

Joseph Vs. State of Kerala

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SooperKanoon Citation : sooperkanoon.com/722162

Court : Kerala

Decided On : Jan-28-1963

Reported in : 1964CriLJ493

Judge : Anna Chandy and; P. Govinda Menon, JJ.

Appellant : Joseph

Respondent : State of Kerala

Judgement :

Anna Chandy, J.

1. The appellant Joseph stands convicted Under Section 303 Indian Penal Code and sentenced to the extreme penalty for having caused the death of his wife.

2. It is alleged that at about 8 or 8-30 P. M. on 13-3-1962 the accused who was not getting on, too well with his wife Thressia quarrelled with her and as the result of the severe man-handling that followed she died on the spot. Two of the accused's neighbours Chandy (P. W. 1) and Siva-raman Chettiar (P. W. 2) who had heard the sounds of the beating and Thressia's cries, but had not thought of interfering in the quarrel, were informed by the accused that when he returned home he found his wife lying dead in the courtyard of the house. These witnesses went out to the accused's house and saw the dead body. Then at the request of the accused P. W. 1 went and reported the incident to the father of the accused.

He also informed P. W. 4 Ulahannan who on the next day at 6-15 P. M. went to the Irrikkur Police Station and gave the information that the accused's wife had died under suspicious circumstances. Within a few hours the police arrived on the scene of occurrence and conducted the inquest. The dead body was sent to Kuthuparam-be Government Hospital where the postmortem was conducted on the morning of the 16th. The accused who was not found at the house when the police arrived was arrested at a place four furlongs from his house at 5 P. M. on the 15th.

3. The accused denies the charge. According to him when he returned home at about 9-30 P. M. he saw his wife lying dead in the courtyard with her ornaments missing. He carried the dead body inside and went to inform his neighbours P. Ws. 1 and 2. As both of them did not respond to his calls he returned home. He then took his children to his sister's house. On his return he again went to the house of P. Ws. 1 and 2 and called out to them. This time they answered to his calls and when they came out he told them about the incident. He also asked P. W. 1 to inform his parents about it. After some time his parents as also the neighbours came to the house and saw the dead body. The next day at about 13 noon he went to the Irrikkur Police Station and informed the station writer about the incident. The writer asked him to go back to his house and promised that the Head Constable who was not present there at the time would be sent to the place of occurrence as soon as he returned to the station. The accused also maintains that he was arrested at his house at 11 P. M. on 14-3-1962.

4. Thressia's death is admitted. The autopsy revealed several areas of discolorations of the skin, on the face, head, chest and back. Internally most of the ribs on both sides as well as the sternum were found to have been fractured and there were lacerations on the lungs. The doctor gives his opinion that death must have been instantaneous.

5. This is typical case where suspicions have been substituted for proof. There is neither direct nor circumstantial evidence to connect the accused with the crime. Instead of considering the prosecution evidence, first, the learned Judge began to pick holes in the defence suggestion and tried to fill up the gaps in the prosecution

case by the defects in the defence arguments. The judgment starts with a discussion of the defence suggestion of a fall from a cashew tree standing in the court-yard of the accused's house. The very approach made by the learned Judge is decidedly wrong. The accused has no obligation to prove his innocence. The burden to prove the accused's guilt is ever on the prosecution and if the prosecution has failed to establish the guilt beyond a shadow of doubt the accused should be acquitted no matter how far-fetched and unconvincing his suggestions might appear to be. This may appear to be too elementary, but it is the obvious that is often missed and the first principles that are always disregarded.

6. There are no eye-witnesses. The prosecution relies mainly on the testimony of the two neighbours of the accused who swear that they heard the sounds of the accused beating up his wife.

7. P. W. 1 Chandy lives 125 yards to the north of the accused's house. He swears that at about 8 or 8-30 P. M. on the 13th while he and his wife were taking their food he heard the accused asking his wife 'Where did you go this day? What were you doing?' and Thressia replying 'I did not go anywhere. I was here.' The accused repeated the question and received the same reply. Then the witness heard the sound of 'beating and fisting' and Thressia pleading with the accused not to kill her and the accused ordering her to keep quiet. Sounds of the assault continued for some time and thereafter everything was silent. After some time the witness saw the accused going westwards along a pathway and returning shortly afterwards.

The accused then called out to the witness. When he asked the accused why he was calling, the accused replied 'You come. I will tell you.' After some hesitation the witness went over and saw the accused sitting on the verandah and Thressia's body lying on a mat inside the house with a pillow under her head and a cloth covering her body. The witness asked the accused how his wife died to which the latter replied that he did not know. On being questioned about the children the accused said that he had left them at his sister's house. Then at the accused's request the witness went to the father of the accused and informed him of Thressia's death. The witness also swears that there was a smell of arrack when the accused was talking to him.

8. P. W. 2, Sivaraman Chettiar swears that he lives about a hundred yards to the south-east of the accused's house and that at about 8-30 P. M. on the date of occurrence he heard sounds of beastly and cries from the house of the accused. He first heard the accused asking Thressia where she had been that day and what she had been doing. That was followed by the sound of beating and fisting accompanied by Thressia's cries that she was beaten to death and the accused's order to 'shut up'. The sounds first came from the southern verandah and then from the court-yard. The witness then saw Thressia running northwards and the accused chasing her. Again he heard the sounds and thereafter there was silence. After about quarter of an hour, he saw the accused going westwards. When the accused returned to his house he stood on the verandah and called out to P. W. 1 who responded to the third call. Then the accused came near P. W. 2's house and called out to him. P. W. 2 also responded only to the third call and the accused told him that when he returned home he found Thressia lying dead in the court-yard. P. W. 2 went to the accused's house and saw the dead body.

9. The evidence of these two witnesses is attacked as unreliable and riddled with discrepancies and improbabilities, I must say that this contention is not without force. The first point urged by the learned defence counsel is that the distance between the house of the accused and the witnesses is too great to have enabled them to hear or see anything. According to P. W. 1 his house is 125 yards away and P. W. 2 states that his is 100 yards from the house of the accused. Between the accused's house and that of P. W. 1 there is a brook five or six yards wide flowing over large boulders which according to P. W. 1 makes a 'big noise' during the monsoon though he maintains that the time of the occurrence being summer there was no such noise.

However he admits that a bund has been put across the brook near the house of P. W. 2 and that there will always be the sounds of a water-fall. It is also admitted by P. Ws. 1 and 2 that the intervening space between their houses and that of the accused is fully planted with trees. It is also in evidence that on the southern side of the accused's house there is a large rock taller than the house itself. These circumstances coupled with the distance between the house makes one doubt seriously whether the witnesses could have heard and seen anything they claim to

have done. According to P. W. 6 the sister of the accused living in the same locality, only a loud hoot from the accused's house could be heard from the houses of Pws. 1 and 2. Though as the sister of the accused she may be expected to be biased in his favour (she has not been declared hostile and -this part of her evidence has not been successfully challenged), her evidence seems to fit in with the facts brought out. Even if it is granted that the witnesses could have heard Thressia's cries it is highly unlikely that they heard the conversation between the accused and Thressia.

In this connection it has to be borne in mind that the accused who is alleged to have been anxious that his wife's voice complaining of beating and fisting should not be heard by the neighbours could not have himself bawled out at the top of his voice to enable them to recognise him. It was far easier for the accused to have silenced her effectively by gagging her instead of repeatedly shouting 'shut up' every time she cried out. Even more unbelievable is their claim that they heard the sound of fisting at a distance of over 100 yards. An unwitting admission made by P. W. 2 the nearer of the two neighbours makes it quite clear that the witnesses could not have heard very much of what went on in the accused's house.

P. W. 2 says that on his return to the house after the incident the accused called out thrice and P. W. 1 responded to the third call, but P. W. 2 admits that he did not hear what they spoke to each other. This conversation according to P. W. 1 consisted of his asking the accused what the matter was and the latter replying 'You come, I will tell you.' If P. W. 2 could not hear this talk when the speakers must have been deliberately shouting out to be heard over the distance then it is unbelievable that either P. W. 1 or P. W. 2 could have heard the talk between the accused and his wife as they now claim.

The equally unacceptable claim of P. W. 2 that he actually saw the accused chasing his wife and of both P. Ws. 1 and 2 that they saw the accused going westwards after the incident has been rightly rejected by the learned Sessions Judge. It is rather strange that the learned Sessions Judge who found that these witnesses were out to give utterly false evidence regarding what they saw, did not find it difficult to accept their evidence when they said that they heard the

imaginary conversation between the husband and the wife,

10. In any view identification by voice is a risky thing and I am not prepared to deprive a person of his life relying on such an unsafe test. The following observations made by M.K.A. Khan in his book on the Law of Identification may be noted with benefit (Vide 2nd Edition page 16 - Chapter on Identification by Speech and Voice):

Some persons have got peculiarities of speech, such as stammering, stuttering, lisping, or speaking with a nasal tone, and such a voice can easily be detected. But there are others whose normal way of talking is either affected by some disease or is altered on account of the absence of teeth, or the use of false teeth and, in such a case, there is the likelihood of mistake. In the case of persons well known to us, identification by voice is an every day affair, but this much is also a matter of experience that people can speak in an affected tone and also change their accent to suit the occasion, and there is nothing to prevent a culprit from doing so when committing an offence at night in known quarters.

It may be added that there are persons who can successfully imitate another's voice, even though the mimicry may be for the sake of amusement. But, amusement or no amusement, the point is whether he can, speaking behind the screen, lead the listeners to mistake him for the real man? If so, remove the screen, make it a dark night, and the result will be the same.

Anyhow, identification by voice, has not by itself been held to be either safe or sufficient to establish identity as would appear from the following cases.

In *Naga Aung Khin v. Emperor* 39 Cri LJ 34 : AIR 1937 Rang 407 the Court took the view that

it is never safe to rely on the identification of a person by his voice. One is always liable to make a mistake.

In *Arshed Ail v. King Emperor* 30 Cal WN 166 where the accused was convicted of murder and sentenced to death on the evidence of the injured and a witness who was present close by identifying the accused by voice the High Court acquitted the

accused finding it unsafe to rely on their evidence.

11. There are also other indications that Pws. 1 and 2 are not entirely reliable. According to P. W. 1 when he saw the dead body of Threes is fifteen to twenty minutes after he heard the sounds he felt the body to be very chill. According to the Doctor normally after death it takes 2 to 3 hours for the body to become cold. Taylor in his book on Medical Jurisprudence says: -

In temperate climates it has been suggested that for an average adult the overall heat loss in air may average 1.5 F. per hour, and in tropical climates about 0.75 F.' (Taylor's Principle and Practice of Medical Jurisprudence - nth Edition - Page 172).

Whatever was the rate of cooling in this particular case it seems certain that the body of a young person meeting with a sudden death would not be "very chill" to the touch within fifteen to twenty minutes after death.

Again the omission by both P. Ws. 1 and 2 to note what happened to the two children of the accused throw doubt on their claim to have seen and heard all that took place in the accused's house. It is the prosecution case that the 'two children were in the house immediately before the incident and that shortly afterwards they were taken by the accused to his sister's house. Yeb P. Ws. 1 and 2 who claim to have seen the accused leaving the house after the incident did not see the children with him. Again while P. W. 2 swears that when the accused, after talking to P. W. 1 came near to his house and called him. he went to the accused's house to see the dead body, neither P. W. 1 nor P. W. 2 say they saw each other at the accused's house. In fact P. W. 2 admits that he saw P. W. 1 only at 2-30 in the night.

Both the witnesses would have it that when the accused told them about seeing his wife lying dead in the court-yard they readily accepted the story without making even the slightest suggestion of having heard the cries of the wife or the conversation between the husband and wife which ensured them that he was the murderer. Yet another significant circumstance to be noted in this connection is that the First Information Report given some twenty-two hours after the incident by P. W. 4 to whom the information was carried by P. W. 1 merely states that

Thressia, died under suspicious circumstances. If P. W. 1 Tieard or seen anything to connect the accused with the crime it is virtually certain that he would have told P. W. 4 about it and that information would have found a place in the First Information Report.

12. The registration of the case at 6-15 P.M. on 14-3-1962 by Pw. 11 as a case of suspicious death on the basis of a four-lined petition Ext. P-i knocks the bottom out of the prosecution case. The petition which speaks for itself reads as follows:

Padiyurengun, Ugthura Dhesathe ante Veedinte Sumar Munne Furlong akela thamesi-ttmna Kanharathankunnel Josephinte bharia Perariyukilla) innale rathri Pettanne Mariehatakai ariyunnu. Avelum bharthavaya JosephUm mathramea Ueetil thamessamullu Marenakariathil Somsyamunde. Anneshiehe Madapadi edukkuvan Apeksha.

Pw. 1 says that he conveyed all the information he had to Pw. 4 who himself went to the scene of occurrence and saw the dead body with the injuries before he reached the police station at 2-30 P.M. on 14-3-1963. He found the station writer Pw. 11 there but submitted the petition Ext. P-i only at 6 P.M. At first Pw. 4 said that the Head Constable who had open to Taliparamba Court has returned and registered the case, but he corrected himself and stated that the Head Constable came only half an hour after the case was registered. Pw. 4 who admits to have reached the station at 2-30 P.M. with all the information given by Pws, 1 and 2 has himself to wait for nearly four hours to hand over Ext, P-i petition to Pw. 11. The strange delay of four hours after reaching the police station which is left unexplained and the suppression of the information Pw. 4 had, lead to the inference that the story that Pws. 1 and 2 heard the conversation between the accused and the wife is an afterthought.

It is even possible that the story of beating, fisting and kicking was pitched upon much later. The suspicion gains strength when we find that the inquest prepared on 14-3-1962 between 9 and 11-30 P.M. is seen despatched to the Court only on the 16th and I find no Court stamp or the initials of the Magistrate on the inquest. The statements of Pws. 1, 2, 3 etc., stated to have been sent to Court along with the inquest also contain no stamp of receipt. The acceptance of Ext. P-i petition

which gives no information of a cognizable offence but only a rumour of a sudden death might be purposeful to gain time and as is definitely suggested by the defence because of the commotion the death created in the locality by petition to the authorities the police were driven to the necessity of hauling up the husband.

13. The defence contention is that both these witnesses are swearing to a false case due to previous enmity. According to the accused, Pw. 1 was a dealer in illicit liquor and many people used to go to his house to drink arrack through the pathway near the accused's house. The obstruction of the pathway by the accused was resented by Pw. 1. True this circumstance was not put to the witness in cross-examination, but the evidence of Pw. 1 that though he knew the accused even before he shifted to the present house a month before the occurrence, he did not visit his nearest neighbour even once seems to indicate that there are not much of neighbourly feelings between them.

The learned Sessions Judge rejected the story of ill-will mainly on the ground that if they were enemies the accused would not have called to witnesses to his house after the incident. I do not think this argument is sound. At a time of emergency it is only natural that one would seek the help of one's immediate neighbors even if they are not of a particularly friendly disposition. Similarly according to the accused Pw. 2 is inimical towards him because he helped one Kellu to file a complaint of assault against the witness and some others. Pw. 2 admits that there was such a case against him, but denies that the accused had anything to do with it. The defence contention is that that case which according to Pw. 2 was compromised some fifteen days before he gave evidence in this case was in reality withdrawn at the instance of the police in an attempt to influence Pw. 2. I have no hesitation in finding that the evidence given by these witnesses is absolutely false,

14. Another argument advanced by the learned defence counsel is that the medical evidence in this case regarding the cause of death and the manner in which the injuries were caused is unreliable. Though it may not be justifiable to reject the medical evidence in toto it must be said that there are some unsatisfactory aspects to it. The post-mortem was conducted some sixty-two hours

after death and the description given by the doctor, viz.,

Body was bloated up. It emanates foul smelling gas. Scalp hair easily peeling off. Skin over the trunk upper extremities, face, neck and left thigh easily peeling off. Eye balls protruding out, tongue protruded out between the teeth

shows that the process of putrefaction had well set in. According to Modi after putrefaction sets in wounds become so altered in appearance that it may be difficult to form an opinion as to whether they are caused before or after death (vide Modi pages 136 and 137) and though it might as well be an omission the post-mortem certificate does not say that the injuries are ante-mortem.

In this case the inquest was over by 11-30 P.M. on the 14th and the Sub-Inspector says that he entrusted the dead body to Pw. 12 immediately thereafter. Pw. 12 reached the hospital with the dead body only at 7 P.M. on the 15th and the post-mortem was conducted at 10-35 A.M. on the 16th. The delay is considerable and without going into the question as to the person or persons responsible, it must be said that it has considerably affected the efficacy of the post-mortem examination. That the examination was not very effective or detailed is indicated by its failure to reveal a number of contusions noted on the body at the inquest. The inquest notes as many as fifteen external injuries including contusions, abrasions and an incised injury in between the thumb and the index finger and bleedings from the nose and mouth whereas only five external injuries are found noted in the post-mortem certificate.

Pw. 5 admits that the post-mortem examination would have been more revealing, if the body had been examined earlier. It is also rather strange that the doctor did not care to examine all the natural orifices as he was bound to do especially the vagina in a case where a young woman died under suspicious circumstances. It may be mentioned here that the police also failed to do it at the time of inquest. As for the internal injuries we find nine ribs broken on the right side and four, on the left and the sternum was also broken in the middle. According to the doctor these fractures must have been the result of repeated kicks and Modi says that a 'kick may fracture a single rib'.

In the very nature of things it is not possible to think that the husband went on administering, so many kicks one after the other on his wife especially in the total absence of an exasperating, cause to behave in such a fiendish manner. On the other hand it is quite probable that the fractures were caused by a fall. The doctor also-agrees that they may be the result of a fall from, a fast moving vehicle or from height though according to him it must be a fall from a height of at least 30 feet. This dogmatic opinion does not appear to be reasonable and I do not feel it is safe to act on it. The doctor when cross-examined about it admits that his opinion is not based on any authority and it is only from the little experience he had. The Medical Officer's guesswork on non-medical matters need not necessarily be correct. It is not possible to eschew the possibility of the fracture being caused from a forcible-suicidal jumping down from a lesser height.

This matter assumes importance in this case when we find that there is a rock fifteen feet in height near the house. The extra-judicial confession attempted to be proved by Pw. 9 is that the accused gave his wife two blows and she died. Though it is discarded by the learned Judge, it gives one the hint that it could as well be a case in which the accused gave one or two blows to his wife and then left the house for a drink or so and the wife who got upset committed suicide-by jumping down from the rock.

There is also intrinsic evidence in the case to indicate that the fractures could be caused by indirect violence. According to Modi when the fracture of the ribs results from direct violence the fragments are driven inwards (Vide Modi's Medical Jurisprudence and Toxicology, 13th Edition page 271). It is noted in the post-mortem certificate that ribs 2 to 6 on the right side are fractured with the medial ends of the distal fragments projecting outwards. However when the doctor was asked a pointed question whether in case of fracture of the ribs due to direct violence the ends should not be driven inwards he said¹ that it need not be. A fall from the rock or the cashew tree is one of the several possibilities-suggested. No accused is under obligation to positively prove how the victim died and in view of the circumstances mentioned above I feel that the possibility cannot be eschewed.

15. The absence of an adequate motive for such a brutal attack on the 25-year old wife by her young husband is also a doubt-creating circumstance. Motive may not be very material in cases where there is enough of direct evidence, but in cases like this where there is not even an iota. of legal evidence or a single telling circumstance, motive has a vital part to play.

Pw. 9 Mathai the deceased's brother who gave evidence regarding the ill-feeling between the couple has been rightly disbelieved by the learned Sessions Judge himself. Pw. 6 the sister of the-accused and Pw. 7 her husband denied that the-accused and his wife were on bad terms and their evidence is not helpful to the prosecution. Even if the evidence of Pw. 3 that when he left after taking meals served to him by Thressia he saw the beginnings of a quarrel between the husband and wife is accepted, the witnesses who claim to have over-heard the talk between the husband and wife do not hear Thressia's saying anything impudent or insulting or provocative to the husband. To the husband's query where she had been during day time she said only that she had not gone out.

There is no whisper in the evidence that Thressia was a woman of bad character, If so there is no reason why no sooner than Pw. 3 left the house the husband should transform himself into a fiend and kill her brutally by repeatedly kicking her with such force and violence as to cause the fracture of thirteen ribs and the sternum. No sober man is expected to behave in such a manner. There is an attempt to prove that the accused smelt of liquor when Pws. 1 and 2 met him after the incident, but both of them have been found to be unworthy of credit. Moreover Pw. 3 who according to the prosecution was taking meals with the accused immediately before the incident is significantly silent about the matter.

It is the prosecution case that every time Thressia cried out the accused asked her to 'keep quiet'. If this is true this precaution only shows that the accused had not his reason unhinged by intoxication as not to know the possible result of thirteen or more violent kicks.

16. The conclusion reached by the learned Sessions Judge that the accused's conduct showed his anxiety 'to cover up his guilt and build up an alibi' does not appear to be justified. The question of alibi as such does not arise in this case and

the accused has made no attempt to establish one. The accused's conduct to carry the dead body of his wife from the courtyard to the house, his attempt to call his immediate neighbours to his help and when that failed, taking his children to his sister's house and returning to house to keep watch over the body are not in the least incompatible with his innocence. To me it appears that this is conduct more compatible with innocence than guilt. The normal and spontaneous reaction of a husband who on his return home sees his young wife lying dead or dying in the courtyard is to remove her inside the house and not to leave the body there and rush up to summon the neighbours.

The words in which he reported about the incident to Pws. 6 and 7 'Anti caniam pokai, Nathun poy Inchan vanumbol Muttathu Kidappundi Ineham eadhuthu Candhopi akattu kidathiy Kutty Kallijarn Udehu avel pay' speak for themselves and give a clear indication of his state of mind at the time. The accused says that he went to the police station at noon and reported the matter to the station writer Pw. 11 who asked him to go back as the Head Constable had gone to Tali-paramba and assured him that the Head Constable would be sent to the place as soon as he returned and on his way back he met Pw. 4 and told him that he had reported the matter to the writer. Pw. 11 denies it and though the accused was not in a position to adduce proof of the fact his version need not be necessarily false when we find that Pw. 4 who reached the station at 2.30 P.M. had to wait for four hours till 6.15 to get the First Information Report registered. There is also the significant admission of Pw. 4 that he met the accused at Iritty or Irikkoor that day and even according to the police the accused had not absconded and was arrested from a place just four furlongs from his house.

17. In short it began as a case of suspicious death and it remains as such when all is said and done. There are no eye-witnesses to the occurrence and there is not a single telling circumstance to connect the accused with the crime. There is no motive much less an adequate one. The medical evidence is unconvincing and the conduct of the accused is to say that least as compatible with innocence as with guilt. The attempt of Pws. 1 and 2 at identification by sight in the moon light, from a distance of 125 and 100 yards - far in excess of the limit of 17 and 12 yards fixed by Tidy and Colonal Barry and incorporated by Modi in his Medical Jurisprudence

and of 33 to 36 feet specified by Dr. Vincent in Legrand and Sammel's Legal Medicine - has been rightly discarded by the learned Judge himself.

Identification by voice is too fragile a foundation and the superstructure can only tumble when the first principles of criminal law are applied. It is a case in which suspicions exist but at the same time doubts abound. At best it may be to adopt with respect the words of Gajendra-gadkar, J., a case of 'may be true' and not 'must be true'. The accused's guilt is not proved and the only course open is to acquit him.

18. In the result the conviction and sentence entered against the accused are set aside and he is acquitted. He will be set at liberty forthwith.

P. Govinda Menon, J.

19. I have carefully read the judgment prepared by my learned brother. I am in general agreement with the conclusions reached that the accused is to be acquitted, but I would prefer to give my own reasons.

20. The accused Kanharathan Kunnel Joseph had married deceased Thressia some years before the occurrence and they had two children. For some time the accused lived with his father and shortly before the occurrence he had shifted his residence with his wife and children to a house in Korayanga in Padiyur amsom. The relationship between the accused and his wife were not very cordial and there used to be frequent quarrels between them. The prosecution case is that on the date of occurrence 3-3-62 the accused came home drunk, started quarreling with his wife and severely belaboured her causing her death.

21. The accused denied the commission of the offence. When questioned Under Section 342, Cri. P. C, his case was that on that night when he returned home at about 9-30 or 10 p.m. he found his wife lying dead in the courtyard, he carried her inside and took the children to his sister's house. After coming back he called Pw. 1 and told him as to what had taken place and asked him to go and inform his parents. Next day he went to Irikkur police station and to (have informed?) the station writer about his seeing his wife lying dead in the courtyard, but his

complaint was not recorded.

22. That Thressia was the victim of murder is amply proved and cannot be disputed. Ext. P-2 is the post mortem certificate wherein the injuries have been described in detail. Internal examination showed that sternum was broken at its middle. A small tear $1\frac{1}{2}$ ' x $1\frac{1}{4}$ ' on, the pleura at the junction of the lower lobe and middle lobe was seen. Left lung was congested and a contusion $1\frac{1}{2}$ ' in diameter was seen on the anterior medial aspect of the upper lobe and a small lacerated wound was seen on the anterior lateral aspect of the upper lobe. Right kidney was seen contused. A contusion was noticed on the curvature of the stomach. Mesentery of transverse colon was also contused. Thoracic cavity contained 2 oz., of fluid blood. On the right side second to sixth ribs were fractured anteriorly 2' away from the cartilaginous ends with the medial ends of the distal fragments projecting outwards. The fractured ends were irregular. The fifth rib was fractured posteriorly 2' away from its vertebral ends. The 7th rib was fractured in two places 2' away from the vertebral end. Ninth and tenth ribs were fractured 1' away from their vertebral ends and the eleventh rib fractured $\frac{1}{2}$ ' away from its vertebral end. On the left side first and the second ribs were fractured in two places.

According to the doctor death was due to shock and haemorrhage as a result of the multiple injuries especially injuries to the ribs, sternum, and lungs. The doctor has stated that the fracture of the sternum would have been caused by a violent kick on that part of the body, the tear of the pleura could have been caused by the fracture of the rib which could be caused by kicking, the injury to the lung could have been caused by the fractured ends of the rib, contusion to the kidney could have been caused by the fractured end of the rib, contusion to the stomach due to fisting or kicking on the abdomen, contusion on the mesentery of the transverse colon due to fisting or kicking and fracture of the ribs by several repeated kicks. According to him injury to the sternum and the ribs were fatal injuries and the presence of fluid blood and the thoracic cavity showed that death was almost instantaneous.

The internal injuries noticed correspond to the external injuries 3 to 5 and they could be caused by violence, like fisting, kicking or beating. No doubt the doctor

stated that the injuries could be caused by the person falling down from a cashew-nut tree but he has categorically stated that the fall must be from a height of more than thirty feet for causing the internal injuries. From the nature of the injuries noticed by him he has discountenanced the theory of a fall. I have absolutely no doubt in coming to the conclusion that death could not have been due to any fall and that it must have been due to homicidal violence. The unfortunate delay in conducting ' the postmortem has, in no way, affected the doctor's opinion regarding the likely cause of the injuries. , (23) Now the main question that arises for decision is whether the prosecution has succeeded in proving that the injuries were caused by the accused. There are no eye witnesses, and the evidence against the accused is entirely circumstantial. Therefore we have to analyse the evidence and find out how far each one of the circumstances alleged is fully established and whether the proved circumstances conclusively establish the guilt of the accused. Circumstantial evidence in order to furnish a basis for conviction in a criminal case requires a high degree of probability and it must be consistent and consistent only with the guilt of the accused. If any rational explanation is possible then there is an element of doubt of which the accused must be given the benefit.

24. The first circumstance on which reliance was placed by the prosecution is the evidence of Pw, 3, Varghese. He lives about two furlongs from the accused's house and knew the accused for the past four years. He has deposed 'that the accused was living with his wife Thressia and his two children. According to him the relationship between the husband and his wife was not cordial and he had heard them quarrelling. He has sworn that some days before the occurrence the accused had borrowed a sum of Rs. 3/- from him, that on that evening he met the accused at the thuds, asked him for the return of the loan, the accused took him to his house and gave him the money, that he invited him for food and deceased Thressia served food to both of them.

He further deposed that after food the husband and wife started quarrelling and he left the house. When he had almost reached his compound he said he heard a cry from the accused's house, the cry appeared to be of the deceased and the next day morning he went to the accused's house hearing that she was dead. If his

evidence is accepted, it would show that the case of the accused coming at night and seeing his wife lying dead is false. But the learned Judge has rejected his evidence remarking that his evidence is artificial and that he does not appear to be a person who is in a position to lend any money to the accused. Absolutely no reasons are given why his evidence should not be accepted. There is nothing unnatural in his evidence. Nothing is elicited from him to show that he had any enmity with the accused. In fact there was no good reason to doubt his testimony. I have been taken through his evidence and on a careful scrutiny of the same it cannot be said that his testimony is such as should have been relegated to the realm of disbelief. However as the learned Judge who had the privilege of seeing and hearing the witness was not impressed with his evidence and found him not a witness of truth, I am reluctant to take a different view in a case of this nature.

25. The next link in the prosecution case is the evidence of Pws. 1 and 2. Pw, 1 Chandy lives 125 yards southeast of the accused's house. He; has sworn that on the night of 13-3-1962 at about 8-30 p.m. while himself and his wife were taking food, they heard some altercation from the house of the accused, he mentioned that actual words he heard, he heard the sounds of beating . and fisting, he heard the cries 'don't beat and kill me', that there was silence for some time and a little later, he saw the accused proceeding west through the pathway. The witness stated that the accused returned through the same way and after reaching his house called him. Pw. 1 stated that at first he did not respond but then he took courage and went to the house, saw the accused sitting on the verandah, his wife lying dead in the kitchen and the accused told him that when he returned home he saw his wife lying dead.

The witness noticed some marks of violence on the neck and the rest of the body was covered¹ with a cloth. The accused asked Pw. i to go and inform his father and Pw. 1 went to the accused's father and told him what had happened. On his way back he told about the incident to Ulahannan Pw. 4 and Sivaraman Chettiar Pw. 3 another neighbour. The learned Judge disbelieved the evidence of Pw. 1 in respect of his seeing and identifying the accused, but accepted his evidence that he heard the quarrel and the screams of the deceased from the accused's house.

26. The learned defence counsel has severely criticised the evidence of this witness. It was argued that the learned Judge having disbelieved the witness regarding his seeing the accused ought not to have placed reliance on any part of his testimony. There is no rule of law that when any one part of the evidence of a particular witness is disbelieved the whole testimony of the witness has to be forthwith rejected. But prudence would require that the evidence of such a witness should be subjected to a stricter scrutiny and it is only if the Court feels absolutely convinced about the truth of the rest of his evidence that the Court would be justified in accepting his evidence.

It is stated that he could not have heard the conversation which he now says he heard because of the distance and the water channel near his house. It was argued that there are big boulders in the brook over which the water flowed and there would be loud noise preventing Pw. 1 from hearing anything. The witness has stated that there would be noise only during the rainy season. It is, therefore, not unlikely that the witness would have heard the loud cries from the house, especially during night time. But it is extremely doubtful whether the witness would have been able to hear the minute details of the conversation and would have been able to identify the voice as he pretends. Even otherwise it is never safe to rely on the identification of a person by his voice alone. I find it difficult to accept the evidence of the witness that he was able to hear the sound of blows or of fisting.

27. There are also other circumstances throwing doubt on the truth of his testimony. When he was called to the house and when he was told by the accused that when he came home he saw his wife lying dead in the courtyard, he did not tell him that he had heard them quarrelling or his seeing the accused leaving the house. If really he had heard and recognised the voice of the accused and found the accused leaving the house he would have conveyed the information to Pw. 4 and he in turn would have incorporated the information in the complaint filed by him. The recital in the complaint is against Pw. 1 having told Pw. 4 what he had seen and heard. It is true that no enmity is proved against this witness, but that alone is not sufficient if the evidence of the witness is otherwise untrustworthy.

28. Then there is the evidence of Pw. 2 Sivaraman Chettiar. He lives 100 yards to the southeast of the accused's house. He also claimed to have heard the cries of the deceased and the accused asking her to keep quiet. He also stated that he got into the courtyard and saw the accused chasing his wife in the yard. The witness further stated that for some time there was a lull and then he saw the accused ascending the hill side and going west. A little later he saw the accused coming back to the house and calling Pw. 1. He then spoke of their going to the house and seeing the woman lying dead in the kitchen.

The learned Judge has disbelieved this witness also about his seeing and identifying the accused. A motive has been suggested for the witness to give false evidence. But whatever that may be, for the reasons mentioned by me in rejecting the evidence of Pw. 1, I find it difficult to accept the evidence of Pw. 2 also. If he had really seen the accused chasing the deceased then he must have been certain that the injuries to the deceased were caused by the accused and he would have mentioned that fact to the persons who assembled there the next day and who would naturally have been enquiring as to how the woman sustained the injuries resulting in her death.

29. The next evidence is the extrajudicial confession of the accused spoken to by Pw. 9, the brother of deceased Thressia. His evidence has been rightly rejected by the learned Judge. Now coming to the question of motive there is no doubt some evidence regarding the strained relationship between the husband and wife but the witnesses who had given evidence regarding the hearing of the quarrel on prior occasions have been disbelieved by the learned Judge. Even if motive is proved that by itself will not advance the prosecution case.

30. Then we have the conduct of the accused. His conduct appears highly suspicious. Viewed in the light of human probabilities, I think the accused as an innocent husband being surprised at seeing his wife lying dead in the courtyard would have behaved in a manner totally different from the manner in which the accused is said to have behaved that night. The first instinct on seeing the dead body of his wife would have been, to raise an alarm, call out for the neighbours and not to peacefully remove the dead body inside the house and remove the

children to the house of the sister. I cannot agree that that would be the natural conduct. He must have known that death was due to violence and violence alone and it is strange that he did not at once go and inform the relations of the deceased or inform the authorities.

The accused when questioned had stated that on the next day he had gone to the police station and reported the matter to the station writer. Pw. 11 was the station writer of the Irikkur Police station on that day. He has denied the suggestion that the accused had gone and reported to him. I find it impossible to believe that if the accused had gone and reported about the occurrence Pw. 11 would have refused to record a complaint and sent him away. Pw. 14 is the Head Constable who went for investigation and it was he who conducted the inquest. He has sworn that the accused was not seen there and that he could arrest the accused only the next day from the road near the church which is about four furlongs from the scene. The conduct of the appellant, therefore, far from establishing his innocence certainly is indicative of his guilt, but the rule of circumstantial evidence has inevitably to satisfy the inexorable test that the evidence must be wholly inconsistent with the innocence of the accused and unmistakably point to the guilt of the accused. The truth of the case can only be a matter for guess. Having given the matter my serious consideration, I am constrained to hold that the circumstantial evidence afforded in the case against the accused does not satisfy the test laid down for cases of circumstantial evidence and the accused has> therefore, to be given the benefit of doubt and should be acquitted.

31. In the result, I agree with the conclusions of my learned brother that the conviction and sentence has to be set aside and the accused ordered to be acquitted.