

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

CRL.A.No. 167 of 2011(A)

ADDL.DISTRICT & SESSIONS COURT(ADHOC-III),NORTH PARAVUR

APPELLANT(S):

BADARUDHEEN @ BADARU, S/O MAKKAR
CONVICT NO.8440, CENTRL PRISON, VIYYUR
THRISSUR.

BY SMT.SHERLY THOMAS (STATE BRIEF)

RESPONDENT(S):

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SMT BINDU GOPINATH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
30.07.2015, THE COURT ON 04-08-2015, DELIVERED THE FOLLOWING:

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

Crl.A.167 of 2011

Dated 4th August, 2015

JUDGMENT

Raja Vijayaraghavan.I.

1. The instant appeal is preferred by the accused in S.C.76 of 2009 on the file of the Additional District and Sessions Judge, (Ad hoc)-III, North Paravur. As per judgment dated 24.6.2010, he stands convicted and sentenced to undergo imprisonment for life u/s 302 of the IPC.

2. The prosecution case as unraveled from the facts and circumstances is as follows:-

PW1-Manilal, owns a fishing boat by name "Syamkutty" and PW6 Gireesh, the accused and deceased were his employees. The accused wanted some money and he demanded PW 6 to secure the same from PW 1. On one such occasion , the deceased was with PW 6, and he dissuaded PW6 from making an effort to secure the loan. As a

result the accused was not in good terms with PW 6 and the deceased . On 26.3.2007, while they were inside the boat , there occurred an altercation between the accused and PW 6 and they slapped each other. The deceased interfered and separated them. The accused left the boat after raising threats. PW 6 , decided to inform PW 1 about the incident and went to the house of PW 1 at about 10.30 P.M. The case of the prosecution, as is built up from circumstances , is that, at 11.00 pm on 26.3.2007, the accused stabbed the deceased with M03 knife on his neck below his left ear and below his right nipple on his chest resulting in serious injuries. The deceased, took M01 towel and tied it around his neck and walked nude towards the house of PW1 which was situated about 200 meters towards the west of the place where the boat was moored. On reaching the house he fell down on the verandah . In the meantime, PW1 had gone with PW 6 in search of the accused, and were spending time outside the shop of one Sivadas , the brother in law of PW 1. PW 3, Santha, PW 2 Sabu and PW 4 Sisupalan were present in the house when the deceased had come and

had fallen, face down, in the Verandah of the house. Immediately PW 1 was called over phone and he reached his house with Sivadas. PW 1 suspected that PW 6 was the man behind the dastardly act and went back and asked the locals to tie up PW 6 , which was promptly done. Based on the calls made to the Police, injured Baby was immediately taken to the Paravur Government Hospital, where he was pronounced dead .

3. PW 1 thereafter approached the Munambam Police Station and gave Ext.P1 statement, based on which, Exhibit P7 FIR was registered at 2.00 am on 27.3.2007 by PW16, the Sub Inspector of police , Munambam police station under S 302 of the IPC.

4. Investigation was taken over by PW18, the Circle Inspector of Police, Njarakkal police station who prepared Ext.P2 Inquest over the dead body of the deceased. The lungi found tied around the neck and the one used for covering the body of the deceased were seized. The Scene mahazar was

prepared and samples of blood found inside the boat by name "Syamkutty" was seized. The accused was arrested more than 1.5 years after the occurrence on 17.09.2008 at 4.00 P.M. from Kannur Iykkara fishing harbour. Based on the statement furnished by the accused on 18.8.2008, MO3 knife was recovered as per Ext.P4 recovery mahazar. Thereafter, the investigation was completed and final report was laid before the learned Judicial First Class Magistrate Court, North Paravur.

5. Committal proceedings were initiated by the learned Magistrate and the accused was sent up for trial before the Court of Sessions for the offence punishable under S.302 of the IPC .The case was made over to the Additional District & Sessions Judge (Ad hoc)-III, North Paravur. Since the accused was not defended by a counsel of his choice, a legal aid counsel was appointed to defend him. After consideration of the records of the case and after hearing the submissions of the prosecution and the accused, charge u/s 302 of the IPC was framed against the accused. When the charge was read over

and explained to the accused , he abjured the guilt and claimed that he be tried.

6. In order to prove the case of the prosecution, PW' s 1 to 19 were examined and Exts.P1 to P15 were marked. Mos 1 to 7 were produced and identified. After closing the prosecution evidence, the incriminating material arising from the evidence was put to the accused under S.313 of Cr.P.C No defense evidence was adduced.

7. The case depends purely on circumstances. We shall adumbrate the circumstances that found favor with the learned Sessions Judge to enter upon the finding of guilt.:

(a) Deceased Baby met with a homicidal death inside the wheel house of a boat by name “Syamkutty”.

(b) The accused and the deceased were workers of the said boat owned by PW1 - Manilal .

(c) The accused was inimically disposed towards the deceased as he dissuaded PW6 from obtaining money for the accused by

way of a loan from PW1.

(d) The deceased after sustaining the injury walked all the way from the boat to the house of PW1 and before falling down uttered in the presence of PW2 to 4 that the accused had stabbed him.

(e) PW5 Vasu, sleeping in the adjacent boat, overheard a cry, and after sometime saw a person walking out of the boat proceeded by another person who, according to the prosecution, was respectively the accused and the deceased. The person who went out first, returned later and after taking a kit from "Syamkutty", left again.

(f) Recovery of MO1 knife at the instance of the accused .

(g). Motive.

8. After an elaborate consideration of the evidence, the learned Sessions Judge accepted these circumstances as conclusive and found the appellant guilty of the offence u/s 302 and convicted him accordingly.

9. We have heard Smt. Sherly Mol Thomas, the learned counsel appearing for the appellant and Smt. Bindu Gopinath, the learned Public Prosecutor.

10. Smt. Sherly Mol Thomas, the learned Counsel for the appellant, assiduously urged before us that the learned Sessions Judge convicted the appellant on the basis of mere suspicion which could never have taken the place of proof. After taking us painstakingly through the evidence based on which the finding of guilt was entered into by the learned Sessions Judge, it was pointed out that the prosecution had attempted to prove its case based on certain chunks of circumstances, which on closer scrutiny could clearly be held as inconclusive. The evidence rendered by PW 2, 3 and 4 was attacked as made up and it was submitted that their evidence was opposed to logic and pure commonsense and at variance with each other. If the evidence tendered by the aforesaid witnesses was perused closely in juxtaposition with Ext.P1 FI statement, it would reveal, according to the learned counsel,

that the genesis of the prosecution was on weak ground. It was pointed out that PW5 was a planted witness, who was cited and examined to give a clean chit to PW 6, whose role in the incident is suspect. It was argued that a closer scrutiny of the evidence of PW 5 would reveal that his credibility is suspect. It was contended that the evidence of recovery allegedly effected in the presence of PW 4 and his friend, more than an year after the occurrence pursuant to the arrest of the appellant, would by itself point to the falsity of the prosecution and the false implication of the appellant. Finally, it was contended that motive would assume great relevance in a case based on circumstantial evidence and in the instant case there was none .

11. Smt. Bindu Gopinath , the learned Public Prosecutor , very ably countered the arguments advanced by the learned counsel appearing for the appellant, and contented that all the witnesses examined supported the prosecution version and they deposed that part of the incident of which they were

a part of. It was pointed out that the witnesses have tendered a truthful version before Court with regard to the complicity of the appellant. The scientific evidence and the recovery of M01 knife at the instance of the appellant further gave credence to the prosecution version. It was finally argued that the attempt of the accused in his 313 statement to set up a plea of alibi would back stab his own case and render his defence suspect.

12. Before convicting an accused, on the strength of circumstantial evidence it is necessary to ensure that the chain of circumstantial evidence is complete and conclusive without even a missing link. The nature and extent of proof in a case depending solely on circumstantial evidence is now well settled.

13. In **Tomaso Bruno and others V State of UP, (2015 KHC 4047)**, the Apex Court has , after referring to celebrated Judgments on the subject has laid down as follows :

In Padala Veera Reddy v. State of A.P. and Others
(1989 KHC 828) : (1989 Supp (2) SCC 706) : (AIR 1990
SC 79) : (1989 BBCJ 121), it was laid down that in a case
of circumstantial evidence such evidence must satisfy the
following test:

*"(1) the circumstances from which an inference of guilt is
sought to be drawn, must be cogently and firmly
established;*

*(2) those circumstances should be of a definite tendency
unerringly pointing towards guilt of the accused;*

*(3). the circumstances, taken cumulatively, should form a
chain so complete that there is no escape from the
conclusion that within all human probability the crime
was committed by the accused and none else; and*

*(4) the circumstantial evidence in order to sustain
conviction must be complete and incapable of
explanation of any other hypothesis than that of the guilt
of the accused and such evidence should not only be
consistent with the guilt of the accused but should be
inconsistent with his innocence. (See Gambhir v. State of
Maharashtra (1982 (2) SCC 351))."*

14. On these time honored and settled principles we shall
evaluate the evidence available and consider whether the case
against the accused has been established beyond any shadow
of reasonable doubt. The very foundation of the prosecution
case rests on the evidence of PW 5 and also on the evidence

tendered by PW 2, 3 and 4. If their evidence is found to be trustworthy and free from blemish, that would go a long way in providing enough materials to hold that the guilt has been established. On the other hand, if on evaluation, the evidence let in by these witnesses does not inspire the confidence of the Court, the rest of the circumstances, like recovery of the weapon of offense after 1.5 years would not by themselves be sufficient to enter a finding of guilt.

15. As far as the homicidal death of deceased Baby is concerned, the prosecution relies on the evidence of PW 17, the doctor who conducted the autopsy. PW 17 stated that the cause of death was the penetrating injury sustained on the chest which is injury No.1 referred to in Ext.P8 postmortem certificate. The doctor has also deposed that the two injuries seen on the body of the deceased are antemortem injuries and the same could be caused by MO3 knife. According to PW 17, the injury sustained is a fatal injury and is sufficient independently in the ordinary course of nature to cause death.

PW 1 is the employee of the deceased, PW 6 is a co-worker, PW 10 is the brother of the deceased and PW 2 was an attester to Ext. P2 inquest. The evidence tendered by these witnesses together with Ext. P2 inquest and Ext. P8 postmortem certificate would conclusively establish that it was Baby who sustained fatal injuries resulting in his death on 26.3.2007 at 11.00 pm.

16. The prosecution relies on the evidence of PW 1, PW 6, PW 7, PW 8 and PW 9 to establish the fact that the deceased as well as the accused were working in the boat by name "Syamkutty" owned by PW1 and the inferences that could be made based on the incidents which occurred on the fateful day, inside the boat and the verandah of the house of PW 1, which ultimately led to the accused being charged for having committed the offense. The case of the accused as is discernible from the cross examination of the witnesses and from his 313 statement is that he used to work in the boat but was not there on the relevant day on which the incident had taken

place. We are of the opinion that overwhelming evidence has been let in by the prosecution to prove the fact that the accused, deceased and PW6 were working in the boat of PW1.

17. In order to evaluate as to whether the prosecution was able to successfully establish the circumstances enumerated as (c) to (e), a re-appraisal of the evidence is undoubtedly necessary.

18. PW1 Manilal is the owner of the fishing boat by name "Syamkutty". He deposed that he was staying in the ground floor of a rented house along with his family. PW2 Sabu and PW4 Sisupalan were residing with their respective families in two separate rooms in the first floor. Deceased Baby , PW 6 Gireesh , Sreedharan, Jose, the accused and himself were the workers in his boat. On 26.3.2007 at about 11.00 pm while he was lying down at home, he was told by PW3 Santha, his wife, that PW6 - Girish was there to meet him. On inquiry with PW6, he was informed that the accused had abused and denigrated

his mother when he refused to borrow money on his behalf. There ensued a quarrel between PW6 and the accused and in pursuance to the same both exchanged blows. On hearing the complaints of PW6, PW1 took him to the shop of Sivadas, near the Munambam ferry and discussed as to how the matter could be resolved. At that time, he received a telephone call informing him that a person was seen lying in a pool of blood in the verandah of his house. PW1 did not remember as to whether it was PW2 Sabu or PW4 Sisupalan, who had made the telephone call. Immediately, PW1 rushed to his house with his brother-in-law Sivadas. It was about 11.00 pm at that time. On seeing a person lying on the verandah, in a prostrate position, he immediately telephoned the Munambam police and informed them about the incident. He also went in search of a vehicle to transport the injured person to the hospital. When he reached the I.R pump near the ferry, he saw Girish standing there and under the impression that the person lying face down was Badaruddin and the injury was inflicted by Girish, he had asked the persons present there to tie up PW6 to

prevent him from escaping. When the police party reached the spot and when the body was turned around, PW6 realized that it was Baby and not Badaruddin. The injured was immediately taken to the Government hospital, Paravur and the doctor concerned pronounced Baby dead after examining him. Thereafter, PW1 went to the Munambam police and gave Ext.P1 FI statement. He further stated that Baby and Badar had started working under him only ten days back. He identified M01 as the clock which was tied around the neck of the deceased. When he had first seen the injured lying on the verandah of his house, he was naked. He also identified M02 as the lungi found on the body of the deceased when he along with the police had reached his house. The accused was not seen in the locality after that and he came to see the accused only after 1 ½ years when he was arrested at Kannur. He also stated that the accused had requested for a loan of Rs.2000/- from him about three-four days after joining the employment and he had agreed to provide him with the loan.

19. In cross examination he stated that he had gone along with two Assistant Sub Inspectors in a bus to Kannur to arrest the accused about 1½ years after the date of occurrence. He stated that M03 knife was shown to him by the Circle Inspector of Police after the accused was arrested. He is not aware as to how deceased Baby had sustained the injuries which resulted in his death. He suspected Girish as the person who had committed the act initially as he thought Badaruddin was the person who received the injury. He denied the suggestion of the defense that he along with PW6 was giving a false version to see that the appellant was convicted.

20. PW2 Sabu is another important witness examined by the prosecution. According to him, PW1 was residing in the ground floor and he along with PW4-Sisupalan was residing in the first floor in a building at Munambam. He was not having any acquaintance with deceased Baby or the accused. About two years back in the month of March at about 12.30 - 1.00 am while he was sleeping, he was called by PW3 Santha, and

requested that he along with Sisupalan come down quickly. When he had come down he had seen a person lying on the verandah of the house. There was blood all around and the person was not moving. Immediately he called Manilal and his employer one Prathapan , and requested them to intimate the police. The injured was taken to the hospital in the jeep of Munambam police. He along with PW4 and PW1 accompanied the injured. He was seeing the injured for the first time. He was told that the injured was a worker in the boat of PW1. He was present during inquest and through him Ext.P2 inquest report was marked. He identified MO1 and MO2 as the clothes found on the body of the deceased at the time of preparation of inquest. Ext.P3 scene mahazar was prepared in his presence and he is an attestor. He further stated that the injured had come inside pushing open the gate and at the time of falling down he called out “മണിച്ചെട്ടാ” (“Manichetta”). In cross examination he asserted that the injured called “Manichetta” and the time was about 12.00 - 1.00 am. According to him, police arrived at the spot about half an hour after receiving

the call. The distance from Munambam till the Government hospital, Paravur, was 14 Kms. He stated that he was not aware as to how the deceased had sustained the injuries.

21. PW3-Santha is the wife of PW1. She stated that PW2 Sabu and PW4 Sisupalan are residing in the 1st floor of the building in which she was residing with family in the ground floor on rental basis. On 26th day of year 2007, (month not stated) Baby had died at about 11.00 pm . At about 10.00 - 10.30 pm someone knocked on their door and her husband asked her to ascertain. It was PW6 Girish and he wanted to talk to her husband. She overheard PW 6 stating to PW 1 that Badaruddin abused him pursuant to a dispute which resulted in both of them exchanging blows. When deceased interfered, Badaruddin left the place after threatening them. He demanded that PW1 interfere in the dispute and settle it. PW1 asked PW6 to return back and PW1 left in his bike. After PW1 left, she went to the 1st floor and asked PW2 and PW4 to come down. When they came down they saw a person crossing the

gate and coming inside. He was drenched in blood. A lungi was tied around his neck. He entered and said “മണിച്ചെട്ടാ ബദറുദ്ദീൻ എനെ കുത്തി.” (Manichetta, Badaruddin stabbed me”) and fell down on the verandah. PW1 was not present at that time. She immediately asked PW2 to call up PW1. PW1 along with Sivadas came from the shop and after seeing the injured, went back to fetch a vehicle. After sometime PW1 came back with the police and shifted the injured to the hospital. The injured was not wearing any clothes and , a lungi was given by her to cover the body. She identified M01 and M02 lungis. In cross examination she stated that PW6 came to her house at 10.00 - 10.30 and was there for about five minutes. Immediately after Girish had left she went up and called PW2 and PW4. They came down together and the injured had entered through the gate when all the three were coming down together. The injured was standing about ten feet away and had fallen down about five feet from the place where they were standing. She admitted in cross examination that she did not state to the police the words that the injured had stated before he had

fallen down to the effect “Manichetta, Badaruddin stabbed me”. She denied the suggestion of the defense that she was stating falsehood at the instance of PW1 and PW6.

22. PW4, Sisupalan was examined to corroborate the version of PW2 and PW3. He was also staying in the 1st floor of the building in which PW1 and family were residing in the ground floor. He deposed that on 26.3.2007 at 11.00 pm, they heard the barking of dogs and thereafter, PW3 called him and PW2, who was residing in the adjacent room. PW3 told him that she heard some noise and as PW1 was not around, wanted their assistance. PW2 and PW4 went down with PW3 and they saw one person coming in through the gate in a naked condition in good speed. After coming in he stated “മണിലാലേട്ടാ ബദറുദ്ദീൻ എന്നെ കുത്തി.” (“Manilaletta, Badaruddin stabbed me”) and fell down face down on the ground. Immediately PW2 called up PW1 and informed him. PW1 came with his brother-in-law and went back to summon the police. After police had come, the injured was shifted to the hospital. He accompanied

the injured in the police jeep along with PW2 and PW1. He was examined to prove the recovery as well. According to him, on 18.10.2008, he had occasion to witness the accused taking out a knife from the culvert near to the S.N.M College, Maliankara. In an answer to a leading question put by the prosecutor, the witness had stated that it was the accused who had taken out the knife and handed over the same to the police. He identified M03 knife. He was also an attester to Ext.P4 recovery mahazar. He also stated that he was present on the next day of the incident when the police prepared Ext.P3 scene mahazar and he stood as an attester to Ext.P3 as well. In cross examination the witness stated that he was not related to PW1. He had seen the injured at a distance of about 25 feet. He does not remember whether everyone present had heard the injured stating "Manichetta, Badaruddin stabbed me". According to him, it was PW2 who had called PW1 over phone. The police had come to the scene after half an hour. The injured was taken to the hospital after 12.00 am. He was questioned by the police on the next day of the incident. He has no previous

acquaintance with the accused. According to him, the distance from his place of residence to the Maliankara College was more than two kilometers. A knife was recovered from under the garbage on the northern side of the culvert. He denied the suggestion in cross examination that he was deposing falsehood at the instance of PW1 and PW6.

23. The most important witness examined by the prosecution in this case is PW5 Vasu. Vasu states that he is a deck hand in a fishing boat and he has seen the deceased only once. His boat, "Manoj", was tied immediately on the eastern side of "Syamkutty". According to him, at about 8.00 pm on the date of incident he saw Baby for the first time. Baby was alone in the boat. Baby asked him about his whereabouts. When he asked Baby as to whether he was alone, he responded by saying that his friend has not yet arrived. PW5 then slept on the front deck of the boat. At about 12.00 AM, he heard some noise and woke up. He heard the words "നിന്നെ ഞാൻ എന്തു ചെയ്തിട്ടാണു നീ എന്നെ കൊല്ലാൻ വരുന്നത്" ("what

have I done to you for you to kill me”) and thereafter, “എന്റെ അമ്മ” (“mother”). He saw a person going out of “Syamkutty” followed by another person who had a cloth tied around his neck. The second person was not wearing any cloth. After the second person had gone out, the first person came back and took a kit from the boat and again left. He saw everything from the light emanating from the fisheries factory of 'Abad sea food factory" on the south. The person who left on the second instance was probably Baby according to him and the person who left with the kit is the accused standing on the dock. He further stated that the accused was shown to him at the Munambam station after his arrest. He was roused from his sleep after 2.00 am by the police and one Jose. In cross examination, he would state that “Syamkutty” was moored on the eastern side of his boat. According to the said witness, the police had come to his boat at about 12.00 am and inquired about the incident but he did not disclose that he had overheard any sound at that point of time. His name and address was taken by the police and they came later at 2.00

am. According to him, he divulged the details to the police only then. He stated that he is from the nearby village and his house is in the vicinity. He decided to sleep in the boat only to enable him to go fishing early in the morning. He admitted that he was summoned to the police station at about 1.00 am immediately after the incident and when he reached there, he found Girish inside the lock up. His statement was recorded only on the next morning. He asserted in cross examination that he had occasion to give statement to the police only once and that was on the next day of the incident. Thereafter, he has never been questioned by the police. He denied that he was giving a false version of the incident to aid PW1 and PW6. He has no acquaintance with either the accused or the deceased. He did not disclose to the police as to the clothes which were worn by the person who had left the boat with the kit. He admitted that he was 68 years old when he gave the evidence and at times his eye sight was very poor. The defense brought out an omission in his statement to the effect that he had not mentioned to the police that he heard someone saying "what

have I done to you, for you to kill me". He asserted that he had clearly heard someone saying the said sentence. But when PW18 the Investigating Officer who questioned PW5 was examined he stated that what Vasu stated to him was that he overheard someone saying "why are you beating me. What did I do to you" and not in the way PW5 had deposed before Court.

24. PW6 is also a worker in the fishing boat. He deposed that he is having acquaintance with the accused for the past three years and it was he who took the accused to PW1 and secured for him a work in the boat of PW1. He deposed that the accused had demanded that PW6 obtain for him a loan of Rs.5000/- from PW1 . This demand was made while PW6 and the deceased were having a drink at the Cherai bar. At that time, deceased Baby interfered and told him not to cede to the request of the accused as his whereabouts and place of residence were not known. This infuriated the accused and he left the place. After having the drink, PW6 and the deceased watched a musical performance going on in the street and the

deceased was also present. Baby left early but the accused and PW6 waited till the musical performance was over. While on their way back in a bus there was a quarrel between him and the accused. Thereafter, they both went to the ferry where PW1 and PW7-Sebastian were found repairing the net. Both PW6 and the accused assisted PW1 and during the same, PW6 complained about the accused. He said that if the accused continued to abuse him, he would definitely beat him. PW1 asked them to go to the boat and get a sleep without quarreling. When PW6 reached the boat he found that the Baby was lying there. A quarrel ensued between the accused and PW6 and they slapped each other. At that time, Baby interfered and separated them. The accused pushed Baby away and he was found searching for something in the wheel house of the boat. Thereafter the accused left the place after threatening the deceased and PW6. Feeling suspicious about the intentions of the accused, PW6 decided to go to the house of PW1 to vent his grievance. He stated that he told PW1 about his grievance and his employer asked him to return back and he would

follow in his bike. The accused was not found in or around the ferry and therefore, PW1 and PW6 went to the shop of Sivadas and purchased some fruit juice and stood there talking with Sivadas. While so, PW1 received a telephone call from his house and he immediately left after asking PW6 to stay there. After sometime PW1 returned and with the assistance of some people standing there tied him to a post. Later, police arrived and he was untied and was taken to the police station. According to him, he overheard from the police station that it was the accused who had stabbed the deceased resulting in his death. He also stated that he saw the accused only after one and half years. During cross examination, he stated at 12 AM, Vasu had come to the police station and had told the police in the presence of PW 1 that it was Badaruddin who had done away with the deceased. At that time he was in lockup. He stated that the dispute that occurred at the Bar was not that serious. He denied the suggestion of the defense that it was he who had perpetrated the murder.

25. PW7 Sebastian had assisted PW1 to do repair works of the fishing net. He deposed that on 26.3.2007, at 5.30 pm his services were availed by PW1 and they did repair works near to the boat jetty. At 10.00 pm PW6 and accused had come together and he heard PW6 complaining that he was abused. After finishing work, he and PW1 went their separate ways. This witness was examined to prove the presence of the accused and the dispute between the accused and PW6. PW8 another employee of PW1 was examined to prove that the accused, deceased and PW6 were employees. He also would say that he overheard the accused asking for a loan of Rs.1000/- from PW6. PW9 Harshan was present when the inquest was prepared. PW10 is the younger of the deceased. PW11 is an attestor to the inquest report. PW12 is a close friend of PW4 and he was present when MO3 knife was recovered at the instance of the accused. He identified Ext.P4 mahazar prepared by the Investigating Officer and also MO3 knife.

26. PW13 is the Head Constable of Munambam police station who arrived at the spot on receiving information about the incident involving the deceased. On his arrival he saw a naked person lying in a pool of blood in the Verandah of the house of PW1. He deposed that he along with PW2 and PW4 shifted the injured to the Government hospital, Paravur, where he was declared dead. PW14 is the Scientific Assistant of the Forensic Science lab who inspected the place of occurrence as requested by the Investigating Officer. Samples were taken from the boat where the incident had taken place and also from the neighboring boats. Through PW14, Ext.P5 report was marked.

27. PW15 is the Assistant Sub Inspector who wrote Ext.P2 inquest report as directed by PW18, the Circle Inspector of police. PW16 is the Sub Inspector of Munambam police station who along with PW13 head constable, had come to the place of occurrence on receiving information about the incident. He found the body of the deceased lying face down on reaching the

spot and he was told by PW1 that the deceased is an employee of his boat. He further stated that he gave instructions to take the injured to the hospital. Thereafter, he went to the boat jetty and found blood inside the boat as well as on the road leading to the boat. He saw PW6 tied on a post near to the jetty and he was taken to the police station. At about 2.00 am PW1 came to the station and gave Ext.P1 statement based on which Ext.P7 crime was registered u/s 302 of the IPC. PW17 is the doctor who conducted the postmortem over the dead body of the deceased Baby and issued Ext.P8 postmortem certificate. PW18 is the Circle Inspector of police Njarakkal police station who conducted the investigation. He prepared the inquest and scene mahazzer and arrested the accused from Kannur . Based on the information furnished by the accused, MO3 knife was also recovered .

28. We scoured the evidence of PW 18 to find if he had made any effort to get the accused identified by PW 5 . There was none. PW5 and the accused are total strangers and it is the case

of PW 5 that he had seen the accused in the dead of night from the light of a sea food factory situated on the other side of the River about 50 meters away .

29. Let us now consider whether circumstance No (d) relied on by the prosecution has been established. PWs 2, 3 and 4 are the witnesses who were examined to prove the fact that the deceased , after sustaining injury on his neck and chest , from inside the boat, had walked a distance of about 200 metres and had come to the house of PW1, probably to inform him about the incident. The presence of blood in the boat of PW1 and the trail of blood all along his passage ending on the verandah of the house of PW1 would unmistakably reveal that the injured had sustained fatal injuries and after sustaining the injury he had walked all the way to the house of PW1. Question is whether the version of these witnesses that they heard the deceased uttering certain words implicating the accused as the author of the crime is clinching or not . From the evidence of PW3, it is revealed that immediately after PW1

had left, she went to the top floor of the building where PW2 and 4 were residing with family. It is the specific case of all these witnesses that they had come down together and had occasion to see the deceased coming in through the gate. An appraisal of the evidence of these witnesses would reveal that out of the three witnesses examined, PW2- Sabu had a bigger role to play. It is Sabu who had called PW1 on seeing the person lying there in a pool of blood. In his evidence before Court, Sabu does not state that he had heard the deceased specifically mentioning the name of the accused as the assailant or as the person who had stabbed him. He only says that the deceased had called out "Manichetta". On the other hand, both PW3 and PW4 state in their evidence that on entering the house, they heard the deceased stating that it was the accused who had stabbed him.

30. The learned defense counsel has argued that PW3 and PW4 was stating absolute falsehood and the same would be evident on a perusal of the FI Statement given by PW1. To

bring out this aspect the learned counsel argued that on receiving a phone call from PW2 about a person lying dead on the verandah of his house, PW1 along with his brother-in-law had come back to his house. If in fact, the deceased had mentioned about the assailant when he had entered the house, as spoken to by PW3 and PW4, it would have been mentioned to PW1 by these witnesses. In that event, there was no reason for PW1 to return back immediately where PW6 was standing and to direct that he be tied to a post till the police arrived. To appreciate the contention of the learned counsel we may have to meticulously peruse the FI statement given by PW1 at 2.00 am after the confirmation of death of Baby. At this juncture it has to be borne in mind that the deceased was transported in the police jeep from the house of PW1 and PW1, PW2 and PW4 were present in the jeep along with PW 13 , head constable. There appears no reason why the alleged mention by the deceased before he had fallen down about the person who had stabbed him , which we consider as very material, was not brought to the notice of PW1 Manilal ,

PW 13 Head Constable or PW 16 Sub Inspector by either PW2 or PW4. There is also no reason why, PW3 Santha, the wife of PW1, who is said to have overheard the utterances of the deceased did not mention this aspect to PW1 at any point of time. We cannot forget that PW1 was carrying a mobile phone as well and it was one of his workers who was murdered in his own boat.

31. In Ext.P1 FI Statement, PW1 says that at 10.30 pm on 26.3.2007, PW6 Girish had come to his house and had stated about some fight that he had with the accused. On hearing the complaint, PW1 asked PW6 to go to the Munambam jetty and he would follow later. He asked his wife to go to sleep after closing the door and went to the jetty. At that time, PW6 also reached and they went to the C - class shop of Sivadas, who is his brother-in-law. While they were talking, he received a call from PW2 Sabu and asked him to return home. He was told that a person drenched in blood was lying in the verandah of his house. Immediately he went back home with Sivadas and

saw his worker Baby lying face down in the verandah with a lungi tied on his neck. Fully certain that it was Girish who had stabbed Baby he went back to the jetty and asked the persons standing there to tie up Girish on a post to prevent him from escaping. The police were informed and they reached the place. The injured person was immediately taken to the hospital where he was pronounced dead. According to him, he went back to the jetty and when he reached there, he received information that after PW6 had left the boat to come to his house a cry was heard from the boat and the accused was seen going out by PW5-Vasu, who was sleeping inside the adjacent boat. It was on the basis of the information given by PW5-Vasu that PW1 had given Ext.P1 statement before the police implicating the accused.

32. While evaluating Ext.P1, which is seen furnished at 2.00 am by PW1, it can be seen that there is no mention anywhere in Ext.P1 that PW2 to PW4 had occasion to hear the deceased uttering the fact that it was the accused who had stabbed him.

It is borne out from the evidence that PW1 had reached his home immediately after receiving the phone call and PW 2 to 4 were very much present there. It was PW2 and PW4 who had accompanied PW1 to the hospital along with the police. It is only but natural and probable human conduct to inquire about the author of the crime and if in fact, PW2 to 4 had overheard from the mouth of the deceased that it was Badaruddin, the accused who had murdered him, they would have definitely shared the information with the police so that the perpetrator could have been apprehended without delay. It has also come out that PW13, Head constable of police, and PW16 the Sub Inspector of police had reached the house of PW1 immediately after the incident. It was PW13 who had taken the injured to the hospital accompanied by PW1, PW2 and PW4. All these while, PW 6 was tied to the post near the Munambam ferry as well. Thus on an analysis of the evidence as aforesaid and the inconsistency in the version of PW 2 to 4, we are not in a position to place implicit faith on this circumstance. It cannot be said that the prosecution has been

able to successfully establish that PW 3 and 4 had overheard the deceased uttering the name of the accused as the person who had stabbed him . This appears to be an afterthought , cooked up later to give a different version of the occurrence . The learned Sessions Judge has held that the evidence of PW 2 to 4 clearly reveals that deceased Baby had come to the house of PW1 and uttered “Badaru stabbed me” and that the said evidence clearly shows that the stab injuries were caused to Baby by the accused himself. It was held that the above evidence was admissible u/s 6 of the Indian Evidence Act. We have no doubt in our mind that if the evidence tendered by PW2 to 4 was without blemish and reliable, their evidence could have been relied on with absolute certainty to hold that it was the accused and the accused alone who had perpetrated the act. But in the instant case PW2, does not even mention about the deceased uttering the name of the accused. The sequence of events as narrated by the prosecution culminating on the lodging of the FI statement at 2.00 am on the next day will also improbabilize the version of the prosecution that the

name of the accused was mentioned by the deceased when he had entered the compound of the house. More over Ext.P1 statement is certain that when on hearing the sound PW2 to 4 had come out, they had seen a person lying in a pool of blood on the verandah. In view of the above discussion, we find it quite unsafe to place absolute reliance on the evidence of PW 3 and 4 to hold that the deceased had uttered the name of the accused as his assailant.

33. Now we shall consider whether circumstance No (e) has been established by the prosecution. According to the prosecution case, PW 5, a deck hand in the nearby boat, had heard some sounds from the nearby boat and after that two persons had gone out from the boat, one of which was the deceased and the other was the accused. The prosecution relies on the evidence of PW 5 to bring out the fact that it was the accused and the accused alone who had committed the act. Vasu at the time of incident, was aged 65 years. He was the employee of a fishing boat by name "Manoj" which was moored

on the eastern side of the “Syamkutty” boat belonging to PW1. Before evaluating the evidence of PW5 Vasu, the nature and lie of the place and the mode in which the boats were moored has also to be looked into for a proper appraisal. From Ext.P3 scene mahazar it is revealed that four boats with their front side facing the south were moored adjacent to each other on the western side of the jetty. “Syamkutty” was on the extreme western side and in order to access the the jetty on the eastern side, a person from “Syamkutty” had to pass through three boats tied one after the other to the jetty. It was not possible to go out through the western side as the vast Periyar river was on that side . PW5 was an employee of the boat by name “Manoj” which was moored immediately after “Syamkutty”. These boats are very small fishing boats and from their description in the scene mahazar, the wheel house wherein the incident had taken place had a dimension of 2.8 metres x 2. 25 metres. It is evident from the mahazar that the boats were all small fishing boats and even according to PW5 he was lying on the front deck. As per the scene mahazar

presence of blood is noted on the bender cover, on top of the engine box behind the wheel house, on either sides of the deck etc of “Manoj” , the boat in which PW 5 was lying. The definite indication in the scene mahazar is that the deceased had walked through the “Manoj” boat after the incident , where PW5 was lying , to reach the jetty . This should have been the most important circumstance to probabalise the version of PW5. PW5 on the other hand, has given evidence, so as to make it appear, that the deceased and the other person whom the prosecution claim as the assailant had gone out of the boat through some other side and as if they did not enter the boat in which PW5 was present . This would create a serious doubt in the evidence of PW5. Moreover, PW5 himself admits that when police had come to the boat at about 12.00 AM on the same day, searching for clues of murder he did not mention about the hearing of sounds from the adjacent boat. According to him the police had again come at 2 AM and at that time he had disclosed about what had happened in the adjacent boat . Quite contrary to the above , PW 6 Gireesh would depose that

while he was in lockup, at about 12 AM , PW 6 was in the police station and he had stated to the Police that it was the accused who had committed the act of murder. This would also cast serious doubts about the veracity of the evidence let in by PW5.

34. If the prosecution case is believed, after 9.30 PM on the date of incident , PW 6 and the accused had come back in a bus from Cherai after hearing the musical performance in the street , and was with PW 1 and PW 7 for some time . It was at 10 PM, that PW 7 and PW 1 had gone to the boat to spend the night as suggested by PW 1 . They could have accessed “ Syamkutty “ only by passing through “Manoj” , in which PW 5 was lying on the front deck . It would be far fetched to believe that PW 5 had not seen the accused and PW 6 passing through his boat . As per the prosecution case , there was a fight prior to PW 6 leaving the boat to the house of PW 1 . PW 5 does not speak any word with regard to this incident as well . He does not speak about the passage of PW 6 and the accused through his boat .

We find it really difficult to believe this version of PW5 .

35. Further, a perusal of the evidence of PW5 would reveal that he has had no acquaintance with the accused. As far as he is concerned , the accused is a total stranger He has no case that he is able to recognize the sound of either the accused or the deceased . He has not described any special features of the accused so as to recognize him and admittedly he did not have an opportunity to interact with him. All that he sees in the dead of the night according to him are two figures moving from one boat to the Jetty .We have gone through the prosecution records as well as the evidence of PW 18 , the Investigating Officer. Not even a whisper is there in the evidence , that , after the accused was arrested on 17.10.2008 at 4.00 pm at the Ayykkara harbour, Kannur , that too after more than 1.5 years after the occurrence , he was got identified by PW5. In a case of instant nature, it was obligatory on the part of the Investigating agency to conduct a Test identification Parade . Though in the chief examination of PW 5 he has stated that he

was shown the accused after he was arrested , this fact is not supported by the Investigating officer . Moreover , PW 5 says in unequivocal terms that he had seen the accused only once prior to examination before court . It can thus be seen that the accused is identified by PW5 for the first time in Court. The ocular evidence of PW 5 does not inspire our confidence and it will be hazardous to form an opinion of guilt solely on the basis of the evidence of the said witness .This aspect would seriously upset the credibility of the evidence tendered by PW5 as regards the identification of the accused.

36. It is by now settled by a catena of precedents that during the stage of investigation of a crime, the investigating agency is well advised to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence, particularly, when such person is a total stranger to the witness. The responsibility is even more if , as in the facts of the instant case, the witness had occasion to have only a fleeting glimpse of the accused in the dead of night with

the only light at a distance of 50 meters. It is by now settled that the absence of test identification may not be fatal if the accused is known or sufficiently described by the witness leaving no doubt in the mind of the Court regarding his involvement. Identification parade may also not be necessary in a case, where the accused persons are arrested at the spot. The evidence of identification of an accused person, for the first time, at the trial is, from its very nature, inherently of a weak character. It is more so in a case wherein the accused was arrested after more than one and a half year after the occurrence . It has been held by the Apex Court that the evidence of identification of an accused, at the trial, in order to carry conviction should, ordinarily, clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part, which the accused allegedly played in the crime, in question, with reasonable particularity (See **Budhsen v. State of U.P., 1970 (2) SCC 128**)

37. In **Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat 2000 (1) SCC 358**, it has been observed by the Apex Court that identification of an accused only in Court when the accused was not known earlier to the witnesses had to be treated as valueless. In the said case reference was made to an earlier decision in **State (Delhi Admn.) v. V.C. Shukla (1980 (2) SCC 665)**, wherein it was observed that the evidence of the witness in Court and his identifying the accused only in the Court without previous identification parade was a valueless exercise.

38. The learned Sessions Judge has placed absolute reliance on the evidence of PW5 to hold that the person who had left the boat in the dead of night is the accused. At the risk of repetition we reiterate that PW18 in his evidence has stated that the 'Abad' factory is lying about 50 metres to the south and the 65 year old witness claims to have had a look at the accused in the dead of night. PW 5 admits in cross examination that his eye sight is weak and , occasionally he sees everything

in a smoky manner . He does not mention the fact that the accused had set foot on his boat at any point of time. The non mention of this particular aspect assumes great significance more so when presence of blood is found on the engine and sides of the wheel house and bender of the “Manoj” boat on whose deck , the deceased was said to have been lying down. If in fact, the accused and the injured had walked out through his boat, definitely they would have seen each other as the fishing boats were lying adjacent to each other and was of comparatively small dimensions. The admitted case of PW5 is that he did not mention about any sound that he had heard when PW16 the Sub inspector of police has come to the boat at 12.00 am after the injured were shifted to the hospital. In the light of the above discussion we are of the considered view that the evidence of PW5 cannot be the basis for holding the prosecution has succeeded in proving the identity of the accused. The evidence tendered cannot be the basis of conviction. We feel it unsafe to rely on the evidence of PW5 to conclusively hold that it must have been the accused and the

accused alone who had committed the crime. We see the possibilities of manipulation of the evidence as well.

39. As regards the alleged motive, it has to be stated that the prosecution has not attempted to establish the same. It has not been proven that the accused had any reason, let alone sufficient reason to, do away with the deceased. If at all there was any grievance, it was against PW 6, who incidentally, was the primary suspect. There is nothing to indicate that the accused had a reason to eliminate the deceased for any reason. Even PW 6, who was cited and examined to prove the motive has not stated that there was any dispute between the accused and the deceased so as to put an end to his life. Thus this circumstance cannot be said to have been established as well.

40. No explanation has been given by the prosecution for the fact that the Accused was not arrested after the investigation commenced, despite the fact that seemingly the prosecution perceived that the finger of suspicion pointed at him and him

alone. Though he was arrested from Kannur more than an year after the occurrence, no mention is made by the investigating officer anywhere in his evidence as to the efforts made by him for locating him or that he had absconded .

41. As far as the arrest of the accused is concerned , there are doubtful circumstances . PW 1 would state in his evidence that he went to Kannur in a bus with two police men to effect the arrest of the accused . There is no case for the prosecution that any other person from Munambam had accompanied them . But P11 arrest memo would reveal that the alleged arrest at Kannur was witnessed by one Kuttan , of Nediyrupil Puthenveedu , Munambam. This was highlighted by the learned counsel for the appellant to advance the point that the arrest of the appellant allegedly at Kannur was nothing but an eyewash . There is no explanation by the prosecution with regard to this aspect as well . This, according to us , would render the arrest of the accused allegedly effected at Kannur quite suspicious .

42. With regard to the evidence of recovery of MO 3 knife , it is in evidence that the accused was brought down to the station and based on his statement MO3 knife is recovered . We would have been persuaded to believe this version but for the fact that the attesor to Ext.P 4 mahazer is none other than PW 4 Sishupalan and his friend Rishikehan, who was examined as PW 12 . PW 4 has other roles to play in this case as well . He has been cited by the prosecution to prove the fact that he was also present when the deceased had rushed inside the house of PW1 and uttered the name of the accused. Thereafter he stood as the attesor to Exhibit P 3 scene mahazzer. When the accused was arrested after more than a year and a half , the same witness stands as an attesor to the recovery . The other witness is his close friend and the recovery is affected at a place about 3 k.m. away from the place of occurrence . The defense challenges the evidence of PW 4 and asserts that he is a stock police witness . We are inclined to accept the same in the facts and circumstances of the instant case. PW 4 as stated earlier is residing on the 1st floor of the building where PW 1 is

residing on rent .Admittedly the knife was found from under the garbage of a culvert, far away from his place of residence, and Ext.P4 would reveal that it was the police who had found it out and asked the accused to take it . The prosecution has also a case that there was presence of B group blood on the knife which was exposed to sun and rain for more than one and a half years in a culvert. As argued by the learned counsel appearing for the appellant, we have reservations about the authenticity of the recovery made as aforesaid.

43. In **Geejaganda Somaiah v. State of Karnataka ; 2007 (9) SCC 315** , the Apex Court had cautioned thus: -

[22]. As the section is alleged to be frequently misused by the police, the Courts are required to be vigilant about its application. The Court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The Court has to

be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of S.27 of the Evidence Act.'

44. In **Mani v. State of Tamil Nadu, 2009 (17) SCC 273**, it was held thus by the Supreme Court:

[26]. The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."

45. In **Vijay Thakur V State of Himachal Pradesh 2014 (11) SCALE 63** it was held by the Apex Court as follows:-

25. With regard to S.27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under S.27 of the Act is the information leading to discovery

and not any opinion formed on it by the prosecution."

46. In view of the above discussion , It does not appear to us that the facts and circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the murder was committed by the appellant and none else. There are gaping holes in the prosecution version rendering it unsafe to base a conviction on its basis . In a case of circumstantial evidence, there has to be some degree of trustworthiness and certainty about the existence of the circumstances - mere probabilities are certainly not enough. [See **Hargun Sunder Das Godeja v. State of Maharashtra, 1970 (1) SCC 724**] The established circumstances do admit of other explanations as well. They are also amenable for an hypothesis of the innocence of the appellant.

47. We therefore, hold that the charge against the appellant cannot be said to have been proved beyond doubt and the

conviction of the appellant therefore cannot be sustained.

48. In the result, the Appeal is allowed. Conviction and sentence passed by Additional District and Sessions Judge, (Ad hoc)-III, North Paravur, in S.C.76 of 2009 is set aside. The appellant/accused is found not guilty of the offences charged. He is acquitted and set at liberty. He shall be released from prison forthwith, if not wanted in any other case.

Sd/-

V.K.MOHANAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

Mrcs