(2013) 04 KL CK 0069

High Court Of Kerala

Case No: Criminal A. No. 1488 of 2004 (B)

Premkumar @ Kuttan, Chandrashekaran @ Chandran, Mony and Pradeep Kumar	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision: April 5, 2013

Acts Referred:

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 201, 307, 323, 324, 326

Hon'ble Judges: V.K. Mohanan, J

Bench: Single Bench

Advocate: T.D. Robin, Sri. K.S. Anil, Sri. R. Anup and Sri. V. Dipu, for the Appellant; N. Suresh, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

V.K. Mohanan, J.

The appellants are the accused in S.C. No. 45 of 2004 of the court of Additional Sessions Judge (Ad hoc-II), Ernakulam, and in this appeal, they are challenging the conviction and sentence imposed on them for the offences under sections 341, 323, 324, 326, 307 r/w 34 of IPC, vide judgment dated 13.8.2004 in the above sessions case. The case of the prosecution is that, the accused persons are CITU workers and they, on account of their previous enmity towards PW1 and in furtherance of their common intention to murder him, on 15.9.1999 after 1 p.m. while PW1 was going along with PW2 in a bicycle for taking meals, along Thripunithura-Eroor road, the accused attacked them with deadly weapons like dagger, iron bar etc. Thus according to the prosecution, the accused unlawfully restrained Pws. 1 and 2, who were coming through the road in a bicycle plied by PW2, while PW1 was a pillion rider. According to the prosecution, the 3rd accused hit PW2 on his hand and driven out PW2 and chased him. It is the further case of the prosecution that the 1st

accused threw chilly powder on the face of PW1 and the 2nd accused, and with an iron bar had forcibly hit on the back side of the head of PW1 and inflicted injuries upon him. The 1st accused with a dagger stabbed on the back side of the head of PW1 to inflict injuries and when PW1 had attempted to prevent the onslaught, his right hand fingers were sustained to fatal injuries. The 2nd accused with an iron bar had beaten on the left elbow of PW1 and other portions of the left hand as a result of which, PW1 had sustained fracture. The 3rd accused with an axle had hit on the right elbow and lower limbs of PW1 and thereby inflicted injuries on him. According to the prosecution, PW1 has sustained precarious injuries and had fallen down on the road and the 1st accused at that time had stabbed him on his right buttock with a dagger and the 4th accused had stabbed on PW1 at that material time. It is the further case that the accused had washed off their clothes soon after the incident, to get rid of the evidence and the accused persons have committed the over acts in furtherance of their common intention to cause the death of PW1. So according to the prosecution, the accused has committed the offences punishable u/s 341, 323, 324, 326, 307, 201 r/w 34 of IPC and section 27 of the Arms Act.

2. On the basis of the above allegation, crime No. 231 of 1999 was registered in the Hill Palace police station and on completing the investigation, report was laid in the court of Additional Chief Judicial Magistrate-Ernakulam, where upon C.P. No. 24 of 2000 was instituted and subsequently by order dated 6.12.2003, the learned Magistrate committed the case to the Sessions Court, where it is received as S.C. No. 45 of 2004, which subsequently made over to the present trial court for disposal. Thus when the accused appeared after hearing the prosecution as well as the defence, the learned Judge has framed a formal charge against the accused for the offences punishable under sections 341, 323, 324, 326, 307, 201 r/w 34 of IPC and section 27 of the Arms Act. After considering the entire evidence and materials, the learned Judge of the trial court has found that there is no material on record or evidence to show that the accused have committed the offences punishable u/s 201 of IPC and section 27 of the Arms Act. Thus it is concluded that the prosecution has succeeded in proving that the accused persons have committed the offences punishable under sections 341, 323, 324, 326 and 307 r/w 34 of IPC and accordingly they are convicted thereunder, but the accused are acquitted of the offence u/s 201 r/w 34 of IPC and for the offence u/s 27 of the Arms Act. On such conviction, all the accused are sentenced to undergo simple imprisonment for 6 months each under sections 323 and 324 r/w 34 of IPC, simple imprisonment for one month each u/s 341 r/w 34 of IPC and rigorous imprisonment for 2 years u/s 326 r/w 34 of IPC and to pay fine of Rs. 5,000/- each and in default to undergo simple imprisonment for 2 months each and also sentenced them to undergo rigorous imprisonment for 3 years u/s 307 r/w 34 of IPC and to pay fine of Rs. 5,000/- each and in default, each of them are directed to simple imprisonment for 2 months. It is the above finding, order of conviction and sentence are challenged in this appeal.

3. I have heard Adv. Sri. T.D. Robin learned counsel for the appellant and Adv. Sri. N. Suresh, the learned Public Prosecutor for the State.

4. From the facts stated above, it can be seen that as a revenge to an incident, which allegedly taken place connected with the Parliament election held during the year 1999, the accused attacked Pws. 1 and 2 at about 1 p.m. on 15.9.1999 in the Chempissery road. I have already referred to the overtact alleged by the prosecution. It is the further case of the prosecution that, when PW1 fallen down and when he raised hue and cry, persons from the locality reached and on seeing them, the accused ran away from the spot and with the weapons used by them and according to PW1, PW4 took him to the Government Taluk Hospital at Thripunithura, where he was treated by PW13 who issued Ext. P11 wound certificate. According to PW1, for further treatment, he was taken to Medical Trust Hospital at Ernakulam and there he was examined by PW16 and he issued Ext. P14 wound certificate and also Ext. P15, the discharge certificate. According to the prosecution, when PW1 was firstly admitted in the Taluk hospital, Thripunithura, on getting intimation, PW17 the then Sub Inspector of police, Hill Palace police station, went to the hospital and recorded Ext. P1 FI Statement of PW1 based upon which, he registered Ext. P16 FIR. When PW1 was examined, he had identified Ext. P1 FI Statement and M. Os. 1 to 3 as the weapons allegedly used and M. Os. 4 to 8. Initially, the investigation was undertaken by PW17, who inspected the place of occurrence and prepared Ext. P5 scene mahazar. He had also questioned the witnesses and seized M.O. 11 series, chappals and scrap of news paper containing chilly powder etc. According to the prosecution, PW2 is the witness, who was riding the bicycle of which PW1 was the pillion rider, but PW2 turned hostile to the prosecution and thus when PW2 was examined, Exts. P2, P2 (a), P2(b), P3 and P3(a), the contradiction of 161 statement were marked. PW3 is another witness cited by the prosecution and examined as occurrence witness, but he also turned hostile and during his examination, Exts. P4, P4 (a), P4(b), P4(c) and P4(d) 161 contradiction of PW3 are marked. PW4 is the person who allegedly rescued PW1 and taken to Taluk Government Hospital, Thripunithura. PW4 is the owner of an auto work shop, where Pws. 1 and 2 were working at the relevant point of time. PW5 is an attestor to Ext. P5 scene mahazar. PW6 is another attestor to Ext. P6 mahazar with respect to the seizure of M.O. 1 dagger, which was allegedly recovered in pursuance to the confession of accused No. I. But PW6 turned hostile and he did not support the prosecution case. PW7 is a witness who is a friend of PW1 and according to him he was present when the police recorded Ext. P1 FI statement of PW1 and he had affixed his signature to show that PW1 could not sign the FI Statement as there was hand fracture. PW8 is another attestor to Ext. P7 mahazar with respect to seizure of M.O. 2 axle on the basis of the confession allegedly given by A3. But PW8 did not stand by the content of Ext. P7. PW9 is another attestor to Ext. P20 seizure mahazar with respect to the seizure of the dress of A1. But PW9 has also turned hostile. PW10 is another attestor to Ext. P8 mahazar with respect to the seizure of the dress of A2. PW10 also not supported the

prosecution as such. PW11 is an eye witness cited and examined by the prosecution to prove the quarrel between PW1 and the accused connected with the Parliament election. But PW11 has also turned hostile. PW12 is the then Village Assistant of Nadama village who prepared Ext. P10 cite plan. As I indicated earlier, Pws. 13 and 16 are the Medical Officers who issued Ext. P11 and P14 wound certificates respectively, with respect to the injuries allegedly sustained by PW1. Ext. P15 is the discharge certificate with respect to PW1, which is issued from the Medical Trust Hospital, Ernakulam, by PW16. PW14 is the staff nurse of Medical Trust Hospital, Ernakulam, who is an eye witness to Ext. P12 mahazar, when PW1 handed over his dress to the police.

5. I have already referred to the role of PW17. After the initial investigation conducted by PW17, the investigation was continued by PW18, the then Circle Inspector of police, Hill Palace Police station. During his investigation, he had again questioned the witnesses who are already questioned by PW17. During his examination, he had deposed about the investigation conducted by him and the steps taken towards the same. When he was examined, he deposed that, he arrested the accused A1 to A3 on 18.9.1999 and A2 on 19.9.1999. Exts. P17, P17(a), P17(b) and P17(c) are the arrest memos respectively with respect to A1 to A4, identified and marked through PW18. He had also deposed that during his investigation, as he had realised that section 201 of IPC and section 27 of Arms Act are involved, he preferred Ext. P18 report to alter the section. Ext. P19 remand report was also marked through him. According to PW18, when A1 was arrested, he made Ext. P6(a) confession statement and consequently M.O. 1 dagger was seized as per Ext. P6 mahazar. Similarly, on arrest and questioning of A2, according to PW18, A2 made Ext. P7 confession statement on the basis of which M.O. 2 axle recovered and seized as per Ext. P7 mahazar. Similarly, when he arrested A3 and on his questioning, he made Ext. P21(a) confession statement, based upon which M.O. 3 iron rode was recovered as per Ext. P21 mahazar. Ext. P22 thondi list, with respect to the material objects, which was recovered as per the confession statements marked through PW18. When PW18 was examined, he deposed that on the basis of confession statement of A1, which was marked as Ext. P21(a) confession statement, M.O. 12 series of shirt and lungi were recovered as per Ext. P20 mahazar. Similarly, as per Ext. P8(a) disclosure statement of A2, M.O. 13 shirt and kaili mundu of A2 were recovered as per Ext. P8 mahazar. M.O. 8 and M.O. 1 shirt and lungi of A3 were also recovered as per Ext. P13 mahazar, on the basis of Ext. P13(a) confession statement of A3. As per Ext. P10 mahazar, the dress worn by PW1 was also seized. According to PW18, he had prepared Ext. P24 thondi list for M. Os. 4 and 5 and produced the same before the court. Ext. P25 forwarding note and Ext. P28 chemical analysis report were also marked through PW18. On completing the investigation, charge was laid by PW18. The then Police constable attached to Hill palace police station was examined as PW19 and he was a witness to the mahazars prepared by the police. These are the evidences and materials referred to by the learned Judge of

the trial court in support of his finding and for convicting the appellants.

6. Adv. Sri. T.D. Robin learned counsel for the appellant vehemently submitted that the learned Judge of the trial court taken no effort to consider the defence advanced by the accused, and the evidence and materials relied on by the defence in support of their contention for an acquittal were not properly appreciated. According to the learned counsel, except a passing reference in paragraph 16 of the impugned judgment, the learned Judge of the trial court has never considered the points raised by the defence and there is no finding and no reasons are assigned to dispel those contentions raised by the accused. According to the learned counsel, without assigning any proper and sufficient reasons and by simply quoting the portions from the judgment relied on by the learned Judge, the learned Judge of the trial court has straight away accepted the prosecution case as such and convicted the appellants, and such an approach of the learned Judge is highly arbitrary and illegal. With respect to the facts of the case, the learned counsel submits that even according to the prosecution, the incident was taken place due to political rivalry, particularly on the basis of an incident taken place three days prior to the alleged present incident connected with the Parliament election. Therefore, PW1 is inimical to the accused. It is also the contention of the counsel that PW1 has involved in several criminal cases including the cases proved through Exts. D1 and D2, and therefore the evidence of PW1 cannot be believed without close scrutiny and evaluation. But the learned Judge, without considering the above legal aspect, has simply acted upon the evidence of PW1, which according to the learned counsel, cannot be approved by this Court. To disbelieve PW1, it is pointed out by the learned counsel that, even according to PW1, he is well aware and acquaintance with the accused, but still then, he failed to mention the names of the assailants to PW13 - the doctor who firstly examined him. According to the learned counsel, the said fact itself is sufficient to disbelieve PW1. It is also pointed out by the learned counsel that, according to the prosecution, immediately after the incident, PW4 came to the spot and it was PW4 who claimed to have taken PW1 to the Taluk Hospital, Thripunithura, but PW1 disclosed nothing to PW4 about the cause of the incident and the names of the assailants. Similarly, to PW7 also, PW1 had never disclosed the reason for the incident and also the role of the present accused and their names, in the commission of the offences. According to the learned counsel, the above facts are sufficient to hold that the evidence of PW1 cannot be believed. After taking me through the evidence of Pws. 13 and 16, and the documents, i.e., Exts. P11, P14 and P15, the learned counsel submitted that the prosecution has miserably failed to prove the offences alleged against the appellants including the offence u/s 307 of IPC. According to the learned counsel, on the basis of the medical evidence available on record, it cannot be said that the prosecution has succeeded in establishing the offences under sections 323, 324, 326 and 307 of IPC. Another important point raised by the learned counsel is that, if the evidence of PW1 is disbelieved, the only remaining fact which the prosecution sought to fix the criminal liability upon the

appellants is the fact connected with the alleged recovery of the weapons. Learned counsel pointed out that all the witnesses to the recovery mahazar turned hostile and the evidence of Pws. 18 and 19 are contradicting each other and such contradiction is an irreconcilable one. It is also contended by the learned counsel that there is substantial delay in producing the material objects before the court. Even though M. Os. 1 and 3 were allegedly recovered on 18.9.1999 and M.O. 2 on 19.9.1999, these material objects reached in the court only on 21.11.1999 and there is no explanation for such a belated production of the material objects. According to the learned counsel, the prosecution has miserably failed to adduce independent evidence, in spite of the fact that, even according to the prosecution, such evidence was available with the prosecution. Therefore, the counsel submits that the learned Judge of the trial court is not justified in convicting the appellants in a serious crime like the present one, where the offences included are under sections 307 and 326 of IPC, particularly in the absence of any convincing and cogent evidence and especially when the alleged incident was taken place out of political rivalry.

7. On the other hand, learned Public Prosecutor adamantly supporting the findings and the judgment of the trial court, has submitted that the learned Judge of the trial court has considered the entire evidence and materials on record and on satisfaction of the genuineness of the prosecution case supported by the evidence, has convicted the appellants and hence no interference is warranted. Answering to the points raised by the learned counsel for the defence, the learned Public Prosecutor after taking me through the evidence of Pws. 1 and 7, submitted that, PW1 was not fit both physically and mentally to disclose the names of the assailants to PW13 - the doctor who examined him first and therefore such omission is not a serious one. It is also pointed out that when PW1 gave Ext. P1 FI statement, he had mentioned the names of two accused and in the meanwhile, his health condition was comparatively good and therefore he could recollect the names of his assailants. After taking me through the other medical evidence, it is the submission of the learned Public Prosecutor that, considering the dangerous health condition of PW1, PW16 has recorded the dying declaration and in such a situation, according to the learned Public Prosecutor, non mentioning of the names of the assailants will not become fatal to the prosecution and that shall not be a ground to disbelieve PW1. It is further submitted by the learned Public Prosecutor that though PW1 was severely cross examined by the defence about the antecedents of PW1, no documentary evidence is seen marked and produced, since according to the learned Public Prosecutor, in the schedule of the judgment, no such defence exhibits are seen cited. It is also the submission of the learned Public Prosecutor that there is no reason for PW1, in deliberately omitting the names of the assailants. According to the learned Public Prosecutor, on a conjoined reading of the evidence of Pws. 13 and 16-the doctors who examined and treated PW1, would show that PW1 sustained fatal injuries and therefore section 326 as well as 307 of IPC are attracted against the appellants and therefore the trial court is justified in convicting them for the said

offences. The learned Public Prosecutor has also submitted that the prosecution has tried to question and examine the independent witnesses but the same was resulted in vain, since nobody came forward. According to the learned Public Prosecutor, if the evidence of PW1 is believable, the absence of independent evidence no way affects the prosecution case. Thus it is the submission of the learned Public Prosecutor that the trial court has considered the entire evidence and materials properly and found against the appellants and even the sentence imposed by the trial court against them is moderate and no interference on that count is also warranted.

8. I have carefully considered the arguments advanced by the learned counsel for the appellants and the learned Public Prosecutor. I have perused the judgment of the trial court and also perused the evidence and materials on record.

9. In the light of the rival contentions and the evidence and materials on record, the question to be considered is whether the trial court is justified in those findings and convicting the appellants and whether the prosecution has succeeded in proving its case beyond reasonable doubt. The specific case of the prosecution is that in pursuance to a quarrel taken place just two-three days back, connected with Parliament Election, and to take revenge against PW1, the accused on the date of the alleged incident had attacked PW1. Whereas, the defence taken by the accused is that, PW1 is a Congress party worker and he is involved in 6-7 criminal cases and he is an accused in those cases and he had a lot of enemies and in the present case, some of those enemies are probably responsible and the case against the accused were taken falsely and with ulterior motive, as the election process had started.

10. At the outset it is to be noted that PW1 is a congress party worker as claimed by himself and as alleged by the defence. It is also a fact that the accused are CITU workers as alleged by PW1 and therefore, PW1 and the appellants/accused are from different political camp. According to me, the entire case has to be examined in the above backdrops of the case, since the political animosity is a double edged weapon which can be grinded against each other, both by the prosecution party as well as by the accused. In the light of the arguments advanced by the counsel for the appellants and the learned Public Prosecutor and particularly with regard to the facts and circumstances involved in the case, the question to be considered is how far PW1 can be believed and whether his evidence alone is sufficient to canvass a conviction against the appellants/accused. I have repeatedly gone through the deposition of PW1 and other materials and evidence on record. In order to challenge the deposition of PW1, the first point raised by the learned counsel for the appellants is that PW1 has failed to mention the names of the accused to PW13 - the doctor who firstly attended and treated him. In Ext. P11, PW13 has recorded that, "Patient is fully conscious. Pulse 82 mt BP-100/70"- Against column No. 9 under the heading ''History and alleged cause of injury'', it has recorded that, "15.9.1999 O/E." In this juncture it is relevant to note that the very case of the prosecution is that the

accused attacked PW1 to retaliate to an incident that was allegedly taken place two-three days back to the present incident. PW1 has deposed about the quarrel taken place two-three days back, between himself and Pradeep. Still then, PW1 fails to mention at least the name of said Pradeep, who is the 4th accused in the present case. There is no convincing or satisfactory explanation for not mentioning the names of all the accused including A4, to PW13, the doctor.

11. In this juncture it is also relevant to note that it was PW4, who firstly claimed to have reached at the spot and rescued the accused and taken him to the Government hospital, Thripunithura. Neither PW1 nor PW4 has got a case that PW4 was informed about the details of the incident or the names of the assailants. In this juncture it is relevant to note that PW4 is none other than the owner of the work shop, where Pws. 1 and 2 were working. If it is true and genuine that PW1 is expected to disclose the reason for the incident and the names of the assailants to PW4, in the present case, in the evidence of PW1, no such natural human conduct can be inferred due to the afore said reason. Similarly, PW7 is also another person who was present along with PW1 in the Taluk Hospital, Thripunithura, who is also a friend of PW1. As in the case of PW4, initially PW1 has not disclosed the reason for the incident and the names of the culprits to him. So the above approach of PW1 is against natural human conduct.

12. In this connection, it is apposite to note that, according to the prosecution and PW1, the present incident was taken place as the accused wanted to retaliate to an incident that was allegedly taken place just two-three days back to the present alleged incident. But regarding that incident, there is no details or specific case and there is no allegation or claim that any of the accused or any of their companions in that incident sustained injuries or any of the friends of the accused sustained injuries at the hands of PW1, so as to take revenge against PW1. Naturally, in a case like the present one, when the entire case of the prosecution depends upon the evidence of injured and other eye witnesses, the motive may not have any relevance. But once the motive is alleged and if it goes unproved or substantiated, the same is sufficient to doubt the prosecution case.

13. According to the defence, PW1 is not only a political opponent, but he is also a person involved in several criminal cases, at least in the cases covered by Exts. D1 and D2. The learned Public Prosecutor submitted that in the schedule of the impugned judgment, there is no mention about Exts. D1 and D2, and therefore the same cannot be treated as true. But it is relevant to note that in paragraph 16 of the judgment, though it is not mentioned in the schedule of such judgment, the learned Judge has stated that Exts. D1 and D2 are the documentary evidence marked from the side of the accused persons, out of which Ext. D1 would show that PW1 has figured as an accused in Crime No. 215 of 1998 of Hill palace police station. Therefore, it can be seen that probably it would be an omission in mentioning Exts. D1 and D2 in the schedule of the judgment. According to me, the above facts would

also suggest that the evidence of PW1 must be scrutinised scrupulously and with caution, especially when PW1 is a political opponent to the accused as well. I have already referred to the fact that PW1 has failed to disclose the names of his assailants to PW13. In Ext. P1 FI statement also, all the names of the accused are not mentioned. It is evident that when PW1 has given statement to the police, lot of people were with PW1 in the hospital. The health condition of PW1 at the time of admitting in the hospital and at the time of giving the FI statement has no much difference. Thus, when PW1 though failed to mention the names of the accused to PW13, he improved and gave two names i.e., A1 and A2 to the police when he gave Ext. P1 FI statement. No explanation is forthcoming either from the prosecution or from PW1 as to how he mentioned the two names of A1 and A2 in the FI statement, though he did not mention any of the names to the doctor. It is also relevant to note that in the FI statement, he has not mentioned the names of A4, even though it is alleged that, it is A4 who took quarrel with PW1, two-three days back of the present incident. In this juncture it is also relevant to note that though PW1 has mentioned only the names of two persons in Ext. P1, no evidence is forthcoming or any explanation from the side of the prosecution how the prosecution implicated accused Nos. 3 and 4. In the chief examination of PW1 itself, he has stated that, ".
But the above deposition of PW1 is only an embellishment or improvement, since there is no corresponding injuries noted in Ext. P11 or P14 wound certificates. It is also relevant to note that PW1 has stated that,

It is relevant to note that during the cross examination it is stated by PW1 that,

From the above admission of PW1 it is clear that he was aware of the name of A4 as the person with whom there was a quarrel, but still then he did not mention the name of A4 in Ext. P11 wound certificate or in Ext. P1 FI statement. During the cross examination he has also stated that,

The learned Public Prosecutor on the basis of the above portion, has submitted that PW1 was not aware of the name of A4. If that be so, there is no explanation as to how PW1 has got the name of A4, thereafter. Thus it can be seen that PW1 is not straight forward and not speaking the truth before the court.

14. In this juncture it is also relevant to note that even as per Ext. P5 scene mahazar and Ext. P10 sketch plan, near to the place of occurrence, there were several residential houses and shops. But the prosecution has not examined any of such persons from the locality. Considering the fact that the political issues involved in the present case, it was incumbent upon the prosecution to find out independent witness and to adduce independent evidence to substantiate its case. But in the present case, no such attempt was made. It is true, PW3 was examined to prove the case, who was cited as an occurrence witness, but he turned hostile. PW3 was not a person from the locality but he is only a fish vendor. But it is strange to note that though the prosecution has cited CW3, an independent eye witness, he was not

examined and he was given up, for which there is no convincing reason. The said facts show that the prosecution was reluctant in adducing independent evidence and there is no corroboration for the evidence of PW1 from any independent source, so as to believe PW1.

15. In the light of the above facts and circumstances, according to me, considering the discrepancies and omissions in the deposition of PW1, more particularly considering the political rivalry of PW1 towards the accused and the fact that he had involved in criminal cases, it is unsafe to place any relevance upon the deposition of PW1, to convict the appellants, who are politically opponent to PW1.

16. In this juncture it is also relevant to note that besides the examination of PW1, the other facts which are tried to establish by the prosecution to connect the accused with the incident are the recovery, claimed to have effected u/s 27 of the Indian Evidence Act. Suffice to say, none of the mahazar witnesses, for the recovery alleged to have effected, has supported the prosecution and they turned hostile. So, there is no independent evidence to prove the recovery of weapons alleged to have used by the accused. In this connection it is also relevant to note that M.O. 1 dagger was allegedly recovered from a private Brahmin cemetery on 18.9.1999 at 3 p.m. Connected with this, the evidence of Pws. 18 and 19 are not tallying each other, but they are contradicting in an irreconcilable way. When PW19 says in his deposition, particularly during cross examination, that he had get into the cemetery, after jumping over the compound wall. He had stated that he does not remember as to how the Circle Inspector entered into the cemetery. He had also deposed that he jumped over the gate as the same kept locked. So, according to PW19, the private cemetery surrounded by a compound wall was kept locked at the time of the alleged recovery and therefore he jumped over the gate and the wall. But during the cross examination of PW18, he had stated that, "

"So, as to how the investigating party got inside the private cemetery for effecting the recovery, there is no consistent evidence and version for the prosecution, since Pws. 18 and 19 had given a different versions. The answer given by PW18 during the cross examination shows that he is reluctant to state the exact position as to how they entered into the said cemetery. Moreover, his answer during the cross examination was evasive in nature and was reluctant to depose the correct position and to admit the facts deposed by PW19. Similarly, as to the other recovery also, there is no concrete and clear cut and legally acceptable evidence. M. Os. 1 and 3 were claimed to have recovered at 3 p.m. on 18.9.1999 from the elephant''s yard, which is a public place and the prosecution has also no case that the accused has conceded the material objects anywhere there. So that part of the recovery with respect to M. Os. 2 and 3 are not supported by any cogent and convincing evidence. Besides the above, there was another defect with respect to the recovery of material objects, since the same reached in the court only on 21.11.1999, though the same

allegedly recovered on 18.9.1999 and there was nearly two months'' delay for the same. No explanation is forthcoming from the part of the prosecution why that much time has taken if the recovery was true and effected on 18.9.1999 or 19.9.1999. So, the second set of fact which relied on by the prosecution to connect the accused with the alleged incident, also is not free from doubt and such doubt is not cleared by the prosecution.

17. I have already referred to the medical evidence involved in the present case. Both the doctors-Pws. 13 and 16, had not stated that any of the injuries noted in Exts. P11 and P14 wound certificates are fatal and dangerous to the life of PW1. Both the doctors are saying about the cumulative effect of that type of injuries, which according to me, is not sufficient to prove the grievous offence alleged against the appellants. PW13 during chief examination itself, when M. Os. 1, 2 and 3 were shown to the witness has stated that, " injuries inflict." No attempt was made by the prosecution to show that the injuries noted in Ext. P11 can be inflicted by using M. Os. 1, 2 or 3. PW13 further stated that, "When all the injuries put together it can be said that the patient suffered grievous injuries. If immediate treatment was not given it could have caused the death of the patient". There is no ascertainment to the effect that, death would be the result of the above injuries. During the cross examination, it is further stated that "I say that even in a cumulative manner, none of the injuries are fatal (Q). When separately takes, it is not grievous (A)". The evidence of PW16 is also more or less same as the evidence of PW13 and as such, the same is not helpful for the prosecution to convict the appellants for the offences alleged against them.

18. In this juncture it is not out of contest in stating that the learned Judge of the trial court has miserably failed to consider the defence advanced by the accused in its true perspectives and seriousness. Even though I have repeatedly gone through the judgment, I fail to find out the ground for the failure of the learned Judge in assigning the reasons for rejecting the contentions raised by the defence, particularly with respect to the points which I have already referred to above and such a practice cannot be approved and should be depreciated. Whatever be the conclusion arrived on by the learned Judge of the trial court, it is incumbent upon him to state the case of the prosecution as well as the defence taken by the accused based upon particular facts and circumstances involved in each case and to state reasons, if the trial court is not prepared to act upon the defence put forward, then only the accused could have a sense of feeling that his defence has been properly appreciated and considered by the trial court and rejected the same for valid reasons. To enable the appellate court as well, in appreciating the approach of the trial court and in considering the defence as well as the prosecution case and to examine the correctness of the decision arrived on by the trial court and its legality and propriety, it is absolutely necessary to state all those facts and circumstances and the evidence and also the points raised by the defence. In the present case, except a passive reference about the defence case that contained in paragraph 16 of

the judgment, there is no detail consideration and finding about the merits or demerits of the defence case. Therefore, the above approach of the learned Judge is incorrect, improper and illegal.

19. Another aspect is that, on an over all consideration of the prosecution case and the evidence and materials on record, I have noted that the prosecution has attempted to introduce artificial evidence, which I cannot approve and tolerate. First of all, it is relevant to note that when PW1 has allegedly given Ext. P1 FI statement, the prosecution has claimed that PW7 was present at that time and he was examined as a prosecution witness to show that PW1 was unable to put his signature because of the injuries on his hand and also to prove that PW7 heard the statement given by PW1 to PW17. In this juncture it is relevant to note that PW7 is one of the friends of PW1 and naturally he might be interested in PW1. Strange enough to note that there is no acceptable evidence to show, how PW7 happened to be in the hospital at the time when Ext. P1 FI statement was prepared by the police. PW7 has never spoken about the person, or about his details, from whom he received the information about the incident by which PW1 sustained injury and taken to the hospital. It is also relevant to note that there is no rule that the FI statement of a person shall be accepted and approved only when the same contain the signature of that person. In the present case, it can be seen that PW1 has affixed his thumb impression on Ext. P1. Still then, the prosecution has managed to bring the presence of PW7 at the time when Ext. P1 was recorded. So the above conduct of prosecution, according to me, is highly doubtful. It is also relevant to note that, according to the prosecution, even though Ext. P1 statement of PW1 was recorded by PW17, without the advice of the police and their assistance, PW1 got discharged from the Taluk Hospital, Thripunithura, and got admitted in the Medical Trust Hospital, Ernakulam. PW17, the then Sub Inspector of police, at that point of time had not felt that it was a case to be referred or PW1 has to be admitted in the above hospital for further treatment. According to me, it is thereafter PW16 recorded the dying declaration of PW1. In the deposition of PW16, he has not stated the circumstances which necessitated the recording of dying declaration of PW1. No reason is also stated for not informing the police to get recorded the dying declaration through the jurisdictional Magistrate. I have already found that the injuries noted in Exts. P11 and P14 wound certificates are not so dangerous or serious. So absolutely there is no explanation from the prosecution, supported by medical evidence, and the reason for recording the dying declaration of PW1 and not getting the same recorded through the jurisdictional Magistrate. It is also relevant to note that there is substantial delay in producing the material objects, namely the weapon, which allegedly used by the accused and recovered in pursuance to their confession statement. I have already found that the evidence of Pws. 18 and 19, particularly, with respect to the so called recovery of M.O. 1 dagger, there is irreconcilable contradiction and from the extracted portion of deposition of PW18, particularly during his cross examination, it can be seen that the

Investigating Officer was reluctant in properly answering to the questions put to him and disclosing the exact facts and his answers to such questions were evasive in nature. So, according to me, there is an attempt to introduce the false evidence. In this juncture it is also relevant to note that the motive alleged by the prosecution is very weak and the same has not established, rather, the same gone against the prosecution. From the above facts and circumstances and the evidence and materials referred, I am of the view that, the prosecution has got a tendency to introduce artificial and unwarranted evidence so as to canvass a conviction on the appellants/accused. The above approach of the prosecution is incorrect and improper and the said facts and circumstances show that the prosecution has derailed from discharging their solemn duty of conducting a fair prosecution. In the light of the above discussion and the evidence and materials referred to above, I am of the view that, the prosecution has miserably failed to prove its case against the appellants beyond reasonable doubt and the learned Judge of the trial court has not extended the benefit of doubt in favour of the accused. Under the above circumstances, I am unable to approve the conviction recorded by the learned Judge of the trial court against the appellants and accordingly the conviction imposed on the appellants/accused is set aside.

In the result, this appeal is allowed setting aside the judgment dated 13.8.2004 in S.C. No. 45 of 2004 of the court of Additional Sessions Judge (Ad hoc-II), Ernakulam, acquitting the appellants/accused of all the charges levelled against them and the bail bond, if any, executed by them shall stand cancelled and they are set at liberty.