IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR. JUSTICE G.GIRISH
THURSDAY, THE 25TH DAY OF JULY 2024 / 3RD SRAVANA, 1946
CRL.A NO. 1089 OF 2016

AGAINST THE JUDGMENT DATED 15.10.2016 IN SC NO.718 OF 2008 OF I ADDITIONAL SESSIONS JUDGE, THRISSUR

APPELLANT/ACCUSED NO.7:

VARGHESE,
AGED 43 YEARS
S/O.DEVASSY, THARAYIL HOUSE, NELLIKUNNU KARA,
OLLUKKARA VILLAGE, KRISHNAPURAM DESOM,
THRISSUR DISTRICT.

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SRI.C.JAYAKIRAN
SRI.V.C.SARATH
SRUTHY K K

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR, SRI. ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.07.2024, ALONG WITH CRL.A. Nos.1095/2016 & 1166/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR. JUSTICE G.GIRISH
THURSDAY, THE 25TH DAY OF JULY 2024 / 3RD SRAVANA, 1946
CRL.A NO. 1095 OF 2016

CRIME NO.173/2006 OF Mannuthy Police Station, Thrissur
AGAINST THE JUDGMENT DATED 15.10.2016 IN SC NO.718 OF 2008 OF I ADDITIONAL SESSIONS COURT, THRISSUR.

APPELLANTS/ACCUSED NOS. 1, 3, 4 and 6 (Accused in custody):

1 JAYAN, AGED 48 YEARS
S/O. PRABHAKARAN,VADAKOOTTU HOUSE,
NELLIKKUNNU KURA DESAM, OLLUKKARA VILLAGE,
THRISSUR DISTRICT.

2 ANILAN, AGED 38 YEARS
S/O. KOCHANIYAN, MUNDUKKARAN HOUSE,
NELLIKKUNNU KURA DESAM, OLLUKKARA VILLAGE,
THRISSUR DISTRICT.

3 RAJESH, AGED 38 YEARS
S/O. ARAVINDAKSHAN, THRIPRAYAR THEKKOOTTU HOUSE,
NELLIKKUNNU KURA DESAM, OLLUKKARA VILLAGE,
THRISSUR DISTRICT.

4 RAJESH, AGED 35 YEARS
S/O. KUNJU, THEKKEPURATH, NELLIKKUNNU KURA DESAM,
OLLUKKARA VILLAGE, THRISSUR DISTRICT.

BY ADV SRI.G.SUDHEER THURAVOOR

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

PUBLIC PROSECUTOR, SRI. ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.07.2024, ALONG WITH CRL.A.Nos.1089/2016 & 1166/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR. JUSTICE G.GIRISH
THURSDAY, THE 25TH DAY OF JULY 2024 / 3RD SRAVANA, 1946
CRL.A NO. 1166 OF 2016

AGAINST THE JUDGMENT DATED 15.10.2016 IN SC NO.718 OF 2008 OF I ADDITIONAL SESSIONS JUDGE, THRISSUR.

APPELLANT/ACCUSED NO. 2:

SANILAN
S/O. EDATTUPARAMBIL BHASKARAN,
NELLIKUNNU KARA DESOM, OLLUKKARA VILLAGE.

BY ADV SRI.M.P.MADHAVANKUTTY

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR, SRI. ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.07.2024, ALONG WITH CRL.A.1089/2016 & 1095/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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J U D G M E N T

Raja Vijayaraghavan, J.

These appeals have been preferred challenging the finding of guilt, conviction and sentence passed by the I Additional Sessions Judge, Thrissur in S.C.No. 718 of 2008. In the above case, nine persons were indicted for having committed offences punishable under Sections 143, 147, 148, 120B, 302 and 302 r/w. Section 149 of the IPC.

2. **Short facts:**

The deceased in this case is one Shameer. In December 2005, an altercation occurred between Shameer and Jayan, the first accused. Jayan was found drinking alcohol in public, which Shameer allegedly objected to, leading to a confrontation. Shameer is said to have hit Jayan on the head with a bottle, causing injuries. As a result, Jayan harboured animosity towards Shameer. The prosecution alleges that the accused Nos. 2 to 7, who are close friends and associates of Jayan, gathered in front of the compound of an unoccupied house belonging to Alappatil Babu and conspired to murder Shameer. Following this conspiracy, the accused Nos. 1 to 7, allegedly formed an unlawful assembly, and armed themselves with deadly weapons,

including a chopper and iron pipes, lay in wait in front of a house owned by one Madhavan, located at Door No. TC15/342. When Shameer arrived at the spot, unaware of the presence of the accused, they allegedly attacked him and inflicted multiple injuries. It is alleged that the first accused cut Shameer with a chopper, while the third and fourth accused attacked him with iron pipes. The chopper was then handed over to the second accused, who also inflicted injuries with it. The accused Nos. 6 and 7 used MO1 to MO3 weapons, handed over to them by the accused Nos. 1 to 3, and went on to inflict injuries. As many as 57 injuries were sustained by the deceased. The 5th accused stood a bit further away guarding the place and did not inflict any injuries. When the prosecution witnesses, cited as PWs 2, 3, and 4, arrived at the scene, the accused threatened them and later fled. The first informant, the nephew of the deceased, also came to the scene. The injured Shameer was transported to Jubilee Mission Hospital, Thrissur in a police jeep., which came to the spot, on receiving information about the incident. Upon arrival, the doctor found him gasping, but there was no pulse or blood pressure. Shameer was pronounced dead at 10:15 p.m. on the same day.

3. **Registration of the crime and investigation:**

After Shameer was pronounced dead, PW1 went to the Mannuthy Police Station and lodged the First Information Statement (Ext.P1) at

2:00 a.m. on 15.05.2016, based on which the FIR (Ext.P9) was registered by PW.15, Sub Inspector of police, Mannuthy, under Sections 143, 147, 148, 120B, and 302 read with Section 149 of the IPC. Ext.P2 inquest was prepared on 15.5.2016. The accused Nos. 1 to 8 were apprehended at 10:30 a.m. on the same day, and the 9th accused was apprehended on 01.06.2016. The accused was obtained in police custody and based on the information furnished, the clothes worn by accused Nos. 1, 2, 3, and 6 were recovered. PW11, a Police Surgeon attached to the Government Medical College, Thrissur, conducted the autopsy and issued a post-mortem certificate (Ext.P6). In the course of the investigation, it was revealed that the accused Nos. 8 and 9 harboured accused Nos. 1 to 7 and they were included in the array of the accused. The initial investigation was conducted by PW16, and it was later taken over by PW17, who completed the investigation and laid the final report before the Judicial First Class Magistrate (JFCM) - III Thrissur.

4. **Proceedings before the Court:**

After complying with the procedure, the Judicial First Class Magistrate (JFCM) - III Thrissur committed the case to the Court of Sessions, Thrissur. After hearing both sides, the learned Sessions Judge framed charges under Sections 143, 147, 148, 120B, 302, and 302 r/w. Section 149 of the Indian Penal Code. The accused pleaded not guilty to the charges and claimed to be

tried. Accused Nos. 8 and 9 expired, and the case against them stood abated.

5. **Evidence Tendered:**

The prosecution examined PWs 1 to 17 to prove its case. Exts.P1 to P20 were exhibited and marked. MOs 1 to 11 were produced and identified. After the close of the prosecution evidence, the incriminating materials arising out of the prosecution evidence were put to the accused under Section 313 of the Cr.P.C. They denied all the incriminating circumstances brought against them and maintained their innocence. They asserted that they did not have any animosity towards the deceased. On finding that the accused could not be acquitted under Section 232 of the Cr.P.C., they were called upon to enter upon their defence. No defence of evidence was adduced on their side.

6. **Findings of the learned Sessions Judge:**

a) The learned Sessions Judge, after a detailed evaluation of the evidence, concluded that the version of Pw1 that he had witnessed the incident was not believable.

b) The evidence tendered by PW's 2 to 4, projected as eyewitnesses, was accepted. Minor discrepancies and omissions in their evidence was taken as natural and their evidence was found to be firm on all material points.

c) The case of the prosecution that there was ample light at the place of occurrence was accepted.

d) The injuries found on the body of the deceased were held to tally with the version of the eye witnesses and the post mortem certificate.

e) Injury No. 27 in the post-mortem certificate, though could not have been caused by MOs 1 to 3 as per the doctors version, was held insufficient to cause a dent to the prosecution case, in view of the ocular evidence which was found convincing.

f) The presence of blood on MO1 Chopper, as noted by the Chemical Analyst in Ext. P11 Chemical Analysis Report, was found in favour of the prosecution.

g) The prompt registration of the FIR at about 2:00 a.m. on 15.05.2006 on receipt of the information from the first informant, the fact that the FIR had reached the Court at 10:00 a.m. on 15.05.2006, and the additional fact that the names of accused Nos. 1 to 7 were mentioned in the FIR, were taken as strong factors in favor of the prosecution.

h) The learned Sessions Judge also concluded that the non-examination of the persons residing in the adjacent houses and the pedestrians mentioned by PWs 1 to 4 in their evidence was not very material so as to throw a shadow of doubt on the prosecution case.

i) Failure of the prosecution to forward the clothes worn by the accused, seized on 15.05.2006, was held to be not fatal. The failure of the prosecution to forward MOs 2 and 3 iron pipes for chemical examination was held not fatal, particularly in view of the detection of blood on MO1 Chopper and the evidence tendered by PWs 2 to 4.

j) The Court concluded that though the evidence tendered by the prosecution was not sufficient to rope in accused No. 5, it was sufficient to infer that accused Nos. 1 to 4, 6, and 7 had indulged in a criminal conspiracy and had nursed the motive to murder Shameer.

k) The Court also concluded that the evidence available on record was sufficient to conclude that accused Nos. 1 to 7, excluding accused No. 5, had formed themselves into an unlawful assembly and in prosecution of their common object had committed murder.

l) Regarding the injuries sustained by the deceased, the learned Sessions Judge, relying on the evidence of PW11 Doctor and Ext. P6 post-mortem certificate, concluded that injury Nos. 1, 2, 5, 6, 22, 27, 28, 30, 41, 44, 49, 50, and 54 were independently sufficient in the ordinary course of nature to cause death.

m) For want of evidence, accused No. 5 was acquitted of all charges.

7. **The sentence imposed:**

a) A1 to A4 and A6 and A7 were sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- each for the offence under Section 302 r/w. Section 149 of the IPC, and in case of non-payment of the fine, Rigorous Imprisonment for a further period of two years each.

b) A1 to A4 and A6 and A7 were sentenced to undergo Rigorous Imprisonment for three months each under Section 143 of the IPC.

c) A1 to A4 and A6 and A7 were sentenced to undergo Rigorous Imprisonment for six months each under Section 147 of the IPC.

d) A1 to A4 and A6 and A7 were sentenced to undergo Rigorous Imprisonment for one year each under Section 148 of the IPC.

8. **Appeals:**

The accused Nos. 1, 3, 4 and 6 have preferred Crl.A. No.1095 of 2016, accused No.2 has preferred Crl.A No. 1166 of 2016 and the accused No. 7 has preferred Crl. A. No. 1089 of 2016, assailing the finding of guilt, conviction, and sentence.

9. Contentions of the appellants:

A. Sri. Suresh, the learned counsel appearing for accused Nos. 1, 3, 4 & 6 have raised the following contentions:

a) There is a serious discrepancy in the evidence tendered by PW1, who is portrayed as the first informant. The incident had occurred on a Sunday, and his presence in a cassette shop owned by his friend, a certain Rajeeb, is not believable. According to him, he was informed about the incident by a passerby. However, the said person has not been examined. Furthermore, he received information about the incident at 9:00 p.m. and he reached the place of occurrence, within 10 minutes. However, as per the prosecution, the incident had taken place at about 9:30 p.m. PW1 has grossly embellished his version while tendering evidence that he had occasion to witness the infliction of injuries by the accused. Though the learned Sessions Judge had disbelieved PW1 as regards his testimony as an eye witness, as it was based on his information, the crime was registered, it ought to have been held that the genesis of the prosecution case itself is false.

b) The evidence tendered by PWs 2 to 4 was believed in toto by the learned Sessions Judge, though their evidence was full of inconsistencies

and embellishments as regards the material part of the incident. No reliance ought to have been placed on their evidence.

c) MO2 and MO3 iron pipes and the clothes worn by the accused, were not sent for chemical analysis. This would reveal that the clothes and the weapons were planted at a later stage.

d) Though MO1 weapon, a Mundu, and certain other things which were allegedly found at the scene of crime were sent for chemical analysis, the report only notes the presence of human blood. The failure of the prosecution to tender evidence that the blood found on the offending weapons and the clothes worn by the deceased and the accused contained blood which could be linked to the deceased is fatal.

e) None of the prosecution witnesses had stated that there was presence of light at the place of occurrence. However, while tendering evidence, they have asserted that there were electric posts nearby and a light source in the house of Madhavan, situated near to the place of occurrence. This was brought out as a material omission but was ignored by the learned Sessions Judge.

f) PW7, who is the brother of the informant, was examined to prove motive. However, the evidence was so flimsy that no reliance ought to

have been placed on the same.

g) Insofar as infliction of injuries are concerned, the prosecution witnesses have no consistent version. While tendering evidence, they stated that the weapons were handed over by the accused Nos. 1 to 3 to the other accused and they have also inflicted injuries using the same. No such allegation was there in their previous statement.

B. Sri Madhavan Kutty, the learned counsel appearing for the 2nd accused has advanced the following submissions:

a) There are serious inconsistencies in the evidence tendered by the eye witnesses making it impossible to believe them. Their conduct is unusual and their evidence ought to have been rejected.

b) It is based on a joint statement given by the accused that the clothes worn by them were recovered. It is improbable that the accused, who are residing nearby will wear the clothes till 10.30 p.m on 15.5.2006 and surrender together before the police wearing the same clothes.

c) The clothes allegedly seized based on information furnished by the accused were not sent for chemical analysis. That would have been the best piece of evidence to link the accused with the crime.

d) The weapons were seized only at the time of preparation of the scene mahazar at about 1.30 p.m. on 15.5.2006 from a place accessible to all. The officer , who was entrusted with the duty to guard the scene, was not examined as a witness. No reliance can be placed on the recovery of weapons.

e) These are serious flaws in the investigation, the benefit of which will have been extended to the accused.

f) The Postmortem Certificate is not a substantive piece of evidence. The doctor, who prepared the Post Mortem certificate, was examined as a witness. But he was not asked to speak about the specific injuries noted in the certificate. The procedure adopted by the learned Sessions Judge has been deprecated by this Court in **Raju v. State of Kerala**[1]

g) The evidence let in by the prosecution to prove conspiracy is only that PW7 had come to the spot earlier and enquired about the whereabouts of Shameer. However, it was brought out that the witness who had testified had no such case when he was questioned by the police.

h) The arrest memo prepared by the investigating officer is not in accordance with law and hence the arrest will have to be termed as

[1] [2017 KHC 984]

illegal.

i) The immediate neighbours such as Madhavan and others have not been cited or examined.

j) As regards the presence of light, there are serious inconsistencies. The witnesses had not spoken about the presence of light in their earlier statement.

C. Sri P.Vijayabhanu, the learned Senior Counsel who appeared for the 7th accused, has raised the following contentions:

a) In Exhibit P1 statement, PW1 has stated that he was told by PW2 that A7 had come to the place at noon and had enquired about the whereabouts of Shameer. However, When PW2 tendered evidence, it was brought out through him that he had not given any such statement to the police.

b) The evidence tendered by PW2 that all accused took the chopper from the hands of Jayan and inflicted cut injuries . However , no such statement was given to the investigating officer and it was brought out as a material omission.

c) Though PW3 was with PW2 all through, he has not mentioned

specifically about the presence or involvement of A7.

d) PW4 also has not stated about any specific overt act committed by A7. Except for mentioning that A7 was also in the dock no specific over act was alleged against him.

e) The fact that the witnesses in their initial statements had not stated anything about the involvement of A7 was brought out through the investigating officer.

10. **Submissions of the learned Senior Public Prosecutor:**

a) Alex Thombra, the learned Public Prosecutor Pleader submitted that the evidence tendered by PWs1 to 4, who are natural and probable witnesses, were rightly accepted finding that their evidence had a ring of truth. The inconsistencies pointed out by the learned counsel appearing for the appellant are minor and the learned Sessions Judge has sifted the chaff from the grain and has arrived at the finding of guilt.

b) The occurrence witnesses are residents of the locality and their presence in and around at the scene of occurrence was quite natural.

c) The witnesses clearly spoke about the presence of light. The

investigating officer has noted the presence of street lights in the vicinity.

d) As many as 57 injuries were inflicted on the deceased by the accused and it may not be possible for the witnesses to specifically state which accused inflicted which injury.

e) The prompt lodging of the FI by PW1 testifies to the veracity of his evidence.

f) Slight embellishment in the evidence of PW1 is only to be expected and the same will not diminish the acceptability of his testimony.

g) The failure of the Sessions Judge to extract the injuries as noted by the doctor in the post mortem is merely an irregularity and that would not affect the genuineness of the prosecution case.

h) MO1 chopper and the clothes used for covering the body of the deceased showed the presence of human blood. As the entire case rests on ocular testimony, the failure of the investigating officer to secure blood grouping will not affect the prosecution.

11. We have carefully considered the submissions advanced by both sides.

12. Whether the incident which led to the death of Shameeer was a case of

homicide?

a) PW12 is the Chief Casualty Officer before whom the injured was brought within about 30 minutes of the date of occurrence. Ext.P7 wound certificate would show that he had seen the injured at 10 pm. and was brought by PW1. The history and alleged cause of injury is that the injured was assaulted by a group of people using sword stick, knife and sticks at about 9.35 am on 15.5.2006. The doctor has noted that the injured was gasping for breath, he had no pulse and no respiration. It is also noted that the injured died at 10.15 am as a consequence of the injuries sustained by the deceased.

b) The autopsy was conducted by PW11, the doctor attached to Government Medical College Hospital. He stated that he had conducted the autopsy of Shameer, the deceased in Crime No. 173/2006 and when the postmortem certificate was put to him, he stated that the same was prepared by him and contains his seal and signature. He stated that injury Nos. 1, 2, 5, 6, 22, 27, 28, 30, 41, 49, 50 and 54 caused the death of the person. He also stated that injury Nos. 1, 2, 6, 7, 27, 49 and 50 were independently sufficient to cause the death. He stated that injury No. 6 could be caused by MO1 and injury Nos. 1 and 2 could be caused by MOs 2 and 3. According to him, the incised

wound collectively can cause the death. He also stated that injury Nos. 1 and 2 could be caused by MOs 2 and 3 and they were sufficient in the ordinary course of nature to cause death.

c) One of the main criticisms of the learned counsel appearing for the accused is with regard to injury No. 27, which is an incised penetrating wound on the outer aspect of the right side of abdomen. Their contention is that the seized weapons cannot cause such an injury. We are of the view that such a contention is only noted to be ignored. As many as 57 injuries were inflicted on the body of the deceased and the non-explanation of one of the injuries cannot be said to be fatal to the prosecution version, particularly when, the doctor has opined that the fatal injuries could be caused with MO1 chopper and MOs 2 and 3 iron pipes.

d) Another irregularity pointed out by the learned counsel appearing for the respondent is the improper procedure followed by the learned Sessions Judge in marking the postmortem certificate. We find that, in the instant case, though the doctor had entered the box and had given a statement as to the cause of death, none of the particulars in the postmortem certificate was recorded by the court in the evidence. In

Munshi Prasad and Ors. V. State of Bihar[2] and in **State of Haryana v. Ram Singh**[3], the Apex Court had occasion to hold that the postmortem certificate by itself is not a substantive piece of evidence. Ideally, the learned Sessions Judge ought to have extracted the injuries noted in the postmortem certificate by the doctor while recording his evidence as the admissibility of a document is one thing and its probative value is quite another thing. In the instant case, the doctor who initially saw the deceased as well as the doctor who conducted the autopsy have given evidence as to the cause of death and the nature of injuries sustained by the deceased. We are of the view that the evidence tendered by the doctor cannot be termed as insignificant. The accused has also no case that it was not a case of murder. Furthermore, the failure of the trial court to follow the procedure cannot be used by the accused to raise a contention that the deceased had not died a homicidal death. We are of the view that the learned Sessions Judge has rightly relied on the evidence of PWs 11 and 12, Ext.P7 wound certificate and Ext.P6 postmortem certificate to come to the conclusion that the injuries inflicted were sufficient in the ordinary course of nature to cause death. We hold that the death of Shameer was a case of homicide.

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[2] [(2002) 1 SCC 351]
[3] [(2002) 2 SCC 426]

13. **Evidence of PWs 1 to 4:**

a) PW1 is a nephew of the deceased. In his evidence, he stated that on 14.5.2006, he was sitting in the Cassette shop of his friend Rajeeb. At about 9 p.m, a passerby told him that a person was being attacked in a place called Kura, which is nearby. Rajeeb, one Shaheed and himself rushed to Souharda Nagar, where the incident was taking place. He stated that he witnessed one person being attacked by a group of 5-6 people. When he reached the place, the assailants ran towards the south. He further stated that Ajeesh (PW2), Akhileswaran (CW5), Jomon (PW4) and Jijo (PW3) were found standing near the scene of crime. They told him that Jayan (A1), Anilan (A3), Sanilan (A2), Rajesh Thekkoott (A4), Thekkepurath Rajesh (A6) and Abhilash (A5) had attacked the injured. He also stated that A5 was standing about 20 mts. away. The body was lying face down and they turned around the body. It was then that they identified that the injured was Shameer, his uncle. Though they tried to stop a car, which was passing by, the driver refused to take the injured to the hospital. Immediately thereafter, a police jeep came to the spot and he along with his friends placed the injured in the jeep and rushed to the Mission Hospital. The Doctor,

after examination, pronounced him dead. According to him, the assailants had left MOs 1 to 3 in the scene of crime. He testified that he had witnessed the occurrence as there were street lights nearby. He also identified the accused standing in the dock. He stated that some weeks back, there occurred an incident involving his uncle, Shameer, and the 1st accused. Shameer had attacked Jayan with a bottle and Jayan had responded back by attacking Shameer. This was the motive behind the murder, according to him. After his uncle was pronounced dead, he went to the Police Station and gave information based on which the crime was registered. He identified the dhoti found at the place of occurrence. In cross examination, he stated that the body was turned around only after he had reached the scene of crime. Shameer was wearing an underwear and shirt and a dhoti was lying nearby. He took the dhoti and used the same to cover the body of Shameer. It was brought out in cross examination that PW1 was wearing a shirt and dhoti and there was blood on it. Another omission brought out was that in his previous statement, he had not mentioned about the presence of three electric posts nearby. The previous incident between Shameer as well as Jayan were also not mentioned in the statement to the police. The learned Sessions Judge took note of his admission in cross examination that it was based on information

furnished by others that he had stated before the police that the accused were the persons, who had inflicted the injuries. We are of the view that the learned Sessions Judge has correctly appreciated the evidence of PW1 and came to the conclusion that he had come to the scene of crime only after the accused had fled the scene and not before that.

b) PW2 is a witness to the occurrence. PWs 3, 4 and CW5 are close friends of PW2. He stated that he is a resident of Kura and sells clothes in individual homes. Shameer is a friend and is also a neighbour. On 14.5.2006, he along with PWs 3 and 4 and CW5 were having a conversation at about 9.15 to 9.30 p.m. He heard a commotion from Souharda Nagar, which is situated towards the south, from the place where he was standing. He along with his friends ran towards the place where the commotion was happening. He witnessed a group of persons comprising about 5-6 people attacking a person who was lying on the ground. When he and friends tried to intervene, accused Nos. 3 and 4 threatened them and asked them to leave the spot. They retreated and stood by the side of a wall nearby. He identified the accused standing in the dock as the assailants. He stated that the chopper was in the hands of A1. A2 and A3 had inflicted injuries with

an iron pipe. He went on to state that the other accused took the chopper from the hands of A1 and inflicted cut injuries. A4 and A6 Rajesh inflicted cut injuries. The other accused took the iron pipes and repeatedly hit the person lying down. When locals assembled at the spot, the accused threw their weapons and ran towards the south. He stated that A5 did not join the other accused to inflict injuries and was standing a bit away. After the accused had left, they went near the injured who was lying face down. It was then they realized that the injured was Shameer. He went on to state that a police jeep came to the spot and the injured was rushed to the hospital in the jeep and he was accompanied by PW1, Afad and Shaheed. He stated that he and his friends did not go to the hospital. He later came to know that Shameer had passed away. To a question put by the learned Prosecutor as to the source of light, he stated that there were street lights nearby. He also stated that there was light from a nearby house. He spoke about the previous incident between Jayan and Shameer. He stated that at noon, A7 had come to the spot and had enquired about the whereabouts of Shameer. In cross examination, he stated that his house is nearby to the cassette shop and the cassette shop was situated about 100 mts. away from the pathway leading to his house, which was situated about 25 mts away. Souharda Nagar is situated

towards the south. There is a slight bend in the road leading to Souharda Nagar. It was brought out that when they reached the spot, there were about 15 persons. PW1 had come to the spot only about 10 minutes after PWs 2 to 4 had come to the scene of crime. He stated that PW1 had torn a portion of his dhoti and put it on the body of Shameer. He stated that there was enough light in the area to identify the persons. Two of the accused are also residents of the area. He stated that he was wearing jeans then and some amount of blood had fallen on his jeans. The accused are also residents of the same area and he is having previous acquaintance with them. Certain omissions were brought about in cross examination. In his earlier statement he had not mentioned A3 and A4 had threatened him. He also did not state that all the accused had inflicted injuries with weapons. He denied the suggestion that he was not present and that the accused were not the assailants. It was also brought out that he had not mentioned about the presence of electric posts in the vicinity. His statement in chief that Varghese had come during noon to enquire about the whereabouts of the deceased was brought out as an omission.

c) PW3 is another occurrence witness. He stated that while he was returning back from his loading and unloading work, he went to the

house of PW2. PW4 and CW5 were also present there. While they were having a conversation on 14.5.2006 at about 9.15 to 9.30 p.m., they heard a cry from the southern side. They immediately went towards the source. He stated that a group of persons were found attacking a person lying on the ground. He and his friends tried to intervene. A3 and A4 threatened PW2 and attacked him. They retreated and stood near a wall nearby. He stated that A1 inflicted injuries with a chopper and A3 took the chopper from A1 and inflicted injuries. A4 and A6 also inflicted cut injuries. Abhilash was standing guard. The accused fled the spot when people of the locality started gathering. They went to the person lying down and found that it was Shameer. He also spoke about the previous enmity between Jayan and Shameer. He identified the accused standing in the dock and also the weapons used by them. He stated that there were street lights nearby and also light from the house of Palancherry Vasavan. In cross examination, he stated that the cassette shop was situated about 100 mts. from the pathway starting from Puliparambu road. He stated that PW 2's house was situated about 50 mts. from Puliparambu road. It was brought out that they had talked only for 5 mnts. when they heard the cry from the south. He stated that there were about 8 -10 persons in addition to the accused when they reached the spot. However, he

was not able to identify who they were. He went on to say that those persons were standing inside their compound. His statement in evidence that A3 and 4 had threatened PWs 2 to 4 when they tried to intervene was brought out as an omission. He spoke about the presence of PW1 at the spot and also stated that all the accused are residents of the area and are previously known to him. He stated that the injured was lying under a telephone post.

d) PW4 is another occurrence witness. He stated that he is employed in a jewelry shop as a Salesman. On 14.5.2006, he was standing near the pathway to his house and was talking to PWs 2, 3, and CW5 at about 9.00 p.m. They heard a cry from Souharda street, which is towards the south. He and his friends ran towards the place where they heard the noise. Seeing them, A1 to A3 rushed towards them and asked them to leave. A3 pushed him. They retreated and stood by the side of a curve in the road and watched the incident. He stated that A1 inflicted cut injuries with a chopper and A2 was hitting with an iron pipe on a person who was lying on the ground. The chopper was snatched by the other accused and cut injuries were inflicted. Abhilash was standing away. He stated that there were street lights nearby and also lights from a nearby house. When people started coming to the spot,

the accused threw the weapons away and left the spot. After the accused had left, they went near the injured, who was lying face down. When the body was turned around, they found that it was Shameer. He stated that PW1 tore a portion of his dhoti and tied the injury on the neck. The police came to the spot and took the injured to the hospital. PW1 accompanied him. He identified the accused and the weapons used by them. He also spoke about the previous incident involving Shameer and Jayan. In cross examination, he stated that his house is situated near Puliparambu road. It was brought out that the road leading to Souharda nagar from Puliparambu has a curve at about 50 mts. He stated that they had stood near the wall at a place near to the curve. He stated that the place where the incident took place was visible from the place where they stood. He also stated that when they reached the spot, they alone were there. After some time, about 10-15 people assembled on hearing the hue and cry. He stated that the accused were all persons residing in the same locality and he is having previous acquaintance with them. It was brought out that in his earlier statement, he had not mentioned that he was standing near the house of Ajeesh. Some omissions were also brought out about the sequence in which the injuries were inflicted and the weapons used by the accused. He stated that the time mentioned is approximate. He

denied the suggestions that he was not present at the scene of crime.

e) Insofar as the evidence of PW1 is concerned, it is discernible that he had come to the spot only after the accused had left the scene. He has stated in clear terms that it is based on information obtained by the witnesses who were present at the spot that he had given the names of the assailants. However, the fact that he had come to the place where Shameer was lying injured and that he had accompanied the injured to the hospital in the Jeep is reliable. The name of PW1 finds a place in the wound certificate prepared at 10 am by the Doctor. One of the main contention is that the names of the assailants were not mentioned when the history and alleged cause of injury was mentioned to the doctor. A perusal of the wound certificate reveals that the injured was gasping for breath when he was brought to the hospital. He passed away within 10 minutes. It would be farfetched to insist that PW1 should insist upon the doctor to record all details in the alleged cause of injury. The counsels have also highlighted some omissions which they termed as material omissions. In **State of U.P. v. Ballabh Das**[4], **Animireddy Venkata Ramana v. Public Prosecutor, H.C. of A.P.**[5] and **Pedda Narayana v. State of Andhra Pradesh**[6], the Apex Court

[4] AIR 1985 SC 1384
[5] AIR 2008 SC 1603
[6] AIR 1975 SC 1252

has observed that minute details of the incidence of the crime need not necessarily be mentioned in the FIR. It is not an encyclopedic version of all that occurred in the commission of a crime. It is a document which is only meant to give the substance of the allegations made. Therefore, the absence of details in the FIR would not render it invalid. While considering the effect of some omissions in the FIR on the part of the informant, the Court is required to take into consideration the probable physical and mental condition of the first informant. The deceased was the uncle of the informant and he had suffered fatal injuries. It would be too much to expect the informant to be in a fit state of mind at that stage and give a detailed version of the incident to the doctor. We are of the view that the contentions raised by the learned counsel is only noted to be rejected.

f) What is immediately discernible from the evidence of PW2 to PW4 is that they are all residents of "Kura" and are residing towards the north of Souharda Nagar. They are friends and have previous acquaintances with both the deceased and the accused. Their case is that they got together near the home of PW2 and were having a conversation, when they heard a cry from the south. They rushed to the spot and saw that a group of persons were attacking a man who was found lying on the

ground. They stated that they tried to intervene, but they were threatened and hence had to retreat. They observed the incident from a spot near the turn in the road, north of the place where the person was being attacked.

g) The main criticism raised by the appellants' counsel is that the evidence of the eyewitnesses are inconsistent and discrepant in material particulars. They also contend that the presence of PW's 2 to 4 in or around the scene of crime is doubtful. After having meticulously analyzed the evidence of the ocular witnesses, we find no reason to doubt their version of the incident on material points. The accused have no case that the eye witnesses are residing far off from the place or that they have any prior animosity towards them so as to falsely implicate them in a case of murder. True, the witnesses have stated that Shameer is a friend. However, it would not make them interested witnesses. Their presence in and around the scene of occurrence is only natural and we find no reason to doubt their version.

h) Of course, the defense has been able to bring about some exaggerations and minor omissions, in the evidence of PWs 2 to 4. Exaggerations per se do not render the evidence brittle and it is only one of the factors to test credibility of the prosecution version, when

the entire evidence is put in a crucible for being tested on the touchstone of credibility. Mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars, those which go to the very root of the case/materially affect the trial or core of the prosecution's case, can alone render the testimony of the witness liable to be discredited. [See **State v. Saravanan**[7], **Arumugam v. State**[8], **Mahendra Pratap Singh v. State Of Uttar Pradesh**[9] and **Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra**[10].

i) In this context, it would be profitable to bear in mind the observations of the Apex Court in **State of U.P. v. M.K. Anthony**[11], wherein it was held as follows in paragraph 10 of the judgment.

> 10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities

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7 (2008) 17 SCC 587
8 (2008) 15 SCC 590
9 (2009) 11 SCC 334
10 (2010) 13 SCC 657)
11 (1985) 1 SCC 505

pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible.

j) In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**[12], the

[12] (1983) 3 SCC 2171

Supreme Court, while considering the minor contradictions in the statement of the witnesses, held as under:

> "5 … … … We do not consider it appropriate or permissible to enter upon a reappraisal or re-appreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:
>
> (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed in the mental screen.
>
> (2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
>
> (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in short time span. A witness is liable to get confused or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

k) As held by the Apex Court, while appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is necessary for the court to scrutinize the evidence more carefully,

considering the deficiencies, drawbacks, and infirmities pointed out in the evidence as a whole. The court must evaluate whether these issues contradict the general tenor of the witness's testimony and whether the initial evaluation of the evidence is shaken enough to render it unworthy of belief. Minor discrepancies on trivial matters that do not touch the core of the case, or a hyper-technical approach that takes sentences out of context or focuses on some technical error by the investigating officer that does not go to the root of the matter, would not ordinarily justify rejecting the evidence as a whole. Even honest and truthful witnesses may differ in some details unrelated to the main incident because the power of observation, retention, and reproduction differs among individuals. As cross-examination is an unequal duel between a layman unacquainted with the intricacies of law and a refined lawyer, much importance cannot be attached to minor discrepancies. A witness cannot be expected to have a photographic memory and recall the details of an incident perfectly. The powers of observation differ from person to person; what one may notice, another may not. In regard to the exact time of an incident or the duration of an occurrence, people usually make their estimates by guesswork on the spur of the moment during interrogation. Ordinarily, a witness cannot be expected to recall accurately the sequence of events that

takes place in rapid succession or a short time span. A wholly truthful witness may be overawed by the court atmosphere and the piercing cross-examination by the counsel. Out of nervousness, they may mix up facts, get confused about the sequence of events, or fill in details from imagination on the spur of the moment.

l) One of the contentions raised by the learned counsel for the appellants criticizes the evidence tendered by PWs 2 to 4 regarding inconsistencies in their accounts of the infliction of injuries. As held by the Apex Court, it is not possible for a witness to accurately recall events that occur in rapid succession and within a short span of time. The power of observation varies from person to person; what one person might notice, another might miss entirely. The eyewitnesses rushed to the place where they heard cries and saw a person being attacked with weapons. Each witness would have perceived different aspects of the incident based on their perspective. If they had all provided identical accounts, their evidence would have appeared artificial. In this case, 57 injuries were noted on the body. The differing accounts regarding the infliction of these injuries do not imply that the witnesses are lying about the incident.

m) Regarding the lighting at the scene, the mahazar clearly shows the presence of streetlights. Witnesses also testified that there are houses

nearby. We are of the view that the witnesses' statements about there being enough light in and around the place of occurrence to enable them to witness the gruesome incident are credible enough to be accepted.

n) The next point raised by the learned counsel is with regard to the failure of the prosecution to cite or examine persons who were residing near to the place of occurrence at Souhrida Nagar. They would contend that several persons of the locality had assembled at the spot and it was on seeing them that the accused had taken to their heels. However, we find that PW3 stated that the residents were standing inside the compound walls. It is not unusual for ordinary people to keep themselves away from an incident of violence. As PW2 to 4 were young men and they were standing near to the area of occurrence that they had rushed to the scene hearing the cry and attempted to intervene. As we have found that their evidence is eminently believable and has a ring of truth, the failure of the prosecution to cite the neighbors cannot be said to be fatal.

14. **Application of Section 149 of the IPC.**

a) Sri. Vijayabhanu, the learned Senior counsel appearing for the 7th accused, pointed out that in the court charge, there is no allegation that the 7th accused was armed with weapons or that inflicted any injury on

the body of the deceased. It is the submission of the learned Senior counsel that the witnesses had no case in the earlier statements that A7 had any major role to play or that he had inflicted any injuries. In view of the said submission, we have carefully gone through the evidence of PWs 1 to 4 and the manner in which they have spoken about the involvement of A7.

b) In the FI statement, the informant, based on information obtained, stated that the persons who participated in the commission of the act are Jayan (A1), Sanilan (A2), Anilan (A3), Rajesh Thekkoot (A4), Abhilash (A5) and Rajesh Thekkepurath (A6). However, later in the statement, he has mentioned about the participation of A7 Varghese. He has also stated that from 9.15 a.m., the above persons along with A7 had been consuming alcohol sitting by the side of the road and that A7 had enquired about the whereabouts of Shameer. While he was examined in court, he did not speak about the congregation of the accused from 9.15 a.m. In his chief examination before court, he has not stated that A7 had inflicted any injuries. He has also not mentioned the presence of A7. PW2 Ajeesh, in his evidence, stated that A1 to A3 and both A4 and A6 had inflicted injuries. He went on to say that the other accused had also inflicted injuries. He went on to say that A7 had approached him at noon and enquired about the whereabouts of Shameer. However, it was

brought out that no such statement was made to the police. The investigating officer who was examined as PW16 has also stated that no such statement was given to him by PW2. He also stated during the course of his evidence that A2 and A7 had assaulted the deceased. PW3, Jijo, in his evidence stated that the persons present there were Jayan (A1), Anilan (A3), Rajesh Thekkoot (A4), Abhilash (A5) and Rajesh Thekkepurath (A6). He identified all the accused who were standing in the dock as persons who were present when the injuries were inflicted. Except for mentioning that all the accused had attacked Shameer, he has specifically not mentioned that A7 was found wielding any weapon or attacking the deceased. During cross examination, a specific question was put to the witness that Sanilan and Varghese were not present at the time of occurrence to which the witness responded that Sanilan was present. Pertinently, he did not respond to the absence of Varghese. PW4 is Jomon who in his evidence stated that A1 attacked with a chopper and A2 hit with an iron pipe. He also stated about the injuries inflicted by Anilan, the 3rd accused. He has given a statement in his evidence that all the accused standing in the dock had attacked Shameer. In cross examination, it was brought out that his statement that the weapons were exchanged by the accused and injuries were inflicted was not stated before the police. PW16 investigating officer also admitted in his evidence

that no such statement was given by PW4.

c) In **Gangadhar Behera v. State of Orissa**[13], 21 persons were prosecuted for the offence punishable under Section 302 read with Section 149 of the IPC. The trial Court acquitted six of them and convicted others under Section 302 read with Section 149 of the IPC and Section 148 as well as under Section 307 read with Section 149 IPC. 15 convicted persons appealed to the High Court. The High Court upheld the conviction of ten and acquitted the rest of the accused. In appeal before the Apex Court, it was contended that the ingredients of Section 149 were not satisfied because the witnesses have not stated the specific role played by the accused and a general statement was not enough to fasten liability under Section 149 of the IPC. While answering the question, the principles were explained as under in paragraph Nos. 22 to 24:

> 22. Another plea which was emphasized relates to the question whether Section 149 IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section

[13] (AIR 2002 SC 3633)

149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object"? It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a

consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

23.Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident on the spot eo instanti.

24. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the

common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not

> within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first, offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew were likely to be committed in the prosecution of the common object. (See **Chikkarange Gowda v. State of Mysore**[14])

d) In view of the overwhelming evidence let in by the prosecution through PWs 2 to 4, we are unable to accept the contention of the learned senior counsel that A7 cannot be roped in with the aid of Section 149 of the IPC. All the witnesses have more or less spoken about the presence of A7. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified in Section 141. The Apex Court has held emphatically that it cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that the accused should have understood that the assembly was unlawful and was likely to commit any

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[14] [AIR 1956 SC 731

of the acts which fall within the purview of Section 149. The common object of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all surrounding circumstances. It is essentially a question of fact which is to be determined keeping in view the nature of the assembly, the arms carried out by the members and the behaviour of the members at or near the scene of incident. In that view of the matter, the finding of the learned Sessions Judge that the appellants herein had formed themselves into an unlawful assembly and in prosecution of their common object inflicted fatal injuries on the body of Shameer is not liable to be interfered with.

15. **Laxity in investigation:**

a) Several flaws in the investigation have been pointed out by the learned counsel appearing for the appellants. The failure of the prosecution to send MO's 2 and 3, and the clothes worn by the accused for analysis is one of the main assertions. The prosecution has forwarded MO1 weapon and the dhoti found at the place of occurrence and the report reveals the presence of human blood. The prosecution has failed to examine the officer entrusted with scene guard duty to prove that the scene was guarded. It is also contended that the accused were arrested at 10 am and a common arrest memo was produced before court. Another flaw highlighted is the recovery of the weapons from a place which is

accessible to all. It is trite that where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Reference may be made to **C. Muniappan v. State of Tamil Nadu**[15], wherein the Hon'ble Supreme Court has observed as follows:

> "55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be

[15] (2010) 9 SCC 567

allowed to depend solely on the probity of investigation.

b) We are of the view that the defects pointed out by the appellants has not affected the fabric of the prosecution case.

16. **Conspiracy, if proved:**

In the instant case, the prosecution allegation is that on 14.05.2006, prior to 9.30 pm, the accused Nos. 1 to 7, gathered in the compound in front of the unoccupied house belonging to Alappattil Babu and agreed among themselves to avene and murder Shameer. No witness was cited nor any evidence adduced, either direct or circumstantial to prove that the accused had hatched a conspiracy to murder Shameer. True, one cannot expect the prosecution to adduce direct evidence to prove the same. Broadly stated, the circumstances in a case, when taken together at face value, should indicate the meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.A few bits here and there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of

criminal conspiracy. It has to be shown that all means adopted, and illegal acts done were in furtherance of the object of the conspiracy hatched. Further, the circumstances relied on for the purposes of drawing an inference should be prior in point of time than the actual commission of the offence in furtherance of the alleged conspiracy. (See **Esher Singh v. State of A.P.**[16]; **Ramachandran K. C. v. State of Kerala**[17]). For want of evidence, we hold that the prosecution has failed to prove the offense under section 120B of the IPC.

17. **Conclusion:**

Having appreciated the entire evidence, we are of the view that the judgment rendered by the learned Sessions Judge finding the appellants guilty for the offence under Sections 143, 147, 148 and Section 302 r/w. Section 149 of the IPC does not warrant any interference. These appeals will stand dismissed confirming the conviction and sentence.

Sd/-

RAJA VIJAYARAGHAVAN V,
JUDGE

Sd/-
G. GIRISH,
JUDGE

ps/23/07/24

[16] 2004 (11) SCC 585)
[17] 2024 KHC 126)

APPENDIX OF CRL.A 1095/2016

PETITIONER ANNEXURES

Annexure A1	A TRUE PHOTOCOPY OF THE WEDDING INVITATION CARD
Annexure A2	A TRUE PHOTOCOPY OF THE WEDDING INVITATION CARD
Annexure A3	A TRUE PHOTOCOPY OF THE ORDER PASSED BY THIS HONOURABLE COURT DATED 02.09.2022.