IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 9TH DAY OF AUGUST 2023 / 18TH SRAVANA, 1945

CRL.A NO. 550 OF 2021

AGAINST THE JUDGMENT IN SC 488/2016 OF ADDITIONAL SESSIONS COURT - III, MAVELIKKARA

APPELLANT/ACCUSED:

GOPI, AGED 56 YEARS,
S/O. THANKAPPAN, C.NO.4141,
CENTRAL PRISON & CORRECTIONAL HOME, POOJAPPURA,
THIRUVANANTHAPURAM
AND RESIDED AT THOPPUPARAMBIL VEEDU,
CHELLANAM PANCHAYATH WARD NO.VII, ERNAKULAM
THROUGH THE SUPERINTENDENT,
CENTRAL PRISON & CORRECTIONAL HOME, POOJAPPURA,
THIRUVANANTHAPURAM

BY ADV DHANYA P ASHOKAN, STATE BRIEF

RESPONDENT/COMPLAINANT:

1. **THE STATE OF KERALA**
   REPRESENTED BY THE PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA PIN 682031

2. **THE CIRCLE INSPECTOR OF POLICE, KAYAMKULAM,**
   ALAPPUZHA 690502.

BY SENIOR PUBLIC PROSECUTOR SRI.ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31.07.2023, THE COURT ON 09.08.2023 DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Criminal Appeal No.550 of 2021

Dated this the 9th day of August, 2023

JUDGMENT

P.B.Suresh Kumar, J.

The sole accused in S.C.No.488 of 2016 on the files of the Additional Sessions Court-III, Mavelikkara is the appellant in this appeal. The appellant stands convicted and sentenced for the offence punishable under Section 302 of the Indian Penal Code (IPC).

2. The deceased and the accused were labourers engaged in cleaning work. Both of them did not have any place to reside. They used to sleep in public places at night. The accusation against the accused, as stated in the final report, is that at about 10.15 p.m. on 12.10.2015, while the deceased was sleeping on the cement bench of a waiting shed, on account of previous enmity, the accused struck with a

casuarina rod on the face and legs of the deceased a number of times and thereby caused his death. As regards the previous enmity, the allegation in the final report is that on 03.10.2015, the deceased struck on the leg of the accused using another wooden rod.

3. On receiving information about the occurrence, Kareelakulangara Police registered a crime, and after investigation, filed final report against the accused alleging commission of the offence punishable under Section 302 IPC. On committal, the accused denied the charge framed against him by the Court of Session and faced the trial. The evidence let in by the prosecution thereupon consists of the oral evidence of PWs 1 to 26 and Exts.P1 to P23 documents. MOs 1 to 36 are the material objects in the case. On culmination of the evidence of the prosecution, the incriminating circumstances brought out were put to the accused in terms of the provision contained in Section 313 of the Code of Criminal Procedure (the Code). The accused, however, denied the same and maintained that he is innocent. In addition, he also stated that he did not go to the place of occurrence on that day. As

the Court of Session did not find the case to be one fit for acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. The accused did not however avail the opportunity to adduce evidence in the case.

4. On an appraisal of the materials on record, the Court of Session found the accused guilty of the offence punishable under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.25,000/-. Default sentence was also imposed on the accused. The accused is aggrieved by the said decision of the Court of Session and hence, this appeal.

5. Heard the learned counsel for the accused as also the learned Public Prosecutor.

6. A perusal of the impugned judgment indicates that it is placing reliance on the oral evidence let in by PWs 1 and 2 as also other circumstances brought out by the prosecution that it was found that the accused is guilty of the offence. The learned counsel for the accused, after taking us through the oral evidence let in by PWs 1 and 2, vehemently contended that the evidence let in by the said witnesses that

they saw the occurrence, is not believable. Similarly, it was also contended by the learned counsel that the discovery of MO1 casuarina rod would not fall within the scope of Section 27 of the Indian Evidence Act inasmuch as it is stated to have been seized from a public place, namely, on the side of the National Highway. It was also contended that if the evidence of PWs 1 and 2 are eschewed, the circumstances relied on by the prosecution do not conclusively establish the guilt of the accused, especially since the prosecution has miserably failed in proving the motive, as has been alleged. It was also argued by the learned counsel that even though the case put forward by the prosecution is that the accused inflicted blows on the face and legs of the deceased, who was sleeping in the waiting shed, using a casuarina rod brought by him, the evidence let in by the prosecution would itself show that the casuarina rod allegedly used by the accused for inflicting injuries on the deceased is one that was always carried by the deceased. If that be so, according to the learned counsel, the occurrence is not as alleged by the prosecution. The learned counsel also contended that at any rate, even if the allegations are

accepted as true, a case of murder is not made out and the accused can be convicted only under Section 304 IPC. The learned counsel elaborated the said argument pointing out that there were no injuries on the vital parts of the body of the deceased; that the weapon used was only a wooden rod; that injuries which led to the death are only in the nature of lacerations and contusions and therefore, the injuries intended cannot be treated as sufficient in the ordinary course of nature to cause death.

7. Per contra, the learned Public Prosecutor argued that there is absolutely no reason to disbelieve the evidence tendered by PWs 1 and 2 that they saw the occurrence. Even if it is found that the evidence let in by the said witnesses cannot be believed, inasmuch as they deposed as to the manner of the occurrence, their evidence coupled with the scientific evidence let in by the prosecution that the group of the blood stains contained on the shirt worn by the accused when he was taken into custody by the police and the casuarina rod discovered and seized based on the information furnished by the accused, would certainly establish that it is

the accused who had inflicted injuries on the deceased and caused his death. In reply to the argument advanced by the learned counsel for the accused that the allegations proved do not make out a case of murder, it was argued by the learned Public Prosecutor that if several blows are inflicted on the face of a person using a casuarina rod, it can certainly be inferred that the intention of the assailant was to cause bodily injury sufficient in the ordinary course of nature to cause death. In short, the submission made by the learned Public Prosecutor is that the decision of the Court of Session is in order, and no interference is called for.

8. The points that arise for consideration are (1) whether the conviction and sentence of the accused are sustainable in law and (2) if not, the relief, if any, to which the accused is entitled to.

9. The points: The first and foremost aspect to be considered is whether the death is homicidal. PW15 is the doctor who conducted the post-mortem examination of the body of the deceased. Ext.P5 is the post-mortem certificate. PW15 has stated in his deposition, the particulars of the ante-

mortem injuries. The cause of death, according to PW15, was due to the blunt injuries sustained to the face and both lower limbs, namely injury Nos. 1 to 3, 8 and 10. The said injuries as stated by PW15 in his evidence read thus:

> "1. Lacerated wound 2.5x1cm, involving whole thickness and with irregular margins, on middle of upper lip; splitting the lip into two halves. The surrounding tissue showed contusion in its whole thickness with crushing of edges. Underneath, the upper alveolar margin showed a fracture forming a freely mobile segment of size about 5x5x1.5cm. The mobility was towards the inner aspect of mouth cavity. The gum margin was in a partially separated state. The upper central incisors, right upper lateral incisor and canine were missing from the respective sockets (fresh loss). The maxilla (upper jaw bone) showed a transverse fracture involving both sides and through its middle with depression of fractured segment.
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> 2. Crushed lacerated wound 7x2cm, involving the whole thickness and raising a flap like segment (7x2.5x1.3cm) towards right side and outwards, over the right outer half of lower lip. The adjacent soft-tissues showed crushing with contusion. The wound had irregular margins due to splitting of tissues.
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> 3. Lacerated wound 3x1.8cm, involving the whole thickness, obliquely placed on left half of lower lip, 1.5cm outer to midline. The adjacent soft tissue showed effect of crushing and contusion.
>
> Underneath, the alveolar margin showed fracture with inward compression of teeth sockets. The gum margin

> was in a partially avulsed state and showed free mobility backwards. Underneath, the lower jaw bone (mandible) showed multiple fractures with fragmentation, which was seen split into two halves in the middle. The central incisors, canine on the left side and the 1st and 2nd premolars on left side of lower jaw were missing from sockets (fresh loss). The tongue showed a contusion (6x2.3cm, involving the whole thickness) in its front aspect. The oral cavity and the pharygo-laryngeal region contained fluid blood. The air passages also contained fluid blood mixed with mucus, down to its lower divisions. The bronchi and their further divisions were seen completely occluded by fluid blood mixed with mucous. Both lungs were heavy (Right- 692, Left- 632 grams) and showed multiple foci of aspirate blood.
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> x x x x x x x x x
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> 8. Contusion 9x6cm, involving the whole thickness, obliquely placed on front and inner aspect of right thigh, just above the knee. Underneath the right thigh bone showed a fracture, with fragmentation and displacement of the fractured ends, just above the level of condyles (bulge of lower end).
>
> x x x x x x x x x
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> 10. Abraded contusion, 9x5cms, involving its whole thickness, obliquely placed on lower part of front of left thigh, just above the knee. Underneath the left thigh bone showed fracture with displacement and over-riding of fractured ends."

PW15 also deposed that the said injuries are possible with the casuarina rod discovered and seized based on the information

furnished by the accused. In cross-examination, PW15 affirmed that the injuries noted on the body of the deceased are sufficient to cause death. He also clarified in cross-examination that injury Nos.1 to 3, 8 and 10 would cause severe and profuse blood loss as also collection of blood in the airways causing airway obstruction. According to him, both the mechanisms acted together to cause the death of the victim. There is no serious challenge to the evidence let in by PW15. It is thus established that the case on hand is a case of homicide.

10. The next question to be considered is whether the prosecution has established beyond reasonable doubt that it is the accused who caused the death of the deceased. The evidence let in by the prosecution needs to be referred to, so as to deal with this question.

11. PW1 is a person examined by the prosecution as an eyewitness to the occurrence. PW1 deposed that at about 10 p.m. on the relevant day, he was sitting in a chair kept in front of a restaurant named “SK Fried Chicken” situated right in front of the Kareelakulangara Spinning Mill, on the opposite side of the National Highway. He deposed that he saw the

accused striking the deceased on his body, especially on his face with a casuarina rod which he identified as MO1. PW1 deposed that though he crossed the road immediately, by the time he reached the scene, the accused had left in a cycle towards south with the casuarina rod. PW1 deposed that he chased the accused along with three of his friends in two bikes for a distance of about 500 meters and intercepted the accused. PW1 deposed that when they intercepted the accused, he did not have the casuarina rod with him. PW1 also identified MO4 shirt and MO5 dhoti worn by the accused at the time when they intercepted him. PW1 deposed that there were blood stains on MO4 shirt. But in cross-examination, PW1 deposed that the distance between the Spinning Mill and the place where the accused was intercepted would be approximately one kilometer and the distance between the waiting shed and the place where PW1 was standing at the time of occurrence would be approximately 50 meters. He also deposed in cross-examination that the new National Highway on the side of which the waiting shed exists is constructed at a height of two and a half feet from the old National Highway;

that remnants of the old National Highway still exist and the restaurant in front of which PW1 was sitting at the time of occurrence is the restaurant situated 10 feet away from the old National Highway.

12. PW2 is also a person examined by the prosecution as an eye witness to the occurrence. PW2 is a lorry goods driver by profession. He deposed that while he was talking with PW1, he heard a sound from the waiting shed and when he looked towards that direction, he saw the accused moving away from the waiting shed and coming back again to the waiting shed and striking on the deceased. PW2 deposed that he immediately went near the waiting shed in his bike and by the time, the accused had left the scene towards south. PW2 deposed that he along with others chased the accused and intercepted him at Puthenroad junction. PW2 also deposed that though the accused had a wooden rod with him while leaving the scene, the same was not with him when he was intercepted. PW2 deposed that after sometime, the police came and took the accused into custody. PW2 also identified MO1 casuarina rod as the wooden rod with which he inflicted

injuries on the deceased as also MO4 and MO5 as the clothes worn by the accused at the time of occurrence.

13. PW3 who was riding a bike at about 10 p.m. on the date of occurrence through the National Highway abutting the Spinning Mill deposed that when he reached Puthenroad junction, he saw a crowd on the road and when he proceeded passing the crowd, he saw another crowd near the waiting shed in front of the Spinning Mill and when he halted his bike, he found that a person who had suffered injuries on his face, was lying on the concrete bench of the waiting shed. He informed the matter to the police and also called for an ambulance. He also deposed that after sometime, an ambulance came and he took the injured to Kayamkulam Taluk Hospital, where after examining the injured, the doctor told him that the injured is no more. PW4, the owner of the restaurant “SK Fried Chicken”, deposed that on the relevant day evening, while he was busy in the shop, somebody came up to him and informed him that there is some issue in the waiting shed opposite to the shop and required him to inform the matter to the police. He deposed that accordingly, he informed the matter to the police.

He clarified that he did not see the occurrence. PW5 deposed that on 12.10.2015, at about 10.30 p.m. while he was engaged in playing carroms at the reading room of a library, he saw the accused being intercepted by a few persons who followed him by their bikes. He deposed that he had acquaintance with the accused as the accused used to visit the library to read the newspaper. He deposed that the accused is a person who used to sleep in the first floor of the Pullukulangara Service Co-operative Bank and the persons who followed the accused informed him that the accused struck the deceased with a stick. He deposed that he accordingly proceeded to the waiting shed and upon reaching, he saw the deceased being taken in an ambulance. He deposed that by the time he returned to the reading room, the police took the accused into custody. PW5 identified the clothes worn by the accused at the relevant time as MO4 and MO5. PW6 also gave evidence more or less on the same lines as the evidence tendered by PW5. PW7 deposed that he had prior acquaintance with the accused and the deceased as they were persons who used to sleep on the veranda of the Co-operative Bank functioning on the first floor

of the building where he runs a tyre shop. PW7 also deposed that a week before the occurrence, he found the accused with a swelling on his leg and when he enquired about the same, he told him that somebody hit him. PW9 is the security guard of the Co-operative Bank. He deposed that he had prior acquaintance with the accused and the deceased, as they used to sleep on the veranda in the ground floor of the Bank building. He deposed that on the night of 02.10.2015, when he climbed down hearing a loud noise, he saw the accused crying and when he enquired about the reason, the accused told him that the deceased struck him with a wooden rod and ran away. PW11 is a security guard of the Spinning Mill. He deposed that on 12.10.2015, he was on day and night duty. He deposed that the night lights on the compound wall of the Spinning Mill is switched off only in the mornings. PW13 is the senior civil police officer attached to Kareelakulangara Police Station. He deposed that on 13.10.2015, the circle inspector of police brought the accused to the police station, and MO4 and MO5 were the clothes worn by him at that time.

14. PW14 was the CMO at Taluk Hospital,

Kayamkulam during October, 2015. He deposed that on 12.10.2015 at about 10.40 p.m., a group of persons brought dead an unknown person. He proved Ext.P4 wound certificate issued by him in this regard. As noted, PW15 is the doctor who conducted the post-mortem examination of the body of the deceased. Apart from the facts relating to the post-mortem, PW15 also deposed that on 14.10.2015, he examined the accused as various injuries were noted on his body and issued Ext.P6 medico-legal certificate. He deposed that on an examination, he found a healing abrasion 5x1.3 cm obliquely placed on the outer aspect of the lower part of the right leg above the ankle joint. He deposed that the accused told him that he had a quarrel with the deceased on 03.10.2015 at night and that the deceased beat him with a wooden rod over his right ankle region. He deposed that the accused also told him that on 12.10.2015, he hit back the deceased with the very same wooden rod.

15. PW21 was the Station House Officer of Kareelakulangara police station. He deposed that on 12.10.2015, at about 10.11 p.m., he received a telephone call

from mobile No.9847046491 regarding a scuffle in the waiting shed of the Spinning Mill; that the injured person was taken to the hospital and that the assailant was restrained at the scene. He deposed that after recording the information in the general diary, he went to the spot and took the accused into custody and registered suo motu Ext.P10(a) case. Ext.P10 is the First Information Statement.

16. PW22 was the Assistant Director of Serology Department of Forensic Science Laboratory, Thiruvananthapuram. PW22 issued Ext.P11 report after examining the various objects that were forwarded for forensic examination. Item No.8 in Ext.P11 report is the shirt worn by the accused at the time when he was taken into custody which is marked in the proceedings as MO4. Item No.10 is the blood sample of the deceased and item No.18 is MO1 casuarina rod. PW22 deposed that the blood group of the deceased is 'O'. She also deposed that item Nos.8 and 18 contain human blood belonging to group 'O'.

17. PW26 is the investigating officer in the case. He deposed that MO4 blood stained shirt of the deceased was

seized by him in terms of the Ext.P2 seizure mahazar. PW26 also deposed that on the strength of Ext.P1(a) disclosure statement of the accused, he discovered and seized MO1 casuarina rod from the weed on the north-west of the National Highway at Puthenroad junction in terms of Ext.P1 seizure mahazar. He deposed that MO1 was also found to be blood stained at the time of seizure.

18. As noted, the main argument of the learned counsel for the accused relates to the acceptability of the evidence tendered by PWs 1 and 2. On a close scrutiny of the said evidence, we find force in the argument. As noted, the place of occurrence is the waiting shed in front of the Spinning Mill on its side of the National Highway. The case of the prosecution is that the deceased was sleeping on the cement bench on the southern side of the waiting shed. The time of occurrence is between 10 p.m. and 10.15 p.m. As noted, at the time of occurrence, PW1 was sitting in a chair kept in front of the restaurant “S.K. Fried Chicken”. It has come out from the evidence of PW1 itself that the said restaurant is situated on the opposite side of the National Highway, of course, in front of

the Spinning Mill. It has also come out in evidence that adjoining the National Highway on the opposite side of the Spinning Mill, remnants of the old National Highway exist at a lower level, approximately 2.5 feet below and it is approximately 10 feet away from the old National Highway that the restaurant referred to above is situated. PW1 admitted in cross-examination that the distance between the waiting shed and the restaurant would be approximately 50 meters. To a specific question put to PW1 in cross-examination as to how he could then see the occurrence, the answer given by PW1 was "ശബ്ദം കേട്ട് തിരിഞ്ഞു നോക്കുകയായിരുന്നു." Similarly, to a question as to whether the restaurant in front of which he was sitting is right in front of the waiting shed, his answer was "ലേശം തെക്കോട്ടുമാറിയാണ് ഷെഡ്." In cross-examination, PW1 also clarified that he is not sure as to how many times the accused struck the deceased using the casuarina rod. It was suggested to PW1 that it is not possible for anyone to see what is happening inside the waiting shed from a long distance, for want of light. PW1 denied the suggestion and added that "വാഹനങ്ങളുടെ വെളിച്ചമുണ്ടാകും." On an evaluation of the evidence tendered by PW1, we are of the

view that it was not possible at all for PW1 to see what was happening about 50 meters away, that too, inside a waiting shed, even if there was light from the vehicles passing by. In other words, it is not safe to rely on the evidence tendered by PW1 that he saw the accused striking the deceased on his body, especially on his face, that too, with a casuarina rod which he identified as MO1 in court. We take this view also for the reason that on a question put to PW1 in cross-examination, he stated that the distance between the Spinning Mill and the place where the accused was intercepted by him and others was almost one kilometer. As noted, immediately on witnessing the occurrence, PW1 crossed the road and proceeded to the waiting shed. In other words, the evidence tendered by PW1 is that by the time he reached 50 meters, the accused covered almost one kilometer by cycle. PW2 also gave evidence more or less on the same lines of the evidence given by PW1. PW2 was a person who was talking with PW1 at the time of occurrence. If PW1 cannot be believed inasmuch as he deposed that he witnessed the occurrence, PW2 also cannot be believed. Be that as it may, in cross-examination, even though

PW2 deposed that it is on hearing the sound that they turned their attention to the waiting shed, he replied evasively to all the questions put to him in cross-examination which were intended to elicit from him that it is not possible for him to see the occurrence. The relevant portion of the deposition of PW2 reads thus:

> "ഞങ്ങൾ waiting shed-ലേക്ക് നോക്കിയത് ശബ്ദം കേട്ടപ്പോൾ ആണ്. ഒരാളെ അടിക്കുന്ന ശബ്ദമായിരുന്നു ഞാൻ കേട്ടത്. ഞങ്ങൾ നിന്ന സ്ഥലവും shed ഉം തമ്മിലുള്ള അകലം പറയാൻ പറ്റത്തില്ല. Question repeated 10m ഉണ്ടാകാം. S.K. chicken ന്റെ direct opposite ആണോ waiting shed (Q) അതെ (A) പുതിയ N.H. ന് ഏകദേശം 40 അടി വീതി വരത്തില്ലേ (Q) അറിയില്ല (A). പുതിയ N.H. ഉം പഴയ N.H. ഉം തമ്മിൽ 2½ അടി താഴ്ച്ച വ്യത്യാസം ഇല്ലേ (Q) വലിയ വ്യത്യാസം ഇല്ല. ഞങ്ങൾ നിൽക്കുന്നതും കാണാൻ പറ്റും (A). പഴയ N.H. ൽ നിന്നും 10 അടി ദൂരത്തിൽ അല്ലേ നിങ്ങൾ നിന്നിരുന്നത് (Q) അറിയില്ല (A) നിങ്ങൾ നിന്നിടത്ത് നിന്നും waiting shed ന്റെ ഉള്ളിലെ കാര്യങ്ങൾ കാണാൻ പറ്റില്ല എന്ന് പറയുന്നു (Q) ശരിയല്ല (A) വാഹനങ്ങൾ പോകുമ്പോൾ നിങ്ങൾ എങ്ങനെ sound കേട്ടു (Q). തുടർച്ചയായി വാഹനങ്ങൾ പോയിരുന്നില്ല (A)"

The answers given by PW2 to the questions put to him in cross-examination as referred to above also compel us to come to the conclusion that PW2 is a person who did not see the occurrence. That does not mean that they were not present in the locality at the time of occurrence. The evidence given by them would indicate that on hearing the noise from the waiting shed, they proceeded to the waiting shed and having found the

deceased in an injured state, they chased and intercepted the accused. The fact that the accused was intercepted on the relevant day immediately after the occurrence at Puthenroad junction which is almost a kilometer away from the place of occurrence, is established from the evidence of PWs 5 and 6 also. The fact that the matter was informed to the police in the meanwhile and that the police came to the spot and took the accused into custody is also established from the evidence of PWs 5 and 6. There is absolutely no reason to disbelieve the said evidence of PWs 5 and 6.

19. PWs 7 and 9 are persons examined by the prosecution to prove the motive, namely that the deceased had struck on the leg of the accused on 03.10.2015 using a casuarina rod. Among them, PW7 is a person who is running a tyre shop on the ground floor of a two storeyed building at Puthenroad Junction where the Co-operative Bank is functioning and PW9 is the security guard of the Bank functioning on the first floor of the building. The version of PW7 is that the accused and the deceased normally used to sleep in the veranda of the Co-operative Bank on the first floor of the

building, whereas the version of PW9 is that the accused and the deceased used to sleep in the veranda of the ground floor of the building. That apart, the evidence tendered by PW7 in this regard is only that a week before the occurrence, he found the accused with a swelling on his leg and when he enquired about the reason, the accused told him that somebody hit him. From the evidence tendered by PW7, it cannot be inferred that it is the deceased who had struck on the leg of the accused, that too with a casuarina rod. Similarly, the evidence tendered by PW9 in this regard is only that on the night of 02.10.2015, when he climbed down the stairs hearing a loud voice, he found the accused crying, and when he enquired about the reason, the accused told him that the deceased struck him with a wooden rod and ran away. Similarly, PW9 has not seen the deceased striking on the leg of the accused with the casuarina rod. What is deposed by him is only that the accused told him that the deceased hit him on his leg and ran away. Even PW9 does not refer to the wooden rod as casuarina rod. Yet another material relied on by the prosecution to prove the motive of the accused is Ext.P19 First Information Report in Crime No.1458 of

2015 and Ext.P19(a) final report in the said case. The said crime is one registered by the police against the victim after his death based on the statement given by the accused to PW15, the doctor who examined him when he was brought for medical examination, having found an injury on his leg at the time when he was taken into custody. The accusation against the deceased in the said case is that on 03.10.2015, at about 3.30 a.m., the deceased struck on the ankle of the accused with a casuarina rod. The aforesaid, according to us, is not sufficient to prove the motive attributed to the accused. Even assuming that there was an occurrence as alleged, according to us, the same is not sufficient to develop the motive of the accused to cause the death of the deceased.

20. As noted, the crime referred to in the preceding paragraph is one registered by the police against the victim after his death based on the statement given by the accused to PW15. PW15 also gave evidence that the accused told him that there was a quarrel with the deceased on 03.10.2015 at night and that the deceased beat him with a wooden rod over his right ankle region. PW15 also gave

evidence that the accused told him that on 12.10.2015, the accused hit back the deceased with the very same wooden rod. It appears that it is from the statement given by the accused to the police in connection with Ext.P19 crime, that the police came to the conclusion that the weapon used by the accused is a casuarina rod. True, the evidence of PW15 aforesaid is only as regards the statement made to him by the accused while he was being examined. Nevertheless, if the police came to the conclusion that the weapon used by the accused is a casuarina rod, then naturally, it could be inferred that MO1 is a weapon that was always carried by the deceased.

21. Let us now deal with the remaining evidence. The evidence of PW21 reveals that what was informed to him over telephone was that there was a scuffle in the waiting shed of the Spinning Mill. The evidence tendered by PW26 would reveal that MO4 blood stained shirt of the deceased was seized by him on his arrest in terms of Ext.P2 seizure mahazar. The evidence tendered by PW26 would also reveal that on the strength of Ext.P1(a) disclosure statement of the accused, he discovered and seized MO1 casuarina rod from the weed on the

north-west of the National Highway at Puthenroad junction in terms of Ext.P1 seizure mahazar. He deposed that MO1 was found to be blood stained at the time of seizure. The evidence tendered by PW22 would reveal that the blood stains found in MO4 shirt and MO1 casuarina rod is found to be of the Group 'O' which is the blood group of the deceased. There is no explanation from the accused as to how the shirt which he was wearing and the casuarina rod which was discovered based on the information given by him contained stains of blood belonging to Group 'O', especially when it was established by the evidence of PW15 and Ext.P6 medico-legal certificate issued by PW15 that the blood group of the accused is 'A Rh-Positive'.

22. Of course, as noted, one of the arguments advanced by the learned counsel for the accused is that the discovery and seizure of MO1 casuarina rod would not fall within the scope of Section 27 of Indian Evidence Act, as it was claimed to have been discovered and seized from the side of a road which is a public place. It is now trite that merely for the reason that a material object is discovered and seized from a

public place based on the information furnished by the accused, the information that distinctly relates to the fact discovered would not become inadmissible. Even if an object is hidden or concealed in a public place, according to us, the information that distinctly relates to the fact discovered is admissible, if the place where the object is hidden or concealed is a place, the particulars of which are known only to the accused. In the case on hand, Ext.P1 mahazar would indicate that the disclosure was that the accused kept the casuarina rod at a place known to him near the reading room. The mahazar would also indicate that on the accused being taken near the reading room, he took MO1 casuarina rod from the weed on the side of the road. The relevant recitals in the mahazar read thus:

> "കരീലകുളങ്ങര PS ക്രൈം 1456/15 u/s 302 IPC പ്രകാരമുള്ള കേസ്സിലെ പ്രതിയുടെ കുറ്റസമ്മതമൊഴിയിൽ കാറ്റാടിക്കഴ ഞാൻ വായനശാലയ്ക്കടുത്ത് വച്ചിട്ടുണ്ട് എന്നെ കൊണ്ടുപോയാൽ കാറ്റാടിക്കഴ വച്ച സ്ഥലവും കാറ്റാടിക്കഴയും ഞാൻ കാണിച്ചു തരാം എന്ന് പ്രതി സ്വമേധയാ പറഞ്ഞ കുറ്റസമ്മത മൊഴിയിന്മേൽ പ്രതി നയിച്ചാനയിച്ച വഴിയേ പ്രതിയുമൊത്ത് സഞ്ചരിച്ച് കൊല്ലം - ആലപ്പുഴ ദേശീയപാതയിലുള്ള പുത്തൻറോഡ് ജംഗ്ഷനിൽ വടക്കുവശമെത്തി ടി ദേശീയപാതയുടെ കിഴക്കുവശം സ്ഥിതിചെയ്യുന്ന നമ്പർ രേഖപ്പെടുത്തിയിട്ടില്ലാത്ത കോൺക്രീറ്റ് ഇലക്ട്രിക്ക് പോസ്റ്റിന്റെ ചുവട്ടിൽ നിന്നും 3 m 10 cm വടക്കു പടിഞ്ഞാറു മാറി ടി ദേശീയപാതയുടെ കിഴക്കുഭാഗത്തായി വളർന്ന് നിൽക്കുന്ന പാഴ്ച്ചെടികൾ വകഞ്ഞു മാറ്റി ആയതിനുള്ളിൽ കിടക്കുന്ന കാറ്റാടിക്കഴ പ്രതി ചൂണ്ടിക്കാണിച്ച് തരികയാൽ ആയത് ബന്തവസ്സിലെടുക്കുന്നതിലേക്ക് കായംകുളം പോലീസ് ഇൻസ്പെക്ടർ K.S.ഉദയഭാനു

> 13.10.2015 വൈകി 6.20 മണിക്ക് സാക്ഷികളുടെയും മറ്റും സാന്നിധ്യത്തിൽ തയ്യാറാക്കുന്ന റിക്കവറി മഹസർ."

The recitals aforesaid in the mahazar would indicate that the material object was concealed by the accused in a place exclusively known to him and it could not have been discovered, but for the disclosure made by the accused to the police. The argument advanced by the learned counsel for the accused in this regard, in the circumstances, is only to be rejected.

23. From the discussion aforesaid, we are of the view that the prosecution has established the case beyond reasonable doubt that there was a scuffle between the deceased and the accused in the waiting shed in front of the Spinning Mill and that in the course of the scuffle, the accused struck the deceased using MO1 casuarina rod on his face and also on his legs and thereby caused his death. It is doubtful as to whether the casuarina rod with which the accused struck the deceased is one which was carried by him to the place of occurrence.

24. The next question is whether the proved facts

would disclose the offence of murder punishable under Section 302 IPC. As noted, one of the arguments advanced by the learned counsel for the accused is that the proved facts, at the most, would amount only to culpable homicide not amounting to murder, an offence punishable under Section 304 IPC. We have, in Criminal Appeal No.467 of 2017, explained the difference between the two offences and indicated the procedure to be followed for deciding the question whether in a given case, the offence is murder, or culpable homicide not amounting to murder. It was held by us in the said case that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', it would be convenient for the court to approach the problem in three stages. It was held that the question to be considered at the first stage would be whether the accused has done an act, by doing which he has caused the death of another. Proof of a causal connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. It was held that

if the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 IPC, is reached and it is at this stage, the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative, the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable.

25. With the aforesaid principles in mind, let us now consider the case on hand. We have already found that the prosecution has established that there was a scuffle between the deceased and the accused in the waiting shed in front of the Spinning Mill and that in the course of the scuffle, the accused struck the deceased using MO1 casuarina rod on his face and also on his legs and thereby caused his death. In other words, we are now at the stage of deciding the question whether the act of the accused amounts to culpable homicide

as defined under Section 299 IPC. The accused has no case that the proved facts would not amount to culpable homicide. The case of the accused is only that the proved facts would not amount to murder, but only culpable homicide not amounting to murder. This takes us to Section 300 IPC. The relevant portion of Section 300 reads thus:

> “**300. Murder**
>
> Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—
>
> Secondly —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> Thirdly —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> Fourthly —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk or causing death or such injury as aforesaid.
>
> x x x x x x x x x

The evidence does not indicate that the accused possessed

knowledge as regards the state of health of the deceased so that the harm caused by him is likely to be fatal. The evidence also does not indicate that the accused possessed knowledge that the act is so imminently dangerous that it must, in all probability, cause death or some bodily injuries as is likely to cause death, and that the same has been done without any excuse for incurring the risk of causing death or such injury as is mentioned above. On the other hand, the proved facts would certainly establish that the accused intended to cause bodily injury to the deceased. If that be so, the next question is whether the bodily injury intended by the accused is sufficient, in the ordinary course of nature, to cause death.

26. It was explained by us in Criminal Appeal No.467 of 2017 that the distinction lies between a bodily injury intended likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. In other words, if it is found that the bodily injury intended is only likely to cause death, it is culpable homicide not amounting to murder and if it is found that the bodily injury intended is sufficient in the ordinary course of nature to cause death, it is murder. It was

also explained by us in the said case that the difference is one of the degree of probability of death resulting from the intended bodily injury. The relevant passage in the judgment reads thus:

> “In Clause (3) of S.300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of S.299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of S.299 and clause (3) of S.300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of S.299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury.... sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.”

In the light of the above decision, what remains to be seen is whether the injuries of the type caused by the accused is

sufficient in the ordinary course of nature to cause death. It was clarified by the Apex Court in **Virsa Singh v. State of Punjab**, AIR 1958 SC 465 that this part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. It is trite that if the distinction between murder and culpable homicide not amounting to murder is overlooked, it would result in miscarriage of justice. We have, in the circumstances, closely examined the injuries. As rightly pointed out by the learned counsel for the accused, there were no injuries on the vital parts of the body of the deceased and that the weapon used was only a wooden rod. The injuries which led to the death are only in the nature of lacerations and contusions. As such, we are of the view that the injuries intended cannot be treated as sufficient in the ordinary course of nature to cause death. In other words, inasmuch as it is found that the act was done with the intention of causing bodily injuries as is likely to cause death, the offence made out is only the offence punishable under Part-I of Section 304 IPC.

27. It is seen that the accused is in custody since 31.10.2015, i.e., seven years and ten months. According to us,

the period of imprisonment already undergone by the accused would serve the ends of justice.

In the result, the appeal is allowed in part, the conviction of the accused is altered to Part-I of Section 304 IPC and the period of imprisonment already undergone by the accused is treated sufficient for the offence committed.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
C.S.SUDHA, JUDGE.

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