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Sajeev vs State of Kerala

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Court : Kerala

Decided On : Jun-28-2019

Judge : Honourable Mr.Justice a.M.Shaffique,Honourable Mr. Justice Ashok Menon

Appeal No. : CRL.A/116/2014

Appellant : Sajeev

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE & THE HONOURABLE MR. JUSTICE ASHOK MENON FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941 CRL.A.No.116 of 2014 AGAINST THE ORDER/JUDGMENT IN CP 133/2011 of JUDICIAL MAGISTRATE OF FIRST CLASS, SASTHAMCOTTA AGAINST THE JUDGMENT IN SC 400/2012 of ADDITIONAL DISTRICT & SESSIONS COURT - V, KOLLAM DATED 17-01-2014 CRIME NO.213/2011 OF Sooranadu Police Station, Kollam

APPELLANTS/ACCUSED NO.1 TO 4 AND 7 TO 9:

1 SAJEEV, AGED 33 YEARS, S/O. MUHAMMED KUNJU, SABEENA MANZILIL, FROM THAZHETHUNDIL VEEDU, NELLUVILA, KAMPALADI MURI, PORUVAZHI VILLAGE. 2 MUHAMMED KUNJU AGED 63 YEARS S/O. HYDROS KUNJU, THAZHETHUNDIL VEEDU, NELLUVILA, KAMPALADI MURI, PORUVAZHI VILLAGE. 3 SUNEER AGED 23 YEARS S/O. ABDU SALAM, THAZHETHUNDIL VEEDU, NELLUVILA, KAMPALADI MURI, PORUVAZHI VILLAGE. 4 NAZAR AGED 38 YEARS S/O. NOORUDEEN KUTTY, VADAKKATHIL VEEDU, KAMPALADI MURI, PORUVAZHI VILLAGE. -:2:- 5 MUHAMMED SHERIEF AGED 48 YEARS S/O. KOCHUKUNJU, THAZHETHUNDIL VEEDU, NELLUVILA, KAMPALADI MURI, PORUVAZHI VILLAGE. 6 SUBER KUTTY AGED 44 YEARS S/O. HYDROS KUNJU, THAZHETHUNDIL VEEDU, NELLUVILA, KAMPALADI MURI, PORUVAZHI VILLAGE. 7 ABDUL RAHIM AGED 56 YEARS S/O. KOCHUKUNJU, AYANTHI THEKKATHIL VEEDU, KAMPALADI MURI, PORUVAZHI VILLAGE. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SRI.RENJITH B.MARAR SRI.E.SHANAVASKHAN SRI.M.REVIKRISHNAN SRI.V.C.SARATH SRI.VIPIN NARAYAN SRI.V.JAYAPRADEEP

RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SPL.P.P. SRI.NICHOLAS JOSEPH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 9.04.2019, ALONG WITH CRL.A.165/2014, THE COURT ON 28.06.2019 DELIVERED THE FOLLOWING: -:3:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE & THE HONOURABLE MR. JUSTICE ASHOK MENON FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941 CRL.A.No.165 of 2014 AGAINST THE JUDGMENT IN SC 400/2012 of ADDITIONAL DISTRICT & SESSIONS COURT - V, KOLLAM DATED 17-01-2014 CRIME

NO.213/2011 OF Sooranadu Police Station, Kollam APPELLANTS/ACCUSED 5 & 6: 1 MUNEER SON OF BASHEER, VYSANTEYYATH VEEDU, KAMPALADI MURI, PORUVAZHI VILLAGE. 2 SAKKIR HUSSAIN SON OF BASHEER KUTTY, KOCHU THEKKEDATHU VADAKKATHIL VEEDU, KAMPALADI MURI, PORUVAZHI VILLAGE. BY ADVS. SRI.ALAN PAPALI SRI.GILBERT GEORGE CORREYA SRI.J.VIMAL SRI.K.GOPALAKRISHNA KURUP (SR.) SRI.SOJAN MICHEAL -:4:- RESPONDENT/COMPLAINANT: STATE OF KERALA (STATION HOUSE OFFICER, SOORANADU POLICE STATION), REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI 682 031. BY ADVS. SPL.P.P. SRI.NICHOLAS JOSEPH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 9.04.2019, ALONG WITH CRL.A.116/2014, THE COURT ON 28.06.2019 DELIVERED THE FOLLOWING: -:5:-

JUDGMENT

Shaffique, J.

These appeals have been filed by the accused in SC

No.400/2012 of the Additional District and Sessions Judge-V, Kollam. They challenged the judgment by which they were convicted and sentenced for having committed the offence under Sections 143, 147, 148, 114, 341, 324, 326 and 302 r/w S.149 of the I.P.C. All of them were sentenced to undergo rigorous imprisonment for three months each for the offence u/s 143 of I.P.C., rigorous imprisonment for one year each for offence u/s 148 of I.P.C, simple imprisonment for one month each for the offence u/s 341 of I.P.C., rigorous imprisonment for 6 months each for the offence u/s 324 of I.P.C., rigorous imprisonment for two years each along with fine of 5,000/- each for the offence u/s 326

of I.P.C. with default sentence of one month each and imprisonment for life and to pay a fine of 45,000/- each for the offence u/s 302 r/w S.149 of I.P.C. with default sentence of 9 months each. No separate sentence was awarded for offence u/s -:6:- 114 and 147 of I.P.C. The fine amount, if realised was to be paid to PW1, PW2

and PW4.

2. During the pendency of the appeal, the 2nd accused

died and his legal heirs have not been impleaded in the case. The prosecution case is that the deceased Salim was the owner of a two-storied building situated at Osthammukku. Building was rented out to the first accused. Salim entered into an agreement with another person to sell the property without the knowledge of the first accused and he demanded the first accused to vacate the building. Similarly another two shop rooms were taken on rent by 2nd accused and the land owner (CW4) called upon him to vacate the building. According to the prosecution, on account of the demand for vacating the building, the accused entertained an

enmity with the deceased and accordingly they formed themselves into an unlawful assembly at about 6.30 p.m on They assembled in the front of the shop of accused No.9. When CW1 came out of the house, the 2nd accused instigated the others to kill him. 9th accused gave an iron rod to the 5 th accused, 8th accused gave a wooden log to the 6th accused and instigated the -:7:-

others. The 3rd accused inflicted a blow on the right side of the head of CW1 with a wheel spanner and another blow on the left hand muscle. When CW1 was about to fall, the 4 th accused started beating him on his back with an iron rod and A5 beat him while he fell down. The deceased Salim, younger brother of CW1 on hearing the hue and cry intervened. Immediately, the 2 nd accused caught hold of him and the first accused beat on his head with a wooden log which caused fracture on his skull. When Salim was about to fall, A1 inflicted another blow on his right shoulder with a wooden log. Even after Salim fell down, A1 continuously beat him causing fracture of his ribs. CW2, the elder brother of CW1 immediately interfered and 6 th accused beat him with a wooden log which he warded off with his right hand. 7 th accused beat him with a lathi which was also warded off and he sustained a fracture on the right hand ring finger and middle

finger. CWs 1 and 2 and Salim were taken to Padmavathi Hospital, Sasthamcotta and from there Salim was taken to Sanker's Institute of Medical Science, Kollam and again to Ananthapuri Hospital, Thiruvananthapuram. Salim succumbed to the

injuries on 28/2/2011 at 6.45 a.m. Based on a statement -:8:- given by CW1, Crime No.213/2011 was registered by the Station

House Officer of Sooranadu Police Station. After investigation was conducted by Circle Inspector of Police, the final report was filed before the Judicial First Class Magistrate Court, Sasthamcotta and thereafter the matter was committed to the Sessions Court and made over the Additional Sessions Court. After completing the procedural formalities, prosecution examined PW1 to PW22 and relied upon Exts.P1 to P28 documents. MO1 to MO3 were the material objects produced and identified. The defence marked Exts.D1 to D5 and examined a witness as DW1. Learned Sessions Judge after completing the procedural formalities convicted the accused as stated above.

3. The accused 1 to 4 and 7 to 9 are represented by

Senior Counsel Sri.P.Vijaya Bhanu, accused 5 and 6 are represented by Senior Counsel Sri.Gopalakrishna Kurup and 3 rd accused is represented by Adv.Renjith B. Marar. Special Public Prosecutor Sri.Nicholas Joseph appeared on behalf of the State and he was assisted by Senior Counsel Dr.K.P.Satheesan.

4. PW1 has given the First Information Statement Ext.P1. PW1 and PW2 were injured in the incident and they are -:9:- eyewitnesses. PW3 is also an occurrence witness and PW4 has seen part of the incident. PW5 another independent occurrence

witness turned hostile to the prosecution. PW6 is a relative of the deceased who had taken the injured to the hospital. PW7 is an attestor to Ext.P2 recovery mahazar for recovery of the

wooden log as per the confession statement of A1. PW8 has conducted plastic surgery on PW2 at Sanker's Hospital, Kollam and he had issued Ext.P3 certificate. PW9 is a Neuro Surgeon at Sanker's Hospital, Kollam. He had examined the deceased and issued Ext.P4 certificate. PW10 is a Surgeon of Medical College Hospital who conducted autopsy and had issued Ext.P5 post-

mortem certificate. PW11 is the Scientific Assistant who had visited the site, collected the materials and issued Ext.P7 report. PW12 is the Village Officer who prepared Ext.P8 site plan. PW13 has issued the wound certificates of Salim,, PW1 and PW2 which were marked as Exts.P9, P10 and P11 respectively. He is the Medical Administrator of Padmavathi Medical Foundation. PW14 is the Surgeon of Padmavathi Hospital who had issued Ext.P12 certificate regarding the injuries on PW1. PW15 is a Civil Police Officer who prepared the body note of PW1 and PW2 which is

-:10:- recorded as Exts.P1(a) and P1(b). PW16 was the Senior

Consultant, Neurology at Ananthapuri Hospital, Thiruvananthapuram. He had issued Ext.P13 certificate after examining Salim. PW17 is the Station House Officer who had recorded Ext.P1, FIS of PW1 and registered Ext.P14, FIR. PW18 is a witness to Ext.P15 mahazar by which MO3 wheel spanner was recovered on the basis of confession statement of 2 nd accused. PW19 was the person who had entered into an agreement with Salim to purchase the shop building. The agreement is produced

as Ext.P16. PW20 is the Chief Medical Officer of Padmavathi Hospital who issued Exts.P17, P18 and P19 with reference to the injuries suffered by PW1,PW2 and the deceased Salim. PW21 is the Circle Inspector of Police, Sasthamcotta Police Station who conducted initial investigation and the final report was submitted by PW22.

5. DW1 has been examined by the defence. He deposed

that, on 26/2/2011, at about 5.30 p.m, there was an issue relating to the cow dung brought for the purpose of PW1 and according to him, there was a scuffle. He had come to know that Salim died on account of a continuation of the said incident. In -:11:-

the 313 statement, the accused denied the incriminating circumstances against them. As already mentioned, PW1, PW2 and Salim were injured in the incident. Initially they were taken to Padmavathi Hospital where they were examined by

PW20. He deposed that on 27/2/2011, at 7.16 p.m, he examined one Haneefa who was brought by Subairkutty (PW6) with history of assault. As per the case sheet, he had suffered (1) an incised wound on the forehead over right eyebrow 1 cm and in the centre about 1 cm, (2) contusion on the centre of the forehead and (3) contusion over back and left arm. He deposed that the injured was conscious and he had sutured the wound. The Surgeon had also seen him and he was admitted for surgery. Ext.P17 series is the case sheet. He also deposed that the said injury could be possible by MO3 and the contusion is possible by contact with wooden log. He further deposed that on the same day, at about 7.06 p.m, he examined Aliyar (PW2) and he noticed an injury viz., fracture to 2nd, 3rd metacarpal on the right hand. X-ray was taken and fracture was confirmed. He was referred to a higher hospital on request. His case sheet was prepared by him which is marked as Ext.P18 series. According to him, the said injury was possible

with MO1. He further deposed that, on the same day, he examined one Salim (deceased) at about 6.55 p.m. Salim had a fracture on the left parietal area. He was drowsy and laboured breathing. Fracture was confirmed by CT scan and he was referred to the Neuro Surgeon at Sanker's Hospital, Kollam. The case sheet is Ext.P19 series. He further deposed that the wound certificate was prepared by Administrative Officer Dr.Raghavan on the basis of the case sheet. He further deposed that the injury on Salim is possible by a blow with MO2.

6. PW13 was working as Medical Administrator at Padmavathi Medical Foundation. He had issued three wound certificates of Salim as Ext.P9, Haneefa as Ext.P10 and Aliyar as Ext.P11.

7. PW9 was the Consultant Neuro Surgeon at Sanker's

Hospital, Kollam on 27/2/2011. He examined Salim (the deceased) at 8.30 p.m on the said day and he had issued Ext.P4. In Ext.P4, he had noticed the following injuries:-

(1) Scalp laceration on the left side

(2) Contusion right clavicle region and the right upper chest. His opinion was that it could be caused by assault. He further deposed that since the patient had head injury and he was in a -:13:-

very critical stage, he was discharged at their request against medical advice. He deposed that there was possibility of the patient to die. He also stated that the injury on the patient was possible with MO2.

8. PW16 was working as Senior Consultant, Neuro Surgeon at Ananthapuri Hospital, Thiruvananthapuram. He deposed that on 28/2/2011 by midnight, he examined Salim and

issued Ext.P13 certificate. According to him, his injuries were (1) right temporal extra dural haematoma (2) temporal subarachnoid hemorrhage and (3) left temporal infra cerebral hemorrhage. He had also diffused brain oedema According to him, the injury was fatal and it was sufficient to cause death in the ordinary course. He was continuously treated and expired on 28/2/2011 at 6.45 am. He also deposed that the injuries are possible by a forcible blow with MO2.

9. Salim's post-mortem was conducted by PW10. He was

the Lecturer at Medical College Hospital during the relevant time. He had issued Ext.P5 post-mortem certificate. During post- mortem he had taken note of the following ante-mortem injuries. 1. Multiple small abrasions over an area 5x4 cm on right -:14:- side of forehead 6 cm outer to midline and 2 cm above eyebrow.

2. Sutured lacerated wound 5 cm long and 0.5 cm deep oblique on left side of head, upper inner end 14cm above eyebrow and 4.5 cm outer to midline.

3. Contusion 30x15 cm involving its full thickness on

sides, top and back of head from ear lobe to earlobe across the skull vault and at the occiput on the back. A depressed committed fracture over an area 9x5 cm on left parietal bone seen with a fissured fracture 15cm long extending to the right temporal bone across the vault of skull. A thin strip of extradural haematoma (1.5 to 2 cm broad and 0.1 to 09.2

cm thick) seen under the fissured fracture. Brain showed laceration 5x3x0.5 cm on the left parietal region, intracerebral haemorrhage in the left temporal lobe with a blood clot, weighting 22gm, diffuse subarachnoid haemorrhage over the left cerebral hemisphere focal subarachnoid over the right parietal region and brain stem haemorrhage with flattening of gyri and narrowing of sulci.

4. Contusion of right side of chest wall on front 8x5x0.5

cm seen 6 cm outer to midline and its upper extent at collar bone. Fracture of right collar bone at the junction of its middle and outer thirds and IIIrd, IVth and Vth ribs on front outer aspect seen.

5. Multiple small abrasions over an area 0.5x0.5 c on back of right wrist along the outer border.

6. Contusion 2.5x2x0.5 cm on back of right hand 2cm below wrist, along the 3rd and 4th metatarsals.

7. Abrasion 1x0.3 cm on back of right hand 3cm above root of little finger. -:15:-

8. Abrasion 0.5x0.2 cm on back of right little finger 2 cm above its tip.

9. Multiple small abrasions over an area 3x0.5 cm on front of right leg 12 cm below knee.

10. Abrasion 0.5x0.5 cm on back of left little finger 2cm above its tip.

11. Multiple small abrasions over an area 2.5x0.5 cm on the knuckle of left index finger.

12. Abrasion 1x0.5 cm on front of left knee.

13. Multiple small abrasions over an area 2x1 cm on front of left leg, 15cm below knee.

14. Abrasion 0.8x0.5 cm on front of left ankle.

He opined that the death was due to the blunt injury sustained to the head. He further deposed that injury Nos. 2 and 3 are possible by MO2. During re-examination he stated that injury

Nos.2 and 3 are not possible by a simple fall. Sufficient blunt force is required and injury no.4 will not occur by a simple fall. It is apparent from the aforesaid evidence that the death of Salim was on account of the head injury sustained by him. The defence had taken up a case that it might be due to a fall that such injuries be caused. But the Doctor had ruled out the said possibility as well. According to PW10, such an injury could not be caused by a single fall. Even otherwise, the evidence available would show that Salim was seen by PW20 at 6.55 p.m on

-:16:-

a better hospital. He was taken to Sanker's Hospital and was seen by a Neuro Surgeon. At the instance of the relatives, he was taken to Ananthapuri Hospital, Thiruvananthapuram where he succumbed to the injuries and all the Doctors have clearly taken note of the head injury and even at the time when he was seen by PW20 and thereafter by PW9, the head injury was fatal and ultimately he died on account of the said injury. The post-mortem conducted by PW10 also reveals the said fact and therefore it is rather proved that Salim died on account of the head injury suffered by him. The other question to be answered would be as to what was the cause of the head injury.

10. As far as PW1 is concerned, he also suffered certain

injuries and certificate in that regard had been issued by PW20 and also PW13. The evidence of PW20 would indicate that he had examined Salim, PW1 and PW2. All of them are seen brought together having suffered assault in the same incident. PW8 had conducted plastic surgery on PW2 at Sanker's Hospital and Ext.P3 is the said certificate. He deposed that PW2 was having critical amputation of right ring finger and the said injury could be

-:17:- caused by MO1 or a wooden log.

11. PW6 is one Subair. He is related with the victim, PW1

and PW2. PW15, the Civil Police Officer during the relevant time had recorded Ext.P1. He had also prepared the body note of PW1 and PW2. Ext.P1(a) is the body note of PW1 and Ext.P1(b) that of PW2. The body note was prepared at Padmavathi Medical Foundation Hospital while preparing Ext.P1 FIS.

12. It is rather clear from the aforesaid evidence that PW1, PW2 and Salim suffered injuries in the very same incident.

13. We shall now consider the oral testimony of the

eyewitnesses. PW1 to 4 are the eyewitnesses to the incident. PW1 and PW2 being injured in the very same incident, there cannot be any dispute regarding their presence at the relevant time.

14. Before proceeding further, it is worthwhile to consider

the evidence in the form of Ext.P1. The main contention urged by the learned counsel appearing for the accused is that most of the accused were not named in Ext.P1 FIS. The FIS was given at 21.00 hrs on 27/2/2011 by PW1. In the FIS it is stated that on the said day at about 6.30 p.m., when he came to the road from his

house, he saw Muhammed Kunju, his brother Subair, Subair's cousin Rahim and their relative Suneer along with another person who could be identified were coming from Rahim's shop with wooden logs, stick etc,. They came running towards him. All the five persons uttered we were waiting to see you all and Mohammed Kunju inflicted a blow on his head with a stick. Subair beat him with a stick near his right eye. Rahim hit him behind with a stick. Suneer had hit him with a stick above his right knee. Another person whom he could identify had hit him with a stick. He cried aloud. On hearing the same, his younger brother Salim and elder brother Aliyar came running. Salim asked them not to beat his brother. At that time Sajeev uttered you all will not be permitted to live. He came running from the shop, took a wooden plank kept by the side of the road for concreting a drain and inflicted a blow on the head of Salim. Salim suffered an injury on his head and he started bleeding. He fell unconscious on the

road. Seeing this, his brother Aliyar Rawther obstructed them and asked them not to hit him. At that time, Basheer's son Shiju @ Sakeer Hussain came with a wooden log and beat Aliyar, who warded off the same with his right hand. While so, he suffered -:19:-

injury on two of his fingers. When the people in the locality came running, all of them threw away the weapons in their hand and ran away. The people who assembled there took Salim and his brother and himself in a car to Padmavathi Hospital, PW1 and his brother PW2 were admitted in the said hospital. Since Salim's injury was fatal, he was taken to Sanker's Hospital. The wooden plank which was used by Sajeev to inflict injury on Salim was having a length of 1 metres and 6 inches width. He also deposed that his brother Salim's shop was given on rent to Sajeev. Since the term of tenancy was over, he had requested the tenant to vacate. However Sajeev did not comply with the said request. There was a talk in between but the matter could not be settled. That was the reason for the aforesaid enmity. Apparently, in Ext.P1, there is reference to the name of Muhammed Kunju (A2), Subair (A8), Rehim (A9), Suneer (A3) and according to him there was also another person who could be identified. These were the persons who had hit him. Salim was hit by A1, Sajeev and PW2 was hit by A6 Sakkir Hussain. Apparently, the name of A4 and A7 have not been mentioned in the FIR. The overt act mentioned in Ext.P1 is that PW1 was assaulted by A2, A3, A8, A9

-:20:- and another person whom he could identify. Salim was assaulted only by A1 and Aliyar PW2 was assaulted by A6.

15. PW2 deposed that on 27/2/2011 at about 6.30 p.m,

the incident happened in front of the house of himself and his younger brother. It was on the western side. Salim was about to return to Gulf after his leave on the next day. The brothers of Salim, PW1 and PW2 are living in the same compound in different

houses. They knew the accused, who were all relatives. A9 conducts a tea shop on the opposite side of their house. On the said date and time, when he came out

of the house, he forgot to take his purse. He called his wife. Accused were standing near the teashop of A9. On seeing him, A2 uttered we were looking for you all, and all the accused came towards him. A few of them had weapons. A2 attempted to hit him with a wooden log, but did not fall on him. At that time, A3, A4 and A5 encircled him and he was beaten up. A3 had hit him with a wheel spanner. He suffered an injury on his right forehead. He had hit him with the wheel spanner on his left hand. He shouted aloud. He also fell down. A4 inflicted a blow on him with an iron rod and he fell down. A9 handed over a stick to A5 and uttered to kill him with which A5

-:21:- inflicted a blow on his behind. Hearing the hue and cry, his brother Salim came running. A2 caught hold of him. Salim was

pleading not to hit his brother. A1 Sajeev ran towards him uttering you all will not be permitted to live took a wooden log which was by the side of the road and hit him on his head. Blood spilled out and it stained on the face and shirt of 2 nd accused also. A1 again inflicted a blow on Salim on his right shoulder. He fell down and A1 again inflicted a blow on him. Salim's wife came running. She gave him water. He could not drink. Aliyar came running on hearing the sound. A6 and A7 hit him. A7 had hit him with a wooden log. That was the weapon A2 had used to hit PW1. He had left it on the road. A6 had hit PW2 on his head. A8 had given the wooden log to A6. PW2 suffered injury on two of his right fingers and he suffered a fracture on the finger. All the accused proceeded to A9's teashop and thereafter left the place. CW3 Sajeev came with a jeep and took Salim and his wife to the hospital. He and his brother were taken in the car of CW6 to Padmavathi Hospital. Salim was taken in an ambulance to

Sankar's Hospital and thereafter to Ananthapuri Hospital, Thiruvananthapuram. PW1 was admitted in Padmavathi hospital -:22:-

and his brother was shifted to Sanker's hospital at 9.30 p.m. Portion of PW2's ring finger was amputated. Surgery was conducted on his middle finger. He also identified Ext.P1 the FIS. On 28/2/2011 at about 6.45 a.m, he heard that Salim died. According to him, Salim's shop was given to A1 for rent. He had demanded to vacate the premises. He had already agreed to sell the shop to another person

and advance was received and agreement was executed. CW4's shop was given to A2 for rent, which also was asked to be vacated. They felt that PW1 and PW2 were behind the same and therefore they were attacked. He also identified MO1 which was left by A2, MO2 by which A1 had inflicted injury on Salim and the wheel spanner MO3 by which A3 had assaulted him.

16. The main discrepancy in the evidence of PW1 is that

he did not mention in Ex.P1 that A3 used a spanner to inflict a blow. In Ext.P1 it was stated that A1 had inflicted only a single blow on Salim and he fell down whereas in evidence he states that A1 had inflicted a few blows on Salim. The suggestion was that there was a push and pull and Salim fell down on to the wooden plank by force on account of which he suffered the injury.

-:23:-

17. PW2 is the brother of Salim. He deposed that on the

very same incident, he suffered injuries. He deposed that on hearing the cry of PW1, he saw A5 inflicting blow on PW1 with a stick. Salim came running. A2 held Salim and by retorting all of you will not be permitted to live, A1 Sajeev inflicted a blow with a black stick on Salim's head. He sustained an injury on his head. Again he inflicted a blow on the right shoulder. Salim fell down. At

that time, A1 inflicted another blow on his ribs. He further deposed that A8 had given a stick to A6 and A6 tried to inflict a blow on his head. He warded it off with his right hand. It was a wooden piece. A7 assaulted him with a wooden piece. He warded the same also or else he would have died. Two fingers of his right hand suffered fracture. One finger was amputated. Salim was taken to the hospital by his wife. Two others Subair and Ansar

were also present. PW1 and PW2 were taken to hospital. He deposed that Salim was assaulted with MO2 wooden piece. PW2 was assaulted with MO1 by A7. Ext.D1 is a contradiction. PW2 stated that he had not stated to the police that he heard the noise in front of Salim's house. He was asked whether he had mentioned to the police that Salim suffered three blows. He said

-:24:- he had mentioned the same to the police. He stated that the second blow was on Salim's shoulder and he does not know why the police had not recorded the same and he also does not know why the third blow was not recorded by the police.

18. PW3 is the son of PW2. He deposed that he had seen

the incident. The incident happened on 27/2/2011 by around 5.00 p.m in front of their house by the road side. He had gone to Salim's house and was coming back. He saw PW1 going out through the gate. All the accused came from A9's shop and uttered we were waiting for all of you. A2 had stated so. A2 attempted to inflict a blow on the head of PW1. He warded it off. A3 took a wheel spanner and inflicted a blow on PW1. PW1 was assaulted by A3, A4 and A5. Hearing the cry of PW1, Salim came out of the house and requested not to kill his brother. A2 leaving the wooden piece got hold of Salim. A1 inflicted a blow on the head of Salim with a wooden piece. Salim suffered an injury. With the same wooden piece, A1 hit Salim. Salim fell down and again A1 inflicted a blow on Salim's ribs with the same wooden piece. PW2 came running from north. A6 and A7 attacked PW2. A6 used a stick and A7 a wooden piece to assault PW2. He warded it off

-:25:-

but he suffered injury on his hand. CW5 came and took Salim and held Salim to her lap. PW3 came with a jeep and took Salim to the hospital. Subair was in the hospital. He had given the details to the Doctor. Since Salim was serious, he was taken to Sanker's hospital in an ambulance. From Sanker's hospital, Salim was taken to Ananthapuri Hospital. He died on 28/2/2011 at 6.45 am. He had given statement at the time of inquest. Salim was assaulted with MO2. PW2 was assaulted by MO1 and PW1 was assaulted by A3 with MO3. However, that he does not remember having given a statement as to who assaulted PW2. He had stated to the police that A2 was having a weapon but he does not

know why it was not recorded by the police. He had also stated to the police that he came running from A9's shop but he does not know why it is not recorded. According to the defence, PW3 has not seen the incident.

19. PW4 is the wife of Salim. She said that the incident

happened at about between 6 to 6.30 p.m on 27/2/2011. She heard the sound of PW1. She saw A2 getting hold of Salim. She ran to the scene. She saw A1 beating her husband on his head by a wooden piece. She uttered not to kill her husband and ran -:26:-

towards them. A1 again hit Salim on his right shoulder and Salim fell down and with the very same wooden piece, he inflicted a blow on his ribs. She got hold of her husband and laid him on her lap. PW1's wife Fathima brought some water. He could not drink water. He became unconscious. PW3 brought a jeep and he was taken to Sasthamcotta Padmavathi Hospital. PW1 and PW2 came behind in a car. Since the condition of her husband was serious, he was taken to Sanker's Hospital. Subairkutty was waiting at Sasthamcotta Hospital. After conducting a scan at Sanker's

hospital, he was shifted to Ananthapuri hospital at Thiruvananthapuram. Salim died on 28/2/2011 at 6.45 a.m. She also narrated the reason for the enmity the accused had with her

husband. She identified MO2 which was used to beat her husband. She said that she had given statement to the police that A2 had held Salim, but she does not know why the police had not recorded that. She does not know why the police had not recorded that she had seen the accused inflicting a blow on Salim's ribs. The presence of 9 persons were also mentioned by her, but she does not know why the police had not recorded the same.

-:27:-

20. PW21 was the Circle Inspector of Police, Sasthamcotta

Police Station on 27/2/2011. He had started investigation in the case at 12.00 midnight on 27/2/2011. He received information that Salim died on 28/2/2011. He proceeded to Ananthapuri

Hospital at Thiruvananthapuram and he prepared Ext.P20 inquest. He had taken statement of witnesses. Post-mortem was conducted at Medical College Hospital, Thiruvananthapuram. By 4.45 p.m, he prepared Ext.P21 mahazar. Scientific Assistant was also present with him. MO1 was taken as per Ext.P21 mahazar. It was blood stained. PW1 was again questioned. Other witnesses were examined. MO1 was produced before Court which was identified by witnesses. Report was filed to incorporate Sections 148, 326 and 302 of IPC. A2 and A9 were arrested on 2/3/2011. Further investigation was conducted by CW33. He admitted that in column 16 of the inquest, only the name of A1, A2 and the relatives were mentioned. He also stated that from Ananthapuri, he had gone to Medical College Hospital and he was present until the post-mortem was over. He reached Sooranadu in 1 hours. When he was asked that he could not reach the scene of

occurrence by 4.45 p.m, he denied the said suggestion. He -:28:- stated that it was after preparing the scene mahazar that he got the statement of PW1. He stated that PW2 Aliyarkutty had not stated that A1 had inflicted three blows on Salim.

21. PW22 had undertaken further investigation from mahazar was prepared in detail. A1, A3 and A8 were arrested on

of A1, MO2 was recovered as per Ext.P2 mahazar. He stated that the wooden piece was kept behind his godown at Osthanmukku. Ext.P2(a) is the portion of the confession statement. Based on the confession statement of A3, the wheel spanner was recovered as per Ext.P15 mahazar and Ext.P15(a) is the confession statement. MO3 is the wheel spanner. A4, A5 and A6 were arrested on

During cross-examination, he stated that in the FIS PW1 referred to a person who could be identified, but nothing has been stated in the charge as to which person it was. He further deposed that PW4 had not stated that Salim was caught and that A1 has inflicted a blow on his ribs. She had not mentioned about any -:29:- accused other than A1 and A2.

22. Therefore, the omission put to the investigating

officers was only with reference to PW4's statement that the 2 nd accused held Salim and the first accused inflicted a blow on his ribs. Apparently, it was a group fight. PW1 was the first person

who was being attacked. In Ext.P1 he states that he was attacked by A2, A3, A8, A9 and another person whom he could identify. Who was the other person has not been mentioned. When he was hit, he cried aloud. In Ext.P1, he stated that they hit him with wooden sticks. But when examined as PW1, he stated that A3 was using a spanner for hitting him. When a person was being attacked, it may not be possible for him to exactly see the nature of weapon. It is during investigation that when A3 was arrested and based on his confession statement, the spanner was recovered that it had come to light that A3 had used the spanner as weapon. It is hearing the cry of PW1 that Salim came out of his house and according to the witnesses, A2 held him and A1 inflicted a blow on his head with a wooden piece. Again another blow was inflicted on Salim by A1. He fell down and again he inflicted a blow on his ribs. The only omission in this evidence is

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regarding the statement of PW4 which has been asked to the investigating officer that he had not stated about the third blow being inflicted on the ribs. But, PW1, PW2 and PW3 have categorically stated that A2 held Salim and A1 inflicted the blow three times. It is thereafter that PW2 came to the scene and according to him, he was attacked by A6 and A7 and he also suffered grievous injury by which a portion of his middle finger had to be amputated.

23. On a consideration of the evidence adduced in this case, it is rather clear that the prosecution has proved beyond reasonable doubt that the first accused is responsible for inflicting the fatal injury on Salim, the deceased. The oral

testimony of PW1, PW2 PW3 and PW4 clearly supports the aforesaid version. The main omission that has been brought on record is regarding the number of blows that deceased Salim suffered. In Ext.P1 FIS, it has only been stated that the first accused ran towards Salim uttering that all of them would not be permitted to live, took a wooden plank kept by the side of the road and inflicted a blow on the head

of Salim. Salim fell down unconscious and started bleeding. It is during evidence that PW1

-:31:-

stated that A1 again inflicted a blow on the right shoulder of Salim and when he fell down, again he inflicted a blow on him. PW2, PW3 and PW4 also stated so while being examined and the 2nd and 3rd blow on Salim according to the defence are omissions leading to contradiction. It could be seen that Salim suffered a head injury and few other abrasions and contusions. It is in evidence that after the first hit by A1 on his head, Salim fell down and became unconscious. That the witnesses did not mention about two other blows earlier while their statements were recorded by itself is not enough to discard the evidence of the eyewitnesses and the medical evidence available in the case. That apart, the aforesaid omissions were not put to the investigating officer. The only omission put to the investigating

officer was regarding PW4's statement that the 2 nd accused held

Salim and first accused inflicted a blow on his ribs. In so far as the alleged omissions were not put to the investigating officer, the same cannot be treated as a contradiction in the evidence. Therefore, there is justification on the part of trial Court to have found the first accused being responsible for committing the fatal injury on Salim.

-:32:-

24. All the accused had been convicted for offence u/s

302 r/w S.149 of I.P.C. There cannot be any dispute about the fact that the accused had formed themselves into an unlawful assembly as they were more than five in number and had a common object. The question is what was their common object. Primarily, let us consider whether they had the common object to commit murder of either Salim or PW1 or PW2. As far as PW1 and PW2 are concerned, they have also suffered certain injuries and all the accused were found guilty under Sections 324, 326, and

341 r/w S.149 I.P.C. They are also found guilty for committing offences u/s 143, 147, 148 and 114 of I.P.C.

25. On a consideration of the sequence of events which

had arisen in the case, it could be seen that first there was an attack on PW1 and while PW1 was attacked, Salim came and requested them not to cause any injury on him and it is at that time that A1 came running and inflicted a fatal blow on Salim. Apparently this is a case in which the accused may not have thought that Salim would come to the scene or else, probably they would have visualised that if PW1 is beaten up, Salim would come. Again when PW2 came to the scene, he was also beaten

up using weapons. When a group of persons had attacked all of them and caused injuries on all the three persons, what is to be analysed is whether all the accused entertained the common object to commit murder. Having regard to the factual aspects involved in the case, the motive proved by the prosecution is the dispute between landlord and tenant. Salim and PW2 who had given the buildings on rent, which was a time expired lease, had asked the tenants to vacate the premises and had entered into an agreement with a third party for sale of the shop rooms. This apparently had infuriated the accused. Taking into account the nature of injury suffered by PW1 and PW2, especially the nature of weapons used, it may not be possible to arrive at a finding that all of them entertained a common object to commit murder. We are constrained to take this view since first accused who was not involved in attacking PW1, when he saw Salim, he suddenly ran towards him, took a wooden plank from the road side and hit him on his head. He did not stop there. He inflicted two more blows to a person who fell down and thereafter ran away from the scene. Even the first accused was not carrying any weapon. He took a wooden plank from the road side and inflicted a blow on

the head of Salim with the knowledge and intention that it might cause a fatal injury leading to his death. He had an axe to grind against Salim because he was the tenant of Salim and Salim decided to sell the shop room, behind his back. Such being the manner in which the crimes had been committed, it cannot be stated that accused 2 to 9 entertained a common object to commit murder of Salim. Of course, accused 2 to 9 had the

intention to commit offence u/s 324 and 326 of I.P.C. by wrongfully restraining them, but from the nature of events, it cannot be stated that they intended to commit murder of any of the victims. It is settled law that the object should be common to the all who composed the assembly and they should all be aware of it and concur with it. In this case, the attack on Salim by itself was suddenly created and that too by the first accused alone and nobody else had interfered in the said acts.

26. In the light of the aforesaid discussion, we are of the

view that accused Nos.2 to 9 cannot be made responsible for having committed the murder of Salim, and they cannot be convicted for offence u/s 302 r/w S.149 of I.P.C. However, in the light of the evidence adduced in the case, accused 2 to 9 are -:35:-

responsible for committing various other acts for offences under Sections 143, 148, 341, 324 and 326 r/w S.149 of I.P.C. Of course, some discrepancy is pointed out regarding recovery of MO3 wheel spanner. The said recovery had been effected on the basis of confession statement of A3. It is true that PW1 did not mention about usage of a wheel spanner as a weapon in Ext.P1 FIS. But, before Court, the witnesses had spoken about the wheel spanner being used to inflict injury on them. Further, enough evidence is available to prove that they formed themselves into an unlawful assembly. They have restrained PW1, PW2 and they committed grievous hurt on the victims with weapons and the sentence

awarded to them is only commensurate with the crime committed by them.

27. As far as the first accused is concerned, the offence

clearly falls under S.300 thirdly of I.P.C. It is done with the intention of causing a bodily injury which is sufficient in the ordinary course of nature to cause death. Hitting a person with a wooden plank on his head is a brutal act which every one knows is likely to cause death. His act does not come under any of the exceptions falling u/s 300 and therefore his conviction u/s 302

-:36:- and the sentence thereof stand sustained. In so far as he is a member of the unlawful assembly, his punishment under the other provisions are also sustained. In the said circumstances, the appeals are allowed in part:- The conviction and sentence of accused/appellants for

offence u/s 302 r/w S.149 is hereby set aside and the first accused is convicted under Section 302 of I.P.C. and sentenced to undergo imprisonment for life, and to pay a fine of `2,00,000/- (Rupees Two lakhs only), in default of which to undergo rigorous imprisonment for 1 year. Fine amount, if realised, is to be paid to

PW4 (wife of deceased). The conviction and sentence of accused/appellants for offence u/s 143, 147, 148, 114, 341, 324 and 326 r/w Sections 149 I.P.C. are sustained. Sd/- A.M.SHAFFIQUE JUDGE Sd/- ASHOK MENON Rp //True Copy// JUDGE PS to Judge

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