

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 23RD DAY OF SEPTEMBER 2015/1ST ASWINA, 1937

CRL.A.No. 628 of 2011 ()

**AGAINST THE JUDGMENT IN SC 635/2008 OF ADDITIONAL DISTRICT & SESSIONS COURT
(AD-HOC) FAST TRACK COURT - I, PATHANAMTHITTA DATED 11-03-2011**

APPELLANTS/ACCUSED 1 TO 3:

- 1. SOJAN VARGHESE, S/O. RAJU VARGHESE
CHAKKUMMOOTIL, PUNNAKUNNAM, KUTTAMPUZHA.**
- 2. SUBIN, S/O.GEORGE, ATTUCHIRAYIL VEEDU,
PUNNAKUNNAM, KUTTAMPUZHA.**
- 3. REJI, S/O.CHACKO, KANIYAKONIL VEEDU,
PUNNAKUNNAM, KUTTAMPUZHA.**

**BY ADVS.SRI.SHABU SREEDHARAN
SRI.C.K.PRASAD
SRI.T.S.ANURAJ
SRI.P.SANJAY SHENOI**

RESPONDENT/COMPLAINANT:

**STATE OF KERALA
REPRESENTED BY THE C.I. OF POLICE, THIRUVALLA THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-31.**

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

shg/

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

Criminal Appeal No.628 of 2011

Dated this the 23rd day of September, 2015

J U D G M E N T

K.P. Jyothindranath, J.

This appeal is preferred against the judgement dated 11.3.2011 in S.C. 635/2008 on the file of the Additional District and Sessions Judge (Ad-Hoc) Fast Track Court-I, Pathanamthitta. The conviction is under Sections 302, 440 and 449 r/w. Section 34 of IPC. Under Section 302 of IPC the appellants are sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- each and in default to undergo rigorous imprisonment for two years each. Under Section 440 of IPC rigorous imprisonment for three years and a fine of Rs.10,000/- each and in default, rigorous imprisonment for one year is imposed. Under Section 449 of IPC, rigorous imprisonment for five years each is also imposed.

2. The gist of the prosecution case is as follows:

The brother of the second appellant Subhash sustained

injuries from the house of the deceased. On the very same date, on 5.8.2005 at about 11.30 p.m., due to that animosity, the accused in the crime (8 in number) made an unlawful assembly with an object to murder the deceased, pelted stones to the house and thereafter the appellants herein trespassed into the house. They were equipped with weapons like chopper and sword stick and inflicted fatal injuries to the deceased and while he was undergoing treatment, succumbed to the injuries on 6.8.2005 at Medical College Hospital, Kottayam. The police registered the crime on the statement of one of the sons of the deceased and after investigation a charge was filed before the court. After committal, the Sessions Court took cognisance of the offences and heard the prosecution and defence. As a prima facie case was made out, charge was framed against the accused and they were tried.

3. PW1 to 18 were examined, Exts.P1 to P33 and MO1 and MO2 were marked. On the side of the defence, DW1 to DW4 were examined and Exts.D1 to D5 were

marked. The court below acquitted accused No.4 to 8 and convicted the appellants herein for the above referred offences and sentenced as detailed above. Aggrieved by the judgement, conviction and sentence this appeal is filed.

4. When the appeal came up for hearing, learned counsel Sri. Shabu Sreedharan appearing for the appellants submitted before us that in this case from the inception of the FIR, it can be seen that police with some ulterior motive made embellishments and suppressed the true facts. It is the submission that even though the deceased Prabhakaran was admitted in the hospital and admittedly some intimation received, the FIR which is marked as Ext.P14 came into existence only on 6th evening. It is the submission that concoction is apparent. It is submitted that a bare looking on the F.I. Statement will reveal that a signature is obtained on some blank papers and in tune with the case that is to be advanced, an F.I. Statement is later written in the same by the police. The space between the lines in the top and bottom and size of the font will reveal the same.

Apart from the same, it can be seen that in the FIR, in the column of gist of the incident there are assertions which we will not find in the F.I. Statement. An exhortation is introduced which is not in the F.I. Statement. To be specific it is stated that “സുഭാഷിനെ അടിയ്ക്കുമോടാ എന്ന് ചോദിച്ചുകൊണ്ട്”. This aspect cannot be seen in the F.I. Statement, which is marked as Ext.P13 before the trial court. It is also the submission that a motive is also attributed therein which cannot be seen as such in Ext.P13. It is the submission that the fact that PW15 is not the person who recorded the first information statement but he is only an official who registered the crime in the police station, on the basis of Ext.P13 which is produced before the police station is also relevant in this aspect. Thus when there is assertion of motive over and above the assertions in the F.I. Statement and exhortation introduced over and above the statements seen in the F.I. Statement, which appears in FIR, the said document as well as the whole investigation process is to be

viewed very carefully or suspiciously.

5. It is also the submission that the prosecution examined PW18, the doctor who treated the deceased. He is the person who first met the deceased. It is the submission made before us that in the wound certificate prepared by the said doctor, which is marked as Ext.P33, it can be seen that the weapon alleged therein is a knife. It is also the submission that the time noted therein and the place alleged therein are varied from the prosecution case now presented before the court. It is also submitted before us that when PW11 was examined, he categorically admitted that he is the person who stated things to the doctor. If that is so, it is to be seen that PW11 who is the person who put signature in the F.I. Statement is actually not witnessed the incident as alleged by him. It is the further submission that now the prosecution case is that sword stick and choppers are used. At the earliest point of time, a knife was stated as weapon of offence to the doctor. It is the submission that when the choppers are not

recovered by the police and when at the earliest point of time the weapon alleged is only a knife, the whole story now presented before this court comes suspicious. It is also submitted before us that actually PW18 (the doctor) was not cited in the charge sheet as a witness. It is an indication that this aspect has to be appreciated in the light of the embellishments already highlighted in the FIR. It is the submission that the prosecution never presented a true version or incident before the court.

6. Learned counsel for the appellants further submitted before us that the case of the defence is that of alibi. For the purpose of alibi, DWs1 to 4 were examined and Exts.D4 and D5 were produced before the court. It is an admitted case of the prosecution that on the very same day, the brother of the second accused Subhash sustained injuries. DW1, who is the mother of the second accused, on getting information, went there and took Subhash in an autorickshaw which belongs to DW3 Omanakuttan. It is also the case of the appellants that the said Subhash was

assaulted by the eyewitnesses presented by the prosecution. It is the submission that as per the evidence of DW1, the injured therein was first taken to a hospital at Thiruvalla and from there he was taken to Medical College Hospital, Kottayam. The evidence of DW1 categorically assert that the two accused viz. accused No.1 and 2 had accompanied her in the autorickshaw and they were in Medical College Hospital, Kottayam at the time when the incident in this case took place. It is the submission of the counsel that DW2 Subin is none other than the second accused. It is a case where the accused entered into the witness box and faced even a cross-examination. Nothing is brought out to disbelieve his evidence. It is the submission that he categorically stated that at the relevant point of time, he was at the Medical College Hospital, Kottayam. To corroborate these versions, the defence also examined the person who took the injured Subhash to the hospital at Thiruvalla. It is also submitted before us that the said Omanakuttan is a person who is admittedly a neighbour of

the deceased. It can be further seen that he not only admitted the case of the defence that he is the person who took the injured Subhash to the Hospital at Thiruvalla but it can be also seen that he is a person who accompanied the deceased to the hospital. He is an autorickshaw driver. He took the deceased to the hospital at Thiruvalla and further it can be seen that he accompanied the deceased to the Medical College Hospital also. This aspect is admitted by PW13 who is none other than another son of the deceased. It is the submission that the totality of all these evidences, on the basis of the other aspects, will show that now the case presented by the prosecution is not believable and on the basis of the evidence, a conviction cannot be entered into. It is also the submission that alibi has to be accepted and the appellants are entitled for acquittal.

7. Now, the learned counsel for the appellants also pointed out some other aspects which will also show that there are discrepancies in the prosecution evidence. It is submitted before us that there is a so-called recovery of one

of the weapons allegedly used by the accused/appellant No.3. The said weapon is now marked as MO1 before the court. It is the submission that no recovery witness supported the recovery; i.e. there is no independent evidence before this court to believe the recovery. It is the further submission that no human blood was detected in the said weapon. Even though Ext.P30 analysis report is therein, it can be seen that only blood is detected and the source of the blood is not therein. When there is no independent evidence regarding the recovery and there is no guarantee that the blood seen in the weapon is that of human blood, it is the submission that no reliance can be placed on the said weapon and it cannot be treated as a circumstance against the appellants in appreciating the evidence of the prosecution.

8. It is the submission of the learned counsel for the appellants that here is a case where there is “scene shifting”. It is the submission before us that at the earliest point of time, that is to the doctor, the version is that

incident occurred near to the house. Now, the case of the prosecution is that the incident occurred inside the house. It is the case that to tally with the earlier version, it seems that place of occurrence is now stated as the shed (chaarth) of the house. It is also submitted before us that admittedly the case of the prosecution is that the injured, after the incident, went to the house of the neighbour. The counsel for the appellants submitted before us that the prosecution case is that his grown up children who were examined as PW11 and PW13 were in his house and his wife was also in the house. The case of injured person going to a nearby house for help shows that either the above so-called eye witnesses were not therein or the version that he sustained injuries in the shed near the house is unbelievable. It is the submission that on the background of the evidence of alibi, this aspect has to be appreciated.

9. Learned counsel for the appellants vehemently submitted that the normal behaviour of a human being, when his grown up children were therein is that he will not

go to a nearby house for seeking help. As per the evidence of PW4, the door of the house of the neighbour was kept opened. His evidence is that he was talking there. But as per the evidence of PW5, the alleged owner of the house, the door was closed and she was sleeping. These evidences will not go together. Apart from these, the case that neither the children of the deceased nor the wife of the deceased sustained any injuries also raises suspicion. There is no case for the prosecution that during the incident or afterwards, that is while removing the deceased to the hospital, their dresses got blood stained. Considering all these aspects, the alibi put forwarded by the appellants can be believed. The version of the witnesses now before the court is to be viewed with suspicion and cannot be relied upon and they are untrusty witnesses.

10. The counsel for the appellants also highlighted that there are no discrepancies in the evidences before the court. It is submitted that it has to be appreciated on the basis of alibi as well as the fact that the normal behaviour of

wife and children of an injured is not seen in this case. The positive case of the prosecution is that the accused persons attacked, that also trespassing into the house. The background is that on the very same day the brother of the second accused sustained injuries. In this regard the evidence tendered is that:

“ഈ കേസിലെ 2-ാം പ്രതിയായ സുബിന്റെ ജ്യേഷ്ഠൻ സുഭാഷ് രാത്രി 8.30 മണിയോടുകൂടി വീട്ടിൽ വരികയും പ്രസാദിനെ തല്ലുകയും ഭീഷണിപ്പെടുത്തുകയും ചെയ്തിട്ടുപോയി. തിരിച്ച് വീണ്ടും രാത്രിയിൽ വരും എന്ന് പറഞ്ഞാണ് പോയത്. ജ്യേഷ്ഠൻ പ്രസാദിനെ ചുമത്ര അമ്പലത്തിനടുത്തുള്ള അമ്മാവന്റെ വീട്ടിലാക്കി. രാത്രി ഞങ്ങൾ പേടിച്ചിട്ട് വീട്ടിൽ ഉറങ്ങാതിരിക്കുകയായിരുന്നു.”

It is the submission that the positive case of the witnesses is that the person namely Prasad was kept in another house and the witnesses were in the house. They were expecting something and then they heard the knocking sound and the accused/appellants trespassed into the house with weapons. The mother and the wife of elder brother restrained him

and he was not in a position to rescue the father or intervene. It is the submission that when they were expecting something, this behaviour is not normal or the corollary is that they are not reliable witnesses and they were not present therein at the time of incident. No normal children will allow night trespassers to assault their father from their house. At least there will be some protest which will give some assurance in the form of some injuries, which is lacking in this case, which will show that the alibi put forwarded is correct as well as the witnesses were not actually present at the place of incident. It is the submission that when normal behaviour will not be so, that is the children cannot be accepted as mute spectators to tell the incident, their evidences also will not inspire confidence and this court cannot rely upon it and the appellants are entitled for an acquittal.

11. The counsel for the appellants also highlighted before us that another aspect also should be looked into by this court. The injuries sustained are only on the lower

limbs of the body. It is the submission that as earlier stated, PW18 was not actually cited in the police charge as a witness. He was seen examined by the court and Ext.P33 marked. It can be seen that injuries are not even grievous in nature which will even come under the purview of Section 320 of IPC. It is also highlighted before us that during chief-examination itself, the doctor deposed that the injury will be fatal only if not treated properly. It is stated as follows:

“ All these injuries are severe and is sufficient to cause death.(Q) If not properly treated it may cause death.”

That is, the evidence to the effect that in ordinary course it will cause death is lacking in this case.

12. The learned Public Prosecutor Smt. V.H.Jasmine submitted before us that here is a case where the father of PWs11 and 13 is the victim. The incident occurred in the house of the witnesses. The incident was at about 11.30 in the night. At that point of time, in a house, there will be only inmates of the house. When trespassers are

committing violence and inflicting injuries and when inmates are giving evidence regarding the same, there is nothing to disbelieve. There is no case for the appellants that they are not the inmates of the house. That is, there is not even a challenge to the effect that the deceased was not staying along with the witnesses now examined as eyewitnesses. They are not chance witnesses. They are the residents in the house. Under such circumstances, their presence in the house need not be doubted. It is the further submission that, in this case, it can be seen that there is evidence to the effect that there was an earlier incident. As per the evidence of DW1 itself it can be seen that the brother of accused No.2 sustained injuries on the very same day near the house of the deceased. It was the motive. With such an animosity and motive, the accused trespassed into the house and committed the offence. PW11, PW13 and PW14 are eyewitnesses. Two witnesses are the children of the deceased. PW14 is the wife of the deceased. It cannot be said that they will falsely implicate persons who are

actually not involved, avoiding the actual culprits. When accused No.2 got motive and as per the evidence of DW1 itself accused No.1 is also a friend of him, which will give assurance to the fact that along with accused No.2, accused No.1 was also involved in this case. It is the case that the behaviour or reaction of the witnesses to an incident will vary. When in the midnight, well equipped appellants trespassed into the house and were attacking the father and when the mother got a case that she is the person who restrained her son from intervening, there is nothing to disbelieve such a version. Immediately after the incident, the deceased was taken to the hospital by PW11. Further assurance can be gathered from Ext.P13, where it is recorded that PW11 is the person who took the deceased to the hospital. Even the hostile witnesses are giving evidence in this regard. It is also the submission that the evidence of PWs11, 13 and 14 are mutually corroborative.

13. It is also submitted before us that the appellants' counsel is arguing on FIR. But it is to be remembered that

the incident occurred at 11.30 in the night. F.I. Statement was recorded and taken to the station. That is, it was recorded from the hospital. Even if there is some variations in the area of gist given in FIR, it cannot be a ground to discard the F.I. Statement, which will be material in appreciating the evidence. It is the submission made before us that if the space between the lines are varied it cannot be a ground to view it with suspicion especially when it is recorded by an officer of the station. The F.I. Statement is recorded from the hospital and categorically written the body mahazar which is marked as P13(a) will give assurance to the fact that it was recorded from the hospital itself and not from anywhere else as alleged by the prosecution. Now, the learned Public Prosecutor also submitted before us the role of PW18. It is the submission that here is a case where the deceased sustained injuries and succumbed to the injuries, post-mortem conducted and the said doctor was examined before the court. Then actually the examination of PW18 is not warranted

especially when there is no other reason for the death, but only the injury inflicted by the appellants. The question is that whether the appellants inflicted injuries and due to that injury he succumbed. When these ingredients are proved by the Forensic Surgeon, nothing more is to be proved before the court. It is also submitted that the injuries are not grievous will not be correct especially when the said injuries are the cause of death as deposed by the doctor who conducted the post-mortem. It is the submission that he is a forensic expert. When the evidence is appreciated, the evidence of the forensic expert has to be accepted in respect of cause of death because he will be a more experienced doctor to depose regarding the cause of death.

14. It is the submission of the Prosecutor that when the incident occurred inside the house and the natural witnesses will be the inmates of the house, there is nothing to disbelieve the ocular evidence of those witnesses. In support of the same, the Prosecutor highlighted the decision reported in **State of Punjab v. Ramji Das [AIR**

1977 SC 1085] where the dictum laid down by the Apex Court is that relationship of the prosecution witness with the deceased is no ground for disbelieving him. It is also submitted before us that admittedly in this case two weapons of the accused are not recovered. No proposition can be laid as that non-recovery of weapons will be fatal to the prosecution case. If such a proposition is therein, to escape from a prosecution, a total destruction of weapon alone will be sufficient. It is not so. This aspect is considered by this court in **Jaison v. State of Kerala [2014 (1) KLT SN 19 (C.No.26)]** where it is categorically held that non-recovery of weapons will not be a ground for acquittal.

15. It is also submitted before us by the Prosecutor that in this case apart from the ocular evidences tendered by PWs11, 13 and 14 it can be seen that the inquest report is marked as Ext.P4 which is also before the court. PW4 is a witness who was declared as hostile. He admitted the fact

that he was examined by the police and while so he had stated that the deceased when came to his house stated that the appellants are the persons who inflicted injuries. It is the submission that it is an admission of a fact by the witness. When it is an admission and when the document is a marked document before the court, that also, a document came into existence as per Section 174 of the Cr.P.C., this Court is entitled to look into it and get assurance in appreciating the evidence of PWs11, 13 and 14. It is the submission that it will come under the purview of Section 6. Even though the witness has not deposed to in explicit words that the deceased stated so to him before the court, the fact that when the inquest is a marked document, which can be perused by this Court, that aspect can be looked into. In this respect the learned Public Prosecutor highlighted the decision in **Kuldip Singh v. State of Punjab [AIR 1992 SC 1944]**. It is stated that “no doubt, the contents of the inquest report cannot be treated as

evidence but they can be looked into to test the veracity of D.W.2. Thus the evidence of D.Ws.1 to 3 is not of any help to the accused". That is, in appreciating the evidence, the statement can be looked into. The importance of this inquest is that if the witness supported the prosecution it would have even come under the purview of Section 32 of the Evidence Act; that is the dying declaration as the injury so inflicted is the cause of death. So in appreciating or getting assurance, this material can be looked into by the court as the cause of death is the injuries inflicted by accused No.1 to 3 as stated by the deceased to the witness as evident and apparent, which is marked as Ext.P4. In this regard the learned counsel also highlighted a decision reported in **Ashraf v. State of Kerala [2015 (3) KHC 578 (DB)]** that is, the statement in this nature will come under the purview of Section 6 as well as that of Section 32. It is also submitted before us that in this case, PW9 is the doctor who conducted the post-mortem. He categorically deposed before the court that the injuries will in ordinary course

cause death. Then the case will squarely come under clause 3 of Section 300, no exception available and the consequence is that the only inference that can be drawn is that the appellants committed murder. Ext.P10 is the post-mortem certificate marked by the said doctor. It is submitted that as there is no merit in the appeal, it is to be dismissed.

16. The evidence in this case is as follows: PW5 is an Assistant Executive Engineer of KSEB through whom Ext.P1 document marked to show that there was electric supply and no power cut was there on the date of incident that is on 5.8.2005 at 11.30 p.m.

17. PW2 is only an attester to the scene mahazar through whom marked Ext.P2 document. He is also an attesting witness to Ext.P4, inquest report. It can be seen that he was declared as hostile. He deposed that he subscribed the signature from the police station. PW3 is the son of the deceased who received the dead body of the deceased after post-mortem. PW4 deposed that deceased

was a neighbour of him and it can be seen that the statement recorded in column No.9 of the inquest report was put to him or read over to him without making him hostile witness and he admitted the same. It can be seen that the permission from the court is also not obtained before doing so. But it can be further seen that he never deposed the said fact as such before the court as a witness on oath but only admitted facts stated in the inquest report. The relevant other facts that can be considered in his evidence is that he deposed that the house of the deceased is only about 10 feet away from his house and further he deposed that while the deceased was coming to his house, he was talking to others and the door of the house was in an opened position. PW5 is the mother-in-law of PW4. She turned hostile.

18. PW6 is a K.S.R.T.C. Conductor; a distant relative of the deceased and his evidence is that he was along with the children of the deceased while the deceased was taken to the hospital. He also deposed that it was in his

autorickshaw, the deceased was taken. He deposed that, Prasad son of deceased, and Pradeep was also present. PW7 denied his signature in the recovery mahazar. PW8 also declared as hostile.

19. PW9 is the doctor who conducted the post-mortem on the dead body of the deceased. He marked the post-mortem certificate as Ext.P10. He deposed before the court that injury No.2 and 3 are fatal and sufficient to cause death in the ordinary course of nature. PW10 is the Village Officer who prepared the scene plan which is marked as Ext.P12. He deposed that the place of incident is marked in Ext.P12 and item No.5 is the house of PW5 (Thankamma). During cross-examination, he deposed that the distance between the house of the deceased and Thankamma is about 35 mtrs. He deposed the same from memory.

20. PW11 is the son of the deceased. According to his evidence, during that period he was conducting catering business and he is the person who gave F.I. Statement which is marked as Ext.P13. According to his evidence, at

about 11.30 hours in the night, accused No.1 to 3 kicked opened the door and trespassed into the house and enquired about Prasad who is the brother of the witness. His evidence is that accused No.1 pulled down the deceased from the cot and using a billhook in his hand, inflicted injury on the deceased Prabhakaran. His evidence is that A1 inflicted injury on the leg and his further evidence is that accused No.2, Subin, by using a sword stick inflicted injury on the right thigh area and accused No.3 Reji inflicted injury on the buttock area by using a sword stick. It is also the evidence that they also destroyed T.V., other utensils etc. and it is also the evidence that they also caused damage to the autorickshaw which was stationed near the house of Ani. It is also the evidence that there was also pelting stones from the railway track area. He further deposed that thereafter the accused ran away from there. An autorickshaw was brought and injured was taken to Medical Mission Hospital at Thiruvalla. He is the person who gave F.I. statement to the police which is marked as

Ext.P13. He also deposed that while undergoing the treatment, his father succumbed to the injuries.

21. PW12 is the Police Constable who received the dead body after post-mortem. PW13 is the elder son of the deceased. According to him, he is working in a bakery at Thiruvalla. His evidence is that he was also staying along with his father and mother and his wife was also therein. He further deposed that on 5th August 2005 at about 11.30 in the night, the accused/appellants pushed opened the door and came inside the house. Accused No.1 pulled down his father from the cot and inflicted injury using a billhook and he sustained cut injury on the leg area. Accused No.2, using a sword stick, inflicted injury on the thigh area and A3 Reji inflicted injury on the lower portion of the waist area and evidence is that they also committed mischief by causing destruction to the household articles as well as to the doors. At first, the injured was taken to Thiruvalla Medical Mission Hospital and from there, in an ambulance, the deceased was taken to the Medical College Hospital,

Kottayam. He was treated there in I.C.U. He also identified the accused from the court. He also identified the weapon as MO1 used by A3.

22. PW14 is the wife of the deceased. She is also an eyewitness who deposed before the court in tune with PWs 11 and 13. She further deposed that on the next day at about 5.30 hours her husband succumbed to the injuries. PW15 is the Sub Inspector of Police who registered the FIR. According to his evidence, the Head Constable produced Ext.P13 F.I. Statement before him and on the basis of the same, he registered the crime. It is further deposed that there was a body mahazar in Ext.P13 which is marked as Ext.P13(a). The FIR is marked as Ext.P14.

23. PW16 is the Investigating Officer, who conducted the investigation in this case. He deposed before the court that he is the person who prepared the scene mahazar and the inquest report and he questioned the witnesses. He recovered MO1 weapon. It is the evidence of the witness that when accused No.3 was arrested, he gave a disclosure

statement which is marked as Ext.P28 (a). As lead by the accused, they reached at the garden land and A3 took a sword stick from a bushy area and handed over to the witness. Ext.P28 mahazar was prepared for the recovery. He also sent the materials to the court with a forwarding note. Ext.P30 is the report of the Assistant Director of Serology. This witness categorically deposed that item No.5 is MO1, which contained blood as per Ext.P30. PW17 is the Circle Inspector who verified the charge and filed charge before the court.

24. PW18 is the doctor attached to the Medical College Hospital, Kottayam who treated the deceased at the earliest point of time. He prepared Ext.P33 wound certificate. He marked the said document before the court as well as deposed before the court that the injured was brought by Pradeep; son of the injured. When his opinion is sought by the Prosecutor, he stated that the injuries can be caused as alleged and further deposed as follows: (All these injuries are severe and is sufficient to cause death.(Q) If not

properly treated it may cause death).

25. The defence witnesses are DW1 to DW4. DW1 is the mother of the second accused. Her evidence is that she got information from DW3 Omanakuttan that her son Subhash is lying injured on the side of the railway track. She went there and in the autorickshaw of the said DW3, she took him to the hospital. On the way, she saw accused No.1 and he was also taken in the autorickshaw and thereafter she saw her son Subin, who is the second accused. She took him also in the autorickshaw. As referred from hospital at Thiruvalla, they took the injured to the Medical College Hospital in a taxi car arranged by the above said Omanakuttan (DW3). DW2 is accused No.2 who is appellant No.2 before this court. He gave evidence in tune with DW1, that is, his case is that an autorickshaw stopped. He also boarded, his mother as well as the injured brother was therein and they went first to the Medical Mission Hospital, Thiruvalla and thereafter they went to the Medical College Hospital. His categoric evidence is that he

was not present at the place of incident. DW3, Omanakuttan, who is an autorickshaw driver, deposed that he took Subhash to the hospital. He also deposed before the court that he saw accused No.1 and 2 when he accompanied the deceased to the Medical College Hospital in the same night at about 11'o' clock. DW4 is the driver of the taxi in which they allegedly travelled from Thiruvalla to the Medical College Hospital, Kottayam.

26. Now, in this case, while appreciating the evidence of the witnesses the main aspect to be considered is that defence got a case of alibi. When the defence is projecting a case of alibi, the evidence of prosecution witnesses is to be considered along with the evidence tendered in support of alibi. If the defence of alibi is believable, the corollary is that the case put forward by the prosecution is false. It is a fact that while appreciating alibi, we will be considering the matter in the light of the Section 106 of the Evidence Act. They are putting forward a case which will belie the prosecution case, if found true. So the evidence of

prosecution in respect of the incident as well as the evidence of defence is to be appreciated together. In other words both the case of the prosecution as well as that of alibi can't go together.

27. In this case, PWs11, 13 and 14 are ocular witnesses produced by the prosecution. PW11 is the witness who gave F.I. Statement to the police which is marked as Ext.P13. As per the evidence, the said statement is taken from the Medical College Hospital by a Police Constable, who is no more. The F.I. Statement is proved by PW11. In Ext.P13, it is categorically stated that the appellants herein trespassed into the house at about 11.30 in the night and committed the offence. He deposed before the court that A1 inflicted an injury with a billhook on the leg area of the deceased. A2 inflicted an injury with a sword stick on the thigh area and A3 inflicted an injury on the buttock area of the deceased. PW11 deposed that he was residing along with his deceased father and mother in the said house. The incident occurred in the night. Thus naturally a person

residing in the house can be considered only as a natural witness at that place of incident. This aspect is applicable in respect of PW11, PW13 and PW14. In appreciating whether the evidence of these witnesses is reliable, the evidence rendered by the defence regarding alibi also is to be looked into. As per the evidence of DW1 (mother of accused No.2), accused No.1 was with her while she was taking her son Subhash to the hospital at Thiruvalla. Thereafter he continued to be with her while she was taking the injured son to Medical College Hospital Kottayam. It is her evidence that he was present therein also. It is the evidence of DW1 that accused No.2 who was examined as DW2 before the court was also along with her and was at the Medical College Hospital, Kottayam. The evidence of DW2, appellant No.2 is also to the effect that he was not at the place of incident at the time of incident. He was at Medical College Hospital, Kottayam. It is the case of the defence that the evidence of DW1 and DW2 is corroborated by the evidence of DW3 and DW4. DW3 deposed that he

saw A1 and A2 in the Medical College Hospital when he accompanied injured Prabhakaran to Medical College Hospital. DW4 is the car driver. Thus the defence case is that the evidence of DW1 and DW2 are corroborated by the evidence of DW3 and DW4. DW3 went to the Medical College need not be doubted in the light of evidence of PW13. The gist of alibi evidence is that when the injured Subhash was taken to hospital at Thiruvalla accused No.1 and 2 also accompanied him. Thereafter accused No.1 and 2 also went to the Medical College Hospital at Kottayam along with the said injured and was therein.

28. Thus, a keen scrutiny of the evidence reveals that the whole case depends upon the evidence of DW3 that he saw the accused No.1 and 2 at Medical College Hospital, Kottayam. DW1 is none other than the mother of A2. DW2 is none other than accused No.2 himself. Surely, only because DW1 happened to be the mother of accused No.2 she need not lie. But the totality of the evidence now before the court is to be appreciated in the light of the relationship

and the nature of the evidence adduced. As per the evidence of the defence, they were first at hospital at Thiruvalla. Thereafter, hiring a car, they went to Kottayam. The distance between the place of incident and the Kottayam Medical College is not before this Court. But it can be seen that the incident allegedly happened at about 11.30 p.m. As per the evidence of DW3, he saw the accused No.1 & 2 at Kottayam Medical College at about 11 p.m. So it appears that the Kottayam Medical College is not so far away from the place of incident. The evidence of DW3 is also that he accompanied the deceased to the Medical College Hospital. It can be further seen that the deceased was first taken to Thiruvalla Medical Mission Hospital and from there, taken to Medical College in an ambulance. The time spent therein is also relevant to be noted. Then the possibility that even if believing DW3 that the accused No.1 and 2 are present therein when deceased reached therein will not rule out the possibility that they will not get time to come and commit the offence and go back to the Medical

College Hospital. In appreciating alibi, the evidence adduced will be in such a nature to demolish all other possibilities before the court. In this case, the evidence tendered by PWs11, 13 and 14 regarding the incident are reliable one. The evidence of alibi should be in such a manner as to demolish the prosecution evidence. In this case such a reliable evidence is not forthcoming to disbelieve the prosecution case. The evidence of DW1, DW2 and DW3 are not inspiring confidence and not believable. When the alibi fails, the corollary is that the evidence adduced by the prosecution, if it is not suffering from any infirmity, it will be only acceptable. Now let us examine the evidence of PWs11, 13 and 14 on the background of other corroborating evidences. In this case, as per the evidence of PW16, when accused No.3 was arrested, he made a disclosure statement. On the basis of disclosure statement, MO1 knife was seized by the C.I. The analysis report, which is marked before the court as Ext.P30 will show that there is blood. Surely the origin of the blood is not ascertained as

the quantity was not that much. It contained human blood is a relevant fact to be noted. The independent witness not supported the prosecution will not be helpful when there is nothing to disbelieve the evidence of PW16, in respect of the recovery effected. More over, in this case, Ext.P2 is the scene mahazar. As per the evidence of PWs11, 13 and 14 it can be seen that their positive evidence was that after trespass into the house they committed mischief. Ext.P2 is eloquent in this regard. There is evidence to show that window beam are cut and more over T.V. utensils etc. are also damaged. These facts are recorded in the scene mahazar immediately after the incident i.e. at the outset of the investigation process by PW16. Thus Ext.P2 scene mahazar is also corroborating the evidence of PWs11, 13 and 14. The presence of PW11, 13 and 14 can be also gathered by the evidence of PWs 4 and 5, even though those witnesses are declared as hostile. Thus what comes out is that when they are the natural witnesses and their presence is deposed to by PWs4 and 5 and there are also

corroboration by independent materials and circumstances, then there is nothing to disbelieve the evidence of these ocular witnesses. Thus, when the evidence of PWs11, 13 and 14 are reliable one what they deposed to are also reliable. Now, it can be seen that the prosecution is also relying upon Ext.P4 inquest report to the extent that the contents therein can be looked into by this court to get assurance in respect of the evidence tendered by PWs11, 13 and 14. PW4 admitted the statement given to the police officer in an enquiry conducted under Section 174 of the Criminal Procedure Code. The statement of PW13 was taken by the Investigating Officer during inquest. The Apex Court and this court again and again stated that it will not be desirable to record the statement of eyewitness while conducting the inquest. But surely recording the statement of an eyewitness during inquest will not in any way affect his oral evidence if otherwise it is reliable. The statement recorded in the inquest cannot be used to see that it is explicitly reliable. But if otherwise it is reliable, only

because his statement is recorded will not in any way affect in accepting the evidence. Similarly the importance of the evidence of PW4 is that the statement of him in Ext.P4 comes under the purview of res gestae. In this regard the dictum laid down by this court in **Ashraf's** case (cited supra) is laid a precedent. It can be followed. Thus it can be seen that the said statement of PW4 will come under the purview of Section 6 res gestae as well as under Section 32 of Evidence Act, dying declaration of the deceased. But we are fully aware that the way in which the statement was put to him. Before putting the statement to the witness he was not declared hostile. Before putting the statement to the witness, the permission of the court was not sought for. Under such circumstances, the way in which the material brought on record seems to be not proper. But at the very same time since it is a marked document it will just give assurance to rely upon the substantiate evidence of PW13 before this court. While concluding so, we are also adverting to the dictum laid down by the Apex Court in the

decision in **Pandurang v. State of Hyderabad [AIR 1955 SC. 216 (Vol.42, C.N. 37)]**. Thus what comes out is that by reliable evidence prosecution has succeeded in proving the commission of offence by trespass and inflicting injuries and mischief with common intention.

29. Now the next point to be considered is that what is the offence the appellants/accused has committed. PW9 is the doctor who conducted the post-mortem. Ext.P10 is the post-mortem certificate. As per Ext.P10 the injuries are four in number. They are:

- 1) Abraded contusion on inner aspect of right foot 1x0.2cm vertical 12cm proximal to tip of big toe.
2. Incised wound (sutured) on back of right calf 15cm oblique. The upper outer and 9.5cm below knee line. The lower inner and at 35cm above ankle, 5.5cm deep up to fibula. The posterior tibial artery cut and anastomosed surgically. The tibial nerve also cut. The muscles were sutured in layers. Muscular branches of arteries transacted.
- 3) Incised wound (sutured) on outer aspect of right thigh 8cm, oblique. The upper inner and at 18cm above knee line. The lower outer and 14cm above knee, 4.5cm deep, cut the muscular branches of the artery.
- 4) Incised wound on right buttock 5cm vertical, sutured, 2.5 cm deep (muscle deep). The inner and superficially out for a length of 11cm downwards and towards left

(talling).

As per Ext.P10, opinion as to cause of death is given as the death was due to multiple injuries sustained to right lower limb. It is categorically stated, while the evidence was tendered, by the witness that injury No.2 and 3 are fatal and will cause death in the ordinary course of nature.

30. Now, PW18 is a doctor attached to the Medical College Hospital, Kottayam. As per the evidence of PW18, he stated that there are three injuries. The wound certificate issued by the doctor which is marked as Ext.P33. There are three injuries noted by the doctor. They are:

- 1) Deep lacerated wound 15x5cm back of (R) leg.
- 2) Lacerated wound 6x1cm lateral aspect of (R) thigh.
- 3) Lacerated wound 2x0.5cm lateral aspect of gluteal region.

31. As per the evidence of PW9 the injury that will in the ordinary course cause death is the multiple injury sustained to the right lower limb. As per the post-mortem certificate there are various injuries. First injury is only an abraded contusion on inner aspect of right foot. It is only a

minor injury. Then the two injuries that is to be taken into consideration are the injury No.2 and 3. The fourth injury is not relevant in consideration of the death as it is not on the lower limb but on the right buttock area. Even though PW9 deposed that in ordinary course injuries on lower limb will cause death, as per the evidence of PW18, only if proper treatment is not given it will cause death. Both doctors are experts in this field. It cannot be said that one doctor is more expert than other one. Both doctors are attached to the Medical College Hospital, Kottayam.

32. In this case, it can be seen that the injuries are on the lower limb. The main contention of the appellant is that the offence committed cannot be considered as murder. Section 299 of IPC deals with culpable homicide. In this case, we have already found that the injuries are inflicted by the appellants. As per the evidence of PW9 and as well as appreciating the evidence of PW18, it can be seen that there will be no dispute regarding the fact that it was a homicide. The only question at first to be considered is

whether it will come under the purview of Section 299 of IPC, culpable homicide. The Section says as follows:

“299. Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

Apparently there are three limbs for culpable homicide. One is intention of causing death and the second is intention of causing such bodily injuries as is likely to cause death thirdly with the knowledge that he is likely by such act to cause death.

33. In this case, as per the evidence of the witnesses, it can be seen that the accused came equipped with weapons in search of Prasad and it can be further seen that as per the prosecution case also when Prasad was not seen therein injuries are inflicted to the deceased. It is the positive case of the prosecution that the earlier incident was in between Prasad and Subhash, brother of A2. Then it appears that they came to the house and committed

trespass and inflicted injuries only because Prasad was not therein. Thus, when the injuries are only on the lower limb and when the prosecution case is that even though deadly weapons were possessed by each accused, now it can be seen that each accused only inflicted one injury each on the lower limb of the deceased. Thus, apparently it can be seen that the intention of causing death seems to be missing in this case, especially when as per the prosecution evidence after inflicting injuries they remained therein but committed only mischief. Thus, from appreciating the attending circumstances and all the materials before the court, it can be seen that intention of causing death is not present in this case. Now, we are only concerned of the second part of the culpable homicide where intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death. In this case it can be prima facie seen that the last part of culpable homicide alone will be applicable, when there was no intention of causing death.

34. When it is found that the act committed by the accused comes under the definition of culpable homicide whether any of the limbs in Section 300 will be satisfied. Now, when the intention is missing and while we find that it falls under the definition of culpable homicide, the relevant clause will be the fourth clause. We are saying so especially because, to satisfy the third clause there should be an evidence to the effect that the injury inflicted should be sufficient in the ordinary course of nature to cause death. Even though PW9 deposed to that effect, the evidence of PW18 was that only if treatment is not given, it will cause death. We also perused the nature of injuries and we are also agreeing with the evidence tendered by PW18 who treated the deceased. Thus, the only point to be considered is the 4th limb. The 4th limb of Section 300 states that if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of

causing death or such injury as aforesaid. Thus, while appreciating whether the act will come under the 4th clause, the aspect that the finding to the effect that there is intention of causing death is missing in this case also to be looked into. While considering culpable homicide, we already found that there also the first and second limb will not be applicable. While coming to these conclusions Explanation 2 to culpable homicide is also taken into consideration. That is while appreciating the evidence of PW18 the evidence is as follows:

All these injuries are severe and is sufficient to cause death(Q) If not properly treated it may cause death.”

But in this respect the explanation No.2 to culpable homicide is that “where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented”. Thus after a harmonious reading of all these

aspects, it can be seen that in this case, the offence committed by the accused will be punishable under Section 304 Part II, as the Act will not satisfy to 4th clause of Section 300 of IPC also. While coming to this conclusion the decision rendered by the Apex Court reported in **Kapur Singh v. State of Pepsu [1956 SC 654 ((s) AIR v. 43 C.110 Oct.)** is also taken into consideration. Thus the offence committed by the accused will be punishable under Section 304 Part II of IPC. Now, there is also conviction under Section 440 of IPC. We have already found that there was mischief committed by the accused. Ext.P2 is eloquent in this aspect. There is also oral evidence to that effect, which we need not elaborate. Thus it is found that accused persons have also committed mischief. To bring Section 440, the ingredients requires that there should have preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint. In this case there is categoric evidence

to the effect that the accused trespassed into the house equipped with weapons to cause hurt. Thus, the ingredients of Section 440 is seen proved by the prosecution. The conviction entered into under Section 440 of IPC will sustain.

35. The next aspect is the conviction under Section 449 of IPC. For a conviction under Section 449 of IPC there should be a house-trespass in order to commit offence punishable with death. In this case, we have already rendered a finding to the effect that the offence committed is under Section 304 Part II which is punishable only for a maximum period of 10 years. Under such circumstances, a conviction under Section 449 IPC will not lie. Then house-trespass is therein. The ingredient of house trespass is already seen by this court. Under such circumstances, the conviction under Section 449 of IPC is converted to under Section 448 of IPC which can be considered as a minor offence of 449 of IPC.

36. Thus, it is found that the accused found guilty of

an offence punishable under Section 304 Part II of IPC read with Section 34 of IPC as well as under Section 440 of IPC read with Section 34 of IPC and for an offence under Section 448 of IPC read with Section 34 of IPC. The conviction of the court below under Section 302 read with Section 34 of IPC is hereby set aside and is converted into a conviction under Section 304 Part II of IPC. The conviction under Section 440 of IPC read with Section 34 of IPC is upheld. The conviction under Section 449 of IPC read with Section 34 is set aside and is converted into a conviction under Section 448 read with Section 34 of IPC.

37. In the result, appellants are convicted and sentenced to undergo rigorous imprisonment for seven years each and they are also liable to pay a fine of Rs.25,000/- each; in default to undergo simple imprisonment for one year each for offence under Section 304 Part II of IPC and to undergo rigorous imprisonment for three years each and to pay a fine of Rs.10,000/- each; in default to undergo simple imprisonment for one year each

for offence under Section 440 IPC and to undergo rigorous imprisonment for six months each for offence under Section 448 IPC. Substantive sentences will run concurrently. Fine amount realised if any will be given to PW14 wife of the deceased as compensation. Appellants are entitled for set off for the period as ordered by the court below.

The Criminal Appeal is allowed to the above extent.

Sd/-

C.T. RAVIKUMAR
JUDGE

Sd/-

K.P. JYOTHINDRANATH
JUDGE

shg/