IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 13TH DAY OF MARCH 2024 / 23RD PHALGUNA, 1945

CRL.A NO. 178 OF 2020

AGAINST THE JUDGMENT DATED 01.09.2015 IN SC NO.1242 OF 2011 OF THE ADDITIONAL SESSIONS/SPECIAL JUDGE (SPE/CBI), THIRUVANANTHAPURAM

APPELLANT/ACCUSED NO.2:

SATHEESHKUMAR @ KARI SATHEESH,
AGED 35 YEARS, S/O. SASI, THAKIDAYIL KUNNUMPURAM HOUSE, (THEKKEKUTTAM PLAPARAMBU) PAYIPAD PANCHAYAT, WARD NO.10, HOUSE NO.272, THURUTHIKKADAVU DESOM, CHANGANASSERY.

BY ADVS.
MANJU ANTONEY
GERRY DOUGLES S.
P.MAMATHA
R.ANAS MUHAMMED SHAMNAD
R.AVINASH

RESPONDENT/COMPLAINTANT:

CBI,
REPRESENTED BY THE STANDING COUNSEL, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682031.

ADV.MANU S. ASG OF INDIA
DR.K.P.SATHEESAN (SR.ADVOCATE)CBI STANDING COUNSEL ASSISTED BY ADV.GOKUL D.SUDHAKARAN

THIS CRIMINAL APPEAL HAVING BEEN HEARD ON 27.02.2024, THE COURT ON 13.03.2024 DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

Criminal Appeal No.178 of 2020

Dated this the 13th day of March, 2024

JUDGMENT

P.B.Suresh Kumar, J.

The appeal is by the second accused in S.C. No.1242 of 2011 on the files of the Court of the Special Judge (CBI), Thiruvananthapuram. There were 14 accused in the case and after the trial, the fourteenth accused was acquitted and accused 1 to 13 were convicted and sentenced for the offences for which they were charged. Among them, the appellant was convicted and sentenced for the offences punishable under Sections 144, 148 and 302 of the Indian Penal Code (IPC) and Sections 143, 147, 341, 323, 324, 326 and 506 Part II read with Section 149 IPC.

2. The case relates to the alleged murder of one Paul M.George. He succumbed to the stab injuries suffered on the back side of his trunk on the early hours of 22.08.2009 at a place called 'Ponga' on the Pallathuruthy-Perunna Road in Alappuzha District. A case was registered in connection with the occurrence by Nedumudy Police based on the information furnished by one Shibu Thomas, the driver of the deceased. The investigation in the case was initially conducted by the local police and later by a Special Investigation Team of the State Police. After investigation, a final report was filed by the Special Investigation Team against 25 accused including the appellant alleging commission of various offences. Later, at the intervention of this Court, Central Bureau of Investigation (CBI) conducted further investigation in the case and filed two separate final reports, one in respect of the criminal conspiracy hatched among the accused to attack one Kurangu Nissar and others, and the second final report in respect of the murder of Paul M.George. The present appeal arises from the proceedings

initiated on the second final report filed in respect of the said murder.

3. The allegations in the final report filed by the CBI against the accused in general, and against the appellant in particular, are the following:

(i) In the backdrop of a quarrel, on a complaint lodged by the tenth accused, a case was registered by Alappuzha North Police against one Shameer and others. Shameer in the meanwhile, arranged a gangster namely, Kurangu Nissar to intimidate the tenth accused to persuade him to withdraw the case. Owing to the intimidating conduct of Kurangu Nissar, the tenth accused arranged the first accused, another gangster to attack Kurangu Nissar and Shameer. The first accused, thereupon arranged a group of persons to attack Kurangu Nissar and others and proceeded from Changanassery to Mannanchery on 20.08.2009 for the said purpose in four vehicles, two tempo travellers, one Scorpio car and one Santro car. The appellant was one among the members of the said

group headed towards Mannanchery. The appellant carried with him a knife. On their way, as one of the tempo travellers got stranded, the remaining vehicles were called back to attend to the stranded vehicle and to proceed together later. While the stranded vehicle was being attended to by the members of the group, one Biju Pushkaran who was proceeding on the same road in a motorcycle, halted near the stranded tempo traveller to enquire as to what had happened. A Ford Endeavour car which came then from the opposite direction hit the said motorcycle and drove away. The deceased was driving the said car. One Manu was also present in the car with the deceased at the relevant time. Agitated by the conduct of the deceased in not stopping his car, the first accused exhorted to the men in his group to chase and get hold of the driver of the car. On hearing the exhortation of the first accused, accused 2, 3, 4, 5, 6, 7, 8 and 9 got into the tempo traveller which was parked there and chased the Ford Endeavour car.

(ii) Even though the deceased had not stopped the

car when the same hit the motorcycle, he had to stop after about 1½ kms away, as the front bumper of the car had broken, from where a sound was heard. While the deceased and his co-passenger were inspecting the bumper of the car, the tempo traveller which was chasing them reached that spot and those who were inside the tempo traveller alighted from the vehicle and questioned the deceased about his conduct in not stopping the car after hitting the motorcycle. There was a verbal altercation followed by a physical altercation between the deceased on one side and those who came in the tempo traveller on the other side. In the course of the said altercation, the fourth accused pushed the deceased, and in retaliation of the same, the deceased also pushed fourth accused, as a result of which, the fourth accused fell down. Persons who accompanied the fourth accused then attacked the deceased, and in the said process, the second accused took out the knife carried by him and stabbed the deceased repeatedly, on the back of his trunk. As a result of the injuries, the deceased fell

down on the road.

(iii) By the time, a few of the remaining members of the group which was proceeding to Mannancherry including the first accused, also reached that place in the Scorpio car in which they were travelling, and having found the deceased lying on the road in a pool of blood, all of them left the scene in the vehicles in which they came.

(iv) In the meanwhile, two persons who were accompanying the driver of the deceased, Shibu Thomas in a Scorpio car owned by the deceased himself, reached the scene and they helped Shibu Thomas to take the deceased and his co-passenger Manu to the Medical College Hospital, Alappuzha in the Scorpio car of the deceased. By the time the deceased was taken to the Hospital, he succumbed to the injuries.

4. On the accused being committed to trial, the Special Court framed charges against them for having committed the offences alleged and the accused pleaded not guilty to the charges. The prosecution thereupon examined 75

witnesses as PW1 to PW75 and proved through them 220 documents as Exts.P1 to P220. MO1 to MO115 were the material objects identified by the witnesses. Exts.D1 to D97 are the documents and contradictions proved by the accused through the prosecution witnesses. On the closure of the evidence of the prosecution, when the accused were questioned under Section 313 of the Code of Criminal Procedure (the Code), they denied the incriminating circumstances against them. As the case was not one found fit for acquittal under Section 232 of the Code, the Special Court called upon the accused to enter on their defence. At that stage, one witness was examined by the accused as DW1 on their side. Thereupon, on an appraisal of the evidence on record, the Court found the appellant guilty of the offences referred to above and convicted him. The first accused was found guilty, among others, of the murder committed by the appellant, applying Section 113 IPC and accused 3 to 9 were also found guilty of murder applying Section 149 IPC.

5. Although the appellant was convicted and sentenced for the offences on 01.09.2015, he did not challenge his conviction and sentence. The remaining accused, however, challenged their conviction and sentence before this Court in Criminal Appeal No.941 of 2015 and connected cases. It was held by this Court in the said cases that the evidence let in by the prosecution neither establishes that the first accused abetted the commission of the offence of murder of Paul M.George nor that accused 3 to 9 entertained a common object at any point of time to commit the said murder for the offence under Section 302 read with Section 149 IPC. Consequently, it was held by this Court that accused 1 and 3 to 9 cannot therefore be convicted for the offence punishable under Section 302 IPC. The conviction of the said accused for the offence punishable under Section 302 IPC, in the circumstances, was set aside. It was, however, held by this Court that the said accused can certainly be convicted for having formed an unlawful assembly to attack the deceased and for the individual

overt acts committed by them. The conviction and sentences of the said accused, in the circumstances, were altered accordingly. The appeal in this case challenging the conviction and sentence of the appellant was filed after the disposal of the above appeals preferred by the other accused in the case.

6. Heard the learned counsel for the appellant as also the learned Special Public Prosecutor.

7. The point that arises for consideration is whether the conviction of the appellant and the sentence imposed on him, are sustainable in law.

8. As noticed, the prosecution case consists of events that took place at different stages. At the first stage, although accused 1 to 9 and others proceeded to Mannancherry in prosecution of their common object to attack Kurangu Nissar and others, they could not accomplish the said common object since one of the vehicles in which they were travelling got stranded on the way. It was while all of them were attending to repair the stranded vehicle, the above mentioned Biju

Pushkaran was hit by the Ford Endeavour car, while he was sitting on his motorcycle, and it was since the said car did not stop, on the exhortation made by the first accused, accused 2, 3, 4, 5, 6, 7 and 8 got into the tempo traveller which was parked there and chased the Ford Endeavour car. The occurrence which resulted in the death of Paul M.George, according to the prosecution, took place in the course of the scuffle in front of the Ford Endeavour car between Paul M.George and those who chased him. The essence of the arguments advanced by the learned counsel for the appellant was that the prosecution has not established its case as regards the occurrence that took place in front of the Ford Endeavour car. More precisely, the argument is that there is no satisfactory evidence to prove that the appellant was one among the members of the group which chased the Ford Endeavour car, and even if it is found that the said fact has been established, there is no satisfactory evidence to prove that it was the appellant who inflicted the fatal injuries on the deceased, in the

course of the scuffle. In order to substantiate the said contention, it was argued by the learned counsel that even though the evidence tendered by the witnesses examined by the prosecution in this regard namely PW2, PW3, PW4 and PW6 would show that the appellant was one among those who travelled to the scene in the tempo traveller, having regard to the fact that the aforesaid witnesses were members of a gangster group, their evidence cannot be accepted as reliable or trustworthy. It was pointed out by the learned counsel that the only other evidence let in by the prosecution is the evidence tendered by PW8, the co-passenger of the deceased in the Ford Endeavour car. It was argued by the learned counsel that it was impossible for anyone to see the alleged occurrence that took place in the course of the scuffle, especially in the pitch darkness of the night. It was also argued by the learned counsel that even assuming that PW8 could see the occurrence, his evidence is not consistent with his previous statement proved as Ext.D51. It was argued by the learned counsel that

the specific case of the prosecution is that the appellant inflicted multiple stab injuries on the deceased, whereas the evidence tendered by PW8 was that the appellant had inflicted a single stab injury on the deceased. It was persuasively argued by the learned counsel that there is no explanation from the prosecution as to who then inflicted the remaining stab injuries on the deceased. It was pointed out by the learned counsel that the cause of death as spoken to by PW44, the doctor who conducted the autopsy of the deceased, being that two out of the four stab injuries suffered by the deceased on the back of his trunk was the cause of his death, if the appellant had inflicted only one stab injury, it cannot be said that it was the appellant who caused the death of the victim. That apart, it was also argued by the learned counsel that among those who reached the scene in the tempo traveller, even according to the prosecution, one person namely, the fourth accused got stranded and he could not therefore flee from the scene in the same vehicle. Instead, he could flee from the scene only in the

Scorpio car in which the first accused came later to the scene of occurrence. According to the learned counsel, it was therefore obligatory for the prosecution to explain the circumstances under which the fourth accused could not get into the tempo traveller in which he came to the scene of occurrence, for, in the absence of any satisfactory explanation in this regard, the possibility of the fourth accused causing injury to the deceased cannot be ruled out. It was also argued by the learned counsel that it has come out in evidence that the clothes of the fourth accused were found soaked in blood when he got into the Scorpio car. It was pointed out that there is no allegation by the prosecution that the fourth accused caused injury, or was injured by anyone. If that be so, according to the learned counsel, it was obligatory for the prosecution to explain as to how the clothes of the fourth accused were soaked with blood when he boarded on the Scorpio car, for, in the absence of any satisfactory explanation in this regard, the possibility of the fourth accused inflicting injury on the deceased cannot be ruled

out. It was argued by the learned counsel that if the aforesaid possibilities cannot be ruled out, the appellant is certainly entitled to the benefit of doubt. The learned counsel reinforced the said argument pointing out that under such circumstances, in all probability, the fourth accused would have inflicted injuries on the deceased, as the fourth accused is a person who suffers from anti-social personality disorder. The learned counsel has drawn our attention to paragraph 36 of the impugned judgment, wherein the learned Special Judge took note of the said fact which was brought on record in the case by the prosecution itself.

9. The learned counsel for the Central Bureau of Investigation resisted the arguments advanced by the learned counsel for the appellant. It was argued by the learned counsel that the evidence tendered by the witnesses examined to prove the occurrence are sufficiently corroborated. It was also argued by the learned counsel that PW8 had not deposed that the appellant inflicted only one injury. Instead, the deposition of

PW8 is that he saw the appellant stabbing the deceased. According to the learned counsel, inasmuch as PW8 did not say that the appellant inflicted only one injury on the deceased, it cannot be said that his evidence is not consistent either with the prosecution case or his previous statement. Even otherwise, it was argued that there is other evidence which would show beyond reasonable doubt that it was the appellant who inflicted multiple injuries on the deceased. We are not narrating here the various materials on which reliance has been placed by the learned counsel to substantiate his arguments, as we propose to deal with the same elaborately in the latter part of this judgment.

10. We have examined the arguments advanced by the learned counsel for the parties. In order to appreciate the arguments, it is necessary, first, to refer to the relevant materials on record. PW1 is one among the members of the group which proceeded to Mannancherry in prosecution of their common object to attack Kurangu Nissar and others. PW1 was

in the tempo traveller which got stranded on the way. PW1 deposed that the appellant was also travelling with him in the same tempo traveller and while they were proceeding, the appellant had shown to him and others a knife which he had kept in his waist and explained that if the said knife is used, the internal injury would be larger than its external appearance. PW1 identified MO1 as the weapon carried by the appellant then. PW1 deposed that when their vehicle got stranded, the remaining vehicles were called back and while they were attending to the repairs of the stranded vehicle, a bullet motorcycle came from Mannancherry direction and stopped near them to enquire as to what happened to their vehicle. It was deposed by PW1 that while they were talking, another car which came from Mannancherry direction dashed down the motorcycle and drove away. PW1 deposed that the first accused then exhorted to the members of his group to catch the driver of that vehicle and on hearing the exhortation of the first accused, accused 2 to 8 boarded on the other tempo

traveller which was parked there and proceeded towards Changanassery direction, chasing the car which hit the motorcycle. It was deposed by PW1 that the first accused and a few others followed the tempo traveller in the Scorpio car of the first accused and after sometime, the third accused called PW1 over telephone and informed him that there was a scuffle with those who travelled in the car, and the appellant inflicted three to four stab injuries to one among them. PW1 deposed that after sometime, the third accused called him again and informed him that they are coming back. It was deposed by PW1 that after sometime, the group which chased the car came back and all those who were waiting at the place where the accident took place boarded on to the tempo traveller and when PW1 entered the said vehicle, he saw the appellant sitting there with MO1 knife stained in blood. PW1 deposed that the appellant had an injury on his left hand then in between his thumb and index finger and when PW1 enquired with the appellant as to what happened to his left hand, the latter

replied that he suffered the said injury while withdrawing the knife from the body after stabbing. PW1 also deposed that they then proceeded to the house of the tenth accused where the appellant and two others washed the bloodstains on the knife carried by the appellant and kept the same along with another knife carried by the third accused. It was also deposed by PW1 that the said weapons were later taken by accused 10 and 11.

11. PW2 is also one among the members of the group which proceeded to Mannancherry. PW2 was driving the Scorpio car which was ahead of the tempo traveller. The evidence tendered by PW2 as regards the events upto the stage at which the car driven by the deceased hit the motorcycle, was almost on similar lines of the evidence tendered by PW1. PW2 also gave evidence that at that point of time, as exhorted by the first accused, a few among them chased the car driven by the deceased in the tempo traveller. It was deposed by PW2 that the first accused then wanted him to take the Scorpio car and as directed by the first accused, they

followed the tempo traveller. PW2 deposed that after driving about 2 ½ kms, they found the Ford Endeavour car and also the tempo traveller which followed the car being parked on the side of the road. PW2 also deposed that he could then see a scuffle between persons who went to the spot in the tempo traveller and the person who was travelling in the Ford Endeavour car. Further, PW2 deposed that he could also see that the person who came in the Ford Endeavour car and who was wearing a shorts and a sleeveless T-shirt, falling to the side of a wall. PW2 deposed that even though they alighted from the Scorpio car, the first accused then directed all of them to flee from the scene. It was deposed by PW2 that all of them, accordingly, boarded on to the two vehicles in which they came and left the scene. It was also deposed by PW2 that when they were about to leave, another Scorpio car came to the scene. It was deposed by PW2 that when they were about to leave, the fourth accused who went to the scene of occurrence in the tempo traveller, boarded on the Scorpio car driven by PW2, as the fourth

accused could not board the tempo traveller, and his clothes were then soaked in blood. PW2 also deposed that the fourth accused then stated that the appellant stabbed the person who came in the Ford Endeavour car and that the appellant also suffered injuries in his hand while doing so.

12. PWs 3, 4 and 6 are also few among the members of the group which proceeded to Mannancherry. Among them, PWs 3 and 4 were sitting in the Scorpio car when the same was parked near the stranded tempo traveller and they were accompanied by the first accused and PW6 in the same car, following the tempo traveller. PWs 3, 4 and 6 gave evidence almost on the same lines of the evidence tendered by PW2. In addition, PW4 deposed that when they reached the scene of occurrence, the tempo traveller which followed the Ford Endeavour car was seen parked in such a fashion that the light of the tempo traveller fell on the front of the Endeavour car. PW6 also deposed, in addition, that those who went to the scene of occurrence in the traveller assaulted the person who

travelled in the Ford Endeavour car. PW5 is Biju Pushkaran, the person who was hit down by the Ford Endeavour car. PW5 deposed in tune with the evidence tendered by PWs 1 to 4 and 6 as regards the events that took place at the place of accident.

13. As noticed, PW8 was the co-passenger of the deceased in the Ford endeavour car. PW8 deposed that the Ford Endeavour car which hit the motorcycle, belonged to PW40. PW8 also deposed that the said car, at the time of the accident, was being driven by the deceased. PW8 admitted that the deceased had not stopped the car when it hit the motorcycle. PW8 deposed that when they proceeded further, they heard a sound from the front side of the car and when they stopped the car on hearing the sound, a tempo traveller came thereon and a few persons who came out of the tempo traveller questioned them for not stopping the car involved in the accident. PW8 deposed that a short person among that group then pushed the deceased away and the deceased also pushed him down, in retaliation. When the said person fell down on

account of the same, all those who came along with him started attacking the deceased and while so, another person stabbed on the back of the deceased using a dagger. PW8 identified in court, the fourth accused, as the short person who pushed the deceased and the appellant as the person who stabbed the deceased. PW8 deposed that when he attempted to prevent further assaults on the deceased, another person pushed him away and caused a cut injury on the top of his left hand. PW8 deposed that he had to run away then from the scene as he apprehended further assaults on him and while doing so, he fell down in a marshy place on the side of the road. PW8 deposed that after some time, PW40 came to the scene in another vehicle and he rescued PW8 from the said marshy place. PW8 deposed that he was then taken by PW40 to the car in which they came and was made to sit in the front seat of the car. PW8 deposed that he saw the deceased in the back seat of the said car then. PW8 deposed that they were taken to Alappuzha Medical College Hospital by PW18, the driver of the car.

14. PW18 was the driver of the deceased. PW18 was in fact following the Ford Endeavour car in the Scorpio car of the deceased with PW40 and it was the said Scorpio car that was mentioned by PW8 in his deposition. PW18 was driving the Scorpio car at that time. PW18 deposed that while they were following the Ford Endeavour car, they found a car parked on the side of the road and a few persons in front of that car. PW18 also deposed that he saw at that place, a tempo traveller in the reverse direction with its headlights on. It was deposed by PW18 that when he reached near the car, it was found that it was the Ford Endeavour car driven by the deceased that was parked on the side of the road. PW18 also deposed that as they reached the scene, those who assembled there hurriedly boarded on the tempo traveller. It was deposed by him that when the tempo traveller left the scene, PW40 came out of the Scorpio car and went near the Ford Endeavour car and PW18 followed PW40. It was deposed by PW18 that they then found the deceased lying near a telephone box by the side of the car.

PW18 deposed that as the key of the Ford Endeavour car was not seen, PW40 took the deceased to the Scorpio car in which they came. It was deposed by PW18 that while he was making arrangements for the deceased to lie down in the centre seat of the Scorpio car, he saw PW40 lifting PW8 from the marshy place near the road. PW18 deposed that there was blood on the body of PW8 at that time and PW8 was also taken by PW40 to the Scorpio car. PW18 deposed that he took both of them, namely the deceased and PW8 to the Alappuzha Medical College Hospital in the Scorpio car. PW18 also deposed that it was he who furnished the information regarding the occurrence to Nedumudy Police and identified his signature in Ext.P16 First Information Statement. PW40 also gave evidence more or less on the similar lines of the evidence given by PW18, as regards the events that took place at the scene of occurrence after they reached that place.

15. PW44 is the Forensic Surgeon who conducted the autopsy of the body of the deceased. Injuries 1 to 4 are the

incised penetrated wounds noted by PW44 on the body of the deceased at the time of autopsy as narrated by him in Ext.P71 autopsy report. The said injuries are the following:

> "1. Incised penetrating wound 4x1cm, obliquely placed on the right side of back of trunk, with its lower inner sharply cut end 6.5cm outer to midline and 14.5cm below root of neck, upper outer end was angulated; the wound track seen directed forwards and slightly to the left for a total minimum depth of 8cm, seen puncturing through the third intercostal space and terminating on the back aspect of upper lobe of right lung over an area of 1x0.5cm. The right lung was in a collapsed state.
>
> 2. Incised penetrating wound 3x0.5cm obliquely placed on the right side of back of trunk with its lower inner sharply cut end 9cm outer to midline and 10cm below top of shoulder, upper outer end was angulated; the wound track seen directed forwards, to the left and upwards for a total minimum depth of 7cm, which was seen puncturing through second intercostal space and terminating by puncturing through the back wall of aorta just below the portion of its arch.
>
> Chest cavities contained 700ml of fluid blood with clots in each.
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> 3. Incised punctured wound 3x1x4cm, on the left side of back of trunk obliquely placed, with its upper Inner angulated end 2cm outer to midline and 20cm below root of neck; lower outer end was sharply cut.

> 4. Incised punctured wound, 4x0.5x5cm, obliquity placed on the right side of back of trunk, its lower inner sharply cut end being 3cm outer to midline and 3cm below root of neck, upper outer end was angulated.
>
> Injuries Nos. 3 and 4 were confined to the muscular plane."

It was deposed by PW44 that the death was due to injury Nos. 1 and 2 and the said injuries are sufficient in the ordinary course of nature to cause death. In response to the question as to what kind of weapon might have been used to cause injury No.1, the answer of PW44 was that it could be caused by a single edged weapon with sharp pointed tip. It was clarified by PW44 thereafter that the sharp pointed tip produces an external stab wound having both of its ends sharply cut, as the sharp pointed tip behaves like a double edged instrument. MO1 was shown to PW44 and after measuring the same, PW44 also added that the dimensions of MO1 are such that it is consistent to have produced injury No.1. In response to the question as to what kind of weapon might have been used to cause injury No.2, the answer given by PW44 was that the same could have also been

caused by a similar weapon as MO1. Identical answers were given to the similar questions put to PW44 in respect of injury Nos. 3 and 4 also. PW44 also deposed that he had occasion to examine the appellant at the stage of the investigation by the CBI of the case on 24.06.2010 and that he noticed two injuries on his body. To a specific question put to PW44 as to whether the injuries noted by him on the body of the appellant then could have been possible while extracting the weapon from the body after inflicting injuries in the nature of injury Nos. 1 to 4, the answer of PW44 was that the said injuries noted on the left hand would have been sustained if the areas caused by the said injuries had specifically come in the path of infliction and extraction and the possibility of causing the injuries during extraction is more probable. During cross-examination, PW44 was asked as to whether he could rule out the possibility of injury Nos.1 to 4 being inflicted by multiple persons with multiple weapons, the answer of PW44 was that the same is possible only if the measurements of the multiple weapons are

consistent with the measurement of the injuries.

16. PW21 was the doctor working at the casualty of St.Rita's Hospital, Nalukody during 2009. PW21 deposed that on 22.08.2009, at about 12 noon, he treated the appellant for the injury suffered by him on his left hand. PW21 deposed that the injury was noted in the records maintained in the hospital as “lacerated left hand, thenar eminence - 2 in number, 4cm x 1cm x muscle deep in the dorsal and ventral aspect.” PW21 deposed that the wounds were sutured under local anaesthesia. Ext.P23 is the case sheet maintained at St.Rita's Hospital in respect of the treatment given to the appellant. PW21 also deposed that the injuries treated by him are injuries possible with MO1 knife.

17. PW41 was the Nodal Officer of Idea Cellular Limited, a telecom service provider. PW41 deposed that mobile number – 9961362546 is one allotted to the third accused on Ext.P64 application and mobile number – 9605299013 is allotted to one Rathi Thomas on Ext.P84 application. PW1

deposed that Rathi Thomas is his wife and he was using mobile number – 9605299013 at the relevant time. The call records of the mobile numbers – 9961362546 and 9605299013 have been made available by PW41 and was marked as Exts.P80 and P86 respectively. Exts. P80 and P86 would reveal that there was a call at 12:12:06 a.m. on 22.08.2009 from the mobile number of the third accused to the mobile number used by PW1. Similarly, there was another call at 12:18:54 a.m. on 22.08.2009 from the mobile number of the third accused to the mobile number used by PW1. These calls would establish that the third accused had made telephonic calls to PW1 to inform him that the appellant inflicted three to four stab injuries to one among the people in the Ford Endeavour Car.

18. PW74 was the officer of the Central Bureau of Investigation who conducted further investigation in the case as directed by this Court. PW74 deposed that during interrogation of the appellant and the tenth accused, PW74 derived information regarding the involvement of the twelfth accused in

the case and when the twelfth accused was interrogated on his arrest, the twelfth accused entrusted the knives to the thirteenth accused and when the thirteenth accused was arrested and questioned, the thirteenth accused informed PW74 that he concealed the knives on the roof of the cattle shed behind his house and when the thirteenth accused was taken to that place, he took out two knives concealed therein and the same were seized by PW74 as per Ext.P211 seizure memo. Ext.P103 is the disclosure statement.

19. PW63 is the officer of the State Police who commenced the investigation in the case. PW63 deposed that a SIM card and a broken mobile phone were seized from the scene of occurrence while preparing the scene mahazar in the case. MO9 is the broken mobile phone and MO11 is the SIM card seized from the scene as per Ext.P18 scene mahazar. PW63 deposed that he got the SIM card examined at Ernakulam Cyber Cell and it was revealed on such examination that the number of the same is 9847292591 and that it is the SIM card

allotted to one Vilasini in response to Ext.P52 application preferred by her. It was deposed by PW63 that Vilasini is none other than the mother of the appellant and the above SIM was one which was being used by the appellant himself. Vilasini was examined as PW58 in the case. Even though PW58 denied having obtained the mobile number – 9847292591, she admitted that the photograph in Ext.P52 application and the ID card enclosing the same are that of hers.

20. Let us now consider the point formulated for decision, in the light of the evidence discussed above. The evidence given by PW1 that he was a member of the group which proceeded to Mannancherry to attack Kurangu Nissar and others is not seen challenged by the appellant in the cross-examination of PW1. Of course, even according to PW1, he did not proceed to the scene of occurrence from the place where the accident took place. We do not find any impediment in accepting the evidence tendered by PW1 as regards the events that took place upto the point of time when the two groups

chased the Ford Endeavour car, one in the tempo traveller and the other in the Scorpio car from the place where the accident took place. The aforesaid part of the evidence tendered by PW1 establishes that the appellant was a member of the group which travelled with PW1 in the tempo traveller upto the place where the accident took place and thereupon, to the scene of occurrence in the tempo traveller which was parked there, chasing the Ford Endeavour car driven by the deceased. This part of the evidence tendered by PW1 is corroborated by the evidence tendered by PW2 to PW6 also.

21. Let us now go to the next stage. In order to prove the events that took place in the next stage, the prosecution relies on the evidence of PWs 2 to 4, 6 and 8. As noticed, PW2 was driving the Scorpio car which followed the tempo traveller which chased the Ford Endeavour car and PWs 3, 4 and 6 were travelling in the said car along with the first accused. The evidence tendered by the said witnesses would show that by the time the said Scorpio car driven by PW2

reached the scene of occurrence, the occurrence was almost over. None of them, namely PWs 2, 3, 4 and 6 could therefore see the appellant inflicting stab injuries on the deceased. The evidence of the said witnesses would only show that there was a scuffle between those who chased the Ford Endeavour car and those who travelled in the Ford Endeavour car. However, the evidence tendered by PW8 would show that there was a word altercation initially, between the group of persons who reached the scene in the tempo traveller on one side and the deceased on the other side, followed by a scuffle and that in the course of the scuffle, the fourth accused pushed away the deceased and the deceased also in retaliation, pushed the fourth accused, and when the fourth accused fell down, the persons who accompanied the fourth accused assaulted the deceased physically and in the course of the said assault, the appellant stabbed the deceased on his back. PW8 also identified in court, MO1 as the weapon used by the appellant to inflict injuries on the deceased. The evidence tendered by PW8

upto this stage is categoric and we do not find any reason to disbelieve PW8, insofar as this part of his evidence is concerned.

22. At this stage, we need to consider one of the main arguments advanced by the learned counsel for the appellant that the evidence tendered by PW8 is not consistent with his previous statement. The relevant portion of the deposition of PW8 reads thus:

> "അപ്പോൾ ഒരു പൈയ്യൻ വന്നു. ഒരു കഠാരകൊണ്ട് paul-ന്റെ back-ൽ കുത്തി. ആ കൂട്ടത്തിലുള്ള പൈയ്യൻ ആണ്. അയാൾ ഇന്ന് കോടതിയിൽ ഉണ്ട്. 4-)ം മത് നിൽക്കുന്ന ആളാണ്. (witness points out A2), Kari Satheesh."

It is seen that the Special Court permitted a portion of the statement of PW8 recorded under Section 161 of the Code as a contradiction. Ext.D51 is the said contradiction which reads thus:

> "<u>അപ്പോൾ അവരുടെ ഇടയിൽ നിന്ന് ഒരു പയ്യൻ ഒരു കത്തിയെടുത്ത് പോളിനെ പലപ്രാവശ്യം കുത്തി</u>. ഞാനത് തടയാൻ ചെന്നപ്പോൾ അയാളെന്നെ കത്തികൊണ്ട് വീശി. എന്റെ ഇടതു കൈയുടെ മുകൾ ഭാഗത്താണ് വീശ് കൊണ്ടത്."
>
> (Underline supplied)

According to us, the underlined portion does not amount to a

contradiction, for the contradiction provided for under the proviso to Section 162 of the Code arises only when the statement in the evidence of the witness is so inconsistent or irreconcilable with the statement before the police officer and both of them cannot, therefore, co-exist. In this context, it is profitable to refer to a passage from the majority judgment of the Apex Court in **Tahsildar Singh v. State of U.P.**, AIR 1959 SC 1012. The passage reads thus:

> "Contradict" according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police-officer-in the sense we have indicated-and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other."

Further, it is now settled that unless the former statement has the potency to discredit the present statement, even if the

latter is at variance with the former to some extent, it would not be helpful to contradict the said witness [See **Rammi v. State of M.P.**, (1999) 8 SCC 649]. In the case on hand, as noted, what was deposed by PW8 was that the appellant stabbed on the back of the deceased. Merely for the reason that PW8 had not stated that the appellant stabbed repeatedly on the back of the trunk of the deceased, the deposition of PW8 cannot be understood as one contradicting his previous statement, in terms of the proviso to Section 162 of the Code, especially when the witness did not state in his deposition that the appellant stabbed the deceased only once, for it cannot be said that the statements are so inconsistent or irreconcilable with each other that both of them cannot co-exist. The contention aforesaid by the learned counsel for the appellant, in the circumstances, is liable to be rejected.

23. That apart, the evidence tendered by PW8 is corroborated by other evidence tendered by the prosecution as well. Among the other evidence, the first and foremost is the

evidence tendered by PW1. As noted, it was deposed by PW1 that the appellant had shown to him and others MO1 knife used by him to inflict injuries on the deceased, while they were travelling together to Mannancherry in the tempo traveller. Similarly, it was deposed by PW1 that immediately after the group left the place of accident chasing the Ford Endeavour car, the third accused called him over telephone and informed him that there was a scuffle with those who travelled in the car and that the appellant inflicted a few stab injuries to one among them. The relevant portion of the deposition reads thus:

> "ആ സമയത്ത് എനിയ്ക്ക സത്താറിന്റെ (A3) phone call വന്നു. കാറിൽ വന്നവരും ആയി ഉന്തും തള്ളും ഉണ്ടായി. കാറിൽ വന്നയാളെ കാരി സതീഷ് 3, 4 കുത്തി എന്ന് പറഞ്ഞു. നിങ്ങൾ എന്താണ് അവിടെ കാണിക്കുന്നത് എന്ന് ചോദിച്ച് ഞാൻ phone cut ചെയ്തു. "

The said evidence of PW1 was corroborated by the evidence tendered by PW41, the Nodal Officer inasmuch as the evidence of PW41 establishes that the third accused called from his mobile phone to the mobile number of PW1, twice at that point of time. This part of the evidence was accepted by the Special Court as *res gestae.* There cannot be any doubt at all to the

proposition that hearsay evidence is admissible under Section 6 of the Indian Evidence Act, provided it is established that the statement is one made contemporaneous with the acts or immediately thereafter, so that the same would be free from all possibilities of fabrication. Having regard to the facts and circumstances of the case, it can certainly be inferred that the statement made by the third accused over telephone to PW1 immediately after the occurrence that the appellant inflicted a few stab injuries to one of the persons who was in the Ford Endeavour car, forms part of the same transaction. As we do not find any reason for the third accused to pass on incorrect information about the occurrence to PW1 at that point of time, we agree with the finding rendered by the Special Court that the said part of the evidence tendered by PW1 would certainly fall under Section 6 of the Indian Evidence Act.

24. Similarly, it was also deposed by PW1 that after the occurrence, when the tempo traveller came to the place where the accident took place to pick them up, PW1 saw

the appellant sitting therein with MO1 blood stained knife. The said part of the evidence tendered by PW1 also corroborates the evidence of PW8 that it was the appellant who stabbed the deceased in the course of the scuffle. It was also deposed by PW1 that at that time, he found that there was an injury between the left thumb and index finger of the appellant and blood was oozing out. This part of the evidence tendered by PW1 is corroborated by the evidence tendered by PW21 that on 22.08.2009, at about 12 noon, the appellant came to the hospital where PW21 was working for treatment of the wounds suffered by him on his left hand.

25. It is seen that there has been a serious debate before the Special Court as to whether the wounds suffered by the appellant on his left hand were possible at all, if the occurrence was as alleged by the prosecution. We do not think that there is any scope at all for the said aspect, in the light of the categoric evidence deposed by PW44 and PW21.

26. The evidence tendered by PW8 is further

corroborated by the evidence tendered by PW2. As noticed, PW2 deposed that the fourth accused stated to PW2 while boarding the Scorpio car from the scene of occurrence that the appellant stabbed the person who came in the Ford Endeavour car. This part of the evidence tendered by PW2 reads thus:

> "A4 സുജിത് ഓടിവന്നു കയറി A1 ന്റെ മടിയിൽ ഇരുന്നു. A1 വണ്ടിയിൽ driver-ന്റെ seat ന്റെ അടുത്ത് ഇരുന്നു. സുജിത്തിന്റെ (A4) dress-ൽ ഒക്കെ blood ഉണ്ടായിരുന്നു. അയാൾ പറഞ്ഞു അവിടെ കുത്തു നടന്നു, കാരി സതീഷ് Endeavour car-ൽ വന്നയാളെ കുത്തി എന്നും കാരി സതീഷിന്റെ കൈ മുറിഞ്ഞു എന്നും പറഞ്ഞു."

This part of the evidence has also been accepted by the Special Court as *res gestae,* and in the light of the discussion made in the preceding paragraph, we do not find any infirmity in the said view taken by the Special Court. It is all the more so since the fourth accused made the said statement immediately after the occurrence while fleeing away from the scene. The evidence tendered by PW8 is further corroborated by the evidence tendered by PW44, the doctor who conducted the autopsy that the incised penetrative wounds found on the back of the trunk of the deceased are wounds that could be caused

using MO1 knife.

27. On an evaluation of the materials aforesaid, we concur with the finding rendered by the Special Court that it was the appellant who inflicted the stab injuries on the deceased which resulted in his death, and if that be so, the conviction of the appellant for various offences other than the offence punishable under Section 326 IPC, is in order.

28. There is absolutely no merit in the contention raised by the learned counsel for the appellant that the facts deposed by PW8 are not facts which could be seen by anyone at the relevant time in the pitch darkness of night, as it was categorically deposed by PW4 that when they reached the scene, the tempo traveller which followed the Ford Endeavour car was seen parked in such a fashion that the light of the tempo traveller fell on the Ford Endeavour car. Similarly, there is no merit in the contention that it was obligatory for the prosecution to explain the circumstances under which the fourth accused could not get into the tempo traveller in which

he came to the scene of occurrence. The narration of the occurrence by PWs 2 to 4, 6 and 8 would show that when the appellant stabbed the deceased and the deceased fell down consequently on the road, those who came in the tempo traveller hurriedly escaped from the scene in the vehicle in which they came. If the inability of the fourth accused to board on the tempo traveller at that point of time is understood in the said background, according to us, there is no need at all for the prosecution to explain the reason as to why the appellant could not board on the tempo traveller, for it is natural that under such circumstances, one might miss catching the vehicle in which he came to the scene. Similarly, it is not obligatory on the facts of this case for the prosecution to explain as to how blood was found on the clothes worn by the fourth accused, for in the nature of the events spoken to by PWs 2 to 4, 6 and 8, it is only natural that there would be presence of blood on the clothes of all the members of the group, especially when there was profuse bleeding on account of the injuries caused to the

deceased. Merely for the reason that the fourth accused is a person suffering from anti-social personality disorder, it cannot be inferred that he must have caused the injuries, especially when there is other satisfactory evidence as elaborated in the preceding paragraphs to show that injuries were caused to the deceased by the appellant.

29. Section 71 IPC provides that where an offence is made up of parts, any of which parts is itself an offence, the offender should not be punished for more than one offence, unless expressly provided and that when an offence falls within two or more separate definitions of offences or when several acts, of which one or more than one would, by itself or themselves, constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences. It is seen that the appellant has been found to be guilty for the offence punishable under Section 326 IPC for having caused the stab injuries on the

deceased. Such a conviction is not permissible in the light of Section 71 of IPC, for when an offence under Section 302 IPC has been established, it takes in the ingredients of the offence under Section 326 IPC, and the offences, though falling under two different definitions of offences, form a single transaction, and the appellant cannot be convicted for both the offences.

In the circumstances, the appeal is disposed of setting aside the conviction of the appellant for the offence punishable under Section 326 IPC and affirming his conviction under the remaining provisions of law.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

JOHNSON JOHN, JUDGE.

YKB