Baby @ Sebastian & Anr vs Circle Inspector Of Police Adimaly on 26 July, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3671, 2016 (13) SCC 333, AIR 2016 SC (CRIMINAL) 1347, 2016 (4) AJR 477, (2016) 65 OCR 272, (2016) 3 ALLCRILR 641, 2017 ALLMR(CRI) 3823, (2016) 3 UC 1665, (2016) 2 BOMCR(CRI) 4, (2016) 4 MH LJ (CRI) 661, (2016) 2 ALD(CRL) 537, (2016) 96 ALLCRIC 918, (2016) 3 CRIMES 310, 2016 CRILR(SC&MP) 806, 2016 CRILR(SC MAH GUJ) 806, (2016) 3 CRILR(RAJ) 806, (2016) 4 RECCIVR 74(1), (2016) 7 SCALE 444, (2016) 165 ALLINDCAS 24 (SC), (2016) 4 BOMCR(CRI) 1, (2016) 3 DLT(CRL) 721, (2016) 3 CURCRIR 334, 2016 (4) KCCR SN 557 (SC)

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Bench: R.K. Agrawal, V. Gopala Gowda

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 952 OF 2010

BABY @ SEBASTIAN & ANR. ……APPELLANTS

Vs.

CIRCLE INSPECTOR OF POLICE, ADIMALY ……RESPONDENT

J U D G M E N T

V.GOPALA GOWDA, J.

This criminal appeal is directed against the impugned judgment and order dated 09.06.2009 in Crl. Appeal No. 1898 of 2005 passed by the High Court of Kerala at Ernakulam whereby it has allowed the said criminal appeal filed by the respondent herein, by setting aside the order of acquittal passed by the Court of the Addl. Sessions Judge, Thodupuzha, in Sessions Case No.461 of 2001. The High Court convicted both the appellants for the offence punishable under Section 302 read with Section 34 of Indian Penal Code, 1860 (for short 'IPC') and has sentenced them to undergo imprisonment for life with a fine of Rs.25,000/- each. In default of payment of fine they shall suffer rigorous imprisonment for two years each.

Brief facts of the case are stated hereunder to appreciate the rival legal contentions urged on behalf of the parties:

The case of the prosecution is that one young man named Jojo (since deceased), an auto rickshaw driver by profession, was in romantic relationship with a minor girl named Smitha (PW-2) daughter of the appellant no.1. The relationship between the two was vehemently opposed by the girl's family. The appellant no.1 completely ruled out the possibility of marriage between the two and allegedly extended threats to Jojo. After having found the strong opposition from the girl's family with regard to their marriage, Jojo and Smitha (PW-2) planned to elope on 19.07.2000 at about 11 pm. Accordingly, both started at about 11.45 pm from Mammattikkanam Kara. Both the appellants sensed their plan and with a view to foil the same, they followed and intercepted Jojo and Smitha (PW-2).

Thereafter, allegedly the appellant no.1 caught hold of the neck of Jojo and pushed him down into the paddy field which was filled with mud and water. He sat on his body and the appellant no.2 caught hold of his neck from back side and immersed his face in the muddy water again and again, thereby strangulated and killed him. Manoj (PW-1) residing a little away from the scene of occurrence informed the matter to one Ravi. Ravi, Secretary of the local Gram Panchayat in turn informed the matter to Idukki police Station, Rajakkad.

Soon after, the Sub-Inspector (PW-31) reached the place of occurrence and recorded the statement of PW-1. Thereafter, FIR No. 102 of 2000 was registered against three persons viz., appellant nos.1, 2 and one Thressiamma for offence punishable under Section 302 read with Section 34 of IPC.

However, Thressiamma was discharged by the learned Sessions Judge of all the charges against her. The trial court commenced the trial against both the appellants. During trial, the prosecution examined 32 witnesses to prove beyond reasonable doubt the guilt of both the appellants on the charges. The Trial Court after proper appreciation of evidence on record by its judgment and order dated 13.11.2003 acquitted both the appellants of all the charges levelled against them holding that the prosecution case against the appellants/accused persons is not free from reasonable doubt.

Aggrieved by the decision of the Trial Court the respondent-State approached the High Court of Kerala at Ernakulam by filing Criminal Appeal No. 1898 of 2005. The High Court by its judgment and order dated 09.06.2009 allowed the criminal appeal by setting aside the acquittal order passed by the Trial Court. The High Court has convicted both the appellants under Section 302 read with Section 34 of IPC and sentenced them to undergo imprisonment for life with a fine of Rs. 25,000/- each. Hence, this appeal.

Mr. M. Karpaga Vinayagam, the learned senior counsel on behalf of both the appellants contended that the High Court has erred in convicting both the appellants without adhering to the well settled proposition of law regarding appeal against acquittal that the order of acquittal shall not be generally interfered with by the appellate court in exercise of its jurisdiction because of the presumption of innocence of the accused who were acquitted by the Trial Court by recording cogent and valid reasons on proper appreciation of evidence on record. It was further submitted by him that the above said legal principle has to be followed by the appellate court considering the appeal against the judgment of acquittal, the same can be interfered with only when there are compelling and substantial reasons namely, the findings and reasons recorded on the charge are patently either perverse or erroneous in law in order to prevent miscarriage of justice in the case. In the present case, the Trial Court after appreciating the evidence on record has rightly acquitted both the appellants from the charges. There exists no legal infirmity in the judgment passed by the Trial Court. However, the High Court has proceeded on surmises and conjectures and reversed the order of acquittal without examining the correctness of the findings and reasons recorded by the Trial Court on proper appreciation of evidence on record. Therefore, he submitted that the impugned judgment and order passed by the High Court is unsustainable in law and deserves to be set aside in the interest of justice by this Court in exercise of its appellate jurisdiction.

It was further contended by the learned senior counsel that the High Court has grossly erred in convicting both the appellants on the assumption that the presence of the appellants at the scene of occurrence as stated by PW-6 has not been disowned by him and it stands on a better footing. It was further submitted by him that PW-1 has not seen the incident. In fact in his statement recorded under Section 164 of CrPC before the court he has denied having said to the police that he saw the appellants or any other person at the place of occurrence. The prosecution has not been able to discredit the version of this witness and his testimony stands uncontroverted. In such circumstances the High Court has erred in holding that the testimony of PW-1 should be disbelieved as he was trying to help the appellants.

The learned senior counsel further contended that the High Court has failed to appreciate the fact that the testimony of PW-6 is full of contradictions. It was submitted that the Trial Court has rightly taken note of the fact that PW-6 after witnessing the incident did not inform the same to anybody neither to the police nor his family members rather the next morning he reached the place of occurrence and on police enquiring with the people gathered there as to whether anyone witnessed the incident, he ventured and told the police. The conduct of this witness in not disclosing the fact that he has witnessed the incident to anybody either immediately or within reasonable time from the time of occurrence of crime casts serious suspicion on his veracity and reliability of his evidence. In this regard the learned senior counsel placed reliance upon the decision of this Court in the case of Chanan Singh v. State of Haryana[1].

It was further submitted by the learned senior counsel that the High Court has erred by placing reliance on the testimony of PW-6 without appreciating the testimony of PW-5 which further casts a shadow of doubt upon the evidence of PW-6 whose evidence is accepted by the appellate court for reversing the order of acquittal of both the appellants passed by the Trial Court.

It was further contended by the learned senior counsel that the High Court has failed to look into the suspicious circumstances surrounding the case of the prosecution. As per the statement of the father of the deceased (PW-

13), he left his house with two bags, a gold chain and Rs. 25,000/- with him. It is the case of the prosecution that all the said things went missing and nothing has been recovered. The possibility of involvement of some third person committing the crime for money and valuables cannot be ruled out. Therefore, the appellant court should have given benefit of doubt to both the appellants in the absence of any concrete and cogent evidence to prove their involvement in the crime.

It was further submitted by the learned senior counsel that the High Court has not noted the contradictions between the statements of PWs-13 and 16 as to the threat alleged to have been issued by the appellants and their family to the deceased. The High Court should have appreciated the fact that PW-13 being the father of the deceased is an interested witness and could not have been relied upon by the High Court in the absence of corroboration by other evidence on record. In fact, PW-16, who is an impartial witness has contradicted the statement of PW-13 by stating on oath that no such threats were ever issued by the appellants or any of their family members.

The learned senior counsel further contended that the Trial Court has rightly taken note of the facts narrated by PW-17 that he had left the locality along with his family after the occurrence and shifting his residence to a place 80 kms away. It was further submitted by him that the aforesaid strange behaviour on the part of PW-17 has to be read with in conjunction with the fact that two bags carried by the deceased along with a gold chain and Rs. 25,000/- have gone missing and has not been recovered as stated by the police. PW-17 did not report the occurrence to anyone and absconded from the place of incident. His statement was recorded by the police after 6 days of the incident. The aforesaid fact should have been considered by the High Court with seriousness and carefully before accepting his evidence. The evidence of PW-17 is completely unreliable to record the finding of the guilt of both the appellants.

It was further contended by the learned senior counsel that in the present case, PWs 1,2,3,4,5,7,8,9,10,11,12,18,29,20,21 and 23 did not support the prosecution case and they were declared as hostile witnesses. Therefore, it was highly inappropriate on the part of the High Court to convict both the appellants on the basis of statements given by such aforesaid witnesses to the police under Section 161 of CrPC alone in the absence of any other corroborative evidence placed on record by the prosecution. In this regard reliance is placed upon the decision of this Court in Ramswaroop v. State of Rajasthan[2] and Rajendra Singh v. State of U.P.[3].

In his further submissions the learned senior counsel assailed the fact of the presence of injuries on the person of PW-2 and appellant No.2 upon which reliance is placed by the High Court in reversing the finding of acquittal and convicting both the appellants in the manner that the nature of the wound on the person of PW-2 was incised wound caused by the sharp object and it is the specific case of PW-2 that she sustained injuries while she was cutting grass. This statement of the above witness has not been demolished by the prosecution. Moreover, there is no recovery of such sharp edged weapon from the place of occurrence or from the house of the appellants. It is not even the case of the prosecution that similar injuries were found on the person of the deceased. As regards the injuries sustained to appellant no.2, the Court has not even gone into the nature of injuries on his person. He further submitted that the High Court has grossly erred in relying upon the version of the prosecution that the injuries could have been caused in the course of fight between the deceased and the accused persons.

The learned senior counsel further contended that the High Court should have re-appreciated the case of prosecution that the Christmas cards and other letters alleged to have been written by PW-2 to Jojo have not been proved to have been sent by PW-2 as the same were never sent to handwriting expert for examination to prove the fact that it was in the handwriting of PW-2. In this regard he further submitted that in the absence of any evidence to show that the alleged letters and cards were sent by PW-2 to the deceased-Jojo, the High Court has erred in relying on the same to hold that both PW-2 and the deceased were in a romantic relationship and terming the same as the reason for the incident involving both the appellants.

While concluding his contentions the learned senior counsel submitted that in convicting both the appellants the High Court has ignored the settled principles of criminal law that every person is presumed to be innocent until proved otherwise and the standard of proof in criminal law is 'proof beyond reasonable doubt', in the guise of protecting the credibility of the judicial system. It has based its reasoning only to ensure that the people in whom the investigating agencies has reposed faith should not be allowed to turn back at the crucial moment. The High Court has relied upon those evidences which are completely unreliable. Therefore, the impugned judgment and order deserves to be set aside in the interest of justice by this Court in exercise of its appellate jurisdiction.

Per Contra, Ms. Liz Mathew, the learned counsel on behalf of the respondent sought to justify the impugned judgment and order passed by the High Court on the ground that the same is well founded and is not vitiated in law. It was submitted by her that no interference of this Court is required in exercise of its appellate jurisdiction.

It was contended by her that the High Court has rightly appreciated the evidence of PW-6 in proper perspective by holding that PW-6 took time to disclose the incident to police for the reason that he was a stranger to the locality. The observation of the High Court is only an enunciation of normal behaviour of any reasonable person which does not require any other evidence.

With regard to the identification of the appellants by PW-6, it was submitted by the learned counsel that dock identification is substantive evidence. This witness has clearly identified the appellants as perpetrators of the crime. It was further contended that since this is not a case where the witness

could only have a fleeting glance of the accused persons, the absence of a test identification parade does not shake the prosecution case in any manner. It was further submitted by the learned counsel that apart from some trifling contradictions that may have arisen on account of the long lapse of time, no material contradictions have been brought from this witness to shake the prosecution case despite having been cross-examined by the defence counsel at length. The learned counsel further submitted that when the incident is taking place in a public place, persons passing by are the best witnesses and therefore, their evidence could not be discarded. In this regard the learned counsel has placed reliance upon the decision of this Court in Raju v. State of Maharashtra[4], para 6 of which reads thus:

> "In the absence of anything elicited in the cross-examination to indicate that these two witnesses were interested in the prosecution of the appellants we are in full agreement with the above-quoted observations of the High Court. The other criticism levelled by the trial court that they were chance witnesses is also wholly unmerited for in respect of an incident that takes place on a public road, the passers-by would be the best witnesses. We have, therefore, no hesitation in concluding that the claim of the above two witnesses that they had seen the incident cannot be disputed at all."
> With regard to the credibility of evidence of PW-17, it was submitted by the learned counsel that PW-17 after witnessing the incident narrated the same to a neighbour. A perusal of the testimony of this witness reveals no concoction in his version and therefore he is completely reliable. It was further submitted that the reason for this witness to leave the locality along with his family members and shifting his residence to a place 80 kms away from the place of occurrence has been duly explained by him in his evidence. Being a tenant in the premises belonging to the appellants, he moved out of fear as the appellants had threatened to kill him. He appeared before the police soon after the arrest of the appellants and narrated the incident.
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> It was further contended by the learned counsel that the non-recovery of the baggage, gold chain and Rs. 25,000/- which the deceased was carrying can at best be stated to be a defect in the investigation. There is nothing on record to suggest that PW-17 has any connection with the missing articles.
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> The learned counsel further contended that the appellants were named in all contemporaneous documents prepared after the occurrence, especially the FIR which was lodged soon after the occurrence. It is settled principle of law that prompt lodging of FIR precludes the possibility of deliberation to falsely implicate any person. A prompt FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence. The learned counsel has placed reliance upon the decision of this Court in Meharaj Singh v. State of Uttar Pradesh[5].
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> While concluding her contentions the learned counsel submitted that the statement of PW-6 is duly corroborated by statement of PW-17 and admissible portions of testimonies of other witnesses and medical evidence in this regard. There is no infirmity with the impugned judgment and order passed by the High Court which

requires interference by this Court.

We have heard both the parties at length and have given our conscious thought to the material evidence on record and the relevant provisions of law. The question for our consideration is whether the prosecution evidence establishes beyond reasonable doubt the commission of the offence by the accused-appellants under Section 302 read with Section 34 of IPC.

This Court in the case of Bindeshwari Prasad Singh alias B.P. Singh and Ors. v. State of Bihar and Anr.[6] has held that in the absence of manifest illegality and perversity in the trial court's findings and reasons resulting in grave miscarriage of justice, the High Court is not justified in interfering with the trial court's order in exercise of revisional jurisdiction. The relevant para 13 reads thus:

"13. The instant case is not one where any such illegality was committed by the trial court. In the absence of any legal infirmity either in the procedure or in the conduct of the trial, there was no justification for the High Court to interfere in exercise of its revisional jurisdiction. It has repeatedly been held that the High Court should not re-appreciate the evidence to reach a finding different from the trial court. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction in such cases is not warranted." (emphasis supplied by this Court) Further, this Court in Sunil Kumar Sambu Dayal Gupta & Anr. v. State of Maharashtra[7] has held that presumption of innocence is a human right. The appellate court should not interfere with the acquittal order passed by the trial court merely because two views are possible in a given case. The relevant paras 38 and 39 read thus:

"38. It is a well-established principle of law, consistently re-iterated and followed by this Court is that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial Court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanor of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved.

The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its

seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the Trial Court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference." (emphasis supplied by this Court) The said view is further reiterated by this Court in the case of Rathinam @ Rathinam V. State of Tamil Nadu & Anr.[8] The relevant para 30 reads thus:

> "30. It is now beyond dispute that interference in such an appeal should be made sparingly in a situation where the findings of the High Court are perverse and not possible on the evidence and if two views are possible the one leading to acquittal should not be disturbed. The presumption of innocence which is always raised in favour of an accused is further strengthened by an acquittal and bolsters the claim of the accused. The aforesaid time-honoured principles have been recently set out in the judgment of this Court in Arulvelu and Anr. v. State...." (emphasis supplied by this Court) In the instant case, the High Court is not justified in holding PW-6 and PW- 17 are as reliable witnesses after re-appreciating the evidence on record when there is absence of manifest illegality and perversity in the acquittal order passed by the Trial Court.

A careful reading of the evidence on record clearly highlights the material contradictions and discrepancies in the prosecution evidence especially the testimonies of Mathai (PW-6) and Eldose (PW-17) upon which strong reliance has been placed by the High Court in convicting both the appellants by setting aside the acquittal order passed by the Trial Court. From the testimony of PW-6 one thing is clear that he is a chance witness who happened to have witnessed the incident by chance. It is a well settled legal principle that the evidence of a chance witness cannot be brushed aside simply because he is a chance witness but his presence at the place of occurrence must be satisfactorily explained by the prosecution so as to make his testimony free from doubt and thus, reliable . This Court in the case of Jarnail Singh v. State of Punjab[9] has elaborately explained the reliability of a chance witness as under:

> "21. In Sachchey Lal Tiwari v. State of U.P. this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:
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> If the offence is committed in a street only passer-by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there.
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> The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and

more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (Satbir v. Surat Singh, Harjinder Singh v. State of Gujarat, Acharaparambath Pradeepan and Anr. v. State of Kerala and Sarvesh Narain Shukla v. Daroga Singh). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal v. State of Rajasthan)." (emphasis supplied by this Court) However, in the instant case, the presence of PW-6, a chance witness, at the place of occurrence is not free from doubt. PW-6 in his testimony has stated that he along with PW-5 while proceeding from Rajakkad to Kuthungal at about 11.45 pm witnessed the occurrence. He has accounted for his presence at the place of occurrence by stating thus:

"PW-5 Thomas asked me a loan of Rs. 500/-. He requested for money 5/6 days back. I had agreed to pay him the money, as soon as I get it from the contractor. Had not stated, when would I get the money. After asking me for a loan, he reminded me about it twice. Had told Thomas that we would meet at Rajakkad. I went to Rajakkad, reaching there at 6.00 am along with PW-5 I went to the contractor K.S's office. The contractor is K.S. Kunju Mohammed. Had met PW-5 Thomas that day. That was at Rajakkad. We sat at the room of K.S. for an hour. We spent there from 6.00pm to 7.00pm. Since we could not meet K.S we went to the cinema at the nearby theatre. After the show was over, we again went to the room of K.S. K.S could not be met. We took food from fast food (thattukada) shop. After that when we were going home, we witnessed incident." However, PW-5 has not supported this version of PW-6. PW-5 in his testimony has stated that he did not witness anything. Further, the deposition of PW- 6 is full of contradictions. On the one hand he says:

"...Two persons were standing in the field. One among them was searching for something. After a while a head came out of slush. A person wearing shirt again pushed the head into the slush forcibly. A-1 standing in the dock was the person without shirt, and A-2 is the person who was wearing the shirt who pushed the head into the slush) is in the dock." On the other hand, while deposing he says:

"...I had no personal knowledge when I left as to who attacked whom." Further, the conduct of PW-6 in not disclosing the incident either to police or to anyone in the village creates a suspicion and renders his version of the incident is doubtful. PW-6 according to his testimony left the place of occurrence quietly and did not inform about the incident to anyone. The relevant portion from his testimony reads thus:

"...I did not tell anybody at anybody at the house what all I saw then. I did not make any noise (cry out); nor did I attempt to save the drowning person. Before telling the police, I had not spoken about the event to anybody else. That was on the next day at the scene of occurrence...

xx xx xx ...Except for the statement to the police, I am speaking about the occurrence only before the court now. If I were not questioned by the police, I would not have spoken about the occurrence which I saw to anybody else. I went to the scene of occurrence and stood there. That was on the next day. Police invited those who had seen the occurrence to come forward and state the facts. At this juncture, I went forward and explained the facts." From the aforesaid evidence, it is clear that PW-6 has acted in an unnatural manner. In this backdrop this Court is of the opinion that the learned senior counsel for both the appellants has rightly pointed out that this unusual behaviour on the part of PW-6 in not telling anyone about the incident of murder which he allegedly witnessed certainly casts a serious doubt upon his testimony. Therefore, the Trial Court has rightly rejected the evidence of PW-6 stating that the same is highly unreliable as it has failed to inspire confidence with regard to the presence of PW-6 at the place of occurrence at the time of incident. Hence, the Trial Court has rightly held thus:

"6....His conduct in immediately not disclosing the fact that he witnessed the murder to anybody casts a suspicion on his veracity...According to PW-6 he had walked 3.5 kms at about midnight and reached the place of occurrence when the incident was happening and without making any attempt to prevent the murder he just proceeded to his house still 3.5 kms away by walk. In the considered opinion of this court the above evidence of PW-6 does not inspire confidence. It will be highly unsafe to rely upon the evidence of PW-6." As far as evidence of PW-17 is concerned, it is clear from the material placed on record that he is not an eye-witness to the incident. The Trial Court has rightly dealt with the evidence of PW-17 as under:

"7. PW 17 is the other witness who has given incriminating evidence against the accused. According to him he had resided at the vicinity of the place of occurrence at the relevant period. On the date of occurrence namely on 19.7.00 at about 10 pm the deceased came to his house with two bags. The deceased told him that he was going to live together with his lover Smitha (PW2). At about 11 pm he went away with the two bags. After sometime the deceased and PW2 Smitha came there. Then he and his wife were standing near the way near their house as directed by the deceased. The deceased and PW2 bid farewell and went away and PW 17 and wife returned to their house and slept. After about one hour somebody knocked on the door and PW17 opened the door and saw the discharged accused. Thressiamma who is the mother of accused No.1 there. Then Thressiama told him that they were going to hospital with Shajan (A2). She requested PW 17 to come to her house. She further told that their child had eloped with one person and they had killed him. PW 17 went to the house of the accused. Then he saw PW 2 (Smitha) standing there weeping. There was mud on her body. Smitha told that Jojo Chettayi was killed by father and brother. PW 17 immediately went to the paddy field and saw the body of the deceased. He again went to the house of the accused. Then the discharged accused Thressiamma gave some money to accused No. 1. After getting the money the accused persons went away.

8. The above is the circumstantial evidence furnished by PW 17 Eldhose against the accused. Of course the statements attributed by him to Thressiamma and Smitha cannot be covered by any section of the Evidence Act/concerned with the relevancy of facts and so the said statements cannot be considered legal evidence. PW 17 was very vehemently cross examined on behalf of the accused. He admitted that immediately after the occurrence he himself and family left the place and shifted his residence to a place named Thalakode which is 80 kms away from the place of occurrence. He admitted that for the next 5 days of the occurrence himself and his wife were not present in the house. Immediately after that they shifted resident to the place 80 kms away from the place of occurrence. The suggestion by the defence to this witness is that the deceased had two bags a considerable amount of money and some gold ornaments were with him and PW 17 is involved in the death of the deceased. Of course PW 17 denied the said suggestion. From the evidence of PWs 13 to 15 who are the father, mother and brother of the deceased it is clear that the deceased had some ornaments and a considerable amount of money with him. He had bags also with him. The bags and the money have not been recovered by the investigating agency. The prosecution has no case that the accused persons murdered the deceased for taking these valuable. The strange conduct of PW 17 in leaving the locality immediately after the occurrence and shifting his residence from there to far away place 80 kms from the place of occurrence is suspicious. Of course in re-examination the prosecution has made desperate attempt to bring out from him that as the accused threatened him he shifted his residence. But he has not stated such a very important fact before police and the said omission obviously amounts a material contradicting and so above version of threat from the accused cannot be relied upon. As already mentioned above the conduct of PW 17 in immediately going into a sort of abscondence for the ensuing 5 day of the murder and there after shifting his residence to a distance of 80kms appears to be very suspicious. Further admittedly the relatives of accused etc. are residing in the neighbourhood. PW 17 admitted that he did not report these facts to any of them. Considering all these facts and circumstances this court is of the view that it will be highly unsafe to act upon the evidence against the accused furnished by PW 17 Eldhose." (emphasis laid by this Court) Further the fact that the age of injuries present on the person of PW-2 and appellant no.2 matches with the approximate time of incident in no way carves out an active role on the part of both the appellants in commission of murder of Jojo.

The material evidence on record does not reveal anything which incriminates both the appellants. Further, the depositions of parents of the deceased i.e., PW-13 and PW-14 in no way implicate both the appellants as the offenders. Rest of the prosecution witnesses have turned hostile and have not supported the prosecution story on material facts to show that both the appellants are involved in the crime as alleged against them.

In the instant case, the prosecution has failed to prove the guilt of both the appellants beyond reasonable doubt. Though the prosecution witnesses Nos. 1,2,3,4,5,7,8,9,10,11,12,18,29,20,21 and 23 have turned hostile, their alleged statements made to the police under Section 161 of CrPC were not confronted to them and marked as exhibits and further the I.O. has not spoken in his evidence anything about the alleged statements of the above hostile witnesses recorded under Section 161 as held by this Court in three Judge Bench in the case of V.K. Mishra v. State of Uttarakhand[10]. Thus, placing reliance upon their statements under Section 161 by the High Court to record the finding of conviction is erroneous in law. The High Court has failed to appreciate the same in arriving at

different conclusion other than the Trial Court in exercise of its appellate jurisdiction. Therefore, the impugned judgment and order passed by the High Court must be set aside by this Court in exercise of its appellate jurisdiction.

For the reasons stated supra, this criminal appeal is allowed. The impugned judgment and order dated 09.06.2009 passed by the High Court of Kerala at Ernakulam in Criminal appeal No. 1898 of 2005 is set aside and the judgment and order of acquittal passed by the Trial Court is restored. Both the accused-appellants are acquitted of all the charges levelled against them. Since both the appellants are in jail, the jail authorities are directed to release them forthwith if they are not required in connection with any other case.

.....J.
[V. GOPALA GOWDA]

.....J.
[R.K. AGRAWAL]

New Delhi, 26th July, 2016

ITEM NO.1A-For Judgment COURT NO.8 SECTION IIB

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 952/2010
BABY @ SEBASTIAN & ANR. Appellant(s)

VERSUS

CIRCLE INSPECTOR OF POLICE ADIMALY Respondent(s)

Date : 26/07/2016 This appeal was called on for pronouncement of JUDGMENT today.

For Appellant(s) Mr. M. Karpaga Vinayagam, Sr. Adv.

Mrs. V.S. Lakshmi, Adv.

Mr. A. Venayagam Balan,Adv.

For Respondent(s) Mr. C.K. Sasi, Adv.
Ms. Liz Mathew,Adv.

Hon'ble Mr. Justice V.Gopala Gowda pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice R.K. Agrawal.

The appeal is allowed in terms of the signed Non-Reportable judgment. Both the accused-appellants are acquitted of all the charges levelled against them. Since both the appellants are in jail, the jail authorities are directed to release them forthwith if they are not required in connection with any other case.

(VINOD KR.JHA)
COURT MASTER

(SUMAN JAIN)
COURT MASTER

(Signed Non-Reportable judgment is placed on the file)

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[1] [2] (1971) 3 SCC 466 [3] [4] (2004) 13 SCC 134 [5] [6] (2007) 7 SCC 378 [7] [8] (1998) 1 SCC 169 [9] [10] (1994) 5 SCC 188 [11] [12] (2002) 6 SCC 650 [13] [14] (2010) 13 SCC 657 [15] [16] (2011) 11 SCC 140 [17] [18] (2009) 9 SCC 719 [19] [20] (2015) 9 SCC 588 (paras 16-19)