IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 15TH DAY OF MARCH 2024 / 25TH PHALGUNA, 1945

CRL.A NO. 1129 OF 2018

CRIME NO.784/2016 OF Karunagapally Police Station, Kollam AGAINST THE JUDGMENT DATED 07.04.2018 IN SC NO.575 OF 2016 OF III ADDITIONAL DISTRICT COURT, KOLLAM ARISING OUT OF THE ORDER/JUDGMENT IN CP NO.36 OF 2016 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, KARUNAGAPPALLY

APPELLANT/SOLE ACCUSED IN THE CASE:

ANILKUMAR,AGED 32 YEARS S/O.KUMARAN, NOW DETAINED IN CENTRAL PRISON C.NO.2601, POOJAPPURA, THIRUVANANTHAPURAM-695 012 AND ORIGINALLY RESIDED AT POCHAYIL VADAKKATHIL VEEDU, KESAVAPURAM MURI, AYANIVELIKULANGARA VILLAGE, KARUNAGAPALLY TALUK, KOLLAM DISTRICT

RESPONDENT:

**STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.**

OTHER PRESENT:

PP: ALEX M THOMBRA, VINU RAJ R., STATE BRIEF

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 21.02.2024, THE COURT ON 15.03.2024 DELIVERED THE FOLLOWING:

“C.R.”

J U D G M E N T

Dr. Kauser Edappagath, J.

The sole accused in SC No.575/2016 on the file of the IIIrd Additional Sessions Court, Kollam (for short, 'the trial court'), who was convicted for fratricide, is the appellant before us.

2. The appellant, Anil Kumar, and the deceased, Sunil Kumar, were brothers. They were residing along with their parents, PW2 Kumaran and PW5 Retnamma, at the house viz. Pochayil Vadakkathil Veedu, Karunagapally, belonging to PW2. It is a small, thatched house consisting of two bedrooms and a hall, as evident from Ext.P8 scene plan and Ext.P9 mahazar. The alleged incident took place in the southern bedroom of the said house on 5/3/2016 at 5.30 p.m. Another son of PW2 and PW5 viz., Suresh (PW1) was residing along with his daughter PW3, Nisha and son Nithin in the house situated adjacent to the house where

the incident took place.

3. The appellant and the deceased were working as tree climbers. The prosecution version is that in the morning hours on the date of the incident, the deceased, Sunil Kumar, took away a rope belonging to the appellant, Anil Kumar, which he used for his work and kept at the house without his permission. When the deceased came back to the house at 4.30 p.m., the appellant asked him for the rent of the rope. Then, an exchange of words and altercation occurred between them. Shortly thereafter, by about 5.30 p.m., Sunil Kumar went to the southern bedroom of the house to get oil. At that time, the appellant, Anil Kumar, who was sitting in the northern bedroom, rushed to the southern bedroom, pushed aside PW5, her mother who was standing there, caught hold of the neck of the deceased Sunil Kumar and stabbed his left chest with MO2 knife. He succumbed to the injuries at the hospital on the same night.

4. PW1 Suresh went to the Karunagapally police station at around 8.30 p.m. and gave Ext.P1 FI Statement to PW16, S.I of

Police. Based on Ext.P1, PW16 registered Ext.P10 F.I.R. against the appellant under Sections 294(b), 201, 449, 506(ii) and 302 of IPC. PW17, C. I of Police, Karunagapally, took up the investigation. After investigation, he filed a final report before the Judicial First-Class Magistrate Court, Karunagapally. The learned Magistrate, after completing the statutory formalities, committed the case to stand trial before the Sessions Court, Kollam. The case was then transferred to the trial court for trial and disposal.

5. The trial court, after hearing the learned Prosecutor as well as the appellant, framed the charge against the appellant under Sections 201, 449, 506(ii) and 302 of IPC. The appellant denied the charge and pleaded not guilty. The parties went on trial. The prosecution examined PWs1 to 17 and marked Exts.P1 to P23. MO1 to MO8 were identified. The appellant was questioned under Section 313 of Cr.P.C. He denied all the incriminating circumstances which were put to him. On the side of the defence, Exts.D1 and D2 were marked. After trial, the trial court found the appellant guilty of the offences punishable under

Sections 201, 449 and 302 of IPC, and he was convicted for the said offences. He was acquitted of the offence charged under Section 506(ii) of IPC. The trial court sentenced the appellant to undergo rigorous imprisonment for life and to pay a fine of ₹1,00,000/-, in default to suffer rigorous imprisonment for one year for the offence under Section 302 of IPC, to undergo rigorous imprisonment for ten years and to pay a fine of ₹50,000/- in default to suffer rigorous imprisonment for six months for the offence punishable under Section 449 of IPC, to undergo rigorous imprisonment for two years and to pay a fine of ₹5,000/- in default to suffer rigorous imprisonment for ten days for the offence punishable under Section 201 of IPC. The sentence was ordered to run concurrently. Out of the fine amount, ₹1,25,000/- was ordered to be paid to the legal heirs of the deceased as compensation under Section 357(1) of Cr.P.C.

6. As the appellant was not represented by his own lawyer, Adv. Vinu Raj R. was appointed as crown counsel to render legal aid to him. We have heard the learned counsel for

the appellant as well as Sri.Alex M.Thombra, the learned Public Prosecutor.

7. The learned counsel appearing for the appellant impeached the findings of the trial court on the appreciation of evidence and the resultant finding as to guilt. The learned counsel submitted that PW1 and PW5, whose evidence was heavily relied on by the trial court, are interested witnesses. The learned counsel further submitted that even if the prosecution case is believed in its entirety, still on the basis of the materials brought on record by the prosecution, the offence under Section 299 of IPC punishable under Section 304 (II) of IPC alone is attracted. On the other hand, the learned Public Prosecutor supported the findings and verdict of the trial court and submitted that the prosecution had succeeded in proving the case beyond reasonable doubt.

8. The deceased, who sustained severe injuries on the left side of the front of the chest, succumbed to the injuries shortly after the occurrence at the hospital. PW6 is the doctor

who conducted the autopsy on the body of the deceased and issued Ext.P4 certificate. The evidence of PW6 coupled with Ext.P4 unmistakably shows that the deceased died because of the injury sustained on the left side of the front of the chest, which has been described as injury No. (i) in Ext.P4. PW6 deposed that the said injury is a fatal one and is sufficient in the ordinary course of nature to cause the death of a person. The crucial question is whether the said injury was intentionally inflicted by the appellant as alleged by the prosecution.

9. The prosecution mainly relied on the oral evidence of PWs1, 3, 5 and 6, Exts.P1, P1(a), P1(b) and P4 to prove the incident and to fix the culpability of the accused. PW5 is the ocular witness. PWs1 and 3 are the witnesses who witnessed the incident in part. While appreciating the evidence of PWs1, 3, and 5, certain specific admissions made by the appellant are to be borne in mind. The appellant has admitted his presence, the presence of the deceased, and the presence of PW5 at the scene of occurrence at the time of the incident. He also admits the

altercation between him and the deceased as well as the stab injury sustained by the deceased on his chest. But his case is that the injuries were not sustained to the deceased in the manner and fashion as alleged by the prosecution and that he was not at all responsible for the injuries sustained by the deceased. According to him, the incident occurred while the deceased, who was in a drunken state, attacked him with a knife, and he tried to save himself.

10. PW5, the mother of the appellant and the deceased, is the key witness relied on by the prosecution. She was an ocular witness. She deposed that on 5/3/2016 in the morning, the deceased Sunil Kumar took away the rope belonging to the appellant Anil Kumar without his permission. When the deceased Sunil Kumar brought back the rope in the evening, the appellant Anil Kumar asked for its rent. He was carrying MO1 stick in his hand. Then, an exchange of words occurred between them. PW1 Suresh and PW3 Nisha were sitting in the verandha of their house. The deceased complained to Suresh that the appellant

was attempting to beat him and asked him to come to his house. The appellant put down MO1, went inside the house, and sat on the cot in the northern bedroom. PW5 was standing in front of the southern bedroom. At that time, the deceased Sunil Kumar came to the southern bedroom to get oil for bathing. Seeing this, the appellant who was at the northern bedroom rushed towards the deceased Sunil Kumar, caught hold of his neck with his left hand, pressed him towards the wall and stabbed his left chest forcefully with MO2 knife. She further deposed that she hit on the back of the appellant. Then deceased Sunil Kumar came outside the house holding his bleeding chest with his hand, walked towards the house of PW1 Suresh and told Suresh that the appellant stabbed him. She also told PW1 that the appellant stabbed him. The deceased took a few steps backward and fell on the ground. The appellant came out of the house carrying blood-stained MO2 in his hand. He wiped off the blood from the knife and sat on the head side of the deceased with a smiling face. She further deposed that PW3 Nisha who was present there then called PW2

Kumaran over phone. PW2 came to the house after a short while and the deceased was taken to the hospital where he was declared dead. She also spoke of the motive. She identified MO1 and MO2 as well.

11. PW1 is the brother of the appellant and the deceased. He was an eyewitness who saw the incident partly. He gave Ext.P1 FIS to the police, based on which Ext.P10 FIR was registered. His evidence would show that while he along with PW3 were sitting in the verandha of his house, he saw the appellant and the deceased quarrelling over the rope took away by the latter without the permission of the former. The deceased complained to him that the appellant was attempting to beat him. PW5 called him inside the house. At that time, the appellant threatened him with dire consequences if he went to his house. The appellant then went inside the house. After a short while, the deceased also went inside the house to take oil for bathing. PW5 followed him. Thereafter, he heard a cry from inside the house. After two minutes, the deceased came out of the house with a

bleeding chest and told him that the appellant stabbed him. The deceased took a few steps and fell on the floor. After half an hour, PW11 Thampan and one Joy came to the house and took the deceased into an auto to the Karunagapally Government Hospital, where he was reported dead later. He identified MO1 and MO2. PW3, the daughter of PW1, also deposed in tune with the evidence given by PW1.

12. The learned counsel for the appellant submitted that it has come out in the evidence that PW1 was not on good terms with the appellant, and hence, his evidence cannot be relied on. The counsel further submitted that PW5 spoke against the appellant at the instance of PW1. We are unable to subscribe to the said argument. PW5 deposed that PW1 and the appellant were on cordial terms. It is settled that the credibility of a witness is not to be judged merely on the basis of his strained relationship with the accused[1]. PW5 categorically deposed that she has the same bond towards the appellant and the deceased. No mother

[1] Kapildeo Mandal & Others v. State of Bihar, AIR 2008 SC 533

would unnecessarily implicate her own son in the murder of her other son. Her evidence appears to be quite natural and reliable. She deposed the way in which the appellant assaulted the deceased and the nature of the weapon (MO2) which had been used and part of the body of the deceased where the injury was inflicted. She identified the weapon before the police as well as before the court. There is nothing to disbelieve the evidence of PW5. Nothing has been elicited in the cross-examination of PWs1 and 3 also to disbelieve their evidence regarding the incident. PWs1, 3 and 5 have given reliable, consistent and credible versions of the crime, and their evidence inspires confidence. All of them identified the appellant at the dock as well as MO1 and MO2 weapons. On perusal of their evidence, we could not find any material contradictions or omissions. It is pertinent to note that their presence at the place of the incident was not challenged by the defence during cross-examination. Therefore, we hold that the evidence of PWs1, 3 and 5 can be safely relied on to prove the incident and to fix the culpability on the

appellant. Ext.P1 FIS given immediately after the incident corroborates the testimony of PW1.

13. Much reliance is placed by the prosecution on the statement of the deceased made to PW1 that it was the appellant who stabbed him. PW1, PW3 and PW5 clearly deposed that immediately after the incident, the deceased came out of the house and told PW1 that the accused/appellant stabbed him. PW1 has stated so in Ext.P1 as well. The said portion in the FI statement has been separately marked as Ext.P1(a).

14. Sections 6 and 32 of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae.* The essence of the doctrine of *res gestae* is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of

such statement or fact in relation to the fact in issue. It is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter[2]. Illustration (a) to the said section is important, and it reads thus:

> *"A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by - standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."*

15. Section 32 of the Evidence Act deals with the cases in which statement of relevant fact by person who is dead or cannot be found etc., is relevant. Clause (1) of Section 32 makes relevant what is generally described as a dying declaration. It essentially means a statement made by a person as to the cause of his death or as to the circumstance of the transaction resulting in his death. The principle on which this species of evidence is admitted in evidence is indicated in legal maxim *“Nemo*

[2] Gentela Vijayavardhan Rao and Another v. State of A.P., AIR 1996 SC 2791

moriturus praesumitur mentire" - a man will not meet his maker with a lie in his mouth.

16. Though a dying declaration is entitled to great weight, it should be of such a nature as to inspire full confidence of the court in its correctness. The court must be satisfied that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant[3]. If the court finds that the incriminatory dying declaration brings out the truthful position, particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made was established, and the other evidence supports its contents, it can be acted upon[4]. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence[5]. Dying declaration can be the sole basis

[3] P.V.Radhakrishna v. State of Karnataka AIR 2003 SC 2859

[4] Jagbir Singh v. State (NCT of Delhi) (2019) 8 SCC 779

[5] Rasheed Beg and Others v. State of Madhya Pradesh (1974) 4 SCC 264

of the conviction, if it inspires full confidence of the court, without any further corroboration[6]. However, where there is any suspicion over the veracity of the dying declaration, it will only be considered as a piece of evidence but cannot be the basis for conviction[7].

17. The appellant is charged with the murder of Sunil Kumar by stabbing. Whatever the deceased said immediately before or after the occurrence to form part of the transaction is a relevant fact under Section 6 of the Evidence Act. Sunil Kumar, who suffered the stab injury, had stated immediately after the incident to PW1 that it was the appellant who had done it. There was no time gap at all between the occurrence and the statement given by the deceased to PW1. Before the said statement was given to PW1, nobody had met the appellant or the deceased. The deceased had no opportunity to discuss with anybody else so as to implicate the appellant in the occurrence falsely. He had no opportunity to deliberate. The statement of

[6] Naeem v. State of Uttar Pradesh 2024 KHC OnLine 6112

[7] Irfan @ Naka v. State of U.P, 2023 SCC OnLine SC 1060

the deceased was spontaneous and clear. It was devoid of fabrication. It remains unchallenged. The evidence of PWs1, 3 and 5 show that the deceased was in a fit state of mind while making the declaration. The said declaration made by the deceased to PW1 is so intimately interwoven with the principal event and so it can be regarded as a part of the transaction itself. The said statement is contemporaneous with the transaction in issue in this case. It is a statement made by a person as to the cause of his death So, it has to be held that the evidence of PWs 1, 3 and 5 that the deceased had told PW1 that it was the appellant who stabbed him would become admissible under Sections 6 and 32(1) of the Evidence Act and it is a vital piece of evidence against the appellant.

18. PW17, the investigating officer, gave evidence that on the next day of the incident at 11.00 0' clock, he reached the scene of occurrence and seized MO1 and MO2. His evidence, coupled with Ext.P9 scene mahazar, would establish the seizure of MO1 and MO2 from the scene of occurrence. The evidence of

the ocular witnesses and the other witnesses mentioned above is corroborated by medical evidence as well. PW6 is the doctor who conducted the autopsy on the body of the deceased. Ext.P4 is the post-mortem certificate issued by him. PW6 deposed that the death was caused due to the incised penetrating injury sustained to the left chest of the deceased, which has been described as injury No.(i) in Ext.P4. PW6 deposed that the said injury could be inflicted by MO2 weapon. MO2 weapon was shown to him. He also deposed that the investigating officer showed MO2 weapon to him. The ocular witness, PW5, clearly and categorically deposed that the appellant used MO2 to inflict stab injury on the deceased. PW5 identified MO2 during the investigation as well as at the court. Thus, the medical evidence adduced by the prosecution also supports the oral evidence adduced by it.

19. The next is the motive. It is trite that when there is direct evidence as to how the death was caused, the existence of a motive may not be a relevant factor. The motive is immaterial

in a case when it was built up with ocular evidence[8]. According to the prosecution, the motive is enmity in connection with the dispute regarding the rent of a rope which belonged to the appellant and was taken by the deceased without permission. PW1 and PW5 clearly spoke up about the motive. That apart, the evidence of PW12, Shivanandan, who was a co-worker of the deceased, would also prove that, on the date of the incident, in the morning, when the deceased came for work, he had brought with him a rope belonging to the appellant.

20. Thus, on a careful examination and appreciation of the entire evidence on record discussed above, we have no hesitation to come to the conclusion that the prosecution evidence successfully established that the injuries which caused the death of the deceased were inflicted on the deceased by the appellant. The prosecution has succeeded in proving beyond reasonable doubt that the deceased had met with a homicidal death at the hands of the appellant.

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[8] Sheo Shankar Singh v. State of Jharkhand and Another (2011) 3 SCC 654

21. The next question to be considered is the offence that is committed by the appellant on the findings given above. The learned counsel appearing on behalf of the appellant strongly submitted before us that if at all the case existed against the appellant, only Section 304 Part II was attracted. According to the learned counsel, the circumstances do not warrant a conclusion that the appellant intended to cause the death of the deceased or to cause such bodily injury as he knew is likely in the ordinary course to cause the death. The learned counsel further submitted that the true facts in the case would only show that the injuries have been caused by the appellant on the deceased without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner and therefore Exception 4 to Section 300 of I.P.C. has been clearly attracted. In these circumstances, the appellant could be convicted only for culpable homicide not amounting to murder under Section 304 Part II of IPC, added the counsel.

22. Sections 299 and 300 of the IPC deal with the definition of culpable homicide and murder, respectively. Section 299 defines culpable homicide as the act of causing death; (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the Section makes it clear that the first and the second clause of the Section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression “intent” and “knowledge” postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide, *i.e.* mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. Section 300, I.P.C, however, deals with murder although there is no clear definition of murder provided in Section 300, IPC. In the scheme of the Penal Code, 'culpable homicide’ is

genus and 'murder' is its species. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is what may be called culpable homicide of the first degree. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide, and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

23. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is

'murder' or 'culpable homicide' not amounting to murder' on the facts of the case, it will be convenient for it to approach the problem in three stages. 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 such 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. 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. This is the stage at which 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 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. If this

question is found positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, Indian Penal Code. The Apex Court has consistently applied the aforesaid principles in several decisions[9].

24. Section 300 of IPC thirdly says that “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”. The prosecution must prove the following facts before it can bring a case under Section 300, “thirdly”: (i) first, it must establish, quite objectively, that a bodily injury is present; (ii) secondly, the nature of injury must be proved; (iii) thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these elements are proved to be present, the

[9] Ruli Ram and Another v. State of Haryana, (2002) 7 SCC 691

enquiry proceeds further, and (iv) fourthly, it must be proved that injury of the type thus described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution, the offence is murder under Section 300, “thirdly”. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause any injury of a kind that is sufficient to cause death in the ordinary course of nature. It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be present, the rest of the enquiry is purely objective, and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death[10].

[10]Virsa Singh v. State of Punjab AIR 1958 SC 465

25. In the instant case, the injury sustained to the deceased was on the vital part of his body, that is, on the chest. The said injury has been described as injury No. (i) in Ext.P4 post-mortem certificate. PW6 doctor deposed that the said injury is a fatal one and is sufficient in the ordinary course of nature to cause the death of a person. He also deposed that the said injury could be inflicted by MO2 weapon. PW5, the ocular witness, deposed that the appellant used MO2 to inflict stab injury on the deceased. According to the defence, the incident occurred while the deceased, who was in a drunken state, attacked him with a knife, and he tried to save himself. But there is absolutely nothing on record, even remotely, to support the said defence theory. PW5 categorically deposed that the appellant, who was sitting on the cot in the northern bedroom, rushed to the southern bedroom, seeing the deceased, caught hold of his neck with his left hand, pressed him towards the wall and stabbed his left chest with MO2, knife. Her evidence would further show that the appellant used tremendous force and

stabbed the deceased indiscriminately. It has also come out in evidence that after stabbing the deceased Sunil Kumar, the appellant came out of the house carrying blood-stained MO2 in his hand, wiped off the blood from the knife and sat on the head side of the deceased with a smiling face. From these circumstances, the intention on the part of the appellant to cause bodily injury is evident. It is settled that the nature of the intention could be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant to the death. Nothing has been brought out in the evidence to suggest that the incident in question, which led to the death of Sunil Kumar, took place due to a sudden fight that ensued between the appellant and the deceased without any premeditation and the act of the appellant in stabbing the deceased was an outcome of the heat of passion or upon sudden quarrel so as to attract Exception 4 to Section 300 of IPC as alternatively pleaded by the appellant. Therefore, the act of the appellant falls squarely under Section 300 thirdly of the

IPC, punishable under Section 302 of the IPC.

26. Section 201 of IPC deals with causing the disappearance of evidence of an offence or giving false information to screen the offender. PW3 and PW5 deposed that, immediately after the incident, the appellant came out of the house carrying blood-stained MO2 in his hand and wiped off the blood from the knife. The said evidence was not discredited in cross-examination. It was found in the scientific examination that though MO2 contained blood, it was insufficient to determine the origin or group. It supports the prosecution's version that the appellant wiped off the blood from MO2 to cause the disappearance of evidence of the offence. As stated already, evidence has come out that the appellant used MO2 for the commission of the offence. Thus, the offence under Section 201 of IPC stands proved.

27. What remains is the offence under Section 449 of IPC. The charge against the appellant is that he committed the murder of the deceased after committing house-trespass. In

common parlance, trespass means entering another's property without his express or implicit permission or authority. Section 441 defines the offence of criminal trespass. Going by the said provision, the essential ingredients for the offence of criminal trespass are:

(i) Entry into or upon property in the possession of another;

(ii) If this entry is lawful, then unlawfully remains upon such property;

(iii) Such entry or unlawful remaining must be with intent:

a) To commit an offence; or

b) To intimidate, insult or annoy the person in possession of the property.

What is relevant under Section 441 is possession and not ownership. A reading of the above provision makes it clear that to attract the offence of criminal trespass, the property entered into by the offender must be in possession of another. In other words, the property into which the offender entered must not be in his possession. So also, when the property is in the joint possession

of the accused and the victim, the latter's entry thereon is lawful and cannot be termed as criminal trespass. There cannot be criminal trespass into a property in which the accused himself is in joint possession. Criminal trespass under Section 441 or house-trespass with the intention to commit an offence punishable with death under Section 449 can be said to be committed only when a person enters or upon any property/house which is not in his possession, either exclusive or joint, but in the possession of another. As stated already, it is an admitted case that the house in question belongs to PW2 and the appellant and the deceased, along with PW2 and PW5, are in possession of the same. They were living jointly in the said house. That being so, it cannot be said that the appellant's entry into the said house was unlawful and amounts to criminal trespass. The finding of the trial court that even if the entry of the appellant into the house was considered lawful, the offence is still attracted since he unlawfully remained there with the intent to commit an offence cannot be sustained inasmuch as the word used in the second part of

Section 441 is ‘such property’, meaning thereby the ‘property in the possession of another’ which does not take in the property in the joint possession of the accused. Where no offence of criminal trespass is made out, no offence under Section 449 could be maintained. Hence, the trial court committed illegality in convicting the appellant under Section 449 of IPC. The appellant is entitled to be acquitted of the said offence.

For the reasons stated above, we set aside the conviction of the appellant under Section 449 of IPC and acquit him of the said offence. We confirm the conviction and sentence of the appellant under Sections 302 and 201 of IPC. The appeal stands allowed in part as above.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-

DR. KAUSER EDAPPAGATH
JUDGE

Rp