

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE V.K.MOHANAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V**

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

CRL.A.No. 53 of 2011 ()

**AGAINST THE JUDGMENT IN S.C.NO.480/2004 of ADDL DISTRICT & SESSIONS COURT
(AD HOC-III),NORTH PARAVUR DATED 14-10-2010**

APPELLANT(S)/ACCUSED:

**LALU, S/O.VALLABHAN,
KANDANTHURUTH HOUSE, KANDANTHURUTH BHAGOM,
CHENGAMANAD KARA, CHENGAMANAD VILLAGE.**

**BY ADVS.SRI.DINESH MATHEW J.MURICKEN
SRI.P.V.BALAKRISHNAN**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE,
CHENGAMANAD, PIN-653578 THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY SMT.PRAICY JOSEPH, SPL. PUBLIC PROSECUTOR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24.06.2015, THE
COURT ON 10-07-2015, DELIVERED THE FOLLOWING:**

Bb

V.K.MOHANAN & RAJA VIJAYARAGHAVAN.V, JJ

Crl.A.53 of 2011

Dated 10th July, 2015

JUDGMENT

“CR”

Raja Vijayaraghavan.J.

1. The sole accused challenges his conviction for murder and house trespass to commit offense punishable with death. As per judgment dated 14.10.2010 in S.C.No.480 of 2004 on the file of the Additional District and Sessions Judge (Ad hoc-III), North Paravur, he has been sentenced to undergo rigorous imprisonment for life and to pay fine under S. 302 of the IPC with default sentence and also to undergo rigorous imprisonment for 10 years and fine with default sentence under S. 449 of the IPC .

2. Succinctly stated, the case of the prosecution is this:-

(a). The accused Lalu had illicit intimacy with Asha Anil, the deceased. There were also some financial transactions between the accused and the deceased. Disputes arose between them and the deceased refused to continue with the said relationship, and put an end to the financial transactions. The accused was having a grudge towards the deceased owing to the said fact. In pursuance thereon, on 15.11.2002 at about 7.15 pm, the accused ,a barber by profession , entered the house of the deceased where she was residing with her family and thereafter, caught hold of her in front of the kitchen of the said house and after covering her mouth in order to silence her , slit her throat and also caused other injuries with a sharp shaving razor used by him for his avocation. As a result of the injury sustained, the deceased fell down on the floor and succumbed to the injuries as

a result of heavy bleeding from the wound. On these allegations, the accused was charged for having committed the offences punishable under Section 449 and 302 IPC.

(b). PW 4, Dinesan, the immediate neighbour lodged the FI statement before the SI of police, Chengamanad police station at 9.30 pm on 15.11.2002. Ext.P13 FIR was registered at 9.30 pm under Section 449 and 302 IPC. On 16.11.2002 at 8 AM the CI of Police, Chengamanad police station took over the investigation. He prepared Ext.P3 inquest over the dead body of the deceased. No separate scene mahazar was prepared as the description of the scene was narrated in detail in Ext.P3 inquest. Portion of the shaving knife was found near the dead body and the same was seized. The clothes worn by the deceased and the sheet used for covering the dead body were seized. Thereafter, the body was handed over to

PW20, for conducting autopsy. On 17.11.2002 at 3.00 pm the accused was arrested from near Aluva U.C College. Thereafter, based on the disclosure statement given by the accused, the clothes worn by the accused was seized as per Ext.P6 mahazar. Thereafter it is alleged that the accused had confessed about the concealment of the other portion of the knife and based on his disclosure statement, handle of the shaving knife was recovered from the banks of a nearby bathing ghat as per Ext.P7 mahazar. The accused was produced before Court and was remanded and after questioning the witnesses the investigation was completed and final report was filed before the Judicial Magistrate of First Class, Aluva

3. The learned Magistrate initiated committal proceedings as C.P.No.20 of 2013 and after complying with the necessary formalities the case was committed to

the Court of Sessions, Ernakulam, wherein the case was numbered as S.C.No.480 of 2004 and thereafter, the case was transferred to the Additional Sessions Court, North Paravur.

4. The accused who was on bail appeared before the Sessions Court on receipt of summons. After hearing both sides, formal charge was framed and when the same was read over to the accused and explained to him, he pleaded not guilty.

5. In order to prove the case of the prosecution, PWs 1 to 24 were examined and Exts.P1 to P17 and P17a were marked. MO1 series to MO7 were produced and identified. On the side of the defence, no oral evidence was adduced. The case diary contradiction was marked as Ext.D1 from the deposition of PW1.

6. The defense case as per the 313 statement of the

accused is that he was not present in the place of occurrence and was implicated falsely. He is unaware as to the incident leading to the death of the deceased and he came to know about the incident only after his arrest by the police.

7. The learned Sessions Judge who tried the case went on to place absolute reliance on the evidence of PW1 and 2 who are the children of the deceased who claimed to have seen the incident and based on other corroborating circumstances held that the prosecution has succeeded in proving its case beyond reasonable doubt and convicted the appellant under Section 449 and 302 of the Indian Penal Code.

8. We have heard Sri.Dinesh Mathew J.Murickan, the learned counsel for the appellant and Smt.Praicy Joseph the learned Public Prosecutor.

9. The learned counsel for the appellant took us through the evidence meticulously and submitted that the trial court has egregiously erred in relying on the evidence of PW 1 and 2 . It was contented that they were tutored and a combined reading would render the evidence untrustworthy. Failure to test the capacity and competency of PW2 to tender evidence was also advanced as a ground to reject his evidence. It was argued that PWs 3, 4, 5, 10, 11 and 13 who were the star witnesses of the prosecution, did not support the case in material particulars and instead of disbelieving them in their entirety, the learned Sessions Judge have relied on portions of their evidence to enter upon a finding of guilt. It was also contented that there was undue delay in lodging P 13 FIR, thus throwing the prosecution case in shambles. Several flaws were pointed out in the investigation to advance the proposition that the benefit of the same be extended to the accused. According to the learned counsel, preparation of the scene mahazer

detailing the scene was skipped and the inquest report in which details are shown can never be a substitute. Recovery of MO 1(c) at the instance of the accused was attacked as cooked up and it was contented that MO 1 (c) was not a part of MO1 (a) and (b). According to the learned counsel, the prosecution has failed to prove the motive alleged, and this would nail the coffin of the prosecution case. If the motive goes, according to the learned counsel, there was no reason why the appellant should have murdered the deceased Asha, is the submission. It was pointed out that the husband and the deceased were on an inimical terms and there is every possibility and the incident might have occurred in a different manner.

10. The learned Public Prosecutor controverting the arguments of the appellant, submitted that PW's 1 and 2, eye witnesses to the occurrence and children of the deceased, grew up into mature teenagers, and their

testimony was cogent, convincing and truthful and there is no reason to doubt the same. Their presence at the home was natural and their evidence was subjected to the closest scrutiny by the trial court. The clarity of the evidence tendered by them, the demeanour of the witnesses and the truthfulness of their version was appreciated by the learned Sessions Judge before relying upon the same, is the submission of the learned Special Public Prosecutor. The narration of the sequence of events in evidence by the child witnesses was corroborated by PWs 3, 4, 5, 10, 11 and 16 in material particulars and there is no reason to doubt the ring of truth in their testimony. According to the learned Public Prosecutor, though PWs 3, 4, 10, 11 and 13 turned hostile, the general tenor of their evidence corroborated the evidence of PW 1 and 2. The recovery effected at the instance of the accused lends further assurance to his complicity and the presence of blood in his clothes as revealed by Ext.P17 chemical analysis report, seals the

fate of the accused. The FIR was registered promptly and it reached the Court at 2.45 pm within 15 hours of its registration. There is absolutely no delay and the FI statement supports the evidence and the narration of the children who were the natural witnesses. According to the learned Public Prosecutor, the learned Sessions Judge has appreciated the various facets of the case in its proper perspective and the evidence was meticulously analyzed and no interference was warranted.

11. As the challenge revolves around the competency, truthfulness, and reliability of the evidence of PW 1 and 2 and also the alleged flaws in investigation, we shall re-appreciate the evidence let in by the prosecution. The evidence of PWs 1 and 2 will have to be evaluated with care and caution to ascertain whether their evidence is trust worthy and reliable or frail as alleged by the counsel for the appellant.

12. PW1 is the elder son of the deceased. He is an eye witness to the occurrence and was aged 11 years at that time. When the evidence was tendered he was aged 19 years. The incident resulting in the death of his mother had occurred when PW1 was 12 years old. He deposed before Court that he is a student of Engineering at Kollam and was residing with his grandparents at Manjaly. According to the witness, the deceased Asha was his mother and at the time of her death, they were residing in a rented house at Karidanthuruthy in Chengamanad along with his father, brother and mother. At that time, he was studying in the 7th standard. His father was working in the Philips Company and he identified the accused who stood in the dock. His mother died at about 7.00 pm on 15.11.2002. He along with his brother Jithin Anil @ Appoos was watching Television lying on a cot in the hall room of their house. His father had gone for work and he along brother and mother Asha were alone in the house. The accused was a neighbor and was residing two houses

away. While he and his brother were watching TV, the deceased/mother came and asked them to get on with their studies. The witness went and took his book and sat in front of the TV and continued to watch the programme. Thereafter, his mother came and asked them to wash their hands and to sit down if they felt hungry. Heeding to her words, PW1 and his brother washed their hands and sat in the bed and continued to watch the TV programme. After sometime, the accused came to their house and directly went towards their mother. The doors were lying open. They heard some conversation between the accused and their mother but they were not able to comprehend the same. Then they heard their mother groaning and immediately PW1 and his brother came out of the room and stood in the center of the hall. At that time, they saw Lalu, the accused covering their mother's face with his palm and slitting her throat with a barber's shaving razor. Immediately, PW1 and his brother cried out and attempted to go towards their mother. But their

mother gestured towards them directing them to go off from the place. By that time, the accused ran off from the place. PW1 and his brother ran towards the house of Dinesan screaming out loud . PW4 was also coming to their house on hearing their cry. PW1 and his brother Jithin -PW2, sat in the house of Dinesan - PW4. The wife of Dinesan- PW3, did not permit them to return back to their house. It was deposed by PW1 that when the accused slashed the throat of their mother, she had shown some gestures with her hand and had fallen down breathing her last. He further stated that he does not remember as to when he had seen his mother thereafter. He was not permitted to see his mother on that day. The accused was familiar to him and used to come home on earlier occasions and it was the accused who used to cut their hair. PW1 further stated that his mother's throat was cut by the accused with a barber's knife. He identified MO1 series comprising of a shaving knife and a piece of blade. PW1 identified the blood stained churidar worn by

his mother at the time of the incident. PW1 also stated that he was unaware as to the reason why the accused had murdered his mother. He stated that his family was on friendly terms with the accused and the accused was a near neighbour. He has not seen any untoward incident involving his mother and the accused. In cross examination, he stated that PW4 Dinesan resides quite close to their house. The television was kept in the hall and there was a cot in the said room where himself and his brother were sitting and watching Television. The hall is in the middle of the house and the kitchen room is behind the hall. He stated that his mother was employed and was a weaver in the Society. The accused had slashed the throat of their mother while their mother was standing near to the wall of the hall room adjacent to the kitchen. He stated that after he had washed his hands, and was sitting in front of the TV, the accused had entered the house. The witness stated that he did not see MO1 series razor when the accused had gone out. PW1

also stated that the sound was heard from his mother about one minute after the accused had come in. He denied that he had heard any cry from his mother. First he heard some sound and thereafter a groaning sound was heard. He stated that he had not seen the accused entering their house while they were washing their hands. The police had questioned them on two occasions. A case diary contradiction was marked on the side of the defense when PW 1 denied his version to the police that while he was washing his hands Laluchettan a nearby resident had entered the house and went directly to his mother. When he entered the room hearing the groans from his mother, he had seen the accused silencing his mother by placing his palms over her face and slitting her throat. PW1 reiterated that when his mother gesticulated him to leave, he along with his brother had ran towards the house of PW4 Dinesan. . PW1 denied that he was stating falsehood at the instance of his relatives.

13. PW2, Jithin Anil @ Appoos is the younger brother of PW1. He was aged 5 years when the incident had occurred .He gave evidence when he was 13 year old and was studying in the 8th standard in the Nirmala Higher Secondary School, Muvattupuzha. He also deposed that he was residing along with his elder brother PW1, his grand father-PW15 and grandmother. He identified the accused and deposed that his mother was no more. He stated that he along with his elder brother, mother and father were residing in a rented house. Though the witness said he did not remember exact date of death of his mother, he stated that it was about 5 to 8 years back. At that time, his mother, brother and himself were alone in the house. He was watching TV along with his brother and then his mother came in and asked them to study. They continued to sit in the room and watched some game on TV. At that time, their mother came into the room and asked them to wash their hands for taking food. He saw Laluchettan , the accused , entering the house.

Thereafter, the accused went to his mother and he heard the accused saying something to his mother. His mother was standing in front of the kitchen. After sometime they heard the groans of their mother. They came out and saw the accused covering his mother's mouth forcefully and slashing her neck. They attempted to go near to their mother but they were dissuaded by their mother by gesticulating with her hands directing them to leave the place. The learned Sessions Judge who conducted the trial has specifically noted the gesticulation of the child. After getting the cue from their mother, PW2 along with his brother ran towards the house of Dinesan, PW4, and they were crying loudly at that time. On hearing their cry, PW4 Dinesan and his wife Aysha were seen coming towards their house. They stayed in the house of Dinesan on that day and on the next day they were taken by their grandfather to their family house. According to PW2, the accused had used a knife which is used by barbers to shave off the hair after a hair cut. He identified the knife

which was shown to him. He identified the dress of his mother and also the blood stained bed sheet. PW2 deposed that he was unaware as to why his mother was murdered and he claimed to have seen the incident from the light emanating from the electric light. When PW2 was cross examined, he deposed after coming back from school they had their food and after that, they started watching TV sitting in the hall. PW2 further stated that the accused had come from the back side and he had not seen anybody coming through the front side. He had seen the accused for the first time in the evening on that day and all the lights were switched on. PW2 also deposed that he had seen the accused coming from the road when he had gone for washing his hands and his elder brother was with him at that time. The accused was seen going to the back side towards kitchen from the road, according to PW2. It is the specific case of PW2 that the accused had cut the neck of his mother standing beside her. He also stated that he heard a distinct groaning sound while

he was watching TV lying in the cot along with his brother and also that the doors on the front and back were lying open. He denied the defense suggestion that he had no occasion to see the incident involving the death of his mother.

14. PW3 is the wife of PW4 Dinesan, and she is the immediate neighbor of PW1 and 2. Both PW 3 and P W 4 were cited to corroborate the version of PW's 1 and 2 and to prove that the accused was a frequent visitor and into some relationship with deceased which was not licit , that the relationship had soured recently and that the accused was seen fleeing from the area immediately after the incident. PW3 deposed that Asha was her immediate neighbor and also identified the accused who had been staying in the neighborhood for the past 10 – 20 years. Asha died on 15.11.2002. PW3 was watching cricket on TV along with her husband and children. PW1 and 2 are the children of Asha and they came running towards their

house crying out loudly and said that something had happened to their mother. PW3 and 4 followed the children to the place of occurrence and they saw Asha lying in a pool of blood. According to PW 3 she did not enter the house as she was having heart ailments. It is her case that PW1 and 2 were ask to sit in her house and they were not brought to the house where their mother was murdered. Though she was cited to prove the fact that she had seen the accused fleeing from the area after the incident, that PW 1 and 2 had specifically named the accused as the assailant when they had come in screaming and also that he was having illicit relationship and also monetary transactions with the deceased which soured recently, she did not state so before court. The witness was thoroughly cross examined with reference to her previous statement so as to discredit her. It is obvious that she had changed her version to assist the accused, as he was her immediate neighbour. Though the witness did not support the prosecution further with regard to the

illicit intimacy between the accused and the deceased, she stated that she had seen the accused visiting Asha on occasions.

15. PW4 Dinesan is the husband of PW3. He is the person who had given FI statement before the police and got the crime registered. When he was examined in Court, he stated that he knows the accused and also the deceased. It was on 15.1.2002 at about 7.00 pm that Asha was done away with. PW4 was also watching cricket at that time. Then PW1 and 2 came to his house screaming loudly. Immediately he along with his wife PW3, PW5-Sumathy and CW7-Balan rushed to the house of the deceased. They saw the deceased Asha lying on the floor in a pool of blood. When the witness reached the house of Asha, she was already dead. He also stated in no uncertain terms that he had no occasion to see anybody running away from the house. PW4 admitted the signature in Ext.P1-FI Statement and stated that it was

read over to him and it was only after that he put the signature. But at the same time he did not support the prosecution case and denied that he did not state to the police that while he was watching cricket on TV, Asha's children came to the house running and crying, saying that 'Laluchettan' had cut their mother's neck using shaving knife. He denied that particular portion and contended that he did not state so before the police. He stated that the police had directed him to sign and therefore he had no other option but to sign the same. He also stated that he had not given any complaint before the police stating that he was made to give a statement which was not actually true. The said witness also denied that he had given water to Asha and when his statement in Ext.P1 that he had given water was put to the witness, he denied the same and stated that it was in a peculiar mental condition that he had given such a statement. PW4 also denied of having stated to the police in Ext.P1 that when he reached the house of the deceased, he had

seen 'Laluchettan' running away from the scene of crime. PW4 also denied having stated to the police in Ext.P1 that Asha and Lalu were in deep love with each other and that Asha was keeping herself away from Lalu and it was due to the said enmity that Lalu had trespassed into the house and had murdered her in cold blood. When he was confronted with this part of his statement, he denied the same. PW4 also stated that he was acquainted with the accused from his childhood. It was stated by PW4 that the accused was working as a barber and that he also used to do sand mining work. While in cross examination PW4 stated that he was residing in the house next to the house of the deceased where Asha used to reside. Several persons had gathered at the spot and it was thereafter that all had come to the place of occurrence. He also stated that he had telephoned the police at 7.30 pm but since nobody came to assist from the police station, at about 8.00 pm, he along with Shaji went to the police station, but the SI was not present at that time. Only two

police men and the writer was there. In the said circumstances the petitioner sought the assistance of the Panchayat member of the area who persuaded the police to come to the spot with the SI after half an hour. According to the witness, the police might have reached the place at 9.00 PM Thereafter the police took PW4 and 11 Shaji to the police station after 9.15 pm on the said day. After completing the formalities he returned from the police station. According to PW4, he put the signature in Ext.P1 at about 9.15 pm and thereafter the police have not recorded any other statement from him.

16. PW5 Sumathy is also a neighbour. She also deposed that she heard about the death of Asha and though she did not remember the date, according to her, it was at about 7.00 pm. When she was in her house, she heard the cry of Asha's children and when she went there Asha was seen lying dead. She also turned hostile to the prosecution and denied her earlier statement that she had

given water to Asha. This contradiction was marked as Ext.P5. She also denied having stated to the police that the accused and the deceased were having some affair and that there was some quarrel with regard to the money transaction.

17. PW6, 7 and 8 are attestors to the inquest, but they denied having seen the police recovering any material objects from the scene of occurrence.

18. PW9 is the husband of the deceased Asha and he deposed that he was working as a Quality Inspector in the Philips Company. He would depose that he was at Kozhikode on 15.11.2002 when Asha had died that he was informed over phone about the incident by PW4 Dinesan. PW9 stated that he was present when Ext.P3 inquest report was prepared by the police. He identified the clothes seized from the body of Asha and also the blade, metal frame of the razor and the blood stained bed

sheet used for covering the body of the deceased with blood. PW9 also stated that the accused is a barber by profession and had used to cut the hair of his children.

19. PW10 is another neighbor who was acquainted with the deceased as well as the accused. She also turned totally hostile to the prosecution and denied her statement before the police that the accused and the deceased were in love with each other, which portion was marked as Ext.P4.

20. PW 11 had accompanied PW4 to the police station for registering the FIR. He also turned hostile and did not support the prosecution case. In the same manner PW12 and 13 also turned hostile. PW14 is the landlord of the house where deceased Asha stayed with her family. He also stood as attestor to Ext.P6 mahazar prepared at the time of seizure of MO6 and 7, shirt and pants of the accused. PW 15 is the father-in-law of the deceased and

PW 16 is her brother. PW17 is the sister of the deceased who deposed that she was aware of the money transactions that the accused had with Asha. PW18 is a fisherman who was cited and examined to prove Ext.P7 mahazar prepared at the time of recovery of MO1 (c) . PW19 is the Village officer of Chengamanand who prepared Ext.P9 scene plan. PW20 is the District Police Surgeon who conducted the autopsy over the dead body of the deceased and he had noted five ante mortem injuries and found that injuries No. 2 to 5 could be caused by MO1 series razor. PW21 is the thondi section clerk and PW22 is the police constable who recorded Ext.P3 inquest and Ext.P7 mahazar as dictated by the Circle Inspector. PW23 recorded Ext.P13 FIR on the basis of Ext.P1 on 15.11.2002 at 9.30 pm. PW24 is the Circle Inspector who conducted investigation and filed final report.

21. It is on the basis of the above evidence that the learned Sessions Judge had entered into a finding of guilt

against the appellant.

22. As far as the homicidal death of deceased Asha is concerned, there can be no doubt, the evidence let in by prosecution by examining the children who are direct eye witnesses to the occurrence and that of the prosecution witnesses along with Ext.P10 post mortem certificate would conclusively establish this fact. In Ext.P10 wound certificate PW20 has noted five ante mortem injuries on the body of the deceased. They are

(I). abrasion 1/1 cm on the front of left leg 2 cm below the knee.

(ii). Bone deep incised wound 2.5/05 cm on the outer end of left eye brow.

(iii). A bone deep incised wound 3.5/.5 cm on the right side of chin 2 cm right to middle eye.

(iv). Linear superficial incised wound 7 cm horizontally placed right end 6 cm below the right ear and left end 4 cm below the chin.

(v). incised wound 11 x 4.5 cm obliquely placed upper outer end 3 cm away from the left ear at 4.00 O clock position inner lower end over the adam's apple underlying sterno mastoid muscle cut, jugular vein cut, carotid artery cut, one cm below with bifurcation. The doctor has further deposed that injury Nos. 2 to 5 noted by him could be caused by the blade used for shaving razor and that injury No.1 abrasion could be caused by contact with rough object or surface. There can never be any dispute with respect to the above fact.

23. Now the question is whether the finding of guilt of the appellant can be based on the evidence let in by the prosecution. The children of the deceased who have become teenagers when the trial started are the star witnesses for the prosecution. If it is found that their evidence is reliable and trustworthy it will go a long way in establishing the complicity of the accused.

24. The main challenge against the acceptability of the evidence tendered by PW1 and 2 are that they are child witnesses and hence unreliable. Several decisions rendered by the Apex court was placed by the learned counsel for the appellant to convince us that children are the most untrustworthy class of witnesses. They can be tutored and will give a parrot like version. It appears that the contention of the appellant is that the evidence appears to be too good to be true and they should be disbelieved. Failure to test the competency of PW2 was also muted as an additional point.

25. As the 1st informant and the immediate neighbors who were cited to prove the complicity of the accused turned hostile , the whole prosecution case rested on the shoulders of the children of the deceased Asha who have grown up to become teenagers when the evidence was tendered before court. When the incident had occurred in the year 2002, PW1 was 11 years old and

PW2 was 5 years old. They had the misfortune of witnessing the murder of their mother in their tender age. When the case came up for trial, PW1 had grown up to a youthful 19 year old Engineering student and PW2 was in the high school and was aged 13 years. As far as PW1 is concerned, the defense has no case that he is a child witness. The argument appears to be that PW13 is a child witness and the consistency in the narration of sequence of events by PW1 and PW2 would throw seeds of suspicion that the witnesses have been tutored.

26. At this juncture it has to be observed that when PW1 and PW2 were cross examined the defense had no case that they were either tutored or that they were giving a false version before Court. PW1 and PW2 have described in a convincing manner the whole incident that happened on 15.11.2002 at about 7.00 pm in the evening. Their presence in the home was natural. It has

also come out from the description of the house in the prosecution records that it comprised of a hall, a kitchen a small verandah and another small room in the front. There was no one else in the house as it has come out that PW9, the husband of the deceased was not at home. PW1 and PW2 have stated in a convincing fashion that the accused was known to them and was their barber, that he had come home on the day of incident after 7.00 pm while they were watching television lying on a cot and their mother was in the adjacent kitchen room. They were interacting with their mother just prior to the occurrence. They were asked to study by their mother and were later asked to wash their hands and to sit down if they were hungry. It was after washing their hands and while they were watching the game on TV that the accused had come in and went directly to the kitchen. The accused has no case that he is a stranger and there is no challenge for his presence. PW1 and PW2 have clearly and unequivocally stated that they heard the accused

speaking to their mother. It was thereafter that they had heard the groaning sound emanating from their mother which persuaded them to get up and take a look. It was then that they noticed that the appellant was holding their mother by placing his palm over her mouth for silencing her and then slitting her throat with MO1 series barbers knife. When they tried to approach their mother, she had gesticulated them to go away and it was then that they had screamed and ran off to the house of PW3 and PW4. They also witnessed their mother collapsing to the ground after her throat was slashed and they had also witnessed her clothes getting stained with the blood that had gushed out from her neck. PW1 and PW2 have also described the accused as "Laluchettan" and he was their barber. They were also familiar with MO1 series razor used by him for committing the horrendous act. The above evidence let in by PW1 and PW2 have been scrutinized by us with utmost care and caution. The story spoken to by PW1 and PW2 have withstood the

test of cross examination. There is nothing to doubt the credibility of their version except that it is too consistent. Nothing worth the effort could be elicited by the defense to bring out any sort of artificiality and element of tutoring in the evidence tendered by PW1 and PW2. A meticulous appraisal of the evidence of the witnesses would reveal that they were deposing the true version of the incident. The injury inflicted by the accused with MO1 series weapon as stated by PW1 and PW2 receive sufficient corroboration from the evidence of PW20, the police surgeon who prepared Ext.P10 postmortem certificate. Sufficient corroboration as regards material parts are also available from the evidence of PWs 3 to 5 , 10 , 11 and 13 to the narration of events by PW 1 and 2.

27. One of the contentions raised by the learned counsel for the appellant is that the evidence of PW2 cannot be reckoned for consideration as the learned Sessions Judge has not tested his competency to testify

by putting preliminary questions. In other words absence of preliminary examination or the *voir dire* is taken as the main ground to content that evidence tendered by PW 2 is to be eschewed from evidence .

28. Under S.118 of the Indian Evidence Act, 1872 all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by S.118 under which competency of witnesses is the rule and their incompetency is the exception. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age - limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient

intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, and to exclude a witness on the ground of mental or moral incapacity, the existence of the incapacity must be shown. Under S.118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto.

29. At the same time the proviso to Section 4 of the Oaths Act, 1969 says that where the witness is a child under 12 years of age and the court is of the opinion that though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions relating to oath shall not apply. But the duty of ascertaining the competency of the child witnesses by the court by putting suitable questions in proper form is still there. PW2 was over 12 years of age and this provision has no application as far as he is

concerned. From the manner of deposition and the demeanor of the child witness , if it appears to the trial Judge that the child was a competent witness, omission to comply with such formalities would not render the evidence inadmissible.

30. We suspect that it was because of the fact that PW 2 was over 12 years of age that the learned Sessions Judge skipped the preliminary examination to verify whether the witness understands the nature of oath or affirmation. The preliminary test is conducted by the Court only to ensure that the witness is capable of understanding nature of questions put to him and is able to give rational answers. The mere fact that the voir dire test is not conducted does not affect the credibility of the evidence furnished by the witness. If the Court, after taking evidence, finds that the witness is capable of giving cogent, convincing and rational answers, then the witness is a competent witness under Section 118 of the

Indian Evidence Act. It is of course desirable that the trial judge should preserve on record the questions put and the answers given to assure himself that the child understood the duty of speaking the truth . Merely because of *voir dire* test is not conducted, it does not take away the probative value of the evidence furnished by such a witness. In the facts of the instant case, we find no infirmity in the procedure adopted by the learned Sessions Judge. Having gone through the evidence of PW 2 we have no doubt in our mind that he was competent to testify and that he knew his duty to speak the truth. His manner of giving evidence , his gesticulation replicating as to how his mother had gestured when they abruptly came into the room, obviously for the purpose of saving the life of her children, vouch safe his truthfulness and this along with the sterling evidence tendered by PW 1 is clinching , to put it mildly.

31. According to the learned counsel appearing for the

appellant , the identification of MO1 series as the weapon used by the accused by PW1 and PW2 is by itself a striking fact to bring home the point that PW 1 and 2 were tutored. According to the learned counsel, nobody could have noticed the presence of MO1 knife in the hands of the accused. It is to be noticed that PW1 and PW2 in their evidence have stated that “Laluchettan” was their barber and that equipment such as MO1 series was used in the course of cutting their hair. They could never have missed the weapon in the hands of the appellant.

32. We think it will be appropriate to refer to some observations of Dr.Hans Gross: criminal investigation page 45, extracted in the Treatise on Law of Evidence by Sir. John Woodroff and Sir. Amir Ali , Sixteenth Edition page 3301:

*“An intelligent boy , as already stated,
is, as a rule , the best witness in the world. An*

intelligent boy is undoubtedly the best observer to be found. The world begins to take him by storm with its thousand matters of interest; what the school and his daily life furnish cannot satisfy his overflowing and generous heart. He lays hold of everything new , striking, strange , all the senses are on the stretch to assimilate it , as far as possible. No one notices change in the house, no one discovers the bird's nest; no one observes anything out of the way in the field ; but nothing of that sort escapes the boy; everything which emerges above the monotonous level of daily life gives him a good opportunity of exercising his wits, for extending his knowledge, and for attracting the attention of his elders to whom he communicates his discoveries.

33. No better explanation is needed as to how PW 1 and 2 could have distinctly noticed the unique weapon in the hands of their barber which was used to slit the throat of their mother .

34. The learned counsel for the appellant brought to

our notice certain inconsistencies in the evidence of PW1 and PW2 as regards the entry of the appellant into the residential home. It was argued that PW1 had stated that the appellant had entered through the front door of the house. He also denied that he had seen the appellant entering the house and going towards their mother while they were washing their hands. On the other hand PW2 in his evidence, had stated that the accused had come through the back side and that he had not seen anybody coming through the front side of the house. It has to be remembered that it has come in evidence that the house where deceased Asha was residing comprised of just three main rooms and both the front and rear door were kept open.

35. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as

shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the Court, such evidence cannot be regarded as safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be

elaborations of the statement made by the witness earlier. Irrelevant details which do not in any way corrode the credibility of a witness cannot be labeled as omissions or contradictions. (See A. Shankar v. State of Karnataka, 2011 (6) SCC 279

36. The minor inconsistencies in evidence projected by the learned counsel are bound to occur and they cannot be regarded as something which would effect the truthfulness of the version given by PW1 and PW2 in respect of the actual incident which had taken place inside their home. We do not see any reason why PW1 and PW2 would falsely implicate the appellant. The relationship of PW1 and PW2 is not a factor to effect their credibility. The children of the deceased would be the last person to conceal the actual culprit and level allegations against an innocent person. A scrutiny of the evidence reveals that , after having gone through a spine chilling phase of their life during which they lost their mother by

a brutal act committed in their presence, they have become levelheaded and intelligent teenagers confident enough to depose truly and correctly as to what they had occasion to witness while they were of tender age. It is not an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, in the circumstances of the particular cases, be sufficient to base a conviction thereon. The minor or trivial discrepancies pointed out by the learned counsel for the appellant do not create a dent in their evidence, warranting to treat the same as improbable or untrustworthy.

37. In **Nivrutti Pandurang Kokate and Others v. State of Maharashtra (2008 (12) SCC 565)**, the Apex Court has summed up the principles in laying as follows:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the Trial Court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an

impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".

38. The real test for either accepting or rejecting the testimony of a child is to see how consistent the story spoken to by it is, how the evidence stands the test of cross examination and how far it fits in with the rest of the evidence and the circumstances of the case. Judged by these standards, we find that the evidence of PWs 1 & 2 has got the impress of truth in it and can be accepted as true.

39. It has to be mentioned that the evidence of PW 1 and 2 receive ample corroboration from the evidence tendered by PW 3 to 5 , 10 and 11 who though deposed in terms of the prosecution case as far as the initial phase is concerned turned against as far as the role of the accused in the murder is concerned. PW3 and PW4 supported the version of PW 1 and 2 in so far as the

homicidal death of Asha, the cries of the children and also the ghastly scene inside the house of Asha. They of course did not support the version of the prosecution as regards the presence of the accused and his alleged intimacy with the deceased.

40. Another very importance aspect which would lend credence to the version of PW 1 and 2 is the lodging of Exhibit P 13 FIR which contains the name of the accused . According to PW4, he along with PW11 Shaji went to the Chengamanad police station and gave Ext. P1 statement before PW 23, the sub inspector. Ext. P1 would reveal that on 15.11.2002 at 9.30 pm, PW4 had given the statement in which time of occurrence is mentioned as 7.15 pm on 15.11.2002. In column No.7 of the FIR , the name of the accused has been stated together with his address. Ext.P1 would also reveal that PW4 had stated specifically that he was told by PW1 and 2 that Laluchettan had slashed the throat of their mother. PW4 would also depose that the

statement given by him was read over to him and only after that he had signed on the same. PW23, the Sub Inspector of police, Chengamanad has given evidence that on the strength of Ext.P1 he has registered crime No.491 of 2002 u /s 449 , 302 of the IPC. In his evidence, he has clearly stated that PW4 had stated to hm that it was the accused who has slit the throat of the deceased Asha while giving Ext.P1 and it is on that basis that he had registered Ext.P13. Exhibit P13 registered at 9.30 AM would lend sufficient corroboration to the version of PWs1 and 2 that their mother was murdered by the appellant between 7.15 and 7.30 pm on 15.11.2002 by the appellant, inside their home using MO1 shaving razor.

41. The next contention raised by the counsel for the appellant is that there is undue delay in registering the FIR. PW4 Dinesan, though he turned hostile, has stated in unmistakable terms that he had telephoned the police at 7.30 pm itself to inform them about the occurrence.

Nobody attended the phone call and therefore, at about 8.00 P.M. he along with Shaji went to the police station. The Sub Inspector was not there and he was asked to take the deceased to the hospital and to await the arrival of the police on the next day. He had to approach the Panchayath member who persuaded the police to come to the scene of crime. It was thereafter that the sub inspector had reached the place of occurrence at 9.00 pm. He had affixed his signature in Ext.P1 at 9.15 pm . The FIR has reached the court the next day at 12.45 pm and that too in about 15 hours. We do not think that there is any delay in the FIR reaching court in the facts and circumstances of this case.

42. Yet another piece of evidence relied on by the prosecution connecting the accused is the recovery of MO1(c) portion of the shaving razor from the bathing ghat of the Manjali river on the strength of the disclosure statement given by the accused/appellant. The accused

was arrested on 17.11.2002 at 3 pm from Aluva U.C.College junction and Ext.P14 is the arrest memo prepared. At the time of arrest the MO6 shirt and MO7 pants worn by the accused , which were stained with blood , and the same was seized by preparing Ext.P6 mahazer. To prove the seizure of clothes, the prosecution had examined PW14 Vijayan. It is the case of the prosecution that based on the information given by the appellant, MO1(c) was recovered u/s 27 of the Evidence Act. Ext.P7(a) is the confessional statement of the accused. Based on the information furnished, the said portion of MO1 series shaving razor was seized from a portion of the Manjali river about 5 meters away from the bathing ghat at a portion where the water was five feet deep. The said portion of the razor was recovered from the river bed by CW21 Khalid whose presence could not be secured to give evidence before court as he had gone abroad. The said item was seized as per Ext.P7 recovery mahazer. MO1(a) and MO1(b) were taken into custody

from near the dead body at the time of preparation of Ext.P3 inquest report.

43. PW1 and 2 have stated that the accused slashed the neck of their mother Asha with a barbers knife which they identified as MO1 series. PW20 the doctor who conducted the post mortem has also deposed that the injuries No.2 to 5 found on the neck of the deceased could have been caused by a shaving razor such as MO1 series. In Ext.P10 wound certificate he has noted five antemortem injuries on the dead body of Asha. Injury No.5 noted by him is an incised wound 11 x 4.5 cm obliquely placed upper outer end 3 cm away from the left ear at 4 O clock position inner lower end over the adams apple underlying sternomastoid muscle cut, jugular vein cut, carotid artery cut, one cm below with bifurcation. The doctor has further deposed that injury Nos. 2 to 5 noted by him could be caused by the blade used for shaving razor and that injury No.1 abrasion could be

caused by contact with rough object or surface. Thus the testimony of doctor corroborates the evidence of PW1 and 2 and also the prosecution case in all material particulars.

44. Another contention raised by the counsel for the appellant is regards the failure on the part of the Investigating Officer to prepare a separate scene mahazer. According to the learned counsel, the room where the corpse was found was not properly identified and the material objects have not been properly seized. The inquest is just a report of investigation of the dead body and its scope and purport cannot be expanded, according to the learned counsel. It is seen that in this case, investigation was commenced by PW24 Circle Inspector of police at 8. am on 16.11.2002. He prepared Ext.P3 inquest report over the body of the deceased. At the time of preparation of the inquest report he has detailed the state of corpse, its posture and exact stage of the limbs eye, mouth etc, and the wounds and

particulars thereof and list of all properties found on the corpse in column No.7 of Ext.P3 inquest. The clothes worn by the deceased and the bed sheets used for covering her were produced and identified as MO2 to MO5. In Ext.P3 he has also described minutely the details of the room where the corpse was found in column No.8 (a). He had also seized the parts of the shaving razor which has been marked as MO1(a) shaving blade and MO1(b) metal frame used for fixing blade. Based on these details PW19, the Chengamanad Village Assistant has prepared Ext.P9 scene plan.

45. It is a fundamental rule of criminal trial that any irregularity or illegality during the course of investigation in collecting materials or otherwise will not affect the trial on the basis of materials placed before Court unless injustice or prejudice is thereby caused and the materials are unacceptable in evidence. After going through Ext.P3 inquest and Ext.P9 plan we have no doubt in our mind

that the description of the place of occurrence has been detailed with precision and there is no question of any prejudice caused to the appellant on that count. The materials seized as per the search list dated 16.11.2002 has been dispatched to the Court promptly. The house of the deceased has been described in detail in Ext.P3 and non preparation of a separate scene mahazar according to us has not caused any prejudice to the appellant. It has been held by the Apex Court that the prosecution is not required to meet any and every hypothesis put forward by the accused. In **Inder Singh and Another V State Delhi Administration (AIR 1978 SC 1091)**, Justice V.R. Krishna Iyer in his inimitable words has spoke thus.

“Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is urged that

it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic.

46. None of the contentions raised by the appellant deserves any merit. In such circumstances , the conviction of the appellant for the offense under S 302 , and 449 of the I.P.C can only be confirmed . The learned Sessions Judge has awarded imprisonment for life in addition to fine of Rs 50000/- for the offense under S. 302

of the I.P.C. And rigorous imprisonment for 10 years and to pay a fine of Rs 30000/- under S. 449 of the IPC, which were directed to run concurrently . In such circumstances, the sentence imposed also do not warrant any interference .

47. Appeal is dismissed. The conviction and sentence are confirmed. The appellant shall be entitled to set off as provided under S. 428 of the Code of Criminal Procedure for the period he has been in custody in this case , subject to the orders passed by the authority under S 432/ 433 of the Code of Criminal Procedure.

Sd/-

V.K.MOHANAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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