IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

FRIDAY, THE 18TH DAY OF FEBRUARY 2022 / 29TH MAGHA, 1943

CRA(V) NO. 17 OF 2019

AGAINST THE ORDER/JUDGMENT IN SC 821/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT,MOOVATTUPUZHA

CP 17/2015 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,KURUPPUMPADY

APPELLANT/WIFE OF DECEASED:

ALLI NOUSHAD, AGED 39 YEARS
W/O.LATE NOUSHAD,
KANAMPURAM HOUSE,
VATTAKKATTUPADI, IRINGOLA.P.O.
PERUMBAVOOR.

BY ADVS.
P.VIJAYA BHANU (SR.)
SRI.P.M.RAFIQ
SRI.M.REVIKRISHNAN
SRI.V.C.SARATH
SRI.VIPIN NARAYAN
SRI.AJEESH K.SASI
SMT.POOJA PANKAJ
SRUTHY N. BHAT

RESPONDENTS/ACCUSED AND STATE:

1 RASHEED, AGED 35 YEARS
S/O.ALI, KOTTIKKATHOTTATHIL HOUSE, INALYPARAMBU BHAGOM, NORTH EZHIPRAM, MARAMBILLY VILLAGE, PIN-683547

2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682031

BY ADV SRI.K.RAKESH

OTHER PRESENT:

SRI.V.S.SREEJITH, PUBLIC PROSECUTOR

THIS CRL. APPEAL BY DEFACTO COMPLAINANT/VICTIM HAVING BEEN FINALLY HEARD ON 25.11.2021 ALONG WITH UNNUMBERED CRIMINAL APPEAL [ZCRL.APPEAL NO.11658 OF 2020(FILING NO.)], THE COURT ON 18.02.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

FRIDAY, THE 18TH DAY OF FEBRUARY 2022 / 29TH MAGHA, 1943

UNNUMBERED CRL.A OF 2020

[(ZCRL.APPEAL NO. 11658 OF 2020(FILING NO.)]

CRIME NO.929/2015 OF Kuruppampady Police Station, Ernakulam

AGAINST THE ORDER/JUDGMENT IN SC 821/2015 OF ADDITIONAL DISTRICT & SESSIONS COURT,MOOVATTUPUZHA

CP 17/2015 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,KURUPPUMPADY

APPELLANT/COMPLAINANT:

STATE OF KERALA
REP.BY THE STATE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADV PUBLIC PROSECUTOR SRI.V.S.SREEJITH

RESPONDENT/ACCUSED:

RASHEED, AGED 40 YEARS,
S/O.ALI, KOTTIKKATHOTTATHIL HOUSE,
INALYPARAMBU BHAGOM, NORTH EZHIPRAM, MARAMBILLY VILLAGE, PIN - 683 107.

THIS UNNUMBERED CRIMINAL APPEAL [ZCRL.APPEAL NO.11658 OF 2020(FILING NO.)] HAVING BEEN COME UP FOR ORDERS ALONG WITH CRL.APPEAL (V) 17/2019 ON 25.11.2021, THE COURT ON 18.02.2022 DELIVERED THE FOLLOWING:

'C.R.'

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

Criminal Appeal (V) No.17 of 2019

and

Crl.M.A.No.1 of 2020

in

Unnumbered Crl.Appeal of 2020
[ZCRA 11658/2020]

Dated this the 18th day of February, 2022

J U D G M E N T

Jayachandran, J.

"I think my wife be honest, and think she is not.

I think thou are just, and think thou are not."

(Act II, Scene 3)

"Ay, let her not and perish and be
Damned tonight for she shall not live"

(Act IV, Scene 1)

-'The Tragedy of Othello, The Moore of Venice'- William Shakespeare.

Othello's syndrome is potentially lethal. Several murders transcending geographical barriers are rooted in this mysterious phenomenon of human mind. An accident apparent has a serpentine effervescence in the murder underneath. We, in this appeal, are called upon to test the authenticity of the Prosecution version, in the midst of inherent limitations in an appeal against acquittal.

2. Under challenge in the Criminal Appeals above referred is the judgment dated 25.5.2019 of the Additional Sessions Court, Muvattupuzha in S.C.No.821/2015. The impugned judgment acquitted the accused, who was charged with offences under Sections 302 and 506(i) of the Indian Penal Code. Criminal Appeal No.17/2019 is preferred by the wife of the deceased/victim under the Proviso to Section 372 of the Cr.P.C. The appeal preferred by the State under Section 378 of the Cr.P.C is not numbered, since Crl.M.A.No.1 of 2020 for condoning the delay of 349 days in preferring the appeal has not been allowed.

3. The prosecution allegations are to the following effect:

The accused, Rasheed, was working as Manager in a plywood company owned by deceased, Noushad. Infidelity on the part of his wife predominated the mind of the accused and he suspected an illicit relationship by and between herself and the deceased, manifested by their frequent contacts over telephone. Out of this enmity, the accused, with the intention of doing away with the deceased, rammed his Maruti Ritz car bearing reg.no.KL-40-H-2322 in the white bullet motor bike bearing reg.no.KL-43-A-2721 driven by the deceased on 7.5.2015 at 7.45 a.m. at Kayyanippadi, Rayamanglam Panchayat. The deceased initially fell down on the wind shield of the offending car and thereafter, to the road margin on the southern side. The accused got out of the car, with a knife on his hand, and stabbed the deceased on his neck thrice, inflicting fatal injuries, to which the deceased succumbed, thus committing offences under

Sections 302 and 506(1) of the Penal Code.

4. The prosecution examined 21 witnesses, through whom Exts.P1 to P38 were marked and MO1 to MO16 were identified. Upon examining the accused under Section 313 Cr.P.C., DW1 and DW2 were examined as defence witnesses. Exts.D1 to D4 were marked. In acquitting the accused, the learned Sessions Judge frowned upon the evidence of PW1-the solitary eye witness-and discarded the evidence adduced by the other witnesses, as unsafe to rely upon.

5. Before addressing the facts and evidence, we will first address the scope, limitation and the principles governing an appeal against acquittal. The jurisdiction of the appellate court is co-extensive with that of trial court in the matter of assessment, appraisal and appreciation of evidence, as also, in determining the disputed issues [**Rajan v. State of M.P. - (1999) 9 SCC 29**]. However, it is cardinal to bear in mind the following principles enumerated by the Hon'ble

Supreme Court, while considering an appeal against an order of acquittal:

1. In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.
2. The High Court has the power to reconsider the whole issue, reappraise the evidence, and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.
3. Before reversing the findings of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.
4. In reversing the finding of acquittal, the

High Court had to keep in view the fact that the presumption of innocence stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

5. If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

6. The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

7. The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

8. Unless the High Court arrives at a definite

conclusion that the findings recorded by trial Court are perverse, it would not substitute its own view on a totally different perspective.

9. The appellate Court in considering the appeal against judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

[See in this regard:

1. **Sheo Swarup** v. **King Emperor [AIR 1944 PC 227]**
2. **Noor Khan** v. **State of Rajasthan [AIR 1964 SC 286]**
3. **Khedu Mohton & Ors** v. **State of Bihar [(1970) 2 SCC 450]**
4. **C.Antony** v. **K.G.Raghavan Nair [(2003) 1 SCC 1]**
5. **Ramanand Yadav** v. **Prabhu Nath Jha [AIR 2004 SC 1053]]**
6. **Chandrappa** v. **State of Karnataka [(2007) 4 SCC**

415]

7. **Syed Peda Aowalia** v. **Public Prosecutor [AIR 2008 SC 2573]**

6. In **V.N.Ratheesh** v. **State of Kerala [AIR 2006 SC 2667],** the Hon'ble Supreme Court held that, if the judgment impugned is clearly unreasonable, where relevant and convincing materials have been unjustifiably eliminated, it is a compelling reason for interference.

7. Having taken note of the contours of an appeal under the Proviso to Section 372 Cr.P.C., we will refer to the arguments of the respective parties.

Arguments of the appellant/victim

8. Sri.P.Vijayabhanu, learned counsel for the appellant/victim submitted that the learned Sessions Judge had gone off tangent and turned a Nelson's eye to the legally recognisable evidence adduced by the prosecution, including that of an

eye witness (PW1). Learned counsel would elaborate that PW1 tendered a believable account of what transpired on the fateful day, particularly, about the fact that the accused had intentionally collided his Maruti Ritz car on the bullet motorcycle driven by the victim. He also spoke clearly about the incident, where the accused got out his car with MO1 knife, talked to the deceased and then stabbed him on the neck thrice. He also deposed that PW3 told him that he was prevented from going near the injured/deceased. To eschew the evidence tendered by PW1, the learned Sessions Judge proceeded on mere surmises and conjectures, generalising human reaction to a given situation and finding fault with PW1 for not reacting/responding in the so called ordinary course. Learned counsel for the appellant then invited the attention of this Court to the evidence tendered by PW2 and PW3, which corroborates the version of the eye witness (PW1), substantially. PW2 is the one who gave Ext.P2 F.I.S. and he tendered evidence in accord

therewith. The version of PW2 would clearly reveal that PW2, along with his father's brother Sidhique, reached the spot to see the deceased lying there in a pool of blood; and the accused sitting in a granite stone nearby. Thus, at the spot of occurrence, there were only the deceased and the accused. More important is the evidence tendered by PW3, who is residing nearby. He clearly spoke of the accused showing gesture not to come to the scene of occurrence, when PW3 attempted to go near the deceased. All the three witnesses, PW1 to PW3, gave evidence regarding the accident between the Maruti Ritz car and the bullet motorcycle, both vehicles being found at the spot of occurrence. There was damage to both vehicles and the bullet motorcycle was lying down. Another clinching evidence, which was eschewed by the learned Sessions Judge, is the availability of the blood group of the deceased (B+) on the dress worn by the accused (MO2 shift and MO3 dhothi) at the time of incident. The evidence in this regard was adduced by PW21-the investigating officer-, as

also, by PW14-the Doctor who conducted the autopsy. The dress worn by the accused was recovered as per Ext.P6 mahazar. The recovery is seen supported by the versions of PW7 and PW8. As regards the motive, the learned counsel would submit that the statement given by none other than the wife of the accused (PW17) would establish the same. Although she was hesitant to speak initially-wherefore she was declared hostile-she deposed that on the day before the incident, there was a quarrel between herself and the accused over her chat with the deceased over phone. This supports the very prosecution case. PW17 also answered in the affirmative to the suggestion that her husband left her house in his car, immediately after the quarrel. Learned counsel seriously attacked the course adopted by the learned Sessions Judge in examining MO1 knife by himself, to ascertain blood stain on the same. The course adopted is surely impermissible, besides being illogical to search for blood stain in a knife after 4 years from the incident. Thus, the

evidence of PW1 to PW3, the presence of blood with the Rh B+ (same as that of the deceased) in MO2 and MO3 dresses worn by the deceased, the motive established, the damage caused to both the vehicles as proved in evidence, the recovery of MO1 knife and the dress worn by the accused under Section 27 of the Evidence Act, coupled with the total denial on the part of the accused would unerringly and clinchingly establish the guilt of the accused, submits the learned counsel. In the above setting, the judgment impugned acquitting the accused can hardly be sustained in law and the same is contrary to the only possible view regarding the guilt of the accused, concludes the learned counsel.

9. Learned Public Prosecutor adopted the arguments of learned counsel for the appellant/victim referred above, besides pointing out that motive, even if not proved, is inconsequential, in cases where there is direct evidence. As regards the passive reaction of PW1

upon witnessing the incident–frowned upon by the learned Sessions judge as unnatural and improbable–the learned Public Prosecutor submitted that PW1 was in a state of shock, as brought out in evidence.

10. *Per contra*, learned counsel for the respondent/accused supported the judgment in all respects, while submitting that the prosecution had failed to establish the guilt of the accused, beyond reasonable doubt. Learned counsel first pointed out that PW1 cannot be believed at all for the following reasons:

a) His presence in the scene of occurrence was not identified/spoken to by any witness. PW2 referred to the presence of PW1 only in re-examination, that too, in answer to a leading question.

b) PW1, who claimed to have witnessed the accused stabbing the deceased thrice on his neck, had not disclosed the same to anybody, which conduct is not merely strange, but unbelievable also.

c) PW1 went missing for a day immediately after

the incident. The version of PW1 in this regard that he went to his native place at Alleppy can only be taken with a pinch of salt.

d) PW1 has not done anything to save the injured/deceased. Nor did he inform the Police about the incident.

e) He did not even inform the incident to Neena Kunju, the brother of the deceased, with whom PW1 claims close acquaintance. The prevaricating stand of PW1 in this regard in cross examination make his evidence, all the more, suspicious.

f) PW1 did not make a cry or a noise upon seeing the ghastly incident. His version that he was in a state of shock, as elicited in the last portion of his cross examination, can hardly be believed.

11. Learned counsel for respondent/accused then pointed out that the evidence tendered by PW2 and PW3 are also not convincing and beyond suspicion. The version that PW2 asked the people who had gathered in the scene of occurrence as to why they have not taken the deceased to hospital and the

alleged version of a youngster that the accused prevented him from going near the deceased, is nothing but a cock and bull story, designed to suit the prosecution version. Learned counsel argued that there was no necessity or occasion for the accused to purchase MO1 knife, when they had allegedly gone to Bangalore for purchasing granite, as spoken to by PW 11. There was no animosity at that point of time and therefore, no pre-meditation as well, which negates the version regarding purchase of MO1 knife at that point of time. Learned counsel pointed out that the accused is a person whose left leg is amputated, besides having disability on his hand, as established by defence evidence adduced. It was impossible for a person like the accused to stab and kill the deceased, who is a well built person. Learned counsel submitted that the motive is not established and the evidence tendered by PW17 would not vouchsafe the same, besides being in the teeth of Section 122 of the Evidence Act. No reliance, whatsoever, can be placed on such

evidence. It was seriously contended that if the evidence tendered by PW1 is discounted, what remains is nothing but circumstantial evidence. The prosecution had failed to bring in evidence, so as to form a complete chain, pointing to the hypothesis of guilt and guilt alone of the accused, wherefore, the accused is entitled to benefit of doubt. The absence of self reparative process in injury Nos.1 and 2, which, according to PW14 Doctor is the cause of death, would amplify that such injuries are not antemortem injuries. Besides, gaping is not noted in Ext.P13(a) postmortem report. Learned counsel submitted that the recovery of MO1 knife cannot be taken stock of. The knife which was allegedly recovered on 8.5.2015 was produced before the court only on 13.5.2015, the safe custody of which, is not explained at all. Learned counsel finally reminded us of the limitations in an appeal against an acquittal, more so when, the Sessions Court had the added advantage of seeing and analysing the demeanour of the witnesses. Learned counsel

finally referred to reiteration of the presumption of innocence of accused on account of the judgment of acquittal. On such premise, learned counsel seeks to sustain the judgment impugned.

12. Having referred to the arguments of the respective parties, we commence with the evidence of the solitary eye witness, PW1. PW1, who conducts a tea shop at Vattakkattupady, deposed that on 7.5.2015, between 7.30 and 8.00 a.m., he was proceeding in his bike towards Pulluvazhy to purchase meat. While so, he saw a bullet bike proceeding in the same direction in front of him. Then, a car came from the opposite side in high speed and turned sharply to collide with the bullet. The person driving the bullet fell on the bonnet of the car first, and then to the road margin, at the southern side. PW1 stopped his bike ahead of the car and turned back, to see the driver of the car coming out with a knife. The one, who fell down from the bike was trying to get up. There was some conversation between them,

which PW1 did not hear. Thereafter, the accused stabbed the biker, which he warded off with his hand. Then, the accused stabbed on the neck of the person, who fell down from the bike. He was stabbed again twice by the accused on the neck. The knife was then thrown to the bush near a tree (Vattamaram) standing there and the accused sat on a granite stone there. PW1 specifically deposed about a youngster, who came from the house at the northern side and attempted to proceed towards the deceased. However, the accused, gestured at him to go away. PW1 also spoke of the arrival of PW2 and his relative in a bike, who took the deceased and accused to the hospital. Thereafter, PW1 identified the car driven by the accused as a white Maruti car and the bike of the deceased as a white bullet bike. He identified MO1 knife, MO2 shirt and MO3 dhothi worn by the accused, as also, MO4 shirt and MO5 dhothi worn by the deceased, at the relevant time. The statement of PW1 under Section 164 Cr.P.C. was recorded and he identified the same as Ext.P1. He also identified the

deceased, as Noushad.

13. In cross examination, PW1's acquaintance with Neena Kunju, the brother of deceased, is elicited. PW1 denied the suggestion that the bullet motor bike driven by the deceased over took his bike. An enabling statement to this effect in his former statement was marked as Ext.D1. PW1 would depose in cross that he saw the incident at a distance of about 25 meters and that he did not point out the place of occurrence to Police. It was PW1, who saw the incident first and who was present in the spot until the deceased was taken to the hospital. It was also elicited that PW1 did not disclose the incident to anybody, including the police. He did not inform Neena Kunju about the incident initially. When he came back after purchasing meat, he informed Neena Kunju. PW1 would state that he was not aware of the phone number of the plywood factory of Neena Kunju. PW1, thereafter, stated that by the time he came back after purchasing meat, all in the locality came to the

spot of the incident. Neena Kunju was not at his factory, when he went to inform him. PW1 saw the accused along with the deceased. As required by the Police, PW1 went to Police Station on the next day, after returning from Alappuzha and gave statement to Police. After one week, he again went to the Police Station for giving further statement, when he identified the accused in the police station. As an explanation to an answer elicited to the effect that PW1 did not scream upon seeing the incident, he deposed that he was in a state of shock.

14. A scan of the evidence tendered by PW1 does not commend us to approve the course adopted by the learned Sessions Judge in discarding his evidence, as unbelievable. All what is seen brought out as contradiction in cross examination is Ext.D1, which pertains to his former statement that the deceased overtook the motor cycle driven by PW1. The contradiction above referred is not with respect to any material aspect, but

concerning a peripheral one.

15. Apart from the above contradiction, what is seen elicited in cross examination is that PW1 who claimed to have witnessed the incident had not disclosed the same to anybody, including the Police. Seeing the accused stabbing the deceased thrice on his neck, PW1 did not scream; nor did he made any noise. This behaviour of PW1 is propounded as strange and improbable and hence not believable, which contention is seen accepted by the learned Sessions Judge.

16. The conclusion arrived at stems from misconception and it is unscientific and illogical to presume a standard behaviour from human beings in a given situation. Equally fallacious is the conclusion drawn based on the deviation from the so-called standard behaviour. Every individual is different and distinct, with separate individual traits and personality patterns. Different persons react to the same situation differently. Some may

react proactively and may even attempt to prevent the commission of the crime. They may some times dare even to risk their lives. *Au contraire*, some may be passive and may take an unconcerned attitude. Some may flee from the spot of crime. Another category can be in the spell of shock, upon seeing a ghastly incident. We are, therefore, of the opinion that no standard behaviour can be expected of human beings, who witness the commission of a crime. Nor is it permissible in law to brand a witness as reliable or unreliable on the sole basis of such standard behaviour, or deviation therefrom.

17. Barring the above two aspects, nothing is seen brought out in cross examination, so as to discredit the authenticity of the evidence tendered by PW1. There is no inordinate delay in PW1 giving statement to the police, except of a single day and no contradiction, sans Ext.D1, brought out in cross examination. In such circumstances, disbelieving PW1, on the premise

that his conduct is strange, upon witnessing the incident, can hardly be countenanced in law. At any rate, the same is not a reason for discarding the evidence of PW1, completely.

18. We may, in this regard, profitably refer to the decision of the Honourable Supreme Court in **Vadivelu Thevar v. State of Madras [AIR 1957 SC 614]**. The Hon'ble Supreme Court classified the witnesses into three. The first category is witnesses who are wholly reliable. The second is witnesses who are wholly unreliable. There will be no difficulty to arrive at a conclusion on the evidence of witnesses, who fit into the above two categories. If a witness is wholly reliable, the court can safely rest a conviction on the solitary testimony of a single witness. If the witness is wholly unreliable, the same is liable to the discarded completely. However, there exists a third category, where witnesses are neither wholly reliable, nor wholly unreliable. In such cases, courts will have to be circumspect and should look

for corroboration in material particulars, by way of reliable testimony, direct or circumstantial. This principle is reiterated in several decisions, one of which is **Lallu Manjhi v. State of Jharkhand [AIR 2003 SC 854]**. In that case, it was found that the evidence of a witness, who had substantially improved his version before the Court, could neither be totally discarded, nor be implicitly accepted.

19. In **Sambath Kumar v. Inspector of Police [AIR 2012 SC 1249]**, the Hon'ble Supreme Court found that the evidence of one witness was in complete contrast with his former statement and that a vital information as regards the presence of the accused near the deceased at or around the time of incident was withheld for a period of five years, until he was examined in court, without offering any satisfactory explanation. Even then, the Hon'ble Supreme Court did not characterise the witness as a completely unreliable witness. Instead, the Hon'ble Supreme Court only said that

the courts will have to look for independent corroboration of his version.

20. In the backdrop of the above exposition of law, the defence, at best, could have aspired to treat PW1 as neither wholly reliable, nor wholly unreliable, and, require the court to legitimately seek for corroboration of his version.

21. Let us proceed to the evidence tendered by PW2 and PW3. PW2 gave Ext.P2 F.I.S. on the date of occurrence, namely, 7.5.2015 at 10.00 a.m. He deposed that he reached the place of occurrence, along with his father's younger brother, Siddique, to see a white Ritz car, with its front portion elevated to a mud block on the southern side of the road and a bullet motorbike lying down there. They also saw the deceased, lying there in a pool of blood and the accused sitting in a granite stone immediately on the south-western portion. They blocked a car passing by and carried deceased to it. The accused was also persuaded to get into

the car for being taken to the hospital. Siddique and one Muhammed accompanied the accused and deceased. PW2 followed them in his bike to Sanjoe Hospital. When PW2 reached the hospital, the Doctor told them to inform the police, as there were injuries on the neck of the deceased. Accordingly, PW2 gave Ext.P2 F.I.S. By about 1.45 p.m., PW2 had shown the place of occurrence to the police, whereupon scene mahazar was prepared. On the same day evening, the police took his statement. On 13.5.2015, PW2's statement was again recorded, when PW2 identified the accused as the one who sat on the granite stone at the time of occurrence. When PW2 questioned the neighbouring persons gathered there as to why the deceased was not taken to the hospital earlier, a youngster among them replied that the one who was sitting on the granite stone prevented them from going near the deceased.

22. In cross, PW2 deposed that others were also present, when the Doctor spoke about the injuries

on the deceased. It is elicited that in Ext.P2 F.I.S., PW2 had stated that he came to know from hospital officials that there is deep injury on the neck of the deceased. PW2 clarified that the Doctor spoke in his presence. It is elicited that no one spoke to PW2 as having witnessed the incident, when PW2 reached the place of occurrence. PW2 would state that he knew the deceased earlier, but had only seen the accused, without knowing his name. It is also elicited that the one who gave information about the accident to PW2 looks like a Tamilian, whom he has not seen thereafter.

23. In re-examination, a specific question is seen put to PW2 as to whether he had seen PW1 at the place of occurrence. This question was opposed as a leading question. Although the objection was recorded, the same was overruled, with the result, the answer given by PW2, that he saw PW1 at the place of occurrence, is seen recorded. We cannot approve the manner in which a crucial information

has been elicited in re-examination. As objected, it was a leading question as regards the presence of PW1 in the place of occurrence. The explanation recorded by learned Sessions Judge that the question pertains to an undisputed fact, as clarified by the Public Prosecutor, cannot be accepted in law. The facts sought to the elicited were certainly disputed. The answer could have been recognised, had it been made, not in response to a leading question. Therefore, we cannot take stock of that part of PW2's evidence identifying PW1 at the scene of occurrence.

24. Nevertheless, the evidence spoken to by PW2 in chief examination is not shaken at all in the cross examination. It could thus be seen that the prosecution version is substantiated to a considerable extent by the evidence spoken to by PW2, besides corroborating the evidence of the eye witness, PW1. PW2 very much spoke about the deceased lying in a pool of blood in the place of occurrence and the accused sitting beside him,

unperturbed, in a granite stone. He also saw the white Maruti Ritz car and the bullet motorcycle in the place of occurrence, which has been proved by other evidence to have been used by the accused and deceased, respectively, at the relevant time. PW2 also referred to an answer given by a neighbouring youngster that the accused prevented him from approaching the deceased.

25. PW3 is that youngster spoken of by PW2, whose evidence we will now consider. PW3, the son of a retired Principal, was conducting a software company. His house is precisely at the northern side of Kayyanippady, the place of occurrence. On 7.5.2015, by about 7.30 a.m., PW3 heard the sound of an accident, and when he came out, he saw a white Ritz car and a white bullet lying involved in an accident, on the southern side of the road. The Ritz Maruti car hit on the mud block of the house of one Santha, which was located on the opposite side of the house of PW3. He saw the deceased lying near the car and the accused

sitting in a granite stone, nearby. When PW3 tried to go near the deceased, the accused dissuaded him by gesturing with his hand, indicating to go away. He disclosed this fact to PW3. PW3 identified the accused in the court.

26. It is important to note that PW3 was not subjected to any cross examination, whatsoever. Thus PW3 also vouched the facts, which were spoken to by PW2, in substantial support to the prosecution version, as also, in corroboration of the version of PW1. The fact that the accused prevented PW3 from going near the deceased is a clear incriminating circumstance as regards the intention of the accused to finish off the deceased. While PW1 and PW2 testified this fact as having spoken to them by a youngster, PW3–the youngster–gave direct evidence regarding this important fact.

27. Motive is sought to be proved by the evidence tendered by PW17-the wife of accused-,the

admissibility of which is seriously challenged by learned counsel for accused, in view of the express bar under Section 122 of the Evidence Act. We will first refer to the evidence of PW17.

28. PW17 deposed that deceased was owner of the company where the accused was working and that they were family friends. The witness was declared hostile when she deposed that she does not remember the mobile phone numbers of herself and the deceased, which she had specifically stated in her former statement. PW17 would state that accused had disability to one of his legs and hands at the time of marriage in the year 2011. In 2003, he lost his left leg in an accident and he is fitted with an artificial limb. PW17 would state that the deceased and the accused, along with their families, went for Umrah. Accused performed all rituals of Umrah, involving considerable physical labour, by himself. Accused used to drive car and motorcycle and he can climb steps and escalators. With the aid of the

artificial limb, the accused can perform all day-to-day chores. She deposed that during May 2015, the accused used to commute in a white Maruti Ritz car bearing no.KL-40-H-2322.

29. The deposition to the following effect is controversial in the context of Section 122 of the Evidence Act. PW17 stated that she had spoken to the deceased over phone, upon returning after Umrah. PW17 would admit that, on the day before the death of the deceased, there was a quarrel between PW17 and the accused, over the telephonic chats between the deceased and herself and that she was questioned in this regard by the accused. PW17 further deposed that the accused left the house in his car after quarrelling with herself on the day before the deceased was killed and that she left matrimonial home on that day, by the evening. Again PW17 would depose that the deceased and the accused were thick friends, like play-mates.

30. Let us now refer to Section 122 of the Evidence Act, which is extracted hereunder:

> "**122:Communications during marriage**.- No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other."

31. Section 122 recognises the age-old concept of marital confidence that all communications between spouses during the wedlock are sacrosanct. In England *The Commission of Common Law Procedure* in its second report, submitted in 1853 observed as under:

> "So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far

> greater evil that the disadvantage which may occasionally arise from the loss of light which such revelations might throw on the questions in dispute...hence all communications between them should be held privileged."

32. While appreciating the sacrosanctity attached to communications between spouses, we are afraid whether the observations made by the above Commission in the year 1853 requires a re-visit, in the touch stone of competing interests between public crimes of extreme cruelty on the one hand; and the peace of families, on the edifice of mutual confidence and trust, on the other. Can we recognise any more that the public interest in the context of disclosure of truth about a crime in a court of law is inferior or subservient to the happiness and peace of a family, secured by suppression of such truth, backed up by statute? One cannot keep happiness and peace of his family, after indulging in a crime and then seeking support of law to suppress it. What about the peace and happiness of the family of victim? What

about the underlying public interest being seriously jeopardized for the sake of peace and happiness of the family of the culprit? We prefer to believe in the primacy and paramountcy of truth and hence, not in the least, perplexed to vote against the continuance of the provision, as it stands now, in the statute book. Its high time that Section 122 is subjected to further scrutiny, more so in the context of changing values governing human and familial relations.

33. A word of caution was raised much before us by the Bombay High Court in **Vilas Raghunath Kurhade v. State of Maharashtra [2011 Crl.LJ 3300]**. After referring to the peril of recognising sacrosanctity of spousal communications as predominant, the Bombay High Court recommended the State Government to approach the Law Commission or the Ministry of Law and Justice, Government of India with a proposal for amendment of Section 122 of the Evidence Act. Be that as it may. We are, nonetheless, bound by Section 122 and its

implications, so long as it remains in the statute book.

34. Section 122 has two limbs as follows:

> A married person shall not be :
>
> (1) compelled to disclose any communication made to him during marriage by any person to whom he is married; and
>
> (2) permitted to disclose any such communication, except
>
> (a) when the person who made it or his representative in interest consents or
>
> (b) in suits between married persons, or
>
> (c) in proceedings in which one married person is prosecuted for any crime committed against the other."

35. The first limb of Section 122 pertains to the component of compulsion in disclosing any communication of the nature referred to in Section 122 by an unwilling witness. The second limb

contemplates prohibition of disclosure of such communication even by a willing witness.

36. In **Emperor** v. **Ramchandra Shankarshet Uravane [AIR 1933 Bom 153]**, it was held that prohibition contained in Section 122 rests on no technicality that can be waived at will, but is founded on a principle of high import, which no court is entitled to relax. It was further held that the prohibition is not confined to communications of a strictly confidential character, but all communications of whatever nature, which passed between husband and wife.

37. A close scrutiny of Section 122 would reveal that the bar of disclosure is only to a 'communication' made to a witness - a married person – by his or her spouse, during marriage.

38. In **Ram Bharosey** v. **State of U.P. [AIR 1954 SC 704]**, the Hon'ble Supreme Court distinguished between communication between spouses; and their

acts and deeds. The relevant findings are as follows:

> "6. Firstly, there is the evidence of P.W.2 that the accused was seen in the early hours of the 27th May 1952 while it was still dark, coming down the roof of this house, that he went to the bhusa kothri and came out again and had a bath and put on the dhoti again. This is not inadmissible under Section 122, as it has reference to acts and conduct of the appellant and not to any communication made by him to his wife. Secondly, there is the fact that among the articles delivered by him to P.W.18 at the time of the investigation on the morning of the 27th was a blood-stained gandasa."

39. The dictum laid down in **Ram Bharosay** *(supra)* is followed by the Allahabad High Court in **Shahnawaj Akhtar** v. **State of U.P. And Ors. [MANU/UP/1024/1991]** and by the Bombay High Court [Aurangabad Bench] in **Bhalchandra Namdeo Shinde v. State of Maharashtra [MANU/MH/0111/2003]**. In **Shahnawaj Akhtar** *(supra)* it was held thus:

> "9. In view of the law laid down by the Hon'ble Supreme Court, it is, therefore, clear that what is barred under Section 122 is the communication by one spouse to the other made during marriage and not the acts

> made by one spouse in the presence of the other. Section 122 cannot, therefore, be a bar for the wife to depose against her husband. The bar is only against the disclosure by her of the communication made by her husband during marriage to her...."

40. In **Bhalchandra Namdeo** (*supra*), the Bombay High Court sifted the communication part, from what has been witnessed by the witness. That part of the evidence constituting communication between spouses was held inadmissible under Section 122 of the Evidence Act. However, the acts of the husband, witnessed by wife, was held admissible.

41. Analysed in the backdrop of the legal position expatiated above, we are of the considered opinion that the entire evidence adduced by PW17-except the one referring to the quarrel between accused and PW17 on the day prior to homicide of deceased-are admissible in evidence. The admissibility of deposition of PW17 regarding the quarrel is to be addressed separately. What PW17, essentially, spoke is about a quarrel which took place on the

day prior to the incident, which is concerning the chat between PW17 and the deceased over phone. The accused questioned (ചോദിച്ചിരുന്നു) PW17 in this regard.

42. At first blush, it may appear that the quarrel is more of a deed or a conduct, than a communication. It is an activity in which the accused and PW17, both, indulge, and hence, one may be easily persuaded to qualify it as a deed and not as a communication, thus sanctioning its admissibility relying upon **Ram Bharosey** (*supra*). However, a closer scrutiny would indicate that the quarrel between PW17 and accused is a means by which the accused had signified and communicated his protest over the chat between PW17 and deceased. A quarrel, in all probability involves, mutual conversation, where, in the instant case, the accused should be interested to find fault with PW17 in chatting with deceased, and PW17 may perhaps justify it as an innocent conduct. All what we are trying to point out is that such

quarrel involves communication by each other of the stand being taken by the respective parties.

43. The sacrosanctity of a family, which includes its privacy, is what is essentially sought to be protected by virtue of Section 122. If that be so, the aspect involved herein, touching the fidelity of PW17, is all the more a finer and important one, which requires to be preserved from being divulged, having regard to the purpose and purport of Section 122 of the Evidence Act. Evidence regarding quarrel and the reason behind it are matters which fit into the prohibited compartment of communication between spouses, and therefore, inadmissible. We thus conclude that, that part of the evidence tendered by PW17 which pertains to the quarrel between accused and PW17 is liable to be eschewed as inadmissible under Section 122 of the Evidence Act.

44. The effect of the above discussion is that the evidence tendered by PW17 cannot be reckoned,

insofar as the motive of the crime is concerned. No other evidence has been adduced by the prosecution to prove motive. The inescapable conclusion, therefore, is that the prosecution failed to establish the motive alleged.

45. We will quickly refer to the evidence tendered by the remaining witnesses for the sake of completion. PW4 and PW5 are attesters to Ext.P3 inquest report and Ext.P4 scene mahazar, respectively. PW6 is the attester to Ext.P5 seizure mahazar evidencing recovery of MO1 knife under Section 27. PW27 is the attester to Ext.P6 mahazar evidencing recovery of dresses worn by the accused at the relevant time. PW8, the H.C.P.O. attached to Kuruppampady Police Station, is the person in whose handwriting Ext.P6 mahazar was prepared. He supported the recovery vide Ext.P6. PW9 was the Chief Medical Officer of Sanjoe Hospital, who confirmed the death of the deceased. PW10–the elder brother of the father of the deceased–is the owner of the white bullet

motorcycle driven by deceased. PW11 is the brother of the wife of deceased, examined to prove the purchase of MO1 knife by accused from Bangalore. PW12 is the brother of the accused and the owner of the Maruti Ritz car driven by the accused at the relevant time. PW13 is the Professor and Head of the Department of Physical Medicine, Medical College, Thiruvananthapuram, who examined the accused and issued Ext.P12 certificate regarding the extent of his handicap, as also, the efficacy of his prosthesis. PW14 conducted autopsy and issued Ext.P13 postmortem certificate. According to him, the death occurred due to injury nos.1 & 2 sustained to neck, which are independently sufficient in the ordinary course of nature to cause death. He would endorse that injury nos.1 to 4 could be caused by a weapon like MO1. PW15, the Motor Vehicle Inspector, inspected the Maruti car and the bullet motorcycle involved in the accident and issued Exts.P14 and P15 certificates, respectively. PW16, the Joint R.T.O, Perumbavoor produced Exts.P16 & P17 RC particulars of the car

and bullet motorcycle concerned. The evidence tendered by PW17 and its impact has already been discussed above. PW18 is the father of the accused, who admitted ownership of the Maruti Ritz automatic car. PW19 is the Judicial First Class Magistrate, Kothamangalam examined in proof of the statement of PW1 under Section 164 of the Cr.P.C. PW20, the Nodal Officer of Bharathi Airtel Ltd., produced Exts.P22, P23 & P24 subscriber details and call details of three phone numbers, whose evidence is of little use to prosecution. PW21 was the Circle Inspector of Police, who conducted investigation. We will refer to evidence of the witnesses above referred in detail based on contextual necessity, while discussing the remaining points.

46. The defence evidence consists of oral testimonies of DW1 and DW2 and Exts.D3 and D4 marked through them, Exts.D1 & D2 contradictions being marked while examining prosecution witnesses. Ext.D3 is the reply issued under the

Right to Information Act by DW1–the Secretary of Rayamangalam Panchayat–to show that PW1 was not issued with any licence to conduct tea shop during 2014-2019. Ext.D4 is the treatment summary of accused issued by DW2, the Medical Superintendent of Medical Trust Hospital, which evidence is aimed at establishing the serious handicap of the accused, to canvas his incapability to perform the overt acts alleged.

47. Having scanned the evidence tendered by the prosecution, as also, the defence, we are clearly of the view that the evidence tendered by PWs 1 to 3 inspire abundant confidence in the mind of the court. We are primarily of the opinion that there is no serious infirmity in the evidence of PW1, so as to disbelieve him. As already indicated, witness cannot be branded as reliable or unreliable solely on the basis of his response/reaction upon witnessing the incident. Even if it is assumed that PW1, the solitary eye witness, is not fully believable, necessitating

corroboration of his version, the same, in our considered opinion, has been amply done by the evidence tendered by PW2 and PW3. PW3, by his version, had gone an extra mile closer to prosecution version by deposing that the accused prevented him from going near the deceased, thus indicating the definite intention of accused to ensure death of deceased. This aspect was also spoken of by PW1; validating further the reliance placed by us, on his ocular testimony.

48. The following two points will substantiate our above conclusion :

a) <u>Presence of Rh B+ blood (the blood group of the deceased) in the dress of the accused</u> :-

The prosecution had established the presence of human blood of the group B+ - the same blood group as that of the deceased – in the dress worn by the accused. The dress of the accused was recovered pursuant to a disclosure made by the accused under

Section 27 of the Evidence Act and recovery effected vide Ext.P6 mahazar. The disclosure part is proved by the evidence tendered by PW21, the investigating officer, to the effect that the accused had kept his shirt and dhothi in a shed near his house. Ext.P6 is the mahazar evidencing recovery of MO2 shirt and MO3 dhothi worn by the accused at the relevant time. PW7 is the attester to Ext.P6 mahazar, but he only identified his signature in Ext.P6, without identifying the dress recovered.

49. However, this lacuna is seen filled up by the evidence tendered by PW8, the H.C.P.O., attached to Kuruppampady Police Station, in whose handwriting Ext.A6 mahazar was prepared. He deposed in detail about recovery of dress worn by accused at the relevant time. He identified MO2 shirt and MO3 dhothi with respect to its nature and colour and deposed that blood stains were found on the same. In cross, it was elicited that on the same day, a mahazar for recovery of MO1

knife was also prepared and that it was PW8, who recorded the statements of several witnesses in this case. Thus on the basis of the evidence tendered by PW8, PW7 and PW21, we find that recovery of MO2 shirt and MO3 dhothi worn by the accused under Section 27, has been satisfactorily established.

50. Having found the recovery in favour of the prosecution, the next aspect is with respect to proof regarding the blood group in the dress, as also, proof regarding blood group of the deceased. As regards the latter, Ext.P13 postmortem report vouchsafe the same. Ext.P13 is proved through PW14, who conducted autopsy. As regards the presence of blood in MO2 shirt and MO3 dhothi, the proof lies in Ext.P35 report of Regional Chemical Analysis Laboratory, Kakkanad. MO2 shirt is referred to as item no.5 in Ext.P35 and MO4 dhothi as item no.6. As regards MO5 shirt, there is a clear finding in Ext.P35 that it contains human blood of the group B. However, as regards MO3

dhothi, the blood group could not be detected conclusively, although it is found that it contains human blood. We could, therefore, safely conclude, at least with respect to MO2 shirt, that it contains human blood with Rh B, which is the same blood group of deceased. This is a clinging piece of evidence insofar as guilt of the accused is concerned. No explanation, whatsoever, is forthcoming on the part of the accused in this regard. We, therefore, conclude that the dress of the accused was bloodied only when the stabs were inflicted, as the accused was sitting at a distance and not attempting to help the injured.

b) Accident and user of vehicles concerned established :-

51. This evidence of the prosecution is more in the nature of circumstantial evidence, which would corroborate other evidence adduced by prosecution as regards guilt of the accused. According to prosecution, the accident involving the two

vehicles concerned, the Maruti Ritz car and the bullet motorcycle, at the spot of occurrence is established by evidence adduced. The prosecution primarily relies upon evidence tendered by PW1, PW2 and PW3–the eye witnesses who saw the vehicles involved in the accident at the spot of occurrence –to establish the factum of accident. In support thereof, the prosecution relies upon Ext.P4 scene mahazar prepared by PW21, the investigating officer, wherein the lie and position of vehicles involved in the accident, the make and registration number of the vehicles etc. are referred to in detail. MO-10 to MO-13 are pieces of broken parts of Maruti Ritz car, whereas MO14 and MO15 are parts of white bullet motorcycle. These are recovered by PW21 and spoken to by him. In order to substantiate the accident, further evidence was adduced by prosecution by virtue of Ext.P14 report preferred by PW15, the Motor Vehicle Inspector of the Sub RTO concerned, who inspected the vehicle at the occurrence spot on the same day, that is 7.5.2015. As many as 14

damages to the Maruti Ritz car are noted in Ext.P14 report. The name of the owner is shown as Ali, S/o.Abdul Rahiman (PW18). Similarly, Ext.P15 report is preferred by the same Motor Vehicle Inspector (PW15) after inspecting the bullet motorcycle at the occurrence spot on the same day. In the bike, PW15 noted as many as 15 damages and the owner is shown as Ali Marakkar (PW10). PW15 would clearly depose before court that the damages shown in the reports occurred in the accident. He was not subjected to any cross examination at all. Thus, the evidence tendered by prosecution would clearly establish the factum of accident involving the two vehicles concerned, a Maruti Ritz car bearing no.KL-40 H 2322 and a white bullet motorcycle bearing no.KL-43 A 2721.

52. The next aspect is more important, which concerns about the user and ownership of the above vehicles. As regards ownership, the evidence tendered by PW16–the Joint R.T.O, Perumbavoor–who produced the R.C particulars of Maruti Ritz car at

Ext.P16, is quite relevant. As per Ext.P16, owner of the car is one Ali (PW18), who is none other than the father of the accused. When examined before the court he would deny the user of the car by the accused at the relevant time. But he admitted receipt of the car from the Magistrate Court concerned, after issuing necessary receipt. The deposition of PW18 as regards user is only to be discounted, as an attempt of the father to save his son. The user of car by the accused is spoken to by other witnesses, including PW17. Besides, PW1, who saw the accused ramming his car into the motorcycle driven by the deceased would vouch the same. The presence of accused at the accident spot was confirmed by PW2 and PW3. Therefore, we would conclude the user and ownership of Maruti Ritz automatic car by the accused and his father, respectively, as established. Likewise, Ext.P17 is the registration particulars of the bullet motorcycle produced by PW16. The owner of the bike as per Ext.P17 is PW10 (Ali Marakkar). Deceased is the nephew of PW10. PW10 deposed before court that

he is the owner of bullet motorcycle concerned. He also vouchsafed the user of the said vehicle by his nephew, the deceased. Apart from the above circumstances, the licence of the accused and deceased are also produced through PW16. We thus conclude that the user and ownership of the respective vehicles by the accused and the deceased respectively, as also, their relatives above referred is established beyond doubt. Therefore, the factum of accident, coupled with proof regarding the user of the vehicles involved, would substantially support other prosecution evidence adduced to establish the culpability of the accused in the crime.

53. As against the above evidence adduced by the prosecution, the defence evidence only attempts to suggest that the accused, being a handicapped person cannot perform the overt acts, constituting the crime alleged. Ext.D4 certificate is produced in support thereof. However, this evidence is in the teeth of evidence tendered by none other than

wife of accused to the effect that, with the aid of the prosthesis, accused can perform all activities. She even vouched that during the course of Umrah, accused performed all difficult/physical acts, involving considerable labour, by himself, without any assistance, whatsoever. This is also supported by evidence tendered by PW13, the Doctor, who examined the accused and his prosthesis and opined that accused can perform the activities ordinarily done by any other human being. The fact that accused used to drive the car is also vouched by the evidence tendered by PW17 and PW11, his brother-in-law. In such circumstances, the defence version, which attempts to suggest a complete incapability/ disability on the accused in performing the overt acts alleged, is only to be discarded.

54. The above referred overwhelming evidence adduced by the prosecution, in our estimation, are quite sufficient to arrive at the conclusion as regards guilt of the accused.

55. Now, the moot question is whether the conclusion arrived at by us is only a different/alternative view possible, while appreciating the evidence; or is it the only view possible in the light of the evidence adduced? In the case of former, it is settled that the judgment impugned cannot be interfered with. However, in the case of latter, the judgment of acquittal, amidst all limitations for interference in an appeal, will have to be set aside. It is also settled, by virtue of the decision of the Hon'ble Supreme Court in **Kashiram** v. **State of M.P. [(2002) 1 SCC 71]**, that it is obligatory on the part of the High Court to discuss the reasons given by the trial court to acquit an accused, to ascertain whether such reasons are liable to be dislodged on the basis of the materials on record.

56. The following are the points which weighed with the learned Sessions Judge to acquit:-

PW1 disbelieved:-

The learned Sessions Judge chose to disbelieve PW1 essentially for the reason that his conduct upon witnessing the incident was contrary to the normal course of human conduct. PW1 has not uttered a word seeing the incident; he did not extend any help to the injured after seeing the accident; he did not inform the incident to anybody, including the police; and, he vanished from the place of his ordinary residence for a day and resurfaced only on the next day. The above referred conduct of the accused was found to be quite contrary to the normal course of human conduct, which renders his evidence wholly unreliable.

57. We are at a loss to endorse the reasoning and approve the above findings. The learned Sessions Judge standardised the immediate reaction of an

ordinary human being upon seeing an accident that he will suddenly come to the rescue of the injured. This generalisation of human conduct, according to us, is palpably wrong and legally unsustainable. As already indicated earlier in this judgment, different human beings react differently to a given situation and no credibility, or lack of credibility, can be attached to their version based on such standard behaviour, or deviation therefrom. The learned Sessions Judge went perverse in finding that PW1 was sure that something more is to follow, as a reason for his inaction on seeing the incident. We find no justification for such conclusion, based on a purely imaginary plane, unsupported on facts. PW1 is not obliged in law to explain his alleged inaction upon seeing the incident. The finding that PW1 was witnessing the incident, as if he was watching a movie, without alighting from the motorcycle, to say the least, is perverse. The learned Sessions Judge also found fault with PW1 for not having disclosed the incident to anybody,

including the police. According to the learned Sessions Judge, PW1 could have spoken about the incident to PW2 and PW3, besides to the brother of the deceased, Neena Kunju, with whom PW1 would claim close acquaintance. The above aspects emanating from the reaction of PW1 are, by itself, not sufficient to disbelieve PW1 as a wholly unreliable witness. As already indicated, we cannot find any inherent infirmity in the evidence tendered by PW1 on the basis of the above conduct taken note of by the learned Sessions Judge. As referred to earlier in this judgment, some may react proactively to an incident; some may flee away; some may remain numb and some others may be shocked. Unless the presence of the witness at the scene of occurrence is found inherently improbable, or proved to be impossible on the basis of the evidence adduced, he cannot be disbelieved for not having reacted in the so-called ordinary course.

58. The learned Sessions Judge disbelieved PW1 also for the reason that he had not informed the incident to somebody in the house of the deceased. Another reason to disbelieve PW1 is his narrative regarding the manner in which the accused got out of the car. We are in complete disagreement with the above findings of the learned Sessions Judge. PW1 is not obliged to inform the incident to any of the family members of the deceased, merely because he knows the family house of the deceased. Nor can his trustworthiness be adjudged in the negative for reason of the alleged failure to inform the family members of the deceased. Similarly, when a witness says that the accused got out of the car holding a knife in his right hand and pushing the door with his left hand, there is no rhyme or reason in thinking why the accused should do so. The finding of the learned Sessions Judge that it would have been much easier, had it been the other way round, reveals undue levity in adjudication. In this regard, the disability of the accused is also liable to be

taken into account, which perhaps persuaded him to get out of the car in a peculiar manner. It is relevant in this regard to point out that the accused had lost his left leg (supported by prosthesis) and a portion of left hand – as spoken to by his wife/PW17 and PW13 doctor – which explains why he held MO1 knife in his right/able hand and chose to open the door of the car by his impaired left hand.

59. The further finding of the learned Sessions Judge relying upon Ext.D3 reply under the Right to Information Act, that running the tea shop by PW1 is not established, also cannot be approved. Firstly, we notice that there is not even a suggestion in cross examination of PW1 that he was not conducting a tea shop, albeit PW1 referring to his shop on several occasions in chief and cross examinations. Secondly, the focus of investigation was on the murder alleged to have been committed by the accused. A roving investigation as to whether PW1 had licence to conduct a tea shop was

not contemplated. Thirdly, lack of licence will not automatically establish that PW1 was not conducting a tea shop. It is one thing to say that conducting such a business without licence is illegal. However, the fact remains that in rustic village areas, several such shops are being conducted either without licence or contrary to such licence issued. Therefore, disbelieving PW1, or for that matter his presence at the place of occurrence, for want of licence to conduct a tea shop cannot be countenanced.

PW1 not questioned on the same day by the I.O:-

60. The finding in paragraph No.39 against the investigating officer as regards the abscondance of PW1 for a day is also far-fetched and unacceptable. According to the learned Sessions Judge, PW21 (I.O), who came to know about the presence of PW1, should have immediately questioned PW1, for which no attempt was made by PW21. The learned Sessions Judge would cast an

aspersion/motive in PW21 not doing so, since it was the necessity of the investigating team to bring in evidence in the form of recovery under Section 27 of the Evidence Act, for which, there would not have been any scope at all, if PW1 was questioned on the very date of incident. It would appear that the Judge was completely predisposed against the prosecution version, probably with a predetermined fixation on the innocence of the accused.

PW2 disbelieved:-

61. The learned Sessions Judge found that there existed ample circumstances for PW2 to entertain a doubt regarding the culpability of the accused, but PW2 did little to guard the accused, who was made to accompany the deceased to the hospital. We cannot but find that the learned Sessions Judge had gone completely off tangent in choosing to disbelieve PW2 on that premise.

PW3 disbelived:-

62. In the case of PW3, the court below went completely wrong in finding fault with prosecution for not examining the mother of PW3 (cited as CW7). It is never the mandate of law to examine more than one witness to drive home the same point, for, it is not the quantum, but quality of evidence, that matters. In this regard, we may profitably place reliance upon Section 134 of the Evidence Act. As against PW3 also, the court below found fault, in having not informed the police about the incident. The finding of the court below that PW2 has no case about PW3 informing him that the accused prevented him from approaching the deceased is factually incorrect. PW2 spoke in so many words that a youngster came forward and told him that when he tried to go near the deceased, the accused prevented him. PW3 very much spoke that he attempted to go near the deceased and was prevented by the accused. There exists no room for any confusion as regards the versions spoken to by

PW2 and PW3.

63. We are of the view that the Sessions Court grievously erred in disbelieving PW1 for the reason of Ext.D1 contradiction. Ext.D1 does not pertain to any material aspect of the crime, but is only with respect to a former statement that the deceased overtook PW1 in his motorcycle, before the accident.

64. Finally, we deprecate the conduct of the Sessions Judge in choosing to examine MO1 knife in the open court to ascertain whether there is any visible blood stain in the same. Ext.P35 report of the Regional Chemical Laboratory was before the court. The trial took place after four years from the date of incident. The Judge is not a forensic expert to detect blood stains, if any, in a knife. Therefore, the course adopted can hardly be approved.

65. A meticulous scan of the impugned judgment would reveal beyond the cavil of any doubt that the findings/conclusions arrived at therein are

nothing, but based on surmises and conjectures. Fanciful possibilities have been contemplated by the Sessions Judge, particularly centered around the supposed and expected behaviour of witnesses, who were present in the scene of occurrence, with the result, the witnesses were disbelieved, quiet erroneously on account of their alleged deviation from the so called standard behaviour.

66. In **Aiden v. State of Rajasthan [1993 Crl.LJ 2413 (Rajasthan)]**, it was held that truthfulness of the statement of wife-the eye witness-could not be disbelieved simply because her emotional reaction while witnessing the murder of her husband was different from what it should have been, in the opinion of the court.

67. We are fully convinced that the view adopted by the learned Sessions Judge from the materials on record to acquit the accused is not one possible within the framework of law. We also find that the view expressed by us pointing to guilt of the accused is the only view legally possible,

having regard to the evidence on record.

68. In **Narinder Singh v. Stae of Punjab [2000 Crl.LJ 3462 (SC)]**,the Honourable Supreme Court held that if the evidence of eye witnesses are rejected, on wrong assumptions, the High Court can interfere in an appeal against acquittal. In **Alla Rakha K.Mansuri v. State of Gujarat [(2002) 3 SCC 57]**, the Hon'ble Supreme Court held that where admissible evidence is ignored and lower court had acted on surmises, conjectures and assumed contradictions to acquit the accused, a duty is cast upon the appellate court to re-appreciate the evidence. This legal position has been reiterated in (1) **State of UP** v. **Babu & Others [AIR 2003 SC 3408]** (2) **Keshavlal** v. **State of M.P. [AIR 2002 SC 1221]** and (3) **State of M.P.** v. **Dharkole @ Govind Singh & Others [AIR 2005 SC 44]**.

69. In **Alla Rakha** (*supra*), the Hon'ble Supreme Court held that paramount consideration of the court should be to avoid miscarriage of justice

and that a miscarriage of justice, which may arise from acquittal of guilty, is no less than from the conviction of an innocent. The Hon'ble Supreme Court went on to hold that a probable view is one which is based on legal and admissible evidence; only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding.

70. We find that the judgment impugned is built up on the foundation of surmises and conjectures and, therefore, squarely in the teeth of the judgments above referred, wherefore, it is our duty to set right the wrong, by setting aside the impugned judgment. The judgment impugned is so manifestly wrong leading to miscarriage of justice as held in **Arun Kumar** and **Alla Rakha K.Mansuri** (both *supra*).

71. We, therefore, set aside the impugned judgment of acquittal. We find that the accused is guilty of having caused the death of the deceased,

attracting the offence under Section 300 of the Penal Code. The overt acts are done with sufficient pre-meditation, with the definite intention of causing death of the deceased. The accused, severed and rammed the car deliberately on the motor cycle of the deceased, coming from the opposite direction, where after, the deceased was stabbed thrice on his neck by MO1 knife. The situs and number of injuries would leave no doubt, whatsoever, as regards the definite and clear intention of the accused to cause death of the deceased. The accused is driven by a definite intention to finish off the deceased; though there is discernible no apparent motive. We find that the offence attracted is nothing but the one under Section 300, since the act does not fall under any of the exceptions to the offence under Section 300.

72. As regards punishment, Section 302 prescribes punishment with death or imprisonment for life and fine. We are not of the opinion that the facts of

the instant case would fit into the category of the rarest of the rare cases, warranting death penalty. Although the alternate punishment for offence under Section 302 of the Penal Code, i.e. imprisonment for life, is the minimum punishment prescribed, we chose to hear the first respondent/accused, specifically on the sentence component of fine. Hence, we directed the first respondent/accused to be present before us today and he is accordingly present.

73. Heard the accused and his counsel on the question of sentence. Learned counsel for the accused submitted that accused is undergoing treatment for bipolar disorder and, therefore, necessary direction be issued for continuance of treatment in prison. The accused pleaded that he has no job, as of now, except selling ornamental fish, which would fetch only little income. His mother is no more and the accused is presently residing with his aged father. The accused would request us to take a lenient view in the matter of

sentence.

74. Having heard the accused and his counsel in the context of sentence, we cannot but note that the offence committed is one under Section 302 of the Penal Code, exterminating the life of the deceased. An unmerited sympathy on the accused in the sentence component of fine will, therefore, be inappropriate.

75. We, therefore, impose the punishment of imprisonment for life, as also, a fine of Rs.2,00,000/- (Rupees two lakhs only) to be paid to the wife and children of the deceased as compensation. In case of default of payment of fine, the accused shall undergo rigorous imprisonment for a further period of two years, which punishment will be consecutive and not concurrent, if remission is granted. The accused shall be entitled to set off the period of incarceration undergone by him, pending trial. The material objects shall be disposed of in

accordance with law.

76. Crl. Appeal (V) No.17/2019 is allowed as above. In as much as the judgment under challenge is set aside, we find no necessity to condone the filing delay in the appeal preferred by the State. Crl.M.A.No.1 of 2020 and Unnumbered Crl.Appeal of 2020 are, therefore, closed.

77. In view of our comments on Section 122 of the Evidence Act in paragraph nos.31, 32 and 33 above, we direct the Registry to send a copy of this judgment to 1). the Secretary, Ministry of Law and Justice, Government of India and 2). the Member Secretary, Law Commission of India.

Sd/-

K.VINOD CHANDRAN
JUDGE

Sd/-

C.JAYACHANDRAN
JUDGE

jg