

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

CRL.A.No. 256 of 2011 ()

AGAINST THE JUDGMENT IN SC 862/2008 of THE COURT OF ADDITIONAL
DISTRICT AND SESSIONS JUDGE (FAST TRACK COURT NO.I), THRISSUR
DATED 3.2.2010

AGAINST THE JUDGMENT IN CP 16/2001 of THE COURT OF JUDICIAL FIRST
CLASS MAGISTRATE, CHALAKUDY
CRIME NO.17/2007 OF CHALAKUDY POLICE STATION, THRISSUR DISTRICT

APPELLANT/ACCUSED NO.1:

SHEBI,S/O.VARGHESE, THEKKAN HOUSE,
NORTH CHALAKUDY, POTTA VILLAGE

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.V.C.SARATH
SRI.UNNI SEBASTIAN KAPPEN

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.V.H.JASMINE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
11-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

Crl.A.No.256 of 2011

Dated 11th September, 2015

JUDGMENT

Jyothindranath, J.

This appeal is preferred against the judgment in S.C.No.862 of 2008 on the files of the Court of Additional District and Sessions Judge (Fast Track Court No.I), Thrissur. By the impugned judgment, the appellant herein is found guilty under Sections 300, 341 and 324 of the Indian Penal Code and convicted thereunder. The appellant is sentenced to undergo imprisonment for life under Section 302 of IPC and also sentenced to pay a fine of ₹ 1,00,000/- with default sentence of simple imprisonment for one year. He is further sentenced to undergo rigorous imprisonment for three years under Section 324 of IPC and to pay a fine of ₹ 50,000/- with default sentence of simple imprisonment for six months. He is also sentenced to undergo rigorous imprisonment for one month under Section 341 IPC. There is also a direction to pay compensation to the legal heirs of the deceased as well as the injured witness, if the fine amount is realised.

2. The prosecution case as per the court charges is as follows:-

The accused on 14.1.2007 at about 10.40 hours made an unlawful assembly and the first accused/appellant herein equipped with a wooden reaper attacked the deceased and others and the deceased was taken to hospital and while he was undergoing treatment, he succumbed to the injuries on the next day. It is also the case that the first accused/appellant attacked PW6 using the very same wooden reaper and inflicted injuries on him and thereby the accused committed offences under Sections 143, 147, 148, 341, 323, 324, 302, 202, 212 read with Section 149 of the Indian Penal Code.

3. Except the appellant herein all other accused who faced trial are acquitted by the trial court. The appellant herein is convicted for the offences mentioned above and sentenced as stated above. Aggrieved with the above conviction and sentence this appeal is preferred.

4. The prosecution altogether examined 21 witnesses and marked Exts.P1 to P15. MO1 to MO4 are also marked. On the side of the defence DW1 is examined and Exts.D1 to D6 are marked.

5. When the appeal came up for hearing, the learned counsel appearing for the appellant submitted before us that here is a

case where the evidence adduced by the prosecution is not reliable. It is the submission that in this case, the incident actually started from a Bar. As per the prosecution case, the accused party as well as the material prosecution witnesses along with others were intoxicating. While so, there occurred some exchange of words. It is the submission that even though the witnesses not admitted, as per the prosecution case itself, as evident from Ext.D1(b) it can be seen that there was an assertion by deceased Biju to the first accused as hereunder:-

“`എന്താടാ നിനക്ക് എന്നെ ഓർമ്മയുണ്ടോ’ എന്ന് ചോദിച്ചു. ബിജു വീണ്ടും അവനോട് `നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കി തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.”

Thereafter, it can be seen that when the accused party left the Bar the deceased and others followed in an autorickshaw and attacked the appellant herein and others and thereby the appellant sustained injuries as evident from Ext.D3.

6. It is also the submission that, it can be seen that, the deceased was taken to the hospital by the Police and he was admitted in the hospital. Even though Police admitted the deceased in the hospital the F.I.R which is marked in this case as Ext.P1(a) came into existence only on the next day. It is an indication that it is an ante-time document prepared in consultation with others. It is also the

submission that the first informant is not an ordinary man. From the evidence of PW21 it can be seen that he was involved in more than two criminal cases. Exts.D4 and D5 will vouch the same. If that is so, the F.I. Statement itself had to be viewed very carefully by the Court.

7. It is the further submission that here is a case where the prosecution has not bothered to explain the injury sustained to the first accused/appellant herein. It is also the submission that, as per the prosecution case itself, at the earliest point of time, when the incident started, there was no weapon in the hands of the accused. Prosecution has not explained from where the weapon, now marked as MO1 came in the hands of the appellant. The only inference that can be drawn is that to tune with the injury and the allegation now made a weapon was fastened in the hands of the appellant so as to make incriminating evidence against him.

8. It is also the submission of the appellant that the evidence of PW6 is also not reliable. It is the submission that, as per the prosecution case, he went to the hospital at 12.10. a.m. At that point of time he has not stated the person who caused injury on him. Now, the positive case of the said witness is that the appellant is the person who inflicted injury. It is the submission that the case now put

forward is that with the very same weapon that caused injury to the deceased, the injury to the witness also caused. It is the submission of the counsel for the appellant that it is only a version now given so as to make believe that he is a witness for the infliction of injury to the deceased.

9. It is the further submission made before us that the background of the incident also has to be appreciated. As per the prosecution case, the animosity is an incident about three years prior to the said date. That was an incident attached to a festival of the Church itself wherein some altercations took place. The submission of the counsel for the appellant is that whether such an incident can be the motive to commit murder ? It is also the submission made before us that now, PW1 and PW6 are giving a version before the court similar in nature. Even omissions and contradictions are similar. Ext.D1(b) which is a contradiction made by the first witness similar to a contradiction by PW6 which is marked as Ext.D2(c). It is the submission of the counsel that when prosecution itself got a case that there was a threat by the deceased to the effect that “നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കി തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.” and a subsequent incident occurred, then the version now put forward by the witness before the

court is not reliable.

10. The counsel for the appellant also submitted before us that prosecution is also relying on recovery under Section 27 of the Evidence Act. It is to be remembered that it is made from an open place and further, as per the evidence of PW19 who marked Ext.P9, it can be seen that the place of recovery is very near to the place of incident. It is the submission that a scene mahazar was earlier prepared and thereafter the recovery made. The independent witness not supported the same. Surely, he admitted the signature but, he got a case that it was made from the Police Station. It is the submission that when a recovery is made after preparing the scene mahazar, such a recovery is not believable especially when independent witnesses are not supporting. It is also the submission that the case on hand is different from an ordinary case. The place of incident is not one spot. As per the prosecution case, place of incident itself spread to about two places. If that be so, it cannot be assumed or presumed that Police only visited a spot alone but can be only considered that the area is covered by the Police and if a recovery is made from such an area it cannot be believed especially when the independent witness is not supporting the same.

11. The counsel also submitted before us that the evidence of PWs 1 and 6 has to be evaluated carefully. It is the admitted case that they were in the company of the deceased. It is also the submission made before us that when the witnesses are near friends or relatives, their evidence has to be considered with due care and caution. It is also the submission made before us that no light was available at the scene of occurrence. One aspect highlighted to our notice is that the specific case of the prosecution as evident from PW3 is that he saw the injured by using the torch. Surely, he got a case that there was street light. But, when the site plan is analysed it can be seen that Sodium Vapour Lamp, which is mentioned in the scene mahazar, is not on the area where the deceased was lying injured. It is the submission that, it can be seen from the site plan that in between the lamp and the place where the deceased was lying there are shop rooms intervening. The electric light will travel only in straight line. If there is blocking like shop rooms, the light will not reach there. Then the admission of PW3 to the effect that he saw the injured using a torch light becomes relevant. PW1 and PW6 claimed that they saw the accused inflicting injury to the deceased. There should be sufficient light for the same. When there is no sufficient light the evidence of PWs 1 and 6 regarding witnessing the incident, that is, inflicting injury to deceased becomes doubtful. It is also the submission that this aspect

gathers much more relevance when PW6 is not divulging the name of the accused at the earliest point of time to the Doctor. When he has not divulged the name of the accused at the earliest point of time and when there is no sufficient light apparent from the site plan, his evidence of having witnessed the incident also becomes doubtful.

12. It is also submitted before us that prosecution examined PW7 before the court to prove the postmortem certificate. Ext.P6 is the postmortem certificate. The evidence of PW9 is relevant to be quoted. He had never deposed before the court that the injury caused is sufficient in the ordinary course to cause death. He is not an ordinary Surgeon. He is the Associate Professor attached to the Medical College Hospital. More over, he is a forensic expert. When the Doctor is not deposing the same, even the fact that the injury is sufficient to cause death in the ordinary course has to be doubted. The postmortem certificate elaborates the antemortem injuries therein. Mainly three injuries are sustained to the head. Surely, there is fracture. But, it does not mean that this injury is fatal in nature. It is to be remembered that the deceased was alive till the next day. When Doctor is not deposing that in the ordinary course, it is sufficient to cause death and the deceased survived about 12 hours, even non-availability of sufficient medical care could be the cause of death or

may be some other complications. If that is so, it can be only held that prosecution had failed to prove commission of offence under Section 300 IPC.

13. The learned counsel for the appellant also submitted before us that when prosecution failed to prove that the injury caused, in the ordinary course, is sufficient to cause death the conviction under Section 300 IPC will not lie. It is the further submission that in the light of the suppression of first F.I.R or non-registration of F.I.R at the earliest point of time and when PWs 1 and 6 are not coming before the court with truthful version and further when all other accused who were tried along with the appellant were acquitted this appellant is also entitled for an acquittal on the above counts. It is the further submission made before us that if he is not entitled for a total acquittal, he is only liable to be convicted under Section 304 Part II of IPC. For the same, the learned counsel for the appellant submitted before us that, as already pointed out, the fact that there was a threat by the deceased from the Bar to the effect that 'നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കി തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.' and thereafter when the incident occurred, it can be only inferred that the deceased and the others are the aggressors. The genesis of the incident is now

suppressed and the deceased and others by going to the area of the appellant, attacked him. This aspect gets more significance when prosecution itself got no case that originally there was any weapon with the appellant or any other person. It is also pointed out that even when the charge was filed, prosecution got no case that all the accused were equipped with weapon, even though in Ext.P1, PW1 was having a case that they were equipped with iron rod, stone etc. If the deceased and others are the aggressors and when the injury sustained to the accused, as evident from Ext.D3, is not explained, it can only be inferred that it is a case where the appellant got the private defence. It is also the submission of the counsel for the appellant that when the Doctor is not deposing that the injury sustained is sufficient to cause death in the ordinary course the intention to murder cannot be inferred by the court. At the most, the court can infer the knowledge, that means the conviction can be only under Section 304 Part II of IPC. Thereafter, the learned counsel submitted that if the court is not convinced about the private defence, then it is a case under Section 304 Part II IPC. It is the submission made before us that in a case of Section 300, Exception (4) will come into play. As per Section 300 Exception (4), it can be seen that culpable homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken

undue advantage or acted in a cruel or unusual manner. It is immaterial in such cases which party offers the provocation or commits the first assault. It is the submission that even if the prosecution case is believed in toto it can be seen that here is a case which will only come under this category. If that is so, the appellant is entitled for allowing the appeal to that extent.

14. It is also the submission made before us that the injury sustained by the appellant as evident in Ext.D3 is not explained by the prosecution. The non-explanation of such an injury is fatal to the prosecution. It is submitted before us that the non-explanation of the injury is fatal when the witnesses who are examined in this case as PWs 1 and 6 had nothing to say about the same. They were not at all aware of such an injury. When they were not at all aware about such an injury, the version now put forward by them before the court itself become unreliable. It is the submission that DW1 is examined before the court to prove the same. It can be seen that it is a sutured wound. Even though the prosecution has not bothered to give measurement of the same, there was a specific suggestion put to the Doctor that the suture contains 10-12 stitches. The Doctor was not ready to deny the same. He only explained that he has not noted. When head is a vital organ and on that area when an injury like that, and when the

prosecution is got no explanation for such an injury, the version now put forward by the witnesses is not believable. Moreover, it is submitted before us that PW1 who filed Ext.P1 cannot be treated as an innocent person on the background of Exts.D4 and D5. The cumulative effect of all these aspects is that the appellant is entitled for an acquittal.

15. The learned Public Prosecutor Smt.Jasmine submitted before us that in this case, two eye witnesses are examined to reveal the prosecution case. It is true that PW3, the ASI has not registered a crime when he got the information regarding the injury sustained to the deceased. But, the Police is only expected to register a crime only when details of the incident are available and at any rate, at least the details regarding the person who sustained the injury and how the incident occurred are to be gathered. Then only F.I.R can be registered. When the details are missing, Police waited for a person having direct knowledge about the incident and thereafter alone Ext.P1 was registered. It is the submission that now, ExtP1 is given by a person who directly witnessed the incident. It is also submitted that the incident occurred as the accused and others restrained the moving autorickshaw wherein PW6, deceased as well as PW1 were travelling. In a case where direct and cogent evidence is available, even genesis of

the incident will not have much relevance. It is the submission that in this case, PW1 gave a clear narration of the incident which happened at the place of incident. The evidence of PW1 is seen corroborated by PW6, who is none other than an injured witness. When an injured witness is coming before the court, his evidence need not be doubted. It is the submission of the learned Public Prosecutor that in this case, it cannot be expected that an injured witness will exculpate the real culprit and inculcate an innocent man. It is also the submission that when PWs1 and 6 are mutually corroborating, and when there is disclosure statement made by the accused after arrest and there is consequential recovery of the weapon of offence, the evidence of PW1 need not be doubted. It is the submission made before us that MO1 weapon is recovered as per the disclosure statement made by the accused before the Investigating Officer and in consequent to the said statement as taken and given by the accused MO1 was recovered. MO1 contains blood stains as evident from Ext.P15. The weapon is identified by eye witness which contained blood. When the concealed area is shown by the accused, the only inference that can be drawn is that he was having the knowledge about the place where it was kept. When the said weapon contains blood stains and when the Doctor examined before the court deposed that, that weapon can be used to cause the fatal injuries on the deceased it is a piece of evidence which will

corroborate and give assurance to the evidence of PWs 1 and 6.

16. Now, the learned Public Prosecutor submitted before us that it is true that the Doctor has not deposed that the injury noted in the postmortem certificate will, in the ordinary course, cause death. But, this Court can very well look into the injuries sustained by the deceased as evident from the postmortem certificate. The first injury is a lacerated wound 11.5 cms. long, sutured, on top of head, placed front to back, slightly oblique, bone deep (1cm), front left end was at midline, 11cm above root of nose, back right end was 2.5cm to the right of midline. Another lacerated wound 8 cm long, sutured bone deep (1cm) was present crossing the first one at a point 9cm away from front end, the right front end of which was 3cm away from the first one at an angle about 45° and the third is scalp contusion internally over an area 20x20x2cm on top, front, back and left side of head. The skull bone underneath injuries (1) and (2) was fractured into multiple pieces over an area 7x6cm with flattening of the fractured area. Fissure fractures extended to forwards to base of skull up to body of sphenoid, and to left side (two numbers) to base of middle cranial fossa. Brain weighed 1300gms, was oedematous. There was subdural and subarachnoid bleeding on entire surface and contusions 5x5x1cm on left fronto parietal region and 4x4x1cm at under aspect of right

frontal lobe of brain. When the skull bone was fractured into multiple pieces over an area of 7x6cm with flattening of the fractured area and further when fissure fractures extended to forwards to base of skull up to body of sphenoid and to left side to base of middle cranial fossa an expert opinion on this aspect is not necessary. This Court can very well come to a conclusion that such an injury will in the ordinary course cause death. It is the further submission made by the learned Public Prosecutor that deceased died due to head injury. When such an injury is therein and death caused due to head injury, a further explanation may not need to prove the prosecution case. It is also submitted before us that as per the defence version, it is a case where there was an earlier threat as is evident from Exts.D1(b) and D2(c). When ocular evidence is before this Court and there is explanation how and why deceased and witness reached at the place of incident, there is nothing to disbelieve the prosecution case. Exts.D1(b) and D2(c) got no relevance at all. Such contradictions will not affect the prosecution case. It is also the submission made before us that it can be seen from the evidence that PW6 was in the hospital. He was in the ICU. As such, his statement was also taken at a later point of time. If that be so, it cannot even be said that prosecution had tried to shape any case. One of the injured died and the other was also in the ICU. Then, it can be only considered that a true version of the incident is now before this Court.

17. Now, after hearing the appellant's counsel as well as the learned Public Prosecutor, a gist of the evidence in this case will be helpful in appreciating the evidence.

PW1 gave the F.I. Statement. He is an eye witness. The incident occurred on 14.1.2007 between 10.30 to 10.45 p.m. The information was given on 15.1.2007 at 9 a.m. He deposed before the court that the incident occurred on a road junction near Kizhakke Potta Church at North Chalakkudy. According to him, he along with the deceased Biju, one Joju, Johny, Biju (Bijukkan), Babu, Nelson and Saji went to a Bar namely 'Sidhartha Bar' and had liquor and food. The time was about 10 p.m. and in the adjacent cabin, the accused Shebi, Dinakar and Lees were sitting. They were talking loudly and he further deposed that about three years prior to that, there was an altercation inside the Kizhakke Potta Church in between those persons and witness' party. It is the further evidence that accused came and talked to Biju and thereafter appellant stared at Biju and then, they went out.

18. It is the further evidence that thereafter all of them came out and went in an autorickshaw and when they reached at the place of incident, the accused six in number blocked the road and the deceased Biju told them to move away from the road. Then the accused told them that if he wants, he can alight and go. There were

some altercations and push and pull. The first accused/appellant beat Biju on the cheek area. Then, one among the accused exhorted to take sword. Then, the first accused/appellant was coming with a wooden reaper (ജനൽപ്പടി പോലുള്ളത്). He moved to the side of the road. Biju ran to the nearby garden land. The appellant followed and the other accused also chased and he beat on the head of the deceased. PW1 identified the weapon as MO1. The other accused beat deceased all over the body and thereafter Shebi/the first accused beat on the head of Joju also using the same MO1 and thereafter, when he found that the accused party is proceeding towards him, he ran away towards the Panampilly College road. He telephoned one Justin and asked for help. Justin came in a car and they went to the place of incident. He got information from the place that one person was shifted to St.James Hospital, Chalakkudy and the other person walked away from there. The witness also went to St.James Hospital and found that Biju was transferred to ICU. He further deposed that the relatives of Biju were also therein and after some time, father of Joju brought Joju to the hospital. Thereafter he went to his house. His case is that on the next day he got information that the condition of Biju is serious and he went to the hospital and by 8.30 a.m. the Doctor told him that Biju is no more. The witness marked F.I. Statement as Ext.P1. He also deposed

that there was street light at the place of incident. He was questioned by the Police.

19. PW2 is an attesting witness to Inquest report which is marked as Ext.P2. PW3, ASI was in charge of the General Diary in the Police Station. According to his evidence, on 14.1.2007, he got information regarding the incident. He reached at the place of incident at 10.45 in the night . The injured Biju was taken in the Police jeep to St.James Hospital, Chalakkudy. PWs 4 and 5 are declared as hostile.

20. PW6 is the injured witness. He also deposed that he sustained injury in the incident. He further deposed that he know deceased Biju. On 14.1.2007 at about 10.00-10.30 hrs. he along with the deceased, Shaju, Nelson, Jayan and Saji went to 'Sidhartha Bar' in an autorickshaw and had liquor and food. In a nearby table, the accused Shebi was there along with two others. It was a cabin like area and his case is that while he and his companions are taking food, Shebi and others were carefully watching them and they stood and moved through the side of their dining table. While moving, Shebi talked to Biju something and was staring at them. Thereafter, the witness and others went out of the Bar. His further evidence is that along with Biju, Shaju, Johny, Bijukkan and Babu, he went through Kizhakke Potta

Church road in an autorickshaw. When they reached near the junction, some persons were sitting on the road. They slowed the vehicle and Biju asked for way for the vehicle. They told him that if they want they can alight and walk. Thereafter they alighted and there was push and pull in between them and somebody among them exhorted to take sword and crackers and all moved away. Shebi and others chased Biju. Biju by the time, reached the nearby garden land. Shebi beat him using a wooden stick. Others were also beating him and kicking him and using the same stick Shebi beat the witness also and he fell down. After two or three minutes, he stood up from the place and went to his house. He further deposed that there was grievous injury on his head. He was in ICU and he lost his memory. He identified the weapon as MO1 and he further deposed that there was street light.

21. PW7 is the Doctor who examined the deceased as well as PW6 from St.James Hospital, Chalakkudy. He marked Exts.P3 and P4. As per the evidence, it can be seen that in the case of Biju he was gasping, B.P. was not recordable and carotid pulse present and in the case of Joju (PW6) he was fully conscious and oriented. Injuries are also noted and through this witness Ext.D3 which is the wound certificate of the appellant herein is also seen marked. PW8 is the Neurosurgeon attached to the very same hospital who marked the

discharge certificate in respect of PW6 as Ext.P5. PW9 is the Associate Professor in Forensic Medicine and Deputy Police Surgeon attached to Medical College Hospital, Thrissur who conducted the postmortem on the body of the deceased. He marked postmortem certificate as Ext.P6. He deposed before the court that the deceased died due to head injury. He also deposed that injury Nos.1 to 5 noted therein can be caused by MO1.

22. PW10 is an attesting witness to the mahazar who turned hostile but, admitted his signature and marked Ext.P7. PW11 is also an attesting witness who proved Ext.P7 mahazar. But, it can be seen that he had also turned hostile but admitted signature. PW12 is the Village Officer who prepared the site plan which is marked as Ext.P8. PWs 13 and 14 are attesting witnesses to Ext.P9 which is the recovery mahazar prepared for the recovery of MO1. There also, witnesses admitted the signatures but, turned hostile. PW15 identified MOs2 and 4 which are the dresses of deceased Biju. He is the brother of the deceased. PW16 is declared as hostile but, admitted the signature in Ext.P10 which is prepared for the production of dress of the accused. PW17 and PW18 are also turned hostile. PW19 is the Head Constable attached to Malakkappara Police Station, who was in the investigating team. He is the attesting witness to Exts.P7, P9, P10 and P11. PW20 is the Sub

Inspector attached to Chalakkudy Police Station wherein the FIR is registered. FIR is marked as Ext.P1(a).

23. PW21 is the Investigating Officer in this case. He questioned the main witnesses in this case. He had also made a report to the court, marked as Ext.P13, to the effect that Son of Chiriyam is not in the accused array. As per his evidence, he prepared the inquest report which is marked as Ext.P2. He also prepared the scene mahazar which is marked as Ext.P7. The seized articles are forwarded to the court for forensic analysis as per Ext.P14 forwarding note. Report obtained after the chemical analysis is marked as Ext.P15. He also arrested the appellant/first accused and when questioned a disclosure statement was made to him and in consequent to the said disclosure statement made by the appellant/first accused MO1 was recovered and for the same Ext.P9 was prepared. He also deposed to the effect that after arrest he noticed injury on the appellant/first accused who was taken to the hospital and Ext.D3 document obtained. The defence examined DW1 to prove the above said Ext.D3 document. It is also deposed by the witness during cross examination that the first accused/appellant sustained injuries, as is evident from Ext.D3, in the very same transaction in which the deceased died.

24. In this case, one Biju died. Ext.P6 is the postmortem certificate which is proved through PW9. As per Ext.P6, it can be seen that the deceased Biju sustained the following injuries:-

- "1. Lacerated wound 11.5 cms. long, sutured, on top of head, placed front to back, slightly oblique, bone deep (1cm), front left end was at midline, 11cm above root of nose, back right end was 2.5cm to the right of midline.
2. Another lacerated wound 8 cm long, sutured bone deep (1cm) was present crossing the first one at a point 9cm away from front end, the right front end of which was 3cm away from the first one at an angle about 45°.
3. Scalp contusion internally over an area 20x20x2cm on top, front, back and left side of head. The skull bone underneath injuries (1) and (2) was fractured into multiple pieces over an area 7x6cm with flattening of the fractured area. Fissure fractures extended to forwards to base of skull up to body of sphenoid, and to left side (two numbers) to base of middle cranial fossa. Brain weighed 1300gms, was oedematous. There was subdural and subarachnoid bleeding on entire surface and contusions 5x5x1cm on left fronto parietal region and 4x4x1cm at under aspect of right frontal lobe of brain.
4. Contused abrasion 1x0.8cm, 2.5cm to the right of front end of injury No.1.
5. Multiple small abrasions over an area 3x3 cm on right side of head, 3.5cm to the right of right end of injury No.2.
6. Abrasion 1x0.5cm on left ala of nose.
7. Lacerated wound 2.5cm, sutured 0.5cm deep, transverse on left side of lower jaw, 3cm away from midline 1cm above jar margin.

8. Abrasion 0.8x0.3cm on top of left shoulder 6cm away from neck.
9. Multiple small abrasions 4.5x1.5cm vertical on back of left forearm, 5cm above wrist.
10. Abrasion 4x2cm, vertical 5cm above injury No.9.
11. Abrasion 0.5x0.5cm each on back of left knuckles of all fingers on right side.
12. Multiple abrasions over an area 17x6cm vertical on back and inner aspect of right forearm. 5cm below elbow.
13. Vertical graze abrasion 6x6cm at inner aspect of right elbow.
14. Abrasion 3x3cm on front of right knee.
15. Vertical graze abrasion 2x2cm on front of right wrist.
16. Contusion on 5x3x1cm at inner aspect of left half of upper lip."

The Doctor who conducted the postmortem opined that deceased died due to head injury. Neither the defence nor the prosecution got any case that death of Biju is not a homicide. It is the case of the prosecution that he sustained injury Nos.1-3 in an altercation and it is a culpable homicide. In this case, prosecution got a case that it is a case of murder. Whereas, the defence got a case that when Doctor has not deposed that the injury noted in the postmortem certificate in ordinary course will cause death, it cannot be treated as a case of murder that

is, when evidence is lacking in respect to cause of such a fatal injury, it will not come under the definition of 'murder'. It is a fact that Biju died due to head injury. After going through injury No.3, the fatal injury, we are also having no doubt that the said injury in the ordinary course will cause death. Doctor opined that MO1 can cause the injury. The next question to be answered in this case is that who caused the same and under what circumstances it was caused ?

25. In this case, Ext.P1(a) is the FIR which is registered upon Ext.P1 statement given by PW1. As per Ext.P1(a), the date of occurrence is noted as 14.1.2007 at 22.40 hrs. The information received at the Police Station on 15.1.2007 at 9.00 hrs. The distance from the place of occurrence to the Police Station is noted as 3 Kms. PW1 who gave the first information to the Police is an occurrence witness. He deposed before the court in support of the prosecution and in tune with Ext.P1. The main argument in respect of the said document, which can be used to corroborate the evidence of PW1, is that it is a document came into existence after deliberations and consultations. It is the case of the defence that it is a document admittedly came into existence only on the next day. Let us examine the facts relevant in this matter. As per the evidence of PW3, the Police officer in charge of the General Diary in the Police Station, he reached

at the spot of incident immediately after the incident. Surely, an information alone seen received to him regarding the incident. Details may be missing. But, it can be seen that he reached at the place of incident and he is the person who shifted the deceased to the hospital. It can be seen that, as per the evidence of PW1, he also reached at the hospital. It can further be seen that he was witnessing the shifting of the deceased to the ICU as well as the arrival of PW6 in the hospital. PW6 was conscious when brought to the hospital going by the Doctor who treated him. In the background of the evidence of the witnesses Ext.P1 and Ext.P1(a) F.I.R have to be appreciated. It is the positive case of PW1 that after witnessing all these facts from the hospital, he went to his house and slept well and only when he got information that the condition of the deceased became worse, he went to the hospital again and only on knowing that injured Biju died from the hospital, he went to the Police Station. That is, it appears that till the death of the deceased Biju, he was having no intention to divulge the fact to the Police or to give information to the Police. That is, the fact that he was available in the hospital to give information to the Police as well as the fact that he was available in the hospital when PW3 reached there to collect information remain as indisputable facts. On the background of the said facts if Ext.P1 is appreciated it can be seen that the said document can be viewed only with some suspicion especially when the

distance between the place of incident and the Police Station is only 3 Kms. In this regard, the decision in **Rajeevan v. State of Kerala** reported in **2003 KHC 556** by the Apex Court is relevant, wherein it is held that the delayed lodging of FIR in a similar situation is raising suspicion. Surely, ordinarily, a delay in lodging FIR will not be fatal to the prosecution which is pointed out by the learned Public Prosecutor. The learned Public Prosecutor to substantiate the submission, highlighted **K.P.Rajan v. State of Kerala (1991 Crl.L.J. 1859)**. Surely, a mere delay may not be fatal to the prosecution. But, under the situation in which the first information statement was given in this case, which will be similar to the facts in **Rajeevan's** case (supra) this Court can only come to a conclusion that Ext.P1 will not be much helpful to corroborate the evidence of PW1.

26. Now, let us examine the evidence of PW1. As per the evidence of PW1, it was a festival day of Church at Potta. On that day, it can be seen that the witness and others went to a Bar namely 'Sidhartha Bar'. Similarly, the accused and others also were present in the Bar. According to him, he and others had liquor and food from the said Bar. The evidence of PW1 is as follows:-

"ഞങ്ങളുടെ അടുത്തുള്ള തിരിച്ച
ഡോറില്ലാത്ത ഒരു മുറിയിൽ പ്രതികളായ

ഷെബി (A1)യും ദിനകർ (A2) ലീസ് (A6) അവിടെ ഇരുന്ന്. ഒച്ചയിൽ വർത്തമാനം പറഞ്ഞിരിക്കുന്നത് സൗണ്ട് കേട്ടു. ഞാൻ നോക്കിയപ്പോൾ കണ്ടു. ഇതിനും 3 വർഷം മുമ്പ് ഇവരും ഞങ്ങളുമായി കിഴക്കേപോട്ട പള്ളി യുടെ ഉള്ളിൽ വച്ച് ഒരടി നടന്നിട്ടുണ്ട്. ഇവരെ അറിയാം. ഷെബിയുടെ പേരു മാത്രമേ അന്നു അറിയുമായിരുന്നുള്ളൂ.”

His further evidence is that he saw Shebi talking to Biju and thereafter Shebi stared at Biju and went out. Thereafter, it is the evidence that they boarded in an autorickshaw and went towards the way to Kizhakke Potta Church road. When they reached at the place of incident, the accused blocked the autorickshaw. They alighted from the autorickshaw and there was an altercation and Shebi beat on the cheek area of Biju. Then, somebody exhorted to take sword and thereafter Shebi came with a wooden reaper and hit on the skull area of Biju by chasing. In this case, it can be seen that the positive case of the prosecution is that the witness herein was a spectator doing nothing in the acts. They went on the alleged way only because the house of one Babu is near to Panampilly College. The said Babu is not examined in this case. The case of the defence is that he is a material witness and the non-examination of the said witness is very relevant to be noted. The positive case of the prosecution is that they reached at the place of incident only because they have to drop the above said Babu at his house. It is to be noted that as per Ext.D1(b) “ഷെബി ബിജുവിന്റെ മുഖത്ത്

സൂക്ഷിച്ച് നോക്കിയപ്പോൾ ബിജു അവനോട് 'എന്താടാ നിനക്ക് എന്നെ ഓർമ്മയുണ്ടോ' എന്ന് ചോദിച്ചു. ബിജു വീണ്ടും അവനോട് 'നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കി തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.' Thus, an appreciation of the arrival of the witness and others at the place of incident on the background of Ext.D1(b) statement given to the Police officer at the time of investigation is to be made. It is an indication that when the above said Babu is not examined, the version that they went to the said area to drop the above said Babu itself becomes suspicious. If their presence at the place of incident itself becomes suspicious, the genesis of the incident also will become suspicious. This fact also is to be appreciated in the light of Ext.P1 F.I. Statement, which came into existence only after the death of Biju.

27. Now, the positive case of PW1 is that he is an eye witness to the assault committed by the first accused. The original case of the prosecution was that there was a group having a common object to attack Biju. Surely, the defence got a case that there was no special animosity towards Biju. He was not present in the first incident allegedly occurred about three years back. Defence tried to make some suggestions that during that period he was abroad. But, there is no reliable material now, before the court, to show that he was not present

at the earlier incident. He is positive. But, when the case of the prosecution was that there was a common object and the common object was to assault Biju and that all other accused were acquitted by the court below, and that there is no State appeal against the acquittal, the version now alleged against this appellant is to be carefully analysed. It is the positive case of PW1 that “ബിജു തൊട്ടടുത്ത പറമ്പിലേക്ക് ഓടി മാറി. ബിജുവിന്റെ പിന്നാലെ ഷെബിയും ബാക്കി പ്രതികളും ഓടിപ്പോയി. ബിജുവിന്റെ തലയ്ക്കടിച്ചു. ഷെബി ഇതു കൊണ്ടാണ് അടിച്ചത് (MO1). ബാക്കി പ്രതികൾ ശരീരത്തിന്റെ പല ഭാഗത്തും അടിക്കുകയും ചവിട്ടുകയും ചെയ്യുന്നുണ്ടായിരുന്നു.” Now, except the first accused/appellant herein all other accused are acquitted.

28. The crucial question before this Court is that whether the assault by Shebi is positively proved ? At this point of time, the submission of the defence counsel is that there was no light. To cover this, the prosecution version is that there was street light. It is also the submission of the learned Public Prosecutor that the court charge will reveal that the specific allegation against the first accused, who is the appellant herein is that, he used the wooden reaper and the allegation against the other accused is only that they also beat with hands. Surely, PW3 deposed before the court during cross examination that he

saw the injured in the electric light. But, on a further question, he admitted that he had stated to the Investigating Officer that he saw the injured in a torch light. It is the case of the learned Public Prosecutor that it is relevant to be noted that the defence has not brought out the presence of electric light as an omission. The indication is that he had stated the same to the Investigating Officer. Now, we look into the scene mahazar and plan which indicate that there are two places of incident. That is, the place where originally the deceased and others were allegedly blocked by the accused party as well as the place where the fatal injury was inflicted. Even though the distance between the places are only about 15 metres, it can be seen that the area is a junction. One road is a tarred road whereas the other is only a mud road. It can be seen that the electric light is specifically marked in the plan as No.4 which is on the side of the tarred portion. But, the second place of incident which is a place where Biju was seen lying is on the side of the mud road.

29. The point highlighted by the defence is that in between the electric post and the place of incident situates buildings which will block the light from seeing the inflicting of injuries from the garden land. The submission is that at the first place of incident there will be light. But, the place where injury was allegedly inflicted is not having

light, which is about 15 metres away from the original place of incident. When the submission of the defence counsel is that there is no light and on the background that the witness as well as other witnesses came from the Bar after intoxicating and he is not divulging the fact to the Police at the earliest opportunity that is, from the hospital, the evidence of PW1 is not inspiring confidence, especially when there is a case for the witness himself that after beating the deceased with the stick by the first accused others also beat him. Thus, actually, whether the injury was inflicted by this accused remains under suspicion. But, the submission of the learned Public Prosecutor is that when the first accused was arrested by the Police during investigation, a confession statement was made to the Police and the relevant disclosure statement is incorporated in Ext.P9 which is marked specifically as Ext.P9(a). It can be seen that in consequence of the said disclosure statement, there is a recovery of weapon. As per Ext.P15, it can be seen that there was also blood on the stick. It is the submission that the inference that can be drawn is that the said stick is used as a weapon of offence and the place where it was dropped was known to the first accused and it is relevant in appreciation of the evidence of eye witness.

30. Surely, there is force in the submission of the learned Public Prosecutor. But, in this case, it can be seen that the original case

of the prosecution is that the first accused along with others assaulted Biju. In a case of recovery, the importance of recovery is the knowledge of the fact that the weapon of offence is concealed in such a place, the exclusive knowledge which will incriminate the accused. But, in this case, it can be seen that even though MO1 is the weapon of offence, the recovery is from near the place of incident. Other accused are now acquitted. When the recovery is from a place near to the place of occurrence, it cannot be treated as a concealment. It is also an open place. Further, it can be seen that the first accused was arrested only on 22.7.2007. In this case, immediately after the death of Biju and registration of the crime, PW21, the Investigating Officer prepared a scene mahazar which is marked as Ext.P7. The relevancy of this aspect is that when the recovery is from a place near to the scene of occurrence and the case of the prosecution is that nobody saw the accused party removing the weapon of offence from the place of incident, there is every chance of searching the place of incident thoroughly by Investigating Officer to collect material evidence. If MO1 was not seen, a recovery after few days of the preparation of the scene mahazar will cast some suspicion and even if true, it will loose all its importance for the reasons stated above. Then the recovery of MO1 weapon on the disclosure statement of the first accused looses all its credit which cannot be used to corroborate the evidence of PW1 or even

PW6, the other eye witness.

31. Now, the other eye witness of the prosecution is PW6. He is an injured witness. As per the submission of the learned Public Prosecutor, there is nothing to disbelieve an injured witness. His case is also that he along with PW1 and others went to 'Sidhartha Bar' and had liquor and food. He also narrated the incident as deposed to by PW1 which happened in the Bar. But, according to him, the appellant and others from the Bar, moved through the side of their table and the appellant Shebi talked something to deceased Biju and after staring, they moved. According to him, to drop Babu to his house, they went through Kizhakke Potta Church road and when they reached near the junction, they found some persons sitting therein. When Biju asked to give way, there was an altercation and there was push and pull and somebody among them exhorted to take sword and crackers. His positive evidence is that "ഷെബിയും ബാക്കി ആളുകളും കുടി ബിജുവിനെ ഓടിച്ചു. ബിജു തൊട്ടടുത്ത പറമ്പിലേക്ക് ഇറങ്ങിയവഴി ഷെബി വരികൊണ്ട് ബിജുവിന്റെ തലക്കടിച്ചു. ബാക്കി 6 പേരും എന്നെ ഇടിക്കയും ചവിട്ടുകയും ചെയ്യുന്നുണ്ടായിരുന്നു." The point discussed above in respect of availability of light also will be relevant in appreciating the evidence of this witness. In the case of this witness, it can be seen that he is an injured witness. He went to the hospital at

12.10 a.m. on 15.1.2007. The main aspect in the case of this witness is that he is not divulging the name of the person assaulted to the Doctor. In respect of the same, the learned Public Prosecutor submitted before us that it is not the duty of the Doctor to conduct an enquiry regarding the cause of injury. The Apex Court and this Court held in so many cases that the non-mentioning of the name of the accused to the Doctor is not a relevant fact. The learned counsel brought to our notice the decision in **Kilakkatha Parambath Sasi and Ors. v. State of Kerala** reported in **AIR 2011 SC 1064**. It is held therein that it is not the function of the Doctor to record the names of those who may have caused the injuries to the person who is being examined by him. Hence, non-mentioning of name of the assailant is not a sufficient ground to disbelieve the testimony of the injured. The learned Public Prosecutor also brought to our notice a decision in **Bhargavan and others v. State of Kerala** reported in **AIR 2004 SC 1058** wherein also the Apex Court considered the duty of the Doctor and held that the primary duty of the Doctor is to treat the person and not to find out who was the assailant or what was the weapon used by the assailant. Surely, the learned defence counsel argued before us that in **Satguru Singh v. State of Punjab (1995 Crl.L.J. 4165)** the Apex Court held that the failure to disclose the name of the assailant to the Doctor renders the prosecution case doubtful. Ext.P4 is the wound

certificate of the witness herein. As per the said document, it can be seen that, it is recorded that the patient was fully conscious and oriented. In the column of 'history and alleged cause of injury' it is recorded as 'assault by unknown at about 11.30 p.m. at Potta east'. The point canvassed by the defence counsel is that non-mentioning of the assailant and unknown are different and distinct. It is the submission that the name of the assailant was not known to the witness is not the case of the prosecution. It is the positive case of the prosecution that the accused Shebi was known to the witness. They had earlier acquaintance with him. As per the evidence of PW6, he has categorically stated that Shebi is the person who talked to Biju from the Bar. It is an indication that he knew the name of the appellant/first accused when he gave the statement to the Doctor. It is a matter to be considered in appreciating the evidence. It can be further seen that as per Ext.P4, the injured was conscious and oriented. It is recorded by the Doctor. It can be further seen that the Doctor is duty bound to give intimation to Police when cause of injury is recorded and it appears that it is a medico legal case. Thus, the fact that the witness had not disclosed the name to the Doctor and further stated to the Doctor that the assailant is 'unknown' is a matter to be considered by this Court while appreciating the substantial evidence of the witness before the court. It is also pertinent to note that in this case, witness went to the

hospital at 12.10 hours and at that point of time he was conscious and oriented. Surely, there is no evidence before the court that at what point of time Police left the hospital. But, at the very same time, it is a matter to be considered by this Court that the deceased was taken to the hospital by the Police and in the very same hospital this witness was treated. Considering these two matters together, in appreciating the evidence of PW6, the evidence of PW6 becomes somewhat suspicious. It can be further seen that there is a contradiction marked by the defence as Ext.D2(c) which is somewhat similar to Ext.D1(b). So also, as per the original prosecution case it can be seen that there was a threat by the deceased to the appellant herein that “എന്താടാ നിനക്ക് എന്നെ ഓർമ്മയുണ്ടോ’ എന്ന് ചോദിച്ചു. ബിജു വീണ്ടും അവനോട് ‘നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കി തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.”

Thereafter, an incident is taken place at the junction near to Kizhakke Potta Church.

32. It is also relevant to note that when the explanation for the witnesses to be at the place of incident is that they were going to drop Babu to his house and the said Babu is not examined before the court, the whole incident narrated by PW1 and PW6 itself will become suspicious. It is submitted by the learned Public Prosecutor that the

said Babu is cited as prosecution charge witness CW3, but, not examined as there was eye witness for the incident. The submission of the defence counsel is that the non-examination of the said witness cast a suspicion to the evidence of PW1 as well as PW6. There is substance in the submission. Surely, the learned Public Prosecutor submitted before us that non-examination of a witness cannot be considered as fatal to the prosecution. Whether a witness has to be examined or not is the prerogative of the Prosecutor. Surely, the proposition is correct and in support of the said proposition the learned Public Prosecutor highlighted a decision in **Allauddin Mian v. State of Bihar (AIR 1989 SC 1456)**. Surely, the prosecution need not examine all the witnesses cited in the charge sheet. But, the material witnesses to prove the case have to be examined. When the non-examination of the witnesses cause suspicion, that fact can be considered in appreciating the materials by the court.

33. Now, in this case, in appreciating the evidence of PW1 and PW6, it can be seen that they had nothing to say about the injury sustained by the appellant. As per Ext.D3, it can be seen that the appellant sustained an injury on the head. When DW1 Doctor examined him he noted that there was a sutured wound. Surely, before this Court, there is no material to ascertain whether there was only one

stitch or 10 stitches. The case of the defence is that there were about 10-12 stitches. The Investigating Officer was also aware that the appellant sustained an injury on the head area. The Investigating Officer took him to the Doctor and he was examined at the hospital. But, it appears that how this injury sustained or what was the weapon used to sustain such an injury is not ascertained during investigation by the Investigating Officer. The injury on the skull area, on a vital region, cannot be brushed aside saying that it is a minor injury. It cannot be sustained in an ordinary fall. In such circumstances, the evidence of PWs 1 and 6 to the effect that when Biju ran away, appellant chased and inflicted the fatal injuries on the deceased becomes suspicious.

34. Now, in the light of the above discussion it is held that:-

(1) There is an inordinate delay in registering the FIR even though the Police reached at the place of incident immediately after the incident and the very same Police shifted the injured/deceased to the hospital.

(2) There is evidence in this case that PW1 was present in the very same hospital even witnessing the shifting of the deceased to ICU. Thereafter he was also present in the hospital till PW6 arrived therein. However, the F.I. Statement was given only on the next day, that also when PW1 came to know that the injured Biju died from the hospital. It

appears, PW1 avoided or slipped away from Police in the night and Police also not found him in the hospital. It can be further seen that PW6 also reached at the hospital where the deceased was taken by the Police and he was conscious.

(3) Even though PW6 identified the appellant as the person inflicted fatal injury to the deceased and on him, from the Court he had not stated the name to the Doctor at the earliest point of time. He categorically stated that the person who inflicted the injury on him is a person unknown to him.

(4) There is recovery of a weapon of offence which is marked as MO1 on the basis of a disclosure statement made by the appellant herein. The said weapon of offence was recovered from an open place which is very near to the place of incident. Original case of the prosecution is that there was about seven assailants and it is the positive case of the witnesses also that they all chased the deceased and the first accused/appellant beat on the head using a reaper. If the case of the prosecution, chase and assault, is appreciated, even if somebody else is the person who assaulted the deceased and the weapon was thrown away by him, there is every chance of this accused also aware of abandoning of weapon by any other person. Apart from this, the recovery is from a place very near to the place of incident. The scene mahazar, Ext.P7 was prepared by the Police immediately

after the incident. At that point of time presence of such a weapon near to the scene was not noticed by the Police. Except the appellant all other accused were acquitted. Thus, a later recovery as now before the Court is raising suspicion and not inspiring confidence.

(5) It is also the case of the prosecution that the witnesses saw the incident in the street light. We have carefully examined the scene mahazar and plan produced before the court. Plan is produced to help the Court to appreciate the evidence. In this case, it can be seen that, in between the electric post marked in the plan and the place where the deceased Biju was assaulted, there are some shop rooms which may prevent the availability of light and it is also seen from the evidence of PW3 that he used torch light to see the injured. Then the availability of light is also under suspicion.

(6) Now, it is also relevant to note that as per Ext.D3 it can be seen that the appellant sustained an injury on the head. That also a sutured wound. Neither the witnesses nor the prosecution got any explanation for it. The said injury cannot be self inflicted or earned in a fall. It is also pertinent to note that when the case of the prosecution is that the witnesses arrived at the place of incident to drop one Babu, who is cited as CW3 to his house, the said witness is not examined. The said fact becomes relevant in the light of Exts.D1(b) and D2(c) which show that there was a threat by the deceased to the appellant

herein that 'എന്താടാ നിനക്ക് എന്നെ ഓർമ്മയുണ്ടോ' എന്ന് ചോദിച്ചു. ബിജു വീണ്ടും അവനോട് 'നിനക്ക് എന്നെ മനസ്സിലായില്ല അല്ലെ? ഞാൻ മനസ്സിലാക്കിത്തരാം. ഞങ്ങൾ അങ്ങോട്ട് വരുന്നുണ്ട്.' and after considering all these aspects we feel that the appellant is entitled for benefit of doubt.

In the result, this appeal is allowed. The impugned judgment in S.C.No.862 of 2008 passed by the Court of Additional District and Sessions Judge (Fast Track Court No.I), Thrissur is hereby set aside. In case detention of the appellant is not required in connection with any other case, he shall be set at liberty immediately.

Sd/-
C.T.RAVIKUMAR
Judge

Sd/-
K.P.JYOTHINDRANATH
Judge

TKS