

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 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No. 2132 of 2011

S.C.NO.1049/2005 OF THE ADDITIONAL SESSIONS COURT-II, PALAKKAD

APPELLANT(S)/ACCUSED NOS.1 & 2 :

- 1. JOSEPH @ DORA, AGED 65 YEARS,
S/O.ANTHONYMUTHU, CHINNAPPANTHADITCHI VEEDU,
KONNAMPUTHUR, KANJIKODE, PALAKKAD DISTRICT.**
- 2. RAJAMANI @ SOURIMUTHU,
AGED 50 YEARS, S/O.ANTHONIMUTHU,
CHINNAPPANTHADITCHI VEEDU, KONNAMPUTHUR,
KANJIKODE, PALAKKAD DISTRICT.**

**BY ADVS.SRI.M.G.KARTHIKEYAN
SRI.NAGARAJ NARAYANAN
SRI.SAIJO HASSAN
SRI.BENOJ C AUGUSTIN
SRI.I.J.AUGUSTINE
SRI.SEBIN THOMAS
SRI.SWATHY DAS
SRI.P.E.SAJAL
SRI.M.G.KARTHIKEYAN**

RESPONDENT(S)/COMPLAINANT :

**STATE OF KERALA,
REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE,
WALAYAR POLICE STATION, PALAKKAD DISTRICT,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM- 682 031.**

BY PUBLIC PROSECUTOR SMT.VH.JASMINE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-12-2015,
ALONG WITH CRL.A.No.2133 OF 2011, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

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

Crl.Appeal Nos.2132 and 2133 OF 2011

Dated this the 16th day of December, 2015

JUDGMENT

Jyothindranath, J.

Both these appeals are filed against the judgment of conviction and sentence dated 3.11.2011 made in SC No.1049/2005 on the file of the Additional Sessions Court, Palakkad. Appeal No.2132/2011 is filed by accused Nos. 1 and 2, whereas Crl.Appeal No.2133/2011 is filed by accused No.3. They were convicted under Section 302 read with Section 34 of IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each with default rigorous imprisonment for six months. Originally five accused faced the trial in the above sessions case and the original charge was under Section 143, 147, 148, 341, 324, 207, 302 read with Section 149 of IPC. The prosecution altogether examined 22 witnesses and Exts.P1 to P38 marked. Mos 1 to 8 were marked on the side of the prosecution. On the side of the defence, Exts.D1 to D7 were marked. No defence witness examined.

After appreciating the evidence, the trial court acquitted accused Nos. 4 and 5 for the charges levelled against them and accused Nos. 1 to 3 were found guilty under Section 302 read with Section 34 of IPC and found not guilty for all other offences charged against them under Section 235 (1) of Cr.P.C. Aggrieved by the above conviction and sentence, the above referred appeals are preferred.

2. When the appeal came up for hearing, the learned counsel appearing for the third accused submitted before us that this is a case where practically there was no legal evidence. It is a case where there was actually moral conviction. It is the submission made by the learned counsel that all the injured witnesses turned hostile. It is also the submission that actually there is no reliable evidence produced before the court and it can be seen that the witnesses who are relied upon by the trial court are interested witnesses. It can be seen that even though PW10, the so called eye witness, deposed that he witnessed the incident, but his reaction to the incident is not a reaction which can be expected from an ordinary person. It is the submission that as per the

prosecution case he came along with the deceased and it can be seen that it is a very tactful pretext or trick played by the prosecution to cover the first part of the incident and only to put before the court a picture of the so called version of the second part. It can be seen that even his evidence varies when being cross examined. The truthfulness of the witness can be tested only by cross examination. Even though he claims during chief examination that he had witnessed the incident, when being cross examined he varied his version. Even though he claims that he had seen accused No.1 inflicting cut injury, it can be seen that it is belied by the expert witness, the postmortem certificate. The evidence of the doctor shows that no incised wound is seen on the head of the deceased. "Witnesses may come and lie, but circumstances will not" is squarely applicable in this case.

3. It is also submitted before us that in this case the positive case of the prosecution is that accused No.1 used a bill hook. But it can be seen that as per the evidence of the Doctor, the injuries noted on the head can be caused only by a blunt weapon, the blunt side of bill hook.

If blunt side is used, the word used “ഘട്ടുക” cannot be believed. It can be only a blow or strike. It is also submitted that, in this case, the evidence of the witnesses will not go together. It is not compatible with other witnesses' evidence. When the evidence of the witness is inconsistent with the evidence given during cross examination and when it is not tallying with the evidence of other witnesses, the only inference that can be drawn is that he is not a witness to the incident and placing reliance upon such a sole witness may be dangerous.

4. It is also submitted before us that in this case even though the witnesses were not declared hostile, the court permitted the prosecutor to put questions as in cross examination. Surely, by virtue of Section 154 of the Evidence Act, the Presiding Officer is entitled to do so. But still it is an indication that when the witness is not declared hostile, his version which will show that the accused are not involved in the incident should have been accepted by the trial court. It is also the submission that even though it is alleged by PW19, the investigating officer, that there is a recovery, it is not admissible in

evidence as there is no recovery under Section 27 of the Evidence Act. It is the submission that the court below erred in considering the evidence of PW19 to the effect that the accused made a confession statement. By virtue of Sections 25 and 26 of the Evidence Act, that evidence should not have come on record and it materially prejudiced the accused. It is the further submission that in this case when there are contradictions in the material aspects of weapon and other evidence, the trial court should have acquitted accused No.3.

5. The learned counsel appearing for accused 1 and 2 submitted before us that the accused are not at all involved in the incident. It is the submission that when there is no reliable evidence before the court, it cannot be said that the accused are involved in the incident. It is the further submission that there is a deviation from the evidence tendered in chief examination by PW10. The deviation is so fatal that no part of the evidence can be taken into consideration by this Court. It is the submission that when the conviction based upon the sole eye witness of the incident, the principle is that either it should be

explicitly reliable and if it is not explicitly reliable, it will be highly unsafe to rely upon the partial reliable one. The principle is that “ the court may convict if the evidence is wholly reliable and may acquit if it is wholly unreliable and must look for corroboration if it is neither wholly reliable nor wholly unreliable.” It is the submission that in this case actually the evidence of PW10 is wholly unreliable as evident after cross examination. It is the submission that for argument sake if it is considered as partial reliable, then also there should be corroboration on material particulars. Even when there is reliable corroboration on material particulars, it may be highly unsafe to rely upon the solitary witness as PW10 in this case.

6. It is the further case made before us that in this regard it can be seen that during chief examination, he deposed that A1 ഓര, A2 രാജാമണി, സനുപ് എന്നിവർ mopedന്റെ മുൻഭാഗത്ത് എത്തി.. A1 ഓര അയാളുടെ കയ്യിലുണ്ടായിരുന്ന കൊടുവാൾ കൊണ്ടു അരുമുഖനെ വെട്ടി. തലയിൽ വെട്ടു കൊണ്ടു. A2 രാജാമണി “കൊല്ലെടാ” എന്ന് പറഞ്ഞു കൊണ്ടു ഇരുമ്പു വടി കൊണ്ടു അരുമുഖനെ

അടിച്ചു. A3 ശെൽവുരാജ് മരവടി കൊണ്ടു അറുമുഖന്റെ തലയ്ക്ക് അടിച്ചു. ഞാൻ നിലവിളിച്ചു.” But during cross examination, his version changed. He varied from his earlier stand and stated that “മുറിവ് എത്രയുണ്ട് എന്ന് ശ്രദ്ധിച്ചില്ല. രണ്ട് അടി രാജാമണി അടിക്കുന്നത് കണ്ടു. വേറെ ആരും അടിക്കുന്നത് കണ്ടില്ല. രാജാമണി രണ്ട് അടി അടിക്കുന്നത് കണ്ടു എന്ന് പോലീസിൽ മൊഴി പറഞ്ഞില്ല. .” Thus what comes out is that even though during the chief examination, he got a positive case that he had witnessed the overtact of all the three accused, he admitted during cross examination that he saw beating of Rajamani alone and that also an omission when statement given to the Police. When he himself admitted that this fact was not told to the Police while being questioned by the Police, then it will be highly unsafe to rely upon such an evidence of the witness.

7. It is also the submission that as per the evidence of PW1, in the hands of Accused No.2 there was only a wooden log. But when PW10 deposed before the court, his version before the court is that Accused No.2 was holding an iron rod. Then on the background of the

recovery, it can be seen that the recovery is that of MO4. The main argument advanced by the counsel is that when the case of the prosecution is that Accused No.2 was holding an iron rod and when as per the evidence of the Doctor, the injuries can be caused only by MO3 and MO4, which are the bill hook and the wooden stick, then it can be seen that it is not the iron rod which is allegedly used by Accused No.2 as deposed to by PW10. If that is so, the main submission is that there can be no corroboration. When contradictions is therein, the only inference that can be drawn is that the evidence of PW10 is wholly unreliable. When it is unreliable, there is no legal material before the court to convict the accused.

8. The learned Public Prosecutor submitted before us that here is a case where it appears that the whole eye witnesses, even the injured witnesses, were won over by the accused party. It is to be remebered that the incident occurred on the National Highway in the broad day light. The injuries are sustained to the witnesses, but that witnesses also became hostile. The State tried its level best to bring the truth

before the court. PW10 is the witness who deposed before the court a truthful story and based upon the truthful story of PW10 and also after looking into the corroborating materials available, the trial court convicted the accused. It can be seen that as per the prosecution case earlier there was an incident in front of the shop room of PW9 and it resulted in this incident. The evidence of PW9 is relevant to be noted in this case. He is conducting a chicken stall . The plan and scene mahazar marked before the court as Exts.P3 and P15 will show that there is a chicken stall and in front of the said chicken stall, the incident occurred. PW9 deposed that he know PW1 and PW4 and he also know accused Nos. 1 to 5 and he is also aware of the death of Arumughan and it was about 7-8 years back before he adduced evidence and his evidence is that in the morning at about 11-12 noon there was an issue. There was some altercation and his evidence is that the injured Arumughan was lying in front of his shop.

9. The main aspect brought to our notice by the learned Public Prosecutor is that Accused Nos. 1 to 5 came therein with weapon. This

aspect is an unchallenged version. No cross reported by the defence counsel. Thus it can be seen that the presence of Accused Nos. 1 to 5 in front of the shop room of PW9 with weapon is proved by the prosecution. The scene mahazar shows that the incident also occurred in front of the shop room of PW9.

10. The learned Public Prosecutor further submitted before us that PW1 is an injured witness. But surely he is not actually supporting the prosecution. But his admissions or materials which will have the tint of the truth can be taken into consideration by the court. As per the evidence of the said witness, he deposed before the court that he was beaten by Accused No.2 and it was by a log (വിറക്) “A2 രാജാമണിയോട് എന്താണ് പ്രശ്നം ചോദിച്ചു. അപ്പോൾ എന്ന് രണ്ട് അടി അടിച്ചു. അവിടെ വന്നു. എന്ന് വിറക് കൊള്ളി കൊണ്ട് കാലിനും അടിച്ചു. തലക്ക് ഓങ്ങിയത് ഞാൻ കൈ കൊണ്ട് തടുത്തതിൽ വിരലിന് പരിക്ക് പറ്റി. ഇടത് തള്ള വിരലിന് പരിക്ക് പറ്റി.” It is submitted that the presence of Accused No.2 with wooden stick is seen proved by the prosecution especially in the light of the medical evidence in this

regard. Ext.P29 is the wound certificate of PW1 which will show that he sustained injury on the finger as well as on the leg. Then his version is also seen corroborated by the medical evidence and that aspect can also be believed by this Court. It is also submitted that even though he was not supporting the prosecution, he deposed before the court that he had seen the deceased lying on the road by getting injuries and he further deposed that “അവിടെ എത്തിയപ്പോൾ R.ചാമി പരിക്ക് പറ്റി താഴെ കിടക്കുന്നത് കണ്ടു. വീണ് കിടക്കുന്ന R.ചാമിയുടെ അടുത്ത് ആണ്ടിമുത്തു (CW8)ഉണ്ടായിരുന്നു.” Thus, what comes out is that the presence of PW10 is also deposed to by PW1. Thus, two aspects can be inferred from his evidence. One is that accused No.2 was present therein with a wooden stick and he also give assurance to the presence of PW10 at the place of incident and he also deposed that ആണ്ടിമുത്തുവും R.ചാമിയും തറവാട്ടിലെ പൂജ കഴിഞ്ഞ് ഇരുചക്രവാഹനത്തിൽ ആണ് വന്നത്.” Then it is also giving assurance regarding how PW10 arrived at that place. These aspects is not seen challenged by the defence.

11. Now, the prosecutor invited our attention to the evidence of PW4 and the main aspect highlighted by the prosecutor is that the incident occurred in front of the shop room of PW9. According to his version, he got blow on his head and he became unconscious. Now, as per the evidence of PW5, it can be seen that he is also a witness who deposed regarding the altercation in the morning. His evidence is that “രാവിലെ പോയി A2രാജാമണിയും ഞാനും വാക്കുതർക്കമായി. സ്ഥലത്തിനെ കുറുച്ചു വാക്കുതർക്കമായി. PW1 ഉം അനന്ദനും (CW6) ഞങ്ങളെ പിരിച്ചുവിട്ടു.” Thus, it can be seen that there was some animosity between these persons involved in the incident. The learned Public Prosecutor also submitted that PW7 also witnessed the deceased lying on the road and that also near the chicken shop of PW9. It is also the case that he also deposed that he saw the deceased lying on a moped. “Moped വണ്ടിയിന്മേൽ ആറുചാമി വീണ് കിടക്കുന്നത് കണ്ടു.” He also deposed before the Court that “ശെൽവനും രാജാമണിയുമായി നേരത്തെ പൈസയുടെ കാര്യം പറഞ്ഞു വഴക്കായിരുന്നു.”

12. The learned Public Prosecutor submitted before us that

PW14 deposed before the court that he reached immediately after the incident and he saw Accused Nos. 1 to 5 equipped with dangerous weapons and standing at the place of incident. He also witnessed PW10 at the place of incident. It is the submission that when the accused persons who are equipped with dangerous weapons were seen at the place of incident immediately after the incident and the deceased was seen lying injured, it will come under Section 6 of the Evidence Act and that evidence will have its own corroboration to the evidence of PW10 which is relied upon by the court below. It is the submission that PW15 is the son of the deceased and he explained before the court that his father is also known as Aruchami. According to him, he produced the dresses before the investigating officer which are now marked before the court as MO1 and MO2. It is also pertinent to note that MO1 and MO2 contained blood stains.

13. Now, the learned Public Prosecutor invited our attention to the evidence of PW10. It is submitted that this is not an ordinary case. It is a case where the witnesses were won over by the defence. Even

the injured witnesses turned hostile. It is submitted that the importance of this witness is that even though he is not an injured witness, when the presence of this witness is deposed to by other witnesses including the injured witnesses, his version can be believable. The chief examination was taken on 21st June, 2011. It is pertinent to note that on that day he had deposed the truthful version. Thereupon it can be seen that the witness was recalled on 22.6. 2011 i.e. on the next day and during cross examination on the next day, the witness changed his version. His original chief evidence is that “A1 ദൊര, A2 രാജാമണി, സനുപ് എന്നിവർ mopedന്റെ മുൻഭാഗത്ത് എത്തി.. A1 ദൊര അയാളുടെ കയ്യിലുണ്ടായിരുന്ന കൊടുവാൾ കൊണ്ടു അരുമുഖനെ വെട്ടി. തലയിൽ വെട്ടു കൊണ്ടു. A2 രാജാമണി “കൊല്ലെടാ” എന്ന് പറഞ്ഞു കൊണ്ടു ഇരുമ്പു വടി കൊണ്ടു അരുമുഖനെ അടിച്ചു. A3 ശെൽവരാജ് മരവടി കൊണ്ടു അരുമുഖന്റെ തലയ്ക്ക് അടിച്ചു. ഞാൻ നിലവിളിച്ചു . അയൽ വക്കത്തുള്ളവർ ഓടിക്കൂടി വന്നു. അരുമുഖൻ താഴെ വീണു. ആളുകൾ വന്നപ്പോൾ പ്രതികൾ ആയുധം കൊണ്ട് അവരുടെ വീട്ടിലേയ്ക്ക് പോയി.”

14. This is the original evidence of the witness. There may have some changes or variations or wilful omissions made by the witness thereafter. But it will not actually affect the evidence of PW10 in respect of the overtact of the witnesses, which are seen corroborated by the other witnesses. On the last portion of the cross examination, a suggestion was made “നിങ്ങൾ പറഞ്ഞ പ്രകാരം A1 to 5 എന്നിവർ അറുമുഖനെ തല്ലി പരിക്കേൽപ്പിച്ചില്ല എന്ന് പറയുന്നു”. He answered “ശരിയല്ല” He denied the same. It is an indication that what he deposed before the court during chief examination is the truthful version and the spontaneous answer shows the truth in it. Thus the version given at the chief examination can be believed.

15. The learned Public Prosecutor also submitted before us that in this case it can be seen that there is recovery of weapon. PW19, the Police Officer, deposed before the court that the weapons are recovered as taken and given by the accused. The possession of the weapon and knowledge of the weapon can be inferred when the accused is taking the weapon and handing over the same. It was the case of the defence

that there is no disclosure statement. But the disclosure statement may be relevant only when there is a recovery under Section 27 of the Evidence Act. But the fact that when an accused is taking the weapon and handing over the same to the Police Officer and when there are materials to show that, that weapon is the weapons used for inflicting the injuries, then that conduct of the accused will be relevant and material will be corroborating the prosecution case. It is the submission that it will be admissible under Section 8 of the Evidence Act and in this case the evidence of the Doctor is that these weapons can cause the injuries. As per Ext.P31 when there is detection of blood stains that also gives assurance regarding the weapon used especially when witnesses identified the same. Thus, the learned Public Prosecutor concluded that when materials are like this and when truth came out even though the major portion of the witnesses are won over by the defence, an interference by this court regarding the conviction is not warranted.

16. In this case, from the submissions of the learned Public

Prosecutor and the learned counsel for the appellants, it can be seen that Arumughan died. That fact is not disputed by the counsel. As per the evidence of PW22, it can be seen that he is not the Doctor who conducted the postmortem. He is only a Doctor summoned to prove Ext.P28 postmortem certificate. The postmortem was seen conducted by one Dr.G.Gnanadurai, who is no more. His signature is proved by PW22 who is working as a Tutor in Forensic Medicine at Coimbatore Medical College. As per the said postmortem certificate, there are antemortem injuries as follows :

- “ 1) An irregular lacerated injury of 5 cms. length with surrounding contusion seen over the right temporo parietal region, 8 cms. Above the right ear.
- 2) Curved lacerated injury of 5 cms. length seen over the right parieto occipital region. The upper end of the wound is 7 cms. away from the lower end of injury No.1.”

17. Thus, the Doctor further deposed that there was subarachnoid haemorrhage as well as subdural haemorrhage. It can be further seen that there was oblique crack fracture of 8 cm. length and

there was also depressed fracture. He also opined that the deceased would appear to have died of shock and haemorrhage due to head injury sustained to him. He was further categorical that the injuries noted in the postmortem certificate are sufficient in the ordinary course to cause death. When there is subarachnoid haemorrhage and further there is fracture of the skull, the opinion seems to be reliable and could be acted upon. Thus, the prosecution has succeeded in proving that the death of Arumughan was a homicide.

18. The next question is who inflicted the injuries and what is the cause of his death. As per the court charge, it can be seen that there was an intervention by the deceased in the altercation in between the accused and some of the witnesses and at that time deceased sustained injuries. The first accused inflicted injuries with a bill hook on the head and Accused No.2 beat with an iron rod and Accused No.3 with a wooden log. It is pertinent to note that Accused Nos. 4 and 5 are already acquitted by the trial court. There is no State appeal. In this case, it can be seen that the prosecution case is that there were more

than three persons involved in the incident. But surely it can be seen that as the majority of the witnesses turned hostile, the trial court came to the conclusion that the prosecution failed to prove the offence under Section 149 of IPC. But considering the overtact of individual accused as well as keeping in mind that in between the convicted accused, there was a common intention formed, the court below found the appellants guilty and sentenced.

19. As per the evidence of PW10, it can be seen that he deposed before the court that Accused No.1 inflicted injuries causing a bill hook and Accused No.2 beat with an iron rod. Accused No.3 beat with a wooden stick. Now, before adverting to the evidence of PW10, whether the presence of PW10 can be believed or not has to be looked into. We are considering this fact especially when the injured witnesses turned hostile. When the injured witnesses are not supporting the prosecution and PW10 admittedly a relative of the deceased came before the court and deposed that he witnessed the incident, the court should be very careful.

20. It can be seen that as per Ext.P5 i.e. the C.D. Portion marked by the prosecution, the first part of the case of the prosecution is that PW1 and PW4 equipped with weapon and went to the STD booth which belongs to Accused No.1 and inflicted injuries and caused mischief and when they came back from therein, as retaliation this incident took place. There is an earlier incident wherein the aggressors are PW1 and PW4. It is only natural that the witnesses may be hesitant to tell the first part of the incident as they may be having a feeling that they will be incriminating themselves. Surely, the law will protect them in telling the truth before the court. PW1 deposed regarding the presence of PW10. Thus, it can be seen that the evidence of PW1 to the effect that PW10 was present therein gives assurance regarding the presence of PW10 at the place of incident.

21. As rightly pointed out by the learned Public Prosecutor, the other witnesses PW4, PW6, PW7 and PW14 also gave evidence in this regard which gives assurance to the presence of PW10. The evidence of PW10 is relevant because he is not a party to the earlier incident.

PW10 is not a party in the group which went to the STD booth earlier as evident from Ext.P5. The evidence of PW10 in this regard is that Accused No.1 inflicted injury by using a bill hook. But surely as submitted by the learned defence counsel this version is not seen corroborated by the medical evidence. There is no incised wound seen upon the head of the deceased. The only possibility is that Accused No.1 used the blunt portion of the bill hook. The evidence of PW22 is only to the effect that only the blunt portion of MO3 can cause the lacerated injury which are seen as antemortem injury in the postmortem certificate. The witness is categorical that “വെട്ടുന്നത് കണ്ടു”. If that is so, when the witness is retracting from the same at the time of cross examination to the point that except Accused No.2 he had not seen anybody else inflicting injuries, the version in the chief examination cannot be accepted without corroboration. At this juncture it is relevant to note that when there is no incised wound seen on the head of the deceased, the ocular version of PW10 to that effect, especially when PW10 changed the version at the time of cross examination, cannot be

relied upon to come to a conclusion that Accused No.1 inflicted injury with a bill hook. It is also pertinent to note that if the blunt portion is used then also, he cannot have an intention to cause any incised wound or any grievous injury to the injured. Now, as per the evidence of PW10 it can be seen that he got a case that “ശെൽവുരാജ് മരവടി കൊണ്ടു അറുമുഖന്റെ തലയ്ക്ക് അടിച്ചു”. Now the case of PW10 during chief examination is that “A2 രാജാമണി “കൊല്ലെടാ” എന്ന് പറഞ്ഞു കൊണ്ടു ഇരുമ്പു വടി കൊണ്ടു അറുമുഖനെ അടിച്ചു.”

22. During cross examination, his positive case before the court is that he saw him using weapon two times “A2 ആദ്യം രാജാമണിയാണ് അടിച്ചത്. രണ്ട് അടി അടിച്ചു. വേറെ ആരും അടിച്ചില്ല.”

23. Now, the evidence of the Doctor is to the effect that there are two injuries on the head. Both the injuries can be caused with MO4 weapon. Surely as per the evidence of PW10 during chief examination, his positive case is that Accused No.2 was seen using iron rod. But as per the evidence of the Doctor, the injuries can be caused only with MO4 or by blunt side of MO3 weapon. We have already found that

usage of MO3 is not proved. It is also to be considered that at the time of cross examination, PW1 deposed before the court that Accused No.2 used wooden stick to inflict injury on PW1. It appears that the deceased also came to the spot and Accused No.2 inflicted injury. When PW1 is categorical that in the hands of Accused No.2 there was a wooden stick and when the Doctor is deposing before the court that injuries noted in the head of the deceased can be caused only by a weapon like MO4 and MO3 and further when MO4 weapon is handed over to the Circle Inspector by Accused No.2, the only inference that can be drawn is that the weapon used by the accused would have been only a wooden stick. A mere change of PW10 regarding the description of the weapon will not materially affect the evidence of PW10 to the effect that accused No.2 twice beat the deceased. It can be seen that during cross examination as well as during the chief examination, the consistent version of the witness, PW10, is that Accused No.2 was seen inflicting injury by beating. The fact that only because during the chief examination he got a case that iron rod was

seen at the hands of the accused, it cannot be said that the factum that Accused No.2 inflicted beat twice is unbelievable. Further there is evidence that accused No.2 handed over the weapon as well as the weapon handed over by him contained blood stains as evident from Ext.P31. Thus, we are coming to a conclusion that the two injuries seen upon the head of the deceased is inflicted by Accused No.2. It can be seen that there are only two injuries on the head of the deceased. Both the injuries are seen inflicted by Accused No.2 .

24. Now, as per the case of PW10 Accused No.3 is seen inflicting injury using a wooden stick. We have already come to a conclusion that the wooden stick was in the hands of Accused No.2 . PW10 is categorical during cross examination that except Accused No.2 he had not witnessed anybody else inflicting injuries. There is reliable evidence regarding infliction of injury by Accused No.3.

25. In this case, it can be also seen that, conviction entered by the court below with the aid of Section 34. As per the evidence before us, it can be seen that the deceased reached at the spot just before

deceased sustained injuries. He reached therein on a moped and deceased intervened thereupon. No stretch of imagination can say that Accused Nos. 1 and 3 also shared any intention to inflict injury to the deceased. i.e. it cannot be said that there was prior meeting of minds or common intention formed to attack the deceased in between Accused Nos. 1 to 3. Naturally the question of invoking of Section 34 is not therein, especially in the light of finding of the trial court that there is no offence under section 143 or 149 of IPC.

26. Now, the next aspect to be considered is regarding the offence. The court already found that the overtact attributed against accused 1 and 3 is not believable. Then the only question is what is the offence committed by Accused No.2. Accused No.2 used a stick. The description of the weapon now found to be used by the accused is “ശീമക്കൊന്ന”. Surely, the length of the wooden stick is discernible from the evidence before the Court. The mahazar shows that it is having a length of 115 cm. It is also evident from therein that it is such a stick that one side of it is bigger than the other and there is no

evidence before this Court to show that which side of the weapon is actually used. But it is a fact that it caused fracture on the skull. When there is no preconcert and when the prosecution case is that there was an incident wherein PW1 and PW4 are equipped with weapons and at that juncture deceased is also coming therein and accused No.2 inflicted injury, it cannot be positively said that there was intention to murder with a stick of Sheemakonna. It cannot be said that the object or intention was to murder the deceased. We came to this conclusion especially after evaluating the nature of the weapon as well as the incident occurred immediately before this incident which is evident from the case diary portions marked before the court. It is also pertinent to note that even though PW1 and PW4 is the real opponents, they were not inflicted with such fatal injuries. Under such circumstances, when the deceased came to the spot and intervened and sustained injuries, we are of the opinion that it can be only said that there was knowledge of causing death by inflicting such an injury with a wooden stick by Accused No.2. Surely while coming to this

conclusion, we have taken into consideration that the injuries are inflicted on the head of the deceased, by beating twice. If the said weapon is used on any other part of the body, it would not have become fatal. When it is used to inflict injuries on the head, it can be positively concluded that he was having the knowledge that such an injury may cause death.

27. Now, at the very same time, we are very anxiously considered whether this culpable homicide committed by the accused will come under the purview of Section 300 of IPC. Surely when the intention is lacking, the only consideration is the 4th clause of Section 300. To bring an offence under the fourth clause of Section 300 of IPC, in our opinion, the knowledge should be in a higher level. Such an higher level knowledge of causing death cannot be attributed in this case especially in the light of weapon used and the background of the case. We are coming directly to the conclusion that this is a case where the offence alleged will not come under the purview of murder, but only an offence punishable for culpable homicide not amounting to

murder. When the intention is lacking it will only come under the second part of Section 304, which is punishable under Section 304 Part II.

28. We have already found that the case against Accused Nos. 1 and 3 is not proved by the prosecution.

In the result, Crl.Appeal No.2133/2011 is allowed. Crl.Appeal No.2132/2011 is allowed to the extent it relates to accused No.1 i.e. the first appellant therein. The judgment in S.C.No.1049/2005 passed by the Court of Additional Sessions Judge-II, Palakkad whereby the appellant in Crl.A.No.2133/2011 and the first appellant in Crl.A.No.2132/2011 are convicted and sentenced under section 302 read with section 34, IPC is hereby set aside. In the case of the 2nd appellant, in Crl.A.No.2132/2011/the 2nd accused, Crl.A.No.2132/2011 is partly allowed. The conviction under Section 302 of IPC of the second appellant in Crl.Appeal No.2132/2011 (accused No.2 in SC No.1049/2005) is set aside and he is convicted under Section 304 Part II of IPC. He is sentenced to undergo rigorous imprisonment for five

years and to pay a fine of Rs.5,000/- with a direction to undergo default simple imprisonment for six months. The appellants who stand acquitted as per this judgment shall be released forthwith in case their detention is not warranted in connection with any other case.

C.T.RAVIKUMAR, JUDGE

K.P.JYOTHINDRANATH, JUDGE

SV.