

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

CRL.A.No. 602 of 2010 ()

AGAINST THE JUDGMENT IN SC 86/2004 of COURT OF SPECIAL ADDITIONAL
SESSIONS JUDGE (MARADU CASES), KOZHIKODE DATED 17-03-2010

APPELLANT(S)/ACCUSED NOS.1, 2, 6, 13 AND 15::

- 1.T.SREEDHARAN, AGED 55 YEARS
S/O.BHASKARAN, THEKETHODI VEEDU, BEYPORE AMSOM DESOM
MARAD.
2. T.SURESAN, AGED 55 YEARS,
S/O.BHASKARAN, THEKKETHODI VEEDU, BEYPORE AMSOM DESOM
MARAD.
3. KALESH @ KRISHNAKUMAR,
AGED 30 YEARS, S/O.VYASAN, CHOYICHANTAKATH VEEDU
BEYPORE AMSOM DESOM, MARAD.
4. VINOD, AGED 25 YEARS, S/O.SUGUNAN,
CHERIYAPURAYIL VEEDU, BEYPORE AMSOM DESOM
MARAD.
5. MANIKANDAN, AGED 34 YEARS,
S/O.LAKSHMANAN, ARAYACHANTAKATH VEEDU
BEYPORE AMSOM DESOM, MARAD.
6. VIJITH, AGED 30 YEARS, S/O.KRISHNAN,
THEKKETHODI VEEDU, BEYPORE AMSOM DESOM
MARAD.

BY ADVS.SRI.P.S.SREEDHARAN PILLAI
SMT.C.G.PREETHA

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SPECIAL PUBLIC PROSECUTOR SRI.S. SREEKUMAR (SR.)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-11-2015 ALONG
WITH CRA. 709/2010, CRA. 429/2011 AND CRAV. 926/2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

**C.T. RAVIKUMAR
&
K.P.JYOTHINDRANATH, JJ.**

**CRL.APPEAL Nos.602 & 709 OF 2010,
429 OF 2011 AND CRL.APPEAL (V).No.926 OF 2015**

Dated this the 27th day of November, 2015

Ravikumar, J.

JUDGMENT

Death of one Aboobacker in a nefarious assault committed in a fishermen village by name Marad which was fear stricken and benumbed following the felony of the previous day wherein four persons lost their lives in a factional fight between two communities, is the subject matter in these appeals. All these appeals arise out of the judgment of the Court Special Additional Sessions Judge (Marad Cases), Kozhikode in S.C.No.86 of 2004 whereby and whereunder the Court handed down verdict of conviction to all but one. Crl.Appeal Nos. 602 and 709 of 2010 are filed by the convicts therein. For the sake of convenience the convicts are referred to hereafter in this judgment as appellants-accused or in accordance with their status in the array of accused in S.C.No.86 of 2004. The former among them

has been filed by accused Nos.1, 2, 6 and 13 to 15 and the latter among them has been filed by accused Nos.3 to 5, 7 and 9 to 12. They were tried for the offences punishable under sections 143, 147, 148, 153A and 302 read with section 149 of the Indian Penal Code and section 5 (1) read with section 27(1) of the Indian Arms Act. Accused No.8 was acquitted of all the charged offences. In the case of accused Nos.3, 4, 5, 7, 9, 10, 11, 12 and 14, they were convicted for the offences punishable under sections 143, 148, 153A and 302, IPC. For the conviction under section 302, IPC, they were sentenced to undergo imprisonment for life and also to pay a fine of ₹20,000/- each. In default of payment of fine, they were ordered to undergo simple imprisonment for two years each. For the conviction under section 143, IPC, they were sentenced to pay a fine of ₹3,000/- each and in default of payment of fine, they were ordered to undergo simple imprisonment for one month each. For the conviction under section 148, IPC, they were sentenced to pay a fine of ₹5,000/- each and in default of payment of fine, they were ordered to undergo simple

imprisonment for three months each. For the conviction under section 153A, IPC, they were sentenced to undergo rigorous imprisonment for two years each. They were convicted for the offences as aforesaid with the aid of section 149, IPC. In addition to the same, accused No.12 was convicted under section 7 read with section 25 of the Indian Arms Act and he was sentenced to undergo rigorous imprisonment for five years and to pay a fine of ₹10,000/-. In the case of accused Nos. 1, 2, 6, 13 and 15, they were acquitted of the offence punishable under section 302, IPC, but were convicted for the offence under sections 143, 148, 153A and 326 read with section 149 IPC and imposed with the very same sentences in respect of each of such offences, as awarded to accused Nos.3, 4, 5, 7, 9, 10, 11, 12 and 14. Additionally, they were also convicted for offence under section 326, IPC and for the conviction thereunder, the first accused was sentenced to undergo rigorous imprisonment for three years and in the case of others, they were sentenced to undergo rigorous imprisonment for five years each. All of them were also sentenced to pay a fine of ₹10,000/- each and in

default of payment of fine, they were ordered to undergo simple imprisonment for six months each.

2.Crl.Appeal No.429 of 2011 has been filed by the State challenging the very same judgment to the extent it ordered acquittal of accused Nos.2, 6, 13 and 15 of the offence punishable under section 302 read with section 149, IPC. Crl.Appeal No.926 of 2015 is filed by the victim viz., the widow of the deceased Aboobacker, virtually raising the same challenge against the same judgment in respect of the first accused as well in addition to accused Nos. 2, 6, 13 and 15 and with prayer for their conviction for the offence punishable under section 302 read with section 149, IPC and further for sentencing all the convicts-appellants with death penalty.

3.The prosecution case was that with the common object of promoting feelings of enmity among Hindu and Muslim communities of Marad Village and in furtherance of the said common object, the appellants-accused formed into an unlawful assembly on 4.1.2002 and committed rioting and attacked Aboobacker brutally and he succumbed

to the injuries inflicted upon him, almost instantaneously. Going by the court charge, accused Nos.2, 7 and 12 stabbed the deceased with sword and accused Nos.4 and 11 stabbed him with chopper, accused Nos.9 and 10 beaten him with sticks and accused Nos.5, 8 and 14 hit him with granite stone pieces. Apart from charging them for having formed unlawful assembly with the common object of creating disharmony among Hindus and Muslims of Marad in Beypore Village and to cause the death of Aboobacker in furtherance of their common object in that regard and for promoting feelingness of enmity between the aforesaid communities, they were also charged with commission of offence punishable under section 5(1) read with section 27(1) of the Indian Arms Act.

4.To prove the charge against the appellants-accused, the prosecution has examined 20 witnesses and exhibited 22 documents besides identifying MOs 1 to 12. After the closure of the evidence of the prosecution, the appellants-accused were examined under section 313 of the Code of Criminal Procedure. They denied all the

incriminating circumstances put to them. Upon finding that the appellants-accused were not entitled to be acquitted under section 232, Cr.P.C, they were called upon to enter on their defence. On the side of the appellants-accused, DWs 1 and 2 were examined and Exts.D1 to D14 which are the CD contradictions and Ext.D15, the death certificate in respect of one Sri.T.Sreedharan, were marked. It is after appreciating the evidence on record and considering the arguments advanced by both sides that the trial court entered into the finding that the prosecution has succeeded in proving that the accused-appellants have committed the offences as mentioned hereinbefore and convicted and sentenced them as aforesaid. These appeals are filed in the aforesaid circumstances.

5.We have heard the learned counsel Mr. P.S.Sreedharan Pillai for accused Nos.1, 2, 6, 13, 14 and 15, the learned Senior Counsel Mr. P.Vijaya Bhanu for appellants-accused 3, 9, 10 and 11, the learned Senior Counsel Mr. B.Raman Pillai for appellants-accused 4, 5, 7 and 12 and learned counsel Mr.Sunny Mathew for the appellant in

Crl.Appeal No.926 of 2015. We have also heard Senior Counsel Mr.S.Sreekumar, the learned Special Public Prosecutor.

6.The question to be considered first, is whether the death of Aboobacker is homicidal or not ? As a matter of fact, the fact that death of Aboobacker was homicide is not disputed before us. Virtually, it is indisputable in view of the evidence of PW16 with Ext.P14 postmortem report. PW16 is the doctor who conducted autopsy on the body of Aboobacker and issued Ext.P14 postmortem certificate. In Ext.P14 the following ante-mortem injuries were noted:-

1. Incised wound 7 x 1cm long bone deep right side of forehead, oblique, lower right end 1cm above outer angle of right eye, left edges 3 cm above root of nose.
2. Incised wound 4 x 0.5cm bone deep transverse on right side of forehead left end 1.5 above inner end of eyebrow, it is obliquely transected by injury No.1.
3. Incised wound 7.5 x 0.3cm, bone deep, oblique on the forehead into lower front left end being 3.5 cm above the left eyebrow and 3cm to the left of middle.
4. Incised wound 9.5 x 0.5cm, bone deep oblique on the top of head, its front outer left end being 8cm above the outer end of left eyebrow.

5. Superficial incised wound 10 x 0.3cm vertical on the left side of face raising a flap of cuticle (7 x 0.5cm) backwards at its upper part, its lower end 5cm in front of tragus of ear.
6. Incised wound 4 x 0.3cm bone deep oblique on the left side of head its lower front end being 5.5 cm above the root of ear.
7. Incised wound 3 x 1cm bone deep on the root of nose. Fracture of nasal bones underneath.
8. Superficial incised wound 4 x 0.1 cm oblique across the bridge of nose.
9. Abrasion 4 x 2 cm on the right cheek just below the orbital margin.
10. Lacerated wound 5 x 1cm bone deep almost vertical on the right side of chin its margin involving the lower lip and 0.5 cm outer to midline, with an abrasion 0.5 cm x 0.5cm just inner to it on the outer aspect of lower lip.
11. Lacerated wound 1.5x0.5x0.8 cm vertical on the upper lip correspondingly above injury No.10.
12. Incised wound 2.5x 1x 2cm oblique on the right side of front of chest, its upper inner end being 1cm to the right of midline and just below collar bone with superficial incised wounds 7 x 0.1cm oblique at its upper end and 12 x 0.1cm oblique at its lower end.
13. Superficial incised wounds (3Nos.) 1x 0.2x 0.3cm, 1x 0.2x0.2cm and 1x 0.2x 0.2cm, oblique, in the same line on the back fingers of right hand the lower outer end of the former being 3cm above the knuckle and upper inner end of latter (3rd one) 1cm below proximal knuckle.
14. Incised wound 9x 2.5x1.5cm oblique on the back

- and inner end or right forearm, the outer upper end being 13cm below elbow.
15. Superficial incised wound 2x 0.2cm on the mons pubis of the abdomen 4cm to the right of midline.
 16. Superficial incised wound 26x 0.2cm on the front of thigh its upper inner end 13cm below the groin at its inner aspect.
 17. Superficial incised wound 19x 0.2cm oblique on the front and inner aspect of left thigh, its upper outer end being 10cm below the middle of groin.
 18. Incised wound 2x0.5x0.5cm vertical on the front of left leg 30cm below knee.
 19. Abrasion 6x 0.3cm vertical on the left side of abdomen 1cm below the level of umbilicus and 7cm outer to midline.
 20. Incised perforating wound of entrance 6x1x3cm oblique on the proximal knuckle and back of middle finger of left hand. Exit wound on the front of left palm 2x 0.5cm at the mouth of palm.
 21. Incised wound 6x2x1.5cm oblique on the back and inner aspect of left forearm, its upper outer end 5cm below elbow, 22.
 22. Superficial incised wound 5.5x0.3cm oblique on the inner aspect of left forearm, its upper inner end 8cm below elbow.
 23. Contusion 7x1.5x0.5cm, oblique on the back of chest, its lower inner end being 12cm to the left of mid line and 15cm below shoulder.
 24. Superficial incised wound 12x0.2cm horizontal on the back of right thigh 16cm above knee.

INJURIES (INTERNAL)

1. Depressed fracture 5x1.5cm right side of frontal bone horizontal under transected injuries beneath injury No.1.
2. Depressed fracture 5x1cm right side of frontal bone with a cut 6cm long at its middle beneath injury No.2.
3. Cut 9x0.1 with depressed fracture 9.2cm around left parietal bone injury with separation of sagittal suture at the back aspect.
4. Subdural bleeding in thin film over right frontal lobe of brain. Subarachnoid bleeding in thin film all over the cerebral hemisphere. Flattering of gyri and obliteration of sulci, contusion a)4x3x0.2 on the upper surface of frontal lobe of brain, b)3x2.5x0.5cm on the left parietal lobe in front of sensory gyri.

7.PW16 opined that Aboobacker died of head injuries and those injuries on the head were sufficient in the ordinary course of nature to cause death. Considering the nature of the mortal wounds noted thereon we find no reason to disagree with the findings of PW16. The nature of the injuries sustained by Aboobacker on the head as noted in Ext.P14, without all peradventure indicate that they were sufficient in the ordinary course of nature to cause death and in fact, in this case, admittedly, he died almost instantaneously on sustaining the

aforementioned injuries. The head injuries are all incised wounds and the largest in size is the one measuring 9.5 cms in length and bone deep. In the said circumstances, the evidence of PW16 with Ext. P14 conclusively establish that Aboobacker died of head injuries and the said injuries were sufficient in the ordinary course of nature and therefore, the death of Aboobacker is culpable homicide.

8.If the homicidal death of Aboobacker was caused by a group of people, numbering 5 or more, and the attack was in furtherance of their common object, the fact that it was an unlawful assembly can never be disputed. If so, the injuries inflicted by any one or more of the members of the unlawful assembly have to be treated as acts done in furtherance of their common object. What was the strength of the assemblage, whether it was five or more, then what was the common object of the unlawful assembly, who are all the members of the unlawful assembly and whether the common object included committing the murder of Aboobacker or else what is the offence committed by the members of the unlawful assembly, are matters for

consideration. At the same time, there can be no doubt that if the fatal injuries are proved to have been inflicted on Aboobacker by one among the members of the unlawful assembly, if was an unlawful assembly, then the question whether the others committed any specific overt act would become irrelevant, provided the injuries were inflicted in furtherance of the common object.

9.A brief narration of the case of the prosecution is necessary before adverting to and appreciating the evidence on record to answer the aforesaid questions. The case of the prosecution is that on 3.1.2002 two persons each belonging to Hindu and Muslim communities were murdered. The deceased Aboobacker and seven others including PWs 2, 3, 5 reached the Juma Masjid at Marad and thereafter, proceeded towards its graveyard for digging graves to Yunus and Kunhikoya who were murdered on the previous day's riot. Owing to the order passed by the District Magistrate under section 144, Cr.P.C applicable in that region the police men stationed near the mosque intercepted and asked them to proceed only in two quadruple groups. Consequently, the

deceased Aboobacker, PW5 Jamsheer, CW9-Azeez and one Ashraf formed the first batch and proceeded alongside the sea wall, through a small lane on its eastern side and the next batch consisting of PWs 2, 3 and two others proceeded towards the same place through another route. The first batch enroute to the graveyard met one Bharathan who was sitting near the boatyard and he told them to retreat as several Hindus armed with weapons, have thronged nearby. No sooner they started retreating they were chased by a gang of Hindus armed with deadly weapons. Seeing that Aboobacker was secluded and being chased, from near the houses of Subaida and Patheyi, the second batch ran back and in fact, three among them ran towards the police personnel positioned near the control room situated at the junction of Vayanasala and Beach roads and passed on the said information. Even prior to that, PW4 and two other policemen were on the move to South on hearing a sound and it was at that point of time that they were informed of the impending attack on Aboobacker. Thereupon, those policemen along with the informant trio, proceeded southwards along

the beach road and they saw Aboobacker was being chased. When Aboobacker reached amidst the houses of Subaida and Patheyi, the assailants attacked him and ultimately, Aboobacker succumbed to the injuries sustained in the said attack, almost instantaneously. The prosecution adduced evidence to establish the aforesaid case and also to establish that the persons who chased, attacked and ultimately caused the death of Aboobacker were none other than the appellants/accused.

10. In fact, re-appreciation of the evidence on record considered by the trial Court as also appreciation of the additional evidence received by this Court invoking the power under Section 391 of the Code of Criminal Procedure are also to be done for a proper disposal of the captioned appeals. Invoking the power under Section 391, Cr.P.C. this Court passed an order on 9.10.2015 for the purpose of receiving additional evidence and in that regard to issue summons to the expert witness who conducted the chemical analysis of the material objects forwarded under Ext.P18 forwarding note and prepared the report

received by the court much before the trial. Subsequently, the said expert was examined as PW21 and the report of analysis of the material objects forwarded under Ext.P18 was marked as Ext.P23. Needless to say that he was also allowed to be cross-examined on behalf of the appellants-accused.

11. Going by the case of the prosecution, the incident occurred at about 8 a.m. on 4.1.2002. PW1 who is a distant relative of the deceased Aboobacker, though did not witness the incident, went to Beypore Police Station and lodged Ext.P1 F.I. Statement at 11.30 a.m. on 4.1.2002, based on the undisclosed source of information. PW13 recorded his statement and on its basis registered Ext.P1(a) F.I.R. In Ext.P1, PW1 named four persons and as per his version, 20 other identifiable persons were also there among the assailant group.

12. PW19, the Circle Inspector, Guruvayoor on being appointed the Investigating Officer on 6.1.2002 questioned PW5 Jamsheer on 10.1.2002. In fact, PW5 whose name was also mentioned besides the names of in column No.(4) of Ext.P13 Inquest Report, is not an eye

witness to the actual attack on Aboobacker. On being chased he along with Azeez and Ashraff ran towards the mosque and according to him it is after five minutes since his arrival in the mosque that came to know about the attack and the hospitalization of Aboobacker. According to him while fleeing for life he had a glimpse of the assailants and from the court he identified accused Nos. 2,3,4,6,12, 13 and 14 but, Vijith(A15) was wrongly identified by him as Prahladhan (A10). PW19 had also questioned PW4, the Sub Inspector of Malabar Special Police who according to the prosecution, went along with the informant trio including PW2 and PW3, near to the place of occurrence and witnessed the actual occurrence in which Aboobacker sustained the injuries that caused his death. He deposed that he came to Marad with two platoons of Policemen on the previous day of the incident and that he deployed 54 policemen of the said platoons at different places for maintenance of law and order. From the court he identified the 3rd accused (Vibheesh) as the assailant who stabbed Aboobacker from the side, accused No.14 (Manikandan) as one of the two assailants who

dropped stone upon Aboobacker and the 2nd accused (Suresan) as the one who beat Aboobacker with iron bar.

13. May be a co-incidence, PWs 2 and 3 whose names were mentioned by PW5 Jamsheer as among the persons who accompanied him and the deceased Aboobacker for the purpose of digging graves, deposed to the effect that their mothers went to the mosque in the dawn and on their return they passed on the information that nobody was there for digging graves for the men who lost their lives in the previous day's incident. According to PW2 and PW3, on getting such information they reached the mosque and there they found Aboobacker and the others and the octonary including themselves and Aboobacker proceeded towards the graveyard to dig graves for them. They would further depose regarding the circumstances for their retreat and also gave their oral account on the attack on Aboobacker by a group of Hindus, in which Aboobacker lost his life. However, from the court he wrongly identified Prahladhan (A10) as Ranjith (A5). So also, Ranjith(A5) was identified by him as Rajesh(A11) and Rajesh(A11)

was identified as Ranjith(A5) and he identified all the other accused. PW2 identified MO1 as the sword used by Sasi (A12), MO2 as the iron bar used by Prahladan(A10), MO3 as the chopper used by Shaji (A4), MO4 as the chopper used by Manikandan (A11) and MO5 as the granite piece used by Ranjith and Manikandan (A14), for inflicting injuries on Aboobacker. PW3, who was all along with PW2 from the moment they moved towards the graveyard, deposed almost on the same lines of PW2 regarding the incident. Nonetheless, he narrated the incident somewhat in a different sequence. From the court PW3 could not identify Sumesh(A8), Vijesh(A9) and Rajesh(A11). In other words, he identified all the accused except accused Nos.8, 9 and 11. He also identified MOs 1 to 5 as the weapons of offence used for inflicting injuries on Aboobacker.

14.PW6 is the attesting witness to Ext.P2 mahazar whereby MO5 stone which was allegedly used as a weapon of offence by Manikandan and Ranjith, was seized. He deposed that one Krishnan had a shop about 50 metres near to the house of Subaida on its southern side. He

would further depose that there is a crossway on the eastern side, leading to the mosque. PW7 is the attesting witness to Exts.P3 to P5 mahazars which are respectively the seizure mahazars in respect of MO4, MO3 and MO1. He would also depose that he had seen collection of the hairs from MO1. From the court he identified Shaji (A4), Rajesh (A11) and Sasi (A12) as the persons at whose instance the aforesaid recoveries were effected. PW8 is the attesting witness to Ext.P6 whereby the MO2 iron bar allegedly used by Prahladhan (A10) was seized. He identified Prahladhan from the court. PW9 one Giridas is a photographer. He would depose that he had taken Ext.P7 photographs of the place of occurrence and Ext.P8 series are the negatives of such photographs. PW10 is the Special Village Officer who prepared Ext.P9 scene plan. PW11 Ashraf is the attesting witness to Exts.P10 and P12 seizure mahazars. Ext.P12 is a mahazar relating collection of tuft of hairs from the deceased by PW16 at the time of postmortem. PW12 is a Police Constable and he spoke about an incident which according to him, led to the incident in question. PW13

was the then Sub Inspector of Police, Beypore. He would depose that there was a control room set up pursuant to the earlier incident near to Marad Vayanasala road. It was he who recorded Ext.P1 statement from PW1 and registered Ext.P1(a) F.I.R. He deposed that it was the duty of the persons in the control room to report incidents and developments to higher officers and also to concerned police stations. PW14 was the C.I. of Police, Kasaba who conducted inquest on the body of deceased Aboobacker and prepared Ext.P13 inquest report. At the time of inquest, after describing in Ext.P13 he took custody of the apparels worn by the deceased at the time of incident viz., MOs 7 and 8. Going by column No.12(a) in Ext.P13 Kannantepurackal Sreedharan, one Sivadasan and certain identifiable persons are the suspects. PW15 was the Scientific Assistant then attached to the Forensic Science Laboratory, Thrissur Mobile Unit. She deposed that while working as Scientific Assistant in the said unit she inspected the place of occurrence and collected blood stained sand viz., MO9 and MO11 besides control samples (MO10 and MO12) from two places and

entrusted them with the Investigating Officer. As already noticed. PW16 is the Doctor who conducted autopsy on the body of deceased Aboobacker and issued Ext.P14 postmortem certificate. PW17 is the C.I. of Police, Chevayoor who took over the investigation with effect from 15.7.2002. He would depose that on being questioned PW13 stated to him that at the time of recording of Ext.P1 F.I. Statement PW1 did not mention the name of Sivadasan. PW18 is the Police Constable who came to the place of occurrence immediately after the incident and took Aboobacker to Medical College Hospital on 4.1.2002. PW19 is the Investigating Officer who conducted the investigation from 6.1.2002 till 29.5.2002. He deposed that on 10.1.2002 he recorded the statements from CWs 18, 19 and 20. He took the hairs collected by PW16 into custody as per Ext.P12. He submitted Ext.P15 report dated 15.1.2002 to the Court incorporating the names of 15 persons. He arrested accused Nos.5, 9 and 14 from Puthiyappa Beach on 15.1.2002 and on the same day itself he arrested accused Nos.3 and 7 from Kasaba Police Station. On 17.1.2002 accused Nos.4, 11 and 13 were

arrested from Puthiyappa Beach and accused Nos.8, 12 and 15 were arrested from near Vellayathodi temple. PW19 also deposed to the effect that while in custody, at the time of questioning, accused Nos.4, 11 and 12 gave statements relating concealment of weapons of offence. He deposed that based on the information furnished by the 4th accused a Koduval (MO4) was recovered under Ext.P3 mahazar at 1.15 p.m. on 17.1.2002. He would further depose that based on the disclosure statement of accused No.11, MO3 was recovered under Ext.P4 mahazar and based on the disclosure statement of accused No.12 MO1 was recovered under Ext.P5 mahazar. In fact, he deposed that MO3 was recovered based on the information furnished by accused No.11 and MO1 was recovered based on the information given by the 10th accused. The iron bar allegedly used by Prahladan (A10) and concealed under a roof of a shed was seized under Ext.P6 mahazar. He would depose that PW8 is the attesting witness to the said seizure. On 13.2.2002, PW19 arrested the 6th accused. He filed Ext.P16 report for adding Section 108, IPC. Ext.P17 which is the copy of the order

passed by the District Magistrate under Section 144, Cr.P.C. was marked through him on 23.2.2002. PW19 sent Ext.P18 forwarding note and all the material objects except MO5 to the Court. On 6.5.2002 PW19 seized Ext.P7 photographs and also its negatives viz., Ext.P8 series under Ext.P10 mahazar. He got prepared Ext.P9 plan through PW10. It was PW19 who immediately after taking over the investigation on 6.1.2002 prepared Ext.P2 scene mahazar and he prepared the same at 10.15 a.m. on the same day. He deposed that the place of occurrence was shown to him by Ibrahim (CW21). The blood stained stone allegedly used by Manikandan and Ranjith was seized by him under Ext.P6 mahazar. On 24.5.2002, PW19 prepared Ext.P19 additional scene mahazar and Ext.P20 observation mahazar.

15.PW20 took over the investigation and on 15.5.2003, he filed Ext.P22 which is the sanction obtained for prosecution of the accused for the offence under Section 153-A, IPC. He laid the charge on 13.7.2002. As noticed hereinbefore, during the hearing of the appeal finding that in dealing with the appeal additional evidence is necessary

lest failure of justice would occur, after recording the reasons therefor, we took additional evidence of PW21. The expert who analysed the material objects forwarded to him for analysis under Ext.P18 forwarding note. The report prepared by him was admittedly, available before the trial court and in fact, it was initially received by the committal court. The report was marked as Ext.P23. The forwarding letter of Ext.P23 was marked as Ext.P23(a). PW21 was examined-in-chief and he was cross-examined at length on behalf of the appellants/accused. PW21 retired as a Joint Director from the Forensic Science Laboratory, Thiruvananthapuram on 31.5.2015. He deposed that Ext.P23 contained his signature and also identified the signature in Ext.P23(a) as that of the then Director of the Forensic Science Laboratory. He deposed that he had examined the material objects involved in Crime No.6 of 2002 of Beypore Police Station from which the aforesaid Sessions Case arose. He would further depose that the said material objects were forwarded to the division to which he was then attached, by the Director of the Forensic Science Laboratory.

According to him, 10 sealed packets were received for analysis and the packets contained seals which corresponding to the specimen seal impression forwarded and the seals were also intact. He also deposed that as per Ext.P23 item No.1 therein contained some dark brown soil and item No.2 contained some brown soil. Item No.3 therein was a metallic chopper with wooden handle having a maximum length of 46 cms. and item No.4 therein was a metallic chopper with metallic handle having a maximum length of 46.3 cms. Item No.5 contained one metallic sword with wooden handle and item No.6 contained three short black hairs. He further deposed that item No.7 therein was a tuft of short black hairs kept in a sealed bottle bearing the label “Department of Forensic Medicine, Medical College, Calicut PN No.21/02”. Item No.8 was a metallic bar with fine holes and was having a maximum length of 65.5 cms. He also deposed that item No.9 was a cut open full sleeve greenish grey coloured shirt and dark brown stains were found on large areas in the shirt. Item No.10 therein was a white coloured, stitched piece of cloth (langotty) having dark brown

stains. He deposed that all those items were subjected to analysis by him from the laboratory using the standard scientific techniques in terms of the requisition in Ext.P18. It was further deposed by him that item Nos.1, 3 to 5, 7, 9 and 10 therein contained human blood. Item Nos.6 and 8 contained blood, but, their origin could not be determined owing to insufficiency of blood, it is deposed. He would also depose that blood could not be detected in item No.2 which contained the unstained soil sample. PW21 deposed further that the hair in item No.6 was detected as human scalp hair which are similar to the sample scalp hair in item No.7. He also deposed that for the purpose of examination the hairs in item No.6 were fully utilised.

16.As noticed hereinbefore, on the side of the appellants-accused DWs.1 and 2 were examined and Exts.D1 to D15 were got marked. In fact, it was the second accused who was examined as DW2. He would depose that he was residing in Thekethodi near Marad Beach and that he was one of the State General Secretaries of 'Hindu Ikya Vedhi' during that time. He had functioned as the Secretary, Joint Secretary

and Member of the committee of a local organisation by name Araya Samajam and the 'Mandalam Secretary' of the Bharathiya Janatha Party, Beypore during the relevant point of time. He would further depose thus:- Accused No.15 is his distant relative and that Kunjumon, who died on 03-1-2002 in the riot was his own brother. He is a fisherman and used to go for fishing in the boats belonging to others from Beypore Harbour. On 02-01-2002 he went for fishing in the boat belonging to one Shanmughan and on 03.01.2002 after midnight he returned to Beypore harbour. As usual he did not go to the house and from there he came to know that some untoward incident occurred at about 5.30 p.m in Marad and in the incident some persons had sustained injuries and one 'Shrimjith' was murdered. On 04-01-2002, in the early morning, he came to know that his own brother too, sustained injuries in the said incident and he was taken to Medical College, Kozhikode. He left for Medical College at 06.00 O' clock and on reaching there he learnt about the death of his brother. He went to mortuary and saw the body of his brother and later, he learnt that in the

incident two persons belonging to Muslim community were also murdered and their bodies were also brought to the mortuary. In such circumstances, apprehending undue delay in the matter of getting the body of his brother after post-mortem he approached Dr. Mohanan (DW1). He got previous acquaintance with Dr. Mohanan as his son was under treatment of the said doctor for the past two years. Dr. Mohanan was residing at 'Thondayar' and he reached the house of the Doctor at Thondayar by about 02.00 O'Clock and told the Doctor about the situation. Thereupon, he went to Medical College along with Dr. Mohanan in his car and when they reached near the mortuary DW1 went inside and after sometime he came back and informed that what is required for an early release of the body of his brother had been done and then he left the place. Accused No.15 'Vijith' was also there in the Medical College Hospital and he got absolutely no connection with the death of Aboobacker and that he was, in fact, in the Medical College Hospital at 08.00 a.m. On 04-01-2002. The distance between the Marad and the Medical College, Kozhikode is only about 15 Kms.

Apart from accused No.1, there is yet another Thekkathodi Sreedharan and that the said Sreedharan is the son of his father's brother. The said Sreedharan died in the year 2005 and that 'Lekshmi' is the mother of the said Sreedharan. Ext.P15 is the death certificate in respect of said Sreedharan.

17.The aforesaid doctor viz, Dr.Mohanan who was the then Associate Professor of Psychiatry at Medical College Hospital, Kozhikode, was examined as DW1. He would depose that he knew the second accused Sureshan and further that the son of Sureshan had been under his treatment for severe mental retardation with psychosis. He would also depose that the said child was admitted in Navajyothi School for mentally retarded children, run by one Mr.Ramakrishnan, Palad, but he could not recollect the name of that child. He deposed further that he knew about the death of the brother of Sureshan. DW1 would further depose that on the next day of the Marad incident which occurred in the year 2002, Sureshan came to him at about 07.00 a.m. and at that point of time, he was working in Medical College Hospital,

Kozhikode. Sureshan requested him to do the necessary for an early release of the body of his brother after post mortem. He also deposed that in the said circumstances, he took Sureshan along with him to the Medical College and on reaching there, he went straight to the Forensic Department and told the Assistant Professor Dr.Govinda Raj to speak about the urgency to Dr.Prasannan and also to see that the bodies of the brother and one Shrimjith, a distant relative of Sureshan are released as early as possible after postmortem. As already noticed, apart from getting examined DW1 and DW2 the defence got marked certain CD contradictions as well, during the examination of certain prosecution witnesses. Ext.D1 is the CD contradiction of PW1. Exts.D2 to D9 are the CD contradictions of PW3 and Exts.D10 to D14 are the CD contradictions of PW4. PW4 was the Sub Inspector of Police, Marad Special Police at the relevant point of time. Ext.D13 contradiction was highlighted by the appellants to canvass the position that PW4 had reached the place of occurrence, only when deceased Aboobacker fell down on sustaining the injuries going by his own

version. In other words, it was highlighted to canvass the position that he had not actually witnessed the incident right from the beginning.

18. We may now advert to the rival contentions as also the authorities based on which the respective contentions were raised, for the purpose of properly appreciating the evidence on record. The learned Senior counsel Sri.B.Raman Pillai appearing for accused Nos.4,5,7 and 12 *inter alia* contended, relying on a catena of decisions, that in group rivalry there would be a tendency to rope in as many persons as possible as participants in the assault. It is further submitted by the learned Senior Counsel that in this case, the appellants were roped in due to group rivalry though they had absolutely no complicity in the matter. It is further contended that in this case, though the incident occurred on 04-01-2002, there occurred inordinate and unexplained delay in the matter of questioning the alleged eye witnesses viz, PWs.2 to 5. In the case of PWs.4 and 5, they were questioned by the Investigating Officer within a couple of weeks from the date of the occurrence whereas in the case of PWs.2 and 3, they

were questioned by the Investigating Officer after about 4 months since the incident. In view of the said factual aspects, it is contended that the evidence of the said eye witnesses are not creditworthy. It is the further contention that if PW4 is found reliable, going by his version, the Assistant Commissioner of Police arrived at the place of occurrence shortly after the incident and he disclosed the entire incident to the Assistant Commissioner and that apart, he had also informed the matter to Beypore Police Station over telephone . Based on the testimony of PW4 in that regard it is contended that there was absolutely no reason for not registering a crime based on any of such information furnished by PW4. Non registration of a crime based on such informations of PW4, who was the Sub Inspector of Police then positioned in the locality near to the place of occurrence to maintain the law and order situation is an indication of non-conveyance of such information by PW4 and the case of the prosecution that PW4 had actually witnessed the incident is also to be viewed with suspicion in such circumstances, it is contended. In view of the fact that PW19 filed Ext.P15 report

before the court on 15-01-2007, incorporating the names of 15 persons it is further contended that though the names of 15 persons were incorporated their overt acts were not specifically mentioned in Ext.P15. Above all, it is contended that the evidence on record would reveal that as on 15-01-2007 only PW5 was questioned by PW19 and he had divulged the names of only 8 persons. It is also contended that there is nothing on record to show that prior to 15-01-2007 any other occurrence witness was questioned so as to have the names of all the accused for the purpose of inclusion in Ext.P15. The learned Senior Counsel further contended that the specific overt acts were attributed against each and every accused only in the final report. In such circumstances, it is contended that there was absolutely no basis for incorporating the names of at least 7 others in Ext.P15 and in fact, that itself is a matter denuding the very credibility of the prosecution case. It is further contended that though PW5 said to have divulged the names of PWs.2 and 3 as well as the persons who accompanied him and the deceased Aboobacker and the others from the Mosque for the

purpose of digging the graves it is highly difficult to believe the said version in view of the inordinate and unexplained delay in the matter of questioning PWs.2 and 3 and it would suggest that they are planted witnesses.

19.The further submissions of the learned Senior Counsel for the appellants are as hereunder:-

The witnesses in this case were actually supplied by the mosque authorities. Owing to the inordinate delay the prosecution has had sufficient time to shape the case and to plant witnesses to suit the case of the prosecution. The evidence of PW21 with Ext.P23 could not be relied on as the acceptance of the said additional evidence received invoking the power under section 391, Cr.P.C would cause high prejudice to the appellants/accused. During the trial stage, appellants/accused were totally in dark with respect to the availability of the report of analysis of the material objects and as such, no question touching the said aspect was put to the prosecution witnesses. The report in Ext.P23 that hairs in item No.6 are similar to the tuft of hairs

in item No.7 cannot be taken as conclusive evidence against the accused No.12 though the case of the prosecution is that MO1 was the weapon of offence used by accused No.12 and the hairs subjected to analysis were collected from MO1. The said contention is obviously founded on the decision of a Division Bench of this Court in **Fr.George Cherian V. State of Kerala** reported in **1989 KHC 663**. In view of the imperfection of the science in respect of the method adopted for analysis of hairs of human being viz, instrumental method it would be unsafe to rely on such a report made following instrumental method, to connect the accused with the offence, it is contended in the light of the decision. There was no reason for the appellants/convicts to put suggestions to witnesses during the trial stage in that regard as no report of analysis of the material objects including the analysis of hair allegedly found in MO1, was then brought on record. Ext.P1 would reveal that PW1 mentioned therein that the place of occurrence is west of 'Sree Kurumba Temple, Marad' whereas the place of occurrence, going by Ext.P2 scene mahazar prepared based on the information

furnished by CW.21 Ibrahim is the spot between the houses of Subaida and Patheyi. The prosecution did not have any case that CW.21 Ibrahim was an occurrence witness and at any rate, he was not examined in court and in the said circumstances collection of blood stained sand from the place which was shown to the Investigating Officer by CW.21 can have no relevance or significance. A perusal of Ext.P13 inquest report would reveal that the place of occurrence shown therein is the one stated by PW1 and mentioned as such in Ext.P1 First Information Statement. Though normally a reasonable delay in recording the statements of the witnesses may not by itself be a matter of any serious infirmity with respect to the case of the prosecution it may assume such a character if there are concomitant circumstances suggestive of the fact that the Investigating Officer was deliberately marking time with a view to decide about the shape to be given to the case and also the eye witnesses to be introduced. The failure to register the FIR pursuant to the information allegedly given by PW4 to the Assistant Commissioner of Police and also to Beypore Police

Station as mentioned hereinbefore, is also fatal to the prosecution, especially taking note of the fact that the FIR was registered later based on the statement lodged by PW1 who was not all an eye witness. The learned Senior Counsel relied on the decision of the Hon'ble Apex Court in **Kaliash Gour and others V. State of Assam** reported in **2012(2) SCC 34**, in support of certain other contentions. Firstly, it is relied on to fortify the contention that the benefit of doubt arising from a faulty investigation ought to go only in favour of the accused and not in favour of the prosecution and secondly, to drive home the point that in a case where police arrived at the scene of occurrence immediately after the occurrence, but the FIR was not lodged promptly it has to be taken the FIR was subscribed after deliberation. The point is that in such circumstances, it can be taken that the FIR was prepared after wide consultation and deliberation owing to the absence of semblance of spontaneity to give credibility. The said decision is further relied on to canvass the position that the action in arraigning 15 persons as accused, as on 15-01-2002 is unsustainable when only 8 persons were

named by the eye witness/ witnesses questioned thus far and in the absence of any explanation as to how the names of the remaining 7 persons were obtained for the purpose of arraigning them as accused. It is submitted that absence of explanation in that regard is another circumstance casting serious doubt about the case of the prosecution.

20. The learned Senior Counsel Sri.Vijaya Bhanu, appearing for accused Nos.3,9,10 and 11 who were convicted *inter alia* for the offence punishable under Section 302 IPC, contended that the discovery of the weapons of offence allegedly based on the disclosure statements could not be taken as an incriminating material against the accused for the reason that in the disclosure statements there is absolute absence and any mention regarding authorship of concealment. That apart, it is contended that evidently, the attesting witness to all the seizure mahazars viz., Exts.P3 to P5, is PW7 and it itself would suggest that he is a stock witness. The learned Senior Counsel further contended thus:-

21.The name of accused No.9 Biju @ Bijesh was not mentioned

in the FIR viz., Ext.P1(a). PW 4 and PW 5 did not depose anything against the 9th accused to indicate his complicity in the incident. PW2 had not even identified the 9th accused and PW3, though identified the 9th accused he did not depose as to what exactly was the overt act committed by the 9th accused. Though PW3 had stated that the 9th accused had birchen the deceased he has not given any such statement to the police and it was brought out as an omission. The stick allegedly used by the 9th accused as a weapon of offence was not recovered. There is long delay in the matter of recording of the statement of PW2 inasmuch as the incident in question occurred on 04-01-2002 and he was questioned only on 24-05-2002. Though the name of the 9th accused was not divulged to the Investigating Officer prior to 15-01-2002 by any eye witness, in Ext.P15 dated 15-01-2002 he was arraigned as the 9th accused and that would also denude the credibility of the prosecution case. The name of accused No.10 was also not included in the First Information Report and as in the case of the 9th accused PW4 had not deposed anything against the 10th accused.

Though PW5 deposed to the effect that 10th accused 'Prahlanan' was also among the assailants and PW2 deposed to the effect that the 10th accused smashed on the back of the deceased Aboobacker with an iron bar neither PW5 nor PW2 could identify the 10th accused from the court. The weapon of offence allegedly used by accused No.11 was not properly identified by PW2 and PW3. According to PW4, it was the second accused who used MO2 and at the same time the case of the prosecution is that MO2 was used by the 10th accused and the same was discovered under Ext.P6 mahazar based on the disclosure statement of the 10th accused. The name of accused No.11 was also not mentioned in Ext.P1(a) FIR. Neither PW4 nor PW5 deposed regarding the presence of accused No.11 at the place of occurrence and though PW2 deposed to the effect that accused No.11 had inflicted a cut injury on Aboobacker he could not even identify accused No.11 from the court and he wrongly identified 'Renjith' (A.5) as accused No.11. Though PW3 had deposed before the court that accused No.11 had inflicted a cut injury, using a chopper, on Aboobacker, he too, could not identify

accused No.11 from the court. Though MO.3 was allegedly discovered in pursuance of a disclosure statement made by the accused No.11, under Ext.P4 seizure mahazar, a scanning of the disclosure statement would reveal that there is absolute absence of authorship of concealment therein. In the said circumstances, the discovery of MO.3 based on the disclosure statement pales into insignificance and at any rate, it could not have been taken as an incriminating material against accused No.11. In such circumstances, the evidence of PW16 who deposed to the effect that all the incised injuries could be caused by using MOs.1,3 and 4 also got no evidential value, as against accused No.11. As regards the third accused, it is contended that, the name shown in the FIR is 'Bibeesh' and not as 'Vibeesh'. No explanation was offered by the prosecution as to how the change of the name had occurred or whether there is anyone with such a name had involved in the case. Though, going by the court charge, the third accused is one among those who inflicted cut injuries on deceased Aboobacker with sword, except PW4 none had deposed to that effect. It is the further

contention that non-recovery of the weapon allegedly used by the third accused is also fatal to the prosecution. The Senior Counsel further contended that the receipt of additional evidence invoking the powers under Section 391, Cr.P.C. by this Court while dealing with the appeal had caused great prejudice to the accused especially, to accused No.3. It is further contended that the powers under Section 391 is not intended to be used for filling up the lacuna in the prosecution case. In short, it is the contention that the additional evidence cannot be relied on to rectify any illegality occurred at the trial stage. To buttress the said contentions the learned Senior counsel relied on the decision of the Hon'ble Apex Court in *Ram Rao and Another Vs. State of Maharashtra* reported in (2011) 4 SCC 759.

22. As already noticed, among accused Nos.1, 2, 6, 13, 14 and 15 except accused No.14 all the others were acquitted of the offence punishable under Section 302 of the Indian Penal Code and they were convicted and sentenced for the offences punishable under Sections 143, 148, 153 A and 326 of Indian Penal Code. In the case of accused

No.14 in addition to the conviction for all the aforesaid offences he was also convicted for the offence punishable under Section 302 IPC. It is contended by the learned counsel Sri. Sreedharan Pillai, appearing for the said appellants/accused that the delay in recording the statements of PWs. 2 to 5 is fatal to the prosecution and to substantiate the said contention, the learned counsel relied on a decision of Hon'ble Apex Court in **Balakrushna Swain v. State of Orissa** reported in ***AIR 1971 SC 804***. It is further contended that though the incident had occurred on 04-01-2002, PW19 was appointed as the Investigating Officer only on 06-01-2002 and naturally, he commenced the investigation only from 06-01-2002. The evidence on record would reveal that the Assistant Police Commissioner instructed PW14 to conduct the inquest and accordingly, he conducted the inquest on 04-01-2002. In such circumstances, it is contended that even if it is taken that the Assistant Commissioner was the Investigation Officer from 04-01-2002 till 06-01-2002, nothing was brought on record as to what was the investigation done by him from 04-01-2002 to 06-01-2002. It is

contended that the prosecution had withheld certain material witnesses and it is fatal to the prosecution. It is also contended that though the case of the prosecution is that the group consisting of the deceased Aboobacker, who had proceeded to the graveyard ahead of the other group consisted of PWs.2 and 3 retreated on hearing the assemblage of persons belonging to Hindu Community with armed weapons from one Bharathan, the said person was not examined. It is further contended that though the prosecution case is that deceased Aboobacker was attacked by the appellants-accused when he reached amidst the houses of 'Patheyi and 'Subaida', those two women were also not examined. In the said circumstances, it is contended that they were virtually withheld by the prosecution on the apprehension that they would not have supported the case of the prosecution. Since they were material witnesses and were withheld an adverse presumption has to be drawn against the prosecution, it is contended. To substantiate the said contention the learned counsel relied on a decision of **Dening Dora Vs. State of Assam** reported in **2015 CRL. L.J. 16**. The learned Counsel

further contended that the alleged recovery of the weapons at the instance of the accused persons based on their disclosure statements also could not be taken as incriminating materials against the concerned accused as Ext.P23 would reveal that no blood grouping was conducted. In support of the said contention the learned counsel relied on the decision of Hon'ble Apex Court in **Prakash Vs. State of Karnataka** reported in **2014 Crl. L.J. 2503**. It is also contended by the learned counsel that though PWs.2 and 3 claimed to have close acquaintance with appellants-accused as they are also natives of Marad, in court they have failed to establish the same inasmuch as they could not identify all of them. It is further contended as hereunder:-

The evidence of PW5 is also unreliable as he remained silent for ten days without divulging the factum of having witnessed the occurrence and such conduct of a person who claimed to have witnessed a gruesome attack is highly abnormal and cannot be said to be a normal human conduct and therefore, this evidence could not be given any credibility. In support of the contention the decision of the

Hon'ble Apex Court in *Chandan Singh Vs. The State of Haryana* (AIR 1971 SC 1554) has been relied on. The identification of the three accused persons by PW4 is also not believable taking into account the fact that he came to the place in question only on 03.01.2002 and also in view of the fact that no test identification parade was conducted. As regards the part played by the second accused in the occurrence there are divergent versions. Going by the Court Charge he has stabbed the deceased with a sword. However, going by the evidence tendered by PWs.2 and 3 he was one among the persons gathered around the deceased holding a weapon. At the same time, they did not depose as to whether with the said weapon he inflicted any injury on the deceased Aboobacker. Coming to the oral testimony of PW4, his version is still different as according to him the second accused smashed on the back of the deceased Aboobacker with an iron bar. In such circumstances, the divergent versions regarding the role played by the second accused itself would show that the prosecution had no definite case as against the second accused and the witnesses could not

be believed and the circumstances would undoubtedly reveal that he was wrongly implicated. The version of PW2 is to the effect that accused Nos.1, 8, , 6, 13 and 15 were carrying weapons. However, PW19 while being cross-examined deposed to the effect that PW2 did not give any statement to the effect that the said accused persons were carrying weapons.

23.The learned counsel Adv.Sri.P.S.Sreedharan Pillai further contended that there is yet another fatal lapse in this case. For the delayed questioning of the occurrence witnesses, the prosecution through PW19 offered an explanation which essentially is a claptrap on the face of oral testimonies of the occurrence witnesses. According to PW19, they could not be questioned owing to the tense situation prevalent in the locality immediately after the occurrence in question and also due to the fact that after the incident occurred on the previous day the occurrence witnesses were residing elsewhere and were not available in their respective houses. The learned counsel submitted that the prosecution witnesses did not support the said explanation and in

fact, a scanning of the evidence of PW3 would reveal that virtually, he denied the same and categorically deposed to the effect that he was very much available in his house and he was also attending his usual activities of fishing at Chevayur.

24.As noticed hereinbefore, the appellant in Crl.A.No.926/2015, the widow of the deceased Aboobacker filed the above appeal seeking interference with the impugned judgment to the extent it ordered acquittal of accused Nos.1, 2, 6, 13 and 15 of the offence punishable under section 302 read with section 149, IPC and consequently, to convict them thereunder and furthermore, with the prayer to award death penalty to all the appellants-accused for the conviction under section 302 read with section 149, IPC. Essentially, the contention of the learned counsel is that the very finding of the trial court that the appellants-accused Nos.1, 2, 6,13 and 15 are guilty of the offence punishable under sections 143, 148, 153A and 326 IPC itself would indicate that they were also members of the unlawful assembly which caused the death of Aboobacker. In such circumstances, according to

the learned counsel, unless there is a specific finding based on the evidence on record that accused Nos.1, 2, 6, 13 and 15 had not shared the common object to commit murder of Aboobacker and that they shared different common object and were not having the knowledge about the common object to commit murder the said appellants-accused ought not to have been acquitted of the offence punishable under section 302 read with 149, IPC. Though essentially, the learned counsel appearing for the victim attempted to canvass the position that the case on hand falls within the category of rarest of rare cases inviting imposition of death penalty on all the appellants-accused after arguing for sometime, the learned counsel fairly conceded that the case on hand cannot be said to be one falling within the category of rarest of rare cases warranting imposition of death penalty. In short, it is the contention that as long as the other accused were found guilty of the offence punishable under section 302 read with section 149, IPC, accused Nos. 1, 2, 6, 13 and 15 ought not to have been acquitted of the offence punishable under section 302 with the aid of section 149,

IPC. The learned counsel further contended that taking into account the fact the appellant is the wife of deceased Aboobacker and she was his dependent and became a widow at the age of 37 years she requires rehabilitation. According to him, it is a fit case for making recommendation for compensation under section 357A, Cr.P.C. And therefore, sought for a recommendation either to the District Legal Services Authority or to the State Legal Services Authority to decide upon the quantum of compensation in tune with the said provision. We will deal with the said question after deciding all the other questions.

25.As stated earlier, the State has also filed an appeal against the judgment in question mounting challenge against the acquittal of accused Nos.2, 6, 13 and 15 of the offence punishable under section 302 read with section 149, IPC. The learned Special Public Prosecutor Sri.S.Sreekumar endorsed the contentions of the learned counsel for the appellant in Crl.A.926/2015 to the extent they are raised against the acquittal of accused Nos.2, 6, 13, and 15 of the offences punishable under section 302 read with section 149 IPC. It is contended that the

contentions of the appellants-accused that there occurred delay in the matter of registration of FIR and unexplained delay in the matter of questioning PWs 2 to 5, are absolutely bereft of any basis. It is contended that the incident occurred at 8 a.m on 4.1.2002 and in the area in question on the previous day viz., on 3.1.2002, in between 7.50 p.m and 8.45 p.m there occurred four murders owing to communal clash. In such circumstances, the prime consideration of Police authorities was for restoring the law and order situation and even then, the FIR was registered in this case on the day of occurrence itself, at about 11.30 a.m based on the statement lodged by PW1. It is further contended by the learned Special Public Prosecutor that PW19 was appointed the investigating officer on 6.1.2002 and immediately thereafter, he inspected the place of occurrence and got prepared the scene mahazar. It is further submitted that on 10.1.2002, PW19 questioned PW5 who was one among the persons who proceeded towards the graveyard along with the deceased for digging graves for Yunus and Kunhikoya, the men belonged to the muslim community

who lost their lives in the previous day's communal clash. It is also submitted that on 11.1.2002, PW4 who was then the Sub Inspector of Malabar Special Police positioned at a spot near the end of Vayanasala Road and witnessed the incident, was questioned. It is the further submission that during the questioning of PW5, Jamsheer, he divulged the fact that PWs 2 and 3 were also with them when they proceeded to the graveyard for digging the graves. In view of the riotous conditions prevailing in that area, the aforesaid witnesses who were named by PW5 Jamsheer, were residing elsewhere and were not residing in their respective houses and the delay in the matter of their questioning had occurred only in the said circumstances, it is contended relying on the version of PW19. The learned Special Public Prosecutor also contended that the contention carrying the suggestion that the place of occurrence was shifted by the prosecution is bereft of any basis. It is the contention that a scrutiny of Ext.P1 FIR as also the oral testimony of PW1 would reveal that he had only mentioned the place of occurrence as a spot lying on the western side of Sreekurumba Temple

and the actual place of occurrence viz., the spot between the houses of Patheyi and Subeida also lies on the western side of Sreekurumba Temple and as such there is no shifting of the place of occurrence. The learned Special Public Prosecutor further contended that in a case where there occurred some delay in the matter of questioning the eye witnesses, that by itself cannot be a reason for throwing out the case of the prosecution. It is contended that even in such cases where there occurred some delay in the matter of questioning of witnesses what is required is only consideration of the evidence of such witnesses who were questioned belatedly with great care and caution. To substantiate the said contention, the learned Special Public Prosecutor relied on a decision of the Hon'ble Apex Court in **Shyamal Ghosh v. State of West Bengal** reported in **(2012) 7 SCC 646**. The same decision is also relied on by the learned Special Public Prosecutor to resist the contentions of the appellants-accused in regard to the alleged defects in the investigation as also in the matter of failure to conduct a test identification parade. It is contended that the defect in investigation by

itself cannot be a reason for disbelieving the case of the prosecution and at any rate, the defect in the investigation cannot go in favour of the accused. In other words, the contention is that defect, if any, has to be eschewed and still the court has to consider the culpability or otherwise of the accused in the light of the other proven incriminating materials. As relates the failure to conduct a Test Identification Parade it is contended that there is no legal obligation on the investigating officer to conduct Test Identification Parade and in fact, the result of Test Identification Parade cannot be a substantive evidence. It is the further contention that the purpose of conducting Test Identification Parade is only to get assurance for the investigating agency that the investigation is proceeding in the right direction. It is also contended, relying on the said decision, that the mere fact that there are embellishments or contradictions in the evidence of witnesses, as long as they are not material contradictions or omissions, cannot affect the admissibility and advisability of the prosecution case.

26.The learned Special Public Prosecutor has also opposed the

contention raised by the appellants-accused that the evidence of PW21 with Ext.P23 cannot be relied on by this Court for the purpose of arriving at the conclusion regarding the culpability or otherwise of the appellants-accused. It is contended that Ext.P18 would reveal that the material objects which were seized under different mahazars were forwarded for analysis through court. It is submitted that the indisputable position obtained in these cases is that after analysis, the report was received in the Magistrate Court even prior to the committal of the case. In such circumstances, the failure to bring such a report on record was a matter bound to be cured by the appellate court for a proper disposal of the appeal, in accordance with law and this court had only done the same by invoking the power under section 391 Cr.P.C. It is further contended that the order to summon the said expert who analysed the material objects was passed by this court after affording a detailed hearing to both the sides. It was found by this Court that in dealing with the appeals that it is necessary to receive additional evidence in regard to that aspect and it is consequent to such

a conclusion that PW21 was summoned and the report of analysis was marked as Ext.P23. In short, the contention is that having admitted the evidence of PW21 with Ext.P23, this Court is legally bound to consider the evidentiary value of the oral testimony of PW21 with Ext.P23. When Ext.P18 and also the seizure mahazars revealed that the weapons of offence were seized and in one of the weapons of offence, hairs were found and the said hairs were also taken into custody under a mahazar and sent for analysis, the result of analysis has to be looked into to decide the evidentiary value. When the appellants were having the full knowledge with respect to the seizure of the weapons of offence and also the fact that hairs were found and collected from one of the weapons, they cannot be heard to contend that the result of analysis of the weapons of offence as also the hairs cannot be looked into for deciding their culpability. In short, it is perfectly legal to look into the evidentiary value of the said documents as also the evidence of PW21. It is the further contention that the evidence of PW21 with Ext.P23 would reveal that the weapons of offence viz., Mos 1, 3 and 4

contained blood stains and on analysis, it was found that it is of human origin. It is contended that the position canvassed by the appellants-accused that in the absence of grouping, the result of analysis cannot be treated as incriminating materials is devoid of any merit. To buttress the said contention, the learned Special Public Prosecutor relied on a decision of the Hon'ble Apex Court in **State of Rajasthan v. Teja Ram [AIR 1999 SC 1776]**. In that case, the blood on one axe was found to be of human origin. However, the serologist failed to conduct the origin of blood on the other axe due to disintegration of serum. No grouping was also made in that case. Even in such circumstances, it was held that the rejection of evidence regarding the recovery based on such aspects is not proper. In other words, the Apex Court held that the evidentiary value of the presence of blood of human origin in the alleged weapon of offence is a matter to be looked into in the light of the other evidence on record. In other words, the rejection of the evidence regarding the recovery in toto, merely for the reason of failure to conduct grouping or its origin was found as not legal. Relying on

the decision of the Hon'ble Apex Court in **Royson @ Paul and another v. State of Kerala [1990 (2) KLJ 46]**, it is contended that it is incorrect to contend that microscopic analysis of hair is not an acceptable mode. It is also contended in this case that the evidence of PW21 with Ext.P23 would reveal that the hair in item No.6 are similar to the hair in item No.7. In such circumstances, it is contended that the evidentiary value of the presence of human blood in the weapons of offence as also the hair found in item No.6 mentioned as such in the report which is similar type of hair in item No.7 therein, are also matters to be taken into consideration to decide the culpability or otherwise of the appellants-accused. It is also contended that the contention of the appellants-accused that in cases of communal clash by groups there may be tendency to rope in as many persons as possible as accused that by itself cannot be a reason for discarding the evidence available in a particular case. It is contended that in this case there is absolutely no reason for disbelieving the versions of PWs 2 to 4 and according to the learned Special Public Prosecutor, the trial court

correctly appreciated the evidence on record and arrived at the guilt of the accused 3, 4, 5, 7, 9-12 and 14 for the offence punishable under section 302 read with 149, IPC as well. Having found that the accused Nos.1, 2, 6, 13 and 15 were also members of the unlawful assembly which caused the death of Aboobacker, there was absolutely no justification for acquitting them of the offence punishable under section 302 with the aid of section 149, IPC, it is further contended. It is also the contention that there is no basis for the reasoning that there is no evidence of commission of any specific overt act as against accused 1, 2, 6, 13 and 15 to convict them for the offence under section 302 IPC with the aid of section 149 IPC. Resisting the contentions of the appellants-accused that PWs 2 and 3 could not be believed owing to the fact that till they were questioned by the investigating officer on 24.5.2002 they did not divulge the fact of having witnessed the incident, either to the police or to anyone, it is contended that merely because of such reasons their evidence could not be brushed aside. It is submitted that when faced with peculiar, situations, persons may react

or respond differently and it cannot be said that in a given situation persons will react only in one particular manner. In support of the said contention, the learned Public Prosecutor relied on a decision of the Hon'ble Apex Court in **State of Karnataka v. Yarappa Reddy [1999 (3) KLT 456 (SC)]**. In the said decision, it was held by the Apex Court that criminal courts should not expect a set of reaction from any eye witness on seeing an incident like murder. If five persons witness one incident there should be five types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eye witness can make. In short, the mere fact that till 24.5.2002 PW2 and PW3 did not come forward to give statement before the police and their statements were recorded only on 24.5.2002 by PW19, cannot be a reason for discarding their evidence, it is submitted. In the wake of aforesaid circumstances and contentions, the learned Special Public Prosecutor submitted that the impugned judgment invites no appellate interference to the extent it convicted accused 3, 4, 5, 7, 9-12 and 14 for the offence punishable under sections 143, 148, 153A and 302 read

with 149, IPC. At the same time, it is submitted that in the light of the fact that accused Nos.2, 6, 13 and 15 were also members of the unlawful assembly in which accused Nos.1, 2, 6, 13 and 15 were also members and therefore, applying the provisions of law under section 149, IPC the appellants- accused 1, 2, 6, 13 and 15 also could not have wriggled out of their culpability for the offence punishable under Section 302,IPC. In short, it is contended that the trial court erred in acquitting accused 2, 6, 13 and 15 of the offence punishable under section 302 read with section 149, IPC and confining their conviction only for the offences punishable under sections 143,148,153A and 326 read with section 149,IPC. In otherwords, according to the learned Special Public Prosecutor they should have been convicted for the very same offences for which accused Nos.3,4,5,7,9 to 12 and 14 were convicted and sentenced. It is further contended that the impugned judgment invites interference to that extent.

27. We will consider whether the contention of the learned Special Public Prosecutor regarding the acquittal of the accused Nos.1,

2, 6, 13 and 15 of the offence punishable under section 302, IPC with the aid of section 149, IPC, is sustainable on the aforesaid ground. Evidently, the accused Nos. 1, 2, 6, 13 and 15 were also convicted for the offences under Sections 143,148,153A and 326 read with section 149,IPC, for the same transaction. If we sustain the finding that accused Nos. 1,2,6,13 and 15 were also members of the very same unlawful assembly and also sustain the conviction of accused Nos. 3, 4, 5, 7, 9-12 and 14 under Sections 143,148,153A and 302 read with section 149,IPC, how can the accused Nos. 1,2,6,13 and 15 escape from the constructive liability and culpability in relation to the same transaction then, from the conviction for the same offences for which accused Nos, 3,4,5,7,9,10,11,12 and 14 were convicted, with the aid of section 149, IPC. ?

28.In **Shambu Nath Singh v. State of Bihar** reported in **AIR 1960 SC 725** the Hon'ble Apex Court held :-But members of an unlawful assembly may have community of object up to a certain point, beyond which they may differ in their objects,and the knowledge

possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly."

29. Thus, in the light of the decision in **Shambu Nath Singh's** case (supra), in the circumstances obtained in this case, in order to escape from the conviction under section 302, IPC with the aid of section 149, there must be evidence to the effect that there was community of object and that accused Nos. 1, 2, 6, 13 and 15 amongst them shared a different common object and they never had the information regarding the likelihood of commission of any unlawful action/actions based on a different common object by the others or what is likely to be committed by any other member. In short, the question is whether there is any circumstance or evidence to hold that the impact of Section 149, IPC should be different on accused

Nos.1,2,6,13 and 15 exists in this case. In fact, none had mooted such a case or defence at any point of time. A scanning of the impugned judgment would reveal that the trial Court entered into a finding to the effect that accused Nos. 1,2,6,13 and 15 had not shared the same common object with accused Nos.3,4,5, 7,9, 10, 11, 12 and 14 and they had shared amongst them a different common object than the one shared by accused Nos.3,4,5,7,9,10,11,12 and 14. Paragraph 52 of the impugned judgment would reveal that the trial court virtually found that they were also members of the same unlawful assembly and went on to hold thus:-

" But there could not be any doubt that they were after Aboobacker and others proceeding to the direction, they had decided to chase them and immediately started the chase. They had succeeded in chasing Aboobacker and ultimately got him when he reached in between the houses of Patheyi and Subeida. Can it be spelt from this conduct of the entire members of the assembly in chasing Aboobacker all along that the assembly at that time had the common object of causing his death? Certainly, it could not be. In this respect, I am also fortified by the conduct of those accused other

than those against whom overt acts are attributed. The evidence given by PWs 2 and 3 is that accused numbers 1,2,6,13 and 15 also were among those who chased Aboobacker and had been at the place of incident when the other accused assaulted him with different weapons. However, there is no case for these two witnesses at all these accused had resorted to any physical assault upon Aboobacker. It is also to be born(sic. Borne) in mind that the evidence given by the two witnesses is that all these accused also were having weapons with them. A2 is specifically referred to and singled out among those passive accused as one who was having a sword with him. Regarding other passive accused, there is only a general statement that they were also having weapons. What exactly were the weapons carried by them is not stated. It has been brought out during cross examination of PW2 that when he was questioned by the Investigating Officer, he had no case that accused numbers 1,6,8,13 and 15 were having any weapons with them. It is always likely that these accused who were led by the common object of creating disharmony among Hindus and Muslims chased Aboobacker in furtherance of this object with the intention of causing hurt to him only and not to cause death. The conduct of the 2nd and 15th accused are to be referred to particularly in the background that their close ones had died in the incident of the previous day. They certainly had the knowledge that grievous

injuries are likely to be inflicted upon Aboobacker. But they need not have desired the death of Aboobacker. Their intention could have been that grievous hurt should be caused. Their knowledge of the likelihood of the consequence of the act also could have been to this extent only."

Based on such conclusions and findings and relying on the decision of the Hon'ble Apex Court in **Pandurang Chandrakant Mhatre and others v. State of Maharashtra** reported in **(2010) 1 SCC (Cri) 413** it was held that accused Nos.1,2,6,13 and 15 need not be fastened with guilt of murder, but only for causing grievous hurt, with the aid of section 149, IPC. As regards accused No.8 the trial Court found that his name was mentioned only by PW2 and PW3 during his examination had not referred at all about accused No.8. It was further found that though PW2 had identified accused No.8 as a member of the unlawful assembly it was brought out during cross-examination that had not referred about him when he was questioned by the Investigating Officer. In short, it was held that PW2 mentioned the name of accused No.8 for the first time only during his examination before the Court.

Ultimately, the trial Court found that his presence at the place of incidence, his involvement in the incident as a member of the unlawful assembly is very much under suspicion and consequently, acquitted him granting the benefit of doubt. The general position of the provision under section 149, IPC is that if an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object of that unlawful assembly or if they got any knowledge that one or other member of the unlawful assembly is likely to commit a particular offence then all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. We have only mentioned the position of law on this issue and we may hasten to add here that we shall not be understood to have held that accused Nos. 1,2,6 and 13 to 15 are also guilty of the offence under section 300, IPC punishable under section 302,IPC read with section 149, IPC. We will deal with the question whether an interference with the impugned judgment in the light of the aforesaid position of law, is required or

whether they are entitled to be acquitted even for the offences for which they have been convicted and sentenced, hereafter in this judgment. So also, the question whether the acquittal of accused No.8 warrants interference in the victim's appeal will also be considered a little later. Furthermore, the very question whether the conviction and sentence of accused Nos. 3,4,5,7,9,10,11,12 and 14 under section 302 read with section 149, IPC could be sustained is also a matter hereafter to be considered.

30. Now, we will consider the evidence on record. PW1 is the first informant and admittedly, he is not an eye witness to the occurrence. Evidently, he lodged Ext.P1 F.I. Statement based on hearsay information and conspicuously he had not divulged from whom he gathered the information. He is a distant relative of the deceased Aboobacker. In the first part of Ext.P1 FIS, he named three persons and according to him, there were 20 other identifiable persons also among the assailant group. In the latter part of it, he named one Sivadasan, as well. Obviously, he had named one Kannante Purakkal

Sreedharan as one of the assailants. However, while being examined he deposed to the effect that the house name of Sreedharan was misstated by him and, in fact, it was Thekkethodi Sreedharan. However, further investigation revealed that he had no complicity in the case and the person involved is one Thekkethodi Sreedharan and accordingly, he was arraigned as one of the accused. As regards Sivadasan, he had stated during the examination that he had not given any such name while giving Ext.P1. Though he claimed to have information regarding the manner in which the injuries were inflicted on deceased Aboobacker he did not divulge the source of information as also the manner of attack. According to PW1, the place of occurrence was on the western side of *Marad Sree Kurumba Kshethram*. However, while being cross examined, he deposed that the statement in Ext.P1 to the effect that the incident occurred on the western side of the Temple is not correct. According to him, the incident took place in between the houses of Patheyi and Subaida. He also stated that if such a statement is not seen in Ext.P1 he did not know about it. In short, the only

relevant aspect that emerged from the oral testimony of PW1 is that it was he who passed on the information regarding the death of Aboobacker firstly, to the police. It is also to be noted in this context that Ext.D15 would reveal that one Thekkethodi Sreedharan, a resident of Marad village was very much alive during the relevant point of time and he died on 14.11.2005. True that, accused No.1 is also another Thekkethodi Sreedharan.

31.The Assistant Commissioner of Police having jurisdiction over the area in question instructed PW14, the C.I. of Kasaba Police Station to conduct the inquest and thereupon, he conducted inquest on the body of Aboobacker between 2 - 4 p.m. on 4.1.2002 and prepared Ext.P13 inquest report which reached the Court on 7.1.2002. PW14 conducted the inquest from Medical College Hospital, Kozhikode. In column No. (3) of Ext.P13 Inquest Report names of Messrs.Rafi and Azeez are shown whereas, in column No.(4) therein in addition to the names of those persons the name of PW5 viz., Jamsheer was also shown therein. Though the incident occurred on 4.1.2002 and Ext.P1(a) FIR was

registered on the same day, PW19, the C.I. of Chevayoor was appointed the Investigating Officer in the said crime only on 6.1.2002.

32. PW4 was then the Sub Inspector of Malabar Special Police. He deposed to the effect that he was deputed to the place of occurrence along with two platoons consisting of 54 policemen. According to him, he reached the locality pursuant to such deputation on 3.1.2002 and after deploying the policemen in the said two platoons at different places, he along with another policemen and the driver of a vehicle positioned at a place near the junction of Vayanasala Road and Beach Road on the date of occurrence. He deposed that he was having a pistol with him and his companion policeman was having a rifle. He deposed that at about 7.45 a.m. on 4.1.2002, he heard a noise from south of the beach and then, he moved thitherwards. He further deposed that hardly he moved along with his companion policemen, three persons came running and told him that one Aboobacker was about to be attacked by a group of persons carrying deadly weapons. He deposed further that on hearing the

same, he along with them and the companion policemen ran towards south alongside the sea wall. Going by his version, when Aboobacker reached in between the houses of Patheyi and Subaida, one of the assailants beat him with an iron bar and another stabbed him with a sword on his head. He deposed regarding the incident further as hereunder:-

Another person stabbed him on his chin and then Aboobacker fell down. Two others picked up a stone and dropped on him. Then he blew the whistle to bring the other police officers to the place and also pointed the pistol towards the assailants and asked them to disburse.

33.During the cross-examination when he was asked if he was actually duty-conscious why he had not used gun to prevent the crime he replied that the entire incident was over within two minutes. When he blew the whistle policemen rushed to the spot and on seeing them coming from different directions, the assailants moved away and then, a police vehicle reached there and Aboobacker was taken to Medical College Hospital, Kozhikode in the said vehicle. He identified accused

No.3 as the person who stabbed Aboobacker from the side and identified accused No.14 as one of the two assailants who had dropped stone on Aboobacker. He has also identified the second accused as the person who beat Aboobacker with an iron bar. According to his version soon after the incident, the Assistant Police Commissioner, Kozhikode reached the place of occurrence and he divulged the entire incident to him and then he had also given telephonic information regarding the incident to Bepur Police Station. It is a fact that though PW4 gave information regarding the incident directly to the Assistant Police Commissioner and telephonically to Beypore Police Station, no crime was registered and no investigation was commenced based on his information. In the light of the decision of the Hon'ble Apex Court in **Lalitha Kumari v. Government of Andhra Pradesh** reported in **2013 (4) KLT 632 (SC)**, the appellants-accused are justified in contending that F.I.R ought to have been registered based on the information furnished by PW4 and investigation ought to have been commenced on the information furnished by PW4 to the Assistant Police

Commissioner without waiting for registration of a crime or at least, based on the information given by PW4, F.I.R. ought to have been registered in Beypore Police Station. In fact, Ext.P1(a) FIR was registered based on Ext.P1 FIS lodged by PW1 and investigation had started on 4.1.2002 itself. But, they cannot be the reasons for discarding the case of the prosecution in toto. Conducting an investigation into an offence after the registration of F.I.R under section 154, Cr.P.C is the procedure established by law. The provisions of law and the decision in **Lalitha Kumari's** case (supra) would make that position clear beyond any doubt. True that, based on the information passed on by PW4 no investigation was commenced and, in fact, no crime was also registered and evidently, it was registered only at 11.30 a.m. based on the information given by PW1. Thus, it is evident that FIR was registered on that day and that too, in the morning itself. He is not an occurrence witness. The only evidence which is available on record regarding the steps taken pursuant to the registration of Ext.P1 (a) F.I.R, in between 4.1.2002 and 6.1.2002, is that on the instructions

of the Assistant Police Commissioner, the C.I. of Police, Kasaba (PW14) conducted inquest on the body of Aboobacker from Medical College Hospital, Kozhikode. Even in such circumstances, we are of the considered view that when a case of homicide is reported such aspects cannot be a reason for non-prosecution of the culprits or for setting at naught the investigation conducted and also the trial conducted based on the materials collected in the investigation. But the said circumstances have to be borne in mind while appreciating the evidence on record to see whether the delay occasioned was one deliberately marked with a view to decide about the shape to be given to the case and also the eye witnesses to be introduced. From the evidence of PW4 it is evident that he came in the locality only on 3.1.2002 and on the date of occurrence he was positioned near the junction of Vayanasala Road and Beach Road. His oral testimony would further reveal that at about 7.45-8 a.m. on 4.1.2002, he heard a sound from the south of Beach Road and when hardly he moved towards that side, three persons came running towards him. It is also

evident from his oral testimony that those three persons divulged the fact that one Aboobacker was about to be attacked by a group of persons carrying deadly weapons. According to the appellants-convicts there is nothing on record to show as to why based on the information passed on by PW4 to the Assistant Commissioner Police and also to the Beypore Police Station no crime was registered. But, we are of the considered view that the inaction in registering F.I.R. based on the information passed on by PW4 also cannot be a reason for discarding his evidence and his evidence is to be analysed scrupulously in view of the unchallenged fact that he was a police officer available in that locality for keeping law and order on that day. In this context it is to be noted what was put to him during his cross-examination was whether he was in a nap. The relevant facts emerged from his evidence is that it corroborates the versions of PW2 and PW3 that they along with another went to the policemen stationed near the junction of the Vayanasala-Beach roads and informed them of the impending attack on Aboobacker and then all of them proceeded through southwards to the

place in question. As noticed hereinbefore, PW5 identified only three of the appellants-accused as the members of the assailant group. At the same time, his evidence would reveal that apart from those identified by him several others were also members of the unlawful assembly whose common object was to commit an unlawful act. The challenge against the identification made by PW4 was based on the failure on the part of the Investigating Officer in conducting the Test Identification Parade(TIP).

34.While appreciating the said contention based on the failure to conduct TIP, the following aspects have to be borne in mind. TIP virtually belongs to the stage of investigation and there is no legal obligation on the Investigating officer to conduct TIP. So also, there is no legal right to any accused to insist for the conduct of TIP. An evidence of identification from court cannot be rendered inadmissible for want of Test Identification Parade. The very purpose of TIP is for corroboration of evidence of eye witnesses in the form of earlier identification. If the evidence of identification in court is found reliable

by court, absence of corroboration by TIP would not and could not be a matter which would render such identification inadmissible. This position has been settled by the Hon'ble Apex Court in a decision in **Daya Singh v. State of Haryana** reported in **2001 SC 1188**. In the context of the contentions, it is relevant to refer to the decision of the Hon'ble Apex Court in **Prakash v. State of Karnataka** reported in **2014 CrI.L.J. 2503** wherein it was held that it would provide corroboration to the evidence given by witnesses in Court. The Hon'ble Apex Court held so after referring to its earlier decisions in **Ravi Kapur v. State of Rajasthan** (AIR 2012 SC 2986), **R.Shaji v. State of Kerala** (AIR 2013 SC 651), **Rameshwar Singh v. State of J&K** (AIR 1972 SC 102), **Malkhan Singh v. State of M.P.** (AIR 2003 SC 2669) and **Visveswaran v. State** (AIR 2003 SC 2471). In paragraphs 30 and 31 of the decision in **Prakash's** case, the said decisions are referred to and said paragraphs read thus:-

“30. An identification parade is not mandatory nor can it be claimed by the suspect as matter of right. The purpose of pretrial identification

evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of time. In **Malkhan Singh v. State of M.P.** (AIR 2003 SC 2669) it was held:

“The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact.”

31. However, if the suspect is known to the witness or victim or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the

prosecution. In Visveswaran v. State (AIR 2003 SC 2471) it was held:

“The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.”

35. In short, in view of the position thus obtained, it can only be said that a TIP would only strengthen the identification made in court and at the same time, failure to conduct a TIP by itself would not and could not render identification from court inadmissible if the court concerned was impressed by the evidence of identification by a particular witness.

36. In this case, the incident occurred on 4.1.2002 and PW4 was examined on 5.1.2010. His version would reveal that he came to the locality on special duty to maintain the law and order situation, along with 2 battalions of MSP only on 3.1.2002. Evidently, he had identified only three of the accused and gave evidence only with respect to their

respective overt acts. If he was giving false evidence only to help the prosecution he need not have to confine his testimony regarding identification only with respect to three among the accused. Still, taking into account the fact that he came to the locality only on 3.1.2002 and he witnessed the incident on 4.1.2002 and gave the evidence only on 5.1.2010, we are of the considered view that it would be unsafe safe to act upon his oral testimony with respect to the identity of the assailants without any corroboration. The evidence of PW4 would also reveal that there was barrage of attack with deadly weapons on Aboobacker by a group of persons and that the entire incident was over within two minutes. Though a feable attempt was made by the defence by putting a suggestion that he had not actually gone to the place of occurrence and he was in a nap, the said suggestion was repudiated by PW4.

37.PW5 was questioned by PW19 on 10.1.2002. PW5 deposed that he was assisting the Mukri of Marad mosque during the relevant period. He deposed that he had not witnessed the incident. However, he deposed to the effect that on that day, he along with deceased

Aboobacker, Aziz, Asharaf, Muneer, Sudheer, Rafi and Siraj had proceeded towards the graveyard of the juma-ath in the morning of 4.1.2002 to dig graves for Yunus and Kunhikoya who were murdered on the previous day. He deposed that all of them left the mosque together and when they reached the road, the policemen who were seen there asked them to form two quadruple groups if they want to proceed further. The version of PW5 is that he along with Aboobacker, Aziz and Asharaf proceeded to the graveyard alongside the sea wall and the other group consisting of Sudheer and Muneer (PW2 and PW3) had proceeded through another route. His further evidence is to the effect that when they reached near southern side of the place where the fishermen used to keep their boats, they saw one Bharathan and he told them not to proceed further as several Hindus armed with weapons gathered nearby and in case they wanted to proceed, they should do so only in company of police. He would further depose that when they were about to retreat they heard a shout from the southern side "പിടിയെടാ മാപ്പിളമാരെ വെട്ടേടാ, കൊല്ലേടാ". He would further depose

that on hearing the same, they fled from there and himself, Aziz and Asharaf ran away towards the mosque and when he looked back he saw Aboobacker being chased by the assailant group consisting of about 25 persons. His version is that they were holding deadly weapons like sword, chopper, iron bar etc. He would depose that Aboobacker was proceeding towards the residence of Patheyi and only on reaching the mosque, he came to know that Aboobacker had sustained grievous injuries in the attack and soon succumbed to them. His further version is that he recognized some of the assailants and then, from the court he identified 8 accused viz., accused Nos.2, 3, 4, 6, 10, 12, 13 and 14. However, he did not identify the others and even among the persons identified, it was misidentification as relates accused No.15 Vijith. He was wrongly identified as Prahladan who was actually accused No.10. He had also deposed that he could identify the weapons which were being carried by the assailants while chasing Aboobacker. The version of PW5 to the effect that he accompanied deceased Aboobacker to dig graves for Yunus and Kunhikoya from the mosque is worthy to be

believed because of the uncontroverted position that during the relevant point of time he was the assistant of the Mukri of Marad mosque. Therefore, his presence at the mosque at the relevant point of time when others turned up, is only quite natural. Going by his version, on being cautioned by one Bharathan regarding the assemblage of Hindus with deadly weapons himself, Aziz and Asharaf ran back towards the mosque through the eastern side and Aboobacker who was isolated and lagged behind, ran through the Beach Road. He has also deposed that he had seen persons in arms chasing Aboobacker, but categorically stated that he had not witnessed the incident and he along with the two others named above, reached the mosque through the eastern side. But, according to him, while fleeing for life, he looked back and had a glimpse of the persons in arms, having a strength of about twenty five, chasing Aboobacker. The evidence of PW5 that he recognized some of the assailants in the blink of an eye, is to be appreciated in the light of such statements. As noticed hereinbefore, he identified only 8 persons from the court and even among them Vijith (accused No.15) was

wrongly identified as Prahladan (Accused No.10). One cannot attribute a photographic memory on PW5, Jamsheer. It is to be noted that at that point of time, he was fleeing for his life and what really he had seen, even according to him, was only a view of the assailants in the blink of an eye. In such circumstances, apart from the fact that on that day he along with Aboobacker, PW2, PW3 and certain others departed from the mosque to dig graves and en route, on instructions from police, he along with Aboobacker and two others proceeded further as the first group and PW2, PW3 and two others had accompanied them up to that point, can be accepted from his version as those aspects get corroboration from the oral testimonies of PW2 and PW3. At any rate, without corroboration, the evidence of PW5 alone cannot be taken as sufficient even to arrive at a finding against the accused persons identified by him, as persons among those who chased Aboobacker. Even going by his version, PW2, PW3 and the two others had to move separately from that spot as a separate group, following the instruction from the policemen.

38. Now, we will examine the extent to which credence could be given to the oral testimonies of PW2 and PW3. To certain extent there is commonness in their versions. Both PW2 and PW3 deposed to the effect that on 4.1.2002 in the morning, their mothers went to the mosque and on their return, they informed them that there was none to dig graves for the two men who died in the previous day's communal clash. They would further depose that their mothers insisted them go to the mosque in the said circumstances. According to them, as per the instruction of Aboobacker, they along with 5 others accompanied him and enroute to the graveyard through the Vayanasala Road, the policemen positioned there asked them to proceed further in two quadruple groups. They would also depose that Aboobacker, Jamsheer (PW5), Aziz and Asharaf proceeded towards the graveyard alongside the sea wall and since then they along with two others proceeded to the graveyard through a byline on the eastern side of the road through which the first batch proceeded to the graveyard. Their further version is that when they along with two others reached near the house of

Patheyi and Subaida, they had seen Aziz, Asharaf and Jamsheer running ahead of Aboobacker, being chased by some Hindus holding sword and sticks from the place where a fiber boat caught fire earlier. that PW2 deposed to the effect that he was remaining in the house on getting frightened by the felonious activities that occurred on 3.1.2002. He deposed that upon the insistence of his mother he went to the mosque and whereupon Aboobacker told him and the others that they should make graves for Yunus and Kunhikoya who lost their lives on the previous day's clash and thereupon they proceeded towards the graveyard through Vayanasala Beach road. He deposed that the Policemen seen there asked them to proceed further in two quadruple groups and thereupon, Aboobacker, PW5 Jamsheer, Azeez and Ashraf formed the first batch and proceeded to the graveyard alongside the sea wall. According to him, he along with PW3 and two others proceeded to the graveyard through a by-lane lying east of the way through which the first batch proceeded. It is his further version that when he along with the three others reached near the houses of Subaida and Patheyi

they saw Azeez, Ashraf and Jamsheer running ahead of Aboobacker and in fact, they were being chased by certain Hindus holding deadly weapons like swords, sticks etc and exhorting “മുസ്ലീങ്ങളെ വെട്ടടാ, കൊല്ലടാ.” He further deposed that Azeez, Ashraf and Jamsheer ran through the pathway lying on the north-eastern direction towards the mosque and Aboobacker was running westwards alongside the sea wall. Upon seeing the same they rushed to the policemen found near Vayanasala road end and informed them of the impending attack on Aboobacker and thereupon he along with his two companions and three policemen ran alongside the sea wall towards south. He deposed further that when they reached the vicinity of the houses of Patheyi and Subaida they found Aboobacker being chased by about 20 persons belonging to Hindu community holding swords, sticks etc. and when Aboobacker reached in between the houses of Subaida and Patheyi, Vibeesh(A3) cut on the head of Aboobacker with a sword. Thereupon, Venkittan @ Sajeevan(A7) also cut on the head of Aboobacker with a sword and Prahladhan(A10) smashed on his back with an iron bar.

According to PW2, Aboobacker then fell down and was lying supine and then Biju @ Bijesh(A9) birched him and Shaji(A4) and Rajesh (A11) inflicted cut injuries with choppers. He deposed that Sasi (A12) had also inflicted a cut injury with a sword on Aboobacker. Suresan (A2), Vijith(A15), Sumesh(A8), Sreedharan (A1), Kailesh (A6) and Vinod (A13) were also among the assailants and that Suresan was also holding a sword. He has also deposed that Manikandan (A14) and Ranjith (A5) picked up a stone and dropped it on the face of Aboobacker and further that all the appellants/accused are natives of Marad and he knew all of them. The oral account of PW3 regarding their retreat, meeting the policemen and reaching near the place of occurrence and also on the attack on Aboobacker got no substantial variance with the version of PW2 on those aspects. He too, deposed that Vibeesh (A3) and Venkittan @ Sajeewan(A7) inflicted cut injuries with swords on the head of Aboobacker. He would also depose that Prahladhan(A10) smashed on the back of Aboobacker with an iron bar and consequently, Aboobacker fell down. He has also deposed that

Sasi (A12) inflicted a cut injury on the head of Aboobacker with a sword and further that Shaji (A4) and Rajesh (A11) inflicted injuries on Aboobacker with choppers. PW3 further deposed that Manikandan (A14) and Ranjith (A5) picked up a stone and dropped it on the face of Aboobacker. He deposed further that Rajesh (A11) birched on the deceased and Sreedharan (A1), Suresan(A2), Kailasan (A6), Vijith (A15), Vinod (A13) and another person were among the persons who gathered around Aboobacker and that Suresan was holding a sword and the others were carrying weapons. But, the following aspects in their oral testimonies are to be borne in mind while considering the question whether it is safe to rely solely their evidence to fix culpability on the appellants-convicts without any corroboration:- PW2 narrated the overt acts of all the accused while being examined. During the cross examination, PW2 deposed that all the accused persons are known to him as they are also natives of Marad. But, the fact is that he could identify only 12 accused persons and he wrongly identified three among them. He wrongly identified the 10th accused Prahladan as

Ranjith (A5), Ranjith (A5) as Rajesh (A11) and Rajesh (A11) was identified by him as Ranjith (A5). Regarding the wrong identification of three of the accused, PW2 deposed that he had forgotten their faces as he had been in jail for about 5½ years in connection with another incident occurred in Marad in the year 2003. It is to be noted that even among the persons who was identified by PW2, the 8th accused was acquitted by the trial court. It is relevant to note that he was questioned by PW19 only on 24.5.2002. He categorically deposed before the court that till such date, he had not divulged the fact that he had witnessed the incident before any authority including the police, but revealed the facts to some of the natives, but did not mention their names. He would admit the fact that after reaching the mosque immediately after the incident he remained there till 6 O' clock in the evening, but did not divulge anything about the occurrence to the policemen who were also there in and near the mosque premises. The crucial fact is that even after vividly narrating the overt acts of all the accused he could not identify all of them from the court and in fact,

some of them were, even wrongly identified by him. The point is that even without recognizing the accused persons he had ventured narrate their overt acts, that too, by naming each and every one of them. For such failure to identify some of them he assigned the reason that he had been in jail for about 5½ years in connection with a case occurred in Marad in the year 2003. How can that be accepted as a reasonable explanation for such failure and mis-identification. Considering the age of the accused persons and PW2 at the time of his imprisonment and the fact that the period of imprisonment was only 5 ½ years, conceivable from the records and admitted facts, it can not be accepted as a reason at all for his failure to identify some of them and also for the misidentification of some. It is very pertinent to note at this juncture that during his examination, he claimed that he knew even the house names and fathers' names of such persons. Such a statement would suggest close acquaintanceship. But, ultimately, he could not say with precision the house names and fathers' names of most of the accused persons and as already noticed, he could not even identify all of them.

Despite those aspects as also of the fact that on his own he did not come forward to give statement to the police prior to 24.5.2002 and his statement was recorded by PW19 only on 24.5.2002, we do not think it proper to discard his testimony, in toto. That is because PW5 had deposed to the effect that PW2 and PW3 were also among the persons who proceeded towards the graveyard for digging graves in the morning of 4.1.2002 from the mosque and up to the point where they were intercepted by the police officials, PW2 and PW3 were with them. It is relevant to note that PW4 would also depose that three persons came to him and told about the impending attack on one person. In the said circumstances, the versions of PW4 and PW5 would give some assurance about the presence of PW2 when the octonary left the mosque to dig graves and reached near the place of occurrence along with PW4 and other policemen. In short, the evidence of PW2 can be believed to the extent his version gets corroboration.

39. We have already taken note of the congruency in the versions of PW2 and PW3. We will now, consider the aspects which makes oral

testimony of PW3 unsafe to accept and act upon without corroborative evidence, as in the case of PW2. Like PW2, he too, did not divulge the fact that he had seen the occurrence till 24.5.2002 before any authority including the police. He was questioned about the incident by PW19 only on 24.5.2002. It is to be noted that for their delayed questioning, PW19 offered the explanation as their non-availability in their houses on getting afraid of the happenings. A scanning of the evidence of PW3 would reveal that the said reason assigned by PW19 for the delayed questioning was specifically denied by him and that apart, he strongly asserted his presence at home, during the said period. He would also depose that though policemen were available in the mosque when they took asylum there, he did not divulge the incident to them. It is to be noted that the learned counsel appearing for the appellants-convicts contended that no credibility could be given to the evidence of PW3 in the light of the contradictions marked at the time of his examination viz., Exts.D2 to D9. We have carefully perused the contradictions marked in the C.D statements of PW3 which were considered carefully

by the trial court. A bare perusal of the contradictions marked by the defence would reveal that except Ext.D6 the other contradictions could not be said to be material contradictions at all. In such circumstances, what is to be looked into is whether the contradiction which was marked as Ext.D6 is so material to render his evidence untrustworthy.

The contradictions marked as Ext.D6 reads thus:-

“അപ്പോൾ അവിടെ വഴിയുടെ കിഴക്കു ഭാഗത്തായി മറ്റ് കുറെ ആളുകളും കൂടി നിന്നിരുന്നു”.

It is to be noted that while being cross examined, PW3 deposed to the effect that his version recorded in his previous statement in regard to the gathering of certain others on the eastern side of the place of occurrence, is not correct. It is in the said circumstances that it was marked as a contradiction. It is contended by the learned counsel for the appellants-convicts that his prevarication itself is an indication that he was not telling truth before the court. It is submitted by the learned counsel for the appellants-convicts that Ext.D6 would reveal that when Aboobacker reached near the houses of Patheyi and Subaida, on being

chased by the group of assailants, some other persons were also there. This was highlighted for twin purposes. Firstly, it is contended that if people had actually gathered there, the possibility of innocent onlookers getting implicated as accused could not be ruled out. In such circumstances, application of section 149, IPC requires greater care and caution as innocent onlookers might have been arraigned as accused. It is the contention that in such circumstances when, apart from the assailants, bystanders were also there in the place of occurrence, to get assurance that the innocent bystanders are not implicated as accused it is to allege and prove the specific overt acts of each and every accused lest it would be improper and unsafe to apply the provisions under section 149, IPC. The other purpose is to highlight the situation that despite the availability of independent witnesses, for obvious reasons, none of them was brought before the Court to unravel the true picture.

40. Evidently, in this case, prosecution sought to establish the commission of the offences by the appellants-convicts through the oral testimonies of PWs 2 to 5. We have already found that the evidence of

PW16 with Ext.P14 leaves no room for any doubt whatsoever, regarding the fact that the death of Aboobacker was homicide. Among PWs 2 to 5, PW5 admitted that he had not witnessed the occurrence and according to him, he had only seen the assailant group chasing Aboobacker, holding weapons. Therefore, evidently, there were only three occurrence witnesses viz., PW2 to PW4. After analysing the evidence of PW4, we have already come to the conclusion that there is no reason to doubt his presence at the scene of occurrence. It is evident that at the relevant point of time, he was a Sub Inspector in the Malabar Special Police. He was brought to the locality along with two platoons consisting of 54 policemen, taking into account the prevailing situation in the locality, in order to maintain the law and order situation. A scanning of his evidence would leave no room to attribute that he was implicating the accused as he being an official witness to aid the prosecution simply because, had it been so, he would not have confined attribution of specific overt acts only against three out of the fifteen accused persons. Still, as stated earlier, owing to the facts that he came

to Marad for law and order duty only on the previous day of the occurrence, no test identification parade was conducted and he was examined in Court only in the year 2009 viz., about seven years since the occurrence, we are of the considered opinion that it would be unsafe to act only upon his version without corroboration. That apart, his evidence would establish that apart from the three persons identified by him in court several others were also members the assailant group and they had also actively indulged in the commission of unlawful acts that culminated in the death of Aboobacker. We have already arrived at the conclusion that it is only safe to look for corroboration to the oral evidence of PW2 and PW3 for the reasons mentioned herein before.

40. There can be little doubt regarding the crux of the principle of corroboration. Certainly, the principle is not that corroboration is essential and/ or inevitable before there can be conviction. Needless to say that if substantive evidence is lacking, contents of corroborative evidence got no significance. Corroborative evidence is not substantive evidence and hence it cannot have independent existence. It only

corroborates and persuades the court to believe substantive evidence. In short, reliability of substantive evidence may be strengthened by corroborative evidence. Normally, a judicial mind may seek for corroboration for entering into a finding of conviction except in circumstances where substantive evidence is so strong and unerringly pointing towards the guilt of the accused. In such circumstances, even while holding that the crux of the principle of corroboration is that a corroboration is not essential for entering into conviction we may add that depending upon the facts and circumstances of a case courts may seek for corroborative evidence.

41. In the circumstances explained above, the question is whether it is safe to sustain the conviction of the appellant-convicts without searching for availability of corroborative evidence and even in case of availability, without considering the question whether they would strengthen the substantial evidence. In the appeal preferred by the victim the question whether the acquittal of the 8th accused warrants interference is also to be considered. In the said appeal and also in the

state appeal the question whether enhancement of punishment is invited in the case of accused 1,2,6,13 and 15 is to be looked into subject to the decision in the appeals against conviction filed by the convicts.

42. True that, PW5 was also cited as an eye witness. But, virtually, he was cited not as an eye witness to the occurrence in which Aboobacker lost his life, but was cited as a witness only to the inception of the transaction that culminated in the homicidal death of Aboobacker. In other words, to establish that the octonary including him and Aboobacker went to dig graves for the two persons named hereinbefore who died in the previous day's riot and in the midway they had to retreat owing to the threat of attack and then they were chased by a group of assailants with deadly weapons exhorting to do away with musalman. The case unfolded by the prosecution leading to the said incident commenced from the spot where a boat caught fire on an earlier occasion and where one Bharathan was seen sitting. The said Bharathan allegedly gave warning about the assemblage of Hindus in arms in the nearby area. At the risk of repetition it is to be stated that

the said Bharathan was not cited as a charge witness and at any rate, he was not examined. At the same time, the prosecution had examined PW5 to unfold its case from the very inception. Going by the evidence of PW5, himself and two others accompanied deceased Aboobacker up to the point where they met the aforesaid Bharathan and upon hearing the words of warning from Bharathan, all of them retreated. As per his version, a group consisting of 25 Hindus, armed with deadly weapons, rushed towards them shouting not to spare musalman and to do away with them and thenceforth they ran westwards for their lives. As noticed hereinbefore he along with two others who were with Aboobacker escaped unscathed and reached the mosque. His identification of the members of the said group of persons whom he claimed to have seen within the blink of an eye while fleeing for life, is certainly, difficult to treat as one corroborating the evidence of identification of PW2 and PW3. Even if his version is believed, it is to be noted that in the court he identified only 8 persons and even among them he identified accused No.10 Prahladan as Vijith, who was actually

accused No.15. Thus, it can be seen that he had identified only 7 persons. It is also to be noted that his version is that when he looked back while running, he saw the assailants chasing them armed with weapons. Going by the case of the prosecution, PW5 was questioned prior to 15.1.2002, the date on which Ext.P5 report was filed by PW19 before the court incorporating the names of 15 persons. Apart from PW9 among the eye witnesses, who were examined before the court, PW4 alone was questioned by PW19 prior to 15.01.2002. PW4 could not be expected to have divulged the names of any of the assailants to PW19 as going by his very version, PW4 came to the locality for official duty only on 3.1.2002 and the incident occurred on the very next day. It is also the case of the prosecution, as is borne out from record that PW2, PW3, and other eye witnesses were questioned for the first time only by PW19, that too, only on 24.5.2002. It is to be noted that PW4 identified only accused Nos. 2, 3 and 14 from the court. In this context it is also to be noted that PW4 narrated the specific overt acts of those three persons whom he identified from court. A close

scrutiny of his evidence would reveal that virtually he had identified even those three persons, by recollecting the specific overt acts and further that his version with respect to the overt act against the second accused is in conflict with the version given by PW2 regarding the overt act of the second accused. PW2 had deposed that he was residing in Marad and during the cross examination he deposed that he knew the accused previously and they are all natives of Marad and he had divulged those facts to the Investigating Officer. He further deposed that if that fact was not seen recorded, he had nothing to say. His evidence would reveal that he claimed that he knew the fathers' names and the residential names of, all the accused. He identified only 12 accused persons from the court. He had failed to give details regarding the fathers' names and residential names. At the same time, the evidence given by PW2 before the court itself would reveal that during the chief examination he had deposed regarding the specific overt acts of 9 accused persons and his further evidence is to the effect that accused Nos.1,2,6,8,13 and 15 were also among the assailants and further that

Accused No.2, Suresan was also holding a sword. PW3, the other eye witness also deposed to the effect that he is a native of Marad and that he got acquaintance with all the accused persons. As has been done by PW2 he had also deposed before the court regarding the specific overt acts of 9 accused and further that accused Nos.1, 2, 6, 13, 15 and other persons were also among the assailants. It is also to be noted that the defence got marked Ext.D6 as his C.D. contradiction. Ext.D6 would undoubtedly suggest that his version before the police was that several others were also present in the place of occurrence and they were mutely witnessing the incident. PW19 the investigating officer who recorded the statement of PW3 would also depose that he had given such a statement. Thus, it is evident that he deviated from his statement under section 161, Cr.P.C. In this context it is to be noted that going by the oral testimonies of PWs 4 and 5 a group of persons were chasing Aboobacker. Even according to the version of PW3 about twenty persons were chasing Aboobacker. In such circumstances, apart from the assailants, the deceased and PWs 2 to 4, if some others were also

present at the place of occurrence a question may arise whether any innocent onlooker was also implicated as an accused. Certainly, when circumstances are such that its possibility cannot be ruled out, then it is only safe to look in to the question whether specific accusation of an overt act was made and proved.

43. As noticed hereinbefore, the appellant-convicts raised a contention that certain crucial material witnesses viz., Bharathan, Subaida and Patheyi were not examined by the prosecution and their non-examination tantamounts to withholding of witnesses and in such circumstances, an adverse inference is liable to be drawn against the prosecution. In the light of the decision of the Hon'ble Apex Court in **Ishwar Singh Ilam Singh v. State of Uttar Pradesh** reported in 1976 SC 2423 before adverse inference against prosecution could be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld, were either the eye witnesses who had actually seen the occurrence or material witnesses to prove the case. There can be no doubt that when better evidence was withheld it is only fair to

presume that there is some motive for not producing such evidence or that if such evidence is offered the design would have been frustrated. Even while holding so, it cannot lose sight of the settled position that the prosecution is bound to produce only such witnesses as essential for unfolding its case. True that if Bharathan, the person who according to the prosecution gave a warning to the deceased and the other persons who accompanied him, regarding the assemblage of Hindus armed with weapons, was examined a better assurance with respect to the inception of the incident that culminated in the murder of Aboobacker could have been obtained. But, at the same time, in this case it is evident that PW5 had tendered oral evidence regarding the inception of the incident. Hence, non-examination of Bharathan cannot be a reason to totally disbelieve the case of the prosecution regarding the inception of the incident. In the case of Subaida and Patheyi, the two ladies before whose houses the incident had taken place, there is nothing on record to show whether they were actually available in their respective houses at the relevant point of time. The prosecution did not have any

such case. In the said circumstances, when there is absolute absence of any evidence to show that they were present in their respective houses at the relevant point of time and had also witnessed the incident it cannot be said that they were material witnesses and they were withheld, in the light of the said decision in **Ishwar Singh Ilam Singh** case (supra). In short, in such circumstances, the non-examination of those witnesses cannot be a reason to throw the case of the prosecution and necessarily the culpability of the appellants-accused has to be decided in the light of the evidence available on record.

44. The appellants-convicts have also pointed out another situation which according to them, would cast suspicion on the prosecution case. According to them there is incongruity in regard to the time of postmortem in view of Exts. P13 and P14. Going by Ext.P13 report, inquest was conducted by PW14 from 2.p.m to 4 p.m on 4.1.2002 and on the other hand Ext.P14 would show the post-mortem commenced at 3 p.m and concluded at 3.30 p.m. on the same day. True that, at the first blush it would appear that there is

inconceivable discrepancy. At the same time, it is to be noted that there is no serious challenge on the issue that PW14 had conducted inquest on the body of the Aboobacker and PW16 had conducted autopsy and issued Ext.P14 post-mortem report on 4.1.2002. We have also gone through Exts.P13 and P14 and on such perusal we did not find anything material so as to hold that there is inconceivable discrepancy in regard to those matters. A scanning of the evidence of the eye witnesses cited by the prosecution would reveal that to certain extent there are omissions and discrepancies. A little bit of deviation from the previous statement by a witness cannot be taken as so material to cast suspicion on the prosecution case unless they are actually very material. We will have to keep ourselves reminded of the position that the maxim '*falsus in uno, falsus in omnibus*' (false in one thing, falls in everything) does not apply in India.

45. In this case, while dealing with these appeals we found it necessary to receive additional evidence and invoking the power under section 391, Cr.P.C, the expert who conducted analysis of the material

objects forwarded for analysis under Ext.P18, was examined. His report was marked as Ext.P23 and it would reveal that in three weapons of offence blood of human origin was found. It is also to noted that from one of the weapons of offence viz., MO1, hair was also collected and it was also made available for analysis. After analysis the hair found thereon, which was forwarded as item No.6, was found similar to the tuft hair forwarded for comparison as item No.7. Taking into account all such circumstances, explained above, we are of the view that while deciding the culpability of the appellants-convicts it would be unsafe to arrive at a conclusion of their culpability without any corroborative evidence, as well.

46. The evidence of PW4 is to the effect that he had seen deceased Aboobacker was being chased by a group of persons. He had also deposed to the effect that though he had pointed the pistol towards those persons and asked them to disburse, but before anything could be done the entire incident took place within two minutes. According to him, Aboobacker was attacked by a group of persons with deadly

weapons. We have already adverted to the evidence of PW4 and also PW16 with Ext.P14 post-mortem report. Ext.P14 would reveal that deceased Aboobacker sustained several cut injuries on his head and the opinion regarding the cause of death, going by PW16, is the injuries which Aboobacker sustained on the head. After analyzing the evidence of PW16 in the light of the injuries noted in Ext.P14 we have already found that that there is absolutely no reason for disagreeing with the said opinion. It is also a fact borne out from the evidence available that the death of Aboobacker was almost instantaneous. The nature of injuries noted in Ext.P14 with the evidence of PW16 would also lend support to the version of PW4 regarding the involvement of several persons in the attack on Aboobacker. We have already found that there is no reason to doubt the presence of PW4 near the place of occurrence and according to him the attack was over within minutes. Going by the version of PW2 and PW3 also the entire action was accomplished by the assailants swiftly when Aboobacker came within their handy distance. The assailants inflicted several cut injuries on the head. In

such circumstances, constrained us to uphold the finding of the trial court that the homicide of Aboobacker is nothing but a murder.

47. Certainly, the questions who are the culprits and whether they are entitled to get the benefit of any of the exceptions under section 300, IPC are all matters to be considered and we will deal with those questions a little later. Going by the evidence of eye witnesses consisting of PWs 2 to 5 it is evident that a group of persons chased Aboobacker. As noticed hereinbefore, the evidence of PW4 is to the effect the entire attack was completed within no time and, in fact, it was completed within two minutes. It can be seen from the evidence of PWs 2 to 4 that the persons who chased Aboobacker inflicted injuries with deadly weapons, at the moment Aboobacker came within a handy distance and Ext.P14 would reveal the number of injuries inflicted on Aboobacker, within a very short time. Earlier, we have specifically referred to the circumstances prevalent in the locality on the previous day of the occurrence in this case. Two persons each belonging to Hindu and Muslim communities were killed in a clash. In fact, going by the

evidence, it is to dig graves for the two persons belonging to Muslim community, who were killed in the said clash that the octonary including the deceased Aboobacker, were proceeding to the graveyard on 4 1 2002. The evidence of PW2 and PW5 is to the effect that the assailant group were exhorting to do away with Musalman, while chasing Aboobacker and others. Such circumstances, would indicate communal colour of the incident. It would also reveal that the common object of the assemblage of those persons who ultimately committed the unlawful act, was to create ill feelings among Hindu and Muslim communities and it is in furtherance of the same that they committed the murder of Aboobacker. In such circumstances, in the light of the decision of the Hon'ble Apex Court in **Jai Shree Yadav's case (supra)** only on establishing the fact that a particular accused person/ persons was/were not at all a member/members of said unlawful assembly or at a particular point of time he/they ceased to be a member/members of the said unlawful assembly or had not shared the common object to murder Aboobacker and he/they were sharing only

different and distinct common object, he/they can escape from the said inescapable inference by virtue of the effect of section 149, IPC lest in view of the said provision all the members of the unlawful assembly are liable for the offences committed by one or other member of that unlawful assembly.

48. The specific charge against accused Nos. 2,7 and 12 is that they had stabbed Aboobacker with swords. The charge against accused Nos.4 and 11 is that they had inflicted injuries with chopper and against accused No.9 and 10 is that they had beaten Aboobacker with sticks. The charge against accused Nos.5,8 and 14 is that they had dropped granite on him. Now,we will revert to the appreciation of evidence. As noticed hereinbefore, the evidence of PW2 and PW3, based on the oral account of PW 4 and PW5, could be believed to the extent that a group of persons armed with weapons chased Aboobacker and further that he was inflicted with injuries to which he succumbed at a spot near the houses of Patheyi and Subaida. Their evidence would also reveal that certainly the said group which chased and inflicted such injuries on

Aboobacker was having a strength much more than 5. PW4 would also depose that several persons attacked and inflicted injuries on Aboobacker with different weapons and that the entire attack was over within two minutes. The evidence of PW16 with Ext.P14 postmortem certificate, discussed in detail earlier, would lend support to the version of such an attack by several persons to a great extent as such is the number of antemortem injuries found on the body of Aboobacker. PW5 who gave evidence regarding its inception also deposed to the effect that Aboobacker was being chased by about twenty five persons. As regards PW2 and PW3 they were questioned by PW19, the Investigating Officer only on 24.5.2002 though the incident in question had occurred on 4.1.2002. The fact that they had failed to identify all the accused even after narrating the specific overt acts of each and everyone of the accused and that too, after making a tall claim to the effect that all the accused, being their natives, are very much known to them, is evident from the analysis of their evidence. It is true that when a person was attacked and done to death by a number of assailants it

may not be possible for the witnesses to identify all of them or to speak about the particular overt act committed by every one of them, with precision. But, at the same time if a witness vividly explained the overt act/acts of each and everyone of the accused by name and then failed to identify them, especially after making such a tall claim, his evidence requires to be analysed with due care and caution. It is taking into consideration of all such aspects and certain other aspects of their evidence stated hereinbefore, we came to the conclusion that availability of evidence of identification by PW2 and PW3 and their oral account regarding the roles played by the accused persons, are not sufficient to fix their culpability without further corroboration. We have also found in this case that PW4, the official witness identified only three of the accused persons viz., accused No.3 {Vibheesh (sic.) Vijesh}, accused No.14 (Manikandan) and accused No.2(Suresan) from among the 15 accused. As noticed earlier, PW4 identified accused No.3 viz., Vibheesh(sic.,Vijesh) as the member of the unlawful assembly who stabbed Aboobacker from the side,accused No.14 (Manikandan) as

one of the two members of the unlawful assembly who dropped a stone upon Aboobacker and accused No.2 (Suresan) as the member of the unlawful assembly who beat Aboobacker with iron bar. However, according to PW2 Biju@ Vijesh (accused No.9) is the member of the unlawful assembly who birched Aboobacker when he fell down and lying supine, accused No.14 (Manikandan) is one of the two members of the unlawful assembly who dropped stone on Aboobacker and Suresan is another member of the unlawful assembly and he was holding a sword. The version of PW3 is that Vibheesh (A3)(sic.,Vijesh) is one of the members of the unlawful assembly who inflicted a cut injury with sword on the head of Aboobacker, Manikandan(A14) is of the two members of the unlawful assembly who dropped stone on Aboobacker and Suresan(A2) was there holding a sword. It is thus obvious that in the oral testimonies of PWs 2 to 4 there is identity of version only with respect to the specific overt act of accused No.14. Taking note of the facts that PW4 came to the locality to maintain law and order only on the previous day of the date of occurrence, that PWs

2 and 3 are among the persons who went to dig graveyards for the two victims of the previous day's clash, were questioned by PW19, the Investigating Officer only after about 4 months, in the absence of corroboration to their versions in respect of any particular accused it is absolutely unsafe to fix them as the members of the unlawful assembly that committed the murder of Aboobacker. Hence, even in respect of accused No.14 it is only safe to search for corroborative evidence.

49. In this case another piece of evidence is available which could be used as a corroborative evidence. Evidently, based on the disclosure statements of accused Nos. 4, 10, 11 and 12 the weapons of offence allegedly used by them were discovered. Based on the disclosure statement made by accused No.12, MO1 sword was discovered under Ext.P5 mahazar. So also based on the disclosure statement made by accused No.11 under Ext.P4 mahazar MO3 was discovered and based on the disclosure statement made by the 4th accused MO4 was discovered under Ext.P3 mahazar. There can be no doubt with respect to the position that discovery under section 27 of the

Evidence Act could not be treated as conclusive evidence and it could only be used as a corroborative evidence. Based on the disclosure statement made by accused No.10, MO2 was discovered under Ext.P6 mahazar. PW19 deposed to the effect that Mos 1 to 4 were discovered in pursuance of the disclosure statements made by the concerned accused persons, as aforesaid. PW7 is one of the independent witnesses to the recovery of the weapons of offence under Exts.P3 to P5 and PW8 is the independent witness to the recovery of MO2 under Ext.P6 mahazar. Thus, according to us, for deciding the culpability or otherwise of accused Nos. 4, 10, 11 and 12 in addition to the oral testimonies of the aforesaid witnesses another piece of evidence in the form of discovery under section 27 is available. Therefore, the question is whether those materials are sufficient to fix guilt against those accused persons. It is to be noted that the learned counsel for the appellants-convicts contended that as long as in the disclosure statements allegedly given by the said appellants-convicts authorship of concealment was absent, the discovery of those weapons would have

no legal consequences. In other words, they could not be treated at all as an incriminating circumstances against any of them.

50. In the context of the said contentions it is only apposite to refer to the Full Bench decision of this Court reported in **Ajayan v.State of Kerala** reported in **2011(1) KLT 8 (FB)**. Evidently, the Full Bench, after considering all aspects, held that it could not be said that presence of author of concealment in a disclosure statement is a *sine qua non* for deciding the admissibility of the discovery under section 27 of the Evidence Act. In such circumstances, absence of authorship of concealment in a disclosure statement by itself cannot efface its admissibility upon recovery of the weapon and therefore the said contention cannot be upheld.

51. Yet another contention of the appellants-convicts that assumes relevance while appreciating the evidence is that the witnesses are implicating the appellants-accused and it writ large in their oral testimonies. It is also the contention that prosecution witnesses who belonged to a particular community owing to the incident that occurred

on the previous day were entertaining enmity towards the community to which accused persons belonged. Going by the evidence, discussed hereinbefore, it has to be treated that the incident in question occurred as a sequel to the clash between the two groups on the previous day in which two persons each belonging to two communities lost their lives. There can be no doubt that in group rivalries there could be a tendency to rope in as many persons as possible as having been participated in the assault. In such circumstances courts should be very cautious and should sift the evidence with great care and caution to rule out implication solely due to such rivalry. Needless to say that when on scrutiny of evidence if a reason of doubt arose as regards participation of those persons to the effect that they were roped in unnecessarily, the benefit of doubt should be extended to the said accused.

52. Essentially, in group rivalries, one can attribute enmity. A careful scanning of the decisions referred (supra) the decision of the Hon'ble Apex Court in **State of Maharastra v. Tulshiram Bhanudas Kamble & ors.** reported in **AIR 2007 SC 3042** would reveal the

position that testimonies of eye witness could not be rejected on the ground that they were inimical to the accused or solely because they belonged to the rival faction. The fact is that enmity is a double edged weapon inasmuch as it can be a ground for false implication and it can also be a ground for correct implication. There could be little doubt with respect to the position that in India, the doctrine of 'false in one, false in all' does not apply. In short, in such circumstances, while discharging the arduous and pious duty of elucidating the truth, the court has to show great care and caution and separate the grain from the chaff. Another position which would act as guideline in the matter of appreciation of evidence in these cases is with respect to the credibility of the eye witnesses. The question is whether a witness could be believed regarding the case of some of the accused and disbelieved regarding the acts of others. The said position is no more res integra in the light of the decision of the Hon'ble Apex Court in **Ahamed Sulaiman Bhorat v. State of Gujarat** reported in **AIR 1971 SC 991**. Going by the dictum laid down by the Apex Court in the said decision

witnesses could be disbelieved regarding some accused and at the same time, could be believed regarding other accused. We are of the view that if courts are to disbelieve witnesses on the mere ground that they gave the statements or that they were examined before the court long later to the incident, in respect of lion portion of criminal prosecution no successful prosecution would be possible as seldom, trial in a murder case would take place shortly after the occurrence. Time consuming process of investigation and such other factors may cause delay in the matter of conducting trial immediately after the occurrence.

53.Now, we will consider other important facets of the provision under section 149, IPC which would be of immense help in deciding these cases. A mere glance at section 149, IPC would reveal that it does not require prior concert or meeting of minds before the attack so as to infer common object. A careful scanning of the said provision would reveal that in order to hold a person liable under section 149, IPC, generally, three conditions must be fulfilled; (1).there must be an unlawful assembly, (2). The offence must have been committed by one

or other member of the assembly in prosecution of the common object of unlawful assembly; (3). The offence must be such as the members of the unlawful assembly knew it likely to be committed in prosecution of the common object of the assembly. While considering the scope of the said provision it is worthwhile to refer to the decision of the Hon'ble Apex Court in **Bhagwan Singh v. State of M.P [AIR 2002 SC 1621]** and **State of Punjab v. Sanjiv Kumar [AIR 2007 SC 2430]**. In **Bhagwan Singh's** case, with reference to the said provision, the Apex Court held that generally no direct evidence would be available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual role played by each offender and easy to hold that such persons attacking the victim had the common object for an offence which was known likely to be committed in prosecution of such an object. When persons who formed an assembly are shown to be having identical

interest in pursuance of which some of them came armed and the others unarmed , under normal circumstances, all of them should be deemed to be the members of that unlawful assembly. The fact that some of them, at the time of execution of their common object remained passive by itself cannot be a reason to hold that they never shared the common object and in such circumstances it cannot be said that it is necessary to establish the specific overt act by each and every one of them, to make them constructively liable with the aid of section 149, IPC. In that case, it was further held that the accused persons who were on inimical terms with the complainant party and came to the spot with some deadly weapons and attacked the complainant party causing death of three persons, shared the common object. It is to be noted that in those cases, in respect of certain appellants-accused, the main crux of the contention was that their names were not mentioned in the FIR. It was held that an accused would not be entitled to get acquitted on the ground of non-mentioning of his name in the FIR and that necessarily non-mentioning of the names of some accused persons was bound to

occur as the FIRs were lodged by persons who have not actually witnessed the incident. In short, as regards a person who is found to be a member of an unlawful assembly that committed an unlawful act which would attract the aforesaid provision, in prosecution of their common object committed an offence, solely on the ground that no specific overt act was attributed against one or other member of that assembly, he cannot wriggle out of the constructive liability, in such circumstances. The culpability of such a person will depend upon the question whether he is a member of the unlawful assembly which committed that offence, in prosecution of the common object of the assembly. The case on hand is one where no direct evidence is available regarding the common object.

54. From the facts and circumstances and evidence on record discussed as above, we have already arrived at certain conclusions and findings. It was found that the death of Aboobacker was homicide. In view of the number of injuries found on his body, as noted in Ext.P14 post mortem report and their nature it and in view of the evidence of

PWs 2 to 5, we have also arrived at the conclusion that the trial court could not be said to have committed an error in finding that Aboobacker was done to death by a group of persons having a strength of more than 5. Regarding its inception there is also the evidence of PW5. Now, the question to be decided is what was the common object of the said unlawful assembly. Evidently, the medical evidence consisting of oral testimonies of PW16 with Ext.P14 post mortem certificate would reveal that Aboobacker had received a number of cut injuries on his head. We have already found that there is absolutely no reason to disagree with the opinion of PW14 to the effect that death of Aboobacker was due to the injuries sustained by him on his head. The evidence in that regard revealed from the oral testimony of PW16 with Ext.P14 would undoubtedly indicate that there was attack with deadly weapons on Aboobacker. A number of cut injuries were noted in Ext.P14 which ultimately proved fatal. As noticed hereinbefore, PW 5 had deposed that Aboobacker was chased by about 20 persons in arms and PW4, the police officer in law and order duty in that area who

witnessed the incident also depose on the same lines. Add to it, he deposed that the said group of persons showered attack on Aboobacker no sooner he came within their handy distance and according to him the entire attack was over in two minutes. The oral account of PW2 and PW3 would thus gain support on these aspects. In such circumstances, the number of injuries found on the head and other parts of the body of Aboobacker would definitely indicate that the common object of the assailants was to commit murder of Aboobacker.

55. Evidently, the trial court convicted the appellants-accused 3, 4, 5, 7, 9-12 and 14 for the offence punishable under sections 143, 148 153A, 302 read with section 149, IPC and convicted appellants-accused Nos.1, 2, 6, 13 and 15 for the offences punishable under sections 143, 148, 153A and 326 read with 149, IPC with the same set of evidence. The question is whether the conviction and sentence imposed on the appellants-convicts require any kind of interference.

56. Even though we have found that Aboobacker was done to death by an unlawful assembly and their common object was to commit

his murder on appreciation of the evidence based on the provisions of law and position of law, we have already held that it would be unsafe to hold the appellants-convicts as members of the unlawful assembly that caused his murder with the aid of section 149, IPC, without corroborative evidence. On scanning the evidence of PW2 and PW3 we have also found that though they were unable to identify all the accused though they had vividly deposed regarding the overt acts of all the accused. The circumstances revealed from the evidence on record would thus clearly indicate the tendency to implicate persons. In the case, on a careful appreciation of the evidence we have also found that as against accused Nos. 1,2,3,5,6,7, 9,13 and 15 apart from the oral evidence which would not inspire confidence, no corroborative piece of evidence is available. Based on the reasons assigned earlier as to why the oral evidence available alone could not be basis for fixing culpability and our finding that it would be unsafe to sustain conviction against the appellants-convicts we have carefully scanned the evidence on record. We found that as against accused Nos. 1,2,3,5,6,7,9,13, and

15 there is no corroborative evidence at all and therefore, in the circumstances explained hereinbefore it is unsafe to sustain their conviction. In other words, in their case except the oral evidence which we have already held fall short to form strong conclusive evidence, no corroborative evidence is available. The same is the position as relates accused No.14. True that in his case under Ext.P2 mahazar MO5 was allegedly recovered. PW6 is the attesting witness. However, there is nothing on record to show that the same was recovered based on his disclosure statement. Accused Nos.1,2,6,13,14 and 15 are respectively appellant Nos. 1 to 6 in Crl.Appeal No. 602/ 2010 and accused Nos.3,5,7 and 9 respectively appellants Nos. Appellants 1 to 3 and 7 in Crl.Appeal No.709/2010. Certainly, they are therefore, entitled to get the benefit of doubt regarding their membership in the unlawful assembly. The upshot of the discussion is that those appellants-convicts liable to acquitted granting the benefit of doubt. Consequently, the aforesaid appeals to the extent it pertains to them is liable to be allowed and their conviction and sentence imposed as per the judgment in

S.C.No.86/2004 passed by the Court of Special Additional Sessions Judge(Marad Cases), Kozhikode are liable to be set aside. As relates accused No.8 who was acquitted by the trial Court neither the learned Special Public Prosecutor nor the counsel for the appellant-victim could make out a case warranting interference with the judgment of acquittal, as relates to him.

57. Now, we will have to consider another position of law as relates Section 149, IPC. We are of the considered view that in a case where some of the accused persons were found entitled to be acquitted by granting the benefit of doubt due to paucity of conclusive evidence regarding their membership in the unlawful assembly which committed the unlawful act and consequently acquitted and thereby the number of convicts was reduced below five, by itself cannot be reason to hold that there was no unlawful assembly, under all circumstances. True that in the decision in **Sukhdev Singh v. Delhi State(Govt.of NCT)** reported in **2003 SCC 441(SC)**, the Hon'ble Apex Court held that to attract section 149, IPC the minimum number required for conviction under

section 302 with the aid of 149, IPC must be five. In that case out of 44 accused brought to trial Sessions Court came to specific finding only against 24 accused and the High Court came to the conclusion that only seven persons formed an unlawful assembly. The Apex Court held that out of the seven only four accused are members of the unlawful assembly four accused could not be convicted since the number four falls short of minimum required number of five to form an unlawful assembly under section 149, IPC. In an earlier decision in **Ram Bilas Singh v. State of Bihar** reported in **(1964) 1 Cr LJ 573(SC)**, the Hon'ble Supreme Court identified certain situations wherein, a court will be justified in holding that there was unlawful assembly of five or more persons even where less than five persons are convicted as members thereof. For instance:-

(a)The charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act, and evidence that led to prove that charge is accepted by the court;

(b) the first information report and the evidence shows such be the case, even though the charge does not states so;

(c)even though the charge and the prosecution witnesses named only the acquitted and convicted persons, there is other evidence which clearly establishes the participation in the unlawful assembly of other persons besides those named in the charge:

Provided in cases (b) and (c), no prejudice has resulted to the accused persons who having convicted by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.

58. In **Kartar Singh v. State of Punjab** reported in **AIR 1961 SC 1787**, thirteen persons were charged under section 149, IPC as members of an unlawful assembly, but only three (including the appellant) were convicted for the offence and the remaining ten were acquitted by giving the benefit of doubt as they were not identified. The conviction of the appellant as a member of an unlawful assembly which consisted of three convicted accused and some others who were

not identified and so not named, was upheld by the Supreme Court because there was sufficient evidence to show that there were several others who participated in the offence though their identity was not known and not named.

59. In **Maina Singh v.State of Rajasthan** reported in **AIR 1963 SC 174**, the appellant Maina Singh along with 4 other named persons, was charged with committing various offences as a member of an unlawful assembly. Four of the accused were acquitted by the High Court giving them the benefit of doubt and the appellant was convicted for offence as a member of an unlawful assembly. The Supreme Court quashed the conviction and held that the appellant, Maina Singh could not be convicted for offences as a member of an unlawful assembly, since there was no evidence to show that the offence was committed by him along with other named persons.

60. In **Achhey Lal v. State of Uttar Pradesh** reported in **AIR 1978 SC 1152**, the Hon'ble Apex Court quashed the conviction of the appellant therein for offences under section 302, IPC read with section

149 as a member of an unlawful assembly as fifteen named accused charged with assaulting the deceased, fourteen were were acquitted by the High Court, and the sole appellant was convicted for the offence as a member of an unlawful assembly without recording any finding to the effect that after the acquittal of the fourteen named accused, the unlawful assembly consisted of five persons or more, known or unknown, identified or unidentified. Thus it can be seen that a mere finding of not guilty in respect of some of the accused and the consequential acquittal granting benefit of doubt by itself will not cannot end in acquittal of the remaining accused even if their number was thus brought below five because such a finding could not and would not reduce the strength of the assailant group to the minimum required number if in a case where there is some evidence to show that the party of those convicted were actually having a strength of five or more and that they constituted an unlawful assembly.

61. Now, we will consider the culpability of accused No.10 and 11. PW2 could not identify accused Nos.10 and 11. PW3 could not

identify accused No.11. In the case of accused No.10, the case of the prosecution is that using MO2 iron bar he smashed deceased Aboobacker on his back. Ext.P6 is the mahazar under which MO2 was discovered based on a disclosure statement made by him. While considering the question of availability of evidence for determining the culpability of accused Nos.4, 10, 11 and 12 the additional evidence received by this Court invoking the power under section 391, Cr.P.C is also to be considered. [MOs 1 to 4 and 3 hairs found in MO1 were sent for analysis under Ext.P18 mahazar along with other material objects. PW21 conducted the analysis of such material objects and he prepared Ext.P23 mahazar which was forwarded to the court along with Ext.P23 (a) covering letter. A perusal of Ext.P23 would reveal that no blood was detected in MO2. But at the same time, the contention of the learned Special Public Prosecutor is that, that itself is no ground for suggesting non-involvement of accused No.10 in the incident in question. It is contended that as long as MO2 was discovered in pursuance of his disclosure statement and it was the said disclosure

statement that led to its discovery so much of the information that led to the discovery of MO2 is having evidentiary value in the light of the provisions under section 27 of the Evidence Act. In the light of another piece of evidence which is available, we do not think it necessary to go into that question in respect of accused No.10. While being examined before the court, PWs 2 and 3 deposed to the effect that it was accused 10 who smashed on the back of Aboobacker with iron bar and they identified the said weapon of offence as MO2. PW2 has wrongly identified accused No. 5 Ranjith as accused No.10 Prahladan. In this context, it is also to be noted that PW4 who identified three of the accused persons namely accused Nos.2, 3 and 14 deposed before the court that MO2 was used by accused No.2. In such circumstances, we are of the view that in the absence of any blood stains on the said weapon of offence it could not be said that there is conclusive evidence to connect accused No.10 with the offence and he is also entitled to get the benefit of doubt. We will now consider the culpability of accused No.11. MO3 was allegedly recovered based on the disclosure

statement of accused No.11 under Ext.P4 mahazar. Ext.P23 report of analysis would reveal that MO3 chopper contained blood stains of human origin. True that it is an incriminating material in such circumstances. But at the same time, the question is whether that is sufficient to connect accused No.11 with the said crime. PWs 2 and 3 specifically deposed to the effect that using a chopper accused No.11 Rajesh inflicted a stab on Aboobacker. But at the same time, while being examined, PW2 identified Renjith (A5) as Rajesh (A11). He was not at all identified by PW4. In such circumstances, despite the availability of the aforesaid piece of evidence, we are of the view that it is unsafe to hold with conclusiveness that Rajesh was a member of the assembly which committed the offence in question. In such circumstances, we are of the view that Accused No.11 is also entitled to get the benefit of doubt.

62. The next question is whether there is evidence available to uphold the conviction of accused Nos.4 and 12. In the case of Accused No.12, based on the disclosure statement, MO1 sword was discovered

under Ext.P5 mahazar. PW7 is the attesting witness. He supported the discovery of chopper under Ext.P5 mahazar and identified the same as MO1. Obviously, MO1 was also one of the material objects sent for analysis under Ext.P18. As noticed hereinbefore, Ext.P3 is the report containing analysis of MO1 as well. It is to be noted that the evidence of PW19 as also the evidence of PW7 would reveal that it is from the chopper which was discovered under Ext.P5 mahazar that three hairs were collected and packed in a sealed cover. It was sent for analysis under MO6 packet. The evidence of PW23 is to the effect that MO1 contained blood stains and on analysis it was found that it is of human origin. The hairs collected and kept in MO6 were subjected to microscopic analysis. In **Royson's** case (supra), it was held that microscopic analysis of hair is also a recognised method of analysis. PW23 upon analysis of the hairs and on comparing with the tuft of hairs in item No.7 therein arrived at the finding that the hairs in item No.6 are similar to the tuft of hairs in item No.7 referred as such in Ext.P23. The learned counsel appearing for accused No.12 attempted

to canvass the position that even in such circumstances in the absence of determination of the group of blood discovery of MO1 and the report of analysis of the said weapon could not be used as incriminating material against accused No.12. In the light of the decision in **State of Rajasthan v. Teja Ram (AIR 1999 SC 1776)**, we are afraid the said contention cannot be upheld. We have already found in the light of the Full Bench decision of this Court in **Ajayan's** case (supra), authorship of concealment is not a sine qua non to make an information received from a person accused of an offence and is in custody of a police officer, admissible under section 27 of the Evidence Act. In the said circumstances, the contention of the appellants that in the disclosure statement authorship of concealment is not there in the disclosure statement cannot be a ground for holding that the discovery of MO1 got no evidentiary value. As long as it is the disclosure statement of accused No.12 that led to the discovery of MO3, the absence of such authorship cannot efface its evidentiary value especially in the light of Ext.P23. The next question is whether failure to detect group of blood

found on MO1 can be a reason for holding that it could not be treated as an incriminating material against accused No.12. In the light of the decision in **Prakash v. State of Karnataka [2014 Crl.LJ 2503]** the failure to conduct grouping of blood could not be a reason for denuding the evidentiary value of a discovery under section 27 of the Evidence Act. As noticed hereinbefore, both PWs 2 and 3 deposed to the effect that accused No.12 inflicted an injury on the head of Aboobacker with a sword. Both of them identified the said weapon as MO3. PW7 who is the attesting witness to Ext.P5 mahazar and PW19 the investigating officer who recovered the same in pursuance of the disclosure statement made by accused No.12 had also identified MO1 as the weapon of offence used by accused No.12. In such circumstances, we are of the view that the trial court was perfectly justified and correct in arriving at the conclusion that the prosecution has succeeded in establishing that accused No.12 was one among the unlawful assembly and it was he who inflicted injury with a sword on the head of deceased Aboobacker. It is also to be noted in this context that a perusal of the

court charge would reveal that a specific charge has been framed against accused No.12 to the effect that he had stabbed Aboobacker with a sword. We have already found that common object of the unlawful assembly was to commit murder of Aboobacker. The manner in which the assailant group in which accused No.12 was also a member committed the offence is relevant for the purpose of deciding the culpability under section 153A. Evidence in this case would reveal that Aboobacker was being chased by the assailant group shouting 'don't spare muslims do away with them'. In such circumstances, we are of the view that the trial court is justified and correct in finding that accused No.12 is guilty under sections 143, 148, 153A, IPC as well. No specific contention has been placed before us on behalf of accused No.12 to canvass the position that the case against him falls under any of the exceptions under section 300 to take it out of the purview of section 300, IPC. In such circumstances, the trial court is also justified in holding that he is guilty of offence punishable under section 300. It is also to be noted that besides being found guilty,

convicted and sentenced for the offences punishable under sections 143, 148, 153A and 302 read with section 149, IPC accused No.12 was also found guilty and convicted for the offence under section 7 read with 25A of the Arms Act. A scanning of the judgment would reveal that there is absolute absence of any discussion with respect to the availability of a notification which is required to make 'sword' as a prohibited arm for the purposes of Arms Act. No such notification was produced in this case and in fact, it is not contended before us that such notification making sword as a prohibited arm under the Arms Act applicable to the State of Kerala has been notified so far. In such circumstances finding of the trial court that accused No.12 is guilty of the offence under section 7 read with section 25A of the Arms Act and the conviction entered against him thereunder is set aside.

63. Now, we will consider the culpability of accused No.4. PWs 2 and 3 deposed before the court that accused No.4 inflicted an injury on the head of Aboobacker with a chopper. They identified Shaji (A4) from the court. PW19 deposed to the effect that MO4 was discovered

under Ext.P3 mahazar based on the disclosure statement made by accused No.4. PW7 is the attesting witness. He supported the case of the prosecution. Both PW7 and PW19 identified the weapon discovered under Ext.P3 mahazar based on the statement made by accused 4 as MO4. Evidently, MO4 was also sent for analysis under Ext.P18 mahazar and it was analysed by PW21 and Ext.P23 contained the result of analysis of MO4 as well. It is evident from Ext.P23 report as also the evidence of PW21 that MO4 which is referred to in Ext.P23 as item No.4 contained human blood. It is true that PW2 identified MO3 as the weapon used by accused No.4. But at the same time, as noticed hereinbefore, PW4 identified MO4 as the weapon used by accused No.4 as the weapon of offence. It is also to be noted that PW7 and PW19 identified MO4 as the weapon discovered under Ext.P3 mahazar. PW19 also testified that MO4 was discovered based on the disclosure statement of accused No.4. In such circumstances for the reasons which we have already assigned for holding the conviction of accused 12, we are of the view that it cannot be said that the trial court

committed fault in entering into finding of guilt and also convicting and sentencing accused No.4. The evidence expatiated above would reveal that the prosecution has succeeded in establishing that accused No.4 was a member of the unlawful assembly which committed murder of Aboobacker and it was he who inflicted a fatal injury on the head of Aboobacker using a chopper which is identified as MO4. Accused No.4 could not bring out that his case falls under any of the exceptions under section 300 to take it out of the purview of section 300 IPC. It is also to be noted that in the court charge, charge was framed specifically against accused No.4 to the effect that using a chopper he stabbed deceased Aboobacker. The trial court is also justified in arriving at the finding of guilt in the aforesaid circumstances against accused No.4 under sections 143, 148, 153A and 302 read with section 149, IPC. Though Crl.A.No.926/2015 was filed to award the sentence of death penalty to the convicts in S.C.No.86 of 2004 in view of the fact that we found that appellants-accused 4 and 12 alone are to be found guilty for the offences under sections 143, 148, 153A and others are entitled to

get the benefit of doubt and also taking into account the fact that the appellant could not establish that the case on hand falls under the category of rarest of rare cases to be awarded with death penalty and also taking note of the fact that the learned counsel for the appellant very fairly conceded the said provision. In the result :-

Crl.Appeal No.602 of 2010

In view of our conclusions and findings made hereinbefore, the appellants/accused Nos.1, 2, 6, 13 to 15 are entitled to get the benefit of doubt and in such circumstances, this appeal stands allowed in respect of the said appellants. The judgment in S.C.No.86 of 2004 dated 17.3.2010 passed by the Court of Special Additional Sessions Judge (Marad Cases), Kozhikode whereby and whereunder accused Nos.1, 2, 6, 13 to 15 are convicted and sentenced, is set aside to the extent it pertains to them. As regards appellant Nos.1, 4 and 6 viz., accused Nos.1, 13 and 15, their bail bonds stand cancelled. Appellants 2, 3 and 5/accused Nos.2, 6 and 14 shall be set at liberty forthwith in case their detention in connection with any other cases is not required.

Crl.Appeal No.429 of 2011

In the light of the judgment in Crl.Appeal No.602 of 2010 acquitting accused Nos.1, 2, 6, 13 to 15 granting benefit of doubt and the consequent setting aside of the judgment in S.C.No.86 of 2004 dated 17.3.2010 passed by the Court of Special Additional Sessions Judge (Marad Cases), Kozhikode to the extent it pertains to them, this appeal filed by the State stands dismissed.

Crl.Appeal No.709 of 2010

In view of our conclusions and findings made hereinbefore, this appeal filed by accused Nos.3, 4, 5, 7, 9, 10, 11 and 12 to the extent it posed challenge against the judgment in S.C.No.86 of 2004 dated 17.3.2010 passed by the Court of Special Additional Sessions Judge (Marad Cases), Kozhikode convicting and sentencing them stands allowed to the extent it pertains to appellants 1 and 3 to 7/accused Nos.3, 5, 7, 9, 10 and 11, partly allowed in the case of appellant No.8/accused No.12 and dismissed in the case of appellant No.2/accused No.4. The judgment in S.C.No.86 of 2004 dated

17.3.2010 passed by the Court of Special Additional Sessions Judge (Marad Cases), Kozhikode whereby and whereunder appellant Nos.1 and 3 to 7/accused Nos.3, 5, 7, 9, 10 and 11 are convicted and sentenced, is set aside to the extent it pertains to them. They shall be set at liberty forthwith in case their detention is not required. In the case of appellant No.8/accused No.12, his conviction and sentence for the offence under section 5(1)(a) read with section 25(1-A) of the Indian Arms Act are set aside and his conviction and sentences for the offences punishable under sections 143, 148, 153A and 302 read with section 149, IPC stand confirmed. In the case of appellant No.2/accused No.4, his conviction and sentences for the offences punishable under sections 143, 148, 153A and 302 read with section 149, IPC stand confirmed.

Crl.Appeal No.926 of 2015

In the light of the judgment in Crl.Appeal Nos.602 of 2010 and 429 of 2011, this appeal to the extent it pertains to the challenge against the acquittal of respondent Nos.1, 2, 6, 12 and 14/accused Nos.1, 2, 6,

13 and 15 for the offence punishable under section 302 read with section 149, IPC and for their conviction thereunder and also for handing down death penalty to all the party respondent Nos.1 to 14/accused Nos.1 to 7 and 9 to 15 is liable to be dismissed. In this appeal, Crl.M.A.No.5370 of 2015 has been filed under section 482, Cr.P.C. seeking a direction to the respondent, without mentioning any particular respondent, to pay an amount of ₹20,00,000/- to the appellant, as compensation. There cannot be any doubt with respect to the position that when there is a specific provision pertaining to a particular remedy/relief available under the Code that has to be sought for, if it is to be sought, in the light of the said provision. We are not oblivious of the position that failure to quote or misquoting of a provision is not fatal so long as there is an enabling provision. Though the specific provision is not quoted, taking into account the fact that there is provision for compensating the victim under section 357A and taking into account the following aspects we are inclined to pass the following order:-

As per the impugned judgment, the trial court while sentencing the accused therein to pay the amount of fine as fixed thereunder, ordered that on realisation of the fine amount, ₹2,00,000/- shall be paid to the legal heirs of deceased Aboobacker. This appeal has been filed by none other than the widow of deceased Aboobacker. Evidently, by virtue of our judgments in the connected appeals, the total fine amount has come down. Therefore, the amount of fine on realisation from the convicts/accused Nos.4 and 12 shall be given as compensation to the appellant herein. Evidently, the appellant herein was in her thirties when she lost her husband. There cannot be any doubt that the amount of compensation directed to be paid under section 357, Cr.P.C cannot now, be sufficient to rehabilitate her. In such circumstances, we are also of the view that the appellant has to be compensated in terms of the provisions under section 357A, Cr.P.C. For deciding the quantum of compensation, the Registry is directed to send a copy of this judgment to the Kerala State Legal Services Authority, which, on its receipt, shall cause issuance of notice on the appellant and decide the

compensation, in accordance with law. It is made clear that we have not made any observation regarding the quantum of compensation to which she is entitled. Subject to the above, this appeal is dismissed.

C.T. RAVIKUMAR
JUDGE

K.P.JYOTHINDRANATH
JUDGE