

Arun vs State of Kerala

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Court : Kerala

Decided On : Feb-19-2024

Judge : Honourable Mr. Justice P.B.Suresh Kumar, Honourable Mr. Justice Johnson John

Appeal No. : CRL.A/568/2016

Appellant : ARUN

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR & THE HONOURABLE MR. JUSTICE JOHNSON JOHN MONDAY, THE 19TH DAY OF FEBRUARY 2024 / 30TH MAGHA, 1945 CRL.A NO. 312 OF 2016 AGAINST THE JUDGMENT DATED 21.12.2015 IN SC 1043/2008 OF THE ADDITIONAL DISTRICT COURT & SESSIONS COURT - V, THIRUVANANTHAPURAM APPELLANT/A1: SIVA PRASAD AGED 40 YEARS, S/O.RAMESAN, MUDUMPIL VEEDU, CHACKA WARD, KADAKAMPALLY VILLAGE, THIRUVANANTHAPURAM. BY ADVS. SRI.SHAJIN S.HAMEED SRI.P.VIJAYA BHANU (SR.) SMT.POOJA PANKAJ

RESPONDENT/COMPLAINTNAT: STATE OF KERALA
REPRESENTED BY THE INSPECTOR OF POLICE, PETTAH CIRCLE,
THIRUVANANTHAPURAM, REPRESENTED THROUGH THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
SRI.E.C.BINEESH PP THIS CRIMINAL APPEAL HAVING BEEN
HEARD ON 06.02.2024, ALONG WITH CRL.A.568/2016, THE COURT
ON 19.02.2024 DELIVERED THE FOLLOWING: Crl.A.Nos.312 and 568
of 2016 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR &
THE HONOURABLE MR. JUSTICE JOHNSON JOHN MONDAY, THE
19TH DAY OF FEBRUARY 2024 / 30TH MAGHA, 1945 CRL.A NO. 568
OF 2016 AGAINST THE JUDGMENT DATED 21.12.2015 IN SC
1043/2008 OF THE ADDITIONAL DISTRICT COURT & SESSIONS
COURT - V, THIRUVANANTHAPURAM APPELLANT/3RD ACCUSED:

ARUN S/O.RAVENDRAN NAIR, ARUNALAYAN VEEDU, T.C.34/493,
ARAPPURAWARD, VATTIYOORKAVU VILLAGE. BY ADVS.
SASTHAMANGALAM S. AJITHKUMAR SATHEESH MOHANAN
P.A.MEERA RESHMA M.S V.S.THOSHIN SREEJITH S. NAIR Sanjana
Rachel Jose P.K.VARGHESE(K/197/1998) P.S.ANISHAD(K/560/2010)
K.R.ARUN KRISHNAN(K/617/2011) P.T.MANOJ(K/1061/2013) REGHU
SREEDHARAN(K/653/2020) Rafiq P.M.
M.REVIKRISHNAN(K/1268/2004) AJEESH K.SASI(K/166/2006) MITHA
SUDHINDRAN(K/000859/2015) RAHUL SUNIL(K/000608/2017)
SRUTHY N. BHAT(K/000579/2017) SRUTHY K.K(K/117/2015)
P.VIJAYA BHANU (SR.)(K/421/1984)

Crl.A.Nos.312 and 568 of 2016 3 RESPONDENT/COMPLAINTNAT:
STATE OF KERALA REPRESENTED BY THE INSPECTOR OF
POLICE, PETTAH CIRCLE, THIRUVANANTHAPURAM,
REPRESENTED THROUGH THE PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM. SRI.E.C.BINEESH PP THIS

CRIMINAL APPEAL HAVING BEEN HEARD ON 06.02.2024, ALONG WITH CRL.A.312/2016, THE COURT ON 19.02.2024 DELIVERED THE FOLLOWING: Crl.A.Nos.312 and 568 of 2016 4 P.B.SURESH KUMAR & JOHNSON JOHN, JJ. ----- Criminal Appeal Nos.312 and 568 of 2016 -----
Dated this the 19th day of February, 2024

JUDGMENT

P.B.Suresh Kumar, J.

Accused 1 and 3 in S.C. No.1043 of 2008 on the files

of the Additional Sessions Court-V, Thiruvananthapuram, who stand convicted and sentenced for the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code (IPC), preferred the above appeals challenging their conviction and sentence in the said case. Among the appeals, criminal appeal No.312 of 2016 is preferred by the first accused and criminal appeal No.568 of 2016 is preferred by the third accused.

2. One Chandu @ Santhosh Kumar was brutally murdered by a group of persons at about 9 p.m. on 23.09.2003 while he was sitting in an auto rickshaw in front of a hotel Crl.A.Nos.312 and 568 of 2016 5

named Hotel Sunoj on the southern side of the road leading to Chackai from Pettah. The brother-in-law of Chandu who rushed to the scene hearing the screaming having found the dead body of Chandu, informed the occurrence to the police. A case was registered on the said information by Pettah Police as Crime No.143 of 2003 and the final report as also a supplementary final report were filed in the case after investigation against seven accused, disclosing commission of offences punishable under Sections 143, 147, 148 and 302 read with Section 149, and Section 120B IPC.

3. The allegations in the final reports, in essence,

are that on account of the enmity of the first accused towards Chandu, the first accused hatched a conspiracy with accused 2 to 7 to murder Chandu, and in furtherance of the said conspiracy, they unlawfully assembled together at the premises of M/s.I.S. Consultants with the aforesaid common object and proceeded to the scene of occurrence in a Jeep bearing registration No.KL 03-F-2628, after collecting weapons such as swords, choppers etc. from the house of the first accused

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located near ITI Junction at Chackai. It is alleged that on locating Chandu at the scene of occurrence, the accused alighted from the Jeep and the fourth accused inflicted an injury first on the head of Chandu with a chopper and when Chandu fell down on account of the injury, accused 1 to 4, 6 and 7 inflicted several injuries on his body using the swords and choppers carried by them and they left the scene in the same Jeep, after ensuring the death of Chandu. The motive alleged for the crime is that Chandu maintained enmity towards the first accused, for the first accused caused to take over through one of his relatives a toddy shop which was being run by Chandu; that the first accused believed that it is in retaliation of the same, Chandu caused the murder of a close friend of the first accused mistaking the said friend to be the first accused and that the first accused was therefore under the impression that if he does not cause the death of Chandu, the latter would cause his death.

4. The fourth accused died after the submission of the final reports. On the remaining accused being committed to Crl.A.Nos.312 and 568 of 2016 7

trial, the Court of Session framed charges against them and they denied the same. Since the sixth accused absconded before the commencement of the trial, the case against him was split up and the case against the remaining accused was proceeded with. Since the accused denied the charges, the prosecution examined 37 witnesses as PWs 1 to 37 and proved through them Exts.P1 to P65 documents. MOs 1 to 26 are the material objects identified by the witnesses. Later, at the stage of questioning under Section 313 of the Code of Criminal Procedure (the Code) the second accused filed a statement in terms of Section

313(5) of the Code taking the stand that he was falsely implicated.

5. As the Court of Session did not find the case to

be one fit for acquittal under Section 232 of the Code, the accused were called upon to enter on their defence and the second accused then examined a witness also on his side as DW1. At that stage, the fifth accused also absconded. The trial, in the circumstances, proceeded against the remaining accused namely accused 1 to 3 and 7. After the trial, on a consideration

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of the materials on record, the Court of Session found that the prosecution has established beyond reasonable doubt that accused 1 and 3 have committed the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 IPC and convicted them for the same. The sentence imposed on them includes life sentence. Accused 2 and 7 were consequently acquitted.

6. Heard the learned Senior Counsel for accused 1 and 3 as also the learned Public Prosecutor.

7. The learned Senior Counsel for accused 1 and 3

did not dispute the murder of Chandu in the manner alleged by the prosecution at the place and time mentioned in the final reports. The essence of the arguments advanced by the learned Senior Counsel, however, was that the prosecution has failed to establish beyond reasonable doubt that accused 1 and 3 were persons who were present among the assailants. In order to bring home the said point, the main argument advanced by the learned Senior Counsel is that the evidence of the ocular witnesses namely, PW2, PW3, PW5, PW8 and PW12 are not

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reliable and trustworthy to hold that accused 1 and 3 were among the assailants. As regards the evidence tendered by PW2, even though the learned Senior Counsel did not dispute the fact that PW2 is a person who knew the deceased and who had previous acquaintance with the first accused, it was argued by the

learned Senior Counsel that, having regard to the evidence let in by PW2, it is doubtful as to whether he could see the occurrence to such extent that PW2 could identify the assailants as also the weapons used by them. It was also argued by the learned Senior Counsel that at any rate, inasmuch as the third accused being a person with whom PW2 had no previous acquaintance, the evidence tendered by PW2 is not believable, especially since the occurrence lasted only for a few minutes, within which time no one could possibly notice the features of a person with whom he had no previous acquaintance, so as to enable him to identify such a person as also the weapon used by him to inflict injury on the deceased. Placing reliance on the evidence tendered by PW2 in cross- examination as also the evidence tendered by PW33, the

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investigating officer that the accused were shown to the witnesses for identification on their arrest, it was strenuously argued by the learned Senior Counsel that the identification of the third accused by PW2 in court, cannot be given any sanctity at all, for such identification can only be, since PW2 was informed by the police that the person who was shown to him at the police station was the third accused and that he was also one among the assailants. As regards the evidence tendered by PW3, PW5, PW8 and PW12, the argument advanced by the learned Senior Counsel was that the said witnesses are not persons who had previous acquaintance with either the first accused or the third accused and the identification of accused 1 and 3 by such witnesses in court, can only be since the said accused were shown to them by the police at the police station on their arrest and informed them that accused 1 and 3 were among the assailants. According to the learned Senior Counsel, the evidence of the said witnesses also, cannot therefore be believed, especially when no test identification parade was conducted for the identification of the accused by the said

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witnesses. It was also argued forcefully by the learned Senior Counsel that at any rate, no sanctity can be attributed to the evidence tendered by the said witnesses as regards the identification of the weapons used by accused 1 and 3 to inflict

injuries on the deceased, especially since the occurrence took place at about 9.15 p.m. It was also argued by the learned Senior Counsel that unlike other similar cases, there is no other evidence to corroborate the evidence tendered by the ocular witness. It was pointed out by the learned Senior Counsel that the only witness examined to corroborate the evidence let in by the ocular witness is, PW29, the person who was examined as one of the partners of M/s. I.S. Consultants. After having taken us through the evidence tendered by PW29, it was argued by the learned Senior Counsel that the evidence of PW29 is not real and natural inasmuch as it appears from his evidence that the accused named by him had voluntarily gone to PW29 and told him that it is they who caused the death of Chandu, as if PW29 had engaged them to cause the death of Chandu. It was also argued by the learned Senior Counsel alternatively that

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even if it is found that PW29 had some connection with the first accused, the evidence tendered by PW29 against the complicity of the third accused, is totally unbelievable. It was argued by the learned Senior Counsel that even though the investigating officer gave evidence that MO1 sword was discovered and seized based on the information furnished by the third accused and MO2 chopper was discovered and seized based on the information furnished by the first accused, the evidence tendered by the investigating officer in this regard is not reliable. As regards the discovery and seizure of MO2 chopper, it was argued by the learned Senior Counsel that PW16, the witness who was examined to prove the discovery and seizure of the said weapon, did not support the prosecution case. As regards the discovery and seizure of MO1 sword, it was contended by the learned Senior Counsel that even if the evidence tendered by the investigating officer in this regard is found acceptable, the only evidence to connect the said weapon with the crime is that the weapon contained stains of the blood group B, and the same has not been put to the third

Crl.A.Nos.312 and 568 of 2016 13 accused for his explanation while he was questioned under Section 313 of the Code. In essence, the submissions of the learned Senior Counsel was that it is a case where the prosecution has miserably

failed to prove the guilt of accused 1 and 3 beyond reasonable doubt.

8. Per contra, the learned Public Prosecutor

supported the impugned judgment, pointing out that there is absolutely no reason to disbelieve the evidence tendered by the ocular witnesses. It was pointed out by the learned Public Prosecutor that it is not necessary, in all cases, to conduct test identification parades, and merely for the reason that the same has not been conducted in the case on hand, the evidence tendered by the ocular witnesses cannot be eschewed from consideration. The learned Public Prosecutor highlighted the fact that as far as PW2 is concerned, he is a witness who had previous acquaintance with the first accused, and a test identification parade in the case of a witness like PW2, would be a sheer waste of time. It was also argued by the learned Public Prosecutor that the prosecution relies not only on the evidence

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of the ocular witnesses to prove the guilt of the accused, but also on other evidence to corroborate the evidence tendered by the ocular witnesses. It was pointed out by the learned Public Prosecutor that the evidence tendered by the ocular witnesses against accused 1 and 3 coupled with the evidence tendered by PW29 and the evidence tendered by the investigating officer as regards the discovery and seizure of MO2 chopper and MO1 sword as also the clothes of the said accused, would corroborate and reinforce the ocular evidence in the case. According to the learned Public Prosecutor, in the light of the evidence let in by the prosecution in the case, the decision of the Court of Session is perfectly in order and no interference with the said decision is called for.

9. In the light of the submissions made by the learned counsel for the parties on either side, the point that falls for consideration is whether the prosecution has established beyond reasonable doubt that accused 1 and 3 were among the assailants of Chandu.

10. As indicated by the learned Senior Counsel for Crl.A.Nos.312 and 568 of 2016
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accused 1 and 3, the prosecution relies on the evidence tendered by PWs 2, 3, 5, 8 and 12 to prove the occurrence. In addition, they also rely on the evidence tendered by PW29, the person who was examined as the owner of the establishment M/s. I.S. Consultants and the evidence tendered by PW33, the investigating officer as regards the discovery and seizure of the weapons allegedly used by accused 1 and 3 for committing the crime and the clothes allegedly worn by them at the time of occurrence containing bloodstains of the blood group of the deceased to corroborate the oral evidence of the witnesses referred to above.

11. Let us start with the ocular evidence. The first

among the witnesses is PW2, an auto rickshaw driver. PW2 is a person who knew the deceased right from his childhood. PW2 deposed that at about 9.15 p.m. on the date of occurrence, PW2 was standing near his auto-rickshaw after parking the same in front of Hotel Sunoj. According to PW2, Chandu was sitting in the driver's seat of the auto-rickshaw then and while they were talking, PW3 came there. It was deposed by PW2 that

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when PW3 came there, PW2 along with PW3 moved to the opposite side of the road to the shop of PW4, Vikraman Nair for purchasing mosquito coil and while doing so, a red colour Jeep came from Pettah direction and stopped near the auto-rickshaw of PW2. PW2 deposed that there were about seven persons in the Jeep and amongst them, three were known to him, and that they carried weapons like choppers, swords etc. PW2 deposed that the first accused hacked Chandu first using a chopper and thereafter the third accused hacked him using a sword and later the remaining assailants also inflicted injuries on the deceased using the weapons carried by them. PW2 deposed that the assailants left the scene in the same Jeep itself towards Chackai direction immediately after the occurrence. PW2 deposed that he could see the occurrence in the background of the light from the sign board of Hotel Sunoj and from the nearby street light. PW2 deposed that the first accused was maintaining enmity towards Chandu as he believed that a friend of the first accused was murdered at the instance of Chandu. PW2 identified accused 1, 3 and 5 in court. PW2 also identified MO2 as the

chopper used by the first accused and MO1 as the sword used by the third accused to inflict injuries on the deceased. Even though the version of PW2 was that it was the first accused who inflicted the first injury on the deceased, in answer to a leading question put to him by the Public Prosecutor in the chief- examination itself, PW2 changed his version and stated that it was the fourth accused who inflicted the first injury on the deceased. In the cross-examination of the first accused, PW2 stated that the police had shown him the weapons used by the accused to inflict injuries on the deceased at the police station within about 15 days of the occurrence and that accused 1, 3 and 5 were also there in the police station at the relevant time. PW2 denied the suggestion that it was not possible to see the occurrence from the place near the shop of PW4. In the further cross-examination of the third accused, PW2 stated that he had no previous acquaintance with the third accused and he saw the third accused for the first time at the scene of occurrence. In re-examination, PW2 however clarified that it was by mistake that he stated in chief-examination that he saw accused 1, 3

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12. PW3 is the person who joined PW2 to obtain

mosquito coil from the shop of PW4. PW3 also gave evidence almost on the same lines of the evidence tendered by PW2. The version of PW3 as regards the occurrence, however, was that it was the fourth accused who inflicted the first injury on the deceased. PW3 also identified accused 1 and 3 in court as also MO2 as the weapon used by the first accused and MO1 as the weapon used by the third accused to inflict injuries on the deceased. In the cross-examination of the third accused, PW3 stated that he had prior acquaintance with those who came in the Jeep, except one though he had no close association with them. PW3 also stated in the said cross-examination that he learnt the names of those who are not familiar with him, from the police station.

13. PW5 is another occurrence witness. PW5

deposed that on the date of occurrence by about 9:15 p.m., he was returning from Karikkakom temple and while he was moving towards the bus stop, right in front of Hotel Sunoj, he Crl.A.Nos.312 and 568 of 2016 19

saw a Jeep coming from the direction of the bus stop and stopping near an auto-rickshaw which was parked in front of the hotel. PW5 deposed that 5 to 6 persons alighted thereupon from the Jeep with weapons like swords and choppers, and when the person who was sitting inside the auto-rickshaw attempted to run away, one among the assailants who alighted from the backside of the Jeep with a chopper in his hand, inflicted injury on the backside of his head and he fell down on account of the same. PW5 deposed that thereupon, the remaining assailants inflicted multiple injuries on the person who fell down using the weapons carried by them and they left the scene in the same Jeep thereafter towards Pettah direction. PW5 identified first and third accused in court. PW5 deposed that he saw the first accused hacking the deceased using a chopper and identified the said chopper as MO2. Similarly, PW5 deposed that he saw the third accused hacking the deceased using a sword and identified the said sword as MO1. PW5 also deposed that he saw the occurrence in the background of the street light and the light from Hotel Sunoj. PW5 deposed that he

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had no previous acquaintance with those who came to the scene in the Jeep and he gathered their names only from those who assembled at the scene immediately after the occurrence. PW5 also deposed that the police have shown the accused to him for identification after their arrest. As in the case of PW3, PW5 also deposed that it was the fourth accused who inflicted the first injury on the deceased. PW5 was thoroughly cross-examined by the counsel for the accused as he was a chance witness. In cross-examination, PW5 conceded that he could gather the particulars of the weapons used by the assailants only when the weapons were shown to him by the Police. PW5 also added that he left the scene by about 10 p.m. after giving particulars of his name and address to the police and the police recorded his statement on 27.09.2003.

14. PWs 8 and 12 are the remaining eye-witnesses.

Among them, PW8 was the collection agent of a Co-operative Society, while PW12 is an electrician. Both of them stated that they were standing in front of the workshop on the opposite side of hotel Sunoj, and talking with each other. It was the Crl.A.Nos.312 and 568 of 2016 21

version of PW8 that he went to the workshop to repair his two wheeler and PW12 was also with him at that time. Both of them gave evidence almost on similar lines of the evidence tendered by PWs 3 and 5 as regards the occurrence. It was specifically deposed by PW8 that he saw the first accused hacking the deceased using a chopper on his head and neck. Both of them identified accused 1 and 3 in court and also identified MO2 as the chopper used by the first accused and MO1 as the sword used by the third accused to inflict injuries on the deceased. In the cross-examination of the first accused, PW8 stated that he has no explanation to offer if the statement given by him to the police that he saw the first accused inflicting injuries on the deceased on his head and neck using a chopper, is not recorded by the police. Similarly, PW8 stated that he has no explanation to offer if the statement given by him to the police that the deceased fell on the road and he was lying on his back after he suffered the first injury, is not recorded by the police. Similarly, PW8 stated that he has no explanation to offer if the statement given by him to the police that he saw the accused

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15. Since PWs 2, 3, 5, 8 and 12, the ocular

witnesses examined by the prosecution did not disclose in their evidence the complicity of the accused other than accused 1, 3 and 5, though the said witnesses were examined by the Public Prosecutor with the permission of the court in terms of Section 154 of the Indian Evidence Act, nothing incriminatory could be brought out against the remaining accused in the said examinations.

16. PW29 is the person who, according to the

prosecution, was running the establishment M/s.I.S. Consultants at the time of occurrence. PW29 deposed that the said establishment was being run by him along with another person and that PW29 had prior acquaintance with the first accused who used to be engaged by the business partner of PW29, to
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take possession of vehicles of those who commit defaults in repaying loans availed in respect of the same. PW29 deposed that on 23.09.2003, he found a red jeep and a few other persons in the company of the first accused at the yard of their establishment and they left the premises of the yard at about 8.15 p.m., when the first accused received a call, after informing the caller that they are starting. PW29 deposed that accused 4, 5 and 6 and another person were those who were found with the first accused then. PW29 deposed that the above mentioned persons came back in the same vehicle at about 9.30 p.m and when they came back, they had a few weapons with them and there were blood on their bodies. PW29 deposed that the first accused then uttered that " " and after sometime, they left the establishment in the same jeep and also in a motor cycle. PW29 identified accused 1, 3 and 5 in court. As in the case of the ocular witnesses, since PW29 did not give evidence as to the complicity of the remaining accused, he was also examined by the Public Prosecutor under Section 154 of the Indian Evidence Act. It was brought in the

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cross-examination of PW29 that he was detained in the police station for a few days at the initial stage of the investigation; that he was assaulted by the police on a few occasions during the said period and that his statement was recorded while he was being detained. PW29 deposed that he did not state before the Magistrate that he had prior acquaintance with the third accused.

17. The evidence that remains to be considered is

the evidence tendered by PW33, the investigating officer who conducted the investigation in the case. It was deposed by PW33 that the third accused was arrested on 15.10.2003 and the third accused was shown to the witnesses

thereupon. It was also deposed by PW33 that while in custody, the third accused informed PW33 that he has concealed a sword around the bushes on the side of the road leading to a school and on the basis of the said information, the third accused was taken to the said place and from there, the third accused took out and handed over MO1 sword to PW33 and the same was seized as per Ext.P10 mahazar. In the chief-examination itself, PW33

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deposed that MO1 sword was though discovered and seized on 15.10.2003, the same was forwarded to the court as per Ext.P38 property list only on 12.12.2003. PW33 also deposed that MO8 shirt of the third accused was recovered from the room of the lodge from where he was arrested, as per Ext.P8 mahazar. It was also deposed by PW33 that a few days later, on

25.12.2003, the first accused surrendered before the Jurisdictional Magistrate. It was deposed by PW33 that later when the first accused was interrogated after obtaining his custody, he informed PW33 that he has concealed a chopper in the marshy area near the house of one Ani at a place called Kaarammood, and on the basis of the said information, the first accused was taken to that place and he took out MO2 chopper concealed by him at that place and handed over the same to PW33 and the same was seized as per Ext.P11 mahazar. PW33 also deposed that the first accused also took out and handed over to him MO4 series pair of clothes from a house near the place from where MO2 chopper was discovered and the same were seized as per Ext.P12 mahazar. In cross-examination,

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PW33 admitted that no one gave any statement to him as to the dress worn by the first accused at the time of occurrence. On a specific question put to PW33, he answered that there exists a workshop at the scene of occurrence and the same was omitted to be mentioned in the scene mahazar. It was also stated by PW33 that there were stickers in every weapon seized indicating the particulars of the accused on whose disclosure the same were seized.

18. Let us now consider the point whether the

evidence let in by PWs 2, 3, 5, 8 and 12 are reliable and trustworthy to hold that accused 1 and 3 were among the assailants of Chandu. We shall first deal with the evidence as regards the complicity of the first accused. As noted, PW2 is a person who knew the deceased right from his childhood and he is a person who also had previous acquaintance with the first accused. The presence of PW2 at the scene of occurrence at the relevant time is not challenged by the first accused in the cross-examination of PW2. The deceased was sitting in his auto rickshaw and PW2 was on the opposite side of the road near the

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shop of Vikraman Nair, who was examined as PW4 in the case. The fact that PW4 was running a shop facing the direction of the scene of occurrence on the opposite side of the road is not disputed. PW2 deposed categorically in his evidence that he saw the occurrence in the background of the street light and the light from Hotel Sunoj and that he saw the first accused hacking the deceased using a chopper. Nothing was brought out in the cross-examination of PW2 by the counsel for the first accused to doubt the veracity of the evidence let in by PW2. The argument advanced by the learned Senior Counsel as regards the evidence let in by PW2 against the first accused was that it is doubtful whether PW2 could see the occurrence to such extent that he could identify the assailants as also the weapons used by them in the circumstances under which the occurrence took place, namely the street light as also the light from Hotel Sunoj. Even assuming that having regard to the nature of the occurrence, it is not ordinarily possible for anyone to identify the weapon used by each and every assailant, according to us, the same is not a sufficient reason to reject the

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evidence let in by an eye-witness like PW2 to the extent that he saw the first accused as an assailant, especially when PW2 is the person who had prior acquaintance with the first accused. No doubt, going by the prosecution case, it was the fourth accused who first inflicted injury on the deceased, but the version of

PW2 in his chief-examination was that it was the first accused who first inflicted injury on the deceased. Though in the chief-examination itself, on being questioned by the Public Prosecutor as to whether it was the fourth accused who first inflicted injury on the deceased, PW2 clarified that it was the fourth accused who first inflicted injury on the deceased. The said clarification was however made in answer to a leading question. The said clarification, in the circumstances, is liable to be eschewed. But, the materials on record indicate that even though the occurrence took place as early as on 23.09.2003, PW2 was examined in court only after about 11 years on 18.11.2014 and in the circumstances, in the peculiar facts of the case, we do not think that merely on account of the fact that PW2 deposed in chief-examination that it was the first

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accused who inflicted the first injury on the deceased, his evidence is not liable to be rejected. True, it has come out that the remaining ocular witnesses namely, PWs 3, 5, 8 and 12 who had no previous acquaintance with the first accused also gave evidence identifying the first accused as an assailant of the deceased. According to us, the finding rendered by the Court of Session that the first accused was one among the assailants of Chandu, is liable to be confirmed even without the aid of the evidence tendered by PWs 3, 5, 8 and 12, since the evidence tendered by PW2 alone, as regards the complicity of the first accused is found trustworthy and acceptable. We take this view also for the reason that there is other evidence to corroborate the evidence tendered by PW2 in this regard. Even while accepting the arguments advanced by the learned Senior Counsel that the evidence tendered by PW29 is not trustworthy inasmuch as PW29 identified in court a few other persons, namely accused 4, 5 and 6 and another person in the company of the first accused at the yard of their establishment a few hours prior to the occurrence, we find that there is no reason to

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disbelieve PW29 to the extent he deposed that he knew the first accused as a person engaged by his partner to recover vehicles; that the first accused was found in the premises of their yard at about 8.15 p.m. on the date of occurrence in

the company of a few others and that they left the yard at or around the said time when the first accused received a phone call. We take this view as PW29 was not specifically cross-

examined by the counsel for the first accused on these aspects. That apart, as noted, it was deposed by PW33, the investigating officer that MO2 chopper was discovered and seized based on the information furnished by the first accused. The fact that evidence was let in by the prosecution to show that MO2 chopper contained stains of the blood group B which is proved to be the blood group of the deceased, is not disputed by the first accused. The evidence tendered by PW33 in this regard was however attempted to be discredited placing reliance on the evidence tendered by PW16, the witness to Ext.P11 mahazar prepared in connection with the seizure of MO2 chopper. Even though PW16 deposed that he could not

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identify in court the chopper handed over by the first accused to the police from the place where it was concealed, PW16 deposed that he could identify the person who took out a chopper from a marshy area and handed over the same to the police and the said person was identified by PW16 as the first accused. Merely for the reason that PW16 could not identify in court, the chopper that he saw the first accused handing over to the police about 11 years ago, the evidence of PW16 cannot be rejected. According to us, the evidence tendered by PW16 would certainly corroborate the evidence tendered by PW33 in this regard. The evidence tendered by PW2 as corroborated in material particulars by the evidence tendered by PW29 and PW33 as referred to above, establishes, according to us, beyond reasonable doubt that the first accused was one among the assailants. It is necessary to clarify in this context that inasmuch as the evidence tendered by PW2 as regards the complicity of the first accused is so convincing, even without the aid of the evidence of PW29 and PW33, we would still arrive at the same conclusion. We therefore concur with the finding

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prosecution.

19. We shall next deal with the evidence as

regards the complicity of the third accused. True, as far as the complicity of the third accused is concerned, none of the ocular witnesses, including PW2 had previous acquaintance with him. Among the ocular witnesses, other than PW2, the remaining witnesses are chance witnesses and all of them except PW3, conceded that they had no prior acquaintance with the third accused. Even though PW3 has stated in his deposition that he knew all the accused, we do not find much credence in the said evidence of PW3, since the third accused was arrayed as an accused in the case by the investigating officer only after his arrest on 15.10.2003 and Ext.P39 is the report filed by the investigating officer in this regard. If as a matter of fact, what was stated by PW3 that he had prior acquaintance with all the accused including the third accused, there is no reason why the investigating officer took almost three weeks' time to array him as an accused in the case. In other words, it has to be taken

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that none of the ocular witnesses, including PW3 had any previous acquaintance with the third accused. As noted, even going by the version of the prosecution, the occurrence lasted only for a few minutes and according to us, in a case of this nature, it would be difficult for anyone to note the features of the assailants and identify them at a later point of time. As argued by the learned Senior Counsel, it was conceded by the investigating officer himself that the accused were shown to the witnesses for the purpose of identification on their arrest. This fact has been confirmed by the witnesses as well. If what is stated by the investigating officer and the witnesses is correct, as argued by the learned Senior Counsel, the possibility of the witnesses identifying the accused in court based on the features of the accused that the witnesses gathered at the time when the accused were shown to the witnesses by the police, cannot be ruled out. In situations of this nature, it is only prudent and ideal for the investigating officers to conduct test identification parades. But, merely for the reason that a test identification parade has not been conducted in a given case,

Crl.A.Nos.312 and 568 of 2016 34 the evidence tendered by the eye-witnesses as regards the identity of the accused cannot be rejected, if the evidence is

otherwise believable and acceptable. It all depends on the facts

and circumstances of each case. Reverting to the facts, admittedly, a test identification parade has not been conducted in respect of any of the witnesses. Inasmuch as the witnesses had no previous acquaintance with the third accused and inasmuch as the third accused was shown to the witnesses in the police station, even though the purpose was to ensure that the investigation is proceeding in the right direction, the identification of the third accused by the witnesses in court, according to us, cannot be the sole basis for holding that the third accused was one among the assailants of Chandu.

20. Let us see whether there are any other

materials to connect the third accused with the crime. The only other evidence let in by the prosecution in this regard is the evidence of PW29 and PW33, the investigating officer. As forcefully argued by the learned Senior Counsel, the evidence of PW29 that the third accused was found in the company of Crl.A.Nos.312 and 568 of 2016 35

the first accused on the date of occurrence at the yard of their establishment, is not inspiring confidence. Even though PW29 named at the beginning of his evidence, three persons who were found in the company of the first accused at the establishment, namely Binu, Kannan and Shaji, he did not name the other person who was also with them taking the stand that he does not remember his name. Then PW29 deposed that they left together from the establishment in the Jeep when the first accused received a telephone call and came back by about 9.30 p.m. After having said that those who left the office have returned after some time, named the person Arun also when he referred to their subsequent in leaving the office in two motor cycles. PW29 has not stated in his evidence that the third accused was there when the group left the establishment or when the group returned. In the absence of any deposition to that effect, the evidence let in by PW29 as regards the third accused looks strange and artificial, as if, he has

implicated him at the dictation of someone else. Even assuming that PW29 saw the third accused in the company of the first accused when

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they came back to the establishment, it is not sufficient to corroborate the evidence tendered by the ocular witnesses that the third accused was among the assailants when he, even according to PW29, was not in the group which left the establishment. Now coming to the evidence tendered by PW33 that MO1 sword was discovered and seized based on the information furnished by the third accused, the case of the prosecution is that MO1 sword contained stains of blood of group B namely the blood group of the deceased and the prosecution attempts to connect the accused with the crime on that basis. It is however seen that the said part of the evidence was not properly put to the third accused while he was questioned under Section 313 of the Code. It is trite that it is not proper to string together a long series of facts and question the accused as to what he has to say about them. He must be questioned separately, about each material substance which is intended to be used against him. The questioning must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. It is so observed by the

Crl.A.Nos.312 and 568 of 2016 37 Apex Court in Ranvir Yadav v. State of Bihar, (2009) 6 SCC 595. The relevant passage of the said judgment reads thus:

The importance of observing faithfully and fairly the provisions of Section 313 of the Code cannot be too strongly stressed. It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an

illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

The question put to the third accused as regards the report of the Forensic Science Laboratory that Item 10, namely MO1 sword contained stains of blood of group B is question No.97, which reads thus: Item No.1 to 3 and 6 to 17, P16 human blood belong to group B PW20 . The said question, according to us, cannot be said to be in compliance with the requirement of Section 313 of the Code. We are conscious of the fact that it is permissible under law in Crl.A.Nos.312 and 568 of 2016 38

a case of this nature to further examine the convict here in this appeal so as to afford him an opportunity to explain the incriminating evidence against him. But, having regard to the fact that the third accused has been in custody for the last almost 8 years and that even if the said course is adopted, the evidence that can be taken into account is only a corroborative piece of evidence, we propose to decide the case on merits itself, without venturing into the said course of action [See Nar Singh v. State of Haryana, (2015) 1 SCC 496]. In other words, the said part of the evidence cannot be used against the third accused. If the said part cannot be used against the third accused, it is not possible to connect the third accused with the crime based on the evidence given by PW33 that MO1 sword was discovered and seized based on the information furnished

by the third accused. Having regard to the totality of the facts

and circumstances of the case, we are, therefore, of the view that it is not safe to hold that the third accused was one among the assailants of deceased Chandu. Needless to say, he is entitled to the benefit of doubt. Crl.A.Nos.312 and 568 of 2016 39 In the result, Crl.A.312 of 2016 is dismissed and

Crl.A.No.568 of 2016 is allowed setting aside the conviction and sentence of the third accused. The third accused shall be set at liberty forthwith from the concerned prison, if his continued detention is not required in connection with any other case. Registry shall communicate this judgment forthwith to the concerned prison, where the appellant in Crl.Appeal No.568 of 2016 is undergoing

incarceration.

Sd/- P.B.SURESH KUMAR, JUDGE. Sd/- JOHNSON JOHN, JUDGE. YKB

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