SUREME COURT OF INDIA

M.A.Antony @ Antappan

Vs.

State of Kerala

(Arijit Pasayat, Lokeshwar Singh Panta JJ.)

22.04.2009

JUDGMENT

Dr. ARIJIT PASAYAT, J

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Kerala High Court upholding the conviction of the appellant for offences punishable under Sections 449, 379, 380, 302 and 201 of the Indian Penal Code, 1860 (in short the `IPC'). Appellant was sentenced to death for the offence relatable to Section 302 IPC, life imprisonment, 7 years imprisonment, 7 years imprisonment for the offence relatable to Section 449, 380 and 201 respectively. No separate sentence was imposed for the offence relatable to Section 379 IPC. For confirmation of the death sentence reference was made to the High Court under Section 366 (1) of the Code of Criminal Procedure, 1973 (in short the `Code'). The appellant also preferred an appeal and by the impugned judgment, both the Death Reference and Criminal Appeal were disposed of.

3. The accusations in essence against the appellant are as follows:

On the intervening night of 6th and 7th January, 2001, when inmates of Aluva Municipal Town of Ernakulam District in the State of Kerala were in deep sleep, Manjooran House located in the midst of the town became a scene of ghastly crime. Six members of one family in the Manjooran House lost their lives in a matter of three hours, Antony @ Antappan, the appellant herein, in search of greener pastures abroad for which purpose he needed money but was refused to be paid by the members of the Manjooran family, and therefore as per the prosecution's version used knife, axe, amd electrocuted and strangulated Kochurani and Clara at about 10 in the night.of 6.1.2001 and Augustine, his wife Mary, and their children - Divya and Jesmon at midnight. The Manjooran House full of life at 10 in the night by the stroke of midnight became a graveyard. The appellant after causing the death of Kochurani and Clara is said to have waited for the arrival of other four

members of the family who had gone to see a film show. On their arrival he turned them into corpses. He waited for their arrival to kill them as he knew that for the two murders committed earlier by him he would be suspected by them, as he was in the house when they left the house for the film show. The prosecution alleges that all these murders were cold blooded, planned and executed with precision and the appellant ensured that there is no trace of life left in them before he left the scene of occurrence.

When put to trial for murders, appellant, however, pleaded innocence and claimed trial.

4. The trial Court as noted above found the accused guilty.

5. Law was set into motion in the following manner: Joseph @ Rajan on 7.1.2001 at 11.30 p.m. gave information to the Aluva Police Station of Ernakulam District that his sister, brother-in-law and their children were murdered by someone at sometime between 6 p.m. on 6.1.2001 and 10 p.m. on 7.1.2001 within Manjooran House, where his brother-in-law Augustine @ Baby, sister Mary @ Baby, children Divyamol and Jesmon, brother-in-law's sister Rani (Kochurani) and mother Rahel were living as a family. He requested for action in the matter. In the first information, Ext.P1, got recorded by N.V. John, Sub Inspector of Police. The informant Joseph stated that he had come to inform that someone had killed his sister-Mary, brother in law-Augustine and their children-Divyamol and Jesmon in their residence at Aluva. He belongs to Christian community and is residing with his father, mother, wife and children. It was stated by him that he was running a stationery store there and his sister Mary was married to Augustine of Manjooran House. His brother in law was running a hardware shop at Aluva. Both the children were school going. On 6.1.2001, his sister had come home to take his father who was sick to the hospital. His sister told him that she would come on 7.1.2001 by 9.30 a.m. to stay with them, as his wife was going to her house. On Saturday morning his wife went to her home. At that time, his sister Lizy, was in the house. Baby wanted to come as Lizy had to go to her house. Since his sister was not seen even after 10 O'clock, he tried to contact her over phone. Though the phone was ringing, nobody picked it up. Around 2 p.m. he telephoned Jose at Neerikode and asked him to enquire as nobody was answering the phone at his sister's residence. After some time Jose informed over phone that when he sent the son of his elder brother Jose to his sister's residence, the house was found locked without anyone being there and also their vehicle was not seen. As she wanted to participate in a function in connection with Christu Jayanthi 2000, thinking that she would have gone for that, they waited till 8 p.m. and thereafter again contacted Jose over phone and requested him to enquire again. After sometime, Jose called back and told that Sebastian informed him that both his sister and brother-in-law were not seen. To know about their whereabouts, he along with his brother- in-law Sunny, came to the house of his sister around 10 p.m. The vehicle was available in the courtyard. There was no light in the verandah. Then he entered the sit-out and lifted the curtain to knock the door, and he saw one of the doors kept open. When he lighted the torch, immediately he saw the legs of Jesmon, son of his sister. He was lying on the floor. There were blood stains near his body. In the adjacent room, he saw the legs of Divyamol, who was lying on her chest down; his sister in a sitting posture with her head down and adjacent to that his brother-in-law, lying on his back. There was no response when he called. They appeared to be dead. Immediately, they came out of the house and went to the house of Jose, his cousin and informed him. Jose called Robin and they all went in Robin's car to the station. Apart from his sister, brother-in-law and their children, his brother in law's mother and sister were also staying with them. He did not know what had happened to them. They were not seen there. The dresses of his brother in law, sister and their children were those they used to wear while going out. There was no financial liabilities on his brother-in-law. When his brother in law laid the

foundation for constructing a new house, he had a case with his family and as per his sister, they were expecting its judgment in the near future. His brother-in-law and his elder brothers had a dispute with regard to their property. He was not aware of any enemies from outside of his brother-in-law. The morning newspaper and milk were lying on the verandah of the house. The incident occurred between 6 p.m. of 6.1.2001 and 10 p.m. of 7.1.2001.

From the statement made by the informant, it appears that the murder of the six persons was noticed for the first time around 9 p.m. to 10 p.m. on 7.1.2001 and the matter was reported to the police at 11.30 p.m. on the same day.

As there was no direct evidence the prosecution relied on circumstances to fasten the guilt on the accused. Accordingly, the conviction was recorded. The High Court confirmed the conviction and sentence imposed.

7. In support of the appeal, learned counsel for the appellant submitted that this being a case of circumstantial evidence the prosecution was required to show that the chain of circumstances was so complete that they excluded even the remote possibility of any other person being the author of the crime. It is submitted that there are many missing links and the explanation offered by the appellant has not been considered in the proper perspective.

8. Learned counsel for the respondent-State on the other hand supported the judgment of the High Court.

9. It is to be noted that the following were the factors which were pressed into service by the prosecution.

(a) Motive;

(b) Presence of accused/appellant on 6.1.2001; (c) Presence at the place of occurrence in the early hours of 7.1.2001;

(d) Absence from residence on the night of 6-7 January, 2001; (e) Recovery of clothes under Section 27 of the Indian Evidence Act, 1872 (in short the `Evidence Act');

(f) Fingerprints;

(g) Recovery of Scalp hair of the accused/appellant; (h) Judicial Confession;

(i) Extra-Judicial Confession

10. Stand of the accused-appellant is essentially as follows: 8

(a) Line of investigation not pursued deliberately by the police and leads missed by the police - which would have shown innocence of the appellant:

The records of the case disclosed that at the very outset there are no circumstances which clearly showed that the accused was involved in the crime. However, this line of investigation was not pursued by the investigating agency. For some strange reason they wanted to show that the case had

been solved and the appellant has been made a scapegoat in the process.

(b) Presence of spermatozoa in the pubic hair and vaginal swab of Kochurani:

It has come in evidence of PW-53 that human spermatozoa was detected in the pubic hair and vaginal swab. These swabs were subjected to DNA test after taking the blood samples of the appellant. Ext. 90 dated 27.12.2002 completely absolved the appellant as being a source of the male DNA.

The Inquest report prepared on the body of Kochurani stated that her skirt was rolled up and white fluid was found on the private parts. It was a fresh intercourse. When pursuing the line of investigation the prosecution attempts to explain it away by saying that it could be an old consensual intercourse forgetting that if it was an old intercourse, stains would not be available in the pubic hair after so many days.

The other line of investigation deliberately not pursued is the presence of blood stained foot prints atleast 10 in number inside the house. It is sought to be argued by the prosecution that the footprints were not clear enough for arriving at any conclusion. In fact to get over this aspect they claim that the accused was wearing socks and also show as if socks was recovered. It is an absolutely false story of the prosecution in order to cover up their conduct of not pursuing the footprint theory. Further, in this case the weapons used were axe, two knives, a chopper and a double knife. No finger print is sought to be lifted from any of these weapons and sent for comparison. The prosecution claims that nine finger prints were lifted from the house of which they say five were not clear for comparison, two remained untallied and of the remaining two are tallied with PW-14 Tintu Joseph, a nephew of Augustine and the other tallied with accused appellant. As to why no finger prints were lifted from the weapons and as to whose finger prints were present in such large number has not at all been pursued by the prosecution. Most importantly, according to the prosecution the finger prints on the door post which tallied with the accused had blood stain. However, according to the expert, from the blood stains it was not possible to decipher as to the group of the blood stain.

Another important circumstance is the so called pledge of two chains and one anklet of the deceased by PW-74 Suresh in the shop of T.V. Gangadharan (PW-25). The police set up a case that the accused had entrusted the jewellery to Suresh on 9.1.2001 at Bombay and that Suresh came to Kerala on 16.1.2001 and pledged the jewellery on 31.1.2001 when he had full knowledge that the appellant was suspected for the commission of offence. Police to support it marked Ext.P-22 through PW-25. Ext.P-22 was a pledge register contemporaneously seized on 20.2.2001 from the shop of PW-25. However PW-25 confessed that the register was subsequently got written and was recovered two months after. What was recovered on the day of seizure was the pledge bond and the token. Abraham Cherian (PW- 59) the Investigating Officer admits that the bonds were recovered but that was not produced in court. By the impugned order, the High Court has disbelieved recovery of ornaments, namely two chains and one anklet. However, what is surprising is if the police did not actually recover, did they pursue the line of investigation against Suresh (PW-74) and if not, why not? There are several other concoction and embellishment resorted to by the police for reasons best known to them.

(c) Recovery of finger print of the accused from the house.- M.T. Jose (PW-14), own brother of Augustine states that accused is brother by relation with Augustine who used to frequently visit the house of Augustine and also house of Jose, the witness and that the accused had full freedom in the `tharavad' since mother had son-like relation with him. Similarly, MT George (PW-15), another

brother of deceased Augustine also states that the accused used to regularly visit Augustine's house. In view of this assuming that the finger prints of the door step tallied with that of accused just as PW-14, Tintu Joseph's finger print also tallied this is no circumstance against the appellant, the appellant admittedly being a frequent visitor. The finger print was tallied by K. Yogendra Sakhya (PW-7) and the report was marked as Ext.P-11. The report reveals that the comparison of the finger print was done with the finger print of the arrest slip. Apart from that this report says that there were 7 other finger prints, five of which were unclear and two could not be tallied. This shows that there were strangers who entered the premises for commission of offence. Further, the report does not disclose the age of the finger print of the accused. Accused admittedly visited the house several times and definitely on 5.1.2001 and 6.1.2001 he had visited the house. Secondly, the specimen finger print ought to have been taken before the Judicial Magistrate as per identification of Prisoners Act and this procedure having not been followed, no reliance can be placed on this circumstance as held by this Court in Mohd. Aman and Anr. v. State of Rajasthan (1997(10) SCC 44).

Thirdly, the blood group of the so called finger prints specimen could not be detected and particularly the group could not be found as is clear from Ex.P-39. No reason is given. Hence, finger print is not a circumstance and cannot form a basis or link in the chain of circumstances. (d) Recovery of hair:

Parameswaran Nair (PW-53) states in the report Ex.D-12 prepared by him that one black hair was located by him on the body of Jesmon, that he entrusted it to the Investigating Officer, that he did not seal it, that it was a scalp hair and a pulled out hair. What is significant is that no information about the unsealed hair allegedly recovered on 8.1.2001 nor the recovered item were sent to the Court earlier to the examination of the accused by police i.e. it was not sent till atleast 18.2.2001. Nowhere it was mentioned about the actual date of sending of the said information. This was adversely commented by the High Court while ordering a CBI investigation. What is important is in the report Ex.P-36 of PW-53 it is seen that when it was forwarded by the Judicial First Class Magistrate it had the seal of Judicial First Class Magistrate but that packet contained two unsealed packets which were the hairs (there is a contradiction as to whether one hair was seized or three hairs were seized from the body of Jesmon but keeping that aside for the time being) allegedly recovered from the body of Jesmon. What is important to note is PW-53 says he did not seal it and what went from the Court was an unsealed packet put inside a sealed packet of the Court. What is important to note is it is not clear as to whether what was sent for examination or what was seized. This coupled with the fact that contemporaneous report was not made to the Judicial First Class Magistrate on 8.1.2001 throws a serious doubt as to what was sent to the Magistrate was what was really seized or was it something else. It appears that after the accused was examined then only a report was made. There again Anita Kumar (PW-60) states that she cut the hair of the accused and sent for chemical examination. A perusal of Ext.P-36 shows that this specimen hair was in closed bottle which was kept in a plastic container. There is no evidence of sealing. PW-60 says she did not state in Ex.P-48 that she sealed the pack but she kept the hair in a glass bottle and after sealing it handed it over to the Investigating Officer. Ex.P-36 does not say that the specimen bottle was sealed. It was just a closed bottle kept in a plastic container. What is significant to note in Ex.P-36 it is mentioned that both the specimen hair and the seized hair had roots. PW-60 says that she cut the hair and while cutting there would not be roots. The fact that the seized hairs were not sealed, the fact that the specimen hair was not sealed and most importantly the fact that the seized hair on 8.1.2001 and forwarded only after questioning accused i.e. on or after 18.2.2001 throws a serious suspicion on the prosecution story and it cannot for a basis or a link in the circumstance against the appellant. PW-51 who prepared Ex.P-3 inquest of Jesmon has admitted in cross examination that the

hairs recovered from the dead body were sealed then and there and taken to the police station. But admittedly those sealed hairs were seen unsealed when it reached in the hands of PW-53 as is clear from the report. If PW-51 sealed it how they are unsealed is a question which the prosecution has not answered. (e) Recovery of the so called pant shirt, kerchief and socks: This theory of recovery is completely bogus. According to the prosecution the accused after the incident went in the early morning to his house and without the knowledge of wife changed the clothes, deposited them in a plastic kit and after depositing it in the compound from where they were recovered came back to the house. What is crucial is CBI investigating officer (PW-77) says that only the handkerchief and socks were thrown by the accused. Apart from this, the recovery witnessed by PW-68 and PW-73 contradict each other in material particular. While PW- 68 says that four items were recovered and that time accused was sitting in the jeep, that blood was seen in the kerchief and no any other items, PW-73 states that the accused entered the gate and that there were blood stains in all the four items. Obviously, police realized that their theory that the accused came home without knowledge of his wife would fall flat came forward with a case that only handkerchief and socks were recovered. In view of these serious contradictions between the police theory and the mahazar witnesses no reliance can be placed on the recovery as a circumstance. Further, if pant and shirt were not recovered how it was sent for forensic examination to PW-54 whose report states that the pant and shirt contained blood of `O' group. CBI investigating officer says only socks and handkerchief were recovered. PW-68 says blood stains only in the handkerchief. PW-73 says that all the cloths had blood stains. PW-73 says accused took out the items while PW-68 says accused was sitting in the jeep. If PW-68 has come after the items were taken out then he is not a recovery witness. If actually handkerchief and socks were recovered what has been sent to forensic lab is something which has not been seized. There is a serious attempt by the prosecution to falsely show recovery of blood stained clothes to implicate the appellant. PWs 15, 16 and 17 saw the accused in the morning. They introduced the theory that the accused changing the clothes without the knowledge of wife PW-19. All these throw serious suspicion on the theory of recovery from a public place 45 days after the incident. Moreover, the recovery itself was organized as a big show that 500 people having gathered there. The police are supposed to have made a theater show by showing clothes from the recovery place. All these show that it was a stage managed recovery on which basis no circumstance and conviction can be imposed on the appellant.

PW-19 who is the wife of the accused states that the accused came in the morning on 7.1.2001 wearing a pant and shirt. She did not speak of any blood stain.

The so called motive for the offence is that the accused was in need of money to go to Saudi Arabia and for that purpose he killed the six members. As explained earlier, the motive theory stands exploded in view of recovery of large amount of cash and jewellery from the scene of crime as is spoken to by PW-1 Joseph, PW-45 and Investigating Officer (PW-59). If the accused had money as motive, he would have decamped with the booty. Subsequently PWs 23 and 24 deposed that accused repaid the loan on the morning of 7.1.2001 in part to Yohannan (PW-23) and promising to send balance and in full to Raman Nair (PW-24). When the accused is a conscientious person who repaid the debts is spoken to by PW-14 and PW- 24. The accused own case is that on the evening of 6.1.2001 Augustine gave him Rs.35,000/- so that he could repay Yohannan and Raman Nair and repay Augustine by betting his chitty with DW-1 or after going to Gulf. PW-19 and PW-23 spoke about the accused having told them that the money was arranged and mentioned Chettathis house to PW-23 and PW- 24. It is enough to show that the accused had returned the money before going abroad. PW-23 only wanted a signed stamp paper and unsigned cheque leaf which also got on the morning of 6.1.2001 and gave it to him. Accused had a running chitty with DW-1 and spoken to by

the said defence witness. It is the accused who having got the money from Augustine from his shop went and paid to PWs 23 and 24 and from there with PW-23 came back, went by bus to Trichur and from there by train to Bombay. In view of this, motive theory falls to the ground and in the case of circumstantial evidence the prosecution has come forward with a motive theory there is an onus on them to prove the same beyond reasonable doubt. The prosecution has miserably failed in its endeavor. It is also to be noted that the final report of CBI is not in conformity with that of Crime Branch. (f) Evidence of PWs 15, 16 17 saw the accused near the house of Augustine on 7.1.2001 in the morning:

The evidence of PWs 15, 16 and 17 has been discarded by the High Court. PW-17 discloses this fact to the Court on 8.4.2003 when her statement was recorded for the first time as to how the police came to know that she was passing on the road was not explained. Similarly, PWs 15 and 16 having not disclosed to the police when they were examined under section 161 of the Code. In any case the accused himself came back to the house on 7.1.2001 in the morning, no blood stain was noticed by any of the witnesses. The accused's house is 20 meters away from the house of the deceased. In view of this, these witnesses have been made to utter falsehood and even otherwise there is no other statement which establishes that merely because the accused was seen he is guilty of committing the murder. According to PW-15 when he met the accused in the road leads to railway station he asked the accused where he was going but he has not replied. This version of PW-15 has been contradicted by his statement recorded under Section 161 of Code. PW-17 has also stated that on 7.1.2001 at 5.45 a.m. she saw the accused walking through a road lies in front of the place of occurrence and leads to railway station. According to her she was on the way to Hospital to see the mother of her mother-in-law. This statement is also contradictory to her statement given to crime branch. According to her she was never questioned by the Crime Branch but was questioned by CBI twice. This is utter falsehood.

(g) So called extra judicial confession to PW-60 as recorded in Ex.P- 48.

A perusal of Ex.P-48 shows that the so called extra judicial confession in the wound certificate is in three lines. It purports to say the following:

On 6th January at about 9 O' clock while beating Kochurani with a stool certain injury on finger by contracting with a knife. No objection to take blood and scalp hair for examination.

This is no extra judicial confession. An extra judicial confession has to be inculpatory and must give substantial details of the manner of commission. The above two lines inserted in a document which itself has certain interpolation in the original. In any event, this is not enough to implicate the accused. Further the Dy. S.P. was also there at the time of the said alleged statement and hence the same is not at all believable. (h) So called confession under Section 164 of Code The accused was arrested on 18.2.2001. He was on illegal custody from 9.2.2001 onwards. The matter was first given to Crime Branch CID on 5.4.2001 whereafter it was transferred to the CBI on 9.4.2001. This confession under Section 164 of code is recorded in October, 2002. A perusal of confession shows that PW-65, Metropolitan Magistrate in the State of Tamil Nadu is supposed to have recorded the same. The reason given by the Investigating agency is that the accused desired to have the confession recorded in a place outside Kerala. No request in writing is produced nor the accused is taken to the concerned court and to state the fact that he wanted to record the confession outside Kerala was recorded. In fact from 25.1.2002 the accused was on bail with the condition that he will not leave the jurisdiction of Alua. Without obtaining any relaxation he was taken to Madras and

after torture a confession was recorded in the Metropolitan Magistrate Court, Chennai. Jayanthi (PW-65) the Magistrate admits that she does not know to read and write Malayalam. The translator was produced by CBI but his name was not mentioned anywhere and he was also cited as a witness who has not been examined by the prosecution. It is suggested that accused gave the confession in Malayalam which was translated by the translator to Tamil and the recording was made in Tamil. The confession document Ex.P-59 was not prepared after following the mandatory procedures. The accused was not informed that he was not bound to give the statement and if he gives it will be used against him. Even in the oral deposition PW-65 only says that she explained to him that he is not bound to give evidence and later it may go against him. This is not what is contemplated under Section 164(2) of Code. She should have told him that he is not bound to make a confession and that the confession can be used as evidence against him. Further, a Tamil version of the confession was translated by PW-76 who says he cannot read or write Tamil. So appellant has a case where PW-65 cannot read or write Malayalam, PW-76 cannot read or write Tamil but they can understand Malayalam and Tamil. PW-76 was helped by a subordinate Muthukumar who is not examined. So the real translators have not been examined, mandatory procedure has not been followed, the accused had not legally been taken outside jurisdiction. When the so called confession so sought to be relied upon, the accused in his statement filed under Section 232(2) of Code flatly denied the same. This confession cannot be used as a substantial evidence against the accused. In any case, in the absence of any corroborative material this is no circumstance against the accused. The accused has no knowledge of Tamil and he knows only Malayalam.

11. The appellant was in dire need of money as established by the testimony of PW-67. The Accused/appellant knew that his visa had come on 23rd December and that a large amount of money was required before 10th January 2001. He had also tried to arrange for loan as per the statement of I'W-19. She mentions the amount which he could arrange by 5 th January 2001 and a meager amount of 10,000/- was left with him. From the statement of Yohannan (PW-23) and Ramachandran Nair (PW-24), the factum of payment of money amounting to Rs 35,000/- on 7/1/2001 is clearly proved. The accused/appellant who was in need of money and who did not have money till 5.1.2001, had surplus amount of money to repay his debts and make payments to P.I. Ummar (PW-67) and also to pay for his ticket fare and other expenses. In this context, it will be worth mentioning that PW-23 had not demanded his money, yet the accused-appellant chose to liquidate his debt which clearly shows an intention on the part of the appellant to do away with ill-gotten money.

12. According to accused in the house of the deceased, a large amount of cash and jewellery was available which could have been taken away by the accused/appellant and that he, as a conscientious man, had taken so that he could repay before his departure. The contention is devoid of any merit and has been found to be incorrect by the courts below. It would be pertinent to mention here that the trial Court has adverted to the fact that the jewellery and cash were lying in hidden condition and thus knowledge of its existence cannot be attributed to the accused/appellant.

13. At the stage of recording of statement under Section 313 of the Code, the accused had come with another explanation that the deceased Augustine had paid him Rs.35 000/- at 8.00 p.m. on 6.1.2001. No evidence at all has been adduced to show that he was present in the shop of Augustine and had been given the said amount. Furthermore, even PW-19 wife of the accused/appellant has not stated that she was told at any stage by her husband that he had received an amount of Rs.35,000/- from the deceased Augustine. The trial Court and the High Court both have disbelieved it.

14. The analysis of the evidence shows that the accused/appellant was in dire and urgent need of more and he had a motive for getting the said amount of money.

15. PW-38 saw the accused/appellant entering the house at 7.00 p.m. on 6.1.2001. His presence inside the house is also supported by other factors, namely:

(i) presence of his fingerprints (Ref PW-6 and PW-7); (ii) presence of hair on deceased's body (PW-51, PW-53 and PW-61); and

(iii) absence of accused/appellant from his house. (PW-19).

16. PW-17 saw the accused/appellant at 5.45 a.m. on 7.1.2001 coming out from the house of the deceased. The evidence has been believed by both the courts and the cross-examination has not discredited the testimony.

17. It is the admitted case of the parties. PW-19 wife of the accused as well as the accused/appellant himself has admitted his absence from, his own house.

18. The theatrical explanation given by the accused/appellant that he was going to Perumbavoor and at Thottuva, nearly 35 kms away, the auto driver tried to snatch his money and he ran and stayed at a dilapidated house for the whole night has been rightly rejected by the courts below. And if he was at Thottuva which is admittedly 35 kms away from the place of occurrence, he could not have been seen on the early hours i.e. 5.45 a.m. on 7.1.2001 at the place of occurrence.

19. Abraham Cheriyan (PW-59), IO supports the factum of statement under Section 27 of Evidence Act. The recovery has been witnessed by Ismail (PW-68) and Johny Cyriac (PW-72). Further, the IO from the CBI, PW-77 has also supported the recoveries and statement under Section 27.

20. The attempt of the defence to discredit the recoveries on the basis of answer given by G. Venkataraman (PW-77) to a question relating to investigation where he had stated that from investigation it was revealed that only Handkerchief and Socks had been recovered, ignores the fact that earlier the investigation had been conducted by PW-59 and the said question was with respect to investigation and not the factum of actual recovery which has been supported by PW-68 and PW-73.

21. V.O. Jose (PW-6), the photographer had lifted the fingerprints and PW-7 the fingerprint expert had matched them. The defence has not seriously denied it, but has tried to explain it by saying that he was a frequent visitor.

22. PW-51-Sub-Inspector recovered the hair and later the containers containing the hair were sealed in a separate packet. PW-53 has examined the hair recovered with the sample hair and has matched it. PW-60 Dr. Anila Kumari had collected the sample.

23. Much criticism has been made with respect to the collection of hair, about the aspect of sealing. The evidence on record clearly shows that the hair was kept in different containers and these containers were later on sealed in a packet. The containers themselves were not sealed. But since they were kept in a sealed packet, there was no possibility of any tampering.

24. The confessional statement is Exhibit P-59. It has been supported by PW-65, the Metropolitan Magistrate. PW-77, IO has categorically mentioned that the accused/appellant wanted to confess outside the State of Kerala. The defence assailed the same on the following grounds: (i) It was a result of torture and was retracted. (ii) There is non-compliance of Sections 164(4) and 164(2) of Code.

(iii) Local Magistrate was not informed.

25. It is respectfully submitted that none of the above submissions are tenable. Confession was not retracted except at the stage of statement under Section 313 of the Code. No complaint of torture has been made to the Magistrate, nor the torture has been suggested in the cross- examination either to PW-59 or PW-77

26. All necessary precautions required under Section 164(2) have been taken by the Magistrate as before recording the confession, she has given time to the accused-appellant to reflect. Secondly, she has also warned the accused about anything said by him in the evidence could be later on used against him and that he was not bound to give evidence. The submission of the defence that the word used by the Magistrate was `evidence' instead of `confession' and therefore, there was non-compliance of Section 164(2) is hyper-technical. The Magistrate has recorded in the statement that she has given the statutory warning and the statutory advice that he was not bound to make the statement. Section 463 has rightly been applied in the case.

27. This Court in State of UP v. Singhara Singh (AIR 1964 SC 358) (para 10) explained the scope of the oral evidence with respect to statements under 164 of Code as can be adduced under section 533 of Code (now Section 463 of Code) in following words:

.....What section 533 therefore, does is to permit oral evidence to be given to prove that the procedure laid down in section 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in Section 164 is not intended to be obligatory, Section 533 really emphasises that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so.

28. There has been full compliance of provisions of Section 164(2) and the confessional statement made freely and voluntarily by accused on bail cannot be rejected merely because the Magistrate has used the expression `evidence' instead of `confession' while warning the accused.

29. It would be further pertinent to mention here that the accused- appellant was released on bail on 25.1.2002 and he has given the confessional statement on 9.10.2002. Thus, when he had given the confessional statement, he was a free man. Further, the accused in his statement under Section 313 or during the cross-examination, has not suggested that the statement recorded by PW-65 under Section 164 was false.

30. PW-60-Dr. Anila Kumari has supported the case of extra judicial confession (Ext. P-48) which records the history of injury and also records the said confession. The statement made by the

independent witness Dr. Anila Kumari has been accepted by both the courts below. In her examination-in-chief, she has stated that, I had examined Antony as per the request of Dy.S.P. of Aluva. There is no material to show that the said Dy. S.P. (PW-59) was present at the time when the statement was recorded. Dy. S.P.(PW59) does not state that he had accompanied the accused to Doctor's house. Secondly, there is no material on record nor is there any suggestion made to PW-60 that when she had recorded the said confessional statement, any police person was present with the accused-appellant. Thus, the criticism of the defence that the said statement is not fit to be accepted as it has-been recorded in the presence of the police officers is without any material on record.

31. The appellant explanation in respect to the aforesaid noted is as follows:

Merely on suspicion and relying on the so called circumstantial evidence, which fall far short of required standard of proof the prosecution attributes motive to the accused i.e. he was in need of money to go to Saudi Arabia and that he murdered the deceased for that purpose. The motive there stands exploded if the evidences of PW 1, Mary Sunny (PW-45) and investigating officers PW-59 and PW-77 are perused. PW-1 states that on searching the house apart from savings bank deposit receipts worth Rs. 45 lakh, gold ornaments worth 55 sovereign were recovered from the almirah and currency notes worth Rs. 1.50 lakh were also recovered from that room in a brief case. Further, in the next room currency notes worth Rs, 45,000/- were recovered and gold ornaments kept inside the almirah were recovered. PW 45 another sister of deceased Augustine also corroborates this, though she says 95 sovereigns of gold ornaments and cash worth Rs 2.5 lakh were recovered. The investigating Officer also testifies to the same effect.

32. The accused denied his involvement in the crime. The evidence of the prosecution witnesses namely, PW 14, PW 23, PW 24 go to show that the accused was a conscientious person who reed the debts and that out of the new given by Augustine on 6.1.2001 of Rs 35 000/- he had repaid PW 23 and PW 24. If money was a motive, the accused would have decamped with cash and jewellery and such a person will not be conscientious enough to repay the loan to PWs 23 and 24, and promised PW 23 that he will settle the balance of Rs. 3000/- with interest and also not take back the signed stamp paper and the blank cheque left with PW 23.

33. Above being the position, the appeal is without merit, and deserves dismissal which we direct.