Kerala High Court
Dasan @ Viswambaran vs State Of Kerala on 29 January, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A.No. 1877 of 2006()

1. DASAN @ VISWAMBARAN,
... Petitioner

Vs

1. STATE OF KERALA.
... Respondent

For Petitioner :SRI.S.SACHITHANANDA PAI

For Respondent :PUBLIC PROSECUTOR

The Hon'ble MR. Justice R.BASANT
The Hon'ble MRS. Justice M.C.HARI RANI

Dated :29/01/2010

O R D E R

R.BASANT & M.C.HARI RANI, JJ.

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Crl.Appeal No.1877 of 2006

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Dated this the 29th day of January 2010

JUDGMENT

BASANT, J.

Whether the prosecution has succeeded in establishing the charge against the accused on the basis of evidence of circumstances adduced against the appellant/accused is the short question to be considered in this appeal.

2. The appellant Dasan @ Viswambharan in this appeal assails the verdict of guilty, conviction and sentence imposed on him in a prosecution for offences punishable under Sections 449, 392 and 302 I.P.C. He faces the sentence of rigorous imprisonment for a period of 7 years, 7 years and

imprisonment for life respectively for the said offences. In addition, he faces sentence of fine to pay Rs.10,000/- each for the said offences and in default to undergo R.I for a further period of one year each.

3. The crux of the allegations against the appellant/accused is that on 02.12.1997 at 12 mid night, he trespassed into the residential building of deceased Suseela, aged 45 years, the mother of PW1. He is alleged to have committed theft of costly gold ornaments including M.Os 6 and 7 by use of physical force. He is alleged to have inflicted fatal injuries on the deceased and murdered her by smothering and strangulation.

4. PW1, the daughter of the deceased came to know of the death on the next morning and she lodged Ext.P1 F.I statement before the police. The F.I statement was lodged at 9 a.m on 03.12.1997, the incident having taken place earlier on the night intervening 02.12.1997 and 03.12.1997. Ext.P1(a) F.I.R was registered and investigation commenced on the basis of that F.I.R. Investigation was completed and PW14, a police official filed final report raising allegations against the appellant/accused.

5. Consequent to denial of the charge by the appellant/accused, the prosecution examined PWs 1 to 15. Exts.P1 to P20 and M.Os 1 to 15 were marked. On the side of the accused, he examined a witness as DW1.

6. We shall now briefly narrate the evidence relied on by the prosecution and the accused. PW1, as stated earlier, is the daughter of the deceased. The deceased had a strained relationship with her husband and was residing separately from him for a fairly long period of time. Her daughter PW1 was married and she along with her husband was residing in an adjacent house at a distance of about 150 metres from the residence of the deceased. PW1 was examined to prove that M.Os 6 and 7 gold ornaments belong to her mother, she having purchased the same under two bills, which she had produced before the Investigating Officer and which the Investigating Officer had seized under Ext.P2. PW1 had come to know of the death of her mother on the next morning when persons who went to the house to call the deceased to go along with them for her daily work found no response from the house. Ext.P1 is the F.I statement lodged by PW1 before the police at 9 a.m on 03.12.1997. Ext.P1(a) is the F.I.R registered and that had reached the court at 5 p.m on the same day. Though Ext.P2 seizure mahazar was proved, the bills seized under Ext.P2 seizure mahazar, which allegedly were produced before the Magistrate, were not traceable. The prosecution could not hence mark the same.

7. PW2 is a neighbour of PW1 and the deceased. She was working as a house maid elsewhere. She came to her native place on coming to know of the death of the deceased. She revealed to the police when she was questioned on 05.12.1997 that the accused was guilty of a similar misadventure against her

- of snatching away her gold chain one night, on an earlier occasion. The prosecution relied on the evidence of PW2 to apprise the court of the circumstance under which the suspicious eye fell on the appellant. PWs 1, 2 and the deceased were residing in different houses in a Laksham Veedu Colony

and the accused was also occupying one of the houses in that colony. PWs 3 and 4 are attestors to Ext.P3 scene mahazar. PW5 is a finger print expert attached to the police. He was examined to prove that at the request of the Investigating Officer, he had inspected the scene of the crime on 03.12.1997 itself. According to him, he had found chance finger prints on M.O 13, a glass kerosene lamp, which was available at the scene. That was developed by him. At the instance of the Investigating Officer he examined that chance finger print and compared the same with the specimen finger print of the deceased. They did not tally. He compared the specimen finger print of the accused which the Investigating Officer sent to him and according to him the same tallied. Ext.P4 is the photographic enlargement of the finger print which was available in M.O 13 whereas Ext.P5 is the photographic enlargement of the specimen finger print of the appellant obtained by the Investigating Officer after his arrest. Comparing the two, Ext.P6 opinion was tendered by PW5 to say that 2 finger prints were of the same person. PW5 had, before getting the specimen finger print of the accused, compared the chance finger print with finger prints of known criminals available in the records. None of them tallied with the chance print.

8. PW6 is an attestor to Ext.P2 seizure mahazar under which the bills for purchase of M.Os 6 and 7 issued by the jeweller were seized by the Investigating Officer when they were produced by PW1. We have exhaustive details about the bills in Ext.P2. But as stated earlier, the bills were not available when the matter came up for trial. Those bills which were produced before the Magistrate were not sent to the Sessions Court and could not be traced in spite of the efforts of the learned Sessions Judge to trace them. PW7 is the salesman of the jewellery to whom the bills were shown and statement recorded. He was examined to prove the sale of M.Os 6 and 7 to the deceased as per those bills seized under Ext.P2. PW8 police constable is an attestor to Ext.P7 seizure mahazar under which M.O 13 which was taken from the scene of the crime by PW5 was produced by him after examination before the Investigating Officer.

9. According to the prosecution, the accused was arrested on 05.12.1997 and when he was so arrested he had injuries on his person. He has got examined by PW9 who issued Ext.P8 wound certificate after such examination. PW9 stated further that he had taken the sample scalp hairs and nail clippings of the accused and had handed over the same to the Investigating Officer. PW10 is the doctor who conducted postmortem examination on the body of the deceased. Ext.P9 is the postmortem certificate issued by him on 04.12.1997. It would appear that at that stage, ie. initially, there was an apprehension that the deceased may have been subjected to sexual harassment. Vaginal swab and smear was taken for examination. Ext.P10 is the report of the examiner, which shows that there was no semen or spermatozoa detected in such vaginal swab and smear.

10. PW11 is the village assistant who prepared Ext.P11 scene plan on the basis of Ext.P3 scene mahazar. According to the prosecution, the deceased had many injuries on her person and that suggests a scuffle/altercation before she suffered death. It is in this context that the prosecution relied on the injuries on the person of the accused found at the time of his arrest recorded by PW9 in Ext.P8.

11. After the arrest of the accused, he was interrogated by the Investigating Officer PW14. He allegedly gave a confession statement. In such confession statement, he allegedly furnished

Ext.P12(a) and P13(a) information to PW14. On the basis of such information, M.Os 6 and 7 were recovered from the place of concealment as pointed out by the appellant under Ext.P12 seizure mahazar. M.O 15 lungi, which the accused was allegedly wearing at the time of the alleged incident, was also recovered on the basis of Ext.P13(a) information under Ext.P13 by the police. It appears that the police expected that an examination of the fibres on the clothes worn by the deceased and M.O 15 lungi might afford crucial information and that explains why M.O 15 was seized. No such fibres were detected on scientific examination by the expert.

12. PW13 recorded Ext.P1 statement of PW1 and registered Ext.P1(a) F.I.R. PW14 conducted the investigation completely - except laying of charge which was done by PW15, his successor. PW14 proved Ext.P17 inquest report. Under the inquest report, he had also seized some strands of hairs which were available clutched in the palm of the deceased. He had submitted Ext.P18 report to court to clarify certain inaccuracies which had crept in PW1's previous statements. Ext.P19 is the forwarding note and P20 is the Chemical Examiner's report. Chemical Examiner reported that the strands of hairs which were found in the palm of the deceased were similar and identical to the specimen hair of the accused and that they were not similar and identical to the specimen hairs of the deceased.

13. After the close of the prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused took up a defence of total denial. According to him, he was not in any way responsible for the injuries found on the deceased or her death. According to him the police had unnecessarily and vexatiously taken him into custody on 03.12.1997 itself. He was kept in illegal custody till 05.12.1997. Thereafter his arrest was recorded and he was produced before the learned Magistrate on 06.12.1997. During this period, he was subjected to physical violence in custody. That is how he suffered the injuries described in Ext.P8 by PW9. He, it appears, did not strain to dispute the finger prints available on M.O 13, but took the stand that he was forced and compelled to give his finger print on M.O 13 while he was in custody. The accused, as stated earlier, examined DW1. DW1 is a neighbour. She was examined to show that she was present when police came to the scene of the crime in that morning and that she had helped to clean up the clothes of the deceased. She is a resident of the Laksham Veedu Colony and the neighbour of the deceased, PW1 and the accused. According to her, there used to be quarrels between PW1 and her husband on the one side and the deceased on the other. She further stated that the accused had also come to the scene of the crime on that morning suggesting that there was no reason to suspect him. She further supported the case of the accused that the accused was taken into custody on 03.12.1997 itself by the police. According to her, she had gone to the police station along with the wife and children of the accused as directed by the police and she had seen the accused in the police station when she so made a visit to the police station.

14. The learned Sessions Judge on an anxious consideration of all the relevant circumstances came to the conclusion that the prosecution has succeeded in establishing clinching circumstances which unerringly point to the guilt of the accused. In these circumstances, notwithstanding the absence of direct testimony about the involvement of the accused in the crime, the court took the view that the circumstances unerringly afford indirect evidence to enter a safe conclusion of guilt against the appellant/accused. Accordingly the court below proceeded to pronounce the impugned verdict of

guilty, conviction and sentence.

15. We note that 2 appeals have been preferred by the appellant - both through the prison authorities. The earlier one was numbered as Crl.Appeal No.766 of 2006 and the same was admitted and it was directed that a counsel on State Brief shall render assistance to the appellant. Without taking note of that, this appeal filed as Crl.Appeal No.1877 of 2006 was also received on file and admitted. A counsel - Advocate Sachidananda Pai has entered appearance on behalf of the appellant/accused. In these circumstances, we are proceeding to dispose of Crl.Appeal No.1877 of 2006 on merits. Crl.Appeal No.766 of 2006 is dismissed as unnecessary as the challenge is being considered in this Crl.Appeal No.1877 of 2006.

16. We have heard the learned counsel for the appellant Sri.Sachidananda Pai and the learned Public Prosecutor Sri.Noble Mathew. The learned counsel for the appellant contends that the learned Sessions Judge has erred grossly in coming to the conclusion that certain circumstances have been established satisfactorily against the appellant. It is the further contention of the learned counsel for the appellant that those circumstances, even if it is assumed that they have been established, are not sufficient to come to a safe conclusion/inference about the culpable responsibility of the appellant for the murder of the deceased.

17. The learned Public Prosecutor on the contrary contends that the circumstances have been established satisfactorily and the cumulative effect of all these circumstances unerringly point to the guilt of the accused and rules out every possible hypothesis of innocence of the appellant/accused.

18. We shall now refer to the circumstances relied on by the prosecution and shall proceed to consider the arguments for and against the acceptability and relevance of these circumstances. The circumstances are:

i) Deceased Suseela was found dead at her house on the morning of 03.12.1997 and she had died as a result of strangulation and smothering. She did not have on her body at that time M.O 6 and 7 ornaments which she usually wears.

ii) The appellant was a neighbour of the deceased residing in the same Laksham Veedu Colony.

iii) The appellant had indulged in an identical misadventure against PW2, who was at that point of time residing in the very same Laksham Veedu Colony in an adjacent house.

iv) Finger prints of the appellant were found on M.O 13 glass kerosene lamp in the house of the deceased and no acceptable explanation is forthcoming for such presence of the finger print of the appellant.

v) When the body was found, the injuries on the body indicated a scuffle and certain strands of hairs were found in the palm of the deceased which strands of hairs are found to be similar and identical to the specimen scalp hair of the accused obtained during investigation.

vi) M.Os 6 and 7 belonging to the deceased, which were found missing when her dead body was found on the morning of 03.12.1997 were recovered by PW14 under Ext.P12 on the basis of information furnished by the appellant to the police in her confession after his arrest.

vii) There were unexplained injuries on the person of the accused when he was arrested on 05.12.1997.

19. We shall now proceed to consider each of these circumstances. Coming to the first circumstance we find absolutely no controversy at all. That the deceased had the injuries described in Ext.P9 postmortem certificate on her is established satisfactorily. That these injuries could be suffered in the course of an attempt of strangulation and smothering is also convincingly established by the evidence of PW10. There is absolutely no dispute or quarrel on this aspect. We do, in these circumstances, hold that the first circumstance has been established satisfactorily. We shall later advert to the controversy regarding M.Os 6 and 7 when we deal with circumstance No.vi.

20. About the second circumstance relied on by the prosecution also, there is absolutely no dispute. The evidence of DW1 clearly shows that it is the common case of both the accused and the prosecution that accused was a resident of the locality - of the same Laksham Veedu Colony. The second circumstance is also thus established satisfactorily. Contention is raised laboriously that the oral evidence of PW2 deserves to be rejected. It is contended that there is incongruity in her version as to the date on which she was questioned and about the date of arrest of the accused thereafter. She had initially stated that she was questioned on the second day after the death of the deceased. Later she stated that she was questioned on the third day. According to her the accused was arrested after 2 days of her questioning. We find no merit in this contention. This is only an attempt to make a mountain out of a mole hill. It would be idle to place any crucial significance on her statement of the precise date on which she was questioned. Evidently her statement on those aspects cannot be preferred to the statement of the Investigating Officer who tendered evidence of the sequence of events with reference to official documents. No crucial significance can be attached to her evidence about the number of days that elapsed between the death of the deceased and her questioning. She stated vaguely that she was questioned two days after the incident. Later she stated the number of days as three days. Death occurred on the night of 02/12/1997 and if PW2 states that she was questioned two days or three days after the death, the case of the prosecution that she was questioned on 05/12/1997 is not contra indicated. Similarly, her statement that the accused was arrested two days after she was questioned cannot also be reckoned as accurate. She does not speak by the clock or calender. Her statement can be reckoned as only an approximate statement. In these circumstances, the laborious attempt made by the learned counsel for the appellant that the version of PW2 disproves the case of the prosecution that the appellant was arrested on 5/12/1997 cannot be accepted. The learned Public Prosecutor, relying on the following observations in paragraph 33 of State of Maharashtra v. Siraj Ahmed Nisal Ahmed [2007(5)SCC 161] contends that the courts cannot attach undue importance to insignificant inadequacies or disagreements between witnesses.

> "Para.33:..... While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly

> necessary for the court to scrutinise the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence, as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of matter in issue, hyper technical approach by taking sentence out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole."

We agree with the learned Public Prosecutor completely that a court has to find out whether the evidence of witnesses are intrinsically acceptable. Once it is found to be acceptable intrinsically and on broad probabilities, the criticism against the evidence of witnesses will have to be gone through realistically to ascertain whether any reasonable doubt is generated thereby.

21. Coming to the third circumstance, the counsel for the appellant argues and we agree that it may not be correct in this prosecution to enter a positive finding as to whether the allegation of PW2 about the alleged earlier misadventure by the accused is correct or proved. We are not adjudicating the guilt of the accused in that earlier alleged incident. Circumstance No.iii is relied on by the prosecution not to prove the earlier incident, but only to satisfy the Court as to why and under what circumstances the needle of suspicion was pointed at the accused. PW2, as the case diary statement and the evidence of PW14 show, had come to her house in the Laksham Veedu Colony on coming to know of the death of the deceased. She was allegedly questioned on 05.12.1997. The accused was arrested later on that evening itself. Without embarking on a detailed discussion as to whether the allegation of PW2 against the accused is true or correct, we can safely come to the conclusion that on 05.12.1997 when PW2 was questioned, she had parted with this information to PW14 which generated serious doubt in the mind of the Investigating Officer about the involvement of the appellant/accused in the incident of murder of the deceased. To this extent, and to this extent alone, we hold that the third circumstance relied on by the prosecution is also proved.

22. The 4 remaining circumstances are crucial and vital. We now take up the fourth circumstance. The prosecution alleges that the chance finger print on M.O 13 - a glass kerosene lamp, in the house of the deceased was that of the appellant. The unexplained presence of the finger print of the appellant on M.O 13 is relied on by the prosecution to contend heavily that the appellant must have present in the house on that night and must have been responsible for the crime that occurred in the house of the deceased on that night. The appellant does not now dispute that the finger print on M.O 13 is not his. He accepts the same and contends that the same happened to be there because he was compelled to put his impression on M.O 13 under duress after his arrest.

23. The learned counsel for the appellant has seriously challenged the evidence of the prosecution relating to MO13. We shall advert to the various circumstances relied on by the learned counsel for the appellant.

24. First of all it is contended that in Ext.P17 inquest report, there is nothing to show that MO13 was seized by the police. The learned counsel for the appellant proceeds to further argue that an exhaustive perusal of Ext.P17 will not even suggest that any chance finger print was detected on MO13 by either the investigating officer PW14 or the finger print expert PW5. We find that this submission is factually correct. Evidence reveals that the finger print expert PW5 was, at any rate, available at the scene of the crime before Ext.P17 was completed. The learned counsel for the appellant laboriously points out that a piece of conduct claimed to have been performed by PW5 is seen recorded in Ext.P17. In column 19(b), it is stated that the finger prints of the deceased was taken by the finger print expert. Column 19(b) of Ext.P17 thus clearly shows that the finger print expert was available before PW14 closed Ext.P17 inquest report.

25. We have gone through Ext.P17 in detail. We do note that in Ext.P17 the presence of MO13 is indicated in page 12 of the inquest report. The availability of a glass kerosene lamp is stated by interpolation in page 12 of Ext.P17. It is not mentioned in Ext.P17 that either the investigating officer or the finger print expert had seen any chance finger impression on MO13. Neither Ext.P17 nor any other document produced shows that Mo13 was seized from the scene of the crime. With the help of all these, the learned counsel for the appellant contends that the theory that MO13 was available in the house with the chance finger print cannot be accepted.

26. We agree that this contention deserves very close scrutiny. We first of all note that Ext.P17 had reached the learned Magistrate on 04/12/1997. In that inquest report which reached the court on 4/12/1997, there is a statement that a glass kerosene lamp was available at the scene. The learned Public Prosecutor argues that at that stage the police or PW5 were not sure whether the chance finger print of MO13 could be developed or not. It is hence that reference is made to the lamp; but without any specific reference to the possibility of extracting the chance finger print from MO13 in Ext.P17. The learned Public Prosecutor further submits that it is evident that this entry about MO13 had to be brought into Ext.P17 by interpolation as PW5 had reached the scene only after the preparation of the inquest report commenced. Not a semblance of doubt can be aroused in the mind of the court about the genuineness or acceptability of the version of the prosecution that MO13 with the chance finger print was available at the scene, contends the learned Public Prosecutor.

27. In this context, our attention has been drawn to Ext.P6 also. Ext.P6 is the opinion submitted by PW5. In Ext.P6, it is clearly stated that MO13 with a chance finger print thereon was taken by PW5 from the scene of the crime and that the fact that the said finger print tallies with that of the accused was conveyed to the investigating officer as early as on 08/12/1997 by wireless message. The question is whether in the circumstances of the case, the version of the investigating officer Pw 14 and PW5 the finger print expert generates any reasonable doubt against the acceptability of this crucial piece of evidence.

28. The learned counsel for the appellant argues that while PW5 stated that the recovery was effected by him from the bed room of the house of the deceased, Ext.P17 shows tht it was recovered from the middle room. The learned counsel for the appellant further argues that the oral evidence of PW1 indicates that not one but two lamps were available in the house of the deceased. That statement of PW5 in the course of cross- examination cannot be given any undue importance or

significance. When confronted with the statement in Ext.P17, the response of PW5 clearly shows that his earlier statement was not an accurate statement about the precise location of MO13 at the time of its seizure. We must note that the totality of the circumstances in this case does not at all arouse any reasonable doubt in our mind about the acceptability of the statement on oath of PW5 that he had taken MO13 with the chance finger print from the scene of the crime when he inspected the same in the morning of 03/12/1997. The contents of Ext.P6, the oral evidence of PW5 as also the oral evidence of PW14, according to us, unmistakably point to this conclusion. The fact that the attesters to Ext.P17 inquest report have not been examined on oath by the prosecution cannot also succeed in generating any amount of doubt in our mind as we note that Ext.P17 had reached the court as early as on 04/12/1997.

29. We now come to the evidence regarding specimen/standard finger prints of the accused. According to PW14, he had taken the specimen finger prints of the accused after his arrest. But surprisingly, no mahazer has been prepared or produced before court to show that the specimen finger prints were taken by PW14. The original of the finger prints so taken from the accused has not been produced at all. What is available before court is only Ext.P5 which is claimed to be the photographic enlargement of the specimen finger print of the appellant which tallied with the chance finger print on MO13. The learned counsel for the appellant argues that the finger print of the accused has been taken in a very suspicious and unsatisfactory manner. No mahazer has been prepared. The original of the finger print has not been produced. The photographer who developed Ext.P5 has not been examined. The learned counsel for the appellant further argues that the finger print has been taken without the intervention of the learned Magistrate as required under Section 5 of the Identification of Prisoners Act. In these circumstances, no reliance can be placed on Ext.P5 which is alleged to be the photographic enlargement of the original finger print taken by PW14 from the appellant/accused after his arrest.

30. We will now consider first of all whether PW14 has committed any illegality or irregularity in taking the finger prints himself without the intervention of the learned Magistrate. The learned counsel for the appellant relies on the decisions in Mohd.Aman v. State of Rajasthan [AIR 1997 SC 2960] and Mahmood v. State of Uttar Pradesh [AIR 1976 SC 69] in support of his contention that finger print taken otherwise than in the presence of the learned Magistrate under Section 5 must arouse suspicion.

31. We have been taken through the relevant passages in those precedents. In Mohd.Aman (Supra) the relevant observations appear in paragraph 8 in the following words:

> "Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also cast a serious mistrust as to genuineness of the evidence. Even though the specimen finger- prints of Mohd.Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take finger-prints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently

desirable that they were taken before or under the order of a Magistrate."

32. Earlier in Mahmood (Supra) the Supreme Court had made the following observations in paragraph 16 which we extract below:

> "Furthermore, the specimen finger-prints of the appellant were not taken before or under the order of a Magistrate in accordance with Sec.5 of the Identification of Prisoners Act.
>
> This is another suspicious feature of the conduct of investigation. It has not been explained why this Magistrate was kept out of the picture."

33. Armed with these observations, the learned counsel for the appellant appears to contend that the specimen finger impressions taken by an investigating officer in the course of investigation without resort to the aid of a Magistrate under Section 5 cannot be relied upon at all. We are afraid, the said contention cannot be accepted in law. It will be advantageous to refer to Sections 4 and 5 of the Identification of Prisoners Act which we extract below:

> 4. Taking of measurements, etc., of non-
>
> convicted persons.- Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner.
>
> 5. Power of Magistrate to order a person to be measured or photographed.- If a Magistrate is satisfied that, for the purposes of any investigation of proceeding under the Code of Criminal Procedure, 1989 (5 of 1898) it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:
>
> Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:
>
> Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."
>
> (emphasis supplied)
>
> 34. Measurements under Section 2(1)(a) of the Identification of Prisoners Act includes finger impressions.

Section 4 and 5 of the Identification of Prisoners Act, according to us, deal with totally different situations. An arrestee comes within the purview of Section 4 of the Act; whereas 'any person' comes within the sweep of Section 5 of the Act. It is by now trite that obtaining finger prints for the purpose of investigation does not amount to objectionable testimonial compulsion under article 20(3) of the Constitution of India. An investigating officer is certainly and absolutely justified in obtaining the finger impressions of a person arrested by him. There can be no doubt on the proposition of law at all. Section 5 does not control, guide or restrict the power of an investigating officer to take finger impressions of an arrestee who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards. It will be idle to expect the police officer to run to the Magistrate every time to take finger impressions of such an arrestee. If the arrestee refuses to co- operate, of course, the investigating officer can make an application under Section 5 and under judicial orders ensure that his finger impressions are taken. If any person other than an arrested accused does not co-operate to give finger impressions then also the police officer can seek directions from the learned Magistrate under Section 5. It will be totally incorrect to accept as a principle of law that the investigating officer must get the permission of the Magistrate to take specimen finger impressions of an arrestee under Section 4. We are of the opinion that the observations of the Supreme Court cannot be so understood. In the facts and circumstances of the peculiar cases which the Supreme Court was dealing with, the Supreme Court only commented on the advisability of the investigating officer getting permission of the Magistrate before taking specimen impressions of the accused in those cases. We are unable to agree that such permission or intervention of the Magistrate is necessary to enable or justify taking of finger impressions from accused persons like the appellant herein. The non-obtaining of permission/orders of the Magistrate under Section 5 cannot at all affect the validity of the drawal of specimen impressions of the appellant by PW14 in exercise of his powers under Section 4 of the said Act.

35. We must say that we are unhappy that the investigating officer PW14 has drawn the specimen impressions without even drawing up a mahazer. Mahazers have to be prepared when such finger impressions are drawn. As a principle to be safely followed in all cases, we would assert that such mahazers must be prepared and the same must be done in the presence of independent witnesses to obviate or eliminate any possibility of actual prejudice or even complaint of prejudice.

36. But the mere fact that such course is not followed, according to us, does not vitiate the specimen impressions drawn by PW14. Nor does that inadequacy/impropriety affect the validity of the evidence tendered with respect to such materials collected.

37. The learned Public Prosecutor points out that it would be idle to concede benefits to the accused without any substance and in its core the evidence relied on by the prosecution does not arouse any serious doubt. The learned Public Prosecutor relies on the observations in State of Rajasthan v. Kishore [1996 SC 3035] to contend that "Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution cases nor can trust worthy and reliable evidence be cast aside to record acquittal on that ground".

38. The learned Public Prosecutor relies on the observations in Bikau Pandey v. State of Bihar [AIR 2004 Supreme Court 997] paragraph 14 also to contend that "Similarly, even if there are irregularities or illegalities in the conduct of investigation that is of no consequence if the essential core of the prosecution case does not arouse suspicion in the minds of the court."

39. The learned counsel for the appellant relies on the decision in Chandran v. State of Kerala [AIR 1990 SC 2148] paragraph 24 to contend that non-examination of the photographer who had taken the photographic prints of Exts.P4 and P5 is fatal to the prosecution case. We extract the passage in paragraph 24 below:

> "In passing, it may be mentioned that the photographer (charge sheet witness No.40) who took the photographs of the finger prints was not available for examination. Though the evidence of PW-30 by itself is free from any infirmity, we are unable to sustain the conviction of these two appellants on the opinion of PW-30 alone as we have entertained a lurking suspicion in our mind about the manner in which the evidence had been obtained as indicted above. Further it is highly hazardous to rely on these two scanty pieces of circumstantial evidence which are brought on record in a very unsatisfactory and loathsome manner and which lack guarantee to inspire confidence."

40. We must mention that the observations in paragraph 24 extracted above cannot be held to lay down any inflexible rule of law that the non-examination of the photographer would render the evidence unworthy of acceptance. Those observations are made in the peculiar facts and circumstances of that case and cannot be understood as laying down any inflexible or rigid law that in every case such photographers must be examined ritualistically or that their non-examination would render evidence inadmissible or untrustworthy.

41. In these circumstances, though we agree with the learned counsel for the appellant that ideally a mahazer should have been prepared while taking the specimen finger impressions of the appellant and it would have been advantageous if independent witnesses had attested such mahazers, the omission to comply with these requirements cannot lead to rejection of Ext.P5. We are also in agreement that ideally the original finger prints should have been produced before court and the photographer who took the photographic enlargement of Exts.P4 and P5 must have been examined in court. But those inadequacies also do not persuade us to squander the material that is available on record. It will be relevant to note that on the back of Exts.P4 and P5, the said photographer has affixed his signature and seal. The presumption that official acts have been done properly and in accordance with law can safely be drawn in the facts and circumstances of the case.

42. Ext.P6 report clearly shows that the chance finger impression of MO13 tallied completely with the specimen finger impressions of the accused. That aspect of the matter is not seen challenged at all. In fact, as we have referred to earlier, the contention is only that finger prints of the appellant were taken on MO13 after his arrest under duress and there is no challenge against the opinion that the two finger prints tallied exactly. We are, in these circumstances, satisfied that the fourth circumstance relied on by the prosecution has also been established satisfactorily.

43. We now come to circumstance No.5. The prosecution relies on the similar and identical nature of hair strands which were available in the palm of the deceased and the specimen scalp hair of the appellant. To appreciate the significance of this circumstance, it is necessary straight away to look at the nature of injuries suffered by the deceased described in Ext.P9. A struggle is clearly indicated by the nature of injuries suffered by the deceased. It is then that the investigating officer alertly noted that there were strands of hair on the palm of the deceased. The investigating officer even in Ext.P17 perceived the significance of the presence of those strands and seized the same under Ext.P17 inquest report. A separate mahazer has not been prepared; but the contents of Ext.P17 clearly show that the strands of hair were seized by the investigating officer under Ext.P17. The failure/omission to prepare a separate mahazer is, in these circumstances, of no consequence at all. The best assurance for such seizure is available from the fact that Ext.P17 as stated earlier had reached the court on 04/12/1997 itself. Not a semblance of doubt is raised in our mind as to whether such strands were available on the palm of the deceased and whether they were seized under Ext.P17 inquest report. The non- examination of the independent attesters to Ext.P17 is also found by us to be of no crucial significance at all in the circumstances of the case. The evidence of PW9 shows that he had taken a specimen hair and nail clippings of the accused when he examined the accused after his arrest. Such examination was on 06/12/1997. It is true that PW9 had not recorded in Ext.P8 that such specimen hair and nail clippings were collected. It is also true that PW14 did not prepare a mahazer of seizure of such specimen hair and nail clippings. But the question is whether the oral evidence of Pws 9 and 14 on this aspect deserves to be discarded on that score. We have gone through the cross- examination of Pws 9 and 14. We are unable to agree that a prudent mind can ever commit the indiscretion of throwing overboard the evidence of Pws 9 and 14 for the reason that mahazer has not been prepared or that the drawal of specimen hair and nail clippings is not mentioned in Ext.P8. Ext.P19 would show that as a matter of fact the hair strands on the palm of the deceased, specimen hair strands of the deceased, specimen scalp hair of the appellant/accused were all available with the court and they were sent to the expert. It is after examining and comparing these three specimens of hair that the expert opined that the hair strands on the palm of the deceased were not that of the deceased and that they were identical and similar to the specimen scalp hair of the accused. We are of the opinion that the prosecution has succeeded satisfactorily in establishing this 5th circumstance also.

44. We now come to the 6th circumstance - i.e that namely Mos 6 and 7 were seized by the police under Ext.P12 on the basis of Ext.P12(a) information furnished by the appellant to the police in his confession statement. This information furnished by the accused is sought to be introduced with the help of Section 27 of the Evidence Act. PW14 tendered primary evidence on this aspect. His evidence is eminently supported and corroborated by the contents of the contemporaneous seizure mahazer Ext.P12 which again had reached the court on 06/12/1997. It is the case of the prosecution that Mos 6 and 7 were ornaments of the deceased. She used to wear the same usually. PW1 had seen her wearing the same on the night prior to her death. She had purchased the same under two bills seized under Ext.P2. The fact that under those bills Mos 6 and 7 were sold is confirmed by the evidence of PW7 salesman of the jewellery. PW1 as early as in Ext.P1 F.I.S had given graphic details of the ornaments of the deceased which were found missing when she was found dead. In these circumstances, we find no semblance of valid doubt to conclude that Mos 6 and 7 ornaments belong to the deceased and that they were found missing when she was found lying dead in the morning on

03/12/1997.

45. The evidence of PW14 shows that Ext.P12(a) statement was given to him by the accused and that he had seized Mos 6 and 7 from their place of concealment under Ext.P12 in the presence of PW12 and another witness. PW12 had turned hostile. The other witness has not been examined. The learned counsel for the appellant argues that in the wake of the hostility of PW12 it was incumbent on the prosecution to examine the other attester to Ext.P12. We do not find much merit in this contention. Hostility of Pw12 cannot deliver any advantage to the appellant/accused. Indian courts do come across several instances where alleged independent attesters turn hostile to the prosecution. Such hostility cannot, by itself, be reckoned as crucial. The version of PW14 about the recovery of Mos 6 and 7 is convincingly supported and corroborated by his ability to produce Mos 6 and 7 and also the contents of the contemporaneous seizure mahazer Ext.P12 which had reached the court promptly on 06/12/1997. If the prosecutor were convinced that oral evidence of PW14 read with the prompt Ext.P12 is sufficient to establish the recovery, in the facts and circumstances of this case, we cannot find fault with the prosecutor for having exercised his prerogative not to examine the second witness to the seizure mahazer Ext.P12. We do, in these circumstances, come to the conclusion that the 6th circumstance - a formidable one, has been established satisfactorily by the prosecution.

46. We now come to the last and the 7th circumstance now that the accused had injuries on his person at the time of his arrest on 05/12/1997. This fact is proved beyond doubt by the evidence of PW 9 and Ext.P8 wound certificate issued by him. The accused does not deny that he had those injuries. Interestingly, his contention is that those injuries were inflicted on him by the investigating officer after he was taken into custody. The importance and significance of the injuries on the accused must be gathered from the nature of the incident that must have taken place inside the house of the deceased. Ext.P9 postmortem certificate clearly and unmistakably shows that there must have been physical altercation before the deceased breathed her last. It is reasonable in such circumstances to expect that the assailant is also likely to bear marks of violence on his person. It is in this view of the matter that the injuries on the accused and the explanation, if any, has to be considered. The injuries found on the accused described in Ext.P8 clearly suggest and indicates that he was also involved in a physical altercation. The only explanation offered by the accused is that he was arrested on 03/12/1997 itself by the investigating officer and injuries were deliberately inflicted on him by the investigating officer. This theory has no legs to stand on. Except vague suggestion thrown in the course of cross-examination of prosecution witnesses there is absolutely no attempt to substantiate this explanation. The evidence of PW9 and Ext.P8 indicates that the injuries found on the person of the accused were injuries that could have been suffered by him prior to 24 hours of examination by PW9. Doctor was not able to pin point and specify the same. In that view of the matter, it is not proved that these injuries were suffered on 03/12/1997; but the fact remains that these unexplained injuries suffered more than 24 hours prior to the examination by the doctor were found on the person of the accused for which he is not able to account satisfactorily.

47. The learned counsel for the appellant points out that the theory of physical altercation between the accused and the deceased cannot be accepted for various reasons. PW14 stated that at the scene, there was no indiction of a physical altercation. That can only mean that articles were not in a state

of disarray. We have come to a conclusion about the possibility of a physical altercation going by the nature of injuries found on the person of the deceased.

48. The learned counsel for the appellant argues that the nail clippings of the accused or the deceased do not indicate any such altercation. We are afraid that this contention cannot be accepted. The accused was arrested long after the incident and he must have had time to wash and clean his hands and remove the possibility of any human tissues in his nails. So far as the deceased is concerned, we have the evidence of PW5 that he had taken the specimen finger impressions of the dead body and for that purpose, he had washed the hands of the deceased thoroughly. In these circumstances, the fact that the nail clippings do not reveal the presence of human tissue is found by us to be of no crucial significance. We come to the conclusion that circumstance No.7 has also been satisfactorily explained.

49. The crucial question now is whether these seven circumstances do point to the guilt of the accused. It is unnecessary to advert to the law relating to proof by circumstantial evidence. It is well settled that all circumstances must be satisfactorily established. The circumstances together must point to the guilt of the accused and together they must exclude every hypothesis of innocence of the accused. We do not think it necessary to advert to precedents in this aspect. According to us, as already held by us, the seven circumstances have been proved satisfactorily and these circumstances together point to the guilt of the accused convincingly. Each circumstance may be capable of different interpretations; but the chain of circumstances clearly show that a reasonable hypothesis of innocence of the accused is not possible and has to be excluded in toto. We are, in these circumstances, satisfied that the conclusion of the court below that the guilt of the accused has been proved is absolutely correct and does not warrant interference.

50. The learned counsel for the appellant contends that the oral evidence of DW1 as well as several other inadequate and suspicious circumstances in this case must lead the court to the conclusion that the appellant is, at any rate, entitled to the benefit of doubt. His explanation for the presence of finger prints on MO13 is that he was arrested on 03/12/1997 and his finger impression was obtained on MO13 under duress while in custody. His explanation for the injuries on him is that those injuries were inflicted intentionally by the investigating officer to create evidence against him. His explanation for the similarity and identical nature of the hair strands found in the palm of the deceased and his own specimen hair sample is that the investigating officer had deliberately taken his scalp hair and planted it on the hands of the deceased. It is his further case that Mos 6 and 7 were not lost and evidence of recovery was falsely created by the investigating officer to falsely implicate him.

51. Criminal trial cannot be a flight of fantasy alone. The prosecution must certainly prove its case satisfactorily. Only if a reasonable doubt is aroused in the mind of the court, can the benefit of doubt be conceded to the accused. Fanciful defences urged attempting to capitalise on every innocuous inadequacy in the conduct of the investigation and prosecution cannot obviously deliver any advantage to the accused unless the totality of circumstances does arouse a reasonable doubt in the mind of the court. We are unable to perceive or invent any such reasonable doubt in our mind on the basis of the totality of the circumstances. The evidence of DW1 is found to be unworthy of credence.

Explanations offered for the seven circumstances proved is also found to be not acceptable at all. The defence of the accused falls miserably short of creating a reasonable doubt in our mind. We do, in these circumstances, come to the conclusion that the verdict of guilty and conviction do not warrant any interference.

52. The learned counsel for the appellant argues that the substantive sentence of imprisonment imposed under Section 449 and 392 I.P.C is excessive. He further contends that there was absolutely no justification for imposing a sentence of fine of Rs.10,000/- under all accounts (total Rs.30,000/-) and default sentence of three years in all. We are unable to agree that the sentence imposed is in any way excessive. The sentence imposed, we are satisfied, is consistent with the gravity of the culpable conduct proved against the appellant. There can be no place for any misplaced leniency or sympathy on the question of sentence.

53. In the result, this Crl.Appeal is dismissed.

(R.BASANT, JUDGE) (M.C.HARI RANI, JUDGE) jsr