

Binu vs State of Kerala

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Court : Kerala

Decided On : Jul-04-2022

Judge : Honourable Mr.Justice K.Vinod Chandran,Honourable Mr.Justice C. Jayachandran

Appeal No. : CRL.A/595/2016

Appellant : BINU

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY, THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 456 OF 2016 AGAINST THE JUDGMENT DATED 28.04.2016 IN SC NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - II, NORTH PARAVUR, NORTH PARAVUR

APPELLANT/ACCUSED NO.8: BABU, AGED 37 YEARS S/O.ANTONY, CHAKKALAKKAL (H), SCHOOLPADI BHAGAM, KONGORAPPILLY KARA, ALANGAD VILLAGE, ERNAKULAM DISTRICT. BY ADVS.

SRI.V.JOHN SEBASTIAN RALPH SMT.P.V.DENCY SRI.K.J.JOSEPH
ERNAKULAM SRI.V.JOHN THOMAS SRI.P.A.MARTIN ROY
SMT.PREETHY KARUNAKARAN RESPONDENT/COMPLAINANT:
STATE OF KERALA REPRESENTED BY THE C.I. OF POLICE,ALUVA
(BINANIPURAM POLICE STATION)REPRESENTED BY THE PUBLIC
PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM, COCHIN-
18. BY SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR THIS
CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
04.07.2022, ALONG WITH CRL.A.461/2016 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN &
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY,
THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 461
OF 2016 AGAINST THE JUDGMENT DATED 28.04.2016 IN SC
NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS
COURT - II, NORTH PARAVUR

APPELLANT/3RD ACCUSED: OUSEPPACHAN, AGED 25 YEARS
S/O.JOY, VAZHAKKOOTTATHIL HOUSE, PANAYIKULAM KARA
ALANGAD VILLAGE. BY ADV SRI.IEANS.C.CHAMAKKALA
RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED
BY THE PUBLIC PROSECUTOR HIGH COURT OF KERALA. BY
SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR THIS
CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
04.07.2022, ALONG WITH CRL.A.456/2016 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY, THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 546 OF 2016 AGAINST THE JUDGMENT DATED 28.04.2016 IN SC NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - II, NORTH PARAVUR

APPELLANT/PETITIONER/ACCUSED NO.5: TABIN, AGED 29 YEARS, S/O.JOSEPH, MATHIRAPPILLY HOUSE, NEERICODE KARA, ALANGAD VILLAGE, ERNAKULAM DISTRICT. BY ADVS. SRI.G.SREEKUMAR (CHELUR) S.RAJEEV S V.VINAY(K/355/2009) M.S.ANEER(K/644/2013) SARATH K.P.(K/001467/2021) RESPONDENT/COMPLAINANT/STATE: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, REPRESENTING STATION HOUSE OFFICER, BINANIPURAM POLICE STATION, ERNAKULAM. BY SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 04.07.2022, ALONG WITH CRL.A.NO.456 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY, THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 595 OF 2016 AGAINST THE JUDGMENT DATED 28.04.2016 SC NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - II, NORTH PARAVUR APPELLANT/ACCUSED NO.4: BINU, AGED 29 YEARS S/O.MAILANKUTTY, MATHEKANDAM (H), METHANAM ROAD, PANAYIKKULAM KARA, ALANGAD VILLAGE, ERNAKULAM DISTRICT. BY ADVS. SRI.V.JOHN SEBASTIAN RALPH SMT.P.V.DENCY SRI.K.J.JOSEPH ERNAKULAM SRI.V.JOHN

THOMAS SRI.P.A.MARTIN ROY SMT.PREETHY KARUNAKARAN
RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED
BY THE C.I. OF POLICE, ALUVA, (BINANIPURAM POLICE STATION)
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA AT ERNAKULAM, COCHIN 18. BY SRI.ALEX.M.THOMBRA,
SENIOR PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING
COME UP FOR ADMISSION ON 04.07.2022, ALONG WITH
CRL.A.NO.456 OF 2016 AND CONNECTED CASES, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN &
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY,
THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 653
OF 2018 AGAINST THE JUDGMENT DATED 28.04.2016 SC
NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS
COURT - II, NORTH PARAVUR APPELLANT/ACCUSED NO.2: SIBIN,
AGED 23 YEARS S/O.PAPPACHAN, KANAPPILLY HOUSE, NSS
ROAD, KARINGAMTHURUTH KARA, ALANGAD VILLAGE, NORTH
PARAVOOR.

BY ADVS. SRI.BINDU SREEKUMAR SRI.T.P.ABDUL HAMEED
RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED
BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM.
BY SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR THIS
CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
04.07.2022, ALONG WITH CRL.A.456/2016 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN MONDAY, THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944 CRL.A NO. 103 OF 2021 AGAINST THE JUDGMENT DATED 28.04.2016 IN SC NO.326/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - II, NORTH PARAVUR

APPELLANT/1ST ACCUSED: NOBIN, AGED 32 YEARS S/O.PAPPACHAN, KANAPPILLY HOUSE, N.S.S.ROAD, KARINGAMTHURUTH, ALANGAD VILLAGE, NORTH PARAVOOR. BY ADV S.NIRMAL KUMAR RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE, IN CRIME NO.144/2010 OF BINANIPURAM POLICE STATION, ALUVA. BY SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 04.07.2022, ALONG WITH CRL.A.546/2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ

----- Dated this the 4th day of July,
2022

JUDGMENT

Vinod Chandran, J.

The injurious destinies that befell, a group of young men, for reason of a wrong delivery of an SMS is the case projected herein; which resulted in the murder of one and incarceration of some others. A minor girl

sent an innocuous message about her exams to a male friend, which was received by a stranger. There were exchanges between the sender and the stranger/recipient, querying about each others identity, which infuriated the friend of the sender. The friend hence repeatedly called the recipient and abused him over the mobile phone, upon

which the recipient complained to his friends. The friends took up cudgels on behalf of the recipient and called back the person who abused him, when they were asked to come to a nearby toddy shop. At the toddy shop a scuffle ensued and one of the friends of the recipient was stabbed. He was taken to the hospital, in fact three hospitals, in the last of which, he succumbed to the injuries. Nine persons were arrayed as accused, out of which six were convicted and three acquitted. The convicted accused A1 to A4 and A5 & A8 are before us in separate appeals.

2. Before the Trial Court the prosecution

examined 41 witnesses and the defence, two witnesses. While the prosecution marked documents from Exts.P1 to P39, the defence marked Exts.D1 to D5. There were also eleven material objects marked in trial. The accused Nos.1 to 5 & 8 were found guilty of the offence of murder under S.300, punishable under S.302 IPC. They were also found guilty of offences under Ss.143, 147, 148, 323 &

324. While various terms of sentences were imposed for

the other offences, they were convicted to life under S.302 with a fine of Rs.5 lakhs each. Fines were imposed under the other offences also and appropriate default sentences.

3. Sri.Nirmal Kumar, learned Counsel for A1 commenced with the argument that the medical evidence does not tally with the ocular testimony. The Wound

Certificate issued by two hospitals, in succession, differ considerably. There is no evidence as to how the victim was taken from one hospital to the other and there is possibility of the fatal injuries being inflicted on the way. The ocular testimony and omissions pointed out would not inspire the confidence of a Court, to hand down a conviction, especially when the fatal injury to the chest, is not spoken of by those who allegedly saw the incident. The eye-witnesses were not believable and there is no corroboration of the material particulars in their testimonies. It is pointed out that the deceased, along

with his friends, had gone to the

scrutinized very carefully and the omissions are very fatal. There is no recovery of weapon from A1 and the prior statements of the witnesses does not speak of A1 having wielded any weapon.

4. Smt.Bindu Sreekumar, learned Counsel,

appearing for A2, submits that though the charge is that A2 took the knife from A3 and gave it to A1; there is no substantive evidence led, to that effect. PW1 & PW35 also did not have any allegation against A2. Learned Counsel Sri. leans C. Chamakkala pointed out that there is no proper identification by PW1 and PW35, did not at all identify A3. The omission proved through the I.O, PW40, clearly indicates that the prior statements did not speak of A3 having brought a knife to the crime scene. It is pointed out that PW35 spoke of having seen the accused on the morning of 13.03.2010, whereas Ext.P8 Arrest Memo and Ext.D2 Remand Report speak of their arrest from Bison Valley on the evening of the said date. The inherent absence of credibility of PW1 is evident.

5. Sri. John S.Ralph, learned Counsel appearing for A4 & A8, points out that despite a charge under S.149 there is no finding on that aspect. The conviction is on

murder simplicitor without even a common intention alleged under S.34 IPC. There is no identification of A4 and his conviction rests upon very curious premise of the unsubstantiated version in the FIS and the contradictions marked by the defence. A8 also has not been identified and the confession recorded from him ought not to have been so recorded, since it results in a confession of the crime itself. There is no overt act alleged against A8 and the recovery is said to have been made from near the crime scene, when the ocular witness testified that the accused, after stabbing the victim, left the place with

the knife and rafters. Sri.S.Rajeev, learned counsel, appears for A5 and points out that there was never a mention of A5 in the FIS. There is also no motive proved, as the genesis of the crime has not been brought out. In fact, in cross-examination PW40, the I.O, specifically spoke of inquiries having been made regarding the mobile calls through the Cyber Cell. Nothing is produced in that regard, which

raises a reasonable doubt that the material received does not tally with the prosecution case. It is

also pointed that there is delay in recording the FIS and the FIR registered just after midnight, reached the Court only in the evening of that day.

6. Sri.Alex M.Thombra, learned Public

Prosecutor, strongly supports the conviction based on the direct evidence led by the prosecution in the nature of eye-witness testimony. The attack on the deceased has been specifically spoken of by the witnesses and the recovery of the knife, clinches the guilt of the accused. Though the concealment of the weapon is by A8, it is very clear that the said weapon was used to stab the deceased,

which inculcates A8 also. The confess

examination are not very material and there is no reason why the witnesses should falsely implicate the accused. The argument of fatal injuries having been inflicted in the journey from one hospital to another, is far fetched,

especially when there is clear evidence to show that there was delay in the previous hospital, from which the victim was taken to a higher center. The date on which the accused were shown to the witnesses could very well have been a mistake. The delay in recording FIS and the delay in submission of the FIR is suitably explained.

7. The charge levelled against the accused was

that, pursuant to the wrong delivery of an SMS, the recipients and his friends were summoned to a place near the toddy shop at Kongorpilly where the accused formed themselves into an unlawful assembly and with common object, armed with a knife and wooden sticks attacked the persons summoned, thus causing injury to some and also stabbing one Prasanth to death. Common intention, thus was alleged, though Section 34 was not specifically noticed. The issues framed by the trial court were in consonance with the charge alleged against the accused

and the additional charge of harbouring the accused as against A9. A9 stood acquitted of the charges and as we noticed, six accused were convicted for the offences

alleged against them. Though the first informant was not available to be examined before Court, another friend of the deceased, who was with the injured victim and the first informant, had confirmed the signature of the first informant and corroborated the FIS to the full, was the finding of the lower Court. The delay with respect to furnishing of the FIR to the Court did not impress the trial Court since the trial Court found that the FIR was registered only in the early morning of the day and it was furnished to the Court in the evening of the very same day. The fact that the alleged crime occurred on the previous night does not raise a ground of unexplained delay in registering the crime, was the finding. The

persons who accompanied the victim was running from pillar to post to save the life of their friend and they cannot be expected to run to the Police Station to register a first information. The non-examination of the first informant was held to be inconsequential especially noticing the judgment in Takhaji Hiraji vs Thakore

Kubersing Chamansing [(2001) 6 SCC 145]. It was held

that a Court could safely act upon the testimony of the other witnesses, if they are reliable and there is no compulsion on the prosecution to examine each and every witness cited. Regarding the disparities in the injuries noted in Ext.P18 and P22 wound certificates issued from different hospitals, it was held that the victim was detained in the first hospital for about one hour and this indicates that first aid was given there and even

the Doctor who examined the victim spoke of profuse bleeding. The mere fact that the Doctor did not notice the injuries on the chest would not raise a doubt, of the victim having been brought to the hospital, with only minor injuries and the major injuries having been inflicted after he was taken from the hospital, on the way to the next hospital. PW1 and PW35 had identified the accused and also spoken of the name of A1 to A4 which was available in the FIS also. A test identification parade

(TIP) is not imperative in every case and in any event the substantive evidence is the identification made in Court. Reliance was also placed on the recoveries made by

the 5th and 8th accused of a wooden stick and the knife used for stabbing the victim. PW16, the relative of the victim, who was the attesting witness for one of the recoveries, was alleged to be an interested witness by the defence. The trial Court however, found from his demeanour and the manner in which he testified that there was no possibility of tutoring and that he was a reliable witness despite being the relative of the accused.

8. The motive was found to be proved by PW10 who

had conveyed the wrong delivery of the SMS to A1. It was also deposed that A1 had called her to speak about his leaving the place to Bison Valley with two friends and had directed her to delete all messages from her phone. She also admitted that she gave statement to the Police, that the 1st accused informed her of the clash with the friends of the recipients of the SMS message. The trial Court placed much reliance on the fact that PW10 had admitted all her statements recorded by the Police under

S.161 Cr.P.C and also Ext.P3 under section 164. The allegation of the inability of the 1st accused to hold a knife or to stab anybody was found to have been demolished, by the evidence of DW1, the Doctor who treated A1. The accused Nos.1 to 5 & 8 were hence found to have committed the offence of murder and the other offences charged against them, on which conviction was entered and sentences were imposed.

9. The first informant was not examined, but the

FIS, Ext.P20 was marked through PW35 who was another eye witness and who affirmed the signature in the FIS as also the narration made therein. The FIS commenced with the narrative that the informants friend was stabbed by about five persons near the Kongorpilly Toddy Shop. On the evening of the subject day, a call was received on PW11's mobile phone from the number 97474 13397 and

there were

hot words exchanged between the two, which fact was informed to the friends of PW11; CW1, the deceased, PW1 and PW35. They were then standing at Millupady at Valluvally when again repeated abusive calls came from the same mobile number. On attending the last call, PW11 asked the person on the other side who he is, upon which the caller asked him to come to the Toddy Shop at Kongorpilly. Hearing the challenge, borrowing the motor cycle of PW14, the deceased, PW1, PW35 and the 1st informant went to Kongorpilly.

10. On reaching the spot, about five people came

to them inquiring whether they were the persons who spoke over the mobile. There was a scuffle and one of them picked up a rafter and started hitting the intruders. At that point, another person brandished a knife and exhorted one Sibin to 'stab them to death'. Sibin immediately grabbed the knife, when the first informant and his friends started running. Sibin caught Prasanth by the collar and started stabbing him on his back. The injured victim ran and sat near the medical shop, to the east of Kongorpilly Junction. PW1 who tried to start the bike and escape was beaten with a rafter.

11. It was also stated that the assailants called

each other, by their names; which were, Nobi, Sibin, Binu and Ousepachan. The first informant affirmed that there was light in the locality from the nearby shops and when the victim fell on the ground, the five assailants ran away; seeing a crowd gathering. The three friends of the

victim immediately took him in an auto-ricksaw to a nearby clinic where the Doctor advised them to take the victim to a major hospital. The friends then summoned a Trax- vehicle and took the victim to Ernakulam Medical Centre and then to the Medical Trust Hospital, where, at around 12.10 a.m on 11.03.2010, the victim breathed his

last. It was apprehended that the exchanges between PW14 and the assailants over the mobile phone was the motive

for murder. The first informant also said that he can recognize the assailants on sight. It was reiterated that the names of the assailants, were picked up, when they called each other when the occurrence was going on. We are sure in my minds that the mere non examination of the first informant cannot lead to the entire prosecution being labelled false or a farce, if the other witnesses put forth the case reliably. However there cannot be any weighty reliance placed on the FIS as done by the lower Court; which in this case has gone to the extent of an

observation that the first informant, CW1, identified the accused by their names; a quite erroneous approach.

12. The death was a homicide, without any doubt,

as spoken of by PW31, the Doctor who conducted post- mortem examination and produced and marked the report Ext.P16. There were six incised wounds on the victim's body. The first transversely placed on the outer aspect of the right side of chest, the next transversely placed on the right thigh, another placed on the outer aspect of the left side of chest, then on the outer aspect of left

side of back of chest, again one transversely placed on the left side of back of chest and the last on the right side of back of chest, vertically placed; which were the injuries marked as item Nos.1, 3 & 4 to 7 in the post- mortem report. One other injury was an abrasion which was inconsequential. According to the Doctor, the cause of

death was the injury sustained to t

caused by a sharp cutting weapon like a knife. The Doctor also opined that the injuries could be caused by MO1 knife.

13. The motive though not imperative was

attempted to be established through PW1, PW35, the friends of the deceased as also PW11, in whose mobile the SMS was wrongly delivered and became the genesis of the crime. The trial Court had also relied on the evidence of PW10, the girl from whose mobile the first SMS came to PW11's mobile. PW10 at the time

when the incident occurred was a standard nine student. She was acquainted with A1 and used to frequently sent him messages from her mother's phone. She admitted having sent a message to A1 about her examination which had been delivered to another, wrongly. However, she denied that she received any reply to the wrongly delivered SMS. She also denied having given any statement to the police about the repeated messages to her mobile. She, obviously did not support the story of motive, projected by the prosecution and was declared hostile. She admitted having given Ext.P3 statement to the Magistrate under S.164, on

her own free will but did not remember the contents of the statement. The trial Court, as we noticed, relied on the fact that she admitted Ext.P3 and the prior statement to the police; again an erroneous approach, in violation of the fundamental principles of appreciation of evidence in a criminal trial. More pertinently, there is no such

admission made by the witness. On permission, the prosecution was permitted to put leading questions. The statements made under S.164 were put to her which were either denied by her or stated to be in a different manner; all the same not supporting the motive at all. She also deposed that she had only told the police that A1 had quarrelled with his friends. In cross-examination she deposed that she was 14 years when she gave Ext.P3 statement and that the Police had tutored her. She also

said that when she made the statement before the Magistrate the Police were standing outside and she was afraid of the Policemen. It was hence that she gave the subject statements to the Magistrate, in the manner in which the Police desired. She also said that she had only

a casual acquaintance with A1 and that she even does not know where he resides or his house name. The location of his residence was spoken to the Magistrate as instructed by the Police. We find the said witness having completely turned hostile and there can be no reliance placed on her testimony. The allegation of the genesis of the crime having been the result of a wrongly delivered SMS could not be substantiated by the prosecution before Court; but

that is not very significant since a motive is not imperative in every crime, especially one sought to be proved by direct evidence.

14. We have to thus, look at the eye-witnesss

testimony which are that of PWs.1 & 35. PW1 in his testimony, made a departure from the FIS, in so far as the last call having been attended by the deceased, to whom was made the challenge to come to the location near the toddy shop. The said conversation, as stated by CW1 in the FIS was between PW11 and the abusive caller. We have to immediately notice that the prosecution has not made any attempt to trace the calls or at least to place

on record the details of the subscriptions of PW10 & PW11 or the subscriber of the call to PW1's number, which was

clearly stated in the FIS. PW1, while narrating the incident, in tandem with that in the FIS, did not mention any names or that the assailants had addressed each other by their names. His testimony was to the effect that when they reached there, there was a push and pull and later, the persons who were at the crime scene, encircled them and bet them with rafters. It was also deposed that one of the assailants brandished a knife which another person

grabbed and stabbed the deceased. Again, as a departure from the FIS, it was stated that, when the deceased attempted to push the assailant away and run away, he was stabbed from the back. The injured victim ran to the medical shop and sat there, when A1 came there and stabbed him, not at all mentioned in the FIS. Later he also deposed that it was A3 who brandished the knife and A1 grabbed it, despite A3 having extorted A2 to stab the persons who came to question them. PW1 first said that A3 only screamed out to 'kill them', but at the stage of identification deposed that A3 exhorted: 'A2 to kill them'. PW1 also alleged that he was fisted and then hit with a rafter by A5. PW1 identified A1, A3 and A5 from the dock. PW1 specifically deposed that when the victim was stabbed and was lying injured, the persons from the locality gathered there. Here it has to be noticed that many of the local persons who were running shops in the neighborhood turned hostile, that is PW 2 to 8. PWs 17 to 20, 24, 25, 27 & 30 also

turned hostile to the prosecution.

15. PW1 admitted that he was shown four accused from the Police Station; A1, A3, A5 and one Shiju. He also said that later A2 was also shown to him from the

Police Station at Alwaye and again A6, A7 & A8. He admitted his statement under S.164, but deposed that the names of A1 (Nobin) & A2 (Sibin) were interchanged and to correct the same, he gave a statement to the Police. Thus there is considerable inconsistency regarding the person who actually committed the overt act. He spoke of a street-light, which facilitated the identification at the crime scene; which in the FIS was the light from the shops. In cross-examination he admitted that, but for informing the Police that he can recognize the assailants, he had not narrated any body features of the accused. He also admitted that he had not spoken about the dress of A1 to the Police. PW1 was specifically asked as to whether he had told the Police in his prior statement on 11.03.2010 that A1 had stabbed the deceased or described the knife used to stab. Though he answered in the affirmative, they were marked as omissions.

16. The victim was conscious when he was at the Medical Center and the history of the occurrence was

spoken by him to the Doctor, PW38. The victim was detained at the Medical Center Hospital for first aid for about an hour and later was taken to the Medical Trust Hospital, according to PW1. At the Medical Trust Hospital, after about two hours, he breathed his last. We do not think that the version that the stabs were delivered between the hospitals, is a reasonable one. PW1's statement that he had described the offending

weapon to the Police and that he had specifically stated it to be a shining knife, was marked as an omission. PW1 deposed that the injuries on the victim was on the back, the stomach and on his leg. As has been stated by the learned Counsel for A1, there was no injury spoken of on the chest as inflicted at the scene of occurrence by either of the eye-witnesses; quite natural considering the fact that there was a scuffle. It was in cross-

examination of PW1 that Ext.D1, S.164 statement, was marked. In Ext.D1 the only statement was regarding five people at the crime scene, when PW1 and his friends arrived at the crime scene. This is also in consonance with the FIS, and the prior statements of the ocular witnesses, which was embellished to rope in the other accused also.

17. PW35 was the other eye-witness examined

before Court. PW35 also, contrary to what was stated by the first informant, stated that the last call, which came to PW11's mobile, was answered by the deceased. According to PW35, when they reached near the toddy shop,

one of the persons came forward and asked them as to whether they were the persons who talked over the phone. There was a push and pull, upon which the deceased went forward and asked them as to what the problem was. It was then that the assailants started beating Prasanth. Here we have to notice that contrary to what was stated by PW1, PW35 does not have a case of the persons standing at the scene of occurrence having encircled the four friends and beaten them. PW35 also spoke of one person having brandished a knife and given it to another, who stabbed the deceased. His version was that the one who brandished the knife, shouted: 'stab him to death'; quite contrary to the other versions. It was PW35's deposition that PW1 mounted the bike and tried to escape when somebody beat him on the back with a rafter. PW35, deposed, Prasanth ran to the medical shop, where he was stabbed once by the

assailants. According to PW35, the victim narrated the details of the entire incident to PW9, a relative at the hospital to which he was taken by PW35, CW1 and PW1.

18. PW35 identified A1 & A5 and the offending

knife MO1 as also the wooden rafter, MO2. He identified the dress worn by A3 but without identifying the accused from the dock. He also identified the dress worn by A5. It was PW35 who marked Ext.P20, as the first information given by his friend CW1. He confirmed the signature of CW1 in the FIS. In cross-examination PW35 said that he was acquainted with the assailants, which was marked as an

omission. He confirmed that A1's name was informed by the Police and that he had only spoken of the stab having been delivered by a person, who was short, with dark complexion. This was also marked as an omission in cross-

examination. Though he identified the dress of the assailants, he admitted that no such description was given in the prior statements made to the Police. The prosecution did not mark the S.164 statement of PW35 also, in chief-examination. In cross-examination it was marked as Ext.D2 and it was admitted that the name of the accused were interchanged as stated before the Magistrate. Both the eye-witnesses did not identify all the accused. Those accused identified by the witnesses, were admitted to have been shown to them in the Police Station. The eye-witnesses had not stated about any acquaintance with the assailants and in that context it was incumbent on the Police to have carried out a TIP.

19. The trial Court had specifically relied on

the decisions which say that TIP is only to aid the investigation and cannot be a substantive evidence, which can only be the identification made in Court. We have no quarrel with such proposition, but when the accused are only identifiable by sight and the witnesses have no prior acquaintance, it is always safe to carry out a TIP,

since the same would corroborate the subsequent identification of the accused from the box. Often, trials are conducted long after the crime and it is rare that the witnesses remember the accused, with whom they had no prior acquaintance and the possibility of the witnesses being shown the accused, by the Police. This is why the Hon'ble Supreme Court often held that identification from the dock is an inherently weak evidence, and on which alone the conviction cannot be based (2014) 12 SCC 133

Prakash v. State of Karnataka. There cannot be undue relevance given to dock identification when the accused were shown to the witnesses by the Police, other than in a Test Identification Parade (2011) 7 SCC 130 Krishan Kumar Malik v. State of Haryana. In the present case the

witnesses had specifically said that they had no acquaintance with the accused and also stated that they had not told the Police in their prior statements about the distinguishing features of the accused or the dress worn by them. The accused, after arrest, were shown to the witnesses, which could very well have facilitated the identification in the box.

20. In this context, we also have to notice that there are discrepancies in the testimonies as to how the incident commenced and continued, which resulted in the

death of the victim who was the friend of the eye- witnesses. As was argued by the learned Counsel for A1, it was not as if the assailants had come to the four friends and attacked them, which resulted in the murder. It was PW1, PW35, CW1 and the deceased, who went to the spot near the toddy shop at Kongorppilly to challenge the persons standing there. It is also very pertinent that, PW1, who was abused over the telephone, did not go along with his four friends; a strange circumstance. The story about an SMS having been wrongly delivered and the exchanges between the girl and PW11, having led to the friend of PW10 repeatedly calling PW11 and abusing him, which eventually resulted in the friends of PW11 going out to avenge the abuses showered on PW11, has not at all been proved. The specific conduct of A11 having not accompanied the four friends, who went to avenge the abuses showered on him, also raise a suspicion. The transaction which occurred at the crime scene resulting in the stabbing and the death of the deceased also varies in the FIS, and the testimonies of PWs.1 & 35.

21. PW12 is the auto-driver, who took the victim

to the hospital, who deposed that only one friend of the victim accompanied him in the auto-rickshaw. PW13 is the Trax-vehicle driver who took the victim from the Clinic to the Ernakulam Medical Center. From the Medical Center,

the injured victim was taken to the Medical Trust Hospital in an ambulance, is the deposition. PW26 was the Doctor who initially saw the injured victim. PW26 said that the patient was conscious, walking and oriented when he saw him first and since the wounds were serious, he did not do any first aid, but only applied one

pressure bandage. He also advised the victim to be taken to a higher center immediately. He did not remember whether the injured had told him about the cause of the injuries.

22. PW38 is the Doctor at the Ernakulam Medical Center, where the victim was taken from the Clinic of PW26. PW38 issued Ext.P22 Wound Certificate, which showed

only three incised wounds; one on the left scapular region, the other on the left flank and the last on the medial aspect of right thigh. The history, as recorded in the Wound Certificate, was the alleged assault at Kongorppilly on 10.03.2010 in which the victim was stabbed with a knife by an unknown person. As has been recorded in Ext.P22 and deposed by PW38, one Jaffar brought the patient to the hospital. No enquiries have been conducted by the I.O to find out the said Jaffar, nor does the eye-witnesses speak of such a person having accompanied the victim to the hospital. PW38 said that the injuries noted in the Wound Certificate were not fatal and the victim was discharged, on request.

23. PW33 is the Doctor who last examined the victim, ie., the Casualty Medical Officer [CMO] at

Medical Trust Hospital. PW33 proved Ext.P18 Wound Certificate, which indicated four stab wounds; one on the left side of lower chest, the other on the right side of upper thoracic wall, then on the left para-vertebral region and one running upwards obliquely. PW33 said that the patient collapsed in the Casualty and was shifted to

Post-operative ICU, where he was incubated and ventilated. The alleged cause of injury, as deposed by PW33 and recorded in the Wound Certificate, was history of assault by some unknown person, who stabbed him on 10.03.2010 around 8 p.m at Kongorppilly. The information regarding the history, according to PW33, was given by one P.T.Babu. P.T.Babu is the relative of the deceased,

examined as PW9, who spoke of a dying declaration.

24. The dying declaration allegedly spoken to by PW9 has to be examined in the context of the evidence led by the three Doctors, who had seen the victim consecutively and immediately after the alleged incident of stabbing. PW9 came to the Medical Trust Hospital,

having been informed of the injury inflicted on his relative; the information passed on by his friends. When he came to the hospital, the injured victim, according to him, was lying in front of the ICU. The Doctor asked for relatives and when he stepped forward, he was told that the condition was serious and the victim needed immediate surgery. According to PW9, the injured victim talked to

him and specifically told him that there was an allegation of some exchange in the mobile phone, which led to his going to Kongorppilly to challenge the person who called. It is also stated by PW9, that the injured victim told him that he was stabbed by one 'Nobin'. First of all, it has to be noticed that none of the eye-witnesses speak of any acquaintance with the accused.

Even in the FIS, CW1 had stated that he came to know of the names only by reason of the assailants having called each other by their names.

25. Here, we also have to notice that none of the Doctors, who examined the injured victim, spoke of a

specific name having been mentioned.

Hospital, spoke of the history of stabbing by an unknown person. There is nothing to show that the deceased was

acquainted with A1 or the other ass

conscious, PW33, the CMO at the Medical Trust Hospital, specifically said that the victim collapsed in the Casualty. The victim was immediately taken to the ICU, where he was incubated and ventilated. In that circumstance, there was absolutely no possibility of the victim having been kept outside the ICU for PW9 to see him or talk to him, when he came to the hospital. The dying declaration, as spoken by PW9, is quite unbelievable looking at the evidence of the Doctors, who saw the

victim and the condition the injured was in, at the time he was taken to the ICU.

26. The statement of PW33 that PW9 had spoken to

him, about the history again cannot be believed, since PW9 had not come to the hospital along with the injured victim. The history of the occurrence, would have been

the first question, put to either the victim or the persons accompanying the victim, to the hospital. PW9 obviously came there only after the injured victim was transferred from the Casualty to ICU, that too after he collapsed in the Casualty. Further if the witness had spoken to the injured and then the History was recorded, definitely the name of the assailant would have been

spoken of. The dying declaration cannot at all be believed to convict A1.

27. Having examined the testimonies of the crucial witnesses; which we detailed herein above, for completeness, we have to look at the other witnesses

examined before Court. PW14 is the person whose bike CW1 borrowed to go to the crime scene, in which bike, the victim also travelled to the crime scene. PW1 said that he heard about the incident and went to the crime scene and saw his bike lying there. He also said that CW1, at that point, was at the crime scene and informed him about

the incident. PW14 came back with his bike and surrendered it before the Police on the next day. PW15 is the inquest witness and PW17 to PW20 also turned hostile. PW21 is the brother of PW1 who said the bike belonging to him was used by his brother. PW22 is the mahazar witness examined to prove the production of the two motor bikes, in which the four friends went to the toddy shop at Kongorppilly. As a relevant fact, we have to notice that there were remnants of an indicator light in the crime

scene, which was seized by the Police as per Ext.P1 Scene/Seizure Mahazar. There was no attempt made by the I.Os to verify whether the indicator light belongs to either of the motor bikes in which the four friends came to the scene of

crime. PW23 is the relative of the deceased, who identified MO3 pants of the deceased and PW24 is the father of A5, who turned hostile. PW25 & PW27 mahazar witnesses also turned hostile and so did PW30, another mahazar witness.

28. PW40 is the I.O, PW36 the Head Constable,

who recorded Ext.P20 FIS and PW37, the Sub Inspector of Police, who registered the FIR, Ext.P21. The FIS is seen to have been recorded at 12.30 p.m on 11.03.2010. PW36 deposed that at around 9 p.m there was an intimation received both from the Medical Center and Medical Trust Hospital about the injured victim having been brought

there. CW53, the Station House Officer [SHO], then directed him to go to the hospital and record the FIS. When he reached the hospital, the injured victim was admitted in the ICU and later, at around 12 O'Clock, the Doctor informed him that the injured had expired. It was then, that the FIS was recorded from CW1, a friend of the

injured. In cross-examination, PW38

hospital premises to get the statement from the injured victim and the by-standers of the victim were running helter-skelter to save the life of a friend. Only on being informed of his death the Constable approached the friend of the deceased to record the FIS. Despite the fact that we find the explanation to be reasonable, it is

his submission that the FIS was not recorded in his handwriting, since he had a hangnail. He could not write, which prompted him to call another policeman from the Police Station. The specific testimony of PW36 was that he came to the hospital in the bike of another policeman, yet, another policeman was summoned to record the FIS, who was not examined before Court. We cannot but notice that the witness had in chief-examination asserted that the FIS was recorded by him, which was resiled from, in

cross-examination. This again raises a suspicion, especially for reason of the first informant having not been examined, though the explanation that he was abroad

has been offered by the prosecution.

29. The FIR was registered by PW37 on 11.03.2010

at 3 a.m, which reached the Court only at 4.30 p.m on the same day. The testimony of PW36 that he did not record the FIS, the further delay in furnishing the FIR to the Court after registering it at 3 a.m on 11.03.2010,

assumes some relevance in the totality of the circumstances. Especially it has to be noticed that the names in the FIS were heard by the first informant only when the assailants called each other by their names. The eye witnesses examined before Court does not speak of the names having been heard at the time of the occurrence. This raises a reasonable suspicion that the recording of the FIS and the FIR was not as stated by the Police and some deliberation had gone into it before the information was recorded and the FIR registered. Otherwise the FIR

should definitely have been forwarded to the Court immediately on the morning of 11.03.2010.

30. The recoveries are of the offending knife

and a rafter which was used to beat the friends of PW11, who came near the Toddy Shop at Kongorppilly. PW16 was the attesting witness to the recovery and the mahazar was

marked as Ext.P6. PW16 deposed that he saw the accused taking the knife from between the boulders lying on the east side of the toddy shop. He also said that it was one person named Babu, who took the knife. However, he could not identify the accused and he also said that he does not remember the face of the person who picked up the

knife from between the boulders. In fact this would indicate that the Police had tutored the witness, especially since he did not identify the accused from the dock, but named him precisely as having picked up the offending weapon. We also look at the confession statement made by the accused who recovered the offending weapon. It is to be noticed that though the allegation was that A1 stabbed the

deceased, it was A8 who made the

confession statement and recovered the

to have confessed before the Police that, A1 handed over the knife to him and he concealed it in the property lying to the east of the toddy shop. The inadmissible confession was marked as Ext.P6(a) and was acted upon by the trial Court to convict A8. If the portion that incriminates A1 is eschewed, as argued by the learned Prosecutor, then the confession is only to the extent of concealment by A8; which cannot inculcate A1. A8 has not been identified by any of the ocular witnesses and there is no scientific evidence as to the recovered knife

having been used to stab the deceased. The ocular witnesses also have not given a description of the knife in their prior statements. Here we have to notice that, the specific testimony of the eye-witnesses was that the deceased ran to the medical shop, to which spot, he was chased by the assailants and again stabbed. When the

injured victim fell on the ground, the local people gathered there and the five assailants ran away from the spot. Then the only conclusion, if we believe the recovery, would be that A8 came back to hide the knife near the toddy shop, which is quite unbelievable. It is also pertinent that the knife did not have any blood stains, despite the repeated stabs found on the victim's body and the same was also not sent for chemical examination. Hence the recovery cannot incriminate A8 also. PW27, the mahazar witness for seizure of the wooden

stick, turned hostile, though he

himself having beaten the friend of the deceased with a rafter and broken the indicator-lights of the motor bike in which they came to the crime scene. In any event, the attesting witnesses having turned hostile, there can be no reliance placed on the same.

31. The motive as projected by the prosecution

has not been proved. The trial Judge had relied on the statements allegedly made by PW10 before the Magistrate under S.164. S.164 as distinguished from S.161 can be used for corroboration and contradiction, while the prior statements made to the Police under S.161 can only be used for the purpose of contradictions. The trial Judge

erred egregiously in having relied on the S.164 statement, when the various statements put to the witness were specifically denied by her. The substantive evidence is the statement made in Court and she does not have a case of either having had exchanges with the recipient of the SMS which was wrongly delivered, or she having stated of troublesome exchanges between herself and the recipient, to the Police. PW11 is said to be the recipient, who specifically spoke of his mobile number and the FIS itself indicated the number from which he received the abusive calls, which resulted in his friends going near the toddy shop at Kongorppilly to confront the person who made the abusive calls. PW11 had only a passive role and he never went with his friends to confront the person who abused him over the telephone. This puts the story of motive, generated from the innocuous message which was wrongly delivered to PW11, in a very suspicious plank.

32. Viewed in that context, it has to be noticed

that CW1, PW1 & PW35, along with the deceased, went to the toddy shop to confront certain persons. A scuffle ensued and the deceased was stabbed. There is no clear indication from the eye-witness testimony as to who delivered the stab. The FIS stated that A3 brandished the knife and asked A2 to stab Prasanth and it was also stated that A2 stabbed the victim first. This was the S.164 statement made by both PW1 & PW35, which they resiled from, in Court. In Court their statement was that they mixed up A2 & A1 and it was their deposition that A1 was the person who delivered the stab injuries. This has to be considered in the context of none of the

eye-witnesses having any prior acquaintance with the assailants. Even the deceased is not stated to have any acquaintance with the assailants, by his friends, two of whom were examined as eye-witnesses in the case. There was

also no clear identification made in Court. We also have to notice that the identification from the dock as

recorded by the Court was not proper. It was merely stated as, the person standing on the third position without specifying as to from which side he was standing at the third position. The identification in the dock is also very suspicious, especially when the witnesses admit of no prior acquaintance with the accused and the accused having been shown to them from the Police Station and without a TIP having been carried out at the earliest opportunity after arrest. The reliance, by the Sessions Judge on CW1's identification as stated in the FIS, to boot, is preposterous.

33. The dying declaration, as projected by the

prosecution also falls to the ground. The medical condition as deposed by the CMO at the hospital where the victim breathed his last, does not commend us to believe the dying declaration as having been stated by the victim to the relative, who is PW9. The recoveries are also not believable. The knife is said to have been recovered from the crime scene itself, when the eye-witnesses claimed that the assailants carrying the weapons fled from the

crime scene. The recovery is also not made on the confession made by the person who wielded the offending weapon. The recovery of a rafter by A5 has not been affirmed by the attesting witness. The recoveries in any event cannot be the sole basis of conviction. The omissions in the eye-witness testimony and the contradictions from the FIS and also the testimonies of both the eye-witnesses persuade us to concede the benefit of doubt to the accused. On an analysis of the evidence led before the Trial Court, we are of the opinion that, there is no

incriminating circumstance brought out against the accused. The contradictions and omissions in the evidence of the ocular witnesses persuade us to doubt the veracity of the transaction as deposed by them. We concede the benefit of doubt to the accused and acquit them. Accused shall be released forthwith, if not wanted in any other case. With respect to those accused who are on bail, their bail bonds shall stand cancelled.

Sd/- K.VINOD CHANDRAN, JUDGE Sd/- C.JAYACHANDRAN, JUDGE jma/sp/uu

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