

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 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 1935 of 2011 ()

AGAINST THE JUDGMENT IN SC 84/2011 OF THE COURT OF SESSIONS,
KOTTAYAM DATED 05-09-2011

APPELLANT(S)/ACCUSED:

BENNY PAUL @ BENNY
S/O.PAULOSE, MAZHUVANCHERIL HOUSE
BHARANANGANAM VILLAGE, EDAPPALLY KARA.

BY ADVS.SRI.GRASHIOUS KURIAKOSE (SR.)
SMT.CELINE JOSEPH
SRI.GEORGE MATHEW

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
CIRCLE INSPECTOR OF POLICE, PALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.K.RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R”

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

Crl.Appeal No.1935 of 2011

Dated this the 30th day of September, 2015

JUDGMENT

Ravikumar, J.

This appeal is directed against the judgment of conviction in S.C.No.84 of 2011 passed by the Court of Session, Kottayam. The appellant/accused along with two others was charge sheeted in crime No.161 of 1992 of Pala Police Station for the offence punishable under sections 302 and 506 read with 34, IPC. The Court of Judicial First Class Magistrate, Pala committed the case as per proceedings in C.P.No.10 of 1993 to Court of Session, Kottayam and it was taken on file and numbered as S.C.No.55 of 1993. During its pendency the appellant herein/the original first accused therein, absconded and thereafter the case against him

was split up and included in the register of Long Pending Cases. Accused Nos.2 and 3 therein who stood the trial in S.C.No.55 of 1993 were found guilty of the offence punishable under section 324 read with section 34, IPC and were convicted and sentenced therefor. The appellant herein was subsequently arrested and produced before the Court of Session, Kottayam and thereupon the case was re-filed as S.C.No.84 of 2011. After preliminary hearing, charge was framed against him under sections 302 and 506(ii) read with section 34, IPC. It was read over and explained to him and he pleaded not guilty and claimed to be tried.

2.To bring home the charge, the prosecution has examined PWs 1 to 15 and got marked Exts.P1 to P28. No material object was available for identification though during the trial in S.C.No.55 of 1993, the prosecution had identified MOs 1 to 9 including the knives which were allegedly used by the appellant

herein viz., MO1 and the second accused therein viz., MO2. Inadvertently, those material objects were directed to be destroyed as per the judgment in S.C.No.55 of 1993 and consequently they were destroyed. In this context, it is to be noted that the appellant who was the original first accused in S.C.No.55 of 1993 was arrested and consequently, the case against him which was split up was re-filed only in the year 2011 viz., after 17 years. After the closure of the evidence of the prosecution, the appellant-accused was questioned under section 313, Cr.P.C and he denied all the incriminating circumstances put to him. The trial court found that the appellant herein was not entitled to be acquitted under section 232, Cr.P.C and therefore, he was called upon to enter on his defence. Nonetheless, he did not adduce any evidence.

3. After considering the evidence on record, the learned Sessions Judge arrived at the conclusion that the prosecution has

succeeded in proving the guilt of the accused for the offence punishable under section 302, IPC and at the same time found that the prosecution has not succeeded in proving his guilt for the offence under section 506(ii) IPC. Thereupon, for the conviction under section 302 IPC, the appellant was sentenced to undergo imprisonment for life and also to pay a fine of ₹50,000/-. The amount of fine, if recovered, was directed to be paid to the legal heirs of deceased Sunny, as compensation. In default of payment of fine, he was ordered to undergo simple imprisonment for one year. Hence, this appeal.

4.I have heard the learned senior counsel appearing for the appellant and also the learned Public Prosecutor.

5.The case of the prosecution was that on 17.4.1992 in the evening, the appellant and accused Nos.2 and 3 in the

aforementioned crime entered into the premises of Toddy Shop No.146 at Alanad and in furtherance of their common intention to commit murder of Sunny attacked him and inflicted fatal injuries to which he succumbed, from the hospital. To mount challenge against the judgment of conviction, the appellant has raised manifold contentions. It is contended that the first informant Joy was not examined and Ext.P20 First Information Statement would reveal that he did not state about the presence of PWs 1 and 4 at the place of occurrence. It is contended that in such circumstances no credence ought to have given to the oral testimonies of PWs 1 and 4. The further contentions can be encapsulated thus:- A scanning of the oral testimonies of PWs 1 and 4 would reveal that the manner of infliction of the injuries spoken to by them would not tally with the medical evidence. The embellishment in the version of PW4 is writ large from the fact that his case of being beaten up while attempting to intervene in the incident is

conspicuously absent in his previous statement and the prosecution did not have any such case. The recovery of the weapon allegedly used by the appellant under Ext.P14 mahazar based on Ext.P14(a) disclosure statement pales into insignificance in view of Ext.P21 chemical examination report to the effect that it did not contain blood stains. The version of PWs 1 and 4 that the deceased Sunny caught hold of the knife with both his hands and at the same time, the appellant using both hands thrust the same into the thigh of Sunny is belied by Ext.P16 postmortem certificate as it did not reveal any sign of sustainment of any corresponding injury on the hands of the deceased.

6. Though accused Nos. 2 and 3, the co-accused, were also tried for the offence under section 302 and 506(ii) read with 34 IPC, they were found guilty, and convicted and sentenced only for the offence under section 324 read with 34, IPC and therefore,

charge of sharing of common intention to commit murder of Sunny would not lie. As the question whether accused Nos.2 and 3 were having the common intention to commit murder was considered and found against the prosecution and they were found guilty of the offence punishable under section 324, IPC only with the aid of section 34, IPC going by the the principle of issue estoppel, the appellant could not have been charged under section 302, IPC read with section 34, IPC and consequently found guilty and convicted for the offence punishable under section 302, IPC for having murdered Sunny. To buttress the said contention, the learned senior counsel for the appellant relied on the decisions of the Hon'ble Apex Court in *State of A.P v. Kokkiligada Meeraiah and another* [AIR 1970 SC 771], and *Assistant Collector of Customs, Bombay and another v. L.R.Melwani and another* [AIR 1970 SC 962]. The evidence on record would reveal that the injury was not on any vital part of deceased Sunny. Though there

was opportunity to inflict further injuries, there is no case for the prosecution that the appellant had inflicted more than one injury on the body of deceased Sunny. All such circumstances indicate the absolute absence of an intention to commit the murder of Sunny and therefore, the trial court went wrong in holding that the appellant had intention to cause death of Sunny. The prosecution has failed in establishing that adequate light was available at the place of occurrence. It was based on the aforesaid contentions that the appellant seeks for interference with the judgment of conviction passed by the learned Sessions Judge and for his acquittal.

7. In fact, an alternative contention was also taken. It is contended that if it is found that the appellant is not entitled to be acquitted, taking into account the fact that injury was inflicted not on any vital part of deceased Sunny and further that only single

injury was inflicted on him and that too, only on the thigh, the appellant is liable to be convicted only for the offence under section 324, IPC. Per contra, the learned Public Prosecutor contended that the contention of the appellant that oral testimonies of PWs 1 and 4, the occurrence witnesses, are unreliable is bereft of any basis. It is contended that PW1 deposed to the effect that the appellant and the other accused who were armed with weapons were the aggressors and the appellant herein had inflicted the injury on the thigh of deceased Sunny, with a knife. It is further contended that the oral testimony of PW1 would also reveal the preparation of the appellant to commit the offence inasmuch as while being inside the toddy shop he stuck a knife on the table. The evidence of PW1 in this regard is corroborated by PW4. The deceased Sunny made a dying declaration to PW2 and the details disclosed therein would gain support and credibility from the evidence of PWs 4 and 9. It is also contended that the evidence of

PW11 with Ext.P16 postmortem certificate would reveal that the injury sustained on the thigh of deceased Sunny was sufficient in the ordinary course of nature to cause death and in the light of the said evidence and the oral evidence of PWs 1 and 4, it could not be said that the learned Sessions Judge had erred in finding the appellant guilty of the offence punishable under section 302, IPC.

8.It is further contended that the absence of blood stains in the weapon recovered in pursuance of Ext.P14(a) disclosure statement would not totally efface the validity, rather the relevancy of the recovery. Regarding the contention of inadequacy of light at the place of occurrence it is contended that PWs 1 and 4 categorically deposed to the effect that there was sufficient light at the place of occurrence and in fact, during the cross examination itself the details regarding the source of sufficient light was brought out. It is further contended by the learned Public

Prosecutor that the oral testimonies of PWs 1 and 4 would establish that the appellant had thrust the knife on the thigh of deceased Sunny overpowering the resistance put by the deceased with both hands and the evidence of PW11 with Ext.P16 would reveal that on account of the same, femoral artery and femoral vein of Sunny were cut and the depth of the injury was 10.5 cms. The learned Sessions Judge could not be said to have erred in holding that the appellant had the intention to commit murder of Sunny and consequently, finding that the appellant is guilty of the offence punishable under section 302, IPC, in the said circumstances. Therefore, the learned Public Prosecutor contended that the appeal is liable to fail.

9. We will firstly consider the contention regarding the applicability of the principle of issue estoppel. The contention of the learned senior counsel for the appellant is that the case of the

prosecution that the appellant and the co-accused had common intention to commit murder of Sunny was considered and rejected as per the judgment in S.C.No.55 of 1993 and the co-accused of the appellant who faced the trial in the said sessions case were found guilty of the offence punishable only under section 324 read with 34 IPC. In such circumstances, it is contended that the question of sharing the common the intention to commit murder on the part of the appellant ought not to have been considered as an issue in the trial of the appellant herein. It is to buttress the said contention that the decisions referred (supra) were relied on. The principle of issue estoppel was explained by the Hon'ble Apex Court in the decision in *Masud Khan v. State of U.P* [AIR 1974 SC 28]. It was held therein thus:-

“The principle of issue estoppel is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute

an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law”.

(emphasis added)

In the context of the contentions, it is also apropos to refer to the decision of the Hon'ble Apex Court in **Ravinder Singh v. State of Haryana [AIR 1975 SC 856]**. In paragraph 18 thereunder it was held thus:-

“.....there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner.....There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in subsequent proceeding by the Crown against the same prisoner.

In paragraph 19 thereunder, it was further held that in order to

invoke the rule of issue estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial.

10.The Hon'ble Apex Court further went on to consider the issue in paragraph 20 and held thus:- “that an issue estoppel did not prevent the trial of an offence as it is by the application of *autre fois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been laid and a specific finding recorded at an earlier criminal trial before the court of competent jurisdiction.” In fact, this position was earlier settled by the Hon'ble Apex Court in the decision in **Mohar Rai v. State of Bihar [AIR 1968 SC 1281]** wherein it was held that the principle of issue estoppel got no application when the parties are not the same as in the previous cases. In this context, it is also

relevant to note that a close scrutiny of the decisions relied on by the learned senior counsel for the appellant in **L.R.Melwani's** case (supra) and **Kokkiligada Meeraiah's** case (supra) would not reveal any change in the position of law regarding the application of the principle issue estoppel. Bearing in mind the said position of law settled by the Apex Court, we will examine the contention with reference to the evidence on record.

11.The learned senior counsel for the appellant brought to our notice the fact that the co-accused of the appellant herein who faced the trial and convicted for the offence under section 324 read with 34 IPC took up the matter in appeal before this Court as Crl.A.No.91 of 1998 and the said conviction was confirmed though the sentence was reduced. In fact, the fact that the co-accused of the appellant were found guilty and convicted for the offence only under section 324 read with 34 IPC though they were

tried for offence punishable under section 302 and 506(ii) read with section 34, IPC is discernible from the judgment impugned in this appeal itself. The learned senior counsel also brought to our attention that the judgment in Crl.Appeal No.91 of 1998 preferred against S.C.No.55 of 1993 would reveal that the second appellant therein viz., accused No.3 in the above crime was found guilty only of the offence under section 324, IPC as he was having the common intention as that of accused No.2 who was found guilty for the offence under section 324, IPC entertained by accused No.2. The learned senior counsel contended that the question of sharing of common intention to commit murder of Sunny was considered in the trial of accused Nos.2 and 3 by the Sessions Court and that was rejected and accused No.3 was found guilty because he shared the common intention to commit the offence under section 324, IPC. It is in the said circumstances that the learned senior counsel raised the contention that having

determined the said issue during the trial of the appellant's co-accused and arrived at the finding that they shared the common intention only to commit an offence punishable under section 324, IPC the Court was precluded from determining the issue again in the subsequent proceeding viz., the trial in S.C.No.84 of 2011 against the appellant herein. In the contextual situation it is relevant to refer to court charge in S.C.No.84 of 2011 from which the captioned appeal arise and it reads thus:-

“That on 17.04.92 by 7 p.m yourself and the other two accused in the crime had approached deceased Sunny with the common intention to cause his death, that the 2nd accused in the crime had stabbed him on his chest and then you had stabbed him with another knife on his left thigh and inflicted grievous injuries upon him, that the 2nd and 3rd accused had again stabbed him, that Sunny succumbed to the injuries and thereby you have committed offence punishable under S.302 r/w.S.34 of the Indian Penal Code, within my cognizance.

Secondly, that the 2nd and 3rd accused in the crime had criminally intimidated the

persons who had reached the place threatening not to interfere, in furtherance of your common intention, and thereby you have committed offence punishable under S.506(ii) r/w.S.34 of the Indian Penal Code, within my cognizance.

And I hereby direct that you be tried within the cognizance of this court for the said offences.”

12.As noticed hereinbefore, paragraph 20 in **Ravinder Singh's** case (supra) would reveal that the principle of issue estoppel did not prevent the trial of an offence as it is by the application of *autre fois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been laid and a specific finding was recorded at an earlier criminal trial before the court of competent jurisdiction. As held in the said case as also in the decisions in **Masud Khan's** case and **Mohar Rai's** case (supra) the principle of issue estoppel would apply only when 'the parties in the two trials' remain the same and also the fact-in-issue proved or not in the earlier trial is identical with what

is sought to be re-agitated in the subsequent trial. In this case, in respect of the occurrence in question there was no previous trial for the appellant and he was firstly and finally tried for the same only in S.C.No.84 of 2011 which is a split-up case of S.C.No.55 of 1993. The trial of the co-accused of the appellant in S.C.No.55 of 1993 and their consequential acquittal of the offence punishable under section 302, IPC would only preclude adducing of evidence of sharing of common intention to commit murder of Sunny by the appellant with the said co-accused who stood the trial and disturbing the finding as against those co-accused who stood the trial for the same occurrence.

13.However, that is not the situation in the case on hand. Here, the appellant did not stand the trial along with his co-accused and owing to his abscondence the case against him was split up in S.C.No.55 of 1993. The fact that the said co-accused

were tried for the offence punishable under section 302, IPC read with section 34, IPC and found guilty and convicted only for the offence under section 324 with the aid of section 34, IPC could not have been and would not have been a reason for the appellant to escape the trial for the offence punishable under section 302, IPC and 506(ii) read with section 34, IPC which are the original offences charged against all the accused. Paragraph 20 in **Ravinder Singh's** case (supra) in unambiguous terms indicate that the principle of issue estoppel did not prevent the trial of an offence as it is by the application of autre fois acquit. The essence of the decision in **Masud Khan's** case and in fact, all the decisions referred above settling the position in regard to issue estoppel is that it precludes the court only from receiving evidence and to disturb the finding on an issue of fact which has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused. As noticed hereinbefore, the

appellant was arrested and his split up case was re-filed after about 17 years. Such an abscondee like the appellant cannot be heard to challenge his trial for the offence punishable under section 302, IPC and his subsequent conviction thereunder if it is otherwise sustainable, on the mere ground that his co-accused persons who were tried for the offence punishable under section 302, IPC were found guilty only for the offence under section 324 with the aid of section 34, IPC. In other words, the finding that those accused persons were not having the common intention to murder Sunny could not be a reason for not considering the question whether the appellant was having the intention to cause death of Sunny and whether, for the particular role played by him in the same occurrence he could be held responsible for the murder of Sunny. Those two issues on fact cannot be said to be the same to apply the principle of issue estoppel.

14. In this context, it is to be noted that even in a case where some among the accused who stood the trial for the offence under section 300, IPC were found guilty only for lesser offence with the aid of section 34 cannot be a reason for the remaining accused in the same case to contend that they cannot be found guilty and convicted for the offence under section 300, IPC. This position is made amply clear by the Hon'ble Apex Court in the decision in **Kripal v. State of U.P** reported in **AIR 1954 SC 706**. In **Kripal's** case, the trial court held all the three accused responsible for causing death of Jiraj and convicted them for the offence punishable under section 304 read with 34 IPC on the ground that there was no evidence of any preconcert or pre-determined plan to kill Jiraj and that the blows were inflicted by them in the course of a sudden fight in the heat of passion without having taken undue advantage or acted in a cruel or unusual manner. However, in the appeal, the High Court held that preconcert in the sense of distinct

previous plan is not necessary to be proved. The High Court dismissed the appeal filed by the appellants-accused and in the appeals filed by the State, set aside the acquittal of the three appellants under section 302, IPC and convicted them thereunder. The Hon'ble Apex Court after considering the evidence on record and the judgments of the trial court and also the appellate court upheld the finding that preconcert in the sense of distinct previous plan need not necessarily to be proved, but held thus:-

“We are, therefore, unable to uphold the view taken by the High Court that any common intention to kill the deceased can be attributed to the three appellants. Therefore, the only common intention that can be attributed to all the three appellants in so far as the assault on Jiraj is concerned is the common intention to beat Jiraj also with the weapons in their hands, which were likely to produce grievous injuries. In this view therefore, all the three would be guilty in respect of their assault on Jiraj for an offence under section 326, I.P.C., while Bhopal alone would be guilty in respect of the offence under section 302 I.P.C. It follows from that the conviction of both

Kripal and Sheoraj under section 302 I.P.C. must be set aside but that of Bhopal has to be maintained.”

Accordingly, the conviction of those two appellants-accused under section 302, IPC was set aside and their conviction was modified to one under section 326, IPC read with section 34, IPC and at the same time, maintained the conviction of the other appellant under section 302, IPC. In the case on hand, a bare perusal of the impugned judgment in S.C.No.84 of 2011 would reveal that as against the appellant herein, the trial court framed only the following points for consideration.

1. Whether the accused had stabbed Sunny by a knife on 17.04.92 from the premises of toddy shop No.146 in Bharananganam village?
2. Whether the injury sustained consequently had resulted in the death of Sunny?
3. Whether the accused had criminally intimidated the onlookers and prevented them from giving medical aid to Sunny?
4. What, if any, are the offences committed by

the accused?

Having found that the appellant had stabbed Sunny with a knife on 17.4.1992 from the premises of the toddy shop in question and that it was sufficient in the ordinary course to cause death, naturally, the court went on to consider the question whether the appellant was having the intention to cause death of Sunny while deciding the point as to what is the offence committed by the appellant. The said issue could not be said to be the same which was framed and determined in the earlier proceeding viz., the trial of his co-accused in S.C.No.55 of 1993.

15.A scanning of the impugned judgment would undoubtedly reveal that what was determined was whether the appellant was having the intention to cause death of Sunny taking into account the injury inflicted by him on Sunny, on 17.4.1992. Though a perusal of the court charge would reveal that the charge against

him was for commission of offences punishable under sections 302 and 506(ii) read with section 34, IPC evidently, he was found guilty only under section 302, simpliciter. An abscondee in a case for the charge of commission of an offence punishable under section 302, IPC cannot be heard to raise the contention that he could not have been convicted for the said offence punishable under section 302, IPC solely because the case against him was split up and tried separately and in the trial of his co-accused, they were ultimately found not guilty for the offence punishable under section 302, IPC and were found guilty only for a lesser offence. Upon surrender or arrest, such an abscondee is bound to face the charge as it is or in other words, the charge or charges for which his co-accused was tried and in such eventuality, it would not preclude the court from proceeding with the trial for the offence as it is by applying the principle *autre fois acquit*, as held by the Hon'ble Apex Court in **Ravinder Singh's** case (*supra*). In such

circumstances, in the light of the provisions of law and the position of law settled by the Hon'ble Apex Court, we have no hesitation to hold that the challenge mounted against the judgment based on issue estoppel is not having any merit at all and it is only to be rejected. The fact that the co-accused of the appellant though tried earlier in S.C.No.55 of 1993 for the offences punishable under section 302 and 506(ii) read with section 34, IPC were convicted only under section 324, IPC with the aid of section 34, IPC by itself is no ground for the appellant to canvass the position that he alone could not be convicted under section 302, IPC. We may hasten to add that because of the above finding we shall not be understood to have held that the offence proved in the instant case is one punishable under section 302, IPC and that the appellant is the author of the offence.

16.The question to be decided first is whether the death of

Sunny is homicidal or not. Virtually, the fact that the death of Sunny was a case of homicide has not been disputed by the appellant. In fact, it is indisputable in view of the evidence of PW11 with Ext.P16. PW11 who conducted autopsy on the body of Sunny noted 5 antemortem injuries as hereunder:-

1. Incised punctured wound 2.8x0.7 cm, nearly horizontally placed on the inner aspect of left thigh 10.5 cm above the knee joint. The front end showed splitting of tissues and the back end was sharply cut. The back end showed an upward and backward tailing for a length of 12 cms. The wound was directed upwards, backwards and to the left for a depth of 10.5cm and had cut the femoral artery, femoral vein and other soft tissues in its track. The soft tissues in the inner aspect, front end back of thigh over an area 25x10cms were found heavily infiltrated with blood.
2. Abrasion 1.2x0.3cm on the outer aspect of the right side of chest 13cm below the arm-pit.
3. Abrasion 1x0.2cm on the right side of the front of chest 6cm, inner to and 5cm, below the nipple.

4. Contused abrasion 1.8x1cm on the outer aspect of the front of left leg 11 cm below knee.
5. Abrasion with black scab 1x1cm on the inner aspect of the root of left big toe.

17.PW11 opined that injury No.1 is the cause of death of Sunny and deposed that it was sufficient in the ordinary course of nature to cause death. The said wound was having the size of 10.5 cms and it cut the femoral artery and femoral vein. He also deposed that going by the depth of the injury it is evident that considerable force was used. Though the said injury was inflicted on the lower limb of Sunny, going by the very nature of injury as revealed from Ext.P16, and taking note of the fact that the femoral artery and femoral vein were cut we do not find any reason to disagree with the opinion of PW11 that the said injury was sufficient in the ordinary course of nature to cause death. In such circumstances, it can only be found that the death of Sunny is homicidal in nature.

18. Now the question is who is the culprit? Evidently, to establish the same, the prosecution has relied on direct evidence. Obviously, the trial court placed reliance on the oral testimonies of two occurrence witnesses viz., PW1 and PW4 for arriving at the conclusion of guilt on the appellant. The oral testimony of PW5 was found corroborating the versions of PWs 1 and 4 regarding the presence of the appellant-accused and other accused persons as also the deceased, at the place of occurrence. The learned senior counsel contended that no credence ought to have been given to their testimonies and in fact, their presence at the place of occurrence itself is suspicious and doubtful.

19. Both PWs 1 and 4 deposed to the effect that they came to the toddy shop in question together to drink toddy and the place of occurrence, going by the case of the prosecution is the premises of the said toddy shop. While considering the doubt entertained by

the appellant regarding their presence at the place of occurrence it is only worthwhile to recollect the following observation of the Hon'ble Apex Court in **Chanakya Dhibar v. State of West Bengal [2004(12) SCC 398]**.

“Murders are not committed with previous notice to witnesses soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only the passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'.

Therefore, when the occurrence is allegedly taken place in the premises of a toddy shop, natural witnesses can also be persons who came there to drink toddy. In such circumstances, there is absolutely no reason for brushing aside or viewing their evidence with suspicion on the ground that they were chance witnesses. In other words, their trustworthiness has to be tested in the light of

their testimonies.

20. Now, we will consider the evidence on record. PW1 Augustine @ Baby is a loading worker. He deposed that he had been in the toddy shop with PW4 Saseendran to drink toddy and the incident occurred on 17.4.1992 at about 7 p.m. when they were there. He deposed that it was a Good Friday and he heard a noise outside the premises of toddy shop. He identified the persons who made such noise as the appellant herein and his brothers. According to him, by about 6.30 p.m. deceased Sunny came to the toddy shop and the accused had quarrelled with him. When Sunny was about to leave there one of the accused persons told him that they wanted to say something to him and then, all of them went outside the toddy shop. He would also depose that the accused persons were armed with knives. PW1 would further depose that when they went outside, the second accused-Johny stabbed Sunny

and he warded off the same and consequently, it fell on his chest. Thereupon the appellant stabbed Sunny on his thigh and Sunny caught hold of the knife and the appellant overpowering him managed to thrust the knife into the thigh, using both hands. On sustaining the same he ran behind the toddy shop and he was chased by the appellant and the other accused. He would also depose that Sunny fell beneath a rubber tree and the accused persons did not allow anyone to go near Sunny. He deposed further that Joy, the first informant went to the house of deceased Sunny and came back with his mother and some others and they took Sunny to hospital and on the next day he came to know that Sunny succumbed to the injuries. He would also depose that at the time of incident there was street light and also the light from the toddy shop. He would further depose that in S.C.55 of 1993 wherein accused Nos.2 and 3 were tried, he was examined as a witness and on that occasion, he identified the knives used by the

appellant Benny and the second accused Johny and that they were marked respectively therein as MO1 and MO2.

21.PW2 Antony deposed that Sunny is the son of his elder sister. He would also depose that he was informed about the incident by Joy (CW1) and further that when he along with the mother of deceased came to the place of occurrence they found the appellant and the other accused in front of the toddy shop holding knives. He would depose that on being asked Sunny told him that he was stabbed by Oorancherikars who are brothers. He deposed thus:-

"സണ്ണിയോട് ചോദിച്ചപ്പോൾ കുത്ത്
കിട്ടിയതാണെന്നും ഊരാഞ്ചേരിക്കാരാണെന്നും
ചേട്ടനനിയന്മാർ ആണെന്നും പറഞ്ഞു."

22.PW3, Sreedharan was an employee of the Alanad toddy shop in the premises of which the incident occurred. He deposed that at the time of the incident, he was in-charge of the store of the

toddy shop and that he did not identify the accused. At the same time, he would depose that he was examined as a witness in S.C.No.55 of 1993. Though he turned hostile to the case of the prosecution he deposed that his deposition during the trial in S.C.No.55 of 1993 was correct. According to him, it was a busy day and customers were aplenty owing to a festival in the nearby place and toddy had exhausted early. While he along with another employee of the shop was going home after closing the toddy shop, police had intercepted and took them to the police station. He also deposed that they were ill treated from the police station during the night and that he did not know from where the death of Sunny had occurred. PW4, Saseendran is another occurrence witness and he was loyal to the prosecution. He would depose that the appellant used Malappuram knife and also that while the melee was going on, he attempted to interfere with it and at that point of time, he was beaten up by the appellant. He would further depose

that he had seen the appellant stabbing Sunny. He gave version regarding the incident in full corroboration with the version of PW1. He too, deposed that the appellant stabbed the deceased Sunny with a knife and Sunny caught hold of it. But, the appellant using both hands thrust it at the thigh of Sunny. He also spoke about the presence of light in the toddy shop.

23.PW5, Sabu was working in a bakery. He would depose that he went to Alanad toddy shop on the date of occurrence and he found all the accused in the aforesaid crime inside the toddy shop and according to him, they were making noise inside the shop. He deposed further that he found a knife stuck on the desk, either by Benny or Shaji. He would also depose that while he was there Sunny came to the shop and even while he was leaving the shop the accused and Sunny were remaining inside. PW6, Sajeesh is another occurrence witness and he turned hostile to the case of

the prosecution. He was the salesman of the toddy shop during the time of the incident. He would depose that the incident took place on the day of Good Friday in 1992. He deposed inter alia, that he was examined as a witness in S.C.No.55 of 1993 and that he did not know the appellant-accused or his brothers and further that he had not witnessed the incident. However, later he identified the appellant, but reasserted that he had no occasion to see the brothers of the appellant and he deposed that he gave false evidence in S.C.No.55 of 1993 knowingly. PW7 is the attesting witness to Ext.P12 inquest report and he admitted his signature thereon. PW8 is the attesting witness to Ext.P13 scene mahazar and he would admit his signature thereon. He deposed that Lungi, a pair of chappals, knife and the sheath of the knife (MO3 to 6 in S.C.No.55 of 1993) were recovered from the rubber plantation and also that he is the owner of the property where the shop in question situates. PW9 is the attesting witness to Ext.P14 mahazar

relating the seizure of MO1, marked as such in S.C.No.55 of 1993. He would depose that he had seen the recovery of MO1 knife. He would further depose that the surname of the appellant is Ooranchery and Ooranchery family got only one house in the locality. He deposed further that during the trial in S.C.No.55 of 1993 he identified the weapon allegedly used by the appellant viz., MO1 and deposed that the handle of the knife was in the shape of horn of a deer.

24.PW11 is the doctor who conducted autopsy on the body of Sunny on 18.4.1992 and issued Ext.P16 post mortem certificate. PW12 was the Lecturer in Medicine at Medical College, Kollam during the relevant period and he deposed that Sunny was brought dead to the casualty at 8.40 p.m on 17.4.1992. PW13 is the Village Officer, Bharananganam who prepared Ext.P19 plan of the place of occurrence. PW14 was the Sub Inspector of Police, Pala

who recorded the first information statement from CW1 Joy viz., Ext.P20 and based on which he registered Ext.P20(a) FIR. Ext.P20 was marked through him and he stated that CW1, the first informant was on plaster cast due to leg fracture. PW15 was the Circle Inspector of Police, Pala who conducted investigation in the case. He prepared Ext.P12 inquest report and Ext.P13 scene mahazar. He arrested the accused on 2.5.1992 and Ext.P14(a) disclosure statement was made to him by the appellant. He deposed that the information furnished by the appellant herein led to the discovery of the weapon used by him and that the same was identified by him in S.C.No.55 of 1993 as MO1. Exts.P21 to 28 were also marked through him. He would depose that Ext.P21 is the report of analysis of blood and urine of the deceased. After completing the investigation, he laid the final report.

25.As noticed hereinbefore, the trial court found PWs 1 and

4 as trustworthy witnesses. We have already found that the doubt cast by the appellant regarding their presence at the place of occurrence is bereft of any basis. Now, the learned counsel for the appellant submitted that on account of the embellishments in the oral testimonies of PWs 1 and 4, it is unsafe to rely on their evidence to arrive at the conclusion of guilt of the appellant-accused. We have adverted to the oral testimonies of PWs 1 and 4. PW1 deposed that he spoke about the presence of the appellant and the other co-accused inside the shop prior to the occurrence and also that they were armed with weapons. He has also deposed that the appellant inflicted injury on the thigh of deceased Sunny with a knife. He would depose that he went to the shop in question to consume toddy along with PW4 Saseendhran. A scrutiny of the evidence of PW4 would reveal that he too deposed to the effect that he went to the shop in question along with PW1. He also deposed to the effect that the appellant and the other co-

accused were armed with weapons and it was the appellant who inflicted a stab injury on the thigh of deceased Sunny. Thus, both PWs 1 and 4 deposed to the effect that the appellant and others were armed with weapons and it was the appellant who inflicted stab injury on the thigh of deceased Sunny. They were categorical in their statement that the appellant inflicted only one injury which was on the thigh of Sunny. Their version gained support from the medical evidence tendered by PW11 who conducted autopsy on the body of deceased Sunny. In Ext.P16, he noted 5 antemortem injuries of which the one that was on the thigh of Sunny ultimately caused his death.

26. Another circumstance which was pointed out to disbelieve PW4 is that he made an improvement to his statement under section 161, Cr.P.C stating that he intervened and tried to take away the appellant when the appellant started to attack Sunny

and that he was then beaten by the appellant and consequently, he fell down. The contention is that since there was no evidence regarding sustainment of any injury on PW4 he is not a trustworthy witness. In this context it is only relevant to refer to the decision of the Hon'ble Apex Court in **Jaishree Yadav v. State of U.P** reported in **AIR 2004 SC 4443** wherein it was held that the fact that the injuries sustained by an eye-witness were not entered into medico-legal register is no ground to disbelieve the witness. In such circumstances, merely because there is no evidence regarding sustainment of any injury duly entered into in any medico-legal register despite his version that he was beaten up, it can be no ground to disbelieve him. In other words, the trustworthiness of his testimony has to be scrutinized without giving undue weight to the aforesaid contention. While the prosecution relied on the oral testimonies of PWs 1 and 4 that gained support of the medical evidence consisting of oral

testimonies of PW11 with Ext.P16 post mortem certificate to establish that it was caused by the appellant the defence sought to resist the same relying on the oral testimonies of PWs 3 and 6.

27. Before considering the verity of the versions of PWs 1 and 4 it would only be appropriate to consider the oral testimonies of PWs 3 and 6. Admittedly, both PWs 3 and 6 were examined as prosecution witnesses in S.C.No.55 of 1993 in which accused Nos. 2 and 3 in the aforesaid crime were tried. Evidently, in that proceedings, they supported the prosecution. However, in this proceedings, while PW3 had prevaricated PW6 unscrupulously deposed to the effect that he had given false evidence in S.C.No.55 of 1993 and that he was then telling untruth knowing fully of its falsehood. Evidently, the specific portions of his evidence during his examination in S.C.No.55 of 1993 were brought to his attention and he has contradicted with the same.

After admitting the fact that he had given evidence in S.C.No.55 of 1993 in terms of the portions which were brought to his notice he deposed as hereunder:-

സത്യമായത് കൊണ്ടാണ് ഞാൻ അന്ന് കോടതിയിൽ മൊഴി കൊടുത്തതെന്ന് പറഞ്ഞാൽ ശരിയല്ല. കള്ളമാണ് എന്ന് അറിഞ്ഞ് ഞാൻ കള്ളം പറയുകയായിരുന്നു. കള്ളം പറയാൻ കാരണമുണ്ടു. സംഭവം നടന്ന രാത്രി എന്തെയും ശ്രീധരനേയും പോലീസ് സ്റ്റേഷനിൽ കൊണ്ടുപോയി. സംഭവത്തെപ്പറ്റി അറിയില്ല എന്ന് ഞങ്ങൾ പറഞ്ഞു. ഒരു മണിക്കൂർ കഴിഞ്ഞ് അന്നത്തെ C.I വന്നു. എന്ന് ഉള്ള കാലിന് റൂൾ വടികൊണ്ട് അടിച്ചു നിരന്തരം ഉപദ്രവിച്ചു. പിറ്റേന്ന് വൈകീട്ട് 5 മണിക്ക് ഞങ്ങളെ വിട്ടു. കഴിഞ്ഞ തവണ കോടതിയിൽ വരാൻ പറഞ്ഞ പോലീസ്കാരൻ മൊഴി കൊടുത്തില്ലെങ്കിൽ നിങ്ങളാവും പ്രതിയെന്ന് പറഞ്ഞു. തിയതി അറിയില്ല. പാലാ പോലീസ് ആണ്. സംഭവം കഴിഞ്ഞ് എത്ര വർഷം കഴിഞ്ഞ് ആണ് അതെന്ന് അറിയില്ല. പോലീസുകാരൻ ഭീഷണിപ്പെടുത്തിയതിന് ഞാൻ പരാതി നൽകിയില്ല. കള്ളം പറയാൻ പറഞ്ഞ കാര്യം കോടതിയിലും പറഞ്ഞില്ല.

As regards PW3, when the portions of his evidence given during

his examination in S.C.No.55 of 1993 were brought to his notice he admitted the fact that he had given evidence in S.C.No.55 of 1993. He deposed thus:-

"ഞാൻ കോടതിയിൽ അന്ന് മൊഴി കൊടുത്തത് ശരിയാണ്."

28.Both PWs 3 and 6 turned hostile to the case of the prosecution in the instant case. In view of the nature of the oral testimonies of PWs 3 and 6 we have absolutely no hesitation to hold that their oral testimonies cannot be relied on to discredit the case of the prosecution. We will now consider the question whether credence could be given to the versions of PWs 1 and 4. They deposed to the effect that they went together to Alanad toddy shop to drink toddy and they were there and they had seen the appellant and others holding knives. Both of them were also examined as witnesses in S.C.No.55 of 1993. They deposed to the effect that the appellant inflicted one injury on the thigh of

deceased Sunny. The learned senior counsel appearing for the appellant contended that the manner of infliction of the injury by the appellant on deceased Sunny as deposed to by PWs 1 and 4 would not tally with the nature of the injury noted by PW11 in Ext.P16. It is submitted that the evidence of PWs 1 and 4 is to the effect that the appellant had attempted to thrust the weapon downwards. Injury noted in Ext.P16 would reveal that the wound was directed upwards and downwards. It is in the said circumstances that the learned senior counsel contended that the oral testimonies of PW1 and 4 are not trustworthy.

29.A careful scrutiny of the evidence of PWs 1 and 4 would undoubtedly reveal that their oral testimonies were not at all wholly inconsistent with the medical evidence. Their consistent version is to the effect that the injury on the thigh of Sunny was inflicted by the appellant by a knife and invariably it gained full

support from the evidence of PW11 with Ext.P16 inasmuch as in Ext.P16 such an injury was noted and PW11 deposed to the effect that the said injury could be caused by a knife. Injury No.1 noted in Ext.P16 would reveal that the said injury is one sustained by Sunny on the inner aspect of his left thigh and the wound was directed upwards and backwards and had a depth of 10.5 cms. That apart, PWs 1 and 4 had also deposed to the effect that the appellant used both his hands to thrust the knife into thigh of the appellant. Again their version gained support of medical evidence of PW11. PW11 deposed to the effect that the depth of the injury No.1 viz., 10.5 cms would indicate that considerable force was used to cause the same. In this context it is also to be noted that the injury was inflicted on the lower limb and the possibility of movement of the said limb at the relevant point of time could not be ruled out. In such circumstances, little variation of the versions of PWs 1 and 4 and the nature of the injuries noted by PW11 in

Ext.P16 cannot have any serious consequence as essentially the versions of PWs 1 and 4 to the effect that the appellant inflicted injury on the thigh of Sunny was fully corroborated by the medical evidence tendered by PW11 with Ext.P16.

30.In this context, certain other relevant aspects also have to be looked into. The evidence of PWs 2 and 5 would also assume relevance in this context. PW2 is a close relative of Sunny and he came to the place of occurrence immediately after the incident on being informed about the same by CW1 Joy. He deposed to the effect that when he along with the mother of deceased Sunny reached the place of occurrence he had seen the appellant and the other accused persons in front of the shop in question holding knives. PW5 deposed to the effect that he went to the shop in question to drink toddy and that he had not witnessed the incident as he left the shop prior to the incident. At the same time, he

deposed to the effect that while he was there immediately before the time of occurrence he had seen Benny and Shaji there inside the toddy shop in question and further that he had seen a knife stuck on the desk either by Benny or Shaji. Thus, it is evident that while PW5 deposed the presence of the appellant and his co-accused immediately prior to the occurrence PW2 deposed the factum of their presence subsequent to the occurrence holding knives. Their evidence, in such circumstances, are relevant with respect to the conduct of the appellant, previous and subsequent to the occurrence and therefore in view of section 8 of the Evidence Act they are relevant. Though PWs 1 and 4 were cross examined at length not even a suggestion regarding any animosity with the deceased Sunny was put to them. The defence did not have a case that PWs 1 and 4 had any hostility towards the appellant.

31.A contention was also raised by the learned senior counsel

for the appellant to the effect that the prosecution had failed to establish that there was sufficient light at the place of occurrence to identify the appellant. In this context, it is to be noted that both PWs 1 and 4 would depose that there was sufficient light in the toddy shop. It is to be noted that during the cross examination of PW4 it was elicited that there were two tube lights inside the toddy shop and another light was put up on its board. That apart, it was elicited that there was a street light about 40 cm away from the toddy shop. The place of occurrence is the premises of the toddy shop. The learned senior counsel further submitted that the no door number was assigned by the Panchayat to the building in question. At the same time, having elicited regarding the sufficiency of light the appellant is not justified in taking up such a contention. It is to be noted that even if it is a the fact that the Panchayat had not assigned building number to the toddy shop and without which electricity connection could not have been obtained

it would at best go to show that electricity connection was unauthorisedly drawn. When it was brought out during the cross examination of PWs 1 and 4 that there was sufficient light in the place of occurrence and their source, the appellant cannot dispute the availability of sufficient light at the place of occurrence citing such a reason.

32.PW15 deposed to the effect that a knife was recovered under Ext.P14 mahazar in pursuance of Ext.P14(a) disclosure statement made by the appellant. It is a fact that the knife allegedly recovered was not available for identification during the trial of the appellant. The evidence of PWs 1, 4 and 15 would reveal that the weapon allegedly used by the appellant was identified as MO1 in S.C.No.55 of 1993. As noticed hereinbefore, the appellant was the original first accused in S.C.No. 55 of 1993. In that sessions case the appellant did not face the trial and he

absconded and he was subsequently arrested only after about 17 years in the year 2011. The appellant in such circumstances cannot be heard to contend that he had not contributed to the present circumstances. True that the material objects in S.C.No.55 of 1993 were destroyed pursuant to an order to that effect by the trial court mistakenly based on the omission to note the pendency of the proceedings against the appellant. No doubt, wherever, material objects are produced and marked in a case if all the accused persons were not put to trial the court concerned is having a duty to preserve the same for identification during the trial of the accused who some or how made their presence scarce along with their co-accused. But, the non-availability of the weapon cannot be a reason to get an acquittal in a case like the one on hand.

33.The case of the prosecution is that the knife used by the appellant to inflict the fatal injury was identified during the trial in

S.C.No.55 of 1993 as MO1 and the knife used by his co-accused viz., the second respondent was identified as MO2. PW9 who is the witness to the recovery of MO1 knife under Ext.P14 referred as such in S.C.No.55 of 1993 deposed to the effect that he had witnessed handing over of the knife by the appellant and he has admitted his signature in Ext.P14. We do not think it necessary to delve deep into those aspects any further in this case as there can be no doubt with respect to the said position that even a failure to effect recovery of the weapon of offence cannot by itself be a reason for the accused to get an acquittal if other reliable direct evidence was available. In other words, if the ocular evidence gets support from the medical evidence the mere non-recovery of the weapon would pale into insignificance for arriving at the guilt of the accused concerned. Taking into account all such aspects, we are of the view that the non-availability of the weapon recovered for the identification in the instant case that too taking

into account the fact that the trial of the appellant had not taken place along with other accused solely due to his abscondence the appellant cannot claim for an acquittal solely on the basis of non-availability of the weapon used by him for inflicting the injury on the thigh of deceased Sunny for identification. We are of the view that when once the evidence of PWs 1 and 4 to the effect that the appellant had inflicted injury on the thigh of deceased gets full corroboration from the versions of the medical witness PW11 with Ext.P16 and in the light of the evidence of PWs 2 and 5 revealing the conduct of the appellant previous and subsequent to the occurrence which is relevant in view of section 8 there is absolutely no reason for entertaining any doubt regarding the culpability of the appellant. In other words, in the totality of the circumstances, it can only be said that the prosecution has succeeded in establishing conclusively that it was the appellant who inflicted the injury on the thigh of deceased Sunny which

caused his death. The evidence expatiated above would also reveal the manner in which the appellant inflicted the said injury. Thus, we do not find any illegality or perversity in the finding of the trial court that it was the appellant who inflicted the fatal injury No.1 which caused the death of Sunny.

34.Now the question to be decided is what is the offence committed by the appellant. We have already adverted to the evidence of PWs 1 and 4 and also the evidence of PW11 with Ext.P16. The evidence on record would invariably indicate that the appellant had opportunity to inflict further injuries on the body of Sunny. However, it is a fact that he had not inflicted any injury other than injury No.1 noted as such in Ext.P16. The question whether a homicide is culpable homicide or murder would depend upon the degree of risk to human life. If death is the 'likely result' it is culpable homicide and if it is 'most probable result' it is

murder. The fact that the appellant had inflicted only one injury and that too, only on the lower limb of Sunny though he had opportunities to make further injuries, according to us, is an indication of absence of any intention on his part to commit murder. At the same time, in the light of the finding as above that he had inflicted injury No.1 and that caused the death of Sunny the question is whether in such circumstances the offence committed by the appellant would be culpable homicide. As noticed hereinbefore, PWs 1 and 4 deposed to the effect that deceased Sunny had attempted to resist the action from the part of the appellant for thrusting the knife into his thigh using both his hands and at the same time, the appellant had used both his hands to thrust the knife on the thigh of the deceased. The evidence of PW11 with Ext.P16 would reveal that the said injury sustained on the left thigh of Sunny was having the depth of 10.5 cms. As noticed hereinbefore, corroborating the versions of PWs 1 and 4

PW11 also opined that the depth of the injury would indicate that considerable force was used for inflicting the said injury. Judging the intention in the light of the actual circumstances we are of the considered view that the intention to attract first and second limbs of section 299, IPC to constitute culpable homicide is absent in this case. Therefore, the question is whether 'knowledge that he is likely by such act' to cause death could be said to be proved against the appellant so as to attract the third limb of the offence of culpable homicide. From the evidence of PWs 1 and 4 as discussed earlier we have no hesitation to arrive at the conclusion that the degree of risk to human life involved in the act committed by the assailant was such that death is the likely result. It is to be noted that the force with which the appellant thrust the knife into the thigh of Sunny using both his hands had ultimately resulted in cutting of the femoral artery and femoral vein and other tissues in its track. Femoral artery is continuation of the external iliac artery

which runs down the front of thigh and then crosses to the back. Femoral vein is then running the upper leg and it is a continuation to the popliteat vein. As a general rule every sane man is presumed to have knowledge about the necessary or natural and probable consequences of his acts. This must prevail unless the court, from the appreciation of evidence on record, entertains a reasonable doubt regarding the knowledge. Can any sane person be attributed with lack of knowledge that through the said locomotor limb important blood vessels are passing? When he had not only inflicted an injury on the thigh but used both hands to thrust the knife deep into the thigh, but at the same time, considering the place of injury and size of injury, it cannot be said that accused was having the further knowledge that the injury so inflicted is imminently dangerous that it must, in all probability, cause death. In other words, the degree of knowledge that required to bring it under the 4th clause of section 300, IPC is lacking in this case. We

are of the view that the appellant was having the knowledge that death is likely to be caused by the said act. In such circumstances, when death is the result of the act committed by the appellant the last limb of section 299, IPC alone must attract. In other words, we are of the view that the appellant had committed the offence of culpable homicide under section 299, IPC. In such circumstances, we vacate the finding of the trial court that the appellant had committed the offence punishable under section 302, IPC and we find the appellant guilty of the offence of culpable homicide under section 299, IPC, not falling under any of the clauses of section 300, IPC.

35. Now, the question is what is the sentence to be imposed on the appellant for the conviction for culpable homicide. The question is whether the appellant should be sentenced under 304 Part I or 304 Part II, IPC, for the conviction of the said offence.

We have already found that no intention to cause death or intention to cause bodily injury which is likely to cause death could be attributed taking note of the size of the injury and the manner in which it was inflicted. At the same time, it has to be said that the appellant was having the knowledge that the said action was likely to cause death. By the aforesaid act a youth had lost his life. In such circumstances, the appellant is liable to be convicted under section 304 Part II. The maximum sentence that could be imposed for the said conviction thereunder is ten years. However, considering the place where the incident took place and the other circumstances referred hereinbefore, we are of the view that the sentence to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹50,000/- would be the comeuppance for the conviction of the appellant under section 304 Part II. In the result, for the conviction under the second part of section 304, IPC the appellant is sentenced to undergo rigorous

imprisonment for five years and to pay a fine of ₹50,000/-. The amount of fine, if recovered, shall be paid to the legal heirs of deceased Sunny. In case of default of payment of fine, the appellant shall undergo simple imprisonment for a further period of one year. Set off is allowed.

This appeal is allowed to the above extent.

Sd/-

**C.T. RAVIKUMAR
JUDGE**

Sd/-

**K.P.JYOTHINDRANATH
JUDGE**

spc/