

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 879 of 2011 ()

**AGAINST THE JUDGMENT IN SC 166/2008 OF 1ST ADDITIONAL SESSIONS COURT,
KOLLAM DATED 31.3.2011**

C.P.NO.120/2005 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II, KOLLAM

CR.NO.633/2005 OF KOLLAM EAST POLICE STATION

APPELLANT/ACCUSED:

**MUHAMMED RANA, AGED 25 YEARS,
S/O. SHARAFUDHEEN, RESIDING AT VAYALINTHOPPU,
NATIONAL NAGAR - 123,
POLAYATHODU, KARPURAMCHERI, VADAKKEVILA VILLAGE, KOLLAM.**

**BY ADVS.SRI.C.PRATHAPACHANDRAN PILLAI
SRI.P.KRISHNA KUMAR (ALAPPUZHA)
SRI.M.KISHORKUMAR
SRI.SUNIL J.CHAKKALACKAL**

RESPONDENT:

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

BY PUBLIC PROSECUTOR SRI.K.K. RAJEEV

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

shg/

(C.R.)

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

Criminal Appeal No.879 of 2011

Dated this the 11th day of December, 2015

J U D G M E N T

K.P. Jyothindranath, J.

This appeal is preferred against the judgment dated 31.3.2011 in S.C.No.166/2008 on the file of the First Additional Sessions Judge, Kollam. The conviction is under Section 302 of IPC. The appellant/accused is sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for one year for the offence under Section 302 of IPC.

2. The court charge is as follows:

“That you on 2.5.2005 at 8 p.m. at a place on the N.H.47 in front of 'Rajagiri autospares' a shop situated near Polayathodu junction in Vadakkevila village at Kollam you have committed murder by intentionally causing the death of deceased Shameer by stabbing him with a knife and thereby committed offence punishable u/s.302 of IPC and within the cognizance of this Court.”

3. The prosecution altogether examined 29 witnesses.

The documents marked are Exts.P1 to P27. The material

objects marked are MOs1 to 8. On the side of defence, no witness was examined. But a portion of the C.D. Statement of PW7 was got marked as Ext.D1. Ext.C1 was marked as a court exhibit. After appreciating the evidence, the trial court convicted the accused and sentenced as stated above.

4. When the appeal came up for hearing, the learned counsel appearing for the appellant submitted before us that here is a case where the prosecution suppressed the earliest version and now presented a case which was shaped afterwards. It is the submission of the learned counsel that in this case, the trial court adopted a curious procedure wherein a witness examined by the prosecution, on a later stage i.e. after examination of other witnesses was recalled and again chief evidence was recorded and thereafter relying upon the same, conviction was entered against the accused. It is the submission that the court erred in recalling the witness as well as relying upon the said evidence. The learned counsel also submitted before us

that the suppression of the earliest version can be gathered from the evidence of PW5, who is now relied upon by the court below.

5. It is the submission that there is an admission by PW5 to the effect that when doctor came out from the casualty, doctor enquired about the incident and a slip was given to hand it over to the police. It is categorically admitted by PW5 that he went to the police station and handed over the same to the police station. But the statement taken down by the police at that point of time was suppressed by the prosecution. It is also the submission that when PW5 was earlier examined, the categorical case of PW5 was that there was no eyewitness available at that point of time. The very same person later, became an eyewitness and his evidence was relied upon to convict the accused. It is the submission that it is an erroneous finding, which has to be corrected.

6. It is also submitted that there is an alleged recovery under Section 27 of the Evidence Act. The learned counsel

pointed out that as per the evidence of PW29, it can be seen that a search was conducted immediately after the incident at the house of the accused. It is the submission that thereafter an alleged Section 27 recovery of the dress, that also from the cloth line (aya) will not inspire confidence and cannot be relied upon. It is the submission that it cannot be expected or believed that when police went for a search, they had not conducted a thorough search. If there was a thorough search, and if such a blood stained dress was not seized, it is an indication that it was not actually therein. Therefore, the so-called recovery should have been discarded.

7. It is also the submission that similar is the case regarding the recovery of the knife from outside the house of PW15. It is the submission that, as per the prosecution version, the recovery was effected from an outer wall of a house, that also from a plastic cover filled with milma packets hanged thereon. It is the submission that the

incident was on the night of 2nd September 2005. But the so-called recovery was only on 8th September 2005. As per the evidence of PW15, the milma packet used to be destroyed after 2 or 3 days. It cannot be treated as a place of concealment. The submission is that either it is a planted one or the recovery is unbelievable. When recovery is not therein and when the oral testimony of whom reliance is seen made by the lower court is not inspiring confidence, the conviction entered will be bad in law. Thus, it can be only seen that the appellant/accused is entitled for an acquittal, it is contended.

8. On the other hand the learned Public Prosecutor submitted before us that it is true that PW5 was recalled by the court. The trial court used powers vested upon it under Section 311 of Cr.P.C. It was an order passed by the court below making use of a tool available with it to find out the truth and to come to a just decision in the matter.

9. It is the submission of the learned Public Prosecutor

that, in this case, the attending circumstances will give assurance to accept the evidence of PW5. Learned Prosecutor submitted before us that the place of incident is very relevant. As per the scene mahazar, which is marked as Ext.P8, it can be seen that it is a public place where there are full of shop rooms. It is on the national highway. It is the further submission made before us that as per Ext.P8, it can be seen that there was full of blood. Then, there cannot be any doubt regarding the place of incident.

10. The next point highlighted by the learned Public Prosecutor is that as per the scene mahazar and as per Ext.P27 there will be light. The evidence of PW6 and PW7 shows that there was sufficient light. The learned Prosecutor then brought to our attention the fact that the main witness relied upon by the prosecution in this case is PW5. PW7 also gave evidence regarding the presence of PW5, who helped to take the injured to the hospital. It is the submission that there is evidence to the effect that

PW27, who is the father of the accused is a vendor of milma milk. The shop is on the same side of the road. Adjacent to the same, there is a fruit shop. The relevancy of the fruit shop therein is that the accused took a knife from therein and proceeded to inflict stab injury to the accused.

11. Thus, the learned Prosecutor brought to our attention the evidence regarding the recovery under Section 27 of Evidence Act. MO3, knife was recovered as per a disclosure statement of accused. Ext.P9 is the seizure mahazar. There is nothing to suspect the recovery. A Government official, that also a Deputy Tahsildar, who was examined before the court as PW26 is the attestor. When PW26 was an independent Government official, who came before the court and deposed that there was a recovery as stated in Ext.P9, there is nothing to disbelieve the same. When Ext.P9 is reliable, the knife, which is marked as MO3 attains relevancy. As per Ext.P7 FSL report, MO3, knife is bloodstained. The blood group is 'B'.

The knowledge of the accused regarding the availability of such a 'B' group blood stained knife at such a concealed place is an incriminating material. The doctor categorically deposed before the court that MO3 could cause injuries like injury Nos.1 and 2 which were noted in the postmortem certificate. The doctor also deposed before the court that the blood of the deceased is group 'B'. If that is so, when there is a knife capable of inflicting the injuries found on the dead body of the deceased and when it is found stained with 'B' blood group, then that aspect is a circumstance which will give corroboration or assurance to the evidence of PW5. The evidence tendered after recalling a witness cannot be treated as false or tutored evidence. The learned Prosecutor submitted that even though PW3, PW5 and PW22 got a case that the deceased and the accused were in friendly terms, while appreciating the evidence of these witnesses the fact that they were all hostile witnesses is also to be kept in mind. It is the further submission that when there is

positive evidence available before the court regarding animosity, that aspect has to be given due consideration. It is the submission made before this court that when circumstances are giving assurance, there is nothing to disbelieve the evidence of PW5. The learned Prosecutor also submitted before us that there is also another recovery i.e. pant and shirt. The mahazar prepared for this recovery is Ext.P7. As per Ext.P7, it can be seen that MO6 shirt recovered as per the disclosure statement of the accused, is stained with 'B' group blood. It also give assurance to the facts deposed to by PW5. Thus, it is the submission that here is a case where prosecution succeeded in proving that accused is the person who inflicted the injury as a result of which deceased died.

12. Learned Prosecutor then submitted before us that when the accused used MO3 weapon to inflict the injuries, the intention of the accused can be gathered from the nature of the weapon and the place of injury. Here is a case

where a penetrating injury was sustained by the deceased. The knife pierced into his right ventricle and terminated into the ventricular cavity. When it is terminated into the ventricular cavity, the penetration is assessed as not less than 3.8 cm. When it is ended in the ventricular cavity, the doctor was correct in giving only an estimated length. Thus, it is the submission that when the injury is on the heart and the weapon is a knife that also having a total length of about 28.4 cm, needless to say that it is a dangerous deadly weapon, which caused the fatal injury on the vital part of the body. Then it is a case which falls under culpable homicide and further satisfies more than one clause of Section 300 of IPC and it is a murder, it is contended. No circumstances is highlighted by the defence to bring it under any of the exceptions. Then the conviction of the trial court for an offence under Section 300 of IPC is not to be interfered, it is further contended.

13. The gist of the evidence adduced by the prosecution

in this case is as follows:

PW1 is the person who gave F.I. Statement before the police, which was marked as Ext.P1. He is not an eyewitness. PWs2, 3 and 4 turned hostile. PW5 was originally declared as hostile. The said witness, upon recalling and reexamination gave evidence in tune with the original prosecution case. He also deposed that he was present at the time of inquest. The document is marked as Ext.P5. It can further be seen that a portion of his statement given at the inquest time is marked as Ext.P5(a). PW6 is a person who reached at the place of incident immediately after the incident. He deposed regarding the availability of light and also identified the dresses of the deceased as MO1 series. PW7 deposed that he reached therein immediately after the incident and he also deposed regarding the presence of PW5.

14. PW8 is the doctor who conducted the postmortem and the certificate is marked as Ext.P6. He deposed that

injury No.2 was the fatal injury which can be caused by MO3 knife. He also deposed that it is sufficient in the ordinary course to cause death. He further deposed that the blood group of the deceased was B. PW9 is a witness to inquest report. PW10 is the Scientific Assistant who marked MO4 and MO5. It can be seen that he was present at the time of preparation of the scene mahazar. According to his evidence, the materials collected by him are sealed and handed over to the Investigating Officer. PW11 is the Assistant Director, attached to the Forensic Science Laboratory who proved the report as Ext.P7. He gave details regarding the analysis result. PW12 is the attestor to Ext.P8 scene mahazar. PW13 is an attestor to the recovery of MO3 knife and the mahazar prepared for the same is marked as Ext.P9. PW14 is the Village Officer who prepared the scene plan and the same is marked as Ext.P10.

15. PW15 is a relative of the accused who turned hostile.

PW16 also turned hostile. PW17 is a witness to Ext.P13. Even though originally he had not admitted the signature therein, and was declared hostile, during cross-examination, he admitted the signature and also admitted that he witnessed the taking and handing over of the pants and shirt by the accused. PW18 turned hostile. PW19 is declared as hostile. PW20 is a Sub Inspector attached to the highway police and the relevant entry in the G.D is marked as Ext.P16 (a). PW21 is a Head Constable. PW22 was declared hostile. PW23 is also in effect hostile. PW24 and PW25 were also declared hostile. PW26 is a Deputy Tahsildar who witnessed the recovery. The recovery mahazar is marked as Ext.P9. PW27 is the father of the deceased. PW28 is the police officer who registered the FIR, which is marked as Ext.P1(a). PW29 is the D.Y.S.P., who conducted the investigation. According to him, after arrest a disclosure statement was made to him by the accused and in consequential, recoveries of the knife and the dress worn

by the deceased are made.

16. The learned counsel for the appellant vehemently argued that the trial court erred in recalling an eyewitness who was turned hostile and cross examined by the prosecution. We have perused the Crl.M.P.; the order on which, the witness was recalled and reexamined. As per the said petition, it can be seen that it is filed under Section 311 of Cr.P.C. Section 311 of Cr.P.C. reads as follows:

Section 311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

17. Thus, it can be seen that it got two parts. The first part is discretionary, whereas the second part is mandatory i.e., when the circumstances indicate that recalling or reexamination is warranted to arrive at a just decision, it is the bounden duty of the court to recall the witness. Thus, it

can be seen that the second part of the said section mainly revolves upon the question whether the recalling and reexamination of the witness is for a just decision. "Just decision" has to be given emphasis. Thus it can be seen that an order to recall and reexamine cannot be made automatically. There should be application of mind. It is the cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove facts to resolve the points in issue. It can be seen that in a murder case, the search of the court will be whether bringing of best evidence is denied by not invoking Section 311 of Cr.P.C. It is also to be noted that in the decision reported in **Rama Paswan v. State of Jharkhand (2007 Cr.L.J. 2750)** it is held that the object of Section 311 of Cr. P.C. is to bring on record evidence not only from the point of view of the accused and the prosecution, but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant,

the complainant should be allowed and given an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311 of Cr.P.C., but under the Evidence Act, which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed as a witness of any particular party, the court should give the right of cross-examination to the complainant also. The recalling of a witness may be on a bit different footing. These aspects were highlighted in the decision reported in **Jamatraj Kewalji Govani v. State of Maharashtra (AIR 1968 SC 178)**.

18. Thus what comes out is that the main aspect to be looked into while exercising the powers vested upon the court is the object of Section 311 of Cr.P.C. The object of Section 311 of Cr.P.C. is to bring on record evidence for a just decision. On the background of this legal position, the order passed by the court below in CrI.M.P.No.182/2011

can be examined. It can be seen that it is a speaking order by which the court allowed recalling and reexamination of the witness. In paragraph 5 of the said order it is highlighted that a copy of the complaint filed by PW5 before the C.I. of Police, East Police Station is filed along with the above petition. In the same it is seen that one Shajahan (PW5) has scribbled in vernacular language that he was a witness to the incident and he was not able to depose truth before the court on account of the threat meted out by the relatives of the accused.

19. On the background of the said complaint, the court allowed the said application with conditions. Thus, it can be seen that only a conditional order is seen passed by the court in the petition filed under Section 311 of Cr.P.C. Thus after procuring the presence of the witness, it can be seen that the court invoking the powers vested on it under Section 165 of the Evidence Act verified the so-called

complaint and then only after application of mind, allowed the prosecution to examine the witness. Thus it can be seen that in this case the court below actually used the power vested upon it under the first and second part of Section 311 of Cr.P.C. i.e., at first invoking the power vested in it under the 2nd part of Section 311 procured the presence of the witness and verified and upon getting satisfied that his examination is essential to the just decision of the case, exercised the discretionary power vested in it under the first part of Section 311 of Cr.P.C. judicially and then allowed to proceed further, in accordance with law. Thus it can be seen that there is no illegality committed by the court below in recalling the said witness. It is to be remembered that an order of recalling and reexamination cannot be passed casually in a matter. There should be application of mind. After application of mind, if only the

court comes to a conclusion that the recalling and reexamination is inevitable to arrive at a just decision, then only the court will be justified in passing an order under the second part of Section 311 of Cr.P.C. Surely, it can be seen that the first part of Section 311 is discretionary in nature. It is also pertinent to note that when a court is exercising the power under Section 311 of Cr.P.C. it is neither for the complainant party nor for the prosecution but only for bringing the best evidence for a just decision, viewing the facts from the point of view of the orderly society.

20. The next point to be considered is that whether it can be held that by allowing application under Section 311 of Cr.P.C. and recalling the witness, the court helped the prosecution to fill up the lacuna in the prosecution case. The Apex Court explained the meaning of the term lacuna in **Rajendra Prasad v. Narcotic Cell (1999 (6) SCC 110)**. The relevant observations of the Apex Court in paragraph 4

is as follows :

“4. LACUNA in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

If the dictum laid above is used as a yardstick, it can be seen that court only permitted to bring on record materials for a just decision. Prosecution has not deviated from its original case. It is not a case of filling up of lacuna.

21. Thus, it can be seen that in this case there is no illegality committed by the court below in invoking the

powers under Section 311 of Cr.P.C.

22. PW1 is the uncle of the deceased Shameer. He proved Ext.P1. As per the evidence of PW1, it can be seen that he is not an eyewitness. FIR is marked as Ext.P1(a) before the court. As per the said document, the information was received at the police station at 9 p.m. We perused the same. It reached the court at 10.30 a.m. on the next day i.e. on 3.9.2005. Surely, in this case the informant is not an eyewitness. So relevancy of F.I. Statement will be only to the extent that it set in motion the investigation machinery immediately after the incident.

23. As per the evidence of PW29, he took charge of the investigation at 10 p.m. on the very same day. It can be seen that he started the inquest on the very next day i.e. on the morning of 3rd September 2005. He started the inquest at 9.30 a.m. and concluded the same at 10.30 a.m. The relevancy of Ext.P5 inquest report is that it is on the very next day of the incident and therein PW5 is seen examined

by the Investigating Officer during inquest. Ordinarily statement of an eyewitness will not be recorded in inquest enquiry. The reason is that if a statement is recorded and when the inquest report is marked that itself will become a part of the record and it can be perused by the court. But as per Section 162 of Cr.P.C. it can be seen that there is an embargo in using any statement recorded by the police officer during investigation. By virtue of Section 174 of Cr.P.C., it will be a part of the record of the case whereas by virtue of Section 162 of Cr.P.C. the court will be precluded from looking into the same. In this case, it can be seen that at first PW5 was declared as hostile and at that point of time Ext.P5(a) is seen marked i.e. the relevant portion in his statement is marked. Surely, it is not an evidence. But when Ext.P5 as a whole can be looked into and when Ext.P5 (a) is a portion, which is marked by the prosecution by exercising the right under Section 145 of the Evidence Act, it can be seen that it is a material which can be looked into

by the court. At this juncture, it is also relevant to look into the dictum laid down in the decision reported in **Kuldip Singh v. State of Punjab (AIR 1992 SC 1944)**. The dictum laid down therein is that an inquest can be looked into to test the veracity of the witness. Thus, in this case, the relevant statement of PW5 can be looked into by this court only to the extent to gather assurance or otherwise, of his evidence before the court.

24. Now, the other aspects available in this case is regarding postmortem certificate. Postmortem was conducted by PW8. There are five injuries. It can be seen that the incised injuries are injury No.1 and 2 whereas the second injury is a penetrating injury. As per the evidence of PW8, it can be seen that in ordinary course the injury No.2 can cause death. It is a stab injury on the chest area which pierced the right ventricle and terminated in the right ventricular cavity. The depth is deposed to as at least 3.8 cms. Thus it is a fatal injury which injured the heart.

The injury sustained on a vital part of the body. Thus, considering the evidence of PW8 and the injury, it can be safely concluded that it is a culpable homicide.

25. Now, the next question is that who inflicted the injury or who committed the culpable homicide. To prove this, prosecution is mainly relying upon the evidence of PW5. It can be seen that as already said, originally PW5 turned hostile. His stand was that he was not an eyewitness. According to his evidence in first part, he reached at the hospital and at that point of time there was no eyewitnesses. He was thoroughly cross-examined by the prosecution. Thereafter a Section 311 of Cr.PC. petition was filed and he was recalled and reexamined as stated above. When he is recalled and reexamined, it can be seen that as per the deposition available in the record, a chief examination was taken. It can be seen that as per the Evidence Act, the Sections relevant in respect of examination of witness are 137, 138, 142, 143 and 145. Thus, as per Section 137 of

Evidence Act, it can be seen that the ordinary course is examination-in-chief, cross-examination and re-examination. In Section 138 of Evidence Act it is categorically stated that “the re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter”. In this case when PW5 is recalled, it can be seen that the prosecution was seen permitted to take chief examination. Even though it was not followed the procedure and further it can be seen that he was earlier declared as hostile, nomenclature which should have been given for his examination is cross examination. But surely in allowing cross-examination, there is a danger. A witness who is at first declared as hostile then becoming loyal and at that juncture, the party who is examining the witness will have the advantage of making leading questions i.e., putting the answer into the mouth of the witness and eliciting the same.

The above highlighted aspect will not go to the root of the evidence and the procedure adopted will give some assurance to this court, when reevaluating the trustworthiness of the evidence. Thus what comes out is that the right of examination of the prosecution is virtually limited or restricted to the extent of the evidence coming from the mouth of the witness itself by prohibiting leading questions. Thus on the background of all these facts and aspects the evidence of PW5 has to be appreciated. But considering the peculiar circumstances prevailing in this case and on the background of the case, we feel that it will be only prudent and safe to seek corroboration to act upon the evidence now tendered by PW5 after recall and the question is how far the circumstances and other materials will give assurance to assess the creditworthiness of this witness.

26. Regarding the motive, the evidence tendered by the prosecution is oral as well as documentary. PW7, PW20

and PW21 are the witnesses examined by the prosecution to show the motive. PW7 claims that he was a witness to an earlier incident wherein he saw the accused as well as the deceased engaged in a push and pull. It is an oral evidence. As per the evidence of PW7, it is stated that the highway police came and took them away. Against this oral evidence, the defence is relying upon the oral evidence of PW3, PW5 and PW22. As per the oral evidence of PW3, PW5 and PW22 they saw accused and the deceased together on different occasions. It can be seen that all these witnesses were declared hostile by the prosecution. Therefore, in this aspect also the court will have to seek for independent corroboration.

27. Ext.P16 is the general diary and Ext.P16(a) is the relevant entry therein. PW20 and PW21 are officials (police officers) through whom they were marked. The entry is regarding a fight occurred at Polayathodu Junction on 2.5.2005 at 10.00 p.m. in between the accused and the

deceased (for ബഹളമുണ്ടാക്കിയതിന്) and PW20 identified the accused as one of the persons whom he had taken into custody. PW21 deposed to the effect that the accused and another were brought to police station by the highway police while he was on G.D. Charge at Kollam East Police Station. Thus, it is an indication that the accused and the deceased were not on friendly terms. When the accused and the deceased were not on friendly terms, the evidence of PW7 that he saw them fighting each other seems to be a reliable one. When the evidence of PW7 is a reliable one, it shows that the prosecution had, at least, succeeded to prove the extent of animosity between the deceased and the accused.

28. Ext.P8 is the scene mahazar prepared by the Investigating Officer on the very next day of the incident. As per Ext.P8, it can be seen that the place of incident is on the tarred portion of national highway at a place near to Polayathodu junction. As per the scene mahazar, "ഈ ഭാഗത്ത്

90 c.m. വീതിയിലും 1.55 മീറ്റർ നീളത്തിലും, ടി ഭാഗത്ത് നിന്നും 45 c.m. കിഴക്ക് മാറി 1.20 മീറ്റർ നീളത്തിലും 40 c.m. വീതിയിലും സമീപദിവസം രക്തം വീണ് കട്ടിയായി ടാറുമായും മണ്ണുമായും പറ്റിപ്പിടിച്ച് ടി ഭാഗങ്ങൾക്ക് ചുറ്റാകെ അവിടവിടെ രക്തം ടാറും മണ്ണുമായി പറ്റിപ്പിടിച്ചും കാണുന്നു.” It is also noted that a scientific expert was also present while the scene mahazar was prepared. The said Scientific Assistant is examined as PW10. He collected MO4 and 5 from the place of incident and handed over to the Investigating Officer who prepared the scene mahazar. The relevancy of the scene mahazar is that extensive blood stained soil area was noted therein. As per the scene mahazar, it can be seen that certain other shop rooms are also there. It is also noted in the scene mahazar that the milma shop of accused Rana situates very near to it. The relevant portion reads thus:

“പ്രതി റാണ മിൽമ കച്ചവടം നടത്തുന്ന കടയും അടച്ചിട്ടിരിക്കുന്ന നിലയിലും”

Thus, there are materials in the scene mahazar which would show that it is an area where there are shop rooms including the shop room where the accused Rana was

conducting the milma business. The deceased sustained injury to the heart. The place of incident is very near to the said milma shop of the accused.

29. Apart from the same, as per the scene mahazar, it can be also seen that the incident occurred on the tarred road area nearer to so many shop rooms. It is also noted in the scene mahazar that very near to the place of incident there are electric posts. Ext.P27 is a certificate issued from the K.S.E.B. which also gives assurance to the fact that light was available there. Thus, it is evident from these materials that there were shop rooms and there was availability of light.

30. Now the next aspect is regarding the recovery evidence of PW29. MO3 knife was recovered on the disclosure statement of the accused given to PW29, the Investigating Officer. It was recovered as per mahazar Ext.P9. The disclosure statement is given after arrest. The arrest was on the 7th September 2005 and the recovery was

effected on the next morning. Surely, the counsel for the appellant vehemently submitted before us that even though the incident was on the 2nd of September, the so-called recovery is only on the 8th September. It is the submission that the place of recovery and the mode of recovery are to be appreciated to give credence to the same. Surely, there is a delay of about six days in conducting the recovery. But it is to be remembered that in this case the witness who attested the mahazar is none other than a Deputy Thasildar. He had deposed before the court that as instructed by the Tahsildar he joined the police party and witnessed the recovery. There is nothing to disbelieve him. Under such circumstances, there is nothing to disbelieve the recovery of MO3 knife.

31. The next aspect is in respect of MOs 6 and 7. These are the alleged dresses of the appellant. Surely the incriminating aspect is that MO6 contained blood that also a blood group of 'B'. It is to be remembered that as per the

postmortem certificate, it can be seen that the blood group of the deceased was also that of group 'B'. Thus, this is an aspect which gives an incriminating aspect to the recovery. Surely, the defence got a specific case that earlier there was a police search in the house as deposed to by PW28. A so-called recovery thereafter from the same place will not inspire confidence. Surely, there is force in the submission. But the fact that an omission or non-noticing of dress will not create the recovery suspectful. In this case we have very carefully examined and analyzed the evidence of recovery witness. Initially he had not admitted even his signature. Thereafter when the summons was put to him, he admitted the signature therein and the witness summons is marked as Ext.C1 and the signature as C1(a). Thereafter, when the cross examination continued, he admitted that the dress was taken by the accused and handed over. Then the recovery inspires confidence. Under such circumstances, we got no hesitation in coming to a conclusion that the

recovery can be relied upon. Surely, MO7 is the pants wherein, as per Ext.P7, there was blood marks. But the origin is not detected. But as we have already highlighted in the case of MO6, it was detected by the forensic laboratory that there was blood that also belonging to 'B' group. Under such circumstances, it can be only said that this is also an incriminating evidence.

32. Inquest report is a report which is prepared by the Investigating Officer under Section 174 of Cr.P.C. We already came to a conclusion that the statement therein can be looked into only for the purpose of getting assurance regarding the evidence of the witnesses examined therein. We have already observed that it may not be desirable to examine eyewitness while conducting inquest enquiry. Any way in this case, an eyewitness was examined therein. The very same witness was later, examined before the trial court as PW5. At first, the said witness was declared hostile. Thereafter he was cross-examined by the

Prosecutor. Then again he was cross-examined by the learned counsel for the appellant. It was thereafter that a petition under Section 311 of Cr.P.C. was filed and he was recalled and reexamined. We have already discussed these aspects and the order passed by the court on the said petition and we found that the order passed is not suffering from any illegality and the evidence tendered by PW5 after recalling and reexamination is an evidence before the court.

33. Now, the evidence of PW5 before the court can be looked into. When he was examined at first, his evidence was to the effect that he was working in a hotel of one Sukumarapillai as a 'porotta maker' and that the deceased Shameer and accused Rana were his neighbours. Accused was conducting milk business in a juice shop which is on the opposite side of the hotel room. He, at first, deposed before the court that he had not seen the incident. His case was that “ഷമീർ മരിച്ചു കിടക്കുന്നത് കണ്ടു. കേസ്സിലെ സംഭവം ഞാൻ കണ്ടില്ല. കണ്ടതായി പോലീസിൽ പറഞ്ഞിട്ടില്ല.” He was declared as

hostile and the prosecutor was allowed to cross-examine him by putting leading questions. He was cross-examined and he admitted that he was present at the time of inquest and his statement was recorded during inquest. The relevant portion of his statement is marked as Ext.P5(a). Thereafter he was cross-examined by the counsel for the defence and during cross-examination he deposed that he was in the hospital and a slip was given by the doctor and thereafter he went to the police station. He was therein for about one hour and thereafter he went to his house. His evidence was that he came to know that PW1 also went to the police station after he left the police station. Then, Crl.M.P.No.182/2011, which was referred earlier, was filed before the trial court and he was recalled. After putting questions by the court, the court allowed the prosecution to examine the witness in chief and chief examination continued and then a specific question was put by the learned Prosecutor that “ഷമീർ മരണപ്പെട്ട സംഭവം

കണ്ടിരുന്നോ? കണ്ടു. and he started to narrate the incident. He thereafter deposed before the court that on that day he was working in one Sukumaran Pillai's shop and on 2.9.2005 at about 7.45 p.m. disabled Shameer, Noufal and Niyas came to his shop to take tea. Thus, evidently the deceased Shameer also came there. Shameer too had tea. When they started to go home PW5 entrusted the coriander which was purchased by him for his domestic use to Niyas to hand it over to his house. When they were about to cross the road he had gone back to the shop and when he was about to step into his shop he heard a sound “എടാ നിന്നെ ഞാൻ കൊല്ലുമെടാ” and saw accused Rana going behind the deceased Shameer with a knife. When Shameer turned, Rana stabbed him. Shameer covered his chest and fell down on the road. He ran to Shameer and took him and blood was pumping out “blood ഭയങ്കരമായി ചീറ്റുന്നുണ്ടായിരുന്നു”. Then his case is that a towel was taken from the shop of Firoz and he tried to tie the injury. His evidence is that by

that time, one Mithinraj came and he along with Mithinraj boarded Shameer in an autorickshaw and Mithinraj went to the hospital. There was blood on his body. He went to his house to change the dress. When he went to the hospital, he came to know that Shameer had already passed away and the doctor enquired about the incident and a slip was given to him. He went to the East Police Station and found PW1 Shajahan therein. Then he went to his house. He further deposed that he was present at the time of inquest. He identified the weapon of offence as MO3 knife. The pant and shirt worn by the deceased are also shown to him which are also identified by him as MOs6 and 7. His evidence was that “എന്നെ മുൻപിവിടെ വിസ്തരിച്ചപ്പോൾ ഞാൻ സംഭവം കണ്ടില്ല എന്ന് പറഞ്ഞിരുന്നു. അങ്ങനെ പറയാൻ കാരണം പ്രതിയുടെ ഭാഗത്തു നിന്നും ഉള്ള ഭീഷണിയും എനിക്ക് മുൻപ് വിസ്തരിച്ച സാക്ഷികൾ മാറ്റി പറഞ്ഞു എന്ന് ഞാനറിഞ്ഞതിനാലുമാണ്”

34. We have already found that no illegality is committed by the trial court in recalling the witness. It can be seen

that even when the witness was present, the court got reassurance regarding the order to be passed to proceed with. It is already found by us that no illegality is committed by the court below in re-examining the witness. 35. Now, the only question before this court is that how far the evidence of this witness can be relied on. Surely, when he was first examined before the court he was hostile and categorically deposed before the court on oath that he had not seen the incident. Now the witness again sworn before the court and deposed. His whole evidence is before the court. Whether the evidence now tendered can be relied on, on the back ground of his earlier version that he did not witness the incident is the question to be considered. The very same witness once deposed before the court that he did not witness the incident. That part is not expunged from the evidence. That evidence is starring before us. But at the very same time, the very same witness deposed the incident which allegedly seen by him. The court is bound to

separate the grain from the chaff. For this purpose the tools available before the court will be other attending materials or evidences. The court can act upon his evidence only when there are materials to corroborate. In this regard we have to analyze the evidence of him on the background of the attending materials.

36. PW1 is the person who gave F.I. Statement before the police. As per the evidence of PW1, at the time of cross-examination, he deposed that when he went to the hospital he had seen Shajahan and Mithinraj. Shajahan referred therein is PW5. Then he also answered that he had also seen Mithilraj (CW6). In the evidence of PW5, there is reference of Mithinraj. Thus the aspect that immediately after the incident Shajahan and Mithinraj was present in the hospital is getting assurance from the evidence of PW1. The version of Shajahan is that Mithinraj was also present and he is the person who had taken the deceased to the hospital. Now, we had already discussed about the place of

incident. The evidence of PW1 tallies with the place from wherein the incident occurred as evident from the scene mahazar. As per the evidence of PW5, he got a case that “blood ഭയങ്കരമായി ചീറ്റുന്നുണ്ടായിരുന്നു”. Ext.P8 scene mahazar also shows that there was profuse blood stains at a remarkable area. Regarding the availability of light also, we have already made a finding regarding the availability of light at the place of incident. Thus, the incident can be seen by a person as there was availability of sufficient light. PW5 also deposed before the court that as his dress was stained by blood, he had gone to his house. Surely, the portion that as his shirt was stained with blood he went to the house was brought as an omission. But the fact that he went to the house seems to be reliable. When he got a specific case that he had taken the deceased and there was profuse bleeding it will be only natural that his dress will be stained with blood and when he got an explanation to the effect that he went to his house to change the dress, that also give

assurance to the evidence that he is the person who first reached at the place of incident and took the injured. If that is so, the possibility of seeing the incident by PW5 is more probabalised. When it is more probabalised, further assurance can be gathered from other attending circumstances. Now when the accused is arrested, it is the case of the prosecution that there was disclosure statement. PW29 deposed before the court that MO3 weapon and MOs 6 & 7 are recovered on the strength of a disclosure statement. We have already found that on MO3 weapon there was blood stains; that also belonged to 'B' group. Similarly, MO6 shirt was having 'B' group blood. It is pertinent to note that as per the evidence of the doctor, who conducted the postmortem, he deposed before the court that the blood group of the deceased was 'B'. Thus when there is a recovery of a knife and when the recovery witness is a Deputy Tahsildar, there is nothing to disbelieve the recovery. The knowledge that such a blood stained knife

was therein is an incriminating material. The doctor who conducted the postmortem deposed that MO3 can inflict an injury as noted in Ext.P6 postmortem certificate, that is injury No.2. It also give assurance to the evidence tendered by PW5. PW5 identified MO3 as the weapon of offence before the court. Another attending circumstance is that as per the evidence of PW5, it can be seen that the appellant Rana is a milma milk vendor. His business is attached to a tea stall. He was seen rushing with a knife and the said knife is identified by PW5 before the court. The evidence of PW5 is seems to be a reliable one on the background of these materials.

37. Now there is also the evidence of PW7. As per the evidence of PW7, he along with PW6 Mithinraj took the deceased to the hospital. He also deposed that blood ഭയങ്കരമായി ചീറ്റുന്നുണ്ടായിരുന്നു and he also referred the presence of Shajahan who was examined as PW5. The identity of the said Shajahan is given as porotta maker and he deposed

that “ഷാജഹാൻ പൊറോട്ട ഉണ്ടാക്കുന്ന ജോലിയാണ്” and he further deposed that “എനിക്ക് ഒറ്റയ്ക്ക് ഷമീരിനെ പൊക്കാൻ സാധിച്ചില്ല. അപ്പോൾ മിഥുരാജും ഷാജഹാനും കൂടി ഓട്ടോയിൽ കയറി”. Thus, this also give assurance to the evidence of PW5. PW5 was present at the place of incident and helped to board the deceased in an auto but he had not accompanied the injured to the hospital. During cross-examination, it was also specifically brought out that Shajahan had not boarded in the auto and the evidence is that “PW5 ഷാജഹാൻ എന്റെ സുഹൃത്താണ്. PW5 ഓട്ടോയിൽ കയറിയില്ല. Thus it also give assurance to the version of PW5 to the effect that as there was blood stains on dress he had not went to the hospital but went to his house. That is, PW5 as well as PW7 gave evidence regarding the profuse bleeding. Blood was actually pumping out. In this regard, the evidence of PW6 is also relevant. His evidence is that he is a head load worker. “എന്റെ ഒപ്പം PW7 സുൽഫിക്കറും ഉണ്ടായിരുന്നു. പോളയത്തോട് Milma Booth-ന് മുൻവശം റോഡിൽ നിന്നാണ് എടുത്തു കൊണ്ടുപോയത്. Milma Booth എന്നു

പറയുന്നത് juice-ഉം പഴവും ഒക്കെ വിൽക്കുന്ന കടയാണ് “ and the plan produced before the court and marked as Ext.P10 is also helpful in appreciating the evidence before the court. The shop rooms are described therein. Then that also give assurance regarding the place of incident and also the probability of PW5 seeing and deposing the incident. He is a natural witness. It is also relevant that, as per the evidence of PW7 to the effect that Noufal (PW3) came and told him that “റാണ ഷമീറിനെ അവിടെ കുത്തിയിട്ടിരിക്കുന്നു. ഓടിവായെന്ന്“. Surely, the portion “Rana” is brought as an omission. It may not come under the category of res gestae, when the person who told him is not an eyewitness. But the relevancy of this is that, it gives assurance to the fact that immediately after the incident he reached therein and his evidence regarding the presence of Shajahan also give assurance to rely upon the evidence of PW5. Thus considering the totality of the case, it can be seen that the evidence of PW5 regarding the incident in this

case can be acted upon on the background of the attending circumstances discussed above. Surely, we are not creating a precedence that whenever a witness is declared hostile and when recalled, he can be relied upon. But surely, when attending circumstances and materials are giving assurance such an evidence can be relied on. When a witness due to external compulsions became hostile and thereafter, on the urge of conscious, coming before the court and deposing the truth, such a version thereafter given is reliable and that portion of evidence can be accepted. In this case, when the attending circumstances are giving assurance, we got no hesitation to rely upon the portion of his evidence to the effect that the accused was the person who inflicted the stab injury to the deceased.

38. Now as per the postmortem certificate and evidence of the prosecution, we came to a conclusion that it is a culpable homicide. The next question to be considered is that whether the culpable homicide will amount to murder.

It can be seen that we have already found that there was an intention. Intention is gathered from the weapon used, the injury inflicted and the fact that there was motive. It can be seen that, in this case, as per the evidence of PW20, PW21 and PW7 the deceased and the accused were not on friendly terms and earlier, a fight occurred between them at Polayathodu Junction on 2.5.2005. As per the evidence of PW5, due to prior animosity, the accused crossed the road and thereafter stabbed the deceased who turned on hearing a sound. If that is so, and when the injury inflicted is on the chest area and the knife is having a length of about one foot, it can be only held that the accused intended to cause death. Thus it is a case where there was an intention to cause an injury on the chest area which will in ordinary course cause death. It can be seen that when the intention is therein, it is a case of murder.

39. The next question to be considered is regarding whether the case will come under any of the exceptions. No

material is produced before the court to show that there was any other weapon either in the hands of the deceased or there was any altercation or any other incident which resulted in inflicting of stab injury. Surely, the learned counsel for the appellant submitted before us that there was an injury on the forehead that also an incised injury which can be caused only by a sharp edged weapon. Surely, there is an injury as evident from the postmortem certificate. But when the doctor was cross-examined, he deposed before the court that injury can be caused by MO3 weapon itself. When MO3 is a sharp edged weapon and when the prosecution case is that after inflicting the stab injury knife was taken out, the other injuries can also be caused. The other two injuries can be caused by a fall. If that is so, there is nothing to show that even any of the exceptions to Sections 300 of I.P.C. will come into play. If that is so, the offence committed by the accused is an offence coming under Section 300 of I.P.C. which is punishable under Section 302

of IPC. The sentence imposed is only life imprisonment.

There is no merit in the appeal.

Hence the appeal dismissed.

Sd/-

C.T. RAVIKUMAR
JUDGE

Sd/-

K.P. JYOTHINDRANATH
JUDGE

shg/16/12

//True copy//

P.A. TO Judge