

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 840 of 2011 ()

(AGAINST THE JUDGMENT IN SC NO.66/2007 of THE COURT OF ADDITIONAL
SESSIONS JUDGE-I, PALAKKAD DATED 10-05-2011
AGAINST THE ORDER/JUDGMENT IN C.P.No.70/2006 of THE COURT OF JUDICIAL
FIRST CLASS MAGISTRATE, MANNARKKAD
CRIME NO.281/2005 OF AGALI POLICE STATION, THRISSUR DIST.)

APPELLANT/ACCUSED NO.3:

V.SUNILKUMAR,S/O.PADMANABHAN NAIR,
AGED 37 YEARS/2005, KUTTIPURATHU HOUSE,
KOTTAPURAM
SREEKRISHNAPURAM.

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.V.C.SARATH
SRI.VIPIN NARAYAN
SMT.P.MAYA

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.V.H.JASMINE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ALONG WITH
CRL.A.NOS.862 & 1384 OF 2011 ON 08-12-2015, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

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

Crl.A.Nos.840, 862 & 1384 of 2011

Dated 8th December, 2015

JUDGMENT

Ravikumar, J.

These appeals are filed respectively by accused Nos. 3, 2 and 1 in S.C.No.66 of 2007 on the files of the Court of Additional Sessions Judge-I, Palakkad who were tried, convicted and sentenced in connection with the death of one Raveendran Nair. For the conviction under Section 302 read with Section 34 of the Indian Penal Code the appellants were sentenced to undergo life imprisonment and to pay a fine of ₹ 2,000/- each and in default of payment of fine they were ordered to undergo rigorous imprisonment for six months each. For the conviction under Section 342 read with Section 34, IPC they were sentenced to undergo rigorous imprisonment for six months each and to pay a fine of ₹ 500/- each and in default of payment of fine, to undergo rigorous imprisonment for 15 days each. Though they were also charged for the offences under Sections 201 and 392 read with Section 34, IPC they were acquitted of the said offences. In the said circumstances, these appeals are being heard and disposed of by this common judgment. In this judgment the appellants are referred to

hereafter in accordance with their respective status in the array of accused in S.C.No.66 of 2007, unless otherwise specified.

2. The case of the prosecution is that the deceased Raveendran Nair along with accused Nos.1 to 3 consumed liquor from a room bearing Door No.XVII/289 adjacent to the ration shop of the first accused situated in the same building at Chemmannur in Kallamala Village between 12 and 1 O' Clock during the night intervening 9.9.2005 and 10.9.2005. When deceased Raveendran Nair snatched the *ganja beedi* from the first accused he got enraged and then, out of the enmity and in furtherance of the common intention of accused Nos.1 to 3 to do away with the life of Raveendran Nair, he punched the deceased. Accused Nos. 2 and 3 closed the door to prevent the deceased from going away and thereafter they too, joined the first accused in assaulting him. They punched the deceased on his chest and abdomen and they also kicked him. The third accused removed the gold chain weighing ½ sovereign worn by the deceased and he with the intention to cause disappearance of the evidence took off the shirt and underwear worn by the deceased and threw them into the corner of the lean-to. At about 3 a.m. on 10.9.2005 the deceased regained consciousness and as the accused persons were sleeping by then, he

escaped from there and subsequently got admitted at E.M.S Memorial Co-operative Hospital, Perinthalmanna on that day itself. While undergoing treatment there he succumbed to the injuries at 1 p.m. on 11.9.2005. PW6, the son of deceased Raveendran Nair lodged Ext.P6 F.I.Statement and based on which Ext.P6(a) F.I.R. in Crime No.281 of 2005 of Agali Police Station was registered by PW20. The statements of PWs 6, 16 and 18 who are respectively the son, sister and wife of the deceased were recorded under Section 164 Cr.P.C. After completion of the investigation charge was laid before the Court of Judicial First Class Magistrate, Mannarkkad and that Court committed the case to Sessions Court, Palakkad. After assigning the number the case was made over to the Court of Additional Sessions Judge-I, Palakkad for trial and disposal. After preliminary hearing charge was framed under Sections 342, 302, 392 and 201 read with Section 34 of the Indian Penal Code against the accused persons. It was read over and explained to them and they pleaded not guilty.

3. To prove the charge against the appellants/accused prosecution examined 26 witnesses and exhibited 29 documents besides identifying MOs 1 to 10. Upon closure of the evidence of prosecution the accused/appellants were questioned under Section 313

of the Code of Criminal Procedure and they denied all the incriminating circumstances put to them. On finding that the accused persons are not entitled to be acquitted under Section 232 Cr.P.C. they were asked to enter on their defence. However, no evidence whatsoever has been adduced by the defence. The trial court on appreciation of the evidence on record arrived at the conclusion that the prosecution has succeeded in establishing the chain of circumstances pointing unerringly to the guilt of the accused persons and consequently convicted and sentenced them as aforesaid.

4. We have heard the learned Senior Counsel Sri.P.Vijaya Bhanu for the appellants in Crl.A.Nos.840 & 862 of 2011, the learned counsel Sri.B.Premod appearing for the appellant in Crl.A.No.1384 of 2011 and also the learned Public Prosecutor Smt. Jasmine.V.H.

5. The case of the prosecution rests on circumstantial evidence. Before considering the circumstances which were sought to be established by the prosecution to prove the guilt of the accused it will not be inappropriate to refer to the cardinal principles relating the appreciation of circumstantial evidence. The decisions on the said point

are aplenty and we do not think it necessary to conduct a survey on those authorities as constantly and consistently the Hon'ble Apex Court held the following circumstances as the principles to be followed in the matter of appreciation of circumstantial evidence:-

- “(i) The circumstances from which the conclusion of guilt is to be drawn must be or should be consistent and not merely ‘may be’ fully established.
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or any other hypothesis except that the accused is guilty.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) They should exclude every possible hypothesis except the one to be proved; and
- (v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

6. We will, now, refer to the evidence tendered by the prosecution. PW1 is the attesting witness to Ext.P1 scene mahazar prepared by PW25. PW2 is the attesting witness to Ext.P2 seizure mahazar relating the seizure of a Maruti Omni Van belonging to PW9, by PW25. PW3 is the witness to Ext.P3 inquest report prepared by

PW25. The said attesting witnesses admitted their signatures in the respective documents and virtually supported the case of the prosecution to the extent revealed from such documents. PW4 was the casualty medical officer at the relevant point of time at E.M.S. Memorial Co-operative Hospital, Perinthalmanna. He would depose that on 10.9.2005 at about 5.30 p.m. he examined deceased Raveendran Nair and issued Ext.P4 wound certificate noting the injuries on his body as hereunder:-

- "1) Black eye left, and
- 2) Pain over Abdomen and face."

He deposed that the deceased was vomiting and was drowsy when brought to the hospital and he would also depose that the cause of injury was divulged to him by the deceased as hereunder:-

"9.9.2005 ഉച്ച തിരിഞ്ഞ് ചെമ്മണ്ണൂരിലെ റേഷൻ കടയിൽ വെച്ച് 3 പേർ ചേർന്ന് മർദ്ദിച്ചതിനാൽ."

He would also depose that it is not noted in Ext.P4 as to who divulged about the cause of injury as aforesaid. He has also deposed to the effect that on examination he diagnosed acute renal failure. But, it is to be noted that the said aspect was not at all noted in Ext.P4 wound

certificate. PW5 was the then Secretary of Agali Grama Panchayat and according to him, the first accused was the owner of the building bearing No.XVII/289 of Agali Grama Panchayat. PW6 who is the son of deceased Raveendran Nair lodged Ext.P6 first information statement based on which Ext.P6(a) F.I.R. was registered. He deposed that on 9.9.2005 at 7 a.m. he saw his father going for redeeming his pawned gold ring. He deposed further that he again saw his father at Kalkandy junction at 12.00 noon on the same day while he was returning after taking back the said ring. PW6 was then attached to the Milk Co-operative Society at Mukkali as a tester and he deposed that on 9.9.2005 he was in the house of PW16 who is none other than his father's sister. He would further depose that while he was going to the milk society from the house of PW16 at 6.15 a.m. on 10.9.2005 he saw his father near the said house and at that time he was wearing only a white dhoti. He deposed further that he noticed a swelling on the face of his father and on being asked for its cause it was revealed as assault by Suresh Tharakan along with two Police Constables from Chemmannur. He would further depose that he led his father to the house of PW16 and then, after taking leave from the society, went to inform his mother about the incident. According to him, on his return

along with his mother (PW18) he asked his father whether he should be taken to the hospital, but his father told him to go and attend the marriage at Payyanedam and that he would come to the hospital only thereafter. Thereupon, PW6 went to attend the marriage and came back to the house of PW16 and in the meanwhile, Raveendran Nair became very weak and feeble. Thereupon, he along with his mother and friends took him to a hospital at Mannarkkad and from there to E.M.S. Memorial Hospital, Perinthalmanna. PW6 would also depose that from the hospital he asked his father as to what really had happened and thereupon, it was disclosed that he went to the ration shop of the first accused situated at Chemmannur and drank liquor from there with the first accused. While they were tippling accused Nos.2 and 3/the appellants in Crl.A.Nos.840 & 862 of 2011 who are Police Constables came there in mufti and they too, joined in libation and it was in a vivacious stage they came out of the room. When the deceased found the first accused smoking a *ganja beedi* he snatched it and thereupon the first accused slapped the deceased across his face. According to PW6, Raveendran Nair further told him that consequently, he fell down and thereupon, accused Nos.2 and 3 closed the doors and they belaboured him while he was lying on the floor. Thereafter they locked him in a room and went away. They returned after some time and

according to PW6, Raveendran Nair further disclosed to him that when he attempted to call one P.C.Baby over phone the appellants stated that they wanted to see what Baby could do to rescue him. He would further depose that the deceased told him that the first accused then asked the Police Constables to start the second programme and thereupon the Police Constables kicked him on his abdomen, ribs and chest besides pulling out and tearing his shirt and underwear. He further deposed that his father had also disclosed to him that he escaped from there while others were sleeping but, at the same time, the gold ring, blouse piece and spectacles could not be taken from the room. PW6 deposed that Raveendran Nair died at about 1 p.m. on 11.9.2005 while undergoing treatment. He has also deposed that his father divulged the names of the Police Constables who inflicted such injuries on him as Sunil and Prabhakaran. It is after the death of his father Raveendran Nair that PW6 went to the police station and gave Ext.P6 first information statement. PW7 is a taxi jeep driver who used to park his vehicle in Kalkandy junction. He deposed that on 10.9.2005 at about 5.30 (without disclosing whether it was in the dawn or in the evening) he received a telephone call at the telephone booth in Kalkandy junction. According to PW7, it was made by the first accused for the purpose of getting a taxi and thereupon, he took his taxi to the

ration shop belonging to the first accused and from there accused Nos. 2 and 3 got into the taxi and asked him to take them to Mannarkkad. When they reached Kanhiram the second accused alighted from the jeep and then he proceeded further with the third accused who got down at Kottappuram. According to PW7, while alighting from the jeep the third accused asked him whether he knew him and on being replied in the negative the third accused introduced himself as the policeman who broke the hand of another driver by kicking. He would depose that the policemen gave him ₹ 200/- (₹ 100/- each) for the purpose of filling fuel in the jeep and on the next day that is, on 11.09.2005 he went to the house of the first accused and received ₹ 300/- towards taxi fare. PW8 was then working as a salesman in the ration shop of the first accused. He turned hostile to the prosecution case and his entire previous statement was marked as Ext.P7. PW9 is the owner of the Omni Van which was seized by PW25 under Ext.P2 mahazar. He deposed that deceased Raveendran Nair and the three accused persons are known to him and that it was the first accused who asked him over telephone to reach the ration shop at 9.15 p.m. on 9.9.2005. He deposed further that when he reached the ration shop of the first accused in his Omni Van Raveendran Nair and all the accused were there in the room adjacent to the ration shop and that the first accused

introduced accused Nos.2 and 3 to him as his friends and police officers attached to Agali Police Station. PW9 deposed that he along with the first accused went to Pakkulam in his Omni Van and the first accused purchased a bottle of liquor from Pakkulam and thereafter they returned to the ration shop. He would also depose that thereafter he along with the first accused, the two policemen and Raveendran Nair drank liquor from the room which is adjacent to the ration shop. According to him, when he was about to leave the room at 10.30 p.m. accused Nos.1 to 3 also got into the vehicle for taking food from a hotel and that Raveendran Nair did not accompany them. He drove the vehicle and stopped it near the hotel situated in front of his house and thereafter since the vehicle could not be started again the accused persons got down from the vehicle and pushed it in the premises of his house. He would further depose that later he came to know from one of his friends by name Neelakandan that Raveendran Nair died from a hospital on 11.9.2005. He also deposed that on 13.9.2005 police seized his vehicle under Ext.P2 mahazar and he put his signature thereon and later got it released under Ext.P8 kychit.

7. PW11 was a Police Constable then attached to Agali Police Station. He turned hostile to the case of the prosecution. He

deposed that on 10.9.2005 at 9.00 a.m. on being asked by the Circle Inspector of Police he along with the Assistant Sub Inspector of Police and the police jeep driver attached to the said station, went to the ration shop of the first accused and conducted an enquiry about the assault allegedly taken place there. He would also depose that when being asked the first accused revealed to them that two Police Constables were lying there. Accordingly, they went inside and found accused Nos.2 and 3 lying on bed. He would also depose that after returning from the ration shop he informed the entire aspects to the Circle Inspector of Police. Strangely, he was sought to be declared as hostile and declared as hostile only during his re-examination and obviously, even after getting him declared as hostile he was not cross-examined. PW12 is one Jipson @ Kunjumani. He deposed that he knew the first accused from his childhood. He would also depose that they used to drink together and on 11.9.2005 he came to know that Raveendran Nair got injured from the ration shop of the first accused and thereupon he reached the ration shop at 3.30 p.m. and met the first accused. He would further depose that while they were drinking together from the adjacent room of the ration shop the first accused told him that Raveendran Nair was hospitalised. On being asked as to what happened to Raveendran Nair the first accused divulged to him

that Raveendran Nair, himself and the two policemen had taken drinks together from the said room and thereafter he had to pick up a quarrel with Raveendran Nair. He would also depose that the first accused further divulged to him that all of them assaulted Raveendran Nair and further that Raveendran Nair went away from there at night and Sunil and Prabhakaran, the two policemen went from there in the morning. PW12 would further depose that while he was taking drinks along with the first accused one driver came there and obtained taxi fare from the first accused and that he left from there by about 4.30 p.m.

8. PW13 was the Assistant Sub Inspector of Police then attached to the office of the Deputy Superintendent of Police, Agali. He deposed that the third accused was working in the office of the Deputy Superintendent of Police in connection with the investigation of Crime No.182 of 2005 and his duty was, then, being supervised by the Dy. S.P. On 9.9.2005 the third accused left the office stating that he was entrusted with a matter in connection with the said crime. But, he did not return to the office, it is further deposed. The evidence of PW14 is to the effect that he was approached by the deceased Raveendran Nair three months prior to his death, seeking help for pledging a ring and that he got it pledged with Mannarkkad Co-operative Bank for ₹ 1,500/-

and later, on 9.9.2005 he and the deceased went to the said Bank and reclaimed the pawned ring. According to PW14, the deceased sought to reclaim the same in connection with a marriage. PW15 was working as driver in Agali Police Station during the relevant period. According to him, he took the Assistant Sub Inspector of Police and PW11 to the ration shop at Chemmannur in the police jeep and on reaching there he along with PW11 entered the room that situated behind the back of the ration shop and found accused Nos.2 and 3 sleeping there. He would also depose that himself and PW11 informed the Assistant Sub Inspector of Police regarding the same.

9. PW16 is the elder sister of deceased Raveendran Nair. She deposed that on 10.9.2005 at 6.00 a.m. the deceased came to her courtyard wearing only a white dhoti. According to her, she noticed a swelling on his face and the deceased told her that he was assaulted by Suresh, the first accused. She would also depose that she noticed blood coloured patches all over the body of the deceased. PW16 along with PW6, took him to the house and though PW6 attempted to take him to a hospital Raveendran Nair was unwilling to go to hospital. Further she deposed that PW6 brought his mother, the wife of deceased Raveendran Nair to her house and when she asked the deceased about

the injury he divulged that the first accused slapped him when he snatched the *ganja beedi* being smoked by the first accused. It was also revealed that there were two Police Constables present in the room and they also kicked him on abdomen. PW16 deposed further that by about 12.00 noon he became so weak and when PW6 came to her house after attending a marriage by about 1.30 p.m. he took Raveendran Nair to the nearby hospital in a vehicle and that on the next day Raveendran Nair passed away. The evidence of PW17 who turned hostile to the case of the prosecution is to the effect that he was running a jewellery shop by name 'Maharani Jewellers' at Mannarkkad. According to him, Police have taken into custody a gold ingot weighing 3.460 grams from his possession, under Ext.P11 mahazer and he identified MO4 as the said gold ingot and had also admitted his signature in Ext.P11. PW18 is the wife of deceased Raveendran Nair. She deposed that her husband left the house at about 7 a.m. on 9.9.2005 for reclaiming the pawned ring, but he did not return thereafter. She deposed further that on the next day she saw him in the house of PW16 and that on seeing her Raveendran Nair caught hold of her hands and said that the first accused and two policemen assaulted him. It is her version that he revealed to have left the ring, watch, spectacles and a blouse piece there and had also complained of

acute pain on the navel area. She would further depose thus:-

Raveendran Nair stated to her that his private part was caught hold of and pulled and he disclosed to her the names of Police Constables who assaulted him as Sunil and Prabhakaran and further that he would not live for more than four hours. Raveendran Nair was taken firstly to a hospital at Mannarkkad by 2 p.m. on 10.9.2005 and from there he was taken to E.M.S. Memorial Hospital at Perinthalmanna. On 11.9.2005 she returned home and by about 4 p.m. on that day she came to know about the death of her husband. PW19 was working as Head Constable at Agali Police Station during 2005. Through him prosecution got marked a carbon copy of the General Diary maintained in Agali Police Station for the period from 9.9.2005 to 13.9.2005 as Ext.P13 subject to proof. He would also depose that he was on GD charge duty in the said police station from 8 a.m. on 9.9.2005 till 8 a.m. on 10.9.2005. He also deposed that accused Nos.2 and 3 were working as Police Constables at Agali Police Station in the year 2005 and going by Ext.P13 the second accused (P.C.3634) was doing law and order waiting duty on 9.9.2005 and the third accused (P.C.3773) was assigned duty at the Office of the Deputy Superintendent of Police, Agali. He would further depose that on 9.9.2005 at about 11 a.m. the second accused was sent for making an

enquiry on a complaint and he returned to the police station only at about 5 p.m. on that day and thereafter left the station for home. PW20 was the then Sub Inspector of Agali Police Station. He deposed that on 11.9.2005 at about 5 p.m. PW6 came to the Police Station and gave Ext.P6 statement and based on which he registered Ext.P6(a) F.I.R. He would also depose that Ext.P13 is the carbon copy of the GD maintained in the Agali Police Station during the period from 9.9.2005 to 13.9.2005. He deposed that going by the GD entry on 10.9.2005 the second accused did not come to the police station for doing beat duty though he was assigned such a duty and his failure to report duty was duly noted in the GD. He also deposed that the said fact was duly reported to the superior officer. PW20 deposed further as hereunder:-

Ext.P13 would reveal that the second accused did not report in the police station when the G.D was closed at 12 O' clock on the night intervening 10.9.2005 and 11.9.2005 and further that the third accused (PC 3773) also did not report for duty and he was absent. It would further reveal that as per the order of the Superintendent of Police accused Nos.2 and 3 were suspended from service at 10.30 p.m. on 12.9.2005. PW21 was the consultant Neurologist at E.M.S. Memorial Co-operative Hospital, Perinthalmanna during the year 2005. He would depose that on 10.9.2005 he examined the deceased Raveendran Nair

and Ext.P14 is the case sheet relating to the said Raveendran Nair. He also deposed that on examination Raveendran Nair was found in distress and he was drowsy. He had multiple bruises and left side ecchymosis and also had sub conjunctival haemorrhage. Radial Pulses were absent and brachial pulse was present, it was further deposed. According to PW21, Raveendran Nair had difficulty in breathing and his chest examination showed pleuro pericardial rub. It is further deposed that his Oxygen saturation was found very low and Raveendran Nair was in poly trauma with acute renal failure due to muscle lysis. In fact, such details were noted in the second page of Ext.P14. PW22 was working as the Secretary of the Rural Service Co-operative Bank, Mannarkkad during the relevant period. He deposed that he was working as such since 1989. Ext.P15 is the copy of the extract of the ledger relating the gold transaction in question. He deposed that going by Ext.P15, on 21.6.2005 one Jayan pledged a gold ring weighing 3.6 grams for ₹ 1,500/- in the said bank and the pawned ring was reclaimed on 9.9.2005. PW23 was working as Circle Inspector of Police at Agali from July, 2007. He deposed that he received summons from the court requiring him to produce the G.D of Agali Police Station for the period from 9.9.2005 to 13.9.2005 and thereupon he asked the Sub Inspector of Police to produce the same before the court. He came to

know that the original GD could not be traced out and therefore the copy of G.D for the aforesaid period kept in his office (Ext.P13) was produced in court, it was further deposed. Ext.P16 is the affidavit filed by him in that regard before the court. PW24 is the doctor who conducted autopsy on the body of Raveendran Nair. He issued Ext.P17 postmortem certificate. Ext.P18 histopathology examination report from the Pathology Department in the Government Medical College Hospital, Thrissur was also got marked through him.

10. PW25 was working as Circle Inspector of Police, Agali on 12.9.2005. He deposed that he took over the investigation in this case and conducted inquest on the body of Raveendran Nair from E.M.S. Memorial Hospital, Perinthalmanna. Ext.P3 is the inquest report. He recorded the statements of certain witnesses and sent the body of Raveendran Nair for postmortem. He would further depose that he prepared Ext.P1 scene mahazar on 13.9.2005 and from the place of occurrence, under Ext.P1, he took custody of MO3 watch, Ext.P19 letter, MO5 blouse piece and MOs 6 and 7 pairs of chappals. He filed Ext.P20 report showing the names and addresses of the accused persons and also took custody of Maruti Omni Van belonging to PW9 under Ext.P2 mahazar. After the postmortem MO8 Dhothi which was

worn by the deceased was also taken into custody under Ext.P21 mahazar. The first accused surrendered before him on 23.9.2005 and consequently he was arrested. He would further depose that on interrogation the first accused stated that the third accused took the underwear and a long sleeved check shirt of deceased Raveendran Nair from the room of the first accused and he threw it into the corner of the lean-to from the kitchen, at about 9.30 a.m. on 10.9.2005. According to PW25, the first accused gave Ext.P23 disclosure statement and in pursuance of which the underwear (MO9) shirt (MO1) were recovered from the south-western corner of the lean-to under Ext.P22 mahazar in the presence of witnesses. He filed Ext.P24 report incorporating the offence under section 201, IPC. He also filed Ext.P25 report incorporating the offence under Section 395, IPC. He took into custody MO2 dhoti worn by deceased Raveendran Nair which was produced by PW6 on 15.10.2005, under Ext.P26 mahazar. The second accused surrendered before the Court. The third accused surrendered before PW25 on 23.10.2005. PW25 further deposed that on questioning the third accused he stated to him that he sold the gold ring to one Sait belonging to Mannarkkad for ₹ 1,700/-. Based on Ext.P27 disclosure statement along with the third accused PW25 reached the house of PW17 Ashok Sait at 2.30 p.m. on 24.10.2005. PW17 produced MO4

gold ingot weighing 3.460 grams before the police stating that he had converted the ring into an ingot and thereupon it was taken into custody under Ext.P11 mahazar by PW25 in the presence of witnesses. PW26 was working as Deputy Superintendent of Police at Agali on 30.9.2006. He would depose that on 30.9.2006 he took over the investigation of the case and recorded the statements of witnesses. He would also depose that since the door number of the building was incorrectly shown in Ext.P1 he filed Ext.P28 report showing the correct number of the building as XVII/289. He got prepared Ext.P29 scene plan through CW35 Village Officer. After completing the investigation he laid the final report.

11. As noticed hereinbefore, the prosecution has adduced evidence as referred above, but, the defence did not adduce any evidence at all. It was after appreciating the evidence referred above and the arguments advanced by both sides that the trial court arrived at the finding that the prosecution had succeeded in establishing beyond any reasonable doubt that the accused persons have committed the offence of wrongful confinement of deceased Raveendran Nair and also committed his murder and consequently, convicted and sentenced them as aforesaid. A scanning of the judgment in question would

reveal that the trial court entered conviction against the appellants based on the following evidence and found that those circumstances which according to the trial court unerringly pointing out the guilt of the accused:-

- (1) The evidence of PW24 with Ext.P17 postmortem report showing that the death of Raveendran Nair was homicide.
- (2) The dying declarations made to PWs 6, 16 and 18.
- (3) The oral testimonies of PWs 6, 7, 9, 11, 13, 15, 16 and 18 to 20.

Therefore, essentially, the question is whether the aforesaid evidence and circumstances unerringly point out the guilt of the accused persons as held by the trial Court?

12. It was PW24 who conducted autopsy on the body of deceased Raveendran Nair on 12.9.2005 between 1.20 p.m. and 2.45 p.m. and issued Ext.P17 postmortem certificate. As per Ext.P17 he noted the following ante-mortem injuries:-

1. Bilateral contusions 12x7 cm muscle deep, 13x9 cm muscle deep over the right and left sides of prominence of face respectively.
2. Abrasion 0.5x0.5 cm over the right side of forehead 5.5cm outer to midline and 1.5cm above the outer 1/3rd of eyebrow.

3. Contusion 6x2.5x0.5 cm over the mucosal aspect of lower lip corresponding from one canine to the other.
4. Lacerated wound 1x0.5x0.3 cm over the inner aspect of lower lip across the midline and corresponding to incisors of right side.
5. Contusion 8x4 cm over the front of neck in the midline and extending to either sides of midline 6cm above the sternal notch.
6. Abrasion 1x0.6 cm over the back of right shoulder.
7. Abrasion over an area 8x1.5 cm over the back of right elbow varying in size from 0.6x0.6 cm to 2.5x1.3 cm.
8. Three abrasions 1.3x1 cm, 1.5x0.8 cm & 2x1 cm over the outer and inner aspect of right knee. (The first two were on the outer aspect of knee.)
9. Multiple small abrasions over an area 11x10 cm over the outer, front and inner aspects of lower part of left leg varying in size from 0.4x0.2 cm to 4.5x0.3 cm, 5cm above ankle.
10. Abrasion 7x4 cm over the front and outer aspects of left knee.
11. Abrasion 4.5x4 cm over the outer and back aspects of left thigh 21 cm below hip bone.
12. Multiple small abrasions over an area 4x1.5 cm over the back of left hand varying in size from 0.4x0.2 cm to 1x0.2 cm, 4cm below wrist, 3cm above the root of left index finger.
13. Multiple small abrasions over an area 16x7 cm over the back of left elbow and forearm varying in size from 0.4x0.3 cm to 2.5x1 cm.
14. Abrasion 4x0.5 cm oblique over the front of left side of

chest its outer end 5.5cm below nipple in the 10 O' clock position.

15. Abrasion 2x1 cm over the back of left shoulder.
16. Abrasion 1.5x0.5 cm over the right side of nape of neck

its inner end 2cm to the right of midline and 5cm above root of neck.

17. Abrasion 2x0.5 cm over the left side of face 0.5cm below ear lobule.
18. Multiple small abrasions over an area 10x9 cm over the left side of face and forehead varying in size from 0.6x0.5 cm to 1.3x0.5 cm.
19. Fracture of ribs 2-12 on the right side in the mid clavicular line, and 8-10 on the right side at the mid scapular line, 5,7 & 9 ribs on the midclavicular line and 10 at the midscapular on the left side. The right and left chest cavity contained 100 ml and 60 ml blood stained fluid.
20. Fracture of sternum in between 4 & 5th ribs transverse with infiltration of anterior mediastinum.
21. Laceration of small intestine 1x0.5 cm, 468cm away from the fixed point and peritoneal cavity contained 150 ml of blood stained fluid.

Beneath injury number (5) the subcutaneous tissues were found infiltrated with blood over an area 10x8x0.8 cm on the right side and on the left side 12x6 cm muscle deep. The hyoid bone, thyroid and cricoid cartilages were free of injuries."

PW24 opined that Raveendran Nair died due to the multiple injuries

viz., injury Nos.1, 5, 19, 20 and 21. He would further depose that injury Nos.1, 5, 19, 20 and 21 are sufficient in the ordinary course of nature to cause death and that they could be produced by kicking. Ext.P18 is the histopathology examination report received from Pathology Department of Government Medical College Hospital, Thrissur and it would reveal that the microscopy examination of kidney showed focal areas of coagulative necrosis of tubules with tubular casts in the lumen and interstitium showed haemorrhage and oedema. Glomeruli had only congestion going by the same and the impression showed extensive fatty degeneration with evidence of hepatocellular regeneration of liver. It is further stated in Ext.P18 as hereunder:-

“Lung shows congestion with changes suggestive of pulmonary oedema. Oesophagus shows mucosal infarct. Kidney shows features suggestive of Acute Tubular Necrosis.”

PW24 further deposed that the deceased sustained multiple rib fracture and fracture in sternum and it would interfere with respiratory movement resulting in hypoxia and further that hypoxia could precipitate kidney failure. He also explained the situations by which renal failure could occur. Taking note of the very nature of the injuries

particularly injury Nos.1, 5, 19, 20 and 21 as is evident from Ext.P17 we see no reason to disagree with the conclusions arrived at by PW24 to the effect that Raveendran Nair died due to multiple injuries viz., injury Nos.1, 5, 19, 20 and 21 and those injuries are sufficient in the ordinary course of nature to cause death. In the said circumstances, the irresistible conclusion can only be that the death of Raveendran Nair is homicide.

13. Now, the next question is who are the culprits ? As stated hereinbefore, the case of the prosecution rests on circumstantial evidence and the evidence of dying declarations made to PWs 6, 16 and 18. We have already taken note of the circumstances relied on by the prosecution to substantiate the charge against the accused. A scanning of the evidence would reveal that virtually, the prosecution has also advanced the last seen theory through the evidence of PW9. There can be no doubt with respect to the position that the last seen theory can be applied only in a case where the evidence is to the effect that the accused and the deceased were lastly seen together. Did PW9 depose that he had seen the deceased lastly only in the company of the accused persons/appellants ? We have already discussed the evidence

of PW9. He had actually deposed to the effect that he obtained a telephonic call to reach the ration shop belonging to the first accused at 9.15 p.m. on 9.9.2005 and when he reached the ration shop of the first accused in his Omni Van he found Raveendran Nair and accused Nos.2 and 3 also in a room adjacent to the said ration shop. According to him, the first accused introduced accused Nos.2 and 3 to him as policemen attached to Agali Police Station and further told him that they are his friends. He has categorically deposed that thereafter he along with the first accused went to Pakkulam in his Omni Van and purchased one bottle of liquor and thereafter he along with accused Nos.1 to 3 and Raveendran Nair drank the same from the said room which is adjacent to the ration shop. What is relevant to note in the context of the contentions is his deposition to the effect that thereafter except Raveendran Nair all of them left the room for taking food in his Omni Van and further that he stopped the vehicle near a hotel situated in front of his house and thereafter owing to starting trouble of the vehicle they pushed it inside the premises of his residential house. He would also depose that he came to know from one of his friends by name Neelakandan that Raveendran Nair died from the hospital on 11.9.2005. Thus, a scanning of his evidence would reveal that PW9 did not depose that he had lastly seen the deceased in the company of the appellants-accused whereas

his definite version is that when he along with the appellants left the said room after intoxication the deceased Raveendran Nair alone was there in the room. He did not depose that thereafter also he had seen the deceased in the company of the appellants. In the circumstances, we got no hesitation to hold that the evidence of PW9 could not be relied on to contend that the deceased was lastly seen in the company of the appellants to make liable to explain what happened thereafter to escape from a prejudicial conclusion.

14. The prosecution tendered evidence through PW11 and PW15 to establish that on 10.9.2005 at 9 a.m. the Circle Inspector of Police directed the Assistant Sub Inspector of Police to conduct an enquiry regarding an assault occurred in the ration shop at Chemmannur. Both PWs 11 and 15 deposed to the effect that pursuant to the direction of the Assistant Sub Inspector who received such a direction from the Circle Inspector of Police they went to the ration shop at Chemmannur. A perusal of the oral testimonies of PWs 11 and 15 would reveal that there is incongruity with respect to the date on which they went to the ration shop in question pursuant to such direction. While PW11 deposed to the effect that he along with others reached the ration shop on 10.9.2005 at 9 a.m. the evidence of PW15

is to the effect that they went there on 9.9.2005 at 9 a.m. Their oral testimonies are to the effect that on such inspection they found accused Nos.2 and 3 lying asleep on a bed in a room behind the ration shop of the first accused. At the same time, it is to be noted that the Assistant Sub Inspector of Police who claimed to have received an information from the Circle Inspector of Police on the aforesaid line and with whom PWs 11 and 15 allegedly went to the ration shop of the first accused was not at all examined by the prosecution. In fact, he was cited as CW39, but, he was given up by the prosecution. Above all, it is to be noted that the Circle Inspector of Police who allegedly gave such a direction while being examined as PW25 did not support the versions of PWs 11 and 15. In other words, he did not depose that on 10.9.2005 at about 9 a.m. he instructed the Assistant Sub Inspector of Police attached to Agali Police Station to conduct an enquiry regarding an assault taken place in the ration shop at Chemmannur, as deposed by PWs 11 and 15. Yet another aspect borne out from Ext.P13 which is the carbon copy of the General Diary of Agali Police Station is also relevant in this context. However, we are also of the view that another question will crop up for consideration, even before going into that aspect, viz., whether Ext.P13 could be relied on in the following circumstances:-

PW19 through whom the said document was marked deposed to the effect that it is the carbon copy of the GD maintained in the Agali Police Station for the period from 9.9.2005 to 13.9.2005. He deposed thus:-

“എന്നെ കാണിച്ചത് 9.9.2005 മുതൽ 13.9.2005 വരെയുള്ള സ്റ്റേഷനിൽ സൂക്ഷിച്ചിരുന്ന GDയുടെ കാർബൺ പകർപ്പാണ്”.

He would also depose that he had been in GD charge of the said police station from 8 a.m. on 9.9.2005 till 8 a.m. on 10.9.2005. PW20 who was then working as Sub Inspector of Police, Agali Police Station would depose to the effect that Ext.P13 is the copy of GD maintained in Agali Police Station for the period from 9.9.2005 to 13.9.2005. The evidence of PW23 who was then working as Circle Inspector of Police, Agali Police Station since July, 2007 would reveal that he received summons from the court directing him to produce the GD of Agali Police Station for the period from 9.9.2005 to 13.9.2005. According to him pursuant to the receipt of the summons he directed the Sub Inspector of Police to produce the GD in court and in turn, he was told that the original of the GD for the said period could not be traced out. The evidence of PW23 would further reveal that in such situation the copy of the GD of Agali Police Station for the period from 9.9.2005 to 13.9.2005 kept in his

office was produced before the court along with Ext.P16 affidavit and it was the same that was subsequently marked as Ext.P13. As noticed hereinbefore, in the light of Ext.P16 affidavit Ext.P13 was marked subject to proof. The position of law relating to admission of secondary evidence is to the effect that the party seeking admission of secondary evidence has to lay foundation for the same. In this case, evidently, the prosecution has brought on record an affidavit from PW23 viz., Ext.P16 to the effect that on enquiry it was found that the original of the GD entries pertaining to the period from 9.9.2005 to 13.9.2005 could not be traced out and at the same time, a carbon copy of the same was available in his office. It was that carbon copy of the GD pertaining to the said period which was marked as Ext.P13 subject to proof through PW20 who was working as Sub Inspector of Police, Agali Police Station on 11.9.2005. It is thereafter that PW23 who filed Ext.P16 affidavit was examined and he deposed to the tune that it was kept in his office and that its original was not there at Agali Police Station. In such circumstances, we are of the considered view that the prosecution has actually laid down the foundation for accepting the said secondary evidence and therefore, Ext.P13 was rightly admitted in evidence. But then, the question is how much credence could be given to the oral testimonies of PW11 and PW15 if their versions could not

reconcile with the entries in Ext.P13. A perusal of the entries in Ext.P13 would reveal that there is absolute absence of any entry which would indicate that PWs 11 and 15 along with Assistant Sub Inspector of Police left Agali Police Station for conducting an enquiry at 9 a.m. on 10.9.2005. It is in this context that the evidence of PW25 assumes relevance. PW25 did not support the versions of PWs 11 and 15 to the effect that they left the police station along with the Assistant Sub Inspector who was given instruction by PW25 to conduct such an enquiry and PW25 did not even have a case that he gave instructions to the ASI to conduct an enquiry on that day. When that be so, the evidence of PWs 11 and 15 to the effect that they went to the ration shop at Chemmannur belonging to the first accused along with the Assistant Sub Inspector as instructed by the Circle Inspector, Agali and there the first accused told them that accused Nos.2 and 3 were sleeping inside the room cannot be believed. An analysis of the endeavour of the prosecution by adducing evidence through PW9, PW11 and PW15 would suggest that virtually, the attempt is to bring out the circumstances, prior and subsequent, which would fall within the purview of Section 8 of the Evidence Act. The evidence of PW9 was adduced to show that accused Nos.1 to 3 along with Raveendran Nair were there inside the ration shop in question during the night of

9.9.2005 and that all of them had consumed liquor from there and though the accused left the ration shop leaving behind the deceased in the shop they had returned and stayed in the same room. The contention of the learned Public Prosecutor in the said circumstances is to the effect that in the absence of any proper explanation from the appellants/accused conclusions arrived at by the court below based on the evidence on record could not be said to be one resulting from perverse appreciation of the evidence. We have already considered the oral testimony of PW9. On analysing the evidence of PW9 it can be seen that till about 10.30 p.m. on 9.9.2005 nothing untoward happened inside the room from where they had drinks in a cordial atmosphere and thereafter the accused persons left the room along with him for taking food leaving Raveendran Nair there. However, it is pertinent to note that there is nothing in the evidence of PW9 which would indicate that thereafter the accused persons have returned to the room adjacent to the ration shop. Thus, it can be seen that the evidence of PWs 11 and 15 are tendered to establish that the accused persons were found sleeping inside the said room in the morning of 10.9.2005 and to canvass the position that it would indicate that the accused persons had returned to the room in question in the night of 9.9.2005 itself. But, then, in the light of Ext.P13 and also going by the evidence of PW25 the

fact that they left the police station at about 9 a.m. on 10.9.2005 cannot be believed. In fact, it would reveal that the Assistant Sub Inspector was very much remained in the police station till 10.30 hours on that day and he was in charge of the General Diary. There is also no reason for treating that it was another Assistant Sub Inspector of Police who was instructed by the Circle Inspector and he left the police station along with PWs 11 and 15 as PW25 who allegedly gave such an instruction has specifically denied to have given any such instruction. It is to be noted that there is absolute absence of any entry in Ext.P13 indicating that PWs 11 and 15 along with the Assistant Sub Inspector of Police, Agali had left the Police Station at 9 a.m. on 10.9.2005 to conduct an enquiry in relation to an assault taken place in the ration shop at Chemmannoor. But, at the same time, the prosecution essentially, produced Ext.P13 to prove that accused Nos.2 and 3 were not actually on duty on 10.9.2005. It would reveal that even on 10.9.2005 they were assigned with duties. The said document was produced also to show that though they were assigned with such duties they did not actually turn up in the police station to discharge the duties assigned to them and their absence was duly noted by the officials and it was also duly intimated to the superior officers. But, when a document is produced and is admitted in evidence the prosecution

cannot be heard to contend that certain entries alone can be looked into and certainly, the entire entries could be looked into by the Court. As noticed hereinbefore, the learned counsel for the first accused contended that PW11 deposed to the effect that the fact that he along with the Assistant Sub Inspector of Police and PW15 left Agali Police Station for the aforementioned purpose was not duly recorded in the GD and at the same time it would reveal that all the matters which were to be entered in a General Diary were duly entered therein. If the station vehicle was used and the Assistant Sub Inspector along with another Head Constable left the station for enquiry regarding an assault occurred in a particular place, on the instruction by the Circle Inspector of Police, it should have been duly entered in the General Diary. It is a fact that in this case when the Circle Inspector of Police who allegedly gave such instruction viz., PW25 did not support the factum of issuing such an instruction and that fact gets corroboration from the entries in the GD viz., from Ext.P13 necessarily it has to be believed and taken as the correct position. If that is believed, the evidence of PWs 11 and 15 to the effect that they along with the Assistant Sub Inspector left the police station and went inside the ration shop and at that point of time they were told by the first accused that accused Nos.2 and 3 were sleeping inside and that they had actually seen accused Nos.2 and 3

sleeping there, cannot be believed. Even if records would reveal that accused Nos.2 and 3 were absent from duty on 10.9.2005 or on subsequent days, that by itself is no reason for arriving at the conclusion that they are the persons who committed the offences involved in this case.

15. Yet another contention raised before us is that in this case, wholesale marking of the previous statements of witnesses was made though such marking was impermissible in law. To buttress the said contention the learned counsel relied on the decision of a Division Bench of this Court in **Imbayi v. State (1989 (1) KLT 956)**. It is contended that portions of statements with which the witnesses were not specifically contradicted nor properly proved through the Investigating Officer could not even be used for discrediting the witnesses. In the said decisions the intention behind Section 162 Cr.P.C. was highlighted as one to protect the accused from being prejudicially affected by any dishonest or questionable method adopted by a police officer. It is held that a combined reading of Sections 161 and 162 Cr.P.C. would reveal that the attention of the witness has to be called upon to the previous statement before proving the same. If the witness admits the previous statement or explains the discrepancy or

contradiction it obviously would make it unnecessary to prove the same after marking it. At any rate, it is well settled position of law that before using the previous statement the concerned witness must be afforded with a reasonable opportunity of explaining the contradictions after his attention has been drawn to such statements in a fair and reasonable manner. Following the dictum in **Imbayi's** case (supra) such statements of PWs 8 and 10 cannot be used even for discrediting them as they were not specifically confronted with the statements and thereby they were denied an opportunity for admission, denial or explanation. In this case, evidently, both PWs 8 and 10 turned hostile to the prosecution. It was without putting any specific portion of their previous statements that their entire previous statements were got marked. The relevant portions in paragraphs 6 and 7 of the said decision read thus:-

"The prosecutor seems to have resorted to an unusual and irregular method, in violation of S.162, to get the entire case diary statements of these witnesses marked en bloc. The case diary statements in full were not incorporated in the depositions. Instead, the beginning and end were put in inverted comas with dotted lines in between. Case diary statements contain contradicted and uncontradicted portions. The portions sought to be contradicted were not put to the witnesses. They were not duly proved by putting to the investigating officer also.

Instead, he was made to swear generally that they said "as stated in Exts.P2, 3 and 7". Neither S.162 of the Code of Criminal Procedure nor S.145 of the Evidence Act was complied with in form. But it cannot be said that there was no compliance in substance or that prejudice resulted. This Court has occasion to remind judicial officers of the irregularity of resorting to such method of whole sale marking of case diary statements. What is required to be done is when a witness is called for the prosecution in the inquiry or trial consequent on the investigation during which his statement is recorded under S.161 and when occasion arises, any part of his statement necessary should be put to him for contradiction as provided in S.145 of the Evidence Act and duly proved through the investigating officer who recorded the same. The witness must get an opportunity of admitting or denying that statement or to give his own `explanation which will have to be considered by court. If denied the statement will have to be duly proved also. Then only it becomes admissible through the admissibility is only to be used for contradicting, discrediting or considering the veracity of that witness and not otherwise to be used as substantive evidence. A contradicted and denied statement, even if duly proved, cannot be used as substantive evidence against the accused. It cannot be said that the said admission of the trial only if there is prejudice. Anyhow, the portions of the statements with which the witnesses were not specifically contradicted nor properly proved through the investigating officer cannot be used even for discrediting the witnesses because they were not specifically confronted with these statements thereby denying an opportunity admission, denial or explanation."

In the light of the aforesaid decisions though marking of such

statements is an irregularity it could vitiate the trial only if there is prejudice. That essentially, is a matter to be established by the defence. However, the appellants could not bring out the factor of prejudice so as to canvass the position that it vitiated the trial.

16. The prosecution has also relied on the oral testimony of PW12 to connect the appellants/accused persons with the crime. PW12 deposed that he is a friend of the first accused and they used to drink together. He deposed that on 11.9.2005 he went to the ration shop belonging to the first accused and there he had drinks with the first accused. He further deposed to the effect that while they were consuming liquor the first accused divulged to him that he along with two other policemen by name Sunil and Prabhakaran assaulted Raveendran Nair. According to PW12, to his queries the first accused replied thus:-

"സുരേഷ് തരകനും സുനിൽ സാറും, പ്രഭാകരൻ സാറും രവീന്ദ്രൻ നായരും മദ്യപിച്ച് വഴക്കായി എല്ലാവരും കൂടി രവീന്ദ്രൻ നായരെ മർദ്ദിച്ചു. എന്ന് 1-)ം പ്രതി എന്നോട് പറഞ്ഞു. രാത്രി രവീന്ദ്രൻ നായർ പോയി. സുനിൽ സാറും പ്രഭാകരൻ സാറും രാവിലെ പോയി. എന്നും 1-)ം പ്രതി എന്നോട് പറഞ്ഞു."

According to PW12, he left there by about 4.30. While being cross

examined for the first accused PW12 would depose that he is a drunkard and he used to consume alcoholic drinks at least 15 days in a month. He would also depose that he came to know about the fact that Raveendran Nair had sustained injuries at about 2 p.m. on 11.9.2005 and in fact, it is to enquire about the same that he went to the first accused. He would further depose that while they were taking liquor one driver came there and received the taxi fare. In this context, it is to be noted that going by the case of the prosecution it was PW7 Jose @ Unni who took accused Nos.2 and 3 when being called over phone by the first accused at about 5.30. But, at the same time, it is to be noted that he did not specifically state as to whether he took them in his taxi jeep in the morning or in the evening. His further evidence is to the effect that when he reached Mukkali Junction along with accused Nos.2 and 3, one Jolly who is the son of one Mary came near the jeep and accused No.3 handed over a letter to the said Jolly stating that it was a letter addressed to the Circle Inspector of Police. According to PW7, after reading the same Jolly returned the same to the second accused who in turn handed it over to the third accused. Though the case of the prosecution is like that the letter which was recovered later and identified as Ext.P19 would reveal that it is a letter addressed to the Sub Inspector of Police, Agali Police Station and not to the Circle

Inspector of Police. What is relevant in the context of the evidence of PW12 is that PW7 deposed to the effect that he went to the ration shop of the first accused on 11.9.2005 and received an amount of ₹ 300/- from him towards the taxi fare. The prosecution relied on the evidence of PW12 to contend that what was revealed by the first accused to PW12 is an extra judicial confession. The question is whether the extra-judicial confession allegedly made to PW12 could be believed or not ? Firstly, it is to be noted that an extra-judicial confession is only a weak piece of evidence. That apart, in this case, it is to be noted that going by the evidence of PW12 he met the first accused on 11.9.2005 at about 3.30 p.m. According to him, they had drunk alcoholic liquor from there with the first accused and it is after about $\frac{1}{2}$ - $\frac{3}{4}$ hours since his arrival there that he asked the first accused regarding the incident and it was thereupon that the first accused made the aforementioned extra-judicial confession. While being cross examined for the first accused he would further depose that he returned from there by about 4.30 and that he was questioned by the police on 17.9.2005. He would further depose that in fact, he was summoned to the police station and before disclosing this fact to the police he has not divulged this fact to anybody. He stated thus:-

"17.9.2005 തീയതി പോലീസ് എന്നോട് ചോദിച്ചു. എന്ന പോലീസ് സ്റ്റേഷനിലേക്ക് വിളിപ്പിച്ചതാണ്. പോലീസിൽ പറയുന്നതിന് മുൻപായി ഈ വിവരം ഞാൻ വേറെ ആരോടും പറഞ്ഞില്ല."

Thus it can be seen that if PW12 is believed the fact that such an extra-judicial confession was made by the first accused to him is known only to himself and the first accused at least up to 17.9.2005. It is to be noted that the first accused was arrested by the police only on 23.9.2005. In such circumstances, the question is who passed on the information to the police that the first accused had made an extra-judicial confession to PW12 or what were the circumstances that constrained the police to summon PW12 to the police station ? In this context, it is to be noted that PW12 himself admitted the fact that he is a habitual drunkard who used to drink at- least 15 days in a month and further more that he is a friend of PW6, the son of the deceased. While considering the evidentiary value of the alleged extra-judicial confession by the first accused to him evidently, the trial court relied on a decision of the Hon'ble Apex Court in **Ghasiram Lakra v. State of Orissa (1997 CrI.L.J. 939)**. The said decision is worthy to be quoted. It reads thus:-

"7. While considering the evidentiary value of an extra-judicial confession, it is to be borne in mind that such confession is not a normal reaction of an accused. It is not a natural act. It is not an ordinary affair. It is, in fact, against the natural human proclivity. While accepting the extra-judicial confession as a truthful aspect of the evidence, the Court has to be, very cautious. An extra-judicial confession in order to be acted upon, must stand the test of reproduction of the exact words and it must be shown by the prosecution as to what was the reason or motive for an accused to make an extra-judicial confession and as to whether the accused would repose confidence in the person before whom such a confession is made"

(emphasis added)

All the aforementioned circumstances and aspects were taken into consideration by the trial court to arrive at a conclusion that the evidence of PW12 could not be treated as credible evidence. We do not find any reason to disagree with the conclusions arrived at by the trial court with respect to the evidentiary value of the oral testimony of PW12 in the aforesaid circumstance. We have already found that the evidence of PW9 even if taken to have established the fact that the accused, the deceased and himself had drinks together his oral testimony would further go to show that up to 10.30 p.m. on 9.9.2005 all of them were in cordial terms and it was in such circumstances that all the others except the deceased Raveendran Nair went along with

him for taking food.

17. When the evidence of PWs 11 and 15 was held as unreliable in the light of the evidence of PW25 and Ext.P13 what survives for consideration is whether the findings of the court below regarding the guilt of the accused and the consequential conviction could be sustained in the light of the dying declarations made to PWs 6, 16 and 18. The learned Senior Counsel appearing for the appellants in Crl.A.Nos.840 and 862 of 2011 (accused Nos.2 and 3) contended that in the light of the evidence of PW9 the dying declarations made to PWs 6, 16 and 18 could not be relied on to enter conviction against the appellants. He has also relied on certain other circumstances to canvass and support the contention that those dying declarations cannot be the basis for conviction. According to the learned Senior Counsel the evidence of PW9 and those declarations could not co-exist and in fact, they cannot be construed as dying declarations. It is also contended that apart from the evidence of PW9 there was absolute absence of any evidence to connect accused Nos.2 and 3 with the aforesaid crime. It is contended that though the case of the prosecution is that MO10 contained stub of *ganja beedi* there is nothing on record to show that they were sent for analysis and if at all they were sent no report of

analysis has been legally brought on record. So also, it is contended that though Ext.P1 scene mahazar prepared by PW25 would reveal that the test inspector had collected finger prints from the glass and cigarette packets and also from steel vessels the prosecution has not explained as to what happened to such materials collected and whether they were subjected to analysis and if so, what is the result of such analysis. When it is evident that finger prints were collected from such materials, in the circumstances, it can only be said that the best evidence was withheld. In such circumstances, the learned Senior counsel contended that an adverse inference ought to be drawn against the prosecution. The learned Senior counsel also drew our attention to the deposition of PW9 while being cross examined on behalf of the second accused. It would reveal that PW9 would admit the fact that after the occurrence police have shown PW9 the accused policemen. It is to be noted that PW9 had not revealed the identity of the policemen when statement was taken from him for the first time. In the said circumstances, it is contended that when police have shown the accused persons to the witness his identification of the accused from the court got no significance at all and it could not be treated as a piece of evidence and to buttress the said contention the learned counsel relied on a decision of the Hon'ble Apex Court in **Mohanlal Gangaram**

Gehani v. State of Maharashtra (AIR 1982 SC 839). It is the contention that the evidence of PW9 is not reliable for the reason that a scanning of the dying declarations allegedly made to PW6, 16 and 18 would reveal the absolute absence of any mention regarding the presence of PW9 in the scene of occurrence, in them. That apart, it is contended that while being cross examined PW9 could not give any details regarding the brand of the liquor or the quantity of liquor claimed to have been purchased by the first accused when both of them went to Pakkulam in his Omni Van, on 9.9.2005. It is also contended that there was no proper identification of the accused persons by any of the prosecution witnesses from the court inasmuch as, none of them pointedly identified any of them from the court though in the case of accused Nos.2 and 3, they made mere reference about them during their examination. The learned counsel for the appellant in Crl.A.No.1384 of 2011 contended that when there are multiple dying declarations it is unsafe to rely on them to arrive at the guilt of the accused, if they are in conflict with each other. In support of the said contention the learned counsel relied on the decision of the Hon'ble Apex Court in **Smt.Kamala v. State of Punjab (1993 KHC 842)**. It is contended that the court has to satisfy that the dying declaration relied on by the prosecution is a truthful dying declaration and it is not

vitiated in any manner. In the said circumstances, the learned counsel for the appellant in Crl.A.No.1384 of 2011 contended that a perusal of the dying declaration allegedly made to PW6 would reveal that it would not tally with his statement in Ext.P6. In such circumstances, it would be unsafe to act upon the dying declarations on the premise that they are truthful dying declarations, it is contended. Per contra, the learned Public Prosecutor contended that the court below had properly appreciated the evidence and arrived at the right and proper conclusion that the prosecution has succeeded in establishing the guilt of the accused. It is also contended that there is absolutely no basis for the contention that the dying declarations made to PWs 6, 16 and 18 are not truthful declarations that could be relied on as the basis for conviction. It is also contended that though no corroboration is required for dying declarations, in this case, certain other materials would justify the reliance placed on those dying declarations. It is also contended that the evidence of PW4 would reveal that immediately after the incident when the deceased was brought to him on 10.9.2005 he noted in Ext.P4 with regard to the cause of injury thus:-

“9.9.2005ൽ ഉച്ച തിരിഞ്ഞ് മൂന്ന് പേർ ചേർന്ന് ചെമ്മണ്ണൂരിലെ റേഷൻ കടയിൽ വച്ച് മർദ്ദിച്ചതിനാൽ.”

It is further contended that there is absolutely no reason for doubting

the truthfulness of the dying declarations made by the deceased Raveendran Nair to PWs 6, 16 and 18 and they would categorically reveal that he sustained the fatal injuries at the hands of the appellants/accused and the evidence of PW9 would rule out the culpability of anyone other than the appellants/accused. It is also contended that going by the well settled position that there could be conviction based on dying declarations even without any corroboration the appellants cannot be heard to say that in the absence of any corroboration the dying declarations to PWs 6, 16 and 18 could not have been the basis for the conviction. In short, the learned Public Prosecutor contended that the appellants have failed to bring out a case for appellate interference. While considering the rival contentions relating dying declarations the decision of the Hon'ble Apex Court in **State of Assam v. Mafizuddin Ahmed (1983 KHC 260)** would assume relevance. The position is well settled therein that there can be conviction based on the dying declaration and it is not at all necessary to have a corroboration for a dying declaration. The said position was restated by the Hon'ble Supreme Court in the decision in **Ashabai and Another v. State of Maharashtra** reported in **AIR 2013 SC 341**. But, at the very same time, in the **Mafizuddin Ahmed's** case (supra) the Hon'ble Apex Court held that the court has to satisfy that the dying

declaration is a truthful one and not vitiated in any other manner. Therefore, we are of the view that the sustainability or otherwise of the findings of the court below now rests on the question regarding the reliability or otherwise of the dying declarations made to PWs 6, 16 and 18.

18. The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under Section 32(1) of the Evidence Act in a case in which the cause of that person's death comes into question. Certainly, a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is therefore, not tested by cross examination on behalf of the accused. But, a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The gist is that the statement of a person who is dead is relevant only when that statement is made by that person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and that too, in a case where the cause of that person's death comes as the question. The principle that no man at the point of his

death is presumed to lie and the maxim '*nemo moriturus proesumitur mentin*' that means, 'a man will not meet his maker with a lie in his mouth', are based on the sound public policy". Certainly, a duty is cast upon the court to examine a dying declaration with due care and caution so as to find whether the dying declaration is creditworthy for acceptance. In other words, the question is whether it is capable of inspiring confidence so as to be the sole basis for recording conviction. It is well-nigh settled that if a dying declaration is capable of inspiring confidence it could be the sole basis for conviction. Bearing in mind what is stated above as also the relevant decisions on the subject we will consider the question whether the dying declaration made to PWs 6, 16 and 18 are creditworthy ?

19. The learned counsel appearing for the appellants contended that when multiple dying declarations are available it would be unsafe to rely on such dying declarations to enter into a finding of conviction. The said aspect has to be looked into in the light of the decision of the Hon'ble Apex Court in **Smt.Kamla v. State of Punjab (1993 KHC 842)**. The crux of the decision is that the dying declaration should satisfy all the necessary tests and one such important test is that in a case where there are more than one dying

declarations they should be consistent, particularly in material particulars. In other words, in a case where multiple dying declarations are available they should not be in conflict with one another. As noticed hereinbefore, in this case, the prosecution relied on the dying declarations made to PWs 6, 16 and 18 and evidently, twin objections have been raised by the accused to mount challenge against their credibility and admissibility. It is contended that nowhere in the said dying declarations the presence of PW9 has been mentioned. Secondly, it is contended that deceased Raveendran Nair was not in a fit mental condition to make such a declaration. While considering the sustainability of the first objection it is appropriate to refer to a decision of the Hon'ble Apex Court in **Heeralal Yadav v. State of M. P. and Ors.** (AIR 2006 SC 2535). In fact, in the said case, a plea was also taken that considering the nature of injuries sustained by the deceased he must not have been in a position to give such a declaration. In other words, he was not in a fit mental condition to give dying declaration. That was a case where the trial court convicted the accused for the offence under Section 302 read with Section 34 of the Indian Penal Code and for entering into conviction the trial court relied on the dying declarations. The High Court reversed the conviction recorded by the trial court on the sole ground that the dying declaration

did not inspire confidence. It is in that context that the Hon'ble Apex Court considered the correctness of the decision of the High Court. Paragraphs 7 and 8 therein would reveal that the High Court in that case rejected the dying declarations of the deceased recorded by PW1 therein, on the ground that the presence of the son of the deceased at the scene of occurrence was not at all mentioned and his name was not mentioned in the dying declaration. In paragraph 9 therein the Hon'ble Apex Court held thus:-

9.From the above-quoted reasoning of the High Court, we are unable to discern the logic of the High Court's reasoning. Presence or non-presence of PW-3 at the scene of occurrence or for that matter non-mentioning of the name of PW-3 in the dying declaration has no connection with ascertainment of the veracity and creditworthiness of the dying declaration. In fact, the High Court did not discuss the veracity and creditworthiness of either the dying declaration recorded by PW-1 or the testimony of PW-1 Dr. Khan deposed before the Court."

(underline supplied)

In the light of the decision referred supra, we are of the view that the objection raised by the defence that the non-mentioning of the name of PW9 by the deceased cannot be accepted as a reason for rejecting the dying declaration. Coming to the second objection regarding the mental condition of the deceased at the time of making the dying

declaration we are of the view that the evidence on record itself would make it clear that it is absolutely bereft of any basis. The evidence on record especially, the testimony of PW6, would reveal that in the morning of 10.9.2005 at about 6.15 a.m. he found his father near the house of his aunt viz., PW16. PW16 would depose that at that point of time he was wearing only a white dhoti and she would further depose that along with PW6 she took him inside the house. Further, the evidence of PWs 6 and 16 is to the effect that thereafter PW6 went to fetch his mother and returned along with his mother viz., PW18 to the house of PW16. The further evidence is to the effect that though PW6 insisted the deceased Raveendran Nair to go to a hospital not only he was reluctant to go to hospital but also he made his son to go and attend a marriage. The consistent version of PWs 6, 16 and 18 is to the effect that Raveendran Nair made PW6 to go and attend the marriage and told them that he would go to the hospital when once PW6 returns after attending the marriage. The deceased Raveendran Nair felt uneasiness after his son-PW6 left for attending the marriage. It is to be noted that in the meanwhile, he made an initial disclosure to his son-PW6 and with respect to the incident his sister-PW16 put certain question to him and he has also divulged to her as also to PW18 as to how he sustained injuries. PW6 deposed to the effect that Raveendran

Nair told him that he was assaulted by Suresh Tharakan of Chemmannur along with two Police Constables and according to him such a disclosure was made when he first saw his father near the house of PW16. PW16 who is the elder sister of deceased Raveendran Nair deposed that she found him coming to her courtyard at 6 O' clock on 10.9.2005 and at that time he was wearing only a dhoti and she deposed to the effect that she along with PW6 took him to her house and then, she noticed a swelling on his face and on being asked for its reason he disclosed that he was assaulted by Suresh, the first accused. She would also depose that though PW6 attempted to take Raveendran Nair to a hospital he was unwilling to go to hospital and in fact, he made him to go and attend a marriage. Further, PW16 deposed that she asked Raveendran Nair about the injury and on being asked he stated to her that the first accused was smoking *ganja beedi* and when he knocked it away the first accused slapped him. He further disclosed to her that there were two Police Constables and they stamped on his belly and abdomen. According to her, he disclosed to her thus:-

"സുരേഷ് കഞ്ചാവ് ബീഡി വലിച്ചപ്പോൾ രവീന്ദ്രൻ തട്ടി കളഞ്ഞു എന്നും അപ്പോൾ സുരേഷ് അടിച്ചു എന്നും പറഞ്ഞു. രണ്ടു പോലീസുകാർ അവിടെ ഉണ്ടായിരുന്നു എന്നും അവർ വയറിലും അടി വയറിലും ചവിട്ടി എന്നും രവീന്ദ്രൻ എന്നോട് പറഞ്ഞു."

PW18 is the wife of deceased Raveendran Nair. She deposed that he was taken to the house of PW16 by her son PW6. PW18 further deposed that when she reached the house of PW16 her husband Raveendran Nair was found lying on a cot and on seeing her he caught hold of her hands and stated to her that Suresh and two police constables assaulted him. According to her, he stated thus:-

“അവർ എന്നെ ഇങ്ങിനെ ചെയ്തു. സുരേഷും രണ്ടു പോലീസുകാരും മർദ്ദിച്ചു. എന്റെ കയ്യിലുണ്ടായിരുന്ന മോതിരവും വാച്ചും Blouse Piece. കണ്ണാടിയും ഒക്കെ അവിടെപ്പെട്ടു എന്ന് ഭർത്താവ് എന്നോട് പറഞ്ഞു. നാഭിക്ക് നല്ല വേദന ഉണ്ടെന്നും രഹസ്യഭാഗത്ത് പിടിച്ചുവലിച്ചു എന്നു പറഞ്ഞു. ദൈവം നിന്റെ അടുക്കൽ എന്നെ എത്തിച്ചു. എന്നും ഭർത്താവ് പറഞ്ഞു. നിലത്തിട്ട് പോലീസുകാർ ചവിട്ടുകയും സുരേഷ് അടിക്കുകയും ചെയ്തു എന്നു പറഞ്ഞു. പോലീസുകാരുടെ പേര് സുനിൽ പ്രഭാകരൻ എന്നു പറഞ്ഞു.”

Both PWs 16 and 18 deposed that after attending the marriage PW6 came back to the residence of PW16 at about 1.30 p.m. and thereafter the deceased who developed uneasiness owing to the injury sustained, was taken to the hospital at Mannarkkad and from there to E.M.S. Memorial Co-operative Hospital, Perinthalmanna. PW6 deposed that after attending the marriage he returned and thereafter he took his father to a hospital at Mannarkkad and from there to E.M.S. Memorial Hospital. He further deposed that his father was admitted in E.M.S.

Hospital and from there he asked his father as to what really happened. According to him, thereupon, his father divulged to him that he went to the ration shop belonging to Suresh Tharakan at Chemmannur and that from there both of them had consumed liquor. He would also depose that his father further disclosed that after some time two policemen in mufti came there and all of them had drinks from there. It is his version that his father further disclosed to him that thereafter when he went outside he found Suresh Tharakan smoking a *ganja beedi* and he knocked it down and thereupon Suresh Tharakan slapped him on his face. He would also depose that his father further disclosed to him that when he fell down the policemen who were there, fisted and kicked him and thereafter he was locked in the room. PW6 would also depose that his father further disclosed to him that he tried to contact one P.C.Baby over phone and then they told him that they really wanted to see as to how P.C.Baby would rescue him. According to PW6, his father also disclosed to him that thereupon Suresh Tharakan told the others to start the second programme and then they kicked him on his abdomen, chest and on the sternum and they have also drawn his shirt and sheddy. According to him, his father had also disclosed to him that he escaped from there when they were asleep and he had to leave his ring, blouse piece and spectacles there. He would also depose that his

father disclosed to him the names of the two policemen as Sunil and Prabhakaran. Thus, it can be seen that in the dying declaration made to PWs 6, 16 and 18 deceased Raveendran Nair disclosed to them that he was assaulted by Suresh Tharakan and two policemen and to PW6 as also to PW18 he has disclosed the names of those two policemen as Sunil and Prabhakaran. A careful scanning of the declarations made by Raveendran Nair according to PWs 6, 16 and 18 as mentioned above would reveal that they cannot be said to be inconsistent with each other on material particulars. It will not be malapropos to refer to Exts.P6 and P6(a) in this context. Ext.P6 is the F.I.Statement lodged by PW6 which was recorded by PW20 based on which Ext.P6(a) F.I.R was registered. Ext.P6 would reveal that PW6 stated to PW20 that on 10.9.2005 at about 6.15 a.m. in the morning he found his father wearing only a white dothi near the house of his aunt Sarada and further that he found a swelling on the face of his father. He further stated therein that thereupon he asked as to what happened and he disclosed to him that he was assaulted. Ext.P6 would reveal that on being asked as to who did it his father replied as hereunder:-

“ഞാൻ എന്ത് പറിയെന്ന് ചോദിച്ചു. അച്ഛൻ അവർ എന്നെ തല്ലിയതാണെന്നു പറഞ്ഞു. ആരാണെന്നു ചോദിച്ചപ്പോൾ സുരേഷ് തരകനും 2 പോലീസുകാരും ആണുയെന്നു പറഞ്ഞു.”

He would further state therein that he brought his mother (PW18) to the house of Sarada (PW16) and further that on insisting to go to hospital his father told him to go and attend the marriage. The oral testimony of PW6 would reveal that from E.M.S Memorial Hospital, Perinthalmanna he again asked his father what really happened and at that point of time his father stated to him that he had consumed liquor from the ration shop belonging to one Suresh Tharakan and while they were consuming drinks two policemen in mufti reached there. It is also deposed that his father further told him that Suresh Tharakan went in an Omni Van and thereafter returned within 15 minutes with a bottle of brandy and all of them had consumed from there. He narrated the further incident as stated earlier. It is also to be noted that Ext.P6 itself would reveal that PW6 stated to PW20 that he came to know that it was one Sunil and Prabhakaran who assaulted his father from the ration shop. PW4 is the doctor who examined deceased Raveendran Nair from E.M.S. Memorial Co-operative Hospital at Perinthalmanna on 10.9.2005 at 5.30 p.m. and he issued Ext.P4 wound certificate noticing some injuries on his body. True that, Ext.P4 would reveal that PW4 noted thereof that while being examined deceased Raveendran Nair was vomiting and he was drowsy. The alleged cause stated to him going by

Ext.P4 is that the deceased was assaulted by three persons from ration shop in Chemmannur in the afternoon of 9.9.2005. The second objection raised by the appellants to support their contention is that the dying declarations are not reliable as there is no evidence to establish that the deceased was in a fit mental condition when statements were made to PWs 6, 16 and 18. From the evidence discussed as above it is evident that Raveendran Nair reached near the house of his sister Sarada (PW16) on 10.9.2005 after 6 a.m. The evidence of PWs 6, 16 and 18 would reveal that deceased Raveendran Nair was in his senses and he recollected and re-produced of what happened on the previous night and he disclosed such facts to them. It is also to be noted that he vividly recollected the fact that Suresh Tharakan, the first accused brought a bottle of brandy and that an Omni Van was used by the first accused for fetching a bottle of brandy. It would also reveal that he recollected the fact that he left spectacles, blouse piece, underwear, shirt, watch etc. in the said room. It is also relevant to note that even after reaching the house of PW16 he insisted his son who fetched his mother (PW18), to go and attend the marriage. He divulged the cause of sustainment of injury to PWs 16 and 18 in the meanwhile. It is also relevant to note that after reaching the hospital while being examined by PW4 the deceased Raveendran Nair disclosed the fact that he was

assaulted by three persons in the afternoon of 9.9.2005. It is pertinent to note that PW4, the doctor who examined him from E.M.S. Memorial Hospital noted in Ext.P4 that deceased Raveendran Nair was conscious though he was drowsy. It is to be noted that the doctor had not noted therein that the cause of injury was disclosed to him by somebody other than Raveendran Nair. The fact that he had sustained injuries to which he succumbed, on 9.9.2005 cannot be disputed in view of Ext.P17 postmortem report and the evidence on record would undoubtedly reveal that in the early morning of 10.9.2005 he came near the house of his own sister Sarada (PW16). All the aforesaid evidence and circumstances would reveal the baselessness of the contention that the deceased Raveendran Nair was not in a fit mental condition for making dying declarations to PWs 6, 16 and 18. In this context, certain other facts also assume relevance in order to consider the admissibility of statements made to PWs 6, 16 and 18 under Section 32(1) of the Evidence Act. A statement made by a person who died subsequently need not have been one made under the apprehension of death. The said position is settled and re-stated by the Hon'ble Apex Court in **B.Shashikala v. State of Andhra Pradesh (AIR 2004 SC 1610)**. In paragraph 18 therein the Hon'ble Apex Court held that it could not be said that a dying declaration would be admissible in evidence only when

the statement was made in expectation of death and the law did not say so.

20. In the light of the above discussion it is clear that in terms of the provisions under Section 32(1) of the Evidence Act any statement, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are relevant facts. Thus, it is evident that any statement, written or verbal, of relevant facts made by a person as to the cause of his death or as to the circumstances of the transaction which resulted in his death would become admissible in terms of the said provision and it forms the exception to the hearsay evidence. In the decision in **P.V.Radhakrishna v. State of Karnataka ((2003) 6 SCC 443)** the Hon'ble Apex Court laid down 10 principles governing the dying declarations. Going by the same, the dying declaration is only a piece of untested evidence and it must, like any other evidence, satisfy the court that what is stated therein as the unalloyed truth and that it is absolutely safe to act upon it. If, after careful scrutiny, the court is satisfied that it is true and free from any

effort to induce the deceased to make a false statement and if it is coherent and consistent, there should be no legal impediment to make it as the basis of conviction, even if there is no corroboration. This position was reiterated by the Hon'ble Apex Court further in the decisions in **Gangotri Singh v. State of U.P. (1993 Supp (1) SCC 327)**, **Goverdhan Raoji Ghyare v. State of Maharashtra (1993 Supp (4) SCC 316)**, **Meesala Ramakrishnan v. State of A.P. ((1994) 4 SCC 182)** and **State of Rajasthan v. Kishore ((1996) 8 SCC 217)**. In the light of the decisions referred supra when the dying declarations made to PWs 6, 16 and 18 are scanned and also in the light of Exts.P4 and P6 we do not find any reason to hold that the dying declarations to PWs 6, 16 and 18 are inconsistent in material particulars rather, they are consistent on material particulars. As noticed hereinbefore, even in a case where multiple dying declarations are available, if such multiple dying declarations are not inconsistent with one another in material particulars or if they are consistent with one another in material particulars they could be safely relied on. The dying declarations made by Raveendran Nair to the aforesaid witnesses adverted to hereinbefore, would make it abundantly clear that they are consistent on material particulars and there is no inconsistency in them. In the circumstances of the case those statements would fall within the

exception to hearsay evidence under Section 32(1) of the Evidence Act. It is also to be noted at this juncture that though PW6, PW16 and PW18 were subjected to cross examination by the defence their evidence could not be shattered and nothing could be elicited from them so as to discredit their versions. In such circumstances, those statements are to be taken as truthful dying declarations. From the decisions referred hereinbefore, it is evident that when once the dying declaration/declarations are found as a truthful version there need not be any corroboration. Still, in this case, we are of the view that it will not be inappropriate to refer to certain aspects which would virtually lend corroboration to the dying declarations to certain extent and suggest their truthfulness. Ext.P23 is the disclosure statement made by the first accused as hereunder:-

"XXXXXX` രവിയച്ഛന്റെ അണ്ടർവെയറും, ചെക്ക് ഫുൾ കൈ
ഷർട്ടും 10.9.05ന് ശനിയാഴ്ച കാലത്ത് 9 1/2 മണിയോടെ എന്റെ
മുറിയിൽ നിന്നും സുനിൽ ചുരുട്ടി എടുത്ത് അടുക്കളയിൽ നിന്ന്
ചായ്പിന്റെ മൂലയിലേക്ക് എറിഞ്ഞിട്ടുണ്ട്. എന്നെ കുട്ടികൊണ്ട്
പോയാൽ ചായ്പും വസ്ത്രം എറിഞ്ഞ സ്ഥലവും ഞാൻ കാണിച്ചു
തരാം.' XXXXXXXXXXXXXXXX"

True that, the said disclosure statement would not reveal that he is the author of concealment and on the other hand it would indicate that the

concealment of the materials referred thereunder in that place was known to the first accused. The evidence of PW25 would reveal that in pursuance of Ext.P23 disclosure statement MO1 shirt and MO9 underwear were discovered under Ext.P22 mahazar. The case of the prosecution, as is evident from Ext.P23, is that it was concealed therein by Sunil, the third accused. We are not oblivious of the position of law that a discovery made on the information of one accused could not be used against another accused and that position is settled by the decision of this Court in **Kunnummal Mohammed and another v. State of Kerala (AIR 1963 Kerala 54)**. But, at the same time, when it is evident that under Ext.P22 mahazar MO1 and MO9 were discovered from a room which was in the possession and control of the first accused based on Ext.P23 disclosure statement it would reveal that he got knowledge about the concealment. In such circumstances, even though no part of the disclosure statement based on which they were discovered is admissible as against accused Nos.2 and 3 under Section 27 of the Evidence Act the fact that based on the statement given by the first accused they were discovered could be taken as established. It is pertinent to note that such discovery based on the disclosure statement of the first accused was made from a place in respect of which Ext.P1 scene mahazar was prepared. Though the learned

counsel for the appellants attempted to canvass the position that police have come and prepared a scene mahazar in relation to that place prior to the discovery of MO1 and MO9 under Ext.P22 mahazar it is to be noted the fact that the shirt and the underwear belonged to deceased Raveendran Nair and they were thrown at that place were not at all known to the police and it was made known to them only by the first accused later while he was taken in custody and it was based on his disclosure statement that they were discovered. Another aspect which assumes relevance in this context is that MO1 shirt was identified by PW6, the son of the deceased. Another contention which was raised by the appellants/accused has also to be considered in the contextual situation. The contention is that none of the prosecution witnesses identified the accused persons. A scanning of the evidence on record would reveal that the first accused was virtually, identified by PW6, the son of the deceased. It is to be noted that during examination under section 313, Cr.P.C, the first accused admitted the fact that he was the ration dealer in the locality. In such circumstances, when PW6 deposed to the effect that he got previous acquaintance with the first accused we do not find any reason to doubt that statement of PW6 and taking into account the fact that he was the ration dealer in the locality in question. There cannot be any doubt with respect to the position that in a case

where a witness had previous acquaintance with an accused identification from court is not required. Now, as regards accused Nos.2 and 3 viz., the appellants in Crl.A.Nos.862/2011 and 840/2011 who are respectively the official witnesses like PWs 11, 13, 15, 19, 20 and 25 got previous acquaintance with them. They were working along with accused Nos.2 and at the relevant point of time. Add to it, it is to be noted that a bare perusal of certain answers made by both accused Nos.2 and 3 during their examination under Section 313 Cr.P.C. would reveal that they themselves virtually admitted the fact that they are the policemen by name Sunil and Prabhakaran then attached to Agali Police Station. Obviously, they admitted that those entries pertain to them. Above all, it is to be noted that they categorically admitted the fact that Ext.P13 is the GD relating Agali Police Station. It contains their names and specific entries were made with respect to the duties assigned to them during the relevant period. When they admitted those facts the fact that PWs 6, 16 and 18 did not identify them from court would have no consequence at all. Even otherwise, when the prosecution got no case that PWs 6, 16 and 18 are eye witnesses to the incident the fact that they did not identify the accused persons has no relevancy as far as this case is concerned. It is also relevant to note that during the 313 examination the second accused admitted the fact that after reporting

to the police station on 9.9.2005 he went home and thereafter did not report for duty. From the answers given by both accused Nos.2 and 3 to the questions put to them during the 313 examination it is evident that they have admitted categorically the fact that Ext.P13 is the carbon copy of the GD of Agali Police Station pertaining to the period from 9.9.2005 to 13.9.2005 and the original of the same could not be found out and also that they would also undoubtedly show that accused Nos.2 and 3 virtually admitted the fact that they are the policemen who were referred as Sunil and Prabhakaran then attached to Agali Police Station. In such circumstances, we do not find any reason to uphold the contention based on the fact that the independent prosecution witnesses did not identify them. As noticed hereinbefore, even though prosecution witnesses more particularly, PWs 6, 16 and 18 were thoroughly cross examined on behalf of the appellants/accused they did not even put any suggestion regarding existence of any hostility towards the accused persons. In such circumstances, they being the son, sister and wife of the deceased cannot be presumed as saying lie to save the real culprits. In the said circumstances, taking into account the fact that there was no inconsistency rather conflict, in the multiple declarations we are of the considered view that the statements made to PWs 6, 16 and 18 by deceased Raveendran Nair could be accepted

under Section 32(1) of the Evidence Act and in such circumstances, in the absence of any inconsistency with respect to the material particulars in such dying declarations and also taking note of the corroboration which they obtained from the other circumstances referred hereinbefore, we find no reason to hold that the trial Court went wrong in finding of guilt against the accused persons relying on them. We have already taken note of the fact that the evidence of PW24 with Ext.P17 would reveal that Raveendran Nair died due to the multiple injuries viz., injury Nos.1, 5, 19, 20 and 21 sustained by him. It is relevant to note that PW24 categorically deposed to the effect that the said injuries could be caused by kicking. In the said circumstances, the position obtained from the dying declarations also gains support from the medical evidence. In the said circumstances, we do not find any reason to upturn the finding of the trial court that the appellants/accused are the culprits responsible for the death of Raveendran Nair.

21. Now, the question to be decided is what are the offences committed by the appellants. The nature of the injuries sustained is evident from Exts.P4 and P17. In fact, it is evident that there is no case for the prosecution that any of the accused persons

had used any weapon for inflicting any injury on deceased Raveendran Nair. In this context the motive alleged is also to be looked into. The motive alleged is that after consuming alcohol the first accused was smoking a *ganja beedi* and the same was knocked down by the deceased Raveendran Nair. The incident occurred thereafter. The motive alleged is certainly very weak. True that, thereafter he was assaulted and Ext.P17 would reveal that many of his ribs as also his sternum suffered fracture. As noticed hereinbefore, the incident occurred at a time when all of them were in an intemperate stage and the circumstances which we have expatiated above would undoubtedly show that no intention to commit murder could be attributed to any of the accused persons. It is also to be noted that even going by the case of the prosecution even after the occurrence the appellants/accused did not abscond and in fact, going by the prosecution case accused Nos.2 and 3 were found sleeping inside the ration shop in question and the first accused was also present there. When once it is found that the assault by the appellants/accused caused the death of Raveendran Nair and when the evidence on record would not support an accusation of intention to cause death or intention to cause such bodily injuries as is likely to cause death the question is whether the last limb of Section 299 would attract ? The last limb of Section 299, IPC is knowledge of a

person that "he is likely by such act to cause death". A scanning of the evidence on record would reveal that appellants cannot be heard to contend that they were not having the knowledge that their actions are likely to cause death. But, at the same time, it is evident that in the circumstances explained hereinbefore, it cannot go to the extent of attributing an intention to cause such bodily injuries as is likely to cause death or that they have knowledge that the act is so eminently dangerous that it must cause death. In such circumstances, we have no hesitation to hold that the offence committed by the appellants herein is culpable homicide not amounting to murder falling under Section 299, IPC. We have already found that no intention contemplated under the first and second limbs of Section 299, IPC could be attributed against the appellants/accused though they were having the knowledge that their actions are likely to cause death. Considering all such circumstances it can only be held that the offences committed by the appellants are punishable only under Section 304 Part II, IPC. In the said circumstances, the impugned judgment whereby the appellants were found guilty and convicted under Section 302 read with Section 34, IPC is set aside and the appellants are convicted for the offence of culpable homicide not amounting to murder under Section 304 Part II, IPC.

22. Since we have already found that the dying declarations made to PWs 6, 16 and 18 are reliable and we have acted upon it we are inclined to uphold the finding of the trial Court that the prosecution has succeeded in establishing that Raveendran Nair was detained in the room that situated adjacent to and behind the ration shop, by the appellants/accused. In such circumstances, we find no reason to interfere with the conviction of the appellants for the offence under Section 342 read with Section 34, IPC. For the conviction thereunder the appellants were sentenced to undergo rigorous imprisonment for six months each and to pay a fine of ₹ 500/- each and in default of payment of fine, to undergo rigorous imprisonment for 15 days each. Considering the entire circumstances we are of the view that the sentence for the conviction under Section 342 read with Section 34, IPC calls for no interference. In the said circumstances, the conviction and the sentence of the appellants for the offence under Section 342 read with Section 34, IPC are confirmed. With respect to the question of sentence to be imposed for the conviction of the appellants/accused for the offence under Section 299 punishable under Section 304 Part II, IPC, taking into account the nature of the injuries and also the fact that no weapon was used by the appellants/accused for inflicting such injuries which ultimately caused the death of Raveendran Nair and also

taking into account Ext.P14 report we are of the view that the sentence to undergo rigorous imprisonment for a period of six years each would be the comeuppance. Accordingly, the appellants are sentenced under Section 304 Part II to undergo rigorous imprisonment for a period of six years each and they are also sentenced to pay a fine of ₹ 2,000/- each and in default of payment of fine to undergo simple imprisonment for a further period of three months each. It is ordered that the sentences shall be run concurrently.

The appeals are allowed as above.

Sd/-
C.T.RAVIKUMAR
Judge

Sd/-
K.P.JYOTHINDRANATH
Judge

TKS