enclosed to the crime number in question. It was argued that Ex. P-7 is hit by Section 162, Cr.P.C. as it was a statement made during investigation to the Investigating Officer and hence not admissible in evidence. The same argument was advanced in the trial Court as well and the trial Court repelled this argument holding that it is not hit by section 162, Cr.P.C., but is a part of information under S. 154, Cr.P.C. Two decisions of the Allahabad High Court were relied upon by the trial Court in repelling this contention. In the case of Brij Lal alias Birja and Others Vs. Emperor., the learned single Judge pointed out that Section 162 has no reference to a list of the stolen property. It is not even necessary for the complainant in a case of dacoity to state in the first information report that a list is being prepared and will be supplied to the police because such a remark is obvious, but it is advisable that such a remark should be entered in the first information report and it is usually done. When it has once been stated that a list is being prepared and when that list is given to the Investigating Officer within a few hours or within a day or two if the dacoity is a very serious one, it is ridiculous to say that the list cannot become part of the record because the investigation has already started. The list of the stolen property is part of the first information report and it should be signed. It is a part of S. 154 and has nothing to do with S. 162. In that case the list of the stolen property was filed after the Police and taken down the first information report in the diary. The learned Judge also observed that he does say that if no list is forthcoming for a very long time it should not be treated with suspicion; the value of the list has to be weighed like any other piece of evidence, but that is entirely different from saying that the list should not be accepted in evidence. The trial Court in the first instance has pointed out that in Ex. P-5 which was treated as F.I.R. PW-2 did state that the list of missing articles would be furnished and in Ex. P-5 it has been stated that the culprits decamped with her rings, chain with pendent, bangles and cash and that the list will be furnished later. In a later case of Bhondur Vs. Rex, the learned Judges held that if after the first information report regarding theft, which report mentions merely the fact of the theft without giving any list or articles stolen or names of culprits suspected, the complainant hands over a list of the stolen property to the Sub-Inspector, as soon as he arrives on the spot for investigation, such a list is not covered by S. 162 but is a part of the first information report u/s 154, Cr.P.C. and is admissible

in evidence. The view taken by the Calcutta High Court in the case of Chandrama Prasad Chamar v. The State (1951 Cal LR 539) though was contrary to this view of the Allahabad High Court still a qualified observation was made by that Court. It was held that if the statement with regard to the list of articles is made prior to the commencement of the investigation such statement may be admitted on behalf of the prosecution. If the same is made subsequent to the commencement of the investigation it is not available to the prosecution. Therefore in considering the statements the Court should be careful to see upon what material the investigation was started. It will then be able to come to a correct appreciation of whether the statements made to the Police are admissible or not. In that case also the investigation had started on telephonic message.

39. In our opinion the view taken by the Allahabad High Court is the correct view and we are unable to agree with the view taken by the Calcutta High Court. It is no doubt true PW-41 went to the spot on receiving telephonic message from the Control Room and that cryptic message did contain information that there was some killing in the House No. 106 of Railway Parallel Road. PW-2 however had given message to the Control Room that A-1 and others had committed murder of his grand-mother and cousin and had robbed the house. This entire information was not given by him directly to the Station House Officer as required u/s 154, Cr.P.C. It was only Control Room which was not the Police Station to receive such first information. The message transmitted to PW-41 from the Control Room was only one of killing. Still that was the information of murder having taken place in the house in question. It cannot be used as a substantive evidence and need not contain all the particulars and not even the names of the culprits or of the victims. The object of the first information report is to obtain the earliest information of an offence to record the circumstance before there is time for them to be forgotten or embellished. If an eye-witness has furnished the first information then non-mentioning of the complicity of the accused would be a material fact. The F.I.R. can also be used to show that the implication of the accused is not an after-thought. Thus the earliest version given in the F.I.R. assumes importance only to test the veracity of the maker of it or of other witnesses and nothing more. That need not be an encyclopedia of the entire prosecution case. What value should be attached to certain omissions or averments made in the F.I.R. differs from case to case and there cannot be a generalization applicable to all situations. If the scope of F.I.R. is considered in the light of these well established propositions then merely because the list of stolen articles is given after the arrival of the Investigating Officer it does not follow that the list itself is hit by Section 162, Cr.P.C. In a serious situation like the one at hand where two murders have taken place and dacoity committed and the message was given by a boy like PW-2 the list given subsequently does not get affected by the bar u/s 162, Cr.P.C. He has made it amply clear that on 22-9-88 when Ex. P-5 was read over to him he remembered that he did not state therein about the presence of two other persons in the Pooja room and the Police asked him to furnish the list of articles and accordingly Ex. P-7 was given. This

was not in the form of a statement but in the form of a report addressed to the Sub-Inspector and signed by PW-2. Even if it were otherwise, in view of the speed with which it was given and the nature of the offence the list Ex. P-7 cannot be held inadmissible in evidence. After all, he was not living in the house of Savitridevi as a member of her family. He had not got prepared any articles for her and perhaps could not have had knowledges as to what were all the valuable articles in the house. He must have required time to ascertain what all were missing from the house. Section 154 or Section 162, Cr.P.C. cannot be used to defeat justice but to promote justice. This was given at the earliest and there was no question of any improvement being brought about in the prosecution case. It was not to make any embellishment nor was to invest something by way of list of articles. The trial Court therefore was justified in using it as a part of F.I.R. and we are of the view that it is admissible in evidence and should be available for the prosecution to corroborate the testimony of PW-2. If that be so then most of the articles recovered during investigation do find place in Ex. P-7 and that gives guarantee of truth to the evidence of these material witnesses in the matter of identification of MOs-1 to 10 and 28 and 29. It is note worthy that even four silver coins which were recovered from the possession of A-3 and two gold coins out of which bangles were prepared by PW-18 do find place in Ex. P-7. Equally important is the mention of a gold chain, a platinum ring and a Citizen wrist watch missing from the person of Sunil. Gramophone records and video cassettes and some other articles were kept in a suitcase which was also removed by the decoits. Perhaps more valuable articles from the suitcase were taken away and these records and cassettes thrown in the bush. In our view therefore the prosecution has established beyond reasonable doubt that these valuable articles which were robbed from the house of Savitridevi after committing dacoity were possessed by the respective accused persons within a short time after the commission of dacoity which even amounts to "soon after" commission of dacoity, thus attracting the presumption under S. 114 of the Evidence Act that they themselves are the decoits. This is only a circumstantial evidence which corroborates the testimony of direct witnesses like P.Ws. 2 and 3.

40. The prosecution has by reliable and acceptable evidence both direct and circumstantial, established that these five accused persons did commit dacoity in the house of Savitridevi after committing her murder and also the murder of Sunil. In a case of this nature no better evidence could be conceived of to connect all the accused persons with the commission of this heinous and barbaric crime. The trial Court was perfectly justified in finding the accused guilty. The trial Court found them guilty under sections 449, 396 and 307, I.P.C. While Section 307 relates only to an attempt to commit murder Section 395 is akin to S. 307 and if there is an attempt to commit death or hurt while committing robbery by five or more persons it becomes dacoity u/s 395, I.P.C. While Savitridevi and Sunil were murdered while committing dacoity there was an attempt to commit murder of PW-2 Sanjay and PW-3 Bhagya and hence the offence clearly falls u/s 395, I.P.C. Thus while we confirm the finding of the trial

Court of guilt of the accused of the offences with which they stood charged, we convict them under sections 449, 396 and 395, I.P.C. Criminal Appeal No. 221/92 filed by A-2 to A-5 is liable to be dismissed subject to the result in Cr. A. No. 217/92.

41. This takes us to Cr. A. No. 217/92 filed by the State u/s 377 Cr.P.C. for enhancement of the sentence imposed by the trial Court on the accused persons. In this appeal also we reject contention of A-1 respondent-1 that his conviction is unsustainable. We confirm the Judgment of conviction but find him guilty of the offences under sections 449, 396 & 395 IPC along with the other accused persons. It is urged by the learned State Public Prosecutor that this case falls under the category of "rarest of rare cases" and hence the extreme sentence of death provided by law for the offence under S. 396 IPC be imposed against them. It is stated in the appeal memo that the reasons assigned by the trial Court in not imposing death sentence are not convincing. It may be mentioned here that thought reasons may be assigned for inflicting the extreme penalty of death the present legal position is that in only rarest of rare cases death penalty should be imposed. In other words imprisonment for life is the normal rule. We have therefore to see if there are circumstances justifying imposition of death sentence on all the accused persons or any of them. The hard facts established are that A-1 came in confidence of the deceased and became a frequent visitor to her house under one pretext or the other. In other words he was in active confidence of the deceased as she even entrusted to him the painting of the dome of the temple in the Sindhi Hall. She was helpless widow living with the maid-servant. Excepting occasional consoling visits of PW-36 or his family members living in the first floor there was no one else to protect her or to take care of her. A-1 appears to have hatched a plot to commit dacoity by resorting to diabolical violence. He secured in the first instance the aid of A-2 and A-3 making the deceased believe that they were cardamom estate owners in Kerala and were willing to take on lease the building in which she was running a school and even offered to deposit huge sum of money of nearly three lakhs with her. Thus A-2 and A-3 also actively associated themselves with A-1 in coming in active confidence of the deceased helpless and old Savitridevi. It is thus patently clear that A-1 was the villain of the piece who slowly engineered a plot to fix the date and time when the final blow should be struck in the house of Savitridevi to commit dacoity. PW-10 who conducted autopsy over the two dead bodies found as many as 25 injuries on the body of Savitridevi and death was due to asphyxia as a result of throttling. She must have struggled bitterly before breathing her last. Similarly on the body of Sunil there were noticed as many as 7 injuries and he was also throttled to death. Thus gang had determined to ward off obstruction by necessary violent means and towards that end even attempted to commit the murder of P.Ws.-2 and 3. PW-23 Dr. N. Venkataramanaih who examined Bhagya PW-3 at 9.40 PM the same night found 50 nail scratch marks over the front and side of the neck, some were deep and some were superficial. The front and side of the neck was swollen and she was under nervous shock. Because throttling did

not take place injuries on the neck appeared to be simple but she had sustained considerable nervous shock and according to her she had also become unconscious. Similarly over the neck of Sanjay PW-2 whom he examined at 9.50 p.m. there were 30 nail scratch marks over the front of the throat, a scratch on the right cheek below the right eyelid, scratches on both the angles of the mouth and scratches in buccal mucus membrane inside the mouth. These injuries could be caused in an attempt to throttle him. It is thus patently clear that these accused persons committed dacoity in the house by murdering two of the inmates and by attempting to commit murder of the two others who were quite young and innocent. The Investigating Officer especially PW-42 deserve appreciation in our hands for prompt and effective investigation.

42. Punishment for the offence u/s 396 IPC is either death or imprisonment for life. As far as imposing of death penalty is concerned the courts have accepted the proposition that in only rare cases keeping in view the heinous nature of the crime and other circumstances death penalty could be imposed. In the case of Iman Ali and Another Vs. State of Assam, the Supreme Court relied upon the principle laid down by it in the case of Dalip Singh and Others Vs. State of Punjab, . That was however not a case of dacoity but at a time when death penalty was considered as a rule and reasons were to be given to impose lesser punishment. However in Dalip Singh's case there was clear finding by the Court of Sessions which was upheld by the High Court that each of the appellants had committed cold blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by them. They were shot and killed even though they had not even tried to put up any resistance. The offence under S. 396 IPC was therefore no less heinous than the offence under S. 302 IPC. Even in the case of Iman Ali and Another Vs. State of Assam, the same observation was made, namely, that an offence u/s 396 IPC is no less heinous than the one u/s 302 IPC. PW-3 was in the kitchen and therefore she could not see how and who among the accused committed the murder of Savitridevi and Sunil. Similarly PW - 2 went to the second-floor when both had been murdered and even PW-3 was attempted to be murdered. In the case of Kehar Singh and Others Vs. State (Delhi Administration), who was responsible for the murder of late Smt. Indira Gandhi the Supreme Court observed that an unarmed lady was attacked by the two persons with series of bullets and it was found that a number of bullets entered her body. The manner in which mercilessly she was attacked by the two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. Therefore even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence. In the case of Machhi Singh and Others Vs. State of Punjab, the Supreme Court laid guidelines to be applied in the matter of imposition of extreme penalty of death. Those are :

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so."

43. We have given our careful consideration to all the circumstances and find that A-1 to A-3 in whom Savitridevi had kept confidence and allowed them in her house by which they became acquainted with the condition of the house, the number of the inmates, the helplessness of the lady, betrayed her and with the assistance of A-4 and A-5 did commit dacoity in her house. There was no question of any resistance by this lady at the relevant time. This is therefore a rarest of rare cases in which A-1 to A-3 should be sentenced to the extreme penalty of death. As far as A-4 and A-5 are concerned A-1 to A-3 secured their assistance to translate into action the plot they had hatched and their participation cannot be considered with the same degree of gravity as that of A-1 to A-3. Life imprisonment against them imposed by the trial Court is quite proper.

44. For the foregoing reasons we dismiss Cr. A. No. 221/92 and confirm the trial Court's Judgment of conviction of the appellants for offences under sections 449 & 396 IPC but alter their conviction to section 395 IPC in place of S. 307 IPC. Sentence of life imprisonment on each of the accused under S. 449 IPC and fine of Rs. 250/- with default sentence imposed by the trial Court is maintained. Each of the accused is also sentenced to imprisonment for life and fine of Rs. 250/- with default sentence imposed by the trial Court under S. 395 IPC. As we have allowed Cr. A. No. 217/92 in view of the enhanced sentence passed against A-1, A-2 and A-3 in that appeal imprisonment for life and fine against A-1, A-2 & A-3 under S. 396 IPC is set aside and the same is maintained against A-4 and A-5 with fine and default sentence imposed by the trial Court. Allowing Cr. A. No. 217/92 partly we sentence each of A-1 to A-3, namely, A-1 Rajan son of Keshavan, A-2 Shashi alias Shashidharan son of Narayana Pillai and A-3 Anshad son of Ibrahim to death u/s 396 IPC and they shall be hanged by their neck till they are dead. The appeal against A-4 and A-5 is dismissed.

45. Order accordingly.