

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 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 604 of 2011 (A)

**AGAINST THE ORDER/JUDGMENT IN SC 134/2008 of ADDITIONAL SESSIONS
JUDGE,PATHANAMTHITTA DATED 07-08-2010**

APPELLANT/ACCUSED:

**AYYAPPAN KUNJUMON, S/O.AYYAPPAN
CHARIVUPARAMBIL VEEDU, KUZHIKKALA MURI
MALLAPUZHASSERI VILLAGE.**

**BY ADVS.SRI.GRASHIOUS KURIAKOSE (SR.)
SRI.GEORGE MATHEWS**

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.V.H.JASMINE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

dlk

'C.R.'

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

Crl.A.No.604 of 2011

Dated this the 20th day of November, 2015

JUDGMENT

Jyothindranath,J.

This appeal is preferred by the accused in S.C.No.134/2008 on the file of the Court of the Additional Sessions Judge, Pathanamthitta. The appeal is preferred against the judgment, conviction and sentence dated 7.8.2010 made in the above S.C.No.134/2008. The conviction is under section 302 of the Indian Penal Code and the appellant/accused is sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for three months.

The facts of the case is as follows:-

The deceased is the nephew of the appellant herein. It is the case of the prosecution that there was some property dispute in between the deceased Mukundan and the appellant herein. On 29.8.2007 at about 8.30 p.m, the deceased Mukundan went to the house of PW2. The house of the appellant is adjacent to the same. It is the case that when the appellant saw the deceased he started to utter abusive words and hearing the

same Mukundan entered into the courtyard of the deceased and asked him to stop the same. A kerosene lamp seen lighted on the side of the well and meanwhile the deceased tried to pull down the accused, he went inside the house and took a sword, came out and inflicted injuries on Mukundan and he succumbed to the said injuries.

2. The prosecution case is that PW2, the aunt of the deceased, who is an immediate neighbour saw the incident. On the next day morning, when PW1, who is the son of the aunt (PW2) came to his house, he came to know about the incident and went to the police station and gave F.I.Statement. Police investigated the crime and filed chargesheet against the appellant herein.

3. The committal court after receiving the charge sheet on file, committed the case to the Court of Sessions and the court took cognizance of the offences, framed the charge and tried the appellant. PW1 to PW13 were examined and Exts.P1 to P24 and MO1 to Mo16 were marked. On the side of defence, documents D1 to D3 were marked. After appreciating the evidence, the trial court convicted the accused under Section 302 of IPC and sentenced as stated above. Aggrieved by the above judgment of

conviction and sentence, this appeal has been preferred.

The evidence in this case in a nutshell is as follows:-

PW1 is the person who gave the F.I. Statement to the police. His evidence is that he is residing in a separate house away from his family house and the appellant is his uncle. It is also deposed to that accused is residing on the western side of his tharwad house and Mukundan is the son of the younger sister of his mother. Witness is not an eye witness to the incident. He got information when he came to his mother's house and thereafter, he went to the police station and gave F.I Statement.

4. PW2 is the mother of PW1, who is the sister of the accused. She deposed before the court that the accused is her brother and he is her immediate neighbour on the western side. She further deposed that PW1 is her son. She also deposed that the deceased Mukundan is the son of her late younger sister. She also deposed that there was a property dispute in between her brother and viz., the accused and herself and in fact, there was a civil case. She further deposed that she witnessed the incident in which Mukundan died. The incident was on 29.8.2007 at about 8.30 hours in the night. It is her evidence that Kunjumon (accused) called abusive words against Mukundan. A kerosene

lamp was seen lighted on the side of the well. Mukundan told the accused not to abuse him and further that the case would be decided by the court. He again warned not to use abusive words. Her further evidence is that Kunjumon ran to his house and Mukundan on entering the courtyard followed and pushed him down. Kunjumon took a sword from his house and hacked on the head of the deceased one after another (തൂരു തൂരെ വെട്ടി)). He also inflicted cut injury on the neck area as well as on the right hand. She further deposed that he chopped off the right hand. (വലതു കൈ വെട്ടി മാറി). Her further evidence is that the witness along with her husband was witnessing all these. Her husband took her inside the house and she became unconscious. She also identified the weapon and marked the same as MO1. She also deposed that the sword, MO1 was used by her father for prayers at 'kavu'. (എന്റെ അച്ഛൻ കാവു പൂജക്ക് ഉപയോഗിച്ചതാണ്). She also deposed that her father was an 'Oorali' and after his death, it was in the hands of her mother and also deposed that it was given to his son by the father.

5. PW3 is a witness to inquest and the inquest report is marked as Ext.P2. PW4 is the brother of the deceased and he gave evidence to the effect that at the relevant point of time deceased

Mukundan was residing in the house of PW2, Kunjukutty. He also deposed that there was a property dispute in between Mukundan and Kunjumon. PW5 is the Sub Inspector, who registered the crime on the basis of Ext.P1. He deposed that the investigation was conducted by the Circle Inspector and the FIR is marked as Ext.P3. PW6 is the Village Officer who prepared the site plan, which is marked as Ext.P4. PW7 is the brother of PW1, who is an attestor to scene mahazar, which is marked as Ext.P5. PW8 is a neighbour and his evidence is that he knew the deceased Mukundan as well as the accused Kunjumon. He deposed that his house is very nearby and on a question by the Prosecutor he stated before the court that there was trivial disputes in between the deceased and the accused. (ചെറിയ ചെറിയ പ്രശ്നങ്ങളും ഒച്ചപ്പാടുകളും ചിലപ്പോൾ അവിടെ കേൾക്കാം).

6. PW9 is a member of the panchayath representing 9th ward. He deposed before the court that he knew the accused. He deposed that he had signed in Exts.P2 and P7 and he also deposed that during the inquest, police had taken to custody the dresses of the deceased which were marked by him before court as MO4 to MO6. His further evidence is that on the next day of the funeral of the deceased, he heard a rumour to the effect that police is

bringing the accused. He saw the police as well as the accused, and his further evidence is that he had signed in a mahazar prepared by the police. The mahazar was prepared on 31.8.2007 at 3 p.m and he identified the signature and marked the same as Ext.P7. He deposed that there was a small water channel and, later it was being as a by-lane, but, now it is covered by wild thickets and further that the accused took from therein and produced before the police, a sword like article (അവിടെ നിന്ന് പ്രതി എടുത്ത് പോലീസിന്റെ മുന്നിൽ ഹാജരാക്കുകയായിരുന്നു വാൾ പോലുള്ള സാധനം) He identified MO1 as the article recovered on that day.

7. PW10 is the Doctor, who conducted post-mortem examination. He deposed that there were 13 injuries sustained on the body. The said injuries are as follows:-

- “1. Incised penetrating wound 17x5x7 cm. horizontally placed on the forehead with its left and 8 cm. in front of the ear and the other and 2 cm. in front of right ear underlying frontal bone showed a cut fracture 12x2cm. which extended to the base. The dura matter was found cut and the wound terminated in the frontal lobes of brain.
2. Incised wound 11x5x3 cm. horizontal on the right side of face with its back and 1 cm. behind the ear, underneath the temporal bone showed a cut 6x0.2x2.2cm.

3. Incised wound 8x5x3 cm. horizontal on the top of head 10 cm. above the root of nose. The lower end of the wound showed beveling. The parietal bones showed a cut 4x3x0.5-0.8 cm.
4. Incised wound 12.5x3x3 cm. oblique on the left side of the head and the face the upper back and was 1 cm. above ear, the lower front and 5cm. Outer to midline at the level of ala of nostril.
5. Incised wound 6x2x2cm. obliquely placed on the left side of face, its upper outer and just below outer end of eyebrow and the inner lower and 2 cm. outer to midline at the level of ala of nostril. The left eye ball was seen contused. (The margins of injury No.1-5 were contused).
Brain showed thick subdural and diffuse subarachnoid bleeding on both sides and laceration of frontal lobes over an area 6x4x4cm.
6. Incised wound 7x5x2 cm. horizontal involving the under chin in the midline. The upper end showed beveling.
7. Abrasion 1x0.2 cm. on the top of right shoulder.
8. Incised amputating wound 7x5 cm. through and through involving right elbow 17 cm. below elbow joint underneath the bones, vessels, and muscles cut.
9. Incised wound 8x2x1 cm. horizontal on the back aspect of right hand. The outer end was at the level of root of thumb.
10. Incised wound 6x5x3 cm. involving front and inner aspect of right elbow.
11. Incised wound 3x1x1 cm. obliquely placed on the left

side of chest with its inner upper end 1 cm. to the left of midline and 9 cm. below collar bone, with a tailing of 4cm. directed upwards.

12. Abrasion 8x0.3 cm. oblique on the left side of front of chest. The inner upper end was 3 cm. outer to midline and overlying the collar bone.

13. Abrasion 3x3 cm. on the top of left shoulder.”

8. Post-mortem certificate is marked as Ext.P8. He further deposed that the injury Nos. 1 to 5 taken together or independently are sufficient in the ordinary course of nature to cause death. He also deposed that Injury No.8 is also sufficient in the ordinary course of nature to cause death. He further deposed that the injury could be caused with a weapon like MO1.

9. PW11 is the investigating officer who conducted the investigation in this case. He deposed before the court that during the relevant point of time he was the Circle Inspector at Kozhencherry. He further deposed that he conducted the investigation of crime No.405/2007 of Aranmula Police Station. He conducted the inquest and prepared a report and the inquest report is identified by him as Ext.P2. He gave a request to the Doctor to conduct the post-mortem examination. He had collected blood stained soil and unstained soil during inquest and the

samples are forwarded to court including in a property list. His further evidence is that he conducted a search in the house of the accused on 30.8.2007 at 12.00 noon. The search memo is marked as Ext.P9 and the search list is marked as Ext.P10. He further deposed that a mahazar was prepared that of the place of incident, which is marked as Ext.P5. A report is given to the court giving the full details of the accused, which is marked as Ext.P11. He further gave evidence that on a reliable information, he arrested the accused. Arrest memo is prepared for the same, which is marked as Ext.P12, and inspection memo is marked as Ext.P13. The dresses which were worn by the accused at the time of arrest were seized as per Ext.P6 mahazar. The accused gave a statement to the effect that വാൾ ഞാൻ എന്റെ വീടിന് കുറച്ച് പടഞ്ഞാറു മാറി കാട് പിടിച്ച് കിടക്കുന്ന ഇട വഴിയിൽ കാടിനുള്ളിൽ ഒളിപ്പിച്ച് വെച്ചിട്ടുണ്ട് എന്നെ കൊണ്ടു പോയാൽ വാൾ ഞാൻ എടുത്തു തരാം and as the accused lead, they reached at a place near to the house of the accused. Accused took out a sword from beneath a bush and produced. It was seized as per a recovery mahazar. He also identified his signature in Ext.P7. He also deposed that there is also signatures of the witnesses. The relevant portion of the statement given by the accused is marked as Ext.P7(a). The weapon recovered as per the

statement is identified by the witnesses as MO1. He also identified the dresses recovered from the body of the deceased Mukundan as MO5 and MO6. The property list by which it was sent to court is marked as Ext.P15. The property list by which MO1 forwarded to the court is marked as Ext.P16. He deposed that the blood stained sand and the control sample are forwarded to the court and the said property list by which it was forwarded is marked as Ext.P18. He also deposed that property included in Ext.P18 are MOs 2 and 3. The blood collected that of the deceased by the Doctor was also forwarded to the court. The said property list is marked as Ext.P19. The properties seized at the time of the body inspection of the accused are also included in a property list, which was forwarded to the court and the said list is marked as Ext.P20. He also marked material objects up to MO16. He also deposed that the property sent through the court were examined by the Forensic Laboratory and a test report was directly received by the court. The said report is marked as Ext.P24. Exts.D1 and D2 are the judgment and the decree marked by the defence through PW2. Ext.D3 is the marked portion in the inquest.

10. The learned senior counsel appearing for the appellant submitted before us that here is a case where the conviction is

based only on the sole testimony of PW2. It is the submission that the evidence of PW2 is not an evidence inspiring confidence. It is the categoric submission of the learned senior counsel that keen scrutiny of the evidence and the materials before the court will reveal that PW2 is actually not an eye witness to the incident. It is the submission that when the F.I.statement, which is lodged by PW1 who is none other than the son of PW2, as well as other attending circumstances will reveal that PW2 is not an eye witness to the incident. It is the submission that Ext.P2 is the inquest report prepared by the investigating officer, who is examined as PW11 before the court. It is a document that came into existence at the earliest point of time of the investigation. But, conspicuously the F.I. Statement, which is marked as Ext.P1 as well as Ext.P2 were silent about any of the eye witnesses who had seen incident much less that PW2 is an eye witness to the incident. It is also submitted before us that even the time of death of the deceased is only a rough estimate made in the inquest report as in between 8 p.m and 9 p.m. It is also the submission that as per Column Nos. 3 and 4 of the inquest report, where the entries made regarding the person last seen as alive, will belie the claim of PW2 that she is an eye witness to the incident. As

per Column 3 'by whom first found dead when and where' there it is written as മൂലപ്പുഴശ്ശേരി വില്ലേജിൽ കുഴിക്കാല മുറിയിൽ ടി സ്ഥലത്ത് ചരി വുപറമ്പിൽ വീട്ടിൽ അയ്യപ്പൻ മകൻ 75 വയസ്സുള്ള കൊച്ചു ചെറുക്കൻ 29.8.07 രാത്രി 9 മണിയോടുകൂടി മൂല പുഴശ്ശേരി വില്ലേജിൽ കുഴിക്കാല മുറിയിൽ ടി സ്ഥലത്ത് ചരി വുപറമ്പിൽ വീട്ടിൽ അയ്യപ്പൻ മകൻ കുഞ്ഞുമോന്റെ വീട്ടുമുറ്റത്ത് കാണപ്പെട്ടു and in Column No.4 it is categorically stated that the above said Kochu Cherukkan saw the deceased alive on 29.8.2007 at 7 a.m. The submission of the senior counsel in this regard is that the Kochu Cherukkan is none other than the husband of PW2 and while the investigating officer was examined he deposed before the court that he made the entries after enquiry. Kochu Cherukkan at that point of time, at the earliest point of time, seem to have revealed to the investigating officer that he saw the deceased alive in the morning of 29.8.2007 and dead body was found by him only at 9 p.m in the very same day at night.

11. It is the submission of the counsel that according to PW2, she witnessed the incident along with the above said Kochu Cherukkan. If the said Kochu Cherukkan had not seen the incident and the body was seen only at 9.p.m and further he saw him alive only in the morning, then naturally PW2 could not be an eye witness to the incident. It is the submission that Ext.P2, the

inquest report, is an enquiry report came into existence after an enquiry conducted by PW11 and he also admits that the entries are made only after enquiries are made. Surely, he may have an explanation that he believed the version thereafter given.

12. It is the submission of the senior counsel that in respect of availability of light, place of incident and the plants growth therein and time of incident are to be appreciated. The case of the prosecution is that she saw the incident in the light of a kerosene lamp. It is the further submission that surely, rural witnesses who are accustomed with kerosene lamp and when the accused is none other than the brother of the witness it may be possible to identify him in such a light but still the question is whether PW2 actually witnessed the incident. It is also highlighted before us that if such an incident occurred and PW2 is actually a witness as claimed by her before the court, her reaction to such incident now claimed by her is also to be looked into by this Court. It is a fact that no witness produced by the prosecution claimed that the said witness informed him/them or came to the place in the night itself. If such a murder actually occurred for which PW2 is a witness, the reaction will not be so and at least the neighbours would have had the information. It is

an indication that PW2 is not an eye witness to the incident and the claim of the witness now before the court that she is a witness to the incident is a false claim and cannot be relied upon by this Court. The learned senior counsel brought to our notice a decision in **Hasan Murtza v. State of Haryana** reported in 2002 SC 762, wherein the dictum laid down is that when the evidence of solitary witness is scrutinised by the court, the court should be very careful. In that case, even though the High Court relied upon the sole witness and convicted the accused, the Supreme Court refused to rely upon the evidence of the sole witness and the appellant was acquitted. The dictum laid down therein is that relying on solitary witness without corroboration for conviction is unsafe.

13. The further submission of the learned counsel before us is that a scrutiny of the F.I.Statement will reveal that there is no mention of weapon. The relevancy of this aspect is that, as per the case of PW1, he gathered the details from his parents, who are none other than PW2 and Kochu Cherukkan. If PW2 as well as late Kochu Cherukkan were actually eye witnesses and had seen the incident, it could not be expected that they would not have divulged the fact that the accused inflicted injuries with a sword

to PW1. When PW1 is not aware of the weapon, it is an indication that PW2 had not divulged the same to PW1. When PW2 is examined before the court, her evidence is that the accused went inside the house and took a sword and inflicted injuries on the head of the deceased as well as chopped off the right hand of the deceased. When he alleged sword is a familiar one as oorali's sword, it will not be omitted to mention by the witness. It is the submission that the sword now introduced during evidence of PW1 is an embellishment which was brought out during cross examination.

14. It is an admitted case that PW2 was in inimical term with the accused. The defence marked Exts.D1 and D2 which are certified copies of the judgment and decree of a suit which was filed by the witness along with the deceased and his brother. The defendant is none other than the accused herein. The submission of the learned senior counsel before us is that when there is documentary evidence before the court to show the animosity and when there are materials to show that even the weapon is not stated to the police when the statement was given and more over when a witness who gathered information from PW2 is also not stating about the weapon, then on the background of Ext.P2 and

other attending circumstances, the only inference that can be drawn is that PW2 is not an eye witness to the incident. Relying upon such a witness will be highly unsafe. When the evidence of PW2 is not a reliable one, there is no evidence adduced by the prosecution to show that the appellant herein is the person who caused the death of the deceased.

15. It is the submission that when comprehending the materials, when PW1 claims that he gathered information from PW2 and when there is no mention in the F.I. Statement that there is any eye witness to the incident and further when in Ext.P2, the person who first saw the dead body is the husband of PW2, that also at 9 p.m, and as per the entry in Column 4 of Ext.P2 that the deceased was seen alive only in the morning of 29.8.2007 and also considering the fact the claim of the witness is that the incident was seen in the light of a kerosene lamp and when the same lamp was not seized by the investigating officer, the version now presented before the court is not believable. More over, there is an admission of PW2 to the effect that her son along with PW7 prohibited Mukundan in coming to his house i.e., if the deceased had not come to the house as deposed to by PW2 before the court, the whole version presented before the court

will be nothing but a lie. Even the presence of deceased at the place of occurrence will raise a question mark. When the evidence is so, it is the submission that the whole evidence of PW2 has to be discarded and the appellant is entitled to an acquittal.

16. Alternatively, the learned counsel for the defence, submitted before us that from the materials available before this Court, it can be seen that even if the prosecution story is believed, the appellant is entitled to a legal defence i.e., the private defence. It is the submission that admittedly, the place of incident is none other than the courtyard of the appellant. A criminal trespass is apparent. It can be also seen that as per the evidence of PW2, she admitted before the court that the deceased pull down the accused and only thereafter there occurred infliction of injuries. It is the submission that this Court shall evaluate all the attending circumstances. When PW10, the Doctor, during cross examination, deposed that the deceased was having a height of 157 c.m whereas the appellant is only having a height of 135 c.m. It is the case of the senior counsel that apparently, the deceased is a young man aged 30 years whereas the appellant is aged 54 years. It is also relevant to note that appellant is residing alone therein. He is at a place where he is expected to be. Whereas,

there is admission on the side of the prosecution that the accused was prohibited from coming to the house of PW2. Earlier, he may be staying therein. But, now, there is evidence that the deceased is staying along with Sasi Mesthri who is not examined by the prosecution before the court. On the background of the time, availability of the light, presence of the accused therein as well as the admission in Ext.P1 to the effect that 'പിടിവലിനടന്നതിന്റെ ലക്ഷണമുണ്ട്' and also appreciating the admission of PW2 to the effect that the deceased pulled down the accused that also at the court yard and thereafter alone, there was a retaliation and further even after sustaining injuries the deceased had not retracted, the only inference that can be drawn is that the appellant if at all inflicted any injury, it is in his private defence.

17. It is the submission that when the dead body is on the property of the appellant, that also on the court yard of a hut, infliction of injury is not exceeded. Even though there are 13 injuries, the dead body is seen on the courtyard of the appellant, the appellant need not go away from his property. If one injury is inflicted and the deceased retracted and if appellant chased and inflicted other injuries, it may be a case of exceeding the private defence. But, when the deceased remains in the property and

infliction of injuries continued, it can be only said that it is not a case of exceeding the private defence and further it is the submission that comparing the physical body of the deceased as well as the appellant, the apprehension of death is the only inference that can be drawn especially when the appellant was chased by the deceased and was pulled down. Apprehension is a mental state as such all the attending circumstances are to be evaluated to come to a conclusion whether there was an apprehension of death or getting grievous injuries. In this case, the attending circumstances will point out that the appellant was entitled to raise the plea of private defence and is on that count also even if the evidence of PW2 is believed, is entitled to an acquittal. It is the further submission that when appreciating the private defence of the appellant, the availability of light and the place of injury and whether the full version of PW2 is believable are also to be looked into, Especially, when in Ext.P1 though it is highlighted that 'പിടിവലിനടന്നതിന്റെ ലക്ഷണമുണ്ട്' but PW2 got no case that there was any such push and pull.

18. The learned Public Prosecutor submitted before us that it is a fact that PW2 is the sister of the appellant and the deceased is the son of younger sister of the witness. It is the submission

that the learned defence counsel highlighted mental infirmity of the witness. The evidence of PW2 is to the effect that on seeing the incident, she was taken inside the house by her husband and she became unconscious. She was examined before the court and was cross examined. If she was incapable of giving evidence, she could not have been examined by the court and further her mental capacity is guaranteed by her examination as a witness by the court. The evidence is before this Court. She was not only examined in chief but also cross examined thoroughly by the defence counsel. All the rational answers are there. She is a truthful witness wherein she was even admitting a fact that the deceased is the person who first pulled down the appellant. She is also not hesitant to admit that PW 1 and PW7, who are none other than her children restrained the deceased from coming to her house. But, during cross examination she is categorical that on that day the deceased came to her house. It is also pertinent to note that she also admitted the fact that deceased also used to take alcohol whereas the other witnesses like PW1 and PW7 denied the same. All these admissions is an indication that PW2 is a truthful witness especially when she is deposing against none other than her own brother.

19. Now, the evidence of PW2 before the court is that on that fateful day the deceased came to her house and at that point of time the appellant was making abusive words aloud. The deceased requested him to stop. Her evidence is that “വൈകീട്ട് 8.30 മണിക്കായിരുന്നു. കുഞ്ഞുമോന്റെ കിണറിൻ കരെ ഒരു വിളക്ക് കത്തിച്ചു വെച്ചിട്ടു മുകുന്ദനെ ചീത്ത വിളിച്ചു. മുകുന്ദൻ പറഞ്ഞു ചീത്ത വിളിക്കരുത് എന്ന്. കോടതി കേസ് തീരുമാനിച്ചു കൊള്ളാം. ചീത്ത വിളിക്കരുത് എന്ന് മുകുന്ദൻ പറഞ്ഞു. കുഞ്ഞുമോൻ ഓടി ചെന്ന് പുരക്കകത്ത് കയറി. മുകുന്ദൻ കുഞ്ഞുമോന്റെ മിറ്റത്തിറങ്ങി. കുഞ്ഞുമോനെ മുകുന്ദൻ തള്ളി താഴെയിട്ടു. കുഞ്ഞുമോൻ പുരക്കകത്ത് കയറി വാൾ എടുത്ത് തുരുതുരു വെട്ടി. കഴുത്തിനും വെട്ടി. വലതുകൈക്കും വെട്ടി. വലതു കൈ വെട്ടി മാറി.”

20. It is the case of the witness that after this incident, she was taken inside by her husband and she became unconscious. During cross examination it is brought out that ഒരു മണിക്കൂർ സമയം ചീത്തവിളി കേട്ടുകൊണ്ടിരുന്നിട്ടാണ് മുകുന്ദൻ ഇറങ്ങി ചെല്ലുന്നത്. The time given by the witness may be a rough estimate. But the fact that the appellant is the aggressor is evident from the same. When appreciating the materials the fact that the deceased is having a property adjacent to the appellant's property as well as the fact that appellant is none other than his own uncle is to be appreciated. Surely, there is evidence that they were not in good terms. There is also civil litigation. But considering the blood

relationship it cannot be said to be a trespass which will enable the appellant raise a private defence. It is also the case of the prosecution that there is nothing before this Court to show that the deceased was having any weapon with him. There is not even a suggestion to PW2 to the effect that when he went therein, there was any weapon with him. It is also the case of the prosecution that when an unarmed man is approaching his own uncle to request not to abuse, it will not give a right of private defence. Here is a case where an unarmed man was attacked by the appellant herein that also using a sword taken from the house. MO1 sword is a full metal weapon and appellant attacked the deceased and inflicted injuries that also about 13 injuries. It can be seen that the hand of the deceased was chopped off. There are also so many injuries on the head area. The injuries and weapon will give an indication regarding the intention.

21. Eventhough, the defence tried to bring out a doubt regarding the ownership of the sword, it is categorically deposed to by PW2 that it can be only owned by the male members of the family. After the death of the father MO1 sword which was identified by PW2, came into the hands of the appellant. The father had entrusted the same for the son. The relevant aspect, in

this case, is that the said sword is recovered on the strength of a statement given to the investigating officer by the appellant herein after arrest. Ext.P7(a) is the said portion of statement in the recovery mahazar prepared by the investigating officer, PW11. The relevant portion will reveal that appellant herein concealed the same under a guava plant. The recovery will attain importance not only by the admission of the accused regarding the concealment but also the analysis report, which is marked as Ext.P24 shows that there is presence of blood. Surely, the blood group or origin is not identified but the fact that there is a blood mark on the sword which is usually used for 'pooja' purpose is relevant to be noted.

22. The submission of the learned Public Prosecutor is that apart from the same, there is also evidence to the effect that there is recovery of the dress of the appellant at the time of arrest by the investigating officer. The said dress are marked as MO1 and MO2, which is item No. 2 in Ext.P24. Ext.P24 shows that there were blood stains which belongs to 'A' group. The relevancy of the 'A' group is that at the time of post-mortem, the Doctor collected blood and ultimately through the court, it was got examined and as per Ext.P24, the said blood belongs to 'A' group.

The submission is that the blood present in MO2 is an incriminating material which will give assurance to the evidence of PW2 to the effect that what she narrated before court is correct. It is also the submission that when the recovery of the MO1 weapon, on the strength of the statement of the appellant is corroborated by the evidence of PW9 and when the totality of the evidence is evaluated, there is nothing to disbelieve the evidence of PW2 to the effect that the appellant is the person who murdered the deceased. It is also the submission that, in this case, there are 13 injuries, it is an indication that it is not a case of private defence but a clear cut murder especially on the background that he was having an admitted animosity as evident from Exts.D1 and D2, the documents which are marked by the defence.

23. It is also brought to our notice that out of the 13 injuries 10 injuries are incised wound and the evidence of PW10 in this regard is relevant to be noted. The Doctor, who is a Lecturer in Forensic Medicine and Assistant Police Surgeon, MCH, Kottayam deposed before the Court that the injuries could be caused by MOI weapon which was shown to him from the court. It is pertinent to note that during cross examination it is

brought out that there are differences in the size of injuries seen on the body of the deceased. But, the nature of the weapon is also relevant to be noted. The shape of the weapon is revealed from Ext.P7 and when there is evidence of PW10 to the effect that all these injuries could be caused by MO1 weapon especially taking into account the peculiarities of the weapon, it is the submission of the learned Public Prosecutor that this is a case of clear murder nothing but murder.

24. Now, in this case after hearing both sides, it can be seen that the F.I.Statement is lodged by not by an eye witness but a person who got information after the incident. Ext.P1 is the F.I. Statement. When the F.I. Statement is not by an eye witness, it will not have much relevancy in appreciating the evidence, that is, it may not be of much relevance under section 157 of the Evidence Act. Ext.P1 was given by the son of PW2. Eventhough, he got a case that the deceased was staying in his house, it appears that it is not a truthful version. But at the same time, as per the evidence of PW1, it can be seen that on the next day morning of the incident, he gathered the information from PW2 and her husband (his parents). Since there is time lag, it may not be able to treat as *res gestae*.

25. Now, the material evidence before the court is the evidence of PW2. She is an eye witness. The question before the court is that whether the evidence of this witness is explicitly reliable. The submission of the learned Public Prosecutor is that it is a fact that her evidence is against none other than her brother. When she is deposing so, she will be very careful that she will depose only the truth. She admitted the suggestions which the other witness denied. Her categoric case during cross examination was that on the fateful day, the deceased came to her house. Thereafter, her case is that the deceased went to the house of the appellant on hearing the abusive words and thereafter, the incident occurred. Eventhough PW2 got a case that the appellant was using abusive words, there is no other witness to corroborate the same. When PW8 was examined, who is none other then the immediate neighbour, deposed that he had not heard any such thing but, his evidence on a question of the Public Prosecutor is as follows: -

മരിച്ചമുകുന്ദനും പ്രതിയും ഒക്കെ എങ്ങനെയാണ് കഴിഞ്ഞിരുന്നത് (Q)ചെറിയ ചെറിയ പ്രശ്നങ്ങളും ഒച്ചപ്പാടുകളും ചിലപ്പോഴവിടെ കേൾക്കാം. എന്തിനെ പററിയാണിത് (Q)അറിയില്ല. വസ്തുവിനെപററി കേസുണ്ടായിരുന്നു.

26. Thus, it can be seen that PW8 got a case that some quarrels are usual therein. PW2 is categoric that on the day, the

deceased went therein and asked the appellant not to abuse and thereafter Kunjumon ran inside his house and thereon the deceased went to the courtyard of Kunjumon and the deceased pulled him down. In appreciating this evidence, the size of the house and place of occurrence is to be appreciated. As per the evidence of PW1, the distance in between the house of PW1 and the appellant is only 15 feet. As per the scene mahazar it is about 15 meters. Thus as per the evidence of PW2, she was witnessing the incident from the courtyard. It is also relevant to note that the house of the appellant is only a hut as evident from the scene mahazar as well as the statement of the accused before the court. The accused stated that it is only a koora (hut) and that also evident from the materials before the court. Now, as per the evidence of PW2, the accused was pulled down by the appellant and thereon the appellant entered into the house and came back and inflicted the injuries. It is to be remembered that as per the evidence of PW2, there was dispute regarding the property in between the appellant and PW2. It is also brought out in evidence that there is a suit in between the appellant herein and the witness. It is also revealed from Exts.D1 and D2 that the suit is in between the appellant on one side and the deceased, PW2 and

children on the other side. Thus, it is apparent that the relationship in between the appellant and the witness and deceased was a strained one. But, another fact is also relevant to be noted. When PW2 was examined, it was brought out during cross examination that PW 1 and PW7 who are the children of the witness prohibited the deceased from coming to the family house. It is also relevant to note that she admitted that the deceased destroyed the agriculture crops cultivated by her husband and thereafter the above prohibition by PW1 and PW7 against the deceased. But, she got no case that she had prohibited the deceased from coming to her house. From all these materials, what we can gather is that she is a balanced person, who is permitting the deceased to come to her house when PW1 and PW7 were not present therein. On such an occasion the incident occurred.

27. Now, it is a fact that the investigating officer had not seized the kerosene lamp which was even noted in Column No.7 of the inquest report. But the latches of the investigating officer cannot be helpful for the defence, when otherwise the evidence of the witness is reliable. Only because the said kerosene lamp was not seen seized by the police, it cannot be said that the witness is

not able to see the incident. It is a fact that the appellant is none other than the brother of the witness and the deceased is the son of her younger sister. The witness is a rural witness accustomed to such light. Under such circumstances, her evidence regarding viewing or seeing the incident need not be doubted. A circumstance highlighted by the defence to disbelieve PW2 is that the inquest report, which came into existence at the earliest point of time will show that the deceased was seen by the husband of the witness only in the morning. It is also therein in Ext.P2 that he saw the dead body in the night at 9 p.m. But it is a fact that the said witness is not examined before the court as he died before the examination. It is to be remembered that PW2 got no case that she went to see the deceased in the night itself. When the evidence of PW2 is not suffering from any infirmity, only because the husband of the witness is not examined, cannot be a ground to disbelieve PW2. As per the evidence of PW2, the appellant inflicted the fatal injuries by using MO1 weapon. MO1 weapon is shown to the Doctor, who is examined as PW10, who deposed before the court that all the injuries could be caused by the said weapon. As highlighted by the prosecutor the peculiarities as evident from Ext.P7 that of the weapon is also seen taken note of

by the expert as he admitted regarding the difference of measurements of the injuries noted by him. When he is categorical that MO1 can cause all the injuries, it is a material evidence that will corroborate the evidence of PW2 to the effect that appellant inflicted injuries by using MO1. It is the evidence of the investigating officer that when he arrested the appellant, he gave a statement to the effect that he had concealed the sword at a bushy area near to his house and there is a recovery of weapon on the strength of that disclosure.

28. The learned senior counsel for the defence argued before us that it is from an open area, that is a pathway as evident from Ext.P7(a) itself. But, when the witnesses were examined it came out that, that is not a pathway which is nowadays used by people, it is a bushy area. The relevant portion of the evidence is that പൊതു വഴിയായിരുന്നു. പക്ഷെ ഇപ്പോൾ വർണ്ണമായി കാടു പിടിച്ചു കിടക്കുന്നു. It is an indication that it is not an open place. Hence, the concealment of the said weapon gets importance by the recovery on the strength of a statement given by the accused. It is also to be noted that the said weapon is now identified by PW2 as the weapon of offence and PW10 also gave evidence to the effect that the said weapon can cause the injuries noted on the accused. It is

also therein that some blood detected on the said weapon as per Ext.P24. Surely, the group or even whether it is human blood is lacking in the report. Now, apart from this, there is also evidence to the effect that the dress recovered from the appellant contained human blood that also belonging to 'A' group. It is also came out in evidence that the blood collected during the post-mortem examination of the deceased also belonged to 'A' group. All these materials may not be a conclusive proof in nature, but it will on the very same time, give assurance to the effect that the oral substantive evidence of PW2 can be relied upon. Thus, the corollary is that the prosecution succeeded in proving that the appellant inflicted injuries on the deceased by using MO1 weapon.

29. The next aspect to be considered is whether the deceased died due to the injuries sustained in such an incident and whether it is a culpable homicide. The Doctor, who conducted the post-mortem is examined as PW10 before the court. As per the evidence of PW10, it can be seen that there are 13 ante-mortem injuries on the body of the deceased. Out of the 13 injuries 10 injuries are incised wounds and 3 injuries are abrasions. The Doctor marked the post-mortem certificate as Ext.P8 and deposed before the court that injuries Nos. 1 to 5 taken together or

independently are sufficient in the ordinary course of nature to cause death and also deposed that injury No.8 is also sufficient in the ordinary course of nature to cause death, evident from Ext.P8, which is already detailed above. When there is categoric evidence by the Doctor to the effect that injury Nos.1 to 5 are independently sufficient in the ordinary course of nature to cause death and injury No.8 is sufficient in the ordinary course of nature to cause death, it can be seen that it is a case of culpable homicide.

30. The next aspect to be considered is that if the prosecution succeeded in proving that the appellant is the person who committed culpable homicide by inflicting injuries as stated above what will be the offence he actually committed. In this regard, the defence submission also to be appreciated along with the submission of the learned Public Prosecutor. The defence case is that the appellant is entitled for private defence, the whole attending circumstances is to be evaluated. Surely, the prosecutor got a case that in the lower court there was no case of private defence. But the suggestion is that it is done by PW1 and PW7 and under such circumstances, the appellant is not entitled to raise a plea of private defence at this stage. But surely, the defence

counsel had highlighted the decision in **Periasami and Another v. State of T.N.** reported in 1997 SCC (Crl) 121 wherein paragraph 16 it is categorically stated that “we may point out that the appellants have not stated, when examined under Section 313 of the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to denude them of the right if the same can be made out otherwise.”

31. Thus it can be seen that even at the appellate stage the appellant is entitled to raise a plea of private defence. The onus on the appellant under Section 105, IPC can be discharged from the materials available on the record. The appellant also brought to our notice a decision in **George Dominic Varkey v. State of Kerala [1971 KLT 420]**. It is a case where injury was inflicted by the accused therein before the deceased taking a stone by bending down i.e., the Apex Court held that when there is apprehension of causing grievous hurt or death, he is entitled to inflict fatal injuries to stall the same. The defence counsel also brought to our notice the decisions in **Thomas Varkey v. State of Kerala** reported in 2006 (3) KLJ 592 and also the decision reported in **Periasami and Another v. State of T.N.** reported

in 1997 SC (Crl) 121. The principles enumerated all these cases, is that when there is a threat to the life or there is a possibility of causing grievous injuries, the accused will be entitled to even cause death. The basic principle can be gathered from reading Sections 97, 100 and 101 of IPC. It reads thus:

“97. Right of private defence of the body and of property.- Every person has a right, subject to the restrictions contained in section 99, to defend-

First.- His own body, and the body of any other person, against any offence affecting the human body;

Secondly.- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

XXXXX

100. When the right of private defence of the body extends to causing death.- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right to be of any of the descriptions hereinafter enumerated, namely:-

First.- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence

of such assault;

Secondly.- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.- An assault with the intention of committing rape;

Fourthly.- An assault with the intention of gratifying unnatural lust;

fifthly.- An assault with the intention of kidnapping or abducting;

sixthly.- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Seventhly.- An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.

101. When such right extends to causing any harm other than death.- If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death."

32. In this case in hand the evidence before the court is that the incident occurred on the courtyard/property of the appellant. The deadbody was seen therein. The inquest Ext.P2 is

prepared by the investigating officer from therein, itself. As per Section 97, IPC it can be seen that when there is a trespass, owner of the property will be entitled to oust the person. In this case the case evident from the evidence is that deceased went to the property of the appellant when the appellant was using abusive words. It also came out in evidence that the deceased pulled down the appellant, thereafter he went inside and took a sword and inflicted the injuries. It can be seen from the evidence before the court that the appellant is entitled to private defence as contemplated under Section 97, IPC. But, by virtue of Section 100, IPC the right of private defence of the body extends to causing death only when an assailant reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. Thus, the vital aspect to be considered is regarding the reasonable apprehension of death in the mind of the appellant. There is no positive evidence adduced by the appellant. Surely, only because no evidence is adduced, it cannot be said that he is deprived of raising the said defence. If materials are available, the appellant can surely raise the plea of private defence and may even cause death. In the decision reported in **George Dominic Varkey v. State of Kerala**

reported in **1971 KLT 420** it can be seen that the deceased therein was going to take a stone. If the accused therein waited, there was a chance of causing death or causing grievous hurt to the appellant. He need not wait. But in this case, differentiating from the same, there is no material before this court to show that the deceased posed a real threat of death or caused any fear of grievous hurt in the mind of the appellant.

33. It is to be remembered that there is no material to show that the deceased was possessing any dangerous weapon or any deadly weapon. There is no suggestion to that effect also. The learned Senior Counsel argued before this Court that the light available at the place of occurrence is to be remembered. But defence case can be discerned only from the suggestions, even if it is denied. We, very carefully examined the cross examination of PW2. The defence case is only that she is not an eye witness. There is no material to show that he was under real apprehension of death or grievous hurt as contemplated under Section 100 of IPC. Thus, what comes out is that as per Section 101 of IPC, it can be seen that the right u/s.97 of IPC will be subject to section 101 of IPC. But at the very same time, it can be seen that here is a case where the appellant already caused death.

34. The next aspect to be looked is that we have already found that the case will come under Section 299 of IPC. Section 299 will amount to murder when the case will satisfy any of the clauses of Section 300. In this case the appellant used a sword as a weapon of offence. He had not stopped by inflicting 1 or 2 injuries. There are 10 incised wounds. The right hand of the deceased was chopped off. There are also very severe injuries inflicted on the head, which is a vital part. The intention to cause death is apparent from the nature of injuries and weapon used. The area of injury and chopping an organ are eloquent. It will come under the definition of murder if not falling under any of the exceptions. The learned counsel for the appellant submitted before us that in this case exception No.1, 2 and 4 are applicable.

35. It can be seen that there is already a finding that Section 97 is available which will be available subject to Section 101 of IPC. Here is a case which exceeded the private defence. The exception 2 of Section 300, IPC will be applicable. Thus it can be seen that it is not a case of murder but a culpable homicide not amounting to murder.

36. Now, it is already found that it is a case where there

was intention to cause death by appreciating the weapon and nature of injuries. Thus the offence will fall under the first part of culpable homicide not amounting to murder. That is 1st part of Section 304 of IPC.

37. The next aspect to be considered is regarding the sentence. Appellant at the time of incident was aged 54 years. This incident occurred in his courtyard. His family is not with him. He is living alone in that hut. Thus, the conviction and sentence passed by the court below under Section 302 of IPC is hereby set aside and converted the conviction to one under Section 304 Part I of IPC. Thus, considering all aspects, including the facts and evidence in the case, the appellant is sentenced to undergo rigorous imprisonment for a period of 7 years and to pay fine of Rs.5,000/- with a default imprisonment for 6 months. The appellant is entitled for set off for the remand period, if any.

Appeal allowed partly as above.

Registry shall transmit the records.

Sd/-
C.T.RAVIKUMAR,JUDGE.
Sd/-

K.P.JYOTHINDRANATH,JUDGE.

dlk/24/11/