



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE G.GIRISH

FRIDAY, THE 30<sup>TH</sup> DAY OF AUGUST 2024 / 8TH BHADRA, 1946

CRL.A NO. 489 OF 2017

AGAINST THE JUDGMENT DATED 28.02.2017 IN SC NO.37/2013 ON THE  
FILE OF ADDITIONAL SESSIONS JUDGE -III, KOLLAM

APPELLANT/ACCUSED NO.2:

- 1 CHANDRA BABU @ BABU  
S/O. DIVAKARAN, CHITHI THEKKETHIL,  
NEAR TELEPHONE EXCHANGE, PAMPALIL CHERRY,  
PANAYAM VILLAGE, KOLLAM. (DIED)
  
- 2 SUPPLEMENTAL APPELLANT NO.2 :  
SREEJA M. , AGED 55 YEARS  
W/O. LATE CHANDRA BABU D. , VETTIYIL THEKKATHIL,  
PAMBALLIL, PERINADU P.O. , KOLLAM, PIN - 691601.  
(IS SUO MOTU IMPLEADED AS PER ORDER DATED  
05.10.2023 IN CRL.M.A.1/2023 IN CRL.A.489/2017)

BY ADVS.

SRI.C.PRATHAPACHANDRAN PILLAI

SRI.N.ANAS

SRI.R.SURAJ KUMAR

SRI.V.K.UNNIKRISHNAN KOLLAM



CrI.A. Nos. 489 & 381 of 2017

:2:

2024:KER:65590

**RESPONDENT :**

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

SMT. NEEMA T V, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING  
30.08.2024, ALONG WITH CRL.A.381/2017, 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

FRIDAY, THE 30<sup>TH</sup> DAY OF AUGUST 2024 / 8TH BHADRA, 1946

CRL.A NO. 381 OF 2017

AGAINST THE JUDGMENT DATED 28.02.2017 IN SC NO.37/2013 ON THE  
FILE OF ADDITIONAL SESSIONS JUDGE -III, KOLLAM

APPELLANTS/ACCUSED NOS. 1 & 3:

- 1 ANILKUMAR @ KUNJUMON @ KUTTIRAMAN,  
AGED 55 YEARS, S/O. SUDHAKARAN,  
ANIL BHAVAN, NEAR TELEPHONE EXCHANGE,  
PAMPALIL CHERRY, PANAYAM VILLAGE,  
KOLLAM DISTRICT - 691 601.
- 2 SANTHOSH  
AGED 45 YEARS, S/O. SASIDHARAN,  
SASIKALA BHAVAN, NENMENI, VADAKKEMURI,  
MANTROTHURUTH VILLAGE,  
KOLLAM DISTRICT - 691 502.

BY ADVS.

P.K.VARGHESE

C.PRATHAPACHANDRAN PILLAI

SMT.SINDHU K.S.

SRI.VIMAL VIJAY

V.RENJITH KUMAR

M.T.SAMEER(K/3346/1999)

DHANESH V.MADHAVAN(K/298/2006)



JERRY MATHEW (K/658/2015)  
DEEPA K. RADHAKRISHNAN (K/001131/2010)  
SOJAN K. VARGHESE (K/1611/2019)  
ARJUN KUMAR K.S. (K/1680/2019)  
REGHU SREEDHARAN (K/653/2020)  
RAMEEZ M. AZEEZ (K/001008/2022)  
NAMITHA K.S. (K/2262/2022)  
SUDARSANAN U. (K/2436/2022)  
ANU ASHOKAN (K/1343/2023)  
ATHUL.P (K/001590/2023)  
R. ROHITH (K/203/2011)

RESPONDENT/COMPLAINANT:

STATE OF KERALA  
(REP. BY THE CIRCLE INSPECTOR OF POLICE,  
KOLLAM WEST POLICE STATION - CR. NO. 612/2010  
OF ANCHALUMMOODU POLICE STATION)  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM,  
KOCHI - 682 031.

SMT. NEEMA T.V, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON  
30.08.2024, ALONG WITH CRL.A.489/2017, THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING:



'CR'

**J U D G M E N T**

[CRL.A Nos.489/2017, 381/2017]

**Raja Vijayaraghavan, J.**

The above appeals have been preferred by the accused in S.C.No. 37 of 2013 on the file of the Additional Sessions Judge-III, Kollam. Crl.A.No. 489 of 2017 has been filed by the 2nd accused and Crl.A.No. 381 of 2017 has been preferred by accused Nos. 1 and 3 in the above case. In the above case, the appellants were charged for having committed offences punishable under Sections 324, 341, and 302 r/w. Section 34 of the IPC. Though in the final report, four persons were arrayed as accused, in the course of proceedings, the 4th accused passed away and the case against him stood abated.

**2. Prosecution version:**

- a) The deceased, Shafi, was the brother of PW1, Ashraf. Ashraf operated a bakery at Thannickal Mukku, while the deceased was an auto driver. The 1st accused, Kunjumon, ran a shop at Vettiyil Mukku and also owned a Jeep. The 2nd accused is his brother. A week before, on 10.06.2010, an incident occurred involving the Jeep driven by the 1st



accused and the Sumo vehicle owned by PW1. The prosecution alleges that the Jeep collided with the Sumo, causing damage. Immediately following the incident at Thannickal Mukku, there was a wordy altercation between the 1st accused and PW1, during which Shafi, who was nearby, intervened.

- b) On 10.06.2020, while PW1 was closing his bakery, the 1st accused arrived on a scooter with his daughter as a pillion passenger at Devarajan's shop, located adjacent to PW1's shop. PW1 called the 1st accused and questioned why he had not taken steps to repair the car. The 1st accused responded that if his younger brother apologized, he might consider it. PW1 then suggested that he would come to the house of the 1st accused to resolve the issue. After closing his shop, PW1, accompanied by his auto driver Shihab and Sri. Biju, the driver of the Sumo vehicle, went to the home of the 1st accused. The prosecution alleges that upon their arrival, the 1st accused, enraged by PW1's audacity to visit his house, began throwing wooden blocks from the rooftop. PW1 retreated and stood near the house of Ayyappan Pillai, close to the road. While PW1 was engaged in conversation, the 1st accused approached from behind and attacked



him with a bamboo stick. A scuffle ensued, during which PW1 fell to the ground. Shihab, Biju, and others intervened to rescue PW1. Biju and Shihab were then asked to return to the house of PW1 in the auto, while PW1 walked back. It is alleged that Shihab called PW1's brothers, including the deceased Shafi, Salim, and Wahid. While they were conversing, Omanamma (PW5) advised them not to escalate the situation and instead, report the matter to the police. Heeding her advice, PW1, Shihab, and Biju proceeded to the Police Station in the auto driven by Shafi.

- c) As they turned the vehicle towards the west on reaching Vettiyl Mukku to proceed to Thannickal Mukku, they noticed that the Jeep owned by the 1st accused was parked on the eastern side of Kandachira Alummoodu Road, facing south, with the engine on. Upon seeing the auto, the Jeep was driven recklessly toward it, cornering the auto and pushing it toward the house of Pachan Pillai, situated west of the 1st accused's shop and towards the southern side of Vettiyl Mukku - Thannickal Mukku Road. The 1st accused, along with Babu (A2), Santhosh (A3), and one Kannan (since deceased), were present. The 1st accused allegedly exhorted the others to kill. Shafi attempted to



flee but was chased by the 1st accused and others. Babu and Kannan restrained Shafi, while the 1st accused is alleged to have inflicted a stab wound on Shafi's abdomen, followed by two sub injuries inflicted by the 3rd accused on his back. PW1, standing at a distance, witnessed the entire incident, the place of occurrence being illuminated by the light from Pachan Pillai's shop and the streetlight. The 1st accused lost his dhoti at the scene before the assailants fled in the Jeep. The deceased was initially rushed to Martha Hospital at Anchalumoodu, from where he was transferred to Sankers Hospital, Kollam, where he was pronounced dead.

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

At about 1:00 a.m., PW1 reported the incident at the Anchalumoodu Police Station, leading to the registration of Crime No. 612 of 2020 for offences punishable under Section 302 read with Section 34 of the IPC by PW21, the Sub Inspector of Police. On the next day, the investigation was taken over by PW22, the Circle Inspector of Police. The Officer concluded the investigation and laid the final report before the Judicial Magistrate of the First Class-I Kollam.





4. **Proceedings before the Court:**

Committal proceedings were initiated and the case was numbered as C.P.No.36 of 2012 by the learned Magistrate. On committal to the Court of Session, the case was made over to the Additional Sessions Court where the same was taken on file as S.C.No.37 of 2013. After hearing both sides, the learned Sessions Judge framed charges under Sections 324, 341, and 302 r/w. Section 34 of the Indian Penal Code. The accused pleaded not guilty to the charges and claimed to be tried.

5. **Evidence tendered during trial:**

The prosecution examined PWs 1 to 22 to prove its case and through them, Exts.P1 to P33 were exhibited and marked. Material Objects were produced and identified as MOs 1 to 6. After the close of the prosecution evidence, the incriminating materials were put to the accused under Section 313 of the Cr.P.C. They emphatically denied the circumstances brought out against them and maintained their innocence. On finding that the accused could not be acquitted under Section 232 of the Cr.P.C., they were called upon to enter their defence. On their side, DWs 1 to 5 were examined.



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

- a) PWs 1, 2, and 4 were treated as trustworthy witnesses. PW3, an independent witness, who was cited to prove the incident was held to be unreliable.
- b) The recovery of MOs 1 and 2 weapons at the instance of accused Nos. 1 and 3 were held to be believable.
- c) The court concluded that the prosecution has successfully proved that accused Nos. 1 to 4 intercepted the auto rickshaw in which the deceased, PW1 and others were traveling while the vehicle reached the front of the house of Pachan Pillai and thereafter, the accused Nos. 1 and 3 inflicted stab injuries on the abdomen and the back of the chest of the deceased.

7. **The sentence imposed:**

- a) The accused were found guilty and were sentenced to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- each for the offence under Section 302 r/w. Section 34 of the IPC and in default to undergo simple imprisonment for a period of one year.



- b) For offence under Section 341 r/w. Section 34 of the IPC, the accused were convicted and sentenced to undergo Simple Imprisonment for one month.

8. **The contention of the appellant:**

- a) Sri. Rohit, the learned counsel appearing for the appellants submitted that the true version of the incident was not placed by the prosecution before the Court of Session. No incident of the nature as alleged had taken place in front of the residential home of Sri.Pachan Pillai. If the version of PW1 is accepted, the 1st accused had inflicted a stab injury on the abdomen of the deceased, and the small intestine was cut at the root and his bowels had come out. However, not even a single drop of blood was found anywhere near the place of the occurrence either on the road in front of the house of Pachan Pillai or in the courtyard of his house.
- b) The learned Sessions Judge had erred in placing implicit reliance on the evidence of PW1, who claimed that he was the one who along with PW2, Shibu, had taken the injured to the Matha hospital and from there, to Sankers Hospital, Kollam, which hospital facilitated fairly at a



distance from the scene of the crime, he was the person who had gone to the Police Station at 1:00 a.m. and set the law in motion. However, the prosecution has no case that there was blood on his clothes. Neither the clothes worn by PW1 nor the auto in which he had travelled with the injured to Matha Hospital was seized. This would show that PW1 had no occasion to witness the incident and he was made to state utter falsehood before the court. Furthermore, serious omissions and contradictions were brought out from the evidence of PW1 to discredit his testimony.

- c) The learned Sessions Judge had erred in relying on the evidence of PW2 as there were serious discrepancies between his evidence and that of PW1. Furthermore, though PW1 was also present in the autorickshaw along with PW1, he has no case that he had witnessed the infliction of stab injury by the 1st accused on the deceased.
- d) Though PW12, son of Pachan Pillai, was examined to prove that there was the presence of light in and around the scene of the crime, he did not support the case of the prosecution.
- e) The evidence let in by the prosecution to prove the recovery of the weapons used for the commission of the offence allegedly at the



instance of the accused is totally unreliable. However, the learned Sessions Judge relied on the same to arrive at the finding of guilt.

- f) The wife and daughter of the 1st accused were cited as CWs 25 and 26. However, they were given up by the prosecution. The defence examined them as DWs 1 and 2, to prove the version of the defence. However, the learned Sessions Judge did not give due weightage to their evidence.

9. **Submissions made by the learned Public Prosecutor:**

Smt. Neema, the learned Public Prosecutor pointed out that PWs 1, 2, and 4 are reliable witnesses, whose evidence gave a clear picture as to what had transpired on 10.06.2010 in front of the house of Sri. Pachan Pillai. The learned Sessions Judge has also taken note of the medical as well as scientific evidence to come to the conclusion that the prosecution has proved its case beyond the shadow of a doubt. The recovery of weapons at the instance of the accused led credence to the prosecution case. It is submitted that the prosecution is not required to meet each and every hypothesis put forward by the accused. Relying on the observations in **Sahabrao Bobade v. State of Maharashtra**<sup>1</sup>, it is submitted that the Apex Court has

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<sup>1</sup> [1974 (1) SCR 489]



deprecated the exaggerated devotion to the rule of benefit of the doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community. It is further submitted that 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. Only those omissions which amount to contradictions in material particulars, i.e., go to the root of the case/materially affect the trial or core of the prosecution's case would render the testimony of the witness unreliable. According to the learned Public Prosecutor, the learned Sessions Judge has evaluated the evidence in meticulous detail and has arrived at the finding of guilt.

10. **Guiding principles:**

- a) Before we proceed to evaluate the evidence in this case, it needs to be borne in mind that in a murder trial when an accused person stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code; and naturally, judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals where the question of confirming life



imprisonment imposed against individuals for their participation in the murder of a person is involved, this Court has to deal with the matter carefully and examine all relevant and material circumstances before upholding the conviction and sentence. It also needs to be borne in mind that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of the evidence forms an opinion about the credibility thereof, in normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. (See: **State Of U.P v. M.K Anthony**.<sup>2</sup>; **Leela Ram v. State of Haryana**<sup>3</sup>). It is also trite that when an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence

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<sup>2</sup> [(1985) 1 SCC 505]

<sup>3</sup> (1999) 9 SCC 525)



of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. (See: **State of U.P V. Ramesh Prasad Misra**<sup>4</sup>). In **Dudh Nath Pandey vs State of U.P.**<sup>5</sup> and **State of Haryana Vs Ram Singh**<sup>6</sup>, it has been held that the evidence of defence witnesses has to be treated at par with that of the prosecution witnesses and a Court should not proceed on the premises that it is a tainted one. True it is, that the standard of proof prescribed for the prosecution in a criminal trial is not applicable in assessing the defence evidence. However, if on consideration of the evidence on record, the testimony of the defence witness does not appear to fit in with the

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<sup>4</sup> (1996) 10 SCC 360

<sup>5</sup> (AIR 1981 SC 911)

<sup>6</sup> (2002) 2 SCC 426)





facts and circumstances of the case, the same has to be rejected.

- b) In **Himachal Pradesh Administration v. Shri Om Prakash**<sup>7</sup>, the Apex Court while delineating the principles that are to be borne in mind by the Court while appreciating the evidence of witnesses who have deposed against the accused who has been charged of murder had this to say in paragraph No. 7 of the judgment, which reads as under:

7. While it is not the function of this Court to determine who other than the person who has been charged with the murder had committed it, the line which the defence adopted was to establish that the witnesses referred to above had an interest in implicating the accused or at any rate to create uncertainty and doubt sufficient to give the benefit to the accused. It is not beyond the ken of experienced able and astute lawyers to raise doubts and uncertainties in respect of the prosecution evidence either during trial by cross-examination or by the marshalling of that evidence in the manner in which the emphasis is placed thereon. But what has to be borne in mind is that the penumbra of uncertainty in the evidence before a court is generally due to the nature and quality of that evidence. It may be the witnesses as are lying or where they are honest and truthful, they are not certain. It is therefore, difficult to expect a scientific or mathematical exactitude while dealing with such evidence or arriving at a true conclusion. Because of these difficulties corroboration is sought wherever possible and the maxim that the accused should be given the benefit of doubt becomes

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<sup>7</sup> [(1972) 1 SCC 249]



pivotal in the prosecution of offenders which in other words means that the prosecution must prove its case against an accused beyond reasonable doubt by a sufficiency of credible evidence. The benefit of doubt to which the accused is entitled is reasonable doubt — the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy — though unwittingly it may be — or is afraid of the logical consequences, if that benefit was not given. Or as one great Judge said it is “not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle skepticism”. It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. If that were so the law would fail to protect society as in no case can such a possibility be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. It is for this reason the phrase has been criticized. Lord Goddard, C.J, in *Rox v. Kritz*, said that when in explaining to the juries what the prosecution has to establish a Judge begins to use the words “reasonable doubt” and to try to explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language. “It is the duty of the prosecution to satisfy you of the prisoner's guilt”. What in effect this approach amounts to is that the greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt. This then is the approach. (emphasis supplied)



With the above guiding principles in mind, we shall evaluate the evidence.

11. **Cause of death:**

It is not disputed that the death of Muhammed Shafi was a case of homicide. Ext.P15 postmortem certificate issued by PW18, the Assistant Surgeon and Forensic Surgeon, discloses that 19 antemortem injuries were found in the body of deceased Muhammed Shafi. Injury Nos.1 and 2 were deep incised penetrative wounds on the right side and left side of the back of the chest. Injury No. 3 was an incised penetrative wound obliquely placed on the left side of the front of the abdomen. The doctor has also given evidence that death was due to penetrating injuries sustained to the chest and abdomen and that they were independently sufficient in the ordinary course of nature to cause death.

12. **Evidence adduced by the prosecution to prove the incident:**

- a) PW1 is the key witness for the prosecution. He testified before the court that, several days prior to the incident, the 1st accused (A1) collided his jeep with PW1's Sumo car, causing damage. A1 promised to repair the vehicle but did not do anything thereafter. On



08.06.2010, A1, accompanied by his daughter, arrived at Thannickal Mukku junction. PW1 demanded that his vehicle be repaired. In response, A1 stated that those who had insulted him should publicly apologize, and invited PW1 to his house for further discussion. Later that day, PW1, along with PW2 and CW2, went to A1's house in an autorickshaw. Since the road leading to A1's house was not motorable, PW2 and CW2 stayed with the auto rickshaw at Vettiyilmukku, while PW1 walked to A1's house. Upon ringing the bell, A1's daughter (DW2) informed him that A1 was not at home. As PW1 was leaving, A1 threw wooden blocks from the terrace of the house. PW1 ran towards Ayyappan Pillai's house to escape. While conversing with the people there, A1 approached from behind and struck him on the back with a bamboo stick. A scuffle ensued, causing PW1 to fall. PW2, CW2, and others intervened and separated them. PW1 then instructed Biju and Shihab to take the auto rickshaw back to his house, while he chose to walk home. It was drizzling at the time. As he walked back, PW1 stopped at the house of Omanamma (PW5) and conversed with her. Meanwhile, PW2 informed PW1's younger brothers - Mohammed Shafi (the deceased), Salim, and Wahid - about the earlier incident. They arrived at PW1's house and then came to meet him at Omanamma's



house. PW5 advised them not to escalate the situation and suggested they go to the police station to lodge a complaint. Following her advice, PW1, Biju, and Shihab proceeded to the Police Station in an auto rickshaw driven by Shafi, heading in the direction of Thannickal Mukku. A1's shop is located at the western corner of Vettiyil Mukku. As they reached Vettiyil Mukku and continued westward, they observed a jeep parked on the side of the road facing south, with the engine running and headlights on. Upon seeing their autorickshaw, the jeep was driven towards them recklessly, forcing the autorickshaw to swerve into the courtyard of Pachan Pillai's house. A1 jumped out of the jeep holding a knife, followed by Babu (A2), Santhosh (A3), and Biju, all armed with weapons. A1 urged the others to kill. PW1 and the others fled in different directions. Shafi ran but was chased by A1 and the others. A2 and A4 restrained Shafi while A1 drew a knife and stabbed him in the lower abdomen. When asked specifically whether the weapon was a dagger or a knife, the witness confirmed it was a knife. A3, Santhosh, inflicted stab wounds on Shafi's back and chest. As Shafi fell, additional stab wounds were inflicted on his knee and back, causing his intestines to protrude from the abdominal wound. PW1 and the others hid behind a coconut tree, witnessing the assault



by the light from a street lamp and a tube light from Pachan Pillai's house. After the attack, A1 fled the scene in his jeep, leaving behind his dhoti, which had come off during the altercation. Shafi was immediately transported to Matha Hospital in the same autorickshaw. The doctor at Matha Hospital suggested that the injured be transferred to Sankers Hospital. An ambulance was summoned, and Shafi was taken to Sankers Hospital, where he was pronounced dead. His body was subsequently taken to the District Hospital in Kollam. PW1 then went to the Police Station and lodged Ext.P1 statement, on the basis of which the crime was registered. During cross-examination, he stated that he did not state before the police that the incident had taken place on the road, in front of the house of Pachan Pillai. He stated that he had not changed the place of occurrence from in front of the road to the courtyard of the house of Pillai. He stated that he had not lodged any complaint before the police for assault by A1. He also did not secure any treatment for the same. He stated that he witnessed the incident by hiding behind a coconut palm. He stated that the injured was examined by Dr. Shaji at Matha Hospital, where he was initially taken. The details were provided by PW1. He denied that he had attacked A1 when he had come to Devarajan's shop with



his daughter. Ext.D2 contradiction was marked, wherein, PW1 denied that he had stated to A1 that it would not be proper to have a conversation there and said he would come to the house of A1 later in the evening. He denied that he had stabbed A1's dog. He denied that PW1, his brothers, and his employees were the actual aggressors. He denied that he had changed the place of occurrence to substantiate that there was light near the place where the incident had occurred. He denied that he had failed to state in Ext.P1 that the entire incident had taken place in the courtyard of the house of Pachan Pillai. He stated that A1's house is just 100 meters away from Omana Amma's House. He denied that he had not given a statement to the police that he and others had hidden behind the jeep and had witnessed the incident. He asserted in cross-examination that the incident had happened in the courtyard of the house of Pillai. He further stated in cross-examination that he had initially taken the injured to the hospital and then to the Police Station. According to him, Shafi was lying on his lap, while he was being taken to the hospital. When he was asked as to the absence of blood in his clothes and the absence of any reference of blood either on his body or on his clothes in the FI Statement, he pleaded ignorance. He denied the suggestion of the



defence that he was not present at the scene of the crime. The defence was able to bring out D1 to D4 contradictions, from the evidence tendered by PW1.

b) Shibu @ Shihabudeen is the Auto Driver of PW1. He stated that on 10.06.2010, at about 10:30 p.m., he went to PW1's Bakery to settle the payment and to park the vehicle. He was told by PW1 that they needed to go to the house of Kunjumon (A1), to get some payment. He also spoke about the collision between the vehicles. He along with PW1, Biju (PW2), went to the house of A1 in the autorickshaw. The vehicle was parked by the roadside and PW1 walked to the house of A1. After some time, he saw PW1 running towards him and A1 following close behind with a stick in his hand. There occurred a skirmish in front of the house situated on the roadside. They intervened and separated them. A lot of people assembled at the spot. Later, PW1 asked him to park the vehicle at his house. He went to PW1's house, called Shafi, and informed him about the incident. Shafi, Salim, and Wahid immediately came to the house of PW1 in an Auto. They all went to meet PW1, who was standing with Omana Amma, who told them to go and lodge a complaint before the Police Station.





In the Auto driven by Shafi, PW1, PW2, Sharaf and Ashraf proceeded to the Police Station. When they turned towards the west at Vettiyaill Mukku, the jeep driven by A1 came at a great speed and cornered the autorickshaw. There were four persons inside the jeep, and A1 and A3 got out initially. There occurred a brawl between Shafi on one side, and A1 and A3 on the other side. Immediately, the others came out of the jeep. They were armed with knives. On seeing the aggressors, PW2 and others took to their heels and hid themselves. Then, A3 inflicted a stab injury on Shafi. To a pointed question put by the Prosecutor as to whether A1 had stabbed Shafi, the witness answered in the affirmative. However, he added that he did not witness, A1 inflicting any injury on the deceased. He stated that the intestine of Shafi protruded outside, consequent to the stab injury inflicted on the abdomen. However, he heard the deceased crying out that he was stabbed by A1. He stated that there was a presence of light in the area, enabling him to witness the incident. After the incident, the accused left in the jeep. They lifted Shafi and took him to Matha Hospital initially and then to Sankar's Hospital. He stated that there was blood on his clothes, which was entrusted to the police. He identified MOs 1 and 2 knives, allegedly used by A1 and A3 for



inflicting the injuries. He stated that the larger among MO1 and MO2 was used by A3. He also identified MO4 Dhoti and MO5 Kaily worn by A1 at the time of the incident. In cross-examination, he spoke about the previous incident, involving the collision of vehicles of A1 and PW1. It was brought out in cross-examination that in his previous statement to police, he never mentioned that Shafi, after receiving the stab injury, yelled that A1 had stabbed him. He denied that PW1 and others had gone to the house of A1, late in the night, demanding money and that, an incident had occurred in and around the house of A1, and in the melee that followed, some injury was sustained by Shafi. The defence was able to bring out D5 to D9 contradictions in the evidence tendered by PW2. D7 to D9 contradictions refer to the earlier statements given by the witness to the police, wherein, he mentioned the aggressive stand taken by PW1 and Shafi, consequent to the motor accident. However, he denied the earlier statements.

- c) PW3 Kareemkutty, is another witness cited by the prosecution to prove the incident. He stated that he had witnessed the incident that took place at 10:30 p.m., on 10.06.2010. According to him, the incident took place in the courtyard of the house, owned by Pillai. According to



him, Pillai's house is situated on the western side of A1's shop. He came to meet A1, to take on rent the concrete mixer owned by A1. Earlier in the day, he had gone to meet A1. However, A1's wife told him that he had gone out with his daughter. At about 10:00 p.m. on the same day, he again went to meet A1. He found that a jeep was parked on the side of the road, on the southern side of the shop. He also found accused Nos. 1 to 4 coming out from the direction of Kunjumon's house. A1 and A3 had weapons in their hand. They were loudly blurting out abusive words. Seeing them in a bad mood, PW3 chose not to request the concrete mixer. While he was standing there, an autorickshaw came from the south towards the north, and it turned towards the west at Vettiyil Mukku. The jeep, which was parked on the opposite side, was driven parallel to the auto, and the auto was forced to turn left into the courtyard of the property of Pillai. The people who were inside the Auto got out initially. Immediately, the people who were inside the jeep jumped out. They restrained one person and A1 inflicted a stab with a pointed weapon on the left side of the abdomen. The injured yelled that Kunjumon had stabbed him. When Shafi bent down, A3 inflicted multiple stab injuries on the backside. The other two persons who were with the assailants physically attacked Shafi,



who was lying on the ground. After inflicting injuries, the accused got into the jeep and left the spot. The witness went near the injured and found that it was Shafi. His brothers came and took him to the hospital. He stated that he was having acquaintance with all the accused. He stated that the police had arrived at the spot about 10 to 20 minutes after the incident. He stated that he had disclosed the incident to the police only on 12.06.2010, though he is a relative of PW1. According to him, he had the mobile phone number of A1. He stated that he had stood on the southern side of the shop room of A1. To a pointed question that he would not be in a position to witness the incident while standing in that place, he denied the same. He also denied the suggestion that he was stating falsehood, without being present at the time and place. Several material omissions were brought out while cross-examining the witness, including the fact that the jeep and the auto had travelled parallel to each other, that the occupants inside the autorickshaw had jumped out first, that the smaller among the weapons were in the hands of A1, and that injured had called out the name of A1, after sustaining the injury. The improbability of the witness, coming to the house of A1 at 10:00 p.m., particularly when he had his mobile number and his act of hiding



behind the shop of A1 to enable him to witness the incident, the long delay in furnishing the statement to the police, despite being a near relative of the deceased were all brought out by the defence while cross-examining the witness. The learned Sessions Judge chose to reject his evidence as he was found to be untrustworthy.

d) PW4 is one Abdul Salim, the younger brother of PW1. He is an autorickshaw driver. He stated that on 07.06.2010, at about 3:30 p.m., he witnessed the incident wherein, the jeep of the 1st accused dashed onto the right bumper and indicator light of the Sumo Car, owned by PW1. He stated that there occurred a wordy altercation between PW1 and A1. On 08.06.2010, while the witness was in the Autorichaw Stand, CW2 Biju asked A1, why he was not carrying out the repair works. A1 stated to him that the persons who abused him were to apologize, he would consider the same. At that time, Shafi was there. Shafi went and talked to A1, and this led to an altercation. On 10.06.2010, at about 8:30 p.m., after parking his vehicle, he went to the shop of PW1. A1 along with his daughter came to the adjacent shop. When PW1 again asked when the vehicle would be repaired, A1 invited him to his house. Later in the evening, Shafi along with Wahid,



came to his house and told him that some incident took place between PW1 and A1, and requested that he also come along. They went to the house of PW1 and found that CW2 and PW2 were there. In the same autorickshaw, they all went towards the road and found PW1 talking to Omana Amma. All of them got down. Omana Amma then told them to go to the police and lodge a complaint. PW4 and Wahid got down from the vehicle, and PW1, Shafi, PW2, and CW2 proceeded to the Police Station. Shafi was driving the vehicle. While the witness and Wahid were proceeding to the house of PW1, they heard the sound of an accelerating jeep and they ran back. Then they heard Shafi screaming that he was stabbed by A1. The accused got into the jeep and drove off. A1 was found driving the jeep. PW4 pushed the auto, which was lying on the property of Pillai to the road. By that time, PW1 and Shibu lifted up the injured and laid him on the autorickshaw. The witness drove the autorickshaw and took the injured to the Matha Hospital. Since there was no facility to provide oxygen, the body was shifted to an ambulance and it was rushed to Sankar's Hospital, where the Doctor examined and pronounced the injured dead. He stated that he had seen all the accused immediately after the incident and that he had previous acquaintance with all of



them. He also spoke about the presence of light, which emanated from the tube light placed in front of Pillai's house. In cross-examination, PW4 stated that he had five brothers, out of which four were present in and around the place where the incident had taken place. He admitted that he had given the statement to the police only about 3-4 days after the incident. When he was asked why he had not stated to the police that he had occasioned to witness the incident, he had no answer to offer. To a pointed question of whether there was the presence of blood in and around the scene of the crime, he stated that there might have been the presence of blood. Numerous omissions were brought out from his evidence as well. To a pointed question that the brothers led by PW1 and their employees, had attempted to attack A1 and that in the melee that followed, the injury was sustained by Shafi, the witness answered in the negative. He stated that there was no blood in his clothes and that he was driving the autorickshaw owned by Shafi.

e) PW5 is Omana Amma. She was examined to prove that she advised PW1 and Shafi to go to the Police Station and lodge a complaint, instead of taking revenge on A1 for assaulting PW1. Ext-D11



contradiction was brought out in her evidence to the effect that, in her previous statement, she stated that the brothers of PW1 were in an agitated state. She denied the same.

- f) PW6 Sreedharan was examined to prove that there was a wordy altercation between Shafi and A1 at Thannickal Mukku Junction and that they were separated by people who were present there, including PW6.
- g) PW7 is the attester to the inquest, and PW8 is the attester to P5 Mahazar, prepared at the time of the seizure of the jeep and shirt. In cross-examination, it was brought out that PW8 was a relative of A1. PW9 is the attester to the scene mahazar. PW10 is the attester to P8 Mahazar prepared at the time of the seizure of sandals, two buttons, two Kailys, and some sand from the property of Pillai. PW11 is the attester to P9 Mahazar prepared at the time of seizure of MO2 knife, shirt, and Kaily, used and worn by A3, at the time of occurrence. He stated that he was residing about two kilometers away, and when he reached there, about 25 people had already assembled at the spot. He was asked to put in a signature and duly obliged.
- h) PW12 is one Somarajan Pillai, who is the son of Pachan Pillai. He





stated that he was aware of the incident which took place in front of his house. However, he asserted that the incident took place on the road and not in the courtyard of his house. According to him, the police knocked on his door at 11.30 and he was asked to sign on a blank paper. He stated that some sandals, buttons and a mobile phone was found in front of his house and the police seized the same. He did not support the prosecution and hence permission was sought to put leading questions which was allowed by the court. He however stated that there is no tube light in front of his house. He stated that a person standing on the southern side of A1's shop will not be able to see the happenings in the northern courtyard of his house. He also stated that there is a fence on the eastern side and trees have been planted there.

- i) PW13 is the Village officer who prepared Exhibit P10 plan. She stated that since there was no mention of electric post in the mahazar prepared by the Investigating officer, she did not note the same in the plan.
- j) PW14 is the attestor to Exhibit P11 recovery mahazar prepared at the time of seizure of MO1 knife at the instance of A1. He stated that he



is an auto driver by profession and saw an assembly of persons standing near a transformer. He saw a person taking out a knife and stated that the said person was A1. In cross-examination, he stated that he is residing about 22 km away from the place from which the weapon was recovered.

- k) PW16 was examined to prove that there was no disruption of electricity supply on 10.6.2010 in and around 10.30 p.m. on the said day in the Vettiyil Mukku Area. He stated that the letter handed over to the investigating officer was prepared after perusing the complaint register, which alone was available. He did not have any occasion to peruse the relevant registers maintained at the Kundara Sub Station.
- l) PW19 is the Sub Inspector of Police, Anchallummoodu Police Station, who registered Exhibit P19 FIR in crime No 612/2010 based on information furnished by PW1. He admitted that in the FI statement, it was stated by PW1 that the incident had taken place on the road in front of the house of Pillai. Several omissions which were brought out from the statement of PW1 were put to him. He stated that PW1 did not state to him that any incident had taken place in the courtyard of the house of Pillai. He also stated that PW1 in his initial statement did



not mention that the deceased had cried out that A1 had stabbed him.

m) The investigating officer was examined as PW 22. He detailed the steps taken by him during the investigation which culminated in the filing of the final report. He stated that separate mahazars were prepared of the place wherein the first incident took place in front of the shop of Ayyappan Pillai and also of the place where injuries were inflicted by the accused on Shafi. On 12.06.2010, he submitted a report before the jurisdictional Court furnishing the names of the accused involved in the crime. He also seized the material objects which were found at the scene of the crime. A1 was arrested on 12.06.2010 and based on the disclosure statement furnished by him, the Jeep used by him to reach the scene of the crime and also the shirt worn by him which was kept in the Jeep, were seized from the parking area at Anchallumoodu. On the same day itself, the shirt and kaily worn by the A2 were seized from his home. On 13.06.2010, based on the confessional statement given by A3, MO2 knife was seized from an almirah inside his residential home. He seized the dhoti worn by PW2 Shihabudeen on the strength of a Mahazar prepared on 16.6.2010 as it was worn by him at the time of shifting



the deceased to the hospital. The custody of A1 was again obtained on 24.06.2010 and based on the statement furnished by him, MO1 knife was seized in the presence of witnesses on 25.06.2010. In his cross-examination, he stated that as per the FI statement, the incident had taken place on the road. Though A1 was arrested on 12.06.2010, his police custody was again sought on 24.6.2010 and it was while in custody that the disclosure statement leading to the recovery of MO1 weapon was made consequent to which recovery was effected on 24.06.2010. He admitted that the relevant portion of the disclosure made by the accused has not been extracted as such in the mahazar. He stated that he had not perused the report of the serologist before submitting the final report before the court. The mobile that was seized from the place of occurrence is that of A1 according to him. However, the call details were not perused to fix the identity. To the question put by the defense that the incident had occurred near the shop of A1 in the dead of night when PW1 and his brothers went there to demand money, PW22 responded by saying that no such incident had occurred. He also denied that the true genesis of the incident was suppressed by the prosecution. The contradictions and omissions brought out from the evidence of witnesses were put to the



investigating officer. He was also asked why the doctors at the Matha Hospital and Sanker's Hospital, who had seen the injured immediately after the incident were not cited as a witness or examined.

13. **The case of the defence pleaded by the 1st accused during his examination under S.313(1)(b) of CrPC was as under:**

- a) A1 stated that he was falsely implicated in the case. According to him, he took his daughter to meet the doctor and when he returned got down at Devarajan's shop to buy bread. PW1 and his henchmen came towards him and took out the key of his bike and behaved in a hostile manner towards him. This is consequence of an incident involving the collision of vehicles of PW1 and A1. PW1 also abused him and pulled out his dhoti. Local people intervened and helped A1 to leave the area. He went back home. Later, PW1 and several others came to his home late in the night and rang the bell. They stabbed the dog and committed mischief there. The neighbors got together and asked PW1 and others to leave. Later, his family members persuaded A2 to come with him to lodge a complaint before the Police. When A2 attempted to go with A1, he was assaulted by a group of persons who came in an auto. A1 went to the police station and lodged his complaint. He was



asked to give a written complaint. He then requested a local Panchayath Member(DW3) to lodge the complaint before the police. They were advised to go to the hospital. While they were leaving, the policemen told him that some issue had happened and asked him to be at the police station itself. Since he was tired, he dozed off. At about 12-1.00 am he was woken up and it was then that he heard about the incident.

b) A2 stated that he was an auto driver. On 10.6.2010, while he was at home late in the evening, DW2 Anila, the daughter of A1 came to his house and requested his assistance to go with her father to the police station to lodge a complaint. While they were on their way to the station in the Jeep, their vehicle was intercepted by an auto, and several people jumped out with weapons. Another auto came from behind. Sensing danger he took to his heels. He stated that he had nothing to do with the murder of Shafi.

c) A3 reiterated that he is innocent.

14. **Evidence adduced by the defence:**

a) Smt. Ajitha, w/o Anil Kumar, was examined as DW1. She stated that



Anila is her daughter. A2 Chandrababu is related to her. On 10.6.2010, when she reached home, she found that her daughter was having a fever. A1 took his daughter to Mangalodayam Hospital to get medicine. When they returned back home, her husband and daughter told her that he was beaten up by PW1 and his brothers when they went to Thannickal Mukku Junction to buy bread. While so, someone knocked on the door of her home and started abusing A1. They closed the door and stayed together. When they looked out through the ventilator, she found PW1 standing outside brandishing a knife. Some others were standing with him armed with sticks and knives. She stated that MO2 knife was held by PW1. Their dog barked at the intruders and later she heard her dog scream and then his barking stopped. They threatened the members of the family and then went back. Her husband hid himself under the bed. She requested A1 to call A2, who was residing nearby so that they could go to the police station and lodge a complaint. DW1 and her daughter went to A2's house and requested his assistance. A2 refused to come. However, his ailing mother asked him to help DW1 and 2. A2 along with A1 then went out to lodge a complaint before the police. Later, the police came and informed that some incident had happened. DW1 went to the police station with



Jayakumar and found that her husband was there at the station.

- b) DW2 is Anila, the daughter of DW1 and A1. She reiterated what was spoken to by DW1. She stated that she was sick on 10.6.2010 and after seeing the doctor went to buy bread. PW1 and 6 others approached them and took out the key of her father's scooter. They snatched his dhoti as well. PW1 took a peduncle and attacked her father with the same. She was 16 years old then and was frightened by the melee that took place there. People who had assembled there got the key back from Ashraf and handed it back. The above incident occurred at 9:00 am. They went back home thereafter. At about 9:30/9:45 p.m., they heard a commotion outside. A table was pushed against the front door as an additional safety measure. When her father looked outside through the ventilator, Asharaf was found standing outside with a few others and they were all armed with weapons. Their dog stopped barking all of a sudden. Later, the armed assailants left the place. When they came out, she found that the dog was lying dead outside. DW1 told her father that the assailants had destroyed the mixer machine. She went to the neighboring house of A2 to persuade him to go with A1 to the police station. While so, Biju, an employee of A1, came and





they all went to the police station to lodge the complaint. The witness was cross-examined in detail by the defence.

- c) DW3 was then a member of the Thrikkaruva Grama Panchayath. He gave evidence that on 10.6.2010, A1 and others came to his house and sought his assistance to lodge a complaint before the Police. He went with them and as suggested by the officer, a written complaint was submitted. He was cross-examined and it was brought out that he was having long acquaintance with A1.
- d) DW4 Rajendra Prasad, is an immediate neighbour of A1. He stated that on 10.06.2010, while he was having dinner, he heard loud exhortations and a dog barking from the house of A1. When he went to enquire, he found that PW1 was standing outside A1's house after stabbing A1's dog and killing the animal. He intervened and persuaded PW1 and others to leave by assuring that the issues could be settled the next day. Thereafter, A1 came out from his house. DW1 went to the house of A2 and he along with A1 went to the police station to lodge the complaint. When they came near to the house of Ayyappan Pillai, near to the junction, Ashraf and his brothers were present there. One young man who was with PW1 called Shafi, who was standing nearby. Anil



went to pick up his Jeep which was parked nearby. By that time, Shafi and four others came there in an autorickshaw and blocked the Jeep. A1 took his vehicle forward and pushed aside the Auto with the Jeep and drove off toward the west. A fight ensued between both factions thereafter. It was drizzling then and there was no electricity supply in the area.

- e) DW5 Anil Kumar is another neighbor of A1 who spoke in the same lines as DW4.

15. **Evaluation of the evidence:**

- a) On an evaluation of the entire evidence, as well as the court charge, it can be seen that the prosecution is attempting to bring home the charge against accused Nos. 1 to 3 by the following evidence:
  - i) The 1st accused had a motive to do away with PW1 and the deceased as they demanded money for repairing the car owned by PW1, and owing to the impertinent act of PW1 in going to the home of A1, demanding money.
  - ii) An incident had taken place in front of the house of Sri. Ayyappan Pillai, wherein, the 1st accused had chased PW1 and attacked him



with a bamboo stick, and pushed him down to the sit-out, as spoken to by PW1 and PW2.

iii) The 2nd incident which took place in front of the house of Sri. Pillai, when the 1st accused cornered the autorickshaw driven by Shafi, wherein, PW1, PW2, and CW2 were travelling, and after chasing Shafi, who tried to escape inflicted multiple stab injuries on his abdomen and the back of his chest.

b) The version of the defence is that the true facts of the case have not been placed before the Court. The tenor of evidence tendered by the defence by examining the wife and daughter of A1 and two of his daughters is that, after about 10:00 p.m., PW1 Ashraf and his employees armed with knives and sticks, had come to the house of A1, killed his dog and had created a frightening situation outside his house. Some construction equipment of A1 was also destroyed. While A1 and his brother were on the way to lodge a complaint before the police, they were attacked by Shafi and others, and in the melee that followed, an injury was sustained by Shafi. They contend that no incident as alleged had taken place in front of the house of Pillai, and according to them, PW1 was nowhere present at the scene of the



crime and he was giving a false version before the Court.

- c) Now the question is whether the evidence let in by the prosecution can be relied upon to enter upon a finding of guilt against the accused.
- d) While evaluating the evidence of PW1, it can be seen that a specific case is that as requested by A1, he along with his employees had gone to the house of A1 after closing his shop. He says that he was attacked by A1, while he was standing in front of Ayyappan Pillai's house. However, the fact remains that he had not lodged a complaint before the police, nor did he seek any treatment from the Doctor. He then states that he did not return back together with PW2 and Biju in his auto rickshaw, even after the incident, but decided to walk back despite the fact that it was drizzling then. It was Shibu, who had called his brothers - Shafi, Wahid & Salim, and they had promptly come after hearing the assault upon their elder brother by A1. As suggested by PW5 Omana Amma, PW1 decided to lodge a complaint before the police, for which he entered the autorickshaw driven by Shafi and proceeded to the Police Station along with PW2 Shihab and CW2 Biju. While they were proceeding towards Thannickal Mukku and when they reached in front of the house of Pillai, A1 along with the rest of the



accused came in a jeep, cornered the autorickshaw, jumped out of the jeep and chased Shafi, and after restraining him, stabbed him with MO1 and MO2 knives. From a perusal of the evidence, it does not stand to reason why A1 and others targeted Shafi instead of PW1, with whom he was having a grievance. Of course, PW2 and PW4 had spoken about an incident that took place on 08.06.2010, between Shafi and A1. Furthermore, the residence of Omana Amma is situated just on the southern side of the shop of A1, and from the evidence of PW4, it is evident that he had heard the sound of an accelerating jeep and he had rushed back, and also heard Shafi crying out. It is curious as to why PW1, his employees, and his brothers did not intervene when a lesser number of individuals cornered their own brother and inflicted stab injuries. If the version of PW1 is to be believed, he and his employees left his younger brother and ran off to a place about 50 meters away and hid behind a coconut palm to enable them to see the incident.

e) The next is the evidence of PW2. He stated about the 1st incident which took place in front of the shop of Ayyappan Pillai, and the 2nd incident which took place in front of the house of Pillai. His version is



similar to that of PW1, except for the fact that he stated that he had not seen A1 stab Shafi in his abdomen. However, he stated that Shafi had cried out that A1 had stabbed him. However, during cross-examination, it was brought out that he had no such case when he was questioned by the Police. When he states that PW1 was also with him and that they had together transported the deceased to the hospital, it can only be deduced that he was also not speaking the truth with regard to the most vital part of the incident. Of course, the presence of blood in his clothes may lead to the conclusion that he was instrumental in shifting the injured to the hospital, and nothing further.

- f) PW4 is the brother of PW1 and the deceased. He did not witness the incident but he heard the cry of the deceased that he was stabbed by A1. He stated that when he reached the place of occurrence, he found the accused escaping in a Jeep. PW1 and PW2 were found lifting Shafi and putting him into the autorickshaw, which was parked nearby. However, in cross-examination, it was brought out that he had no occasion to state before the police that Shafi had cried out the name of A1. His speaking about the presence of A1 and of A1 assisting in the



transportation of the deceased into the autorickshaw would clearly disclose that he was lying about a material part of the incident.

- g) The most important question is on what basis did the prosecution fix the place of occurrence as the courtyard of the house of Pillai. If the version of the prosecution witnesses is believed Shafi was stabbed when he had gotten out of the auto along with PW1, 2, and CW2 Biju. The FIR and the Remand Application indicate that the stab injury was inflicted on the road in front of Pachan Pillai's residence. However, in the police charge, as well as in Scene Mahazar, the incident is stated to have occurred on the northeastern corner of the residential home of Pachan Pillai, the father of PW12. The learned Sessions Judge believed the prosecution version and came to the conclusion that the prosecution successfully proved that the deceased was wrongfully restrained and thereafter, stab injuries were inflicted in front of the courtyard of the residence of Pachan Pillai and noted as item No.10 in the scene plan. We have difficulty in accepting the said contention, due to a very serious flaw in the prosecution case. A perusal of the Postmortem report would reveal that the deceased had sustained two incised penetrating wounds on his back and an incised penetrating



wound on the left side of his abdomen. It is also stated that a loop of the intestine was protruding through the wound. PW1 and PW2 had also stated that the intestine of the deceased had protruded out when the first stab injury was inflicted. The injured had fallen on the ground according to the witnesses and PW1 & PW2 had lifted him up. However, the investigating officer has not noted the presence of blood, in or around the alleged scene of crime. Of course, in the evidence of PW1 and the scene-mahazar, it is casually mentioned that there was drizzle on the previous day. If, in fact, the injury was inflicted within the compound of the property, or on the road in front, the presence of blood would in all certainty be noted at the scene of crime. Not even a speck of blood was found anywhere on the road or on the property of Pachan Pillai. This aspect of the matter throws serious doubt on the case set up by the prosecution that the incident had occurred in the courtyard of the house of Pachan Pillai. Furthermore, the son of Pachan Pillai, who was examined as PW12, did not support the case of the prosecution that the incident had taken place in his courtyard. His evidence is to the effect that the police had come to the spot at 11:30 p.m. and this was stated in the chief examination itself. If that be the case, the foremost thing that the prosecuting agency ought to have





done was to fix the place of occurrence on the basis of the pool of blood found at the scene of the crime. There is no mention of the presence of blood anywhere in the scene mahazar or in the evidence of the Investigating Officer when he was examined as PW22. The failure on the part of the prosecution to fix the place of occurrence on the basis of the presence of blood and their failure to furnish any sort of explanation for noting the same would create a serious doubt in the prosecution case. It cannot be safely concluded that the incident happened at the place as alleged by the prosecution. The necessary corollary is that PWs1, 2 and 4 who are interested witnesses are not stating the truth before the Court as to the manner in which the incident had taken place. As held by this Court in **Sivan @ Siva v. State of Kerala**<sup>8</sup>, it is not enough if an allegation is made that the incident happened at a particular place, but it must be proved to the satisfaction of the Court, especially when there is a rival version about the incident in question. It is not enough if two witnesses say that the incident happened at a particular place, but when such a statement is made by interested witnesses, the Court must seek corroboration from other sources especially if certain facts emerging from records cast

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<sup>8</sup> [2012 KHC 629]



doubt on their version.

h) There are even more critical issues to doubt the version of PWs1, 2, and 4. In order to lend credence to his presence at the scene of the crime, PW1 stated that he had hid behind a coconut palm, which was situated about 50 meters away. The witnesses above also asserted that when A1 and others left the scene in the Jeep, PW1 and 2 lifted up the deceased who was lying injured with multiple stab injuries and who must have been profusely bleeding, and rushed him to Matha Hospital in the autorickshaw owned by Shafi. To the question posed by the counsel appearing for the 2nd accused in cross-examination, PW1 stated that Shafi was lying on his lap. As suggested by the doctor at Matha Hospital, the injured was shifted to the Sankers Hospital in an ambulance. After Shafi was pronounced dead, he was taken to the District Hospital, and then PW1 rushed to the Police Station and lodged the FI Statement at 1:00 a.m. In the body note appended to the FI Statement, it is stated that PW1 was wearing a red shirt and black pants, and there was nothing noteworthy to be noted. When PW1 has no case that he had changed his clothes after the incident, his version that he was present on the spot, and had occasion to



witness the occurrence, that he had taken the injured to the hospital, that the bleeding injured was on his lap, etc., can only be rejected for the reason that not even a drop of blood was found in his clothes.

- i) There is yet another striking inconsistency in the prosecution case. The deceased had come to meet PW1, pursuant to the call made by PW2 in an autorickshaw. The said autorickshaw was allegedly blocked by A1, and it was thereafter that the stab injuries were inflicted on Shafi. It was in the said autorickshaw that Shafi was shifted to Matha Hospital. In view of the injuries sustained by Shafi, he would have lost a substantial amount of blood and necessarily, the inside of the auto and passengers like Shibu, and PW1 would have been drenched in blood. However, the said vehicle was also not seized by the police. The doctor attached to the Matha Hospital was also not examined to prove that Shafi was brought to the said hospital, and after noting the injuries, he was referred to a higher center. The failure of the prosecution to seize the clothes worn by PW1, and the autorickshaw in which the deceased was taken to Matha Hospital, coupled with the absence of blood anywhere near the projected place of occurrence would throw serious doubts as to the presence of PW1 at the place of



occurrence, and the manner in which the incident had taken place. If PW1 and his brothers and employees were in fact present at the scene of the crime, a different sort of response was expected by any prudent person. Furthermore, the prosecution has attempted to plant PW3, a near relative of PW1 at the scene of the crime, to probablize its version. However, the learned Sessions Judge analyzed the evidence of PW3 and found him not to be trustworthy at all.

- j) To add to this another important circumstance is the omission on the part of the prosecution to send the bloodstained earth which most certainly would have been found at the place of occurrence for chemical examination which could have fixed the situs of the assault. In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the court, and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution. This also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the



defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the court to reject the prosecution version. (See: **Lakshmi Singh And Others v. State Of Bihar**<sup>9</sup>)

- k) The circumstances described above cast serious doubts on the case set up by the prosecution and the presence of PWs 1, 2, and 4. It seems that the investigating agency has deliberately attempted to present a specific version of the incident to the court while concealing the true facts. Inconsistencies and contradictions run throughout the prosecution's case, making it impossible to distinguish truth from falsehood.
- l) A fair trial for the accused, a constitutional guarantee under Article 21 of the Constitution, becomes meaningless if the investigation in a murder case raises serious concerns about its fairness. The prosecution bears the responsibility to clearly demonstrate that the investigation was fair and judicious, without any circumstances that could raise doubts about its credibility. The obligation to prove guilt beyond a reasonable doubt encompasses the requirement for a fair investigation; without it, there can be no fair trial. If the investigation

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<sup>9</sup> [(1976) 4 SCC 394]



itself is biased or unfair, expecting the accused to demonstrate prejudice is dangerous, as it grants arbitrary powers to the police, potentially leading to false accusations. In such cases, the investigation becomes a mere formality and a farce.

m) As held in **Babubhai v. State of Gujarat**<sup>10</sup>, the investigation into a criminal offence must be free from objectionable features or infirmities that could legitimately lead the accused to believe that the investigation was unfair or motivated by ulterior motives. It is also the duty of the investigating officer to conduct the investigation in a manner that avoids any form of mischief or harassment towards the accused. The officer must be fair and vigilant, ensuring that no evidence is fabricated and that their impartial conduct dispels any suspicion about the investigation's genuineness. The investigating officer's role is not merely to bolster the prosecution's case to secure a conviction but to uncover the real, unvarnished truth.

n) In **Ankush Maruti Shinde v. State of Maharashtra**<sup>11</sup>, the Supreme Court while speaking about the need for an impartial and truthful investigation observed as under:

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<sup>10</sup> [(2010) 12 SCC 254]

<sup>11</sup> [(2019) 15 SCC 470]



"10.2. Nothing is allowed by the law which is contrary to the truth. In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudences of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human rights at a much higher pedestal and the accused is presumed to be innocent till proven guilty. The alleged accused is entitled to fair and true investigation and fair trial and the prosecution is expected to play a balanced role in the trial of a crime. The investigation should be judicious, fair, transparent, and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

o) A careful consideration of all the facts narrated and the discussions held would lead us to the irresistible conclusion that the prosecution has not placed the true facts before the Court or rather they have made an attempt to suppress the material facts from the notice of the Court. The evidence of PWs1, 2, and 4 cannot be stated to be confidence-inspiring as it does not appear that they had occasion to witness the incident as narrated by them. They have stated a distorted



version before this Court to make it appear that the incident of the nature alleged by them had taken place in the courtyard of the house of Pillai. As held by this Court in **Sivan** (supra), the investigation or trial devoid of its true spirit and merit will undermine the confidence of the society in the criminal system of administration of justice as well as in the sublime values enshrined in our Constitution. A fair investigation of the case is not a mere exercise of formulating a particular theory as the prosecution case with such evidence so as to secure a conviction of the accused based on that theory. The prosecution case must be one placing the true facts including those facts which are beneficial to the accused to the notice of the Court. A conviction secured without adhering to the fair principles of criminal justice would be anathema. The presumption of innocence of the alleged accused is fundamental in nature in the criminal justice delivery system until the charges framed against him are proved beyond reasonable doubt by way of credible, cogent, and unimpeachable evidence. The evidence collected by the investigation and adduced before the Court during trial shall not create suspicion and cast a shadow of doubt on the credibility and truthfulness of the prosecution case spoken through their witnesses. The facts narrated and the discussions held in this case would





definitely create serious suspicion and cast a great shadow of doubt on the prosecution case.

p) We notice that the learned Sessions Judge has implicitly accepted the evidence of PWs 1, 2, and 4 without properly considering the deficiencies and the contradictions in their evidence. In our opinion, some of the omissions and discrepancies in the evidence of the eyewitnesses, which we have already pointed out are glaring. PW1 and PW4 being brothers and PW2 being an employee of PW1, their evidence has to be subjected to the most serious of scrutiny. Their presence at the scene of the crime being found doubtful, and there being no such corroboration from independent sources, we find it rather difficult to accept the evidence of PWs 1, 2, and 4.

q) At this juncture, it would be profitable to refer to the evidence of DWs1 to 4. DW1 and DW2 had narrated a different version in court. According to them, after A1 had returned back from Thannickal Mukku, PW1 and his employees had come outside the house of A1, armed with weapons. When their dog barked at them, the animal was killed. This is spoken to by PW4 and 5 as well. The neighbors intervened and dispersed the violent crowd. Later, A1 along with A2



got out to lodge a complaint before the police. By that time, PW1 and his brothers had assembled and had ganged up. When A1 and Chandrababu attempted to flee from the place in their Jeep, they were blocked using the auto. There was no light in the area and there occurred a melee during which Shafi sustained injury. In view of the inconsistencies we have noted in the evidence of the prosecution, we are not in a position to ignore the version put forward by the defence.

16. **Recovery of weapons at the instance of the accused:**

- a) Another material evidence relied on by the learned Sessions Judge to link the accused with the offence is the recovery of MO1 and MO2 knives at the hands of accused Nos. 1 and 3 respectively. Insofar as the recovery of weapons based on the disclosure statement of A1 is concerned, the records reveal A1 was arrested on 12.06.2020. Based on the statement furnished by him, the Jeep and a shirt were seized on 13.06.2020 from Anchallummodu. Thereafter, there was a lull till 24.06.2020, on which day, a fresh application was filed to obtain police custody of A1. As per Ext.P11 seizure mahazar, when A1 was questioned again, he disclosed that MO1 knife was thrown away by him, and based on his disclosure statement, he was taken to a place



leading to Thannickal Mukku, and from a near transformer, he is alleged to have taken out MO1 knife. PW14 is the attester to the Mahazar. In his evidence, he stated that he is an autorickshaw driver and while on a trip, he saw a person wearing spectacles, taking out a knife. However, in cross-examination, he admitted that when he got down to that place, several people had already assembled. He also stated that he is residing about 22 kms. away from the place, from where the weapon was recovered. The prosecution has no case that the disclosure statement was given by the accused in the presence of the witness, or that the witness was present when the police had come to the spot with the accused. The contention of the defence that the knife was planted by the police and thereafter, custody was sought, and the whole recovery of the weapon was stage managed cannot be ignored. At any rate, all that the witness stated was that he found the accused taking a knife out of shrubs and nothing more. Insofar as the 3rd accused is concerned, it is based on Ext.P9 (a) Disclosure Statement, that the knife, shirt, and kaily recovered in the presence of PW11, the attester. PW11 stated that he is an autorickshaw driver. He stated that he had occasion to sign on Ext.P9 Mahazar. He stated that when he had got down on seeing the police jeep, about 25 persons had already



assembled. He saw the knife and clothes being handed over by A3 to the police. Insofar as the 2nd accused is concerned, he was arrested at 7:30 p.m. on 12.06.2010 from the KSRTC Bus Stand, Kollam. His police custody was obtained and based on Ext.P22 Disclosure Statement, the Saffron Dhoti and Shirt were seized. However, the attester to the Mahzar was not examined as a witness.

- b) In **State of Rajasthan v. Bhup Singh**<sup>12</sup>, the Apex Court has observed the following as the conditions prescribed in Section 27 of the Evidence Act, 1872 for unwrapping the cover of the ban against the admissibility of statement of the accused to the police (1) a fact should have been discovered in consequence of the information received from the accused; (2) he should have been accused of an offence; (3) he should have been in the custody of a police officer when he supplied the information; (4) the fact so discovered should have been deposed to by the witness. The Court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence.

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<sup>12</sup> (1997) 10 SCC 675



c) The aspect which this Court has to consider in the present case is whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not, and most importantly, the link with and effect of the same vis-a-vis the commission of the crime. At this juncture, it would be profitable to bear in mind the observations of the Apex Court in **Subramanya v. State of Karnataka**<sup>13</sup> wherein the Supreme Court has delineated the principles that are to be borne in mind by the Court while confronted with the question of admissibility of recovery effected at the instance of the accused. It was observed as follows in paragraph Nos. 77 and 78 of the judgment.

"77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the appellant-accused while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes, etc. then the first thing that the

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<sup>13</sup> [(2022 SCC OnLine SC 1400)]



investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence, etc. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or bloodstained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the



investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.”

d) In **Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh**<sup>14</sup>,

the principles were clarified further and it was observed as under:

“56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we have noticed from the oral evidence of the investigating officer, PW7, Yogendra Singh is that he has not proved the contents of the discovery panchnama and all that he has deposed is that as the accused expressed his willingness to point out the weapon of offence the same was discovered under a panchnama. We have minutely gone through this part of the evidence of the investigating officer and are convinced that by no stretch of imagination it could be said that the investigating officer has proved the contents of the discovery panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of

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<sup>14</sup> 2022 SCC OnLine SC 1396



the investigating officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned hostile and have not supported the prosecution. In order to enable the Court to safely rely upon the evidence of the investigating officer, it is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and, for this purpose the investigating officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place.

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71. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the investigating officer in his evidence, and also without proving the contents of the panchnama (Exh.5), the trial court as well as the High Court was not justified in placing reliance upon the circumstance of discovery of weapon

72. If it is the case of the prosecution that the PW2, Chhatarpal Raidas, s/o Rameshwar Raidas had acted as one of the panch witnesses to the drawing of the discovery panchnama, then why the PW2, Chhatarpal Raidas in his oral evidence has not said a word about he having acted as a panch witness and the discovery of the weapon of the offence and blood stained clothes being made in his presence. The fact that he is absolutely silent in his oral evidence on the aforesaid itself casts a doubt on the very credibility of the two





police witnesses i.e. PW6 and PW7 respectively.”

e) In the case on hand, when the investigating officer was examined, he merely stated that the accused while in custody furnished a statement and nothing more. In his evidence, he has not proved the contents of the recovery mahazar. He has also not mentioned that he had procured the presence of independent witnesses of the locality to witness the search. Furthermore, the witnesses to the recovery effected at the instance of the A1 and A3 are concerned, they only stated that they only saw the MOs being taken out by the accused, and by the time they had reached there scores of people had assembled at the place by then. Insofar as the recovery effected at the instance of the 2nd accused is concerned, the prosecution did not choose to examine the attestor. In other words, the recovery of weapons at the instance of the accused will not advance the case of the prosecution.

17. **Whether the flaws in the prosecution case can be ignored on the ground of defective investigation:**

a) The learned Sessions Judge has ignored some of the flaws in the prosecution case on the ground that defective investigation, by itself



cannot be a ground for acquittal of the accused.

- b) In this context, it would be apposite to bear in mind the observations made by the Apex Court in **C. Muniappan v. State of Tamil Nadu**<sup>15</sup> wherein it was observed as under:

“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 de hors 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 allowed to depend solely on the probity of investigation.

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<sup>15</sup> [(2010) 9 SCC 567]



- c) We may also refer to a decision of this Court in the case of **Surajit Sarkar v. State of W.B.**<sup>16</sup>, as under:

“49. We are not prepared to accept as a broad proposition of law that in no case can defective or shoddy investigations lead to an acquittal. It would eventually depend on the defects pointed out. If the investigation results in the real culprit of an offence not being identified, then acquittal of the accused must follow. It would not be permissible to ignore the defects in an investigation and hold an innocent person guilty of an offence which he has not committed. The investigation must be precise and focused and must lead to the inevitable conclusion that the accused has committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. In such a situation, it would not be correct for the prosecution to argue that the court should gloss over the gaps and find the accused person guilty. If this were permitted in law, the prosecution could have an innocent person put behind bars on trumped up charges. Clearly, this is impermissible and this is not what this Court has said.

In the case on hand, we have carefully examined the evidence let in by the prosecution de hors the lapses in investigation and we have found that the evidence let in by the prosecution to canvass the guilt of the accused suffers

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<sup>16</sup> [(2013) 2 SCC 146]



from serious inconsistencies and lapses. With the aid of such evidence, it would not be possible for us to arrive at a finding of guilt against the accused.

18. **Our conclusion:**

Every accused person is presumed innocent until proven guilty. This presumption of innocence is not just a legal principle but a fundamental human right. While there are statutory exceptions to this rule, it forms the cornerstone of criminal jurisprudence. In assessing guilt, the nature, seriousness, and gravity of the offence must be carefully considered. However, in cases where the statute does not explicitly place the burden of proof on the accused, it unequivocally rests with the prosecution. Only in exceptional circumstances, as provided by specific statutes, does the burden shift to the accused. Even when a statute presumes guilt, it must meet the standards of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. A conviction cannot be based on surmises, conjectures, or even strong suspicion, regardless of how grave that suspicion may be. Strong coincidences and grave doubts cannot substitute for legal proof. The prosecution cannot fulfill its obligation by merely pointing to strong suspicions or highly suspicious circumstances to incriminate the accused. Nor can a false defense take the place of the proof that the prosecution must establish to



secure a conviction. While a false plea by the defense might be considered an additional circumstance, it is only relevant if other evidence unerringly points to the accused's guilt (See: **Digamber Vaishnav v. The State of Chhattisgarh**<sup>17</sup>). Suspicion, however strong, is no substitute for proof. There is a significant distance between "may be true" and "must be true," and the prosecution must cover this distance by proving its case beyond all reasonable doubt. In the case at hand, the prosecution not only failed to prove its case but also presented palpably false evidence, falling far short of the standard required to establish the appellant's guilt beyond all reasonable doubt (See: **Varkey Joseph v. State of Kerala** <sup>18</sup>).

We hold that the prosecution has suppressed the genesis and the place of occurrence and has thus not presented the true version. We also hold that the witnesses who are projected as eyewitnesses are lying on a most material point and therefore their evidence is unreliable. Thus in view of the inherent improbabilities, the serious omissions and infirmities, the interested or inimical nature of the evidence and other circumstances pointed out by us, we are clearly of the opinion that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt. We

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<sup>17</sup> [(2019) 4 SCC 522]

<sup>18</sup> [AIR 1993 SC 1892]



therefore conclude that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt, the benefit of which has to be extended to the accused.

In the result, these appeals are allowed. The conviction and sentence of the accused for the offences punishable under sections 341, 324, 302 r/w. section 34 IPC are set aside and the appellants/accused are acquitted of all charges under section 235(1) Cr.P.C. Their bail bonds shall stand cancelled and they shall be set at liberty, if their continued incarceration is not required in any other case.

Sd/-

**RAJA VIJAYARAGHAVAN V,  
JUDGE**

Sd/-

**G. GIRISH,  
JUDGE**



**Cr.A. Nos. 489 & 381 of 2017**

**:71:**

**2024:KER:65590**

**APPENDIX OF CRL.A 489/2017**

**PETITIONER ANNEXURES**

**Annexure 1**

**TRUE PHOTOCOPY OF THE DEATH CERTIFICATE DATED  
13.7.2022 ISSUED BY THE REGISTRAR OF BIRTHS  
AND DEATHS, PANAYAM GRAMA PANCHAYATH WITH  
RESPECT OF THE DEATH OF APPELLANT.**