

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

CRL.A.No. 1008 of 2011 (A)

**AGAINST THE JUDGMENT IN SC 344/2009 OF ADDITIONAL SESSIONS COURT,
(ADHOC)-I, KOTTAYAM DATED 10.02.2011**

APPELLANT(S):

**JOSE, C.NO.5976,CENTRAL PRISON,
THIRUVANANTHAPURAM.**

BY ADV. MURALEE KRISHNAN R. (STATE BRIEF)

RESPONDENT(S):

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

BY PUBLIC PROSECUTOR SMT. P.P. JASMINE V.H.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

shg/

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

Criminal Appeal No.1008 of 2011

Dated this the 7th day of October, 2015

J U D G M E N T

K.P. Jyothindranath, J.

This appeal is preferred against the judgment dated 10.02.2011 in S.C.No.344/2009 on the file of the Additional Sessions Judge (Adhoc)-I, Kottayam. The conviction is under Section 302 of IPC and the appellant is sentenced to undergo rigorous imprisonment for life.

2. When the appeal came up for hearing, the appellant was represented by Sri. Muralee Krishnan R. appointed as a State Brief by this court. The learned counsel for the appellant argued before us that this is a case where apparently there is false implication. It is the submission that from the inception of the F.I. Statement, it can be seen that there is tampering and concoction of facts and evidence. It is also the submission that even though, as per the prosecution case, the deceased was, when got injured, transferred to the hospital by the police, no

investigation extended to that aspect. Now, the First Information Statement which is marked as Ext.P1, by the prosecution, is a statement apparently created in tune with the case of the prosecution now presented before the court. It is the submission that admittedly the person who gave the F.I. Statement is an office bearer of an organisation namely S.N.D.P. It is the submission that according to the said witness, he at first saw transferring of injured into an ambulance at about 4 p.m. and thereafter at about 7 p.m. he went to the police station and gave Ext.P1. When he gave evidence on oath his version was modified to the effect that police was also present when he saw the injured at first. Now PW2 and PW4 also admitted that police transferred the injured to the hospital. It is an indication that the police was having information regarding the incident and that the first version of incident has now been suppressed. It was also admitted by the Circle Inspector of Police, who conducted the investigation, that he had not conducted any

investigation in this regard. He evaded the question by saying that, that police is the Manimala Police and not the Erumeli Police. It is also the submission that PW9 police officer who registered the crime admitted in evidence that eventhough he received the intimation from the hospital, he had not handed over the same to the Investigating Officer, which indicates that there is suppression of material document by a responsible police officer. It is also the submission that when an Investigating Officer is deposing before the court that he has not investigated regarding the policemen who transferred the injured to the hospital, he had committed grave laches in the investigation, especially when as per the evidence of PW4, the deceased died while he was taken to the hospital. It is an indication that he died in the presence of the police and if the Investigating Officer is not investigated all these aspects, it is only an indication that the case now presented before this court is not a truthful version.

3. The counsel for the appellant has also drawn our attention to the evidence of PW1, the then Secretary of a branch of SNDP, who gave F.I. Statement. When PW2 was examined, his case was that the President of the Panchayat was the person who informed the police. The said person was not examined before the court. The relevancy of this fact is that the person who first informed the police about the incident was kept away from the court. It will attain more relevance when defence got a specific case that there is suppression of the first information received at the police, and, on which, the police went to the spot and removed the injured to the hospital. It is also brought to our notice that the doctor, who treated the injured was also not examined before the court. The matters like who brought the deceased and what was the history given are also relevant facts to be considered by this court.

4. The learned counsel also argued before us that PW4 also indicated the presence of a Panchayat member.

On that aspect also, no evidence forthcoming. Surely, he may be also referring the Panchayat President. But still when the Panchayat President is not coming forward, the evidence of PW2 and PW4, cast some suspicion regarding the first information now presented before the court.

5. The counsel for the appellant also submitted before us that the original case of the prosecution was that there was eyewitnesses. But now, only circumstantial evidences are available. Two eyewitnesses produced by the prosecution in the trial court are PW2 and PW3. It is pertinent to note that they are not made hostile. It is an indication that even the prosecution was having the case that they were not actual eyewitnesses. If the prosecution was having a case that they are eyewitnesses and deviated from the above stand, then naturally the Prosecutor would have made them hostile and cross-examined them on that aspect. When there is no such cross-examination, the only inference that can be drawn from the conduct of the

prosecution is that they were not actual eyewitnesses to the incident, but only witnesses to project the circumstances.

6. Further submission of the counsel for the appellant is that from the available evidence, no conviction can be entered into. It is the submission that there is evidence to show that the deceased and the accused are brothers. PW4 is none other than the mother of the deceased as well as the accused. It is the submission that, as per the prosecution case, a well was under construction for the deceased. It is the case that originally the accused was entrusted with the work and due to some dispute, he arranged PW2 and PW3. It is the submission of the counsel that this version is not believable. It can be seen from the contradiction marked as Ext.D1 that accused as well as the deceased had food together. Surely, the witness PW2, when examined, varied from this stand and had a case that the deceased had not taken food on that day along with them. But it is pertinent to note that the post-mortem certificate is

conspicuously silent about the condition of the food seen in the stomach. It is noted in Ext.P2 post-mortem certificate that there was blood stained food found in the stomach with smell of alcohol, but whether it was digested or not is not stated therein. Thus it can be only treated that he had food from therein and also had alcohol either from the house or immediately after or before. It is the submission that on the background of this aspect, the evidence now before this court has to be appreciated.

7. It is the categoric case of the accused that he is not the person who committed the offence. He filed a statement under Section 313 of Cr.P.C. wherein he had categorically stated that PW3 is the culprit. The case now presented before the court by PW3 is that the deceased told him to go away and he went away and from a distance, when he turned back and looked he saw the deceased in a stabbed position. It is the submission that the said version of the witness is unbelievable, especially in the light of the

evidence of PW11, the Investigating Officer. It is submitted before us that he categorically admitted before the court that “പുഴി മണ്ണിൽ മൽപിടുത്തത്തിന്റെ ലക്ഷണം കാണുന്നതായി എഴുതിയിട്ടുണ്ട്.” It is also the submission of the counsel for the appellant that as per the evidence of PW2, it can be seen that the accused on fateful date came at about 12 at the noon and at about 3.30 p.m. they had their food.

8. It is also the case that Kunjumon came at 3.30 p.m. and he deposed that “ഞങ്ങൾ 3½ ആയപ്പോൾ കയറി വന്ന് അവരുടെ വീട്ടിൽ വെച്ച് ഭക്ഷണം കഴിച്ചു.” Thus, reading along with Ext.D1, it can be seen that the accused as well as the deceased and the workers had their food from their house. If that is so, it cannot be a case where the accused was having an animosity to murder his own brother. It can be seen that, as per the evidence of PW2, after food the witness went to take rest in an estate and the accused followed him and his case is that there was a quarrel regarding the wages. The exact portion deposed to is that

“കുലിയെപറ്റിയും അവർ പറയുന്നുണ്ടായിരുന്നു.” The submission of the learned counsel is that, if the deceased was not working, surely there cannot be a dispute regarding the wages. The dispute can be only with regard to the person who is working and on the background of this aspect, the statement submitted by the accused has to be appreciated. His further evidence is that they talked about 10 minutes and Kunjumon went towards the house and Jose also followed and he remained at the estate area. His further evidence is that “ഞാൻ തോട്ടത്തിൽ ഇരുന്നു. ഒരു കേട്ടു ഞാൻ കയറിച്ചെന്നു വീട്ടിലേക്കു കുഞ്ഞുമോന്റെ “അയ്യോ” എന്ന നിലവിളികേട്ടു. ഞാൻ ശ്രദ്ധിച്ച് നോക്കിയപ്പോൾ പ്രതി Jose ഇങ്ങോട്ട് തിരിച്ചുവരുന്നുണ്ട്. എന്നോട് അങ്ങോട്ട് പോവണ്ട എന്ന് പറഞ്ഞു പ്രതി.” Thus this evidence will not tally with the evidence of the Investigating Officer to the effect that “പുഴി മണ്ണിൽ മൽപിടുത്തത്തിന്റെ ലക്ഷണം കാണുന്നതായി എഴുതിയിട്ടുണ്ട്.”

9. The evidence of PW3 is that, as if not to see the incident, he walked away. His evidence regarding the incident is that he was originally near to the well where

digging of the same was going on and later at the exact time of incident, he went away. It is the submission that this aspect also to be appreciated in the light of the statement filed by the accused. It is also brought to our notice that PW3 now got a case that “Jose സ്ഥലത്തുണ്ട്. അയാൾ കത്തികയ്യിൽ പിടിച്ചു എന്നെ വിളിച്ചു, കയ്യുകൊണ്ട്. ഞാൻ പേടിച്ചു തിരിച്ചു പോന്നു. പിറ്റേന്ന് കുഞ്ഞുമോൻ മരിച്ചതറിഞ്ഞു.” This version of the witness will tally with the case of the accused in questioning under Section 313 that after inflicting injury he ran away from the spot. When the evidence of PW4 is perused, it can be seen that, she is declared hostile and her evidence is also to the effect that she heard a cry of Kunjumon to the effect that “തീർന്നു” and when she looked, she saw the deceased lying and her evidence is that she ran towards the road and Panchayat member informed the police and police came and took the injured and she also went with them.

10. Thus what comes out is that she is not seeing any

other aspect but only hearing the cry of the deceased and when she went, she saw the person lying. When the evidence of this witness is appreciated in the light of evidence of PW3, then it can be seen that it can be only after the actual culprit left the place.

11. It is also the submission that another evidence adduced by the prosecution is regarding the recovery. In the case of recovery, independent witness, who is examined as PW8, deposed that he witnessed the police presence near to the SNDP office. There is a culvert from under which the alleged weapon was taken by the police. His only evidence is that police shown the same to him and claimed that it is the knife taken by the police on the information given by the accused. He has not witnessed the actual recovery. The submission of the counsel for the appellant is that the place of recovery is relevant to be noted. It is near to the SNDP office. The F.I. Statement which is under challenge is also given by a Secretary of an SNDP unit. It is also the

submission that the categorical admission of the Circle Inspector of Police, who is examined as PW11 that he went to the police station only in the evening is critical in appreciating the evidence. He is also admitted during his evidence that the accused was not present or along with him neither when the inquest was prepared nor when the mahazar was prepared. From the inquest, it can be seen that he started the inquest at 9.30 and it was over only by 11.30. It is the evidence of the witness to the scene mahazar that police prepared the scene mahazar only at about 12.30 and he was there till 3 p.m. It is also the submission that, in the light of the admission of the Circle Inspector that he went to the police station only in the evening and the accused was not available with him during the inquest or at the time of preparing the scene mahazar or during the investigation process done in the morning session, the possibility of recording the statement on 26.2.2009 of the accused also become unbelievable. The

categoric evidence of the Investigating Officer is that the statement was recorded on 26.2.2009 and in consequence to the said statement the recovery was made.

12. It is also the submission that when the origin of the blood is not detected and when there is no evidence regarding the blood group of the deceased before this Court, no reliance can be placed on the recovery. It is also the submission that even though, as per Ext.P2 it can be seen that blood was collected during the postmortem, it is only known to the Investigating Officer that what happened to the said sample of blood. Thus it is the submission that this is a case where no positive evidence adduced to show the commission of offence by the accused. He is entitled for an acquittal.

13. The learned Public Prosecutor submitted before us that here is a case where the witnesses are the close relatives like mother and even the workers engaged by the accused for a work. The Prosecution tried to adduce

available evidences to show the guilt of the accused. In this case, at first, there is evidence to show that police transferred the deceased to the hospital. But there is nothing to show that the non-examination of the said witnesses actually caused prejudice to the defence. Originally, the case was resting on ocular evidence. When there was witnesses to show that the accused is the person, who inflicted the fatal injury, then an evidence regarding transferring of the injured to the hospital may not be that much relevant and that may be the reason why the Investigating Officer has not collected evidence on that regard. It is the submission that it is not a case where police alone transferred the injured to the hospital. As per the evidence of PW4, it can be seen that she was also along with the injured son and she was examined. Thus, a person who was along with the injured was examined by the prosecution to reveal what all things happened during the transfer and reaching at the hospital. It is also the

submission that, in this case, it can be seen that the incident occurred at about 4 p.m. The distance in between the place of incident and that of the police station is about 7 Kms. When the distance is about 7 Kms. and when the F.I. Statement came into existence within three hours, then it can be seen that there is no delay. It is also pertinent to note that the F.I. Statement promptly reached at the court on the very next day and the Magistrate initialled the same at 10.30 a.m. It is an indication that the F.I.R. now produced before this court is the original one, which can be relied upon.

14. It is the submission of the learned Prosecutor that in this case there is cogent evidence that the accused inflicted fatal injury by using MO1 weapon. MO1 weapon got a speciality; a rubber tapping knife. The doctor who is examined as PW5 marked Ext.P2 postmortem certificate and gave evidence to the effect that the injury noted as No.1 can be caused by this weapon. It is the evidence of

PW5 that “the death was due to injury No.1. It is sufficient in the ordinary course to cause death of a person. Injury No.1 & 2 can be caused by a weapon like MO1. MO1 has a bracket shape. So injury No.1 is bracket shaped. Witness deposed that it is not specifically stated - but side cuts are noted due to the peculiar nature of the weapon. Thus, the expert witness categorically stated before the court that MO1 is the weapon used to inflict the injury with special features. The relevancy of this is that MO1 is a tapping knife and as per the evidence of PW4, it can be seen that accused is the person who is tapping the rubber trees in their property. Thus, the availability of such a weapon to the accused is explained by the prosecution.

15. The submission of the defence counsel before the court is that the F.I. Statement now before the court is not the original one. The Prosecutor submitted before us that in a rural area, it will be only natural that the persons like Panchayat President and the Secretaries of organisations

will alone go to the police station and give information. In this case, it can be seen that, PW1 who is none other than the Secretary of the branch of SNDP gave the information. Being a social worker, he will have some responsibility to the society and there is nothing to disbelieve the version of such a person before the court. It is the submission made before us that he is not an eyewitness. There is no motive alleged against him for implicating the accused herein.

16. Now, the learned Prosecutor also submitted before us that PW2 was therein to dig the well. Ext.P4 is the scene mahazar. Scene mahazar shows that there is a well under construction which is having a depth of about only 5 ½ kole. Thus, this is the circumstance which will give assurance regarding the presence of PW3. As per the evidence of PW2, it can be further seen that there was an altercation in between the accused and Kunjumon at a nearby place where they went to rest and it is also the evidence now before the court that he heard a cry 'അയ്യോ'

and when he looked towards the side from where sound came he found that the accused was coming towards him and he told him that you need not go towards there. When he went near to the well, he found the injured Kunjumon and he further deposed that blood was coming from the neck area and he also asked Santhosh to give water. He ran to hire a vehicle and his case is that a jeep came and in that there was the President of the Panchayat. President informed the police and police came and Kunjumon was taken to the hospital. PW3 is none other than Santhosh who is also a co-worker of PW2. It is the evidence of PW3 that he also found the accused and the deceased together and he was asked to go away by the deceased and when he moved and looked back, he found the injured Kunjumon sitting.

17. It is the submission of the Prosecutor that apart from these two evidences, the evidence of the mother is also therein to the effect that immediately after the incident she saw the injured. The definite case of the defence is that, as

per the statement filed under Section 313 of Cr.P.C., it is PW3 who inflicted injury. It is the submission that when there are eyewitness, it is easy to make an allegation that the eyewitness are the culprits. But in this case, PW4 who is none other than the mother of the deceased, when examined before the court categorically stated during cross-examination that “മറ്റു പണിക്കാരുമായി വഴക്കുണ്ടായതായി അറിയില്ല.” But she is categoric that “നേരത്തെ പ്രതിയും കുഞ്ഞുമോനും തമ്മിൽ വഴക്കുണ്ടായതായി അറിഞ്ഞു.” On the background of this evidence, the evidences of two other witnesses are to be appreciated. The evidence of PW2 is corroborated by the evidence of PW3 and PW4 and it can be further seen that the evidences are mutually corroborative. When originally the case of the Prosecution was that of ocular evidence and the witnesses who are none other than the mother and the persons employed by the accused deviated from their original story and this court is entitled to appreciate and accept the circumstantial evidence now available before

this court which will show that immediately before sustaining injury and immediately after sustaining injury the accused was along with the deceased. Thus, the only inference that can be drawn is that the accused is the person who inflicted injury. It is the submission that the defence got no other case that there was any private defence or any exception of Section 300 of IPC is therein. Then it can be legitimately held by this court that the accused committed nothing but murder of his brother. It is also the submission that circumstantial evidences also give assurance to the evidence of PW1 to PW4. The Investigating Officer arrested the accused on the date of incident itself. It can be seen that when he was questioned by the Investigating Officer, a disclosure statement was given and in the light of the disclosure statement a recovery is seen made, that also from beneath a culvert. It can be seen that it was hidden by the accused in a gap therein which is having a depth of about 35 cms. which can clearly hide the

knife which is having only 35.5. cm in length. When a recovery from a such a place is made by the accused, the knowledge that the knife was therein give an incriminating aspect in appreciating the material. In this case, the speciality of the weapon is also to be appreciated by this court that it is nothing but a tapping knife. When a tapping knife is used, which is marked as MO1 and tallying with injury No.1 & 2 found on the body of the deceased, which is vouched by the evidence of PW5, the doctor who conducted the postmortem, there is nothing to doubt the evidence of PW1, PW2 and PW3. A safe inference can be drawn from their evidences that accused is the person who committed the offence. When no motive attributed for false implication, there is nothing to disbelieve the evidence of a responsible police officer who conducted the investigation in this case. It is also the submission that non-examination of the doctor who first saw the dead body is not relevant especially when as per the prosecution case, the deceased died before he

reached at the hospital. When a person was brought dead there is nothing to be noted by the doctor but only an intimation has to be given to the police regarding keeping of the dead body in the hospital. Surely, that intimation is not seized by the Circle Inspector. There are some laches committed by the Circle Inspector during the investigation. But laches and lapses committed by the Investigating Officer cannot be a ground for an acquittal. The available evidence in this case will show that accused committed murder and when a such an evidence is available, only because there was some laches or lapses on the side of the Investigating Officer will not be a ground to give benefit of doubt to the accused. Thus the sum of the submission of the prosecutor is that here is a case where the available evidences will show the guilt of the accused and no interference by this court is warranted.

18. Now, in this case the court charge is as follows:

“That you on 25.2.2009 at about 4 p.m. in the evening had committed murder of deceased Kunjumon, S/o. Scaria b y stabbing him with a knife in the compound of

Mariamamma in MP VI/302 at Koovakkad and liable under S.302 I.P.C. and within my cognizance and that you be tried for the above offence.”

19. The Prosecution altogether examined PW1 to PW12 and Exts.P1 to P8 were marked. MO1 to MO3 are also marked. On the side of the defence, Ext.D1 marked. The prosecution case rests mainly on circumstances. But in this case, a peculiarity can be seen in the evidence of the witnesses. Even though PW2 and PW3 are allegedly cited as eyewitness to the incident, it can be seen that they are not declared as hostile. Their evidence on oath is before this court. Before coming to their evidence, Ext.P6 is also can be looked into for appreciating the evidence before this court. The inquest was conducted by the Investigating Officer on the next day of the incident i.e. on 26.2.2009 at 9.30 a.m. At that time itself when witnesses to the inquest are examined, their opinion was to the effect that accused committed murder of the deceased. But surely this is not a substantial piece of evidence. The substantial piece of evidence before this court is the evidence of PW2, PW3 and

PW4 and the evidence regarding recovery. As per the evidence of PW2, it can be seen that he is a coolie and he was digging the well in the property of Kunjumon along with PW3 for the last 10 days i.e. prior to the incident and his case is that “ ജോസ്, കുഞ്ഞുമോൻ, അവരുടെ അമ്മ എന്തിനാലും ഉണ്ടായിരുന്നു.” and further it is deposed that Jose came in the morning and went and thereafter came back at 12 in the noon. It is also the evidence of this witness that in the noon, Kunjumon went out and came back only at 3.30 p.m. and it is also the evidence that by 3.30 they had food and thereafter he went to rest to the nearby estate. The accused also followed him. His case is that they went to rest and his further evidence is that PW3 remained near the well itself. His further evidence is that “Joseഉം കുഞ്ഞുമോനും കൂടെ പണിയെപ്പറ്റി തർക്കം ഉണ്ടായി.” and it is also categorically deposed that “Joseഉം കുടി കുടിയിട്ടാണ് പണിതിരുന്നത് and it is also deposed that for about 10 minutes they talked (10 മിനിറ്റോളം സംസാരിച്ചു) Kunjumon went and Jose followed. They went

towards the house and thereafter he heard a cry “അയ്യോ” and when he looked he found that Jose was coming towards him and near to the water stream therein Jose told him not to go towards that side “എന്നോട് അങ്ങോട്ട് പോവണ്ട എന്ന് പറഞ്ഞു “. When he went near the well, he saw Kunjumon sitting after having stab injury and blood was coming from the side of the neck. Thus, this is the evidence regarding the incident by this witness. As per the evidence of PW3 who is none other than the co-worker, it can be seen that he went for work as the accused called him. According to him by 3 p.m. he had food from the courtyard of the house of Kunjumon and he was resting on the lower mud wall (താഴത്തെ കയ്യാലയിൽ ഇരിക്കുകയായിരുന്നു.) and his case is that PW2 after food went to take rest towards estate and his further evidence is that “പ്രതിയും മരിച്ച കുഞ്ഞുമോനും തമ്മിൽ കശപിശ ഉണ്ടായി. ഞാൻ കിണറിന്റെ കരയിലേക്ക് മാറി നിന്നു. കുഞ്ഞുമോൻ മുന്നിലും പുറകെ ജോസും കിണറിനടുത്തോട്ട് വരുന്നത് കണ്ടു. കുഞ്ഞുമോൻ എന്നോട് പൊയ്ക്കോ എന്ന് പറഞ്ഞ പ്രകാരം ചാക്കുംഎടുത്തു നടന്നു. നടന്ന് കുറെ ചെന്നപ്പോൾ

കുഞ്ഞുമോന്റെ കരച്ചിൽ കേട്ടു. തിരിഞ്ഞുനോക്കി. Jose ഒരു കത്തിയുമായി നിൽക്കുന്നതും, തോട്ടത്തിലേക്ക് പോയി.” He thereafter again asserted that “കുഞ്ഞുമോൻ കുത്തുകൊണ്ടിരിക്കുകയായിരുന്നു നോക്കുമ്പോൾ. ഞാൻ കയറ്റത്തിലായിരുന്നതിനാൽ കാണാമായിരുന്നു.” He also identified the weapon of offence as MO1. The relevant evidence of PW4 is that she was inside the house and she heard “തീർന്നു” എന്ന് കുഞ്ഞു ഉറക്കനെ പറയുന്നത് കേട്ടു ഞാൻ ഓടിച്ചെന്നു. കുഞ്ഞുമോൻ വീണു കിടക്കുന്നത് കണ്ടു.” and it is also the evidence of this witness that she was not in the house on that day in the morning. She came only at 1.30 in the noon and she also said that accused is the person who prepared the food for the workers. Her evidence is also corroborating the evidence of PW2 to the extent that after having food, PW2, accused and the deceased Kunjumon had gone towards the estate. Thus the evidence of PW2 to the effect that he went to the estate followed by the accused and the deceased seen corroborated by the evidence of PW4. Thus, thereafter she is only hearing a cry of the deceased as “തീർന്നു”. The

evidence of PW2 is that after they went to the estate there was altercation in between the deceased and the accused and the accused followed the deceased and thereafter he heard a cry and it was seen that the accused coming back. It is seen corroborated by the evidence of PW3 also. The fact that immediately before the incident and immediately after the incident, the accused was seen along with the deceased is seen proved. The evidence of PW2 to the effect that “എന്നോട് അങ്ങോട്ട് പോവണ്ട എന്ന് പറഞ്ഞു പ്രതി.” will also come under the purview of Section 6 of the Evidence Act. Surely, in a similar fashion PW3 also deposed that Kunjumon told him to move away. It is brought as an omission by the defence which was also put to the Investigating Officer who admitted that while he was questioned, the same version was not given to him. The overall effect of these aspects is that the circumstances now put before the court show that the evidence of the witnesses to the extent that the accused was seen along with the deceased immediately and after the

incident seems to be correct. The weapon used is a rubber tapping knife. That also seems to be proved through the expert evidence of the doctor who is examined as PW5. It is also pertinent to note that as per the evidence of PW4, it came into evidence that they owned rubber trees and none other than the accused is the person who is tapping the same. Surely, the defence got a case that PW3 is the culprit. But there is no evidence available before this court to disbelieve the evidence of PW2, PW3 and PW4. It appears that it is only a wild allegation made against the witnesses.

20. But, in this case, from the inception of FIR it can be seen that the investigation was conducted in a shabby manner. It is a fact that the deceased was transferred from the place of incident by police. While PW11 was examined, he admitted the fact that during investigation he came to know that police removed the injured to the hospital. During the first portion of the cross examination itself it is stated by this witness that “മരിച്ച കുഞ്ഞുമോനെ പോലീസുകാർ ചെന്നാണ്

ആശുപത്രിയിൽ കൊണ്ടു പോയത്.” and he added that “മണിമല സ്റ്റേഷനിലെ പോലീസുകാരല്ല”. It is not clear how he came to know that it is not Manimala police who took him to the hospital when the concerned police was not questioned by him. He can say so only when the said police is questioned. It is also pertinent to note that from the initial period of the investigation, that is, while enquiry was being conducted, he wrote in the inquest report which is marked as Ext.P6 before the court, that the person who lastly saw the deceased “alive” was the mother. That fact may be correct. But later, he wrote in the inquest report that she saw him at his house. When the positive case of the prosecution is that the injured was removed to the hospital in a vehicle by the police and died during the transfer and the mother of the deceased was also present in the vehicle. There will be other persons also in the vehicle. There is ambiguity. As per Ext.P1, the vehicle in which the injured was transferred is noted as 'ambulance'. But it appears that either that stand was given

a go by or a new story is seen introduced so as to fit the case that police was also present. On this aspect, it appears that no evidence was adduced. If the police who transferred the deceased was questioned, what was his condition in the vehicle could have been ascertained. As per the evidence of the Sub Inspector, who registered the crime, the intimation received from the hospital was not handed over to the Investigating Officer. Handing over the same is not the mercy of the officer. It is the bounden duty of the Investigating Officer to seize the same. Now, as per the evidence of the Investigating Officer and Ext.P4, it can be seen that the mahazar was prepared in the early morning, that also at 8.30 a.m. But when the witness is examined, his evidence is that the police came at about 12.30 hours and they remained there till 3.30. This witness is not declared as hostile. The relevancy of the evidence is that the prosecution got a case that as per a disclosure statement recovery of weapon was made. But at the very

same time, the Investigating Officer while giving evidence was categorical that as per his memory he went to the police station only in the evening and further he deposed that while the scene mahazar or the inquest report was prepared the accused was not present. It is also pertinent to note that in Ext.P5 seizure mahazar, it can be seen that the time of preparing the same is not noted. When the Investigating Officer is not noting the time of preparation of the mahazar and when the defence got a case that it is a concocted document, it can only be treated as the Investigating Officer was very careless. Now, it can be seen that there was evidence to the effect that the President informed the police regarding the incident and it is the positive case of the witnesses that on such an information police came to the spot. When this aspect is apparent and evident, what was the information given by the President is a relevant matter. When information given, police came and removed the injured is a fact. Thus, which was the

police station, what was the information given, whether any FIR was registered therein in this regard, all are matters which caste suspicion. But already we have found that the evidence regarding the incident is reliable. But we are highlighting all these aspects to show that the Inspector who conducted the investigation was careless and the investigation was also conducted in a hopeless manner.

21. We have come to a conclusion that the evidence now presented before the court points out to the commission of an offence especially in the light of the decision rendered by the Apex Court reported in **Paras Yadav v. State of Bihar [(1999) 2 SCC 126]** where it is categorically held by the Apex court that lapse on the part of the investigating officer should not be taken in favour of the accused. Prosecution evidence is required to be examined de hors such omissions to find out whether the evidence is reliable or not.

22. We have already come to a conclusion that the

evidence tendered before the court can be accepted to come to a limited purpose that by the infliction of injury by the accused on the deceased is acceptable, nothing more, nothing less. But it is a fact that the attending circumstances will show that there was soft pedaling in the investigation and there was carelessness. The investigation was not conducted with due care expected from a responsible police officer. The evidence now before the court can point out to the commission of an offence. We accepted that part and discarded the other aspects. It is also relevant to note that even though prosecution got a case that PW2, PW3 and PW4 are eyewitnesses and even when PW2 and PW3 deviated from their original stand, the Prosecutor who conducted the case had not bothered to even make the witnesses hostile and cross-examine them. This is also an aspect to be noted by this court. Now, on the background of these aspects and also other attending circumstances, we have to examine what was the offence

actually committed by the accused. In this case, it can be seen that the doctor was examined as PW5 before the court. He marked Ext.P2. He was categorical when evidence is tendered that injury No.1 will in ordinary course cause death. The weapon of offence used is also a tapping knife having a length of about 35½ c.m. in total and the blade portion alone will be having a length of 20½ c.m. Such a weapon was used to inflict an injury near to the neck area and it pierced inside the body. When such an injury is inflicted, it can be seen that it will satisfy the ingredients of Section 299 of IPC as well as under Section 300, even when the actual intention to commit murder may not be therein. But in this case, we feel that the actual picture is not presented before the court either by the prosecution or by the witnesses. It is a fact that accused is the person who inflicted the injury on the neck area of the deceased by using MO1 weapon. But the materials that can be gathered from the available evidences and the nature of evidence

adduced before this court by the prosecution are also to be appreciated while coming into the conclusion that what is the actual offence committed by the accused. In this regard, the evidence of PW11 to the effect that “പൂഴി മണ്ണിൽ മൽപിടുത്തത്തിന്റെ ലക്ഷണം കാണുന്നതായി എഴുതിയിട്ടുണ്ട് ” and also there is admission to the effect that there was altercation in between the deceased and the accused just before the infliction of the injury. It is a case, as per the evidence of PW2 that both Kunjumon, the deceased and the accused Jose went to the estate area for resting. As per the evidence of the doctor and from Ext.P2 it can be seen that in the stomach contents there was smell of alcohol. It is also the evidence of PW4 to the effect that children were intoxicated. It is also the case of PW3 that immediately before the incident the deceased asked him to go away. Thus, the nature of the evidences adduced before the court and all attending circumstances now highlighted will point out that exception No.1 and 4 to Section 300 of IPC will be

applicable in this case. When this court comes to such a conclusion, we have also appreciated the inquest report, which came into existence immediately after the incident i.e. on the morning of 26 February 2009. While going through the said document, it can be seen that the mother, who is examined as PW4 is residing in a hut built near to the tharavadu house and for which it is alleged that the accused brought some roofing sheets. It is also seen in Ext.P4 scene mahazar that such sheets are also stored near to the place of incident and as per the inquest report the statements are to the effect that in respect of the sharing the value of the said sheets, there was dispute between the deceased and the accused. Thus, considering all these aspects and also at the very same time keeping in mind that as per the prosecution case the deceased and the accused had food together on that day as evident from Ext.D1, we are of the opinion that the accused is entitled for exemption under Exemption No.1 & 4 of Section 300 of IPC which will

bring the offence only under culpable homicide not amounting to murder, punishable under Section 304 Part I of IPC.

23. Now, considering all aspects including the relationship of the deceased and the behaviour immediately before the incident, we feel that a rigorous imprisonment for a period of 8 years will be sufficient in this matter. Then the accused is sentenced to undergo rigorous imprisonment for eight years for an offence under Section 304 Part I of IPC.

24. Before parting with this case, it can be seen that the investigation is conducted by the Investigating Officer in a very careless manner. A person belonging to the lower strata of the society died and the accused is also belonging to the same category. Irrespective of their caste, creed and financial position, due importance should have been given in the investigation of such a grave crime. Carelessness is not expected from such a responsible police officer in

such matter.

25. It is to be remembered that the prosecution has not tried their level best to bring the whole evidence before the court. If the prosecution was having any idea that the close blood relative PW4 may become hostile, her statement could have been recorded under Section 164 of Cr.P.C. We are not making much comments about the investigation done in respect of the information received and the police who came at the place of incident at the earliest point of time. So it is only said that the Investigating Officer was careless in this matter.

The appeal is allowed in part as stated above.

Sd/-

C.T. RAVIKUMAR
JUDGE

Sd/-

K.P. JYOTHINDRANATH
JUDGE

shg/