CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

FRIDAY, THE 16TH DAY OF SEPTEMBER 2022 / 25TH BHADRA, 1944

CRL.A NO. 320 OF 2016

CRIME NO.173/2015 OF PERAMANGALAM POLICE STATION, THRISSUR
AGAINST THE JUDGMENT IN S.C.NO.300/2015 OF ADDITIONAL DISTRICT COURT, THRISSUR

APPELLANT/ACCUSED:

MOHAMMED NISAM A.A.@MUHAMMED NISHAM A.A.
AGED 39 YEARS (IN 2015), S/O.ABDUL KHADER,
ADAKKAPRAMBIL HOUSE, PADIYAM VILLAGE,
RESIDING AT FLAT NO.1073, MUTTICHOOR KARA,
SOBHA CITY, PUZHAKKAL, THRISSUR DISTRICT.

BY ADV.SRI.RAMAN PILLAI (SR.) ASSISTED BY
ADV.SRI.GEORGE BRISTON
BY ADV.SRI.P.VIJAYABHANU (SR.)
BY ADVS.
R.ANIL
M.SUNILKUMAR
SUJESH MENON V.B.
MAHESH BHANU S.
NIKITA J. MENDEZ

RESPONDENT/COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

BY SRI.GRACIOUS KURIAKOSE, ADDL. DIRECTOR GENERAL
OF PROSECUTION ASSISTED BY SRI.C.K.SURESH,
SR.GOVERNMENT PLEADER

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.08.2022, ALONG WITH CRL.A.NOS.245/2017 & 233/2016, THE COURT ON 16.09.2022 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 16TH DAY OF SEPTEMBER 2022 / 25TH BHADRA, 1944

CRL.A NO. 245 OF 2017

CRIME NO.173/2015 OF PERAMANGALAM POLICE STATION, THRISSUR

AGAINST THE JUDGMENT IN SC.NO.300/2015 OF ADDITIONAL DISTRICT COURT, THRISSUR

APPELLANT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.GRACIOUS KURIAKOSE, ADDL. DIRECTOR GENERAL OF PROSECUTION ASSISTED BY SRI.C.K.SURESH, SR.GOVERNMENT PLEADER

RESPONDENT/ACCUSED:

MOHAMMED NISAM A.A.@MUHAMMED NISHAM A.A.
AGED 39 YEARS (IN 2015), S/O.ABDUL KHADER,
ADAKKAPRAMBIL HOUSE, PADIYAM VILLAGE,
RESIDING AT FLAT NO.1073, MUTTICHOOR KARA,
SOBHA CITY, PUZHAKKAL, THRISSUR DISTRICT.

BY ADV.SRI.RAMAN PILLAI (SR.) ASSISTED BY ADV.SRI.GEORGE BRISTON
BY ADVS.SRI.P.VIJAYABHANU (SR.)
POOJA PANKAJ

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.08.2022, ALONG WITH CRL.A.NOS.320/2016 & 233/2016, THE COURT ON 16.09.2022 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 16TH DAY OF SEPTEMBER 2022 / 25TH BHADRA, 1944

CRL.A NO. 233 OF 2016

CRIME NO.173/2015 OF PERAMANGALAM POLICE STATION, THRISSUR

AGAINST THE ORDER IN CRL.M.P. NO.308/2016 IN SC.NO.300/2015 OF ADDITIONAL DISTRICT COURT, THRISSUR

APPELLANT/PETITIONER:

KIRAN RAVI RAJU, AGED 28 YEARS
S/O.RAVI RAJU, RESIDING AT 33, 2ND CROSS,
VENKATTTAPPA LAYOUT, SANJAY NAGAR, BANGLORE 560 094.

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.V.S.THOSHIN

RESPONDENT/RESPONDENT:

1 **THE STATE OF KERALA**
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM THROUGH THE SUB INSPECTOR OF POLICE, PERAMANGALAM, THRISSUR.

2 **MOHAMMED NIZAM.A.A., AGED 42 YEARS**
S/O.ABDUL KHADER, ADAKAPARAMBIL HOUSE, PADIYAM, MUTTICHOOR, THRISSUR.

BY ADV.SRI.RAMAN PILLAI (SR.) ASSISTED BY ADV.SRI.GEORGE BRISTON
BY ADV.SRI.P.VIJAYABHANU (SR.)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.08.2022, ALONG WITH CRL.A.NOS.320/2016 & 245/2017, THE COURT ON 16.09.2022 DELIVERED THE FOLLOWING:

C.R.

K. VINOD CHANDRAN & C. JAYACHANDRAN, JJ.

Crl. Appeal Nos. 320 of 2016, 245 of 2017 and 233 of 2016

Dated this 16th September, 2022

JUDGMENT

Vinod Chandran, J.

The *'Cultural Capital'* of the State woke up, to the news of a thoroughly uncultured act, adding chill to the otherwise cold January morning. A frenzied attack by a resident of an apartment complex, on an employee of the complex, with a powerful vehicle; resulted in the victim sustaining very grievous injuries to which he succumbed eighteen days later, during which period he was continuously in the Intensive Care Unit of a hospital. The prosecution allegation is that the accused who approached the complex in the very early hours of 29.01.2015; incensed with the staff at the entrance of the complex having delayed to raise the electronic barrier for his smooth entry into the complex, went on a rampage. The accused parked the vehicle, got out of it and unleashed a vocal tirade against the staff, which was respectfully questioned by the deceased. Furious with that, the accused assaulted the deceased, who, first hid inside the security cabin. When the accused gained entry into the cabin by smashing the window panes and started assaulting him, he

jumped out of it and ran on to the curb, near the fountain at the entrance itself. The accused then got into his car, chased the running man, took the car over the curb, intentionally hitting the victim with the car, a high-end, powerful one, by name Hummer. The victim was thrown down and the car swerved onto the fountain, one tyre of which burst on the impact. The car was taken out of the fountain, the victim further assaulted and bundled into the Hummer by the accused. The Hummer was then taken around the fountain, back to the entrance where the wife of the accused; who came in another car from inside the complex, having been summoned over telephone, entered the Hummer which was driven into the parking area of one of the apartment buildings, by name Topaz. There, the victim was pulled out of the vehicle and further assaulted physically, by which time the Police arrived. The victim was taken to the Hospital and the accused to the Police Station. This is the long and short of the prosecution case on which the trial was conducted.

2. The prosecution examined 22 witnesses in the trial and marked documents from Exts.P1 to P65(a); many in series. Material Objects, MO1 to MO24 were produced, of which MO1, MO6, MO18 & MO24 were in series. The Court marked one Exhibit as Ext.C1. The defence examined 6 witnesses and marked Exts.D1 to D57; again many in series. The trial Court convicted the accused under Ss.323, 324, 326,

302, 427, 449 & 506 of IPC and acquitted him on the charges under Ss.341 & 294(b) IPC. The accused was imposed with the sentence of imprisonment of life under S.302 IPC and fine of Rs.70 lakhs; out of which Rs.50 lakhs was to be paid as compensation, to the family of the victim, under S.357(1)(b) of Cr.P.C which was to be received by the wife of the deceased. Various terms of sentences were also imposed under the other provisions, with a fine totalling Rs.1,30,000/- under S 326, 427 & 449 IPC and suitable default sentences were also provided. Three appeals are before us, one, of the accused, against the conviction and sentence, the other, of the owner of the vehicle against the order in a Crl.M.A refusing to release the vehicle to the applicant and another, by the State seeking capital punishment for reason of the accused having unleashed a merciless attack on a defenceless person, especially the act of having used a car to mow him down and thus murder him.

I. THE DEFENCE:

3. Sri. B Raman Pillai, learned Senior Counsel appearing for the accused, instructed by Sri. Sujesh Menon made a scathing attack on the prosecution, the medical evidence and the investigation. It was argued that all, conspired together to nail the accused with murder, when actually the accused was at the receiving end. An accident occurred when the accused was fleeing from the aggressors; that too on

the deceased, one of the aggressors, trying to stop him. The prosecution, he styled as having been carried out by a battery of lawyers, who created stories as the trial was proceeding, of which, there was no inkling from the materials gathered in the investigation, especially from the prior statements under S.161 & S.164 of Cr.P.C. It is pointed out that, from the very beginning high ranking police officers were present in the scene of occurrence, for reason of the negative media attention on the accused, which is the sole reason for the allegations now levelled. Out of 111 witnesses only 22 were examined and so were many of the documents produced; not marked or proved in trial. In fact many of the documents were manipulated which were marked through the prosecution witnesses, at the instance of the defence. There was initially a story of prior animosity elicited in the statements of CWs.6 & 13 as also of the wife of the deceased, CW14; under S.161. All these witnesses were given up and the prosecution never attempted to bring forth the case of motive, at the trial. The story put forth in trial as testified by the witnesses was a totally different one from that revealed in the investigation. The accused was also prejudiced in so far as the entire witness list proffered by the defence was not allowed and the I.O was not permitted to be confronted with a DVD which contained video footage of the scene of occurrence, taken at the time of preparation of the scene

mahazar. The Hon'ble Supreme Court, while dismissing Special Leave Petitions against the orders of this Court, for reason only of the trial Court having reserved judgment; had permitted the ground of prejudice to be raised, if the judgment goes against the accused.

4. It was pointed out that the use of a baton and a chair, both of which broke in the alleged melee at the security cabin, was never spoken of under S.161 or the FIS; specific omissions marked in the deposition of the so called eye witnesses. The presence of PWs.2 & 3 is not proved and the special feature of the cabin door, which cannot be opened from the inside, for reason of the door handle on the inside having broken, was not spoken of by any witnesses. There was gross delay in recording the statement of PW5 who was the only witness to the alleged incident in the car parking area. The call records indicate calls to PW5's wife at a time when the incident alleged was over; throwing suspicion on his presence at the parking area when the victim was allegedly assaulted there. It is pointed out that the FIS is not genuine and that Ext.P2 is not the statement taken, which is the first, in point of time. Police Officers were present in the crime scene before 5.00 a.m and they would have definitely enquired with the staff of the residential complex as to what transpired. No such statement led to the registration of an FIR and Ext.P2, FIS was recorded only at 5.00 a.m. PW20 who

registered the FIR deposed that what he heard over the telephone was sufficient to register an FIR, but he did not do so since he wanted to verify the truth. When PW20 reached the crime scene, PW62, the Grade ASI was already there, who also did not think it fit to record a FIS. PW1 is said to have gone with another person to give the FIS , the latter of whom was not examined. Ext.P25, the FIR, reached the Court only at 7.00 p.m on the same day for which there is no explanation. Ext.P2, FIS and P25, FIR, regarding the incident, differ considerably. In Ext.P25, Column 13, regarding the steps taken, column 14 , where the signature of the informer is to be obtained and column 15, wherein the manner and time of despatch of the FIR to the Court is to be recorded, are all left blank. The FIS and FIR are deliberate attempts made by the Police to nail the accused, for an offence he never committed.

5. Further, it is pointed out that the breaking up of the baton, the accused having entered into the cabin, 'crawling' through the broken window and the presence of MO1 & MO1(a) broken pieces of the baton were not spoken of in the FIS or the prior statements. The broken baton as revealed from Ext.P26 was seized from near the cabin. The photographs of the cabin show three batons in one piece and then only two, which clearly indicates the other having been broken by the Police. PW3's specific testimony is that he saw MO1 & MO1(a) near Mos 4 to 6,

the personal effects of the deceased, which were near the fountain. There is no fair and honest investigation from the outset and there were deliberate manipulations, which is revealed at every stage of investigation; which stood complemented by the prosecutors, thus clearly setting up a version, both improbable and untruthful. There were a number of glass pieces recovered from the scene of occurrence all of which contained the blood of the accused and deceased. One particular glass piece contained two finger prints, which were picked up from that object, by the fingerprint expert. The report of the expert was not produced nor was he examined, which requires an adverse inference to be drawn. In this context, it was also pointed out that the injuries found on the accused remained unexplained and PW22, the I.O had no explanation, but to say that the accused sustained those while crawling through the window; the glass panes of which were completely broken as seen from the photographs and anybody could have jumped through them, unhurt. The learned Senior Counsel emphasized the words '*crawled*', as if it was through a narrow opening, which in the given circumstance was not even a possibility. PW3's testimony that both the accused and the deceased '*crawled*' through the window pane was marked as an omission. Exts. P30, P35 & D45 series indicates the injuries sustained by the accused. Ext.D45 specifically speaks of

perforation of tympanum which could only have been by a slap inflicted on the accused, on the ear with undue force. Ext.D35 is a written complaint given to the Magistrate dated 30.01.2015, at the first instance, where the accused specifically complained of an assault by the employees of the complex.

6. The very presence of the victim is suspicious and this coupled with the other inconsistencies herein before argued, makes the version of the accused under S.313, probable. There is nothing to show the specific duties or duty time of the victim and even his appointment order Ext.P50 was not proved by any witnesses of the management and the attestors to the seizure mahazar were given up. Ext P50 shows the duty time to be 8 hours which makes the presence of the victim, a clerical employee, in the security cabin very suspicious in the wee hours of the subject day. A story is put up by the prosecution, that the victim was at the security cabin to give an out pass to an outgoing vehicle. The outgoing vehicle was driven by one Hassanar who was accompanied by one Kingsley, who came to the scene of occurrence after the alleged incident commenced, but neither was examined in Court. Under S.313 the accused has specifically put forth the version that the victim was present there to confront him for not having used the sticker of the apartment complex, in his car. The accused also had submitted before

Court that there was a melee at the scene of occurrence, in the course of which the victim and the accused were involved in a scuffle and the accused was chased by the victim with a glass piece. The accused was assaulted by the security staff, led by the victim and the victim was accidentally hit by the car in which the accused was trying to escape.

7. Further stressing the aspect of suppression of material records it is pointed out that an Occurrence Book, produced in Court, but not marked by the prosecution; at the instance of the defence was marked as Ext.P4. There is nothing in Ext.P4 about a vehicle having been used to run down an employee and the bland statement is of the victim having been beaten up by the accused, who also caused destruction inside the security cabin. Ext.P5 is the Duty Book of 28.01.2005, of which eight pages are missing, for which PW22 has no explanation. This puts to peril the claim of duty of the witnesses and the deceased. Ext.P48 is the Attendance Register, from which it is pointed out that the signature on the particular date, showing the deceased having joined duty, differs from the other signatures put by himself on the previous days. There is nothing to show the presence of PW1 to PW3 in the occurrence scene. Coupled with this is the fact that Ext.D56 GD Entry made at 3.30 a.m having not specifically spoken of the vehicle having been used against a staff member, nor was the staff member who

was attacked, named.

8. PW1, PW2 & PW3 have different versions of the vehicle hitting on the victim. While PW1 merely says that, the victim was thrown away on the hit, PW2 speaks of the victim having been dragged by the vehicle and PW3 deposes that the vehicle smashed the victim into the granite wall. PW1 had three versions; one in the FIS and the prior statements, then a hostile version before Court at the first instance and later the prosecution story set up at the trial. It is also pointed out that after the initial deposition of PW1, he was bound over on the request of the prosecution and released on bail by the Court, as per the proceedings sheet. He was also kept in the custody of the Police for the night, which explains his turning turtle on the next day and toeing the prosecution line, obviously on the pressure exerted by the Police. PW2 is also the occurrence witness, whose presence is not spoken by PW3, nor by PW1 in the FIS or previous statements. His testimony regarding Mos.1 & 1(a) baton pieces is an omission in the earlier statement. The testimony of PW3 specifically indicates the manipulation in Ext.P26 regarding the baton pieces.

9. The second incident, in the car parking area, is spoken by PW5 alone, despite CW8 to CW12 being proffered in the final report as witnesses, to speak of it. PW5, who alone was picked up from the three

witnesses proffered, gave the S.161 statement on the 18th day. There is no explanation offered for the delay and he has not spoken about the manhandling of the deceased, specifically the accused having stomped on him. He also did not speak of having witnessed such manhandling either to his wife or in a meeting of the residents association, summoned to discuss the incident, as revealed from the minutes produced. The omissions in the S.161 & S.164 statements of PW5 make it unreliable from all angles and he is a witness procured to substantiate the version of stomping, which in fact created all the media frenzy. The shoes, supposedly worn by the accused does not figure in the inspection memo prepared at the time of arrest of the accused. The same was procured in the search conducted at the different premises of the accused; from which nothing else worthwhile, was obtained. The scientific evidence of blood stains on the shoes, in that circumstance, is to be eschewed as planted evidence. To further buttress the contention that there was a new story put up by the prosecutors before Court, Ext.D32 application before the Magistrate for custody of the accused, made by PW22 is read out.

10. The learned Senior Counsel also made a scathing attack on the medical evidence which too was styled as manipulated. PW13, PW14 & PW15, the Doctors examined on the side of the prosecution,

were quite untruthful and mere stooges of the prosecution. There is clear evidence of three surgeries conducted on the deceased, by PW14, the details of two of which are not revealed from Ext.P19 case-sheet. Ext.P19 does not have serially numbered pages and many of them are missing. Ext.D12 & D12(a) contradictions are specifically marked in the cross-examination of PW15. From what is available in Ext.P19, after admission on 29.01.2015, the patient, ie. the victim, was assessed as comfortable and mobile on the chair from 03.02.2015; having been removed from the ICU on the 30th itself. In addition to this, it is pointed out that the condition of the patient was also confirmed by PW22 as spoken to him by one Dhanesh, a relative of the deceased, whose S.164 statement was taken. That witness was given up, which requires an adverse inference to be drawn. It is seen from the case-sheet that on 9th, the condition of the patient worsened, on the 10th he became serious and after 12th there was no recovery. However, there is no document available in the case-sheet regarding the treatment carried out on the patient. According to the learned Senior Counsel, especially looking at the initial assessment in Ext.D9, of the victim being conscious and oriented; which stood scrapped and corrected as 'disoriented'; the negligence at the hospital is the only reason for the death of the victim. The prosecution has failed in proving that the death was on account of

any of the actions alleged on the accused.

11. The defence submits that, what has been proved by the prosecution, is the defence version of an assault on the accused by the security staff of the apartment complex; the deceased having run behind the accused with a glass piece, the attempt of the accused to escape in the vehicle, in the course of which the deceased was accidentally hit, on the accused loosing control of the vehicle. It is categorically submitted that there is no private defence set up, but the contention is only of an accidental hit. The evidence led, does not show any scuffle and the accused is projected as the only aggressor having unleashed a one sided attack, upon which there was no cause for any injuries on the accused. It was reiterated that there was no enquiry carried out regarding the injuries on the accused. PW1 to PW3 have not been proved to be present in the crime scene and the embellishments made, as seen from the omissions marked, clearly indicate a scripted story advanced through their testimonies. Their versions being doubtful, it cannot be solely relied on and the Court should definitely look for corroboration, which is totally absent. The medical evidence also puts forth a reasonable hypothesis of medical negligence, as to the real cause of death. There was also no statement taken from the victim, despite he being conscious and mobile. There is also the evidence of PW14 regarding the CPR

administered on the victim, which could have caused the rib fractures. The prosecution has not established the offence under S.302 and the accused ought to have been acquitted or in the worst scenario booked for an offence of having unintentionally caused a motor accident.

II. THE PROSECUTION:

12. Learned Senior Counsel, Sri. Gracious Kuriakose (Addl. Director General of Prosecution) assisted by Sri. C.K. Suresh, Senior Government Pleader, defends the appeal of the accused and prosecutes that of the State. While seeking to uphold the conviction; in the appeal filed by the State, he urges capital punishment, since the case is one which can be categorised as the rarest of the rare. It is first pointed out that on the facts established, on which there is no dispute raised, the conviction can be upheld, which facts are the following. That around 3 a.m. on 29.01.2015, the accused reached the entrance of the apartment complex in a Hummer vehicle and stopped it at the entrance. That he alighted from the car and there was an untoward incident, after which he again boarded the car and moved it to chase the deceased, took it specifically over the curb and mowed the victim down. That the car after running down the victim, bounced onto the fountain and the right front tyre got deflated. That the car was taken out of the fountain by the accused, the deceased bundled into it and the wife of the accused

arrived at the scene in her own car and boarded the Hummer, in which the accused took his wife and the injured to the car parking area of the apartment building Topaz. That the accused did not have a car parking area in the space to which the vehicle was taken and after the car was taken there, the deceased was made to lie on the floor. That PW5 came to the spot, behind whom, the police came and the victim who was lying on the floor of the parking area was taken to the Amala Hospital in an ambulance. That the victim reached the hospital at 3.50 a.m., he was admitted there pursuant to the injuries caused in the incident and later, on 16.2.2015, succumbed to the injuries sustained.

13. In addition to this, PW1 to 3 have clearly spoken of how the incident commenced, continued and culminated, in the merciless killing of their colleague. The use of the baton which broke and later the pieces having been used to hit the deceased and when he ran off, the threat to shoot, the victim having then been chased in the car to run him down were testified in accordance with the prior statements. The learned Senior Counsel points out that even if the omissions and contradictions are eschewed, what remains; essentially brings out the fact that without any cause, the accused initiated the aggression, carried it out mercilessly and later levelled threats to kill and carried out the threat with his high-end vehicle; obviously not being able to get his

hands on a pistol. On his moving back to the car, the staff of the apartment complex ran helter-skelter, out of sheer fear and the accused targeted the deceased, who had questioned him; when the incident commenced with the vocal aggression on the staff at the entrance of the residential complex.

14. PW5's evidence was also read over to urge that, though PW6, the wife of the accused turned hostile, her admitted testimony establishes the factum of the commotion and more particularly that of the accused having taken the injured in his vehicle to the parking area of one of the buildings. She admitted that the deceased was in a bleeding state and PW5; whose wife she called for help, came along with two other residents and offered to take the injured to the hospital. This corroborates the testimony of PW5 that he saw the deceased being stomped on, by the accused, which is in consonance with injury No.1 revealed from Ext.P20 post-mortem certificate; the corresponding internal injury being injury No.42. The evidence of PW5 to the extent it corroborates that of PW1 to 3 establishes the above admitted facts and corroborates the further aspects spoken by the witnesses. The cleavage of opinion, as the learned Senior Counsel terms it, is only on whether there was a murderous intention or not, nursed by the accused; which he asserts to be evidently clear from the circumstances.

15. As far as the intention is concerned there can be no doubt entertained, which is fortified by the deliberate falsehood spoken of by the accused in his 313 statement. There is nothing stated in the version of the accused about the three other staff available at the scene, whom he saw in the security cabin along with the victim. Again, if the accused had the intention to take the injured to the hospital, he could have flagged a car going through the main road. True, the time was unholy and there would not be much traffic on the main road, but then according to the accused, he had summoned his wife who had come there in a car which could have been used to transport the injured victim to the hospital. Yet again, the accused while asserting that the gates were closed for reason of which he parked the vehicle outside, speaks of having taken his vehicle in, accompanied by his wife and the injured, without any hindrance after the victim was mowed down by the car. Even in the parking area, when PW5 and the other residents suggested moving the injured to a hospital, the accused refused to comply and said that he would take the injured to Ernakulam; testified by PW5 and admitted by PW6, the wife. The totality of the circumstances makes the defence plea patently false and totally improbable. The false explanation given by the accused further fortifies the prosecution case, as held by the Hon'ble Supreme Court.

16. From the S.313 statement it is further pointed out that question Nos.134 & 157 were specifically with respect to the presence of PW5 at the parking area of '*Topaz',* which was admitted by the accused. The accused said that PW5 and two others came along with the Police, but it was the testimony of PW6; who called PW5's wife, that the Police came later and that they were following PW5 and the other two residents, at a distance. As far as the delay in taking the statement of PW5, the learned Prosecutor offers an explanation that from 04.02.2015 to 11.02.2015, the I.O was not in station, since he had received the accused in custody and had taken him to many places to find out the pistol, the accused was referring to, while the incident was going on. Then PW5 went out on business and he was contacted and along with the others, statement was recorded on the 15th, on which day itself steps were initiated to record their statements under S.164. As far as the medical evidence is concerned, it is first pointed out that the post-mortem examination specifically speaks of the cause of death being injury Nos.43 & 44. Explanation (2) to S.299 was specifically referred to and reliance placed on *Virsa Singh v. State of Punjab AIR (1958) SC 465*. The opinion as to death is due to blunt injuries to chest and abdomen and the nature of injuries corroborate the ocular evidence, insofar as it could be caused in a hit by a vehicle and the further assault

alleged to have been perpetrated on the victim. The stomping on the head of the victim as testified by PW5 is evident from injuries Nos.1 & 42, the former being the external and the latter, the corresponding internal injury. The evidence of DW4, according to the learned Senior Counsel, is to be totally eschewed, going by the manner in which he deposed. It is vehemently argued that the manner in which DW4 styled the victim as a drunkard and a debauch, shows that he would stoop to any level. The statements made were thoroughly uncharitable; maligned a fellow Pathologist & the medical profession and he was insensitive to the poor victim's plight.

17. The learned Senior Counsel also answered the specific challenge made by the defence on the following aspects. It was argued by the defence that the finger print evidence collected from the scene of occurrence and examined by experts were not at all produced. Many witnesses, who were proffered to speak on the various aspects of the alleged crime were given up, despite call details having been collected and produced, but no witness examined to prove it. In answer, the learned Senior Counsel would first urge that it is the quality of evidence that is vital and not the quantity. The instant case is one in which there was direct ocular evidence and the presence, of the accused and deceased, was never in question and was admitted by the accused also.

The identity of the accused and the deceased were also not in dispute and it was the discretion of the Prosecutor to decide on who should be examined and given up. The Prosecutor, on judicious consideration, having given up certain witnesses; cannot be faulted, if otherwise there is evidence beyond reasonable doubt. On the question of the delay in FIR reaching Court, it is pointed out that on the same day night at 7 p.m it reached the Court. The offence then was under S.307 and there was none to be identified; in which circumstance the minimal delay was inconsequential. There were serious attempts made to win over the witnesses, as is discernible from the case of PW1. Hence, the Prosecutor cannot be found fault with for not examining witnesses, on whom he did not have absolute confidence.

18. As far as the injuries on the accused are concerned, there was ample evidence to show that the accused had carried out destruction on the inside of the security cabin and there ensued a scuffle between the accused and the other persons at the scene. It is only natural that the injuries on the nose and a contusion below the eyes; not very serious, were sustained. As far as the injuries on the vertebra, there was a violent ramming of the car on a solid granite wall, enclosing the fountain, which would have caused the injuries on the driver of the said vehicle, supported by the testimony of DW1, a doctor examined by the defence.

As far as the missing pages of Ext.P5, it is pointed out from the original register, that four pages are seen missing between page Nos.30 & 39 and only three pages on the corresponding end at the beginning, pages 1 to 6. The Register itself starts at page 7, indicating a wrong printing of page numbers. If there was a manipulation, the first page would not have been blank and would have contained the signatures of the persons on duty, since the names and signatures were entered respectively, on the two facing pages on either side. The corrections in Ext.D9, insofar as noting the patient as being disoriented, was admitted to have been done by PW1, since an intern entered the details wrongly. As far as the vacillation of PW1 in his testimony, it is urged that the explanation put forth by the witness, of remorse, is reasonable and sufficient. On the missing pages from the case-sheet, it is argued that the case sheet was handed over by the Hospital and there is nothing to show a medical negligence, having caused the death, as revealed from the post-mortem certificate.

19. Learned Senior Counsel for the defence, in reply, pointed out that suggestions were made to both PW14 and PW15 about the missing pages and the possibility of medical negligence having led to the death. The fracture of ribs increased in number, in the days in which the victim continued in the hospital and there was no X-ray or scan report

produced before Court. There was every possibility of the CPR carried out on the patient having caused the multiple rib fractures and there is nothing to indicate the surgeries conducted on 10.02.2015 and 12.02.2015. There is a reasonable hypothesis for medical negligence, which could have resulted in the death. We shall refer to the arguments of the defence, regarding the hypothesis advanced of medical negligence, when we deal with the medical evidence.

20. On the question of the rarest of the rare cases, the learned Senior Counsel for the prosecution, would contend that the accused, by his own showing, is a very prosperous business man, but all the same was involved in a number of crimes. It is also pointed out that he was detained under the Kerala Anti-Social Activities (Prevention) Act and this Court had confirmed his detention in a reported decision. The deceased is from a marginalised section of society, eking his livelihood with the bare subsistence from his meagre employment. The accused had unleashed a merciless attack on the poor person that too with a vehicle and mowed him down causing injuries which resulted in his eventual death. It is pointed out that accused was never out of the ICU and there is sufficient explanation for the I.O having not taken a statement from him. Further when he was in hospital, there was no contemplation of death, for the I.O to initiate recording of a dying

declaration. In fact, the argument that no effort was made to get a dying declaration from the deceased goes against the argument of the accused that from the inception, there was a concerted attempt by the Police to indict the accused for murder; which for the first few days was not in contemplation. Though the death occurred after a few days, the intention to murder is very clear from the evidence led. The *mens rea* coupled with the fact of the injuries having, in the natural course, led to the death of the deceased, brings the offence under S.300. The manner in which the act was carried out, that is by chasing a frightened man running for his life, in a car and then mowing him down as also the attendant circumstances, the vast disparity in the status of the assailant and the victim, both social and financial, the weapon used, being a high-end car and the accused having given short shrift to due caution to be exercised in the use of any vehicle; individually and cumulatively persuades any reasonable man to find the instant case to be the rarest of the rare case, warranting capital punishment. At least the accused should be handed down a life sentence, without remission, for a specified period beyond 14 years.

III. THE VACCILATION OF PW1 :

21. PW1 to PW3 are the witnesses proffered by the prosecution to speak on the commotion at the entrance of the apartment

complex, the rampage with the vehicle near the fountain and PW 5 & 6, regarding the last incident at the parking space of the building called '*Topaz*'. There are certain preliminary objections, which are to be dealt with and it has to be observed that there has been an exhaustive cross-examination of all the witnesses, which were read out to us elaborately by the defence, before the arguments commenced. Even during the arguments, the learned Senior Counsel specifically stressed on the omissions from the prior statements of the witnesses, both under S.161 & S.164 Cr.P.C to put up a defence and argue that the story now spoken of by the witnesses were one set up by the prosecutors and differs considerably from the earlier statements. The argument was also that the evidence led, in fact probablises the story of the defence as set up in the suggestions made to the witnesses as also in the S.313 questioning. We have to first look at the evidence of PW1, who initially turned hostile and then, on the next day narrated the incident as put forth by the prosecution. According to him, he was full of remorse for the earlier amoral stand taken by him. The defence argues that he was threatened by the Police and influenced by them, in whose custody he remained on the previous day. A veiled attempt was also made to accuse the Court of having attempted to threaten the witness by warning him of the consequences of having lied before Court, in considerable deviation

from the S.164 statements given before the Magistrate.

22. Even at the first instance, PW1 admitted that he was on duty in the night of 29.01.2015 and the deceased victim was also present. He identified the accused as a resident of the apartment complex and, the owner of a Hummer car. According to him, when he was on duty from the evening, the Hummer car of the accused passed the security barrier, two or three times. The victim, who was also in the security cabin asked him why the vehicle of the accused alone, does not display a sticker and why the same was not checked. The sticker was one supplied to all residents of 'Sobha City', which has to be pasted on the wind shield of their vehicles, to enable easy access to the complex. PW1 explained to the victim that the accused was a trouble maker and hence there was instruction from the management not to insist on the sticker. PW1 also deposed that at around 2-2.30 a.m, the victim asked him whether the accused had returned, and he replied in the negative. The victim also instructed him to close both the gates and when the accused came and incessantly honked, the victim came out and asked the accused as to why he alone was not using the sticker. He denied the statements in the FIS that the barricade was opened before the car came and due to the high speed of the car, it hit the curb and stopped. The witness was then declared hostile and the contradictions from Ext.P2,

FIS were marked as Ext.P2(a) to Ext.P2(i). Ext.P1 was the S.164 statement of PW1 and Ext.P3, a relevant portion from his S.161 statement.

23. The witness was bound over for the day and the proceedings on 26.10.2015 as available from the proceedings sheet is extracted hereunder:

> *"Accused produced, CW1 and CW2 present. CW1 examined as PW1, in part, Ext.P1, P2 series, P3 marked. I.O filed petition u/s 340 Cr.P.C. to proceed against PW1 u/s 195 Cr.P.C and 181 IPC. The prosecutor has prayed this Court to keep PW1 in judicial custody till his examination is over. defence counsel has vehemently opposed this. PW1 says that his child Nanmitha has to be taken to Jubilee Hospital for treatment and he shall not be sent to Judicial custody. He undertakes to appear tomorrow without fail. He says that no sureties are with him. PW1 is bound over on executing bond and surrender of his Aadhar Card. (Bond amount shall be Rs.10,000/-). PW1 bound over to 27.10.2015. PW1 says that he wants protection. C.I will do the needful. Accused sent back. Produce him on 27.10.2015."*

We cannot for a moment accept the argument that, the Court's action of ordering a remand and then permitting release of the witness on bail bonds executed, was an attempt to persuade him to change his stand or in any manner intimidate him. Firstly, there is no such order of remand discernible from the above extracted portion and the binding over is

only since his testimony was not completed. The Court did not initiate any proceedings and despite the prayer of the prosecution to keep the witness in judicial custody; on the submission of the witness itself, released him on self-bond. The police protection was granted specifically at the request of the witness. Pertinent also is the fact that the witness, was threatened and intimidated by the members of the public and the media. There were also adverse comments made, both in the electronic and print media, which would have persuaded the witness to come back to Court and tell the truth. The veiled allegation against the Court is totally baseless and untenable.

24. On the next day, the witness was produced and it was his testimony that, he repented making false statements before Court, which resulted in public humiliation and earning a bad name in one single day. He wanted to state the true facts before Court and he categorically stated that there was no threat, coercion or extraneous pressure. Then he deposed in accordance with the FIS. The learned trial Judge, who watched the demeanour of the witness, both at the point he turned hostile and then decided to come out with the truth, as declared by himself, had accepted the second testimony given on the next day by PW1. We are definite that the trial court was absolutely justified in accepting PW1 as a loyal witness, despite he having turned hostile on the

previous day. We find no reason to reject the same as having been made under the influence of the Police. The Police obviously was deputed to protect the witness and it cannot be said to be a concerted attempt to influence and tutor the witness. We reject the contention of the defence that PW1 had turned turtle after his initial hostile attitude before Court, only under the influence of the Police and for reason of the coercion exerted by the public or the media.

IV. THE FIRST INFORMATION:

25. Ext.P2 is the FIS given by PW1, the first informant at 5 a.m on 29.01.2015 at the Peramangalam Police Station. Ext.P2 speaks of an attempt to murder the named colleague of PW1, by the named accused residing in 'Sobha City'. PW1 introduces himself as a Security Supervisor of 'Sobha City' and the victim as an employee. According to him, at around 3.15 a.m, the accused staying in flat No.1073 came in his car having registration No.PB-03-F-9999. The remote barrier on the gate was closed and seeing the vehicle coming very fast; about 100 meters before reaching the barricade, it was opened. Presumably due to the speed, the vehicle hit the curb of the road and stopped a bit forward, between the open entrance gates. The accused got out of the vehicle and at that moment the victim came out of the cabin hearing the sound. The victim asked the accused as to what happened, when the accused using

filthy words, questioned the authority of the victim and slapped him after holding on to his shirt. The victim, having suffered the slap, ran into the cabin and closed it, when the accused kicked on the cabin door. PW1 and the other security staff, Baby and Gireesh Kumar, tried to pull him away. The accused then hit PW1 on the ear, took the baton of the security staff and smashed up the glass panes of the cabin, entered it and assaulted the victim with the baton as also stabbed him with the broken glass pieces. The accused then shouted at the deceased that he would be shot dead, hearing which the victim jumped out of the window and tried to escape through the footpath around the fountain, at the front. The accused then, threatened to kill him with the vehicle, got into the car and drove the vehicle on to the curb, hitting the victim. The victim fell down and the accused got out of the car to again assault the victim with his hands and feet. He then dragged the victim into the car and drove inside. Since he threatened to shoot, PW1 did not follow the car. He heard that inside the parking area of the flat the victim was dragged out and again assaulted. The injured victim was taken to Amala Hospital in the company ambulance by one Ajeesh (PW2) and Hassanar. The victim was under treatment in the hospital, having fractured his ribs and hand. The accused attempted to kill the victim for reason of the security staff having delayed opening the gate. PW1 saw the entire incident in the

lights, in front of 'Sobha City'.

V. THE CRIME SCENE:

26. PW1, as we found, had a justifiable explanation in having turned hostile on the first day, and coming out with the truth on the second day. Before we examine his testimony as such, we find a pictorial description of the crime scene from his evidence, even at the first instance. The residential complex by name 'Sobha City' lies to the north of the Thrissur-Guruvayur Road, which road lies east to west. The apartment buildings are located at about 1 Kilometre distance from the main road. At the entry point from the main road, there are plant boxes within which plants are grown. There are three to four, high-mast lights at the entrance positioned on posts and aimed outside. There is a circular road providing ingress and egress; at the same time to two vehicles, around a fountain placed at the centre, which also is circular in shape. At the inner edge of the road, around the fountain there is a concrete curb of about 3 to 3 ½ feet width and then sloping lawns, of 1 to 1 ½ feet width after which is the fountain. On the lawns, is the circular wall of the fountain with a height of 2 to 2 ½ feet, laid with marble. It is inside the circular wall that the fountain is placed, again with lights. The fountain is at around a height of 4 feet from the road level. The circular road ends at the entrance from where there is a road

going north, at the commencement of which there is another plant box and then a security cabin of area 10 x 10 feet. On three sides of the security cabin, there is a 4 feet half-wall, the other half enclosed with glass, up till the roof. The entrance of the cabin is on the northern side and on the side of the door, there is a glass window with two sliding panels. On the west of the cabin is the inner gate and on the east is the outer gate; the vehicles come in through the western half of the circular road and exit through the eastern half. The outer and inner entrance have 2 door-iron gates and before that, is a remote barrier to control the traffic. There is sufficient lighting during the night time and there is an automatic generator, which can be used at times of power failure. After the entrance, going inside the complex, there is a median separating the inner gate road and the outer gate road and where the median ends, there is an office space. There is ample light at the entrance of the apartment complex.

VI. TESTIMONY OF PW1:

27. PW1, on the second day, in Court, narrated the incident in the following manner. PW1, as security supervisor, was on duty at the main gate, and on the inner and outer gate, Gireesh Kumar and Baby (PW3) respectively, were on duty. The victim was present and his duties were to record the materials brought into the complex and issue out-passes

for the vehicles taking goods outside the complex. At around 2.45 a.m, the victim issued a bill to Hassanar, the company driver, for transporting certain materials to Madras. Hassanar and Kingsley, another employee, were present when the bill was issued and they came from their residences outside the complex. They went inside the complex to take the vehicle, on which was loaded the goods. PW1 was sitting inside the cabin, when he heard a car approaching the entrance with blinding lights. The car was identified as the Hummer car and before it reached the entrance, Gireesh Kumar raised the remote barrier of the inner gate. However, the car, coming in high speed hit the curb and stopped between the doors of the open entrance gates. The accused alighted from the driving seat of the car and shaking the remote barrier, abusively and in filthy language shouted that one day he will pull out all these things. Hearing the commotion, the victim came out and enquired as to what was the problem, when the accused abused him in a filthy language and struck him on the cheek. The victim asked him why he was doing so, when the accused further abused him and slapped him on the face repeatedly. The frightened victim ran into the cabin and closed the door, which could not be opened from the inside, since the handle on the inside was broken. The accused kicked on the door which did not open, when PW1, PW3 & Girish tried to pull him back. PW3 evaded a

kick aimed at him and the accused turned his ire on PW1, who was holding him oand slapped him on the left cheek, at the ear. PW1 immediately moved away and called their Assignment Manager one Rejin and told him that the accused was creating a problem at the site and he was assaulting the staff. The accused then took a chair from the outside of the cabin and tried to break the window panes of the cabin, but the chair broke and not, the glass pane. PW1 then remembered Ajeesh, PW2, who was sleeping in the main office room and informed him over the telephone about what was happening at the entrance. The accused in the meanwhile, prowled around and picked up a baton used by the security staff and started beating on the glass enclosure of the cabin. The baton broke but he took up the pieces and again smashed on the window panes. At that time, the vehicle driven by Hassanar came to the outer gate which was not allowed to pass through, by the accused who closed the open half gate and gestured to those inside the vehicle, to take it back. Hassanar took the vehicle back, when the accused resumed his assault on the cabin window, which broke. The accused climbed into the cabin through the broken window and assaulted the victim as also pulled down everything inside the cabin. The accused brutally hit the victim with the baton piece and also stabbed him with glass pieces, all the while threatening the victim verbally. The accused then jumped out

of the window, and moved in the direction of the car, threatening to shoot the victim down and also making a shooting action with his hand. PW1 shouted at the victim to jump through the window and escape. The victim jumped out and along with PW1 ran out to the footpath around the fountain attempting to run outside. The accused entered his car, took it back from the entrance and came after the running staff through the eastern half of the circular road. The victim was standing on the footpath of the fountain when the accused, driving the vehicle in high speed, careened on to the footpath of the fountain, to deliberately hit the victim, who was thrown down. Since the vehicle was in high speed, it hit the granite wall around the fountain and jumped over the wall, to be stationary with one wheel inside the circular wall. The accused got out of the vehicle and went around it, to see how it could be taken out. Again he boarded the vehicle and reversed it, on to the footpath of the fountain. He then got out and approached the lying victim and fisted and kicked him. He dragged the victim towards the car and opening the rear door on the right side, the victim was pushed into the vehicle. At this moment a car came to the outer gate which was driven by the wife of the accused, PW6. PW6 got out and came to the inner gate, to which spot, the accused had brought the Hummer car. She also got into the Hummer car and both of them took the victim in the car into the

complex. PW1 was afraid to follow the car since the accused had spoken of having a revolver. Immediately afterwards, PW2, Hassanar and Kingsley came to the spot with the ambulance of the company and enquired after the victim. PW1 informed them that the accused had taken him into the complex. While they were assembled at the entrance, not knowing what exactly to do, the police arrived. Later, in the ambulance, PW2 took the victim to the hospital and the police took the accused in their jeep. To a specific question as to how the incident commenced, PW1 answered that it was due to the remote barrier having not been raised, well in advance. He marked MO1 and MO1(a), the two pieces of the baton seized from the scene of occurrence. The car which was stationed on the front of the Court was also identified and the same was marked as MO2; the key of which was marked as MO3. He also admitted that he had made the statements in the FIS, which was marked on the previous day as Exts.P2(a) to P2(i); conforming fully to the first information given.

28. In cross examination, PW1 admitted that the incident was not graphically narrated to the doctor who examined him and that in Exts.P1 and P2, he had stated that the commencement of the incident was at around 3.15 a.m. He also did not remember about the specific calls made, which from the call details, the defence suggested, was at

3.10 a.m. As far as the omissions, PW1 admitted the following: That, he did not speak about the work of the deceased comprising of recording the incoming vehicles and giving out-pass to the outgoing ones or about his duty in the security cabin. That, Hassanar was scheduled to take a vehicle to Madras and that he was issued a bill by the victim before the incident commenced. To a question whether he spoke of Gireesh Kumar having opened the security barrier, PW1 said that he may not have mentioned the name. PW1 also did not speak of the vehicle having hit the curb, stopped between the open gates, the accused shaking the barrier, threatening to throw it away, that the deceased came out of the cabin during the conversation and asked the accused respectfully as to what the problem was, the accused slapping the deceased two or three times and the deceased asking the accused as to why he did that, the deceased going inside the cabin and the door not capable of being opened from the inside, that the accused and deceased jumped out through the window of the cabin, that Gireesh Kumar tried to pull the accused away, that the accused tried to kick PW3, that when PW1 tried to hold him, the accused having abused him and slapped him, that PW1 phoned up Ajeesh and Rejin and the accused having attempted to break the glass of the window pane with a chair. He also admitted to have not stated that, the accused prowled around to find the baton, which on

being used, broke into two pieces and also omitted the incident of the accused having closed the outer gate and gestured Hassanar to go back, the broken glasses of the window panes protruding out, pulling down of the objects inside the cabin, the accused having entered the cabin through the window and so on and so forth.

29. Despite the various omissions marked from the FIS, we are convinced that essential facts in the FIS was testified by the witness. This clearly indicates that the accused had come to the entrance in a car, created a commotion for reason of the barrier having not being raised in advance, when the deceased/victim came out and enquired as to what happened. Upon which the accused abused the victim in a filthy language and slapped him. The victim having fled into the cabin, the accused went on a rampage and there ensued a scuffle when PW1 and PW2 and Gireesh, tried to pull away the accused from assaulting the victim. The accused picked up the stick of the security staff and demolished the office and further targeted the victim. There was also clear statement of the accused having threatened to shoot the victim. Whether upon exhortation of PW1 or otherwise, by himself, the victim jumped out of the cabin and along with PW1, tried to escape through the circular road, around the fountain. The accused then chased them in the car and again targeted the victim who was mowed down, further

assaulted, dragged into the car and taken inside the complex, accompanied by his wife, who reached there in another car, from inside the complex. The omissions regarding whether the accused attempted to kick PW3 or shouted in this manner or that manner; so far as the threats levelled were clear, is irrelevant. So also whether PW1 called Rejin and Aneesh before the victim jumped out of the cabin or after he jumped out of it, are all inconsequential in so far as the crime is concerned. We also notice that there was a question asked about whether PW1 has stated in the FIS that the cabin door cannot be opened from the inside; which, when speaking of the incident of mowing down, is really insignificant.

30. Much time was also spent on the use and the breaking of the baton, which we find to be immaterial. The use was stated in the FIS but the argument vehemently urged by the defence was that the breaking of the baton was not stated. The attempt was to say that the two pieces were seized from near the cabin as per Ext.P26, while PW3 specifically speaks of having seen those being picked up, from near the place where the victims belongings were found; the spot where he was hit by the car. It was also argued that a mere look at the MOs would indicate that the baton was purposefully broken by the police to fabricate evidence against the accused. It was also pointed out that in

one of the photographs, there were three batons, displayed in one piece and later only two were seen, which further fortifies the contention of deliberate breaking of the other baton at the time of inspection of the crime scene. At the outset, we have to state that no such photograph with three batons, was shown to us by the defence and we could not see any, from those produced before Court. We also do not attach much weight to the argument of the number of batons seen in the photographs, since there is nothing to show that there were only three batons in the vicinity. No suggestion was put to any of the witnesses as to the number of batons available in the security cabin. It is also to be noticed that even according to PW1, the baton was not taken by the accused, from inside the cabin and it was taken from the veranda of the cabin opening out to the outer gate. It is quite possible that the person who was manning the outer gate, had kept the baton near him or at the veranda, to easily access it. We also observe that the baton having broken, is not a relevant fact to prove the crime and is just an ancillary incident and we cannot, after considerable soul searching, fathom the reason as to why the police should break the baton. Whether the baton broke into two or not is not a relevant fact and even as to the prior conduct, the testimony is only to the effect that the window panes were broken with the baton, later the articles inside the cabin were pulled

down with its aid and also used to assault the victim; which assault is not the alleged cause of death. We have seen the two pieces, MO1 and MO1(a), in Court, and we cannot also, from the nature of its breakage, find that it was deliberately broken. As to PW3's deposition of a police man having picked up the baton from near the fountain, a reading of his testimony would indicate that, when those were brought to the I.O, the latter spoke roughly and asked him to put it in its place, which validates its presence in the cabin, when the seizure was made. In any event the seizures of the baton is not a very relevant fact as it is proved from the testimony and photographs that the security cabin was smashed up; both its window panes and the inside. We noticed the objection of the defence regarding the photographs, but it is the defence who relied on those photographs, before us. We find absolutely no reason to find any manipulation in so far as the seizures made of MO1 and MO1(a).

VII. THE OCCULAR CORROBORATION TO PW1:

31. PW2 is Ajeesh, a driver of 'Sobha City', who was in the main office, about 350 meters from the security cabin. Ajeesh's presence, according to the defence is not spoken of by PW1 in the FIS and the fact that PW1 telephoned Ajeesh & Rejin also is omitted in the FIS. However, on a reading of the FIS, it is clear that Ajeesh was present

at the site. After the Hummer carrying the victim was taken into the complex, Ajeesh is said to have come to the entrance with the ambulance of 'Sobha City'. This could only have happened on Ajeesh having witnessed the incident, in which, the victim was mowed down by the car of the accused. In fact, in the S.164 statement, PW1 specifically spoke of having telephoned Ajeesh who was in the main office. PW2 also confirmed that PW1 telephoned him and asked him to come, since the accused was assaulting the victim and PW1. He immediately came from the main office and while approaching the entrance of the complex, he saw the pick up van coming back through the outer gate which he noticed, since usually no vehicle comes inside, through the road leading to the outer gate. He also spoke of having seen Hassanar and Kingsley in the vehicle. PW2 informed them about the call from PW1, upon which Hassanar told him that the accused, had threatened him with a stick (reference is to the baton) and asked him to go back. PW2 along with Hassanar went in a bike to the main gate through the footpath, after putting off the headlights. Both the doors of the outer gate were closed. PW2 witnessed the accused breaking the window panes of the security cabin with a stick, go inside the cabin through the broken window and assault the victim, who was inside and who desperately tried to evade the assault. He also spoke of the accused having crawled out through the

broken window and proceeded to the car. He heard PW1 shouting to the victim asking him to escape, when the victim also crawled through the window and proceeded to the fountain. The accused then approached PW2 and Hassanar and asked them to catch the running man. Then he turned to the victim and threatened that he would be taken care of and would be done away, with the vehicle. The accused got into the driver seat of the Hummer car, reversed it and chased the victim. The vehicle was slowed and swerved to aim it on the victim, who was mowed down by the car. The victim was then standing on the curb of the fountain and after running him down, the car mounted the fountain wall and its front tyre was inside the fountain. PW1 screamed that the victim was hit by the car and everyone were afraid to approach the car. PW2 and Hassanar went to get the ambulance, with which they returned along with the auto electrician, Kingsley. While they were approaching the outer gate, they saw a white Jaguar car at the outer gate from which a lady alighted and boarded the Hummer car, which came to the inner gate. The lady was the wife of the accused and the car proceeded to the apartment buildings.

32. PW2, along with others, immediately went near the fountain on the expectation that the injured victim would be lying there, but he was not found. PW1 told them that the victim was dragged into

the car and taken inside. They did not go inside since they apprehended that the accused would harm them also. At that moment, Rejin came there and told them that the police have been informed. Immediately thereafter, the Highway police and after them the Peramangalam police reached there. PW2, Hassanar and Kingsley, with the ambulance, went to the apartment building called Topaz. The ambulance was parked near the security cabin of Topaz and PW2 verified the register to find out the flat number of the accused, while the others along with the police went into the car parking area, in search of the victim. Then Hassanar came running and asked him to bring the ambulance. When PW2 went inside, he saw the victim drenched in blood and also the accused and two or three residents, standing there, in addition to the police, Rejin, Kingsley and Hassanar. Kingsley, Hassanar and the police together lifted the victim and put him in the ambulance. Hassanar, Kingsley and himself took the victim to the Amala Hospital, on the way to which the victim was faintly asking for water. The victim was bleeding from the mouth and had blood all over his body. The victim was admitted to the hospital and immediately some residents of the complex including Dr. Rakesh came there. After one or two hours, they came back to 'Sobha City' and PW2 affirmed that there was sufficient light akin to day light, at the time of the incident in the crime scene, from the high-mast lights near the

fountain. He confirmed that Baby and Gireesh were available at the site. He identified the personal effects of the accused as MO4 series (shoes), MO5 (specs), Mo6 and MO6(a) (broken mobile set and its cover). He also identified Mo1 and MO1(a), the licence of the accused was identified as MO8 and the mobile tab of the accused, as MO7.

33. PW2 withstood searching cross examination and confirmed that from where he was standing, he could see the car hitting the victim but he could not see the place where the victim fell down. The said testimony is very believable, especially since from the evidence of PW1, it is clear that the granite wall surrounding the fountain was at a height of less than 4 feet from the ground level. The gates are positioned at the inner and outer road, commencing after the circular road around the fountain. Hence a man standing at the inner or outer gates, at the north of the fountain, could easily see the incident, which happened at the southern curve of the fountain; almost diagonally opposite to the entrance. However when the victim fell down on the curb, from the entrance gates, one could not have seen the body for reason of it being hidden by the granite wall around the fountain. PW2 does not say anything about that because on seeing the accused being run over, he immediately went to get the ambulance.

34. The omissions marked from the prior statement under

S.161 were; having seen MO1 & MO1(a) in the hands of the accused, PW2's employment as an ambulance driver, himself being on duty in the subject night and he being employed in the 'Sobha City' for 4½ years. Ext.D3 marked was his prior statement that he was working as a driver in 'Sobha City' from last November. He clarified that the victim asked him for water at the causality and admitted that he does not remember having stated so before the police. PW2 was not clear about whether he has stated before the Magistrate that he had asked for the victim's wife's number, upon which the victim told him not to inform his wife. He also admitted that he does not know the speciality of Dr. Rakesh nor his flat number. Other omissions marked were with respect to: PW2 having seen 3 to 4 residents of the flat, Rejin, the accused and his wife in the parking area on the crucial day, Dr. Rakesh having told them, at the hospital, about the assault on the victim by the accused in the parking area; which in any event is hearsay. The testimony was also that this conversation occurred in the hospital and not in the course of the crime proper. He clarified that he was standing along with Hassanar on the western side of the outer gate when the incident occurred, which we note from the description of the crime scene, is almost diagonal to the place where the victim was mowed down. He specifically denied the suggestion that a person standing in that spot would not be able to see

the southern part of the fountain. Again, omissions were marked from S.164 statement regarding the witness having seen the assault of the victim inside the cabin and the manner in which the accused went inside the cabin as also how the accused and the deceased came out of it. As we noticed earlier, the learned Senior Counsel for the defence had made much of the fact that according to PW2, both the accused and the victim '*crawled out of the broken window*' to impress upon us that, with the glass broken, there was enough space for a person to jump through. In the cross examination of PW2, a specific question was asked and it was answered that one cannot jump over it but could only turn on the side and come out through the window. Obviously, the reference to both the accused and the deceased *'crawling out'* is just an expression used by the witness and we need not necessarily take it to be one indicating something, akin to a crawl through a hole or a narrow space. Ext.D3(a) marked was also ചരിഞ്ഞു നൂഴ്ന്ന് ഇറങ്ങി, which was clarified as the victim having turned on his side, to come out of the cabin. One had to get out, through the space, where the window panes were broken, by stepping over the half wall on which the glass window was positioned. There is no reason to attach any significant weight to the said contradiction, which also is with respect to the antecedent incident and not the crime proper, which occurred a little later. There were also many

omissions marked with respect to the specific transaction with Hassanar and Kingsley, which are also not relevant to the crime proper.

35. There was also an omission marked in so far as the witness having stated neither before the Magistrate nor before the police about the presence of Baby, PW3, another security staff. This would have been relevant, only if he spoke in Court, of any direct transaction with Baby, or having seen Baby involved in the scuffle; which he did not. PW2 came to the crime scene when the accused was entering the security cabin to assault the victim. Baby's role as spoken of by PW1 was before the accused entered the security cabin. Baby definitely would have been in the background after having evaded a kick by the accused, at the commencement of the incident. Even PW1 does not speak of Baby being involved in the scuffle, except for the initial effort to restrain the accused. PW2 also had not told the police about having heard PW1 screaming to the victim to escape. However in cross examination, PW2 clarified that after getting out of the cabin, the victim ran outside, often turning around to look at the accused, and the accused was at a distance of about 4 meters. It was also admitted that if the accused sprinted, he would have reached the victim in 5 to 6 seconds, as an answer to a specific question in cross examination. Here we have to pause, to notice that this aspect brought out in cross examination is very relevant in

disclosing the intention of the accused. If the intention was a mere physical assault, the accused could have just sprinted towards the victim. Hence the deliberate act of getting into the vehicle and moving it towards the victim, discloses the intention to mow him down and thus murder him, which is also revealed from the threats shouted by the accused, spoken of by the ocular witnesses. The ocular testimonies clearly indicate the injured running away and the defence version of the accused attempting to escape from the deceased, who was chasing him with a glass piece, is a deliberate falsehood.

36. Further omissions were marked as to whether PW2 had told the Police about the victim having repeatedly turned around to look at the accused and the accused having threatened to kill the victim with the car or that he will be taken care of. PW2 also admitted that he did not speak of the vehicle having been slowed and then aimed at the victim, to the Magistrate or the police. To a specific question whether he saw the vehicle, dragging the fallen victim, he answered that he only saw the car hitting the victim who was thrown away, as against the S.164 statement that he saw the victim under the car being dragged. In fact, it is to be noticed that from the spot at which the witness was standing, that is at the outer gate, definitely he would not have seen the body of the victim under the vehicle on the southern side of the circular wall of

the fountain, which was lying on the inner curb of the circular road. The omissions then marked were all with respect to the subsequent events.

37. PW3 is Baby, security staff of 'Sobha City', who also spoke of the presence of PW1, the victim and another security staff, Girish, at the entrance of the complex. He specifically stated that the victim, an office assistant, usually sits inside the cabin and also takes rest inside it. He spoke of the incident in the manner in which PW1 & PW2 narrated it and identified the accused on the dock. The transaction between the accused and the victim, as also what transpired afterwards, were also spoken of in the same manner, but with certain minor differences, which only validates its genuineness, since if two persons speak about an incident in an identical manner, then a suspicion of tutoring arises, and not otherwise. PW3 also said that when the accused started chasing the victim, he, along with PW1 and the victim, ran towards the outer gate. PW1 was running through the outer curb on the east of the circular road and the victim, on the inner curb around the fountain, also on the eastern half of the circular road. PW3 was standing inside the plant box when the incident occurred and the car hit the victim and threw him down. Seeing the car mounting the fountain, he ran towards the main road, when he saw Rejin, the Manager, coming in a motorcycle. He went with Rejin to the Police Station and reaching

back, he did not see the Hummer Car or the victim at the crime scene. There was a vehicle of the Highway Police near the main gate. The Peramangalam Police jeep followed them, into 'Sobha City'. Later he saw PW2 Hassanar and Kingsley taking the victim to the hospital in the ambulance. He identified the baton pieces and Ext.P5 Duty Book, from which Ext.P5(a) indicated his name in Column No.2. He also spoke of the first name in the said page being of Anoop K., PW1, who was the Security Supervisor. PW3 was asked about the missing pages in Ext.P5(a), but he was not able to explain it. He was also confronted with a copy of Ext.P5(a), given to the accused, in which there was no signature at the place where PW1 was to sign on his relief from duty; which photocopy was marked as Ext.D4. He denied Ext.P5 having been prepared afterwards. He also admitted that MO1 & MO1(a) were taken from the scene of occurrence by the Police on the very same day. He conceded that he had not told the Police about having seen the baton pieces inside the cabin. He admitted that the incident commenced around 3-3.15 a.m, but had not spoken of the time, after looking at a watch. Much was made out in the cross-examination about the antecedent assault, the use of batons by the accused and so on and so forth as in the case of the other witnesses, many of which were also marked as omissions. He admitted in cross-examination that he had

seen Gireesh Kumar standing near the hotel in front of 'Sobha City', however he did not talk to him. The defence had pointed out that the said admission by the witness, reveals the unnatural conduct of PW3, having not talked to his colleague, about the incident. We are not impressed, especially since Gireesh Kumar, one of the security guards, was available at the entry gate when the incident commenced. PW1, but for having testified that Gireesh Kumar opened the barrier, does not speak of his involvement afterwards when the accused created a commotion and made the vocal and physical assault against the staff members. There is also ample evidence to show that the security staff were specifically asked by the management not to insist for stickers, in the vehicle of the accused, since he was a regular trouble maker. It is only a reasonable inference that Gireesh Kumar took flight, soon after the incident commenced and this might have been the reason why Gireesh Kumar was not examined before Court; besides the fact that Gireesh Kumar was no longer in the employment of 'Sobha City'.

VIII. THE VERACITY OF OCULAR TESTIMONIES :

38. *Ram Kumar Pande v. State of Madhya Pradesh AIR (1975) SC 1026* highlights the omission to mention any injury inflicted on the deceased in the FIR and the absence of the names of the eye-witnesses in the FIR. It was held that though the FIR, is a previous

statement to be used, strictly speaking, for only corroborating or contradicting the maker; the omissions of important facts affects the probability of the prosecution case and are relevant under S.11 of the Evidence Act in judging the veracity of the prosecution case. There is no such relevant and important material aspect omitted from the FIS and the FIR, with respect to the crime proper. The omissions elicited are all on the prior scuffle, in which too, the accused was the aggressor and the others were defending themselves. The aggression could bring forth some inconsistencies in the narration, by the different people, which we find to be not at all material or significant. *B. Virupakshaiah v. State of Karnataka (2016) 4 SCC 595* was a case in which there were 6 eye-witnesses, who made material embellishments in their testimony before Court, especially regarding the number of assailants and one of such witnesses was left blind, an year ago. The Court found that there could be no faith reposed on any of the eye-witnesses, also since four of these witnesses kept quite for a long time, after the incident and there was material alterations even in the deposition of the I.O. There is no such material alteration in the eye-witness testimonies of PW1 to PW3 in the above case and we have found that the omissions brought out in cross-examination are not very material or relevant. *Subbulaxmi S. v. Kumarasamy (2017) 8 SCC 125* was a case in which the deceased

sustained six, serious, bleeding injuries and PW1, the wife stated that she brought the husband to the hospital in a car, keeping his head in her lap, none of which was indicated in the accident register. The evidence of the wife, on a meticulous examination, was found to be unreliable and the materials on record portrays huge suspicion, especially considering the evidence, which were full of contradictions. It would be unreasonable to attribute ill-motive to witnesses for variations of time of 15-20 minutes, especially when they were not going by the clock, when the incident occurred, as held in *Shyamal Ghosh v. State of West Bengal (2012) 7 SCC 646.* It was also held that every variation would not adversely affect the prosecution case unless it is material and that all omissions cannot take the place of a contradiction in law. Minor contradictions, inconsistencies or embellishments of trivial nature, not affecting the core of the prosecution case, cannot be a ground to reject the evidence led, in its entirety. S.162 uses the words 'significant' or 'otherwise relevant having regard to the context' to qualify omissions, which can be treated as a contradiction; amounting to a question of fact. Emphasis was also laid on the 'may' employed in the Explanation, to hold that if the legislative intent was to treat every omission or discrepancy as a material contradiction, then the word 'shall' would have been used. The learned trial judge has observed that; there was cross-

examination on every word and phrase spoken by the witnesses in their prior statements, which was quite unwarranted especially when S.161(3) does not require verbatim reproduction of the prior statements. We fully agree with the said observation. We also agree with the trial judge that the perception and understanding of witnesses would differ and so would their narrative capabilities; viewed from which context, the minor omissions and contradictions only give more credence and veracity to their testimonies.

39. We are convinced from the testimonies of PW1 to PW3 that the incident commenced at around 3 o'Clock, when there was delay in raising the electronic barrier, at the entrance of the complex, to facilitate smooth entry of the car of the accused. The barrier having been opened in the last moment, the car which was coming in high speed, hit the curb and the accused braked and stopped it between the entrance gates. He was incensed with the delay in opening the electronic barrier and he first unleashed a verbal tirade and when the victim tried to elicit the cause of his ire, the accused physically attacked that staff and caused destruction by breaking the glass panes of the security cabin and pulling down the various articles kept in the cabin. That staff, who enquired with the accused first, was the target of his attack and despite the victim having locked himself inside the security cabin, the accused smashed the

windows and entered the cabin to further assault the victim. The accused then came out of the cabin threatening to shoot the victim. The victim also came out through the window and tried to escape along with PW1 & 3. PW2, at that time, had just come to the entrance along with Hassanar. PW1 ran on the outer walkway through the circular road and the victim through the inner walkway around the fountain. The accused, as stated by PW2, turned against the running victim shouted at him and then purposefully got into the car, reversed it and moved it on the eastern half of the circular road and deliberately hit the accused, who was standing on the walkway around the fountain, to throw him down. The car mounted the fountain and the accused, after surveillance of the car and the scene, reversed it out of the fountain. He again vented his anger on the victim; fisting and kicking him, and eventually dragging him into the car. At this moment, PW6, the wife of the accused, came to the outer gate in a Jaguar Car. She parked the car there and boarded the Hummer, which came to the entrance gate, driven by the accused. The accused and his wife went inside the complex with the victim inside the Hummer, which had a burst tyre. PW1 to PW3 corroborate each other fully and even as to the hit, their testimony was that the victim was thrown down in the hit, neither was it of the body being dragged under the vehicle or the victim being smashed against the granite wall.

40. The omissions in describing the commotion at the security cabin are not very significant, insofar as the crime proper. After PW1 and the victim attempted to flee from the security cabin, the accused deliberately got into the car, reversed it and followed them, specifically the victim, who was standing on the curb, ie: the side-walk around the fountain, at the edge of the road. As we noticed from the cross-examination of PW2, it was clearly brought out that the running victim was just a sprint away from the accused and if the intention was mere physical assault, he could have carried it out without any effort. However, he mounted the car, reversed it and followed the victim, indicating the deliberation with which he carried out the mowing down of the man standing on the curb of the road, with such force that the powerful vehicle climbed onto the fountain, which was about 4 feet above the ground. The intention to kill is very clear from the testimony of the witnesses. However, the victim did not die at the spot and there was a further incident, which was attempted to be proved by the evidence of PW5 & PW6, the wife and another resident of the complex.

IX. INSIDE THE CAR PARKING AREA:

41. PW4 is the witness to the inquest report at Ext.P7 and before looking at the evidence of PW5; the fellow resident of the complex, we would first look at the evidence of PW6, the wife of the

accused, who turned hostile. It is trite law that the testimony of a hostile witness need not be eschewed in its entirety. *Shyamal Ghosh (2012) 7 SCC 646* held that the statement of a hostile witness to the extent it supports the prosecution case can be relied upon. Here is a witness, the wife of the accused, who corroborates the testimony of the ocular witnesses to a large extent as to what happened immediately after mowing down of the victim and what transpired of the victim, who was bundled into the vehicle, with which he was mowed down. PW6 admitted the residence in the flat and her marital status as also their family circumstances. She deposed that her husband was in the jail, pursuant to the incidents that occurred on the 29th of January. She spoke of her husband having gone out on the crucial day in his Hummer, which she believed to be owned by her husband. At around 3 O'clock, he had called her in the mobile, from his mobile. As she could make out, he was calling from the security post and there was some commotion heard in the background. The conversation hence was not clear and it was breaking due to poor coverage. She heard him ask her to come to the security post. He again called after 4 to 5 minutes when too, the conversation was not clear. After 1 -1½ minutes he called her again to come fast and she heard sounds akin to crying. She went to the main gate with her Jaguar and the outer gates were closed. She saw her

husband's car coming to the inner gate, driven by her husband. He gestured for her to come and she alighted from her car and went to the Hummer. She was asked to get inside and she boarded the car from the left-hand front door. She enquired about taking the other car, when her husband said that *'if we don't go immediately, they will again hurt*'; an innuendo that he was assaulted, but all the same, an omission in the prior statement. They went to the parking lot; to the IIIrd block, while their allotted parking was in the Ist block. The vehicle was stopped with the engine on and her husband got out before she did. When she got out and went around, she saw him holding a person, at the right-hand rear door. The injured was saying something and his left hand was bleeding. Her husband asked her to call the association people, with whom she was not acquainted and hence, she called her friend Riya, Prince's (PW6) wife. She asked Riya to send her husband down, since the car of the accused hit a security staff at the front gate and the victim had to be taken to the hospital. She admitted that she had called twice or thrice and later Thomas, Rakesh and Prince came and at a distance, behind them, she also saw the Police coming.

42. When the three residents came, her husband said that the injured has to be taken to either Medical Trust Hospital or Amrita. Then the Police came and so did an ambulance. The Police took her

husband from the parking lot and later she saw him at the Police Station. Her statement that her husband told her that *'if we don't go immediately, they will again hurt*' was marked as an omission before the Police and the Magistrate. On putting a suggestion that according to the statement recorded by the Police, her husband had told her, over the phone, that there was trouble with the security staff and she should come fast; it was denied. The witness was declared hostile and was cross-examined. There were many questions asked to her about her marital life, which we completely eschew from consideration as the same has no relevance to the crime proper. Her statement before the Police, that her husband asked her to come, due to a problem that arose with the security, was marked as Ext.P9. Ext.P9(a) was her statement that when she asked her husband, in the car, as to what happened; he asked her to keep silent and when the query was repeated he said that he' *finished of*' / '*brushed by'* a person, the specific word used is 'തട്ടി ', which in the vernacular means, in the context, either '*an accidental hit*' or '*to kill*'. The reference obviously could be to either, considering the prosecution case and the contrary version of the defence. Ext.P9(b) contradiction, was the statement that he asked her to bring the pistol and Ext.P9(c) is her prior statement that when she implored her husband to take the injured to the hospital, he refused and she called

Riya. To a specific suggestion that the call made to Riya, was since she realised that the accused did not want to take the injured to the hospital, for which she required help; she replied that the accused was not in a physical condition to do anything and hence she sought help from the association. She specifically confirmed that Prince, Rakesh and Thomas came down to the parking lot, because of her request to Riya. Even when they came, according to her, before the Police, her husband was wasting time with the refrain that he should be taken to either Medical Trust or Amrita. We pause here to observe that both these Hospitals are located at Ernakulam, eighty kilometers away from the scene of occurrence; when Amala Hospital, to which the injured was admitted later, was just about three kilometers away. When the statement was put to her, she denied having spoken of wasting time, but confirmed that the accused wanted the injured to be taken to Ernakulam and said that his friends were coming to take the injured, before which the Police and the ambulance came.

43. She identified the shirt worn by her husband as MO9, his pants as MO10 and the pair of shoes as MO11. She was also cross-examined by the defence. She spoke of some injuries on the accused, one on the nose and redness under the eyes and his eyes having been bloodshot. In cross-examination, as alertly pointed out by the

prosecution, she clarified that when Prince, Rakesh and Thomas came down to the parking lot, the Police were not immediately behind them. She also spoke of her husband having suffered from bipolar disorder and being under the treatment of one Dr.Syed Mohammed. According to her, her statements before the Police were only due to her fear that she also would be made an accused. But, we have to pertinently observe, her testimony before Court corroborates the version of PWs 1 to 3, about the injured victim having been taken into the complex and validates the presence of PW5, in the parking area, before the Police and the others came to the spot. PW6 also, never deposed of her husband informing her of an assault by the security personnel, except the omission referred above; which belies the defence set up and lends support to the prosecution version.

44. Now we look at the evidence of PW5, the resident of the very same complex. PW5 spoke of being acquainted with PW6, through his wife. On the crucial night, at around 3.15 a.m, PW6 called his wife and asked her help; which when told to him, he called his friend, Thomas staying in another flat, to which flat he went with his family. Thomas called Dr.Rakesh, when again a call came from PW6, to his wife asking them to come fast. Himself and Thomas went in the lift to the ground floor, where Dr.Rakesh also reached. They saw PW6 standing in

the car parking area and she was crying aloud. When they reached her, the Hummer was parked at the north side at a dead end, with its engine and headlights on. The accused, who was identified from the dock, was standing there and there was a person lying on the floor. The accused came to them and they told him that, the injured person should be taken to the hospital, when the accused said '*my friends will come, I will take care*' and tried to contact somebody over telephone. When the man lying on the ground tried to raise his head, the accused went to him and stomped on his head uttering that "*this dog will not die*". Then, again PW5 and the others asked the accused not to do anything and implored that the injured be taken to the hospital. However the accused said '*No, no, I will take care, my friends will come,* ഞാൻ എറണാകുളത്ത് കൊണ്ടുപോകാം' (*I will take him to Ernakulam*). PW5 approached the lying man, to see who it was and recognised the victim as a security staff. There was blood on his body and resolving to take him to the hospital, PW5 went forward to call the other security staff. Then, the police party and the other security staff came there and asked them where the victim was lying. Dr.Rakesh showed them the spot and the injured was lifted on to the ambulance to be taken to the hospital. The Police took the accused in their jeep.

45. PW5 was also elaborately cross-examined. The Minutes

Book of the Association, was marked as Ext.P8 after recording the objection raised from the defence that the witness was not the custodian of the book. The draft minutes of 01.02.2015 was also marked as Ext.P8(b) subject to the same objection. However, the defence, who raised the objection, wants to rely on the minutes book to discredit PW5. The suggestions were all with respect to the witness having not spoken about what transpired at the car parking area in the meeting of the association; wholly irrelevant. He admitted that he had not spoken about Ext.P8 minutes book of the meeting, to the police or the Magistrate. An omission was marked that neither had he mentioned about four other residents of the complex having accompanied him to the hospital, nor that he had spoken about seeing the other staff of the 'Sobha City' at the hospital. PW5 also had not spoken about what happened in the parking area to the staff of 'Sobha City'. The details of the meeting and what transpired therein as suggested to him were denied by him. He also did not speak about the details of the car of the accused to the police. He had no personal acquaintance with the accused but was acquainted with PW5, through his wife.

46. Since the defence had argued on the basis of the Minutes Book, we verified it; a typical resident's association meeting minutes, which shows the presence of PW5. It was the President who introduced

the topic of the day; the attack by the Hummer car on the security guard posted at the main gate, by one of the residents, the accused, who was named. The meeting condemned the attack, decided financial assistance to the victim, reiterated the Code of Conduct and noted the decision of the Management to fully assist the victim. There were other issues taken up and merely because PW5 did not speak of what he witnessed in the meeting; he cannot be disbelieved. PW5 answered in cross-examination that the time noted of 3.15 a.m, when PW6 called his wife, was from the mobile. There were many questions with reference to the time at which PW6 first rung up PW5's wife. There were also references made to calls made to Thomas and Dr. Rakesh. The attempt of the cross-examination with reference to specific time of calls made and received, was to bring out that the time does not tally, with the time at which the injured reached the hospital; which, without doubt is at 3.50 A.M. We are not convinced that the cross examination on that respect was at all relevant especially when PW6 admitted the call made to PW5's wife seeking Pw5's assistance; when the injured along with the accused and PW5 were at the parking area. There were a number of questions asked about what transpired after the call from PW6, came to the wife of PW5 . Whether PW5 went with his family, to the house of Thomas and whether PW5 called Dr. Rakesh from Thomas's house is not at all material. PW5

also is not expected to speak of every detail after the call came to his wife. Admittedly there was a call made to the wife of PW5 seeking his assistance. PW5 called Thomas and Dr. Rakesh and after brief deliberation came down to the parking area and found PW6, her husband and the injured inside the parking area. This much is corroborated by PW6, the wife of the accused. PW6 admits to the above facts and there is no point in unnecessarily enquiring about the exact time when the calls were made. It is also possible that even after the incident, there would have been many calls made between PW5's wife and PW6, the wife of the accused. The call records were produced and so were the Nodal Officers cited, but the prosecution was of the opinion that there is no reason to examine these witnesses or bring out the exact time of calls from the call records. When the call records were available and so were the Nodal Officers cited, the defence could very well have summoned them; if according to them there was something in the call records which was favourable to the accused. Obviously, the defence did not attempt such an exercise and merely put questions regarding the time in which the calls came to PW5, repeatedly; an exercise aimed at merely confusing the witness and the Court, which turned futile. The witness was unruffled and deposed, according to us in a very credible manner.

47. As for the statement under S.161, he said that the police officers who were in the parking area after the incident, did not ask about what transpired. To a specific question as to whether the police officers came to the apartment complex, he replied that he had travelled to Thiruvananthapuram and Thiruvalla for business purposes. PW5 also stated that Dr. Rakesh was called by the police and he was told that all three of them; ie: himself, PW5 and Thomas would be questioned on the same day. It was suggested that the story regarding the accused having stomped on the injured and shouted that '*this dog will not die*' was not stated to the police for a long time since it was a tutored version. PW5 answered that Dr. Rakesh was the Association Secretary and he had agreed to see the police and hence, PW5 did not want to overtake him. A suggestion that the statements of himself, Thomas and Dr. Rakesh were taken on the very next day of the incident was denied. The suggestion that PW5 was talking on the influence and coercion of the Resident's Association and the Management of 'Sobha City' was denied; with the further assertion that he has no grouse against either the accused or his family and hence there is no reason to fabricate a story. Omissions were marked as to the statements of PW5 in Court that, the injured was lying on the right side of the car and he was in a very bad stage, that Nisam on seeing him came to him, that he went forward to

look at the injured and recognised him as Chandrabose and that Chandrabose had blood on his body and wound on his hands. The further statement that PW5 had spoken to the staff of 'Sobha City' regarding the incident in the parking area was marked as an omission; which belies that statement by PW3; again, not relevant.

48. Another omission put, with respect to witnessing the stomping on the head of the injured and hearing the words '*this dog will not die*', as uttered by the accused was in the following manner:-

> "സംഭവത്തെ കുറിച്ച് ആദ്യമായി പറയുന്നത് ഭാര്യയോടാണ് (Q) എല്ലാവരും ഒരുമിച്ച് ഇരിക്കുമ്പോഴാണ്, തോമസും ഉണ്ട് .(A) അങ്ങിനെ പറയുമ്പോൾ നിസ്സം ചവുട്ടിയത്തായോ 'ഈ പട്ടി മരിക്കില്ല' എന്ന് പറയുന്നതായോ അവിടെ വച്ചു കണ്ടതായും, കേട്ടതായും കോടതിയിൽ പറഞ്ഞ കാര്യങ്ങൾ നിങ്ങൾ പറഞ്ഞില്ല."

The prosecution opposed the question, rightly, as hypothetical and we are of the opinion that, what PW5 stated to the others, ie: the staff of 'Sobha City', his wife, those who accompanied him and at the meeting of the Residents Association are irrelevant. An enquiry into what PW5 stated to his wife and whether he stated the same to his wife, when she was alone or in the company of others does not at all weigh with the Court, as long as the recitals are contained in the prior statements. Obviously, the recitals were available in the prior statements before the

Police and before the Magistrate, since it was the suggestion of the defence, on the ground of delay in recording the statement; that it was a tutored story. No omission as to the specific overt act and the abusive and revolting words spoken by the accused, not having been seen and heard by PW5 was put to the witness. PW5, to a large extent is corroborated by PW6 and we do not think that non-examination of PW5's wife is at all material. As we noticed, PW6 categorically admitted her call to PW5, requesting the help of her husband. The prosecution pointed out, it was PW5 and two others who came to the parking area first and they were followed by the Police at a distance, as admitted by the wife of the accused, PW6. What transpired in the parking area, after PW5 and two other residents came to the area, took minimal time. They saw the injured and requested him to be taken to the hospital which the accused declined, saying that his friends are coming from Ernakulam and the injured would be taken either to Medical Trust or Amrita at Ernakulam. The injured man raised his head when the accused stomped on his head and spoke those disgusting words. Upon which, PW5 closely inspected the injured and recognised him as a security staff of the complex. By that time, the Police and the other staff came to the spot. The examination of Dr. Rakesh and Thomas, the other residents who accompanied PW5, would be only a duplication. It is also pointed out

that they came to the spot on the request of PW5 whose wife was requested for help, by PW6. PW5 is the material witness and not his wife or those who accompanied him. Be that as it may, we necessarily have to consider the issue of delay in examination of the witness under S.161; which we will do with reference to the precedents placed before us, a little later.

X. THE SUPPORTING CAST:

49. PW7 is the RTO, Thrissur, who examined the Hummer with registration No.PB 3 F 9999 on 26.02.2015, and issued Ext.P11 certificate. The front right tyre was punctured, with a side wall crack, radially at right outer side. The alloy wheel base, flange edge was pierced due to hit at outer edge, in line with the tyre side wall crack. Scratches were seen on the engine oil cum protection shield front left suspension, lower arm scratched at lower portion. There was also a dent in the front of the right tyre wheel and the front number plate was scratched; dark brown stains found on the driver's seat, co-driver seat and rear seats. The brake systems were efficient as noted in column No.8. He also carried out site inspection and he confirmed that the occurrence was not due to any mechanical defect of the vehicle. All the tyres except the front right tyre were in good condition and all were tubeless. He deduced that the front tyre was cracked due to hitting on a

hard object on the occurrence. On inspection at the site, a tyre like black material and a metallic coloured material was found on the upper surface of the fountain granite slab and the granite slab was seen broken. He also deposed that on hitting a hard surface while the vehicle was running, the tyre burst as seen from the right tyre could happen and the hard surface could very well be the granite slab. The witness also deposed that even if the tyre bursts, the vehicle could be run for about 30 miles at a speed of around 20 miles/hour. He also spoke of the features of the Hummer, which we do not find to be very relevant. The Hummer Car, though registered in the name of another, was admittedly in the possession of the accused and his S.313 version is also that he indulged in purchase and sale of high-end vehicles.

50. The cross examination was with respect to his knowledge of a Hummer car and the main challenge was with respect to his testimony that the vehicle could be run for about 30 miles even after the tyre burst. The defence also heavily relied on the testimony of DW2 and the photographs of the vehicle which clearly indicated the right tyre having been deflated completely. DW2 is a person who declared himself to be an expert in tyres, for reason of his prior employment with a tyre manufacturing company and then his business in tyres, which he had been carrying on, after he left the company. We do not think we have to

examine the same minutely because it is an admitted fact that after the accident and the tyre burst, as testified by the ocular witnesses, the vehicle was taken into the parking lot. The ocular witnesses spoke of it and so did the wife of the accused who had boarded the car at the entrance from where the accused had driven the car to the parking lot of Topaz. It is even admitted in the S.313 questioning by the accused; which we notice only for reason of the other evidence spoken of herein before. There is no reason why we should minutely scrutinise the evidence of PW7 or DW2 since nobody has a case that the car was immobile after the tyre burst; not even the accused in his S.313 statement. The photographs definitely show the flat tyre, but the same was taken only on the next day morning. Obviously, the capacity of a burst tubeless tyre to run for 30 kms. is immediately afterwards and not after a considerable time. The distance from the entrance of 'Sobha City' to the apartment building is less than a kilometre as we saw from the testimony of PW1. We say this; despite the admissions made, lest we be accused of not meeting every argument raised.

51. PW8 is the Assistant Engineer of the Electricity Board who confirmed that 'Sobha City' was a high-tension consumer within his section and there was no power failure between 6 p.m. of 28.1.2015 to 6 a.m. of 29.1.2015, as certified by Ext.P13. PW9 is the Doctor who

examined PW1 and found tenderness on the left cheek, which injury appeared to be fresh. She marked Ext.P14, in which the history was stated to be "*assault at Sobha City at 3.30 a.m.*" She admitted in cross examination that Ext.P14 does not show any specific allegation of beating, and neither the name of the assailant nor the time of examination is noted in Ext.P14. PW10 is the Village Officer of Puzhakal Village who prepared Ext.P15 site plan i.e., the spot in which the fountain is placed and the entrance and exit of the complex is located. PW11 is the Village Officer of Kuttoor Village, in which jurisdiction lies the parking lot of 'Topaz'. He produced Ext.P16 site plan of the parking lot. Both these witnesses admitted that they had prepared an earlier sketch and at the request of the CI, the present sketches were prepared. This was also raised as a manipulation by the prosecution, without any argument addressed on how the exhibits produced in Court would prejudice their defence. There was also no argument addressed as to the sketches not being the true depiction of the two scenes. We reject the argument as one blandly raised for mere effect and not for any real purpose.

52. PW12 assessed the damage at the scene of occurrence and the communication, assessing the same is marked as Ext.P17. As per Et.P17, the damage caused to the granite slab enclosing the fountain

is assessed at Rs.8,963/- and the destruction caused to the glass panel is valued at Rs.1,279/-. PW13 and 14 are the Doctors who treated the victim in the hospital and PW15 is the Police Surgeon who carried out post-mortem examination; the testimonies of whom, we will discuss under a separate heading. PW16 is again the Joint RTO of Thrissur, who produced the driving licence particulars of the accused which was marked as Ext.P23. PW17 is the police photographer who marked Ext.P6 series of photographs, subject to objection that the primary source is not produced; either the negative or the digital device. Ext.P24 photographs also were marked subject to the very same objection. Both Ext.P6 and P24 were said to have been taken with an electronic device. Though the defence had objected to the marking of the document, it was the defence who wanted to rely on it specifically to refer to the tyre burst of the car and also the presence of three batons in one photograph, one of which was absent in another photograph. We have dealt with these arguments, on a reference to the photographs itself and negatived both.

53. PW18 is the Scientific Assistant, who collected blood stains, found from the front side of the fountain, inside the car, at the floor of the car parking area, at the floor of the security room and the control sample on 29.1.2015. He also admitted that on the very same day, a fingerprint expert and department photographer were available.

PW19 is another Scientific Assistant who examined the scene of occurrence and the vehicle on 26.2.2015. She collected 5 items being (i) particles found adhered to the metallic shield of the engine at the bottom of the vehicle; (ii) control sample collected from the metallic shield of the vehicle; (iii) metal particles found adhered to the fountain wall; (iv) broken pieces of fountain wall materials & (v) black coloured material found at the fountain wall. PW20 is the Principal SI who recorded the FIS and registered the FIR, PW21 the Magistrate, who recorded the 164 statements of PW1 and PW6, and PW22 is the IO.

XI. DOES DELAY VITIATE THE FIS & THE FIR ?:

54. The FIS & the FIR were challenged as delayed and deliberately concocted to nail the accused. From the testimonies we have a clear picture of the incident having commenced at around 3 0'clock at the entrance of the complex, then continued at the car park, from where the injured was taken to the hospital and reached there at 3.50 a.m. There were police aplenty at the site after the incident and the FIS was at 5 a.m in the Police Station, the FIR, Ext P25 registered immediately and the same reached the jurisdictional Court at 7 p.m on the same day. At the outset we have to notice that there was no death contemplated initially, but admittedly there was media attention and public outcry, and the injured was also in the hospital, battling for life. The police had

their hands full, but we find nothing to endorse the defence version of there being a malicious attempt by the Police, to nail the accused somehow. As pointed out by the prosecution, there was no reason to make up a story, as the accused was apprehended from the spot and there was an incident in which a staff of the complex was hit by the car of the accused and he was injured grievously. The only question was whether it was a deliberate attempt to kill or an accidental one, and the *prima facie* impression supported by the FIS was the former, under S.307 IPC. *Ishwar Singh v. State of U.P (1976) 4 SCC 355,* relied on by the defence, considered the circumstance of the version in the FIR being considerably deviated from, before Court, as to the genesis of the crime and there was also delay of two days in registering the FIR, from the time of receipt of the first information at the Police Station. No such circumstance arise herein and the delay is not that large and is inconsequential insofar as, on the same day evening it reached the Court. *Harpal Singh v. Devinder Singh (1997) 6 SCC 660* condoned the delay of four hours in reaching the FIR to the concerned Magistrate, also on the ground that these days a police station is not concerned with only one crime. While holding that the ideal situation would be lodging the FIR with the utmost speed and dispatch it to the jurisdictional Magistrate; if the ideal is not adhered to in any case, the corollary always

is not castigation of the evidence of the first informant. There is also no concoction, evident from the first information, to which PW1 subscribed fully, before Court; despite a dalliance at the initial stage of the testimony, which we have already accepted as arising out of fear.

55. There are also some omissions in the FIS, which we have found to be not relevant and in any event the statement made immediately after the incident cannot be of every minute detail of the incident. *Rattan Singh v. State of U.P (1997) 4 SCC 161, held the FIS to be not a chronicle of every detail nor an exhaustive catalogue of events. Mishra V.K v. State of Uttarakhand (2015) 9 SCC 588 reiterated the trite law that, the FIR is not meant to be an encyclopaedia nor is it required to contain every detail of the prosecution case.* Here the contention is also of omissions in filling up columns 13, 14 and 15 in the FIR. In column 13, under steps taken, a brief 'yes' is recorded and there is nothing recorded as to the time and date of dispatch of the FIR to Court. This has to be considered together with the delay argued, in recording the FIS and the receipt in Court. The FIS was recorded at 5.00 a.m, of the incident which took place between 3 and 3.45. The defence argued that there were high ranking police officers at the scene and none recorded the FIS. In fact it was PW20, who recorded the FIS and PW1, the first informant said that he was asked at the crime scene

and he saw notes being taken by the Officer. It is only natural that the Officer took him, or summoned him to the station to record the FIS. But there is no prejudice caused to the accused, as the prosecution argued, since there is no dispute on the identity of the accused and the incident which occurred at the spot. The testimonies of the ocular witnesses have been believed and there is no reason, perceivable as to why there should be a delay in registering the FIR, which again was one under S.307, since at the initial point there was no contemplation of the attempt to murder, culminating in the death of the victim.

56. The allegation of an attempt to nail the accused somehow, by the accused on grounds of the whole world turning against him for his unprecedented success in business, is far fetched and at best arises from a persecution complex, coupled with an attempt to wriggle out of the liability for the gruesome acts alleged against him. *Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195* held that lapses in investigation, like omission to record some relevant entries in the inquest report, do not constitute a material defect to throw out the prosecution story and disbelieve the other wise reliable testimonies of the witnesses. The cited decision also lays down that though in terms of S.157, Cr.P.C, the police officer is required to forward an FIR to the jurisdictional Magistrate, promptly and without delay; every delay does

not make the prosecution version unreliable or vitiate the trial. It is not a rule of universal application and in this case we are of the opinion that the facts warrant no such conclusion against the prosecution.

XII. EXAMINATION OF MATERIAL WITNESSES :

57. The learned Senior Counsel argued that the prosecution has presented a compact, air-tight case before Court with witnesses putting forth the material aspects and it is not the law or the rule, that every witness cited has to be examined before Court. *Raghava Kurup v. State of Kerala (1965) KHC 382* was a case in which the eye witness testimony was doubtful for reason of the impossibility of having seen the incident from his location; and another witness whom the eye witness testified to have seen, at more proximity to the crime scene, was not examined. This was the reason why the non examination of that material witness was held to be vital; despite affirming the right of the prosecution to choose their witness. *Harpal Singh (1997) 6 SCC 660* declared that Courts should not mechanically draw adverse inference even when a material witness is not examined unless there are circumstances to facilitate such an inference. Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary one, was the dictum. There the Court found that the non examination challenged, if carried out, would only have resulted in duplication, as is

the situation in the instant case too. *Hukam Singh v. State of Rajasthan (2000) 7 SCC 490* held that no vulnerability can be attached, for non-examination of cited witnesses, after referring to S. 226 of Cr.P.C, which enjoins upon the Public Prosecutor the duty to open the case with a description of the charges and then state the evidence proposed to be led. When the case reaches the stage of s.231, the Sessions Judge is obliged to take all evidence produced, in support of the prosecution; and not in derogation of the prosecution case, it was emphasized. It is the Prosecutor's task to take a decision on which witnesses he proposes to examine and give up; for example, give up those, according to him will be repetitious on the same facts, related witnesses and even those in his estimation or on information received, will not support the prosecution version. The principle was followed in *Banti @ Guddu v. State of Madhya Pradesh (2004)1 SCC 414* .

58. *Subhash v. State of U.P. (2022) 6 SCC 592* was a case wherein the presence of eye-witnesses were found doubtful and there were material contradictions between the ocular testimony and medical evidence as also withholding of material eye-witnesses. In the present case the employment of PW1 to PW3 and the deceased in the apartment complex was not at all questioned by the defence. PW1, who gave the FIS, spoke of PW3 from the commencement of the incident and PW2

also named him, as having been present in the spot after the incident, as noticed by PW1. PW1, after the commencement of the incident, was involved in the scuffle and had been attempting to save the deceased, which would be the reason for not having seen PW2 come to the scene of crime in the midst of the scuffle. PW1 & PW2 spoke of PW1 having summoned PW2 to the scene of crime over telephone and PW2 also speaks of his presence, after the incident commenced. He came to the spot to see the accused entering the security cabin and assaulting the victim.

59. *Parminder Kaur @ Soni v. State of Punjab (2020) 8 SCC 811* was a case of rape wherein letters deposed to, by the prosecutrix in her chief-examination was not produced, thus shedding no light on the relationship between the accused, prosecutrix and a male tenant, prior to the incident. There were also two witnesses cited by the prosecution, who could have been examined to fill up the gap in the prosecution story and resolve the contradiction in the testimonies of PW 1 & PW2. It is in that circumstance that *Takhaji Hiraji v. Thakore Kubersing Chamansing (2001) 6 SCC 145* was relied on, to hold that when the prosecution case is suffering from a deficiency, withholding of material witnesses would oblige the Court to draw an adverse inference. We find no such deficiency vitiating the prosecution case in the instant

case and no lacuna relevant, as to disbelieve the witnesses examined who spoke on all the material aspects and corroborated each other. PWs 1 to 3 were occurrence witnesses and PW5 spoke of what happened after the injured was taken inside the complex; which to some extent, is significantly corroborated by the wife of the accused, PW6. PW5's wife who was called by PW6 and Dr. Rakesh and Thomas who accompanied PW5 only duplicates PW5, who is the material witness. PW5's wife is not material since the desperate call made to her, that too for the assistance of her husband, was fully admitted and corroborated by PW6. Thomas and Dr. Rakesh could not speak of what PW5's wife told him and what was witnessed at the car park could very well be stated by PW5. There is no rule that the entire persons available at the crime scene should be examined and on facts, that seems to be the argument of the defence. One Gireeshkumar, who was manning the entrance gate, presumably took flight at the initial stage and was found in the adjacent tea shop. He had not participated in the scuffle and his role spoken of in the FIS, is only of having opened the barricade, seeing the approaching Hummer. As for Hassainar and Kingsley their role is minimal and the presence of the victim at the security cabin cannot at all be disputed; nor was it done with any seriousness. They could only have duplicated what was spoken of by the others. The presence of the deceased is admitted by all the

ocular witnesses, PW1 to PW3 & PW5 and even PW6, the wife of the accused, as also the accused himself. The accused only has a different version as to what happened at the entrance of the complex. That the deceased was always present in the security cabin, despite being a clerical employee, is fortified by the fact that PW5 recognized him as a security staff and not a clerk, presumably on having regularly seen him in the cabin. The employment of the deceased hence is a foregone conclusion and PW5's testimony thus establishes the prosecution case of the workplace of the deceased, the security cabin; where he processes the incoming and outgoing materials/goods to the complex. We reject the contention of non examination of material witnesses raised by the defence and also, that of the material documents being not proved through competent witnesses.

60. There is also a complaint raised of the finger print evidence and the expert having not been examined. The thrust of the argument was on the photograph clearly indicating the presence of finger prints on a glass piece and the defence version that the accused was chased by the deceased with the above glass piece. *Vineet Kumar Chauhan v. State of U.P (2007) 14 SCC 660*, held that, when the direct evidence is of an unimpeachable character; in that case, the non examination of the ballistic expert was not essential, since the post-mortem notes were

consistent with the direct evidence. *Kashinath Mondal v. State of West Bengal (2012) 7 SCC 699* was a case in which the finger prints were not taken from the crime scene, and it was held that remissness and inefficiency of investigation cannot be a ground to acquit the accused, if there is evidence on record establishing his guilt beyond reasonable doubt. Such irregularities and deficiencies, if does not affect the substratum of the prosecution case, they cannot weigh with the Court. *Shyamal Ghosh (2012) 7 SCC 646* held that every discrepancy in investigation does not weigh with the Court to an extent, that it necessarily results in acquittal of the accused. In *Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195* *their Lordships declared that an investigation cannot be held to be tainted, in the absence of prejudice caused to the accused. As to the inference of the deceased having carried the glass piece to stab the accused, adversely to be found on the evidence not being produced, we will deal with it at the time of discussing the injuries on the accused and the defence version in S.313. As of now, suffice it to notice that the finger print expert was not a material witness and no adverse inference can be drawn, for the prosecution having given up the said witness.*

XIII. DELAY IN EXAMINATION OF PW5:

61. There is no rule of universal application that the delay in

examination of a witness during investigation is fatal. It becomes material only if it is indicative and suggestive of some unfair practise by the investigating agency to introduce a witness to falsely support the prosecution case, as held in *Sunil Kumar v. State of Rajasthan (2005) 9 SCC 283*. *Mishra V.K (2015) 9 SCC 588* followed the said decision and held the delay in that case to be inconsequential. Here there is is ample explanation for the delay; the I.O having been busy with the investigation, especially after the accused was taken into custody. Having received the accused in custody the I.O had gone in search of the pistol, the accused was referring to, in the course of the incident and PW5, was away on his business. *Shyamal Ghosh (2012) 7 SCC 646* considered, non availability of witnesses, the I.O being preoccupied with other spheres of investigation of the same case or even with other serious matters, as plausible and acceptable explanation for the delay. Further the presence of PW5, is confirmed by PW6, the wife of the accused, who turned hostile on some material particulars.

62. *Ganesh Bhavan Patel v. State of Maharashtra (1978) 4 SCC 371* and *Meharaj Singh v. State of U.P (1994) 5 SCC 188,* relied on by the defence are not applicable in the instant facts. In the former, the evidence of material prosecution witnesses were found unsafe to be acted upon and the prosecution story was redolent of doubt, in which

circumstance the High Court reversed the acquittal ordered by the trial court and entered a conviction. It was also held that the delay simplicitor, of a few hours in recording statements of eye-witnesses should not by itself amount to a serious infirmity, unless there is a concomitant circumstance to suggest that the investigator was deliberately marking time, to shape the prosecution case in a befitting manner. In the present case, there is no allegation of delay in recording the statements of PW1 to PW3 and the allegation arises only with PW5; which we have found is properly explained, despite it being of about 18 days and not merely hours. In the latter case there was not only delay in sending special report to the Magistrate, there was failure to send copy of FIR to the Medical Officer along with the dead body and there was no reference to it, in the inquest report. There was also no evidence to show when the copy of the FIR was received by the Magistrate. *Balbir v. Vazir (2014) 12 SCC 670* was an appeal against acquittal by the High Court, which strengthens the presumption of innocence. It was found that the names of the assailants surfaced three days after the incident, when the statement of eye-witnesses were recorded; not at all relevant in the above case. We find the testimony of PW5 to be of sterling quality and corroborated on many aspects by the testimony of PW6, the wife of the accused. The delay in recording the S.161 statement is properly

explained and that does not warrant, shelving of the testimony of PW5.

XIV. THE CAUSE OF DEATH - IN MEDICAL TERMS:

63. The learned Senior Counsel for the defence seriously assailed the medical evidence and vociferously argued for acceptance of the case of the accused; that of an accident, which, at worst is punishable under S.304 IPC. It is argued that PW13 who first saw the victim had made corrections and interpolations in the Initial Assessment Form (D9) to alter the condition of the victim from 'conscious & oriented' to 'dis-oriented'. In fact, the same was done, clearly overlooking the recording in Ext.D11, of the GCS (Glasgow Coma Scale) at 15/15 showing adequate motor, verbal and eye response. The correction made, to that of a 'disoriented' condition is only to further help the prosecution case. It is also pointed out that the external injuries noted in Ext.P18 are mere abrasions without the size being noticed, which probablises the defence version and there were no fatal/grievous injuries at that point of time. In fact, no X-ray was taken of the chest and the only fracture noticed is of the left radius. A specific suggestion was made in cross examination that the fracture of ribs can be ascertained by various methods, including clinical examination, which was answered in the affirmative, but, no such injury was noticed in Ext.P18. According to PW14, who

carried out the surgeries on the patient, rib fracture cannot be treated with medicine and can only be managed with coastal drainage and analgesics.

64. The learned Senior Counsel argues that no incubation was done despite ventilator facility being available; which can only lead to the conclusion that there was no rib injury. Ext.P18 also does not show any resuscitation having been done. Thus, the evidence of PW13 and 14 does not speak of a rib fracture and what is seen from Ext.D9 regarding breakage of 2nd , 3rd and 5th ribs is an interpolation. Even if the same is believed, the patient had only 3 fractures of ribs at that point of time, which later became many, as per the post-mortem examination report, which is possible, only due to the CPR for resuscitation; which PW14 admits was done and it requires chest compression at the rate of 100 per minute, resulting in the further injuries caused to the ribs and the sternum. The injuries of the abdomen were also not properly identified and but for the tear in the mesentery, the other organs were perfectly normal which was reflected in the testimony of PW14 also. While the injury to the mesentery could be a definite indication of the impact suffered on the abdomen, the rigidity of the walls of the abdomen was caused by the collection of blood in the abdomen and not the impact. The condition of the patient was improving after the

laparotomy and he was also found to be comfortable on the chair but later his condition worsened and he eventually succumbed, obviously due to the medical treatment being not properly given. The available case sheet Ext.P19 does not have the entire pages and it does not reveal the procedures done on the patient or the treatment undertaken on the days when he was at the hospital. There is also no documentary evidence as to the specific surgical procedure carried out on 10.2.2015 and the third laparotomy done on 12.2.2015.

65. The learned Senior Counsel, appearing for the prosecution on the other hand, based on the decisions placed before us, specifically argued that when there is clear direct evidence, the medical evidence, which only has a corroborative value and the probable omissions therein, would not warrant the prosecution to be thrown out in its entirety. It is pointed out that the injuries have been clearly noted in the post-mortem examination report and there is no ambiguity as to the cause of death which arises from the complications to the injuries caused on impact, to the chest and abdomen. It is also pointed out that the mere fact that a better or more skillful treatment (Explanation 2 to S.299 IPC) would have saved the victim, is not a ground to absolve the accused of the charge of murder, if the injuries caused in the incident; deliberately by the accused, led to the death.

66. PW13 was the Casualty Medical Officer (CMO) who examined the victim on his first admission and issued Ext.P18, with the alleged history of *'assault by hitting with a vehicle around 3.15 a.m. at 'Shoba City', Puzhakkal'*. He said that the patient was disoriented, BP-80 mm-systolic and pulse rate @ 50 per minute. There was saturation fall, guarding in the abdomen and abrasion on the left side chest. There was diffused contusion on the middle part of the head and decreased air entry on the left side chest, with crepitation. There was also diffused swelling on the left forearm middle part, lacerated wound on the elbow of same arm, deep abrasion left leg front part, deep abrasion on right knee, abrasion right forearm near elbow and poly-trauma-blunt-chest and abdominal trauma. He was admitted in the surgical ward after resuscitation where he was attended by PW14. It was also opined that BP-80 mm-systolic, indicates circulatory failure and is a life endangering situation. Pertinent is also the fact that there was no diastolic pressure recorded. The injuries noted, according to him was possible in a hit, by a speeding vehicle.

67. In cross examination, he admitted that Ext.P18 issued by him does not show the date of issue and as to dying declaration, it was his opinion that there were no criteria to take a dying declaration, since the patient was not in a sound mental state; quite evident from the signs

of shock, specifically recorded. There was also a suggestion that the case was not reported to the police, to which, the response was that, what is of prime importance is resuscitation and saving the life of the patient, with immediate surgery carried out. The question is irrelevant since the police was already informed and the patient was taken from the crime scene in their presence. As far as Ext.P18, only the injuries were noted and the resuscitation done was not specified. With respect to incubation on a ventilator, it was the response of the witness that it will be done if necessary, by the surgical team. The Initial Assessment Form contained his handwriting and also that of the intern, in casualty. In the second page of Ext.D9, the recitals 'conscious-oriented' was changed to 'dis-oriented' by scoring of 'conscious' and interpolating 'dis' before 'oriented'. The witness admitted that he made the correction on his assessment of the patient and the earlier recital was by an intern. He also asserted that normal resuscitation methods adopted are high flow of IV fluids to bring up the patient and other supportive measures like controlling bleeding etc. The wearing apparels of the patient were removed which was done before bringing the patient to the casualty. The witness asserted that there was no X-ray conducted on the chest and the fracture of ribs could be detected in clinical examination. He repeated that the decreased air entry into the lungs and crepitation is

common to fractures of the rib and though no X-ray was taken, he had specifically noted in Ext.P18 to r/o (rule out) blunt-chest and abdominal trauma.

68. We see from Ext.P18 that the testimony of PW13 is in accordance with the wound certificate and the further details elicited in cross examination also is available in the wound certificate. It cannot for a moment be said that there were no fatal injuries at the time of admission. Poly-trauma is a condition where injuries are sustained to multiple body parts and this is in consonance with the oral evidence of the deceased having been beaten up with a baton and then run over by a car, that too a powerful one like Hummer. There is also reference to blunt trauma to chest and abdominal trauma and there was an emergency reference to S3, surgical unit with specific mentioning of the name of the PW14, who was on duty. As per the testimony itself BP at 80 mm systolic, with saturation fall and low rate of pulse, is in itself a life endangering situation. Regarding the interpolation, we are not convinced that there is any attempt to change the status of the patient afterwards. The resident doctor, the Casualty Medical Officer (PW13) had specifically spoken of the earlier recital having been written by an intern, which he corrected on examination of the victim. We also note that Ext.D11, on X-ray taken shows rib fractures at 2, 3, 4, and 5 which

cannot be said to be an interpolation. In fact, though the numbers were in brackets, the brackets were then scored off. We do not find any reason to disbelieve the testimony of PW13. The patient was brought to the Hospital at 3.50 a.m and the time PW13 got to assess the patient was less than 10 minutes, after which the patient was moved to the surgical unit.

69. The testimony of PW14 is very relevant and has to be looked at minutely. She was called to the causality by 4 a.m. and according to her the patient was resuscitated at causality, by administering IV fluids and oxygenation. At that time his pulse was very feeble. Systolic BP alone could be recorded, which was 80 and diastolic could not be recorded. The patient was having breathing difficulty, with oxygen saturation of only 60% and he had complaints of chest pain, with features of rib fracture. Air entry was decreased on left side, on auscultation (-listening to the internal sounds with a stethoscope-) which indicates the lungs on the left side had collapsed, because of pneumothorax. That also means air leak from the lung to the thoracic cavity, an after effect of rib fracture, resulting in the collapse of the lung. His abdomen was rigid and mild distention was there, suspected out of blunt trauma and patient was shifted to surgical ICU. Flail chest was also suspected, which means fracture of more than 3 consecutive ribs at

two sites, anterior and posterior and there was independent movement, opposite to normal chest movement, which occurs by heavy blunt trauma and heavy blunt impact and is an immediate life-threatening injury. The patient was treated with inter coastal drainage with underwater seal; a typical chest drain management procedure for draining of air, blood or fluid, from pleural spaces; allowing expansion of lungs and negative pressure in the thoracic cavity - to maintain respiratory function and haemodynamic stability. To a question whether the injury is sufficient to cause death in the ordinary course, the witness answered in the affirmative; which is very relevant.

70. It was also the deposition of PW14, that the patient was given IV fluids and inotropic (wrongly recorded by the trial Court as anatropic) drugs to raise his B.P to 108/77 by 6 A.M. But again, patient suddenly deteriorated. Before that, according to PW14, portable ultrasound scan of abdomen was done to find moderate free fluid, which may be blood, in a trauma patient; though termed moderate by ultrascanist. The patient was taken for emergency laparotomy and in the theatre, before shifting the patient from trolley to operating table he had a cardiac arrest. Immediately patient was resuscitated, by incubation and ventilation, and the B.P raised with inotropics. Operation was carried out to control the bleeding in the peritoneum and they found two

liters of blood in the peritoneal cavity. To a question whether it was a life threatening situation, it was answered that patient was in severe shock, and on examination of the abdomen longitudinal mesentery tears were detected; three of them in the small bowel mesentery and one in the zygmoid colon mesentery. There was haematoma in small bowel mesentery and zygmoid colon mesentery, all life threatening. The Surgeon sutured the mesentery, teared edges and ligated bleeding vessels. The bleeding was controlled in that procedure and there was a thorough wash with warm saline. Then the whole bowel, ie: solid organs like liver and spleen were examined and found to be normal. The abdomen was closed with flank drains on both sides and 8 pints of packed blood cells, 4 fresh frozen plasma, 2 pints of platelets were transferred and then shifted to ICU in ventilator.

71. The patient was constantly monitored by critical care anesthetist and was gradually improving, but his chest was in a very bad state. CT taken on 2nd of February, showed flail chest on left side involving 2nd, 3rd, 4th and 5th ribs continuously in the anterior and posterior aspects and left 6th , 7th ribs on the posterior aspect. On the right side also there were 4th and 5th ribs fracture on the anterior aspect. Both lungs showed hemorrhage, due to contusion. The report of the CT scan is seen at page 30 of Ext.P19. CT Abdomen was also done on the

same day from which no serious abnormality was detected. But still abdomen wall had edema with distensions of abdomen, prompting another CT of abdomen on 4th, when too there was not much difference from that on the second. Patient passed normal stools on 4th of February, but distention was continuing and chest was also bad with bilateral crepitation, the latter of which was due to collection of fluids; either blood or sputum, within the lung parenchyma. Patient suddenly deteriorated on 9th February and on 10th February his bowel sounds became sluggish again. Blood and mucossa were passed through rectum. On 10th CT was repeated after consultation with Surgical and Medical Gastroenterologists. It showed significant pneumo peritoneum and suspecting perforation in zygmoid colon, emergency laparotomy was done on 10th February which showed colonic perforations on zygomoid colon about 3 cm size and small pin head, .5cm perforation, on ileum and small bowel. Zygomoid colon was repaired, bowel part was removed and ilea perforation sutured. Bowel was very much edematous with inter loop collections and abdomen was washed and closed, with bilateral drains. But on the 11th afternoon again bilean secretion was found through flank drain and another perforation was suspected in the ilium. On 12th morning patient was again taken for laparotomy, done by surgical Gastroenterologist, assisted by PW14. Just distal to the earlier

iliac perforation another perforation was found and ileum was brought out on ileostomy. Because it was edematous and could not be repaired, the abdomen was kept as laparotomy (covered only by sterile plastic sheets). After that patient did not recover, suffered multi organ disfunction and expired on 16.2.2015 from the ICU.

72. On the suggestion that blunt impact sustained to the chest had resulted in the injuries on the lungs and ribs it was answered that heavy blunt trauma can produce the same. The patient was in severe shock since 2 liters of blood was there in peritoneal cavity, which can produce late complication because of cell death, which may not be visible microscopically. The shock and injuries found on abdomen were necessarily fatal, ie: fatal chest injury, fatal abdomen injury and severe shock. The condition was amenable to immediate death of the patient or could lead to later complications. Injuries to abdomen noted are sufficient enough to cause death in the ordinary course of nature. The fracture of the left forearm bone is grievous hurt, all of which injuries could be caused on hit, by a speeding vehicle. The multiple fractures, particularly on sternum and ribs could be caused by kicking and stomping. The patient's mind was clear and he responded with monosyllable answers and actions, could not speak continuously and could only say 'yes' or 'no'.

73. PW14's testimony elaborately details the procedures conducted on the patient over the days the patient was admitted in the hospital. The attempt of the defence was to bring out a case of medical negligence being the cause of death, which failed miserably, though no direct suggestion as to the same was made. Crepitation from the left side of the chest was detected and noted at the very first instance, at Ext.P18, an indication of rib fracture as deposed by PW13. Poly-trauma and blunt trauma, chest and abdomen was also noted in Ext.P18 wound certificate. PW13, the CMO of the casualty was specific about the need to rule out blunt-chest and abdominal trauma, all clearly indicative of a hit by a speeding vehicle. The wound certificate issued at the first instance definitely resonates with the ocular testimony of what happened to the victim. Ext.D11, the initial assessment sheet also indicates fractures of the second, third, fourth and fifth ribs. As far as the scoring and interpolation made to indicate the condition of the patient as disoriented, PW13 admits to have done the same, since the intern had entered the earlier details; quite plausible explanation. The GCS scale of 15/15 shows the motor, verbal and eye response, and by this alone, it cannot be said that the patient would not be disoriented, which is deposed by the expert doctor who attended to the patient. The initial condition of the patient as spoken of by PW13, is corroborated by PW14,

the attending surgeon who saw the patient immediately after resuscitation was done in the casualty. PW14 took over the management of the patient and has elaborately spoken of the procedures done on the patient.

74. The defence emphasized the possibility of CPR having caused the rib injuries as spoken of by DW4, a Pathologist, allegedly of repute. When the initial wound certificate itself speaks of crepitation, which is indicative of rib fracture and the initial assessment sheet notices four rib fractures, the condition of the patient definitely was fatal. The patient had rib fractures at the time of admission itself and to accentuate this, there is the trauma caused to the abdomen which resulted in guarding. Guarding is the tensing of the abdominal wall muscles; an involuntary response to prevent pain, again indicative of trauma to the abdomen, which could be caused in a hit by a speeding vehicle, as spoken of by both PW13 and PW14. The laparotomy also disclosed tears in the mesentery, which recurred, due to which the said procedure had to be repeatedly done. As has been pointed out by the prosecution, Explanation 2 to S. 299 IPC deems death, caused by bodily injury, to be caused by the person who inflicted the body injury; even if the death might have been prevented by resorting to proper remedies and skillful treatment. There was continuous treatment given to the

patient throughout his admission in the hospital and the details have been spoken by the Surgeon before Court.

75. Much ado has been created by referring to Ext.P19, the case sheet which has missing pages, according to the defence. We have looked at Ext.P19, despite PW14, in cross examination saying that she narrated the details of treatment without looking into the case sheet. It has to be noticed that the treatment procedures were conducted from 29.1.2015, till the death of the patient on 16.2.2015. The examination of the Doctor, in Court, was on 17.11.2015, within ten months. Definitely the Surgeon remembered the procedures for reason of the complications involved and the public attention the case garnered. The case sheet at Ext.P19 contains the entire medical records of the patient, which, as we see, was collated from the various departments, numbered differently. For example there is a T.P.R chart, an Intensive Monitoring Chart of BP, Spo2 etc., an Intake and Output Chart, Doctors Notes, Ventilator Chart etc. serially numbered independently. They were numbered together, serially, when kept in the case sheet; which numbering is from serial number 1 to 240. There can be no suppression found of the pages, merely because the separate sheets in the case sheet showing different numbers; quite possible in the given circumstances. Each of these separate charts, record different parameters of the patient from

29.01.2015 to 16.01.2015. The Doctors Notes from page 115 to 177 records the Doctors observations, the prognosis, the medicines and so on from the 29th to the 16th at the different times, noted in each of these days. We have to pertinently note that the patient was throughout in the Surgical ICU (SICU) as per the Case Sheet at Ext.P-19; clear from the Doctors Notes. Emergency laparotomy was decided at 6 a.m on 29th itself and carried out. Laparotomy is a surgical incision into the abdominal cavity, for diagnosis and for preparation for surgery. The Doctors Instructions at page 117, shows Post-Operative Diagnosis as *'Blunt injury Abdomen, hemoperitoneum, multiple mesnetery tear, left pneumothorax, multiple rib fractures compound fracture of left forearm'* all indicative of the hit by a moving vehicle, at the initial stage itself. The patient was back in SICU at 10.20p.m., on the same day and was on ventilator support till 7.15 p.m on the 31st. On the subsequent days the patient was recorded as conscious, oriented and resting, but with constant complaints of abdominal distention and occasional chest pain on the left side. He was also mobilized on chair, but throughout kept in the SICU. From 9.45 a.m. on 07.02.2015 the patient was comfortable without any new complaints and resting. At 10.15 p.m, on 10.02.2015 due to abdominal distension and absence of bowel sounds a CECT of abdomen was done to detect suspected tear in sygmoid colon.

This led to the second laparotomy, with Post-Operative Diagnosis of '*large sygmoid perforation and ileal perforation*' evident in page 151 of Ext. P19, which again is part of the 'Doctors Instructions'. The Operation Record of the 10th was also marked as Ext. C1. He was continuously on ventilator and on 12.02.2015, at 12 noon on the right flank drain, *'bilious'* (-excessive bilirubin in blood stream-) was detected. This led to the 3rd laparotomy on 12.02.2015, evident from the 'Doctors Instructions' on page 157 of Ext.P19, wherein the Post-Operative Diagnosis is *'ileal perforation'*. The laparotomy was kept open due to the infection on the ileum; through which motion passes, which has to heal, before closing the stomach. The patient was then on ventilator, was responding to calls, but grave prognosis was informed to bystanders as seen from page 172, at 5.00 a.m. on 16.02.2015. Then his condition was noted as worsening and he succumbed at 1.40 p.m. on the same day. We find no reason to doubt the Case Sheet and we cannot find any interpolation, deletion, or missing pages and we went through the entire records only due to the argument raised on that count, based on the suggestions made in cross examination.

76. We find the testimonies of PW's 13 & 14 to be credible and worthy of acceptance and in consonance with Ext.P18, Wound Certificate and Ext. P19, Case Sheet. There cannot be found any

negligence on the part of the doctors. In such circumstances, it is also to be noticed that the repeated procedures were warranted, because of the initial injury being inflicted by a speeding vehicle causing trauma all over the body as noticed on 29.01.2015 itself as per the Doctor's Post-Operative Diagnosis, we referred to above. The trauma and injuries noted were especially on the chest and abdomen and the complications that arose led to the death. The complications that arose could only have been attempted to be thwarted, by the various medical procedures. Such complications that arose even in a CPR or the surgical procedures were a direct result of the injuries caused by the accused, from which he cannot be absolved. In contrast to Explanation 2 of S. 299, here the best treatment was afforded and despite that the patient succumbed. There is no doubt that the patient succumbed due to the injuries inflicted by the accused; specifically on running him down with a vehicle.

77. PW15 is the Doctor who conducted the postmortem on 16.02.2015 and produced the certificate at Ext.P.20. The certificate noticed 44 injuries, of which, injury Nos. 31, 34 and 35 to 38 were surgical injuries. All the other injuries were abrasions, contusions & wounds, over the entire body and injuries Nos. 43 and 44; opined to be fatal. Injury number 43 was a fracture separation between manubrium and body of sternum with blood infiltration around fracture of 4^{th} , 5^{th} &

6th ribs on the right side and fracture of 2nd, 3rd, 4th & 5th ribs on the left side, on the front and back aspect, as also fracture of 7th, 8th & 9th ribs of the left side on front aspect, with minimal blood infiltration. Injury No.44 showed intestinal wounds, adhered with flakes of puss on their surface and peritoneal cavity containing 1000 ml of purulent fluids. The ostomy and colostomy openings were surgically caused. The mesentery of the small intestine showed three tears with sutured margins and the largest one was measuring 4 x 3 cms. According to PW15, death was due to the above detailed injuries, Nos.43 and 44, being those sustained on the chest and the abdomen. He also affirmed that the said injuries were sufficient in the ordinary course of nature to cause death. According to the police surgeon, death was due to blunt injuries sustained to chest and abdomen and its complications. Without doubt, hence the death was a direct cause of the injuries caused in the mowing down of the victim by the Hummer car, driven by the accused, deliberately with intention to murder the victim.

78. PW15 also deposed that injury No.16 is a grievous injury and that the rib fractures could be caused by a speeding vehicle hitting on a standing person. The Surgeon, PW14 confirmed that there is possibility of rib fracture during cardiac massage (CPR), but that multiple fractures on both sides with sternal fracture is not possible. In

this context, we have to notice that there is separation between the manubrium and sternum, a very serious condition. Hence, even if CPR caused some of the rib injuries; as deposed by PW13 and 14, resuscitation is imperative and the possibility of causing rib fractures cannot stop the medical personnel from conducting CPR. At the risk of repetition; the life endangering situation, warranting resuscitation was caused by the incident of hit by a speeding vehicle. The cross examination was again to bring forth something to indicate a medical negligence or the cause of death being due to some complications in the medical management. There is not even a whisper in the report of the post-mortem examination to even remotely suggest a possibility of medical negligence. As we noticed, negligence can be ruled out and there is no specific suggestion to that aspect. With regard to complications developed while on treatment, the medical procedures were warranted only because of the incident in which the victim was run down by a vehicle, the indications of which are available from the testimony of the three witnesses who corroborated each other. The complications were not those arising from the medical procedures, but those arising from the injuries sustained by the deceased in the head-on collision by the vehicle.

79. There was a further challenge to the results of the

postmortem examination and the testimony of PW15 was sought to be rubbished, by the defence, with the examination of DW4. At the outset we have to note the argument raised by the learned Senior Counsel, that, there was an attempt to malign the victim as a drunkard and also a debauch; unnecessary in the circumstances. The witness described himself, elaborately and his achievements, appreciatively. Though the witness spoke of having seen Exts.P18, 19 and 20, Ext.P20 alone was referred to, in the box. It was first stated that fatty changes in the lever indicates continuous intake of liquor for years and that it can lead to sinking liver or lever cirrhosis; which is just a contemplation and not the cause of the death, the Court was concerned with. According to him, the presence of 1000 ml of purulent discharge in the peritoneal cavity indicates septicemia and toxemia; which is not to say that the mesentery tears caused in the blunt trauma to the abdomen, as stated in the postmortem examination, is ruled out. There are also other possibilities aired, broadly of fever, other reasons (?) and multiple organ failure; in our opinion, throwing doubts not only on the expertise of the witness but also on the intention behind such testimony. These are all possibilities referred to and not a sure shot opinion. He also speaks of the separation of manubrium and sternum with blood infiltration, to be a peri-mortem injury ie: at or near the time of death, quite divergent

from the post-mortem examination. As to the flail chest, it is stated to be not a fatal injury and one sufficient to cause death in the ordinary course of nature. A direct hit by a Hummer car, according to him would cause abrasions and laceration on the abdomen and chest, if there is severe tangential pressure and that it could cause rupture of the internal organs; again only a possibility. Abrasion and lacerations on the abdomen would not have been detected in the post-mortem examination for reason of the three laparotomy conducted on the patient, the last of which was not sutured. DW4 also vouches that CPR could cause fracture of ribs and sternum, which according to PW15, is possible on the ribs and not on the sternum. The witness in cross-examination even challenged the authority of 'Modi's text on Medical Jurisprudence and Toxicology,' widely acclaimed as an authority. When the witness was asked whether fatty liver can be caused by viral infections hepatitis and by excessive medicines; his answer was that it could also be by heavy metals and arsenic, which is a medicine for sexually transmitted decease; quite uncharitable. We cannot but discard the testimony of DW4, with the disdain it deserves, for the apparent malicious intent, digressing from the essential opinion regarding the cause of the instant death and the supercilious manner that pervades the entire testimony. There is a qualified enthusiasm to promote the defence version, which

steps beyond a dispassionate, objective, professional assessment. One other pertinent aspect weighing with us, to accept the testimony of PW15 over and above that of DW4, is that the former saw the cadaver, examined it and recorded what he saw and his findings in PW20 speak of the cause of death, based on which he testified. The other witness, DW4, makes vague observations and broad possibilities based on the post-mortem examination certificate. We are reminded of the analogy, from the caution expressed in an adage, '*to not judge a book, by its cover*.' We cannot term PW's 13 to 15 as stooges of the prosecution or the police, based on the vapid, ill motivated and partisan testimony of DW4. We find the death to be a direct consequence of the injury caused in the hit by the vehicle driven by the accused, with deliberate, malicious intent to kill, coming within S. 300 of the IPC, under clause *'Firstly'* itself.

XV. SCIENTIFIC EVIDENCE:

80. The scientific evidence is with respect to the analysis of the various materials including blood stains, collected from the scene of occurrence, the car and the control samples and blood collected from both the accused and the deceased. The items were collected from, in and around the security cabin, around the fountain, the car parking area and the vehicle, by PWs. 18 & 19, the Scientific Assistants. PW18

collected five samples of blood stains from the fountain, inside the car, floor of car parking area, floor of security cabin and also control samples. PW19 collected five items; being (i) particles found adhered to the metal shield of the engine and the bottom of the vehicle, (ii) control samples from the said metal shield of the vehicle, (iii) metal particles found adhered to the fountain wall, (iv) broken pieces of the fountain wall & (v) black colored material found at the fountain wall. Mos 4 to 6 were the personal effects of the deceased and Mos 9 to 11 were the dress of the accused. There is an argument raised that the shoes of the accused, which contained blood stains, was not recovered from the body of the accused; an obvious attempt to distance himself from the accusation of stomping on the injured/deceased. Specific reliance was placed on Ext.P29, Inspection Memo prepared at the time of the arrest of the accused, evidenced by Ext.P28, Arrest Memo. It is the contention of the accused that the Inspection Memo does not indicate any dress material of the accused and hence, the shoes is one seized from one of the premises of the accused, searched by the Investigating Officer (I.O). Dealing with the above contention, it has to be noticed that the arrest was at 4.30 p.m. on 29.1.2015, the day on which the crime occurred. Ext.P32 is the seizure mahazar by which the dress of the accused was seized at 9.30 a.m. on 30.1.2015. Obviously, the dress worn by the

accused was not noted since he was wearing the same apparel even after the arrest. It is evident from Ext.P32, that the accused was provided a change in dress, on the next day, after which the above articles were seized, of which, the first one was an used pants of size 31 with brand name 'DIESEL CO', the second item a blue full shirt with brand name 'LEVIS' and the third item a pair of shoes of size 9 inch with brand name 'LOUIS VUITTON'. The seizures were made on the next day itself. We notice from the evidence of PW22 (I.O) that there were seizure mahazars or search lists prepared at every premises where a search was conducted by the I.O. On 29th itself, the apartment of the accused within the 'Sobha City' was searched as per Ext.P33, in the presence of witnesses and also the accused. The family house of the accused at Muttichoor was searched in the presence of witnesses and the mother of the accused, to evidence which, Ext.P34 search list was prepared. On 30.1.2015, again the flat in the complex was searched and certain items seized (MO16 to MO20) as per Ext.P36 which was signed by the Manager of the accused. The accused was received on police custody from 4.2.2015 to 11.2.2015. MO 21 to MO23 were the mobile phones and cover, of the accused surrendered before the police by his brother for which a seizure mahazar was prepared as Ext.P37, with witnesses. None of these searches or the documents prepared thereat show the seizure of

a pair of shoes, other than that revealed from Ext.P32. There is also no evidence tendered by the accused through any of the witnesses in the various mahazars/search lists noticed by us herein above, regarding the seizure of a pair of shoes. We reject the contention raised by the defence.

81. Now we look at the scientific evidence regarding the analysis and the comparison made of the various items referred to above. The property lists have not been marked before Court. But the forwarding notes have been marked as Exts.P46 and P54 to 57. Exts.P58 to P61 are the reports of chemical analysis and Ext.P62 is the report for collecting blood sample of the accused. There was also a contention raised by the accused that the police had not collected the blood sample of the accused as a clear indication of the suppression attempted, of the injuries caused to the accused. All the same, the FSL was careful in seeking for the blood sample of the accused, which had been collected and forwarded to the FSL through Court. There is, hence, no prejudice caused since the blood stain samples collected from the scene of occurrence has been compared with the sample collected from the accused. Resuming our narration regarding the forwarding notes, each of the items forwarded to the FSL are shown in a tabular form, along with the property list numbers by which the items were produced before Court. The date of such production is also noticed by the learned

Magistrate in the endorsement made in Ext.P46, which was an application to forward the various items produced before Court to the FSL. The property lists were four in number, PI Nos. 50/15, 60/15, 78/15 and 83/15 received in Court respectively on 31.1.2015, 4.2.2015, 11.2.2015 and 18.2.2015. MOs 9 to 11, the dress of the accused including the shoes were produced before Court as per PI No.50/2015 and described in Ext.P46 forwarding note from item Nos. 8 to 10. The personal effects of the deceased, a pair of shoes, a mobile as also two pieces of the baton and blood stains and other materials collected from the car, parking area, security cabin were those produced through PI No.60 of 2015. By PI No.78/2015, the items surrendered by the brother of the accused were produced and PI No.83/2015 included the hair sample and nail clippings of the deceased, the blood of the deceased collected for DNA testing and a dried blood-stained glass. By Ext.P54 forwarding note, the materials collected by PW19 produced before Court by PI No.123/2015 were sent to the FSL. Ext.P55 was the forwarding note of the blood sample of the accused produced before Court as per PI NO.133/2015 sent to the FSL. Ext.P56 forwarded the items produced as per PI No.147/2015, not relevant. Ext.P57 is the forwarding note of the tab of the accused seized from the car.

82. Dealing with the analysis reports, we only refer to the relevant

materials, which on comparison revealed a connection with the crime. Ext. P58 is the histopathological report of the deceased, from the Chemical Examiners Laboratory, which is an omnibus negative report; also negativing the presence of alcohol in blood. Ext.P59 is another report of the FSL wherein item Nos. 1 & 3 are the shoes & mobile of the deceased and Item No.s 4 & 5 are the two broken pieces of the baton, item No.6, the broken pieces of glass recovered from the scene, item Nos.8, 9 and 10, the pants, shirt and shoes of the accused. Item Nos.16 & 17, are the blood sample of the deceased and item Nos. 18 and 18(a), the blood samples of the accused. The blood samples of both were subjected to DNA typing, and compared with the blood stains on the various items seized. The blood stains on item No.4, which is the longer piece of baton; as distinguished from item No.5, which is the handle portion, indicates blood of the deceased. Item Nos.1 & 3, belongings of the deceased, obviously contained his blood. Likewise, item Nos. 8, 9 and 10 which are MOs 9 to 11; the dress and shoes of the accused, showed the blood of the deceased. The glass pieces recovered from the scene of occurrence (item No.6) revealed blood stains of both the accused and the deceased; quite natural since they were both grappling inside the cabin and the glass pieces are of the window panes of the cabin. Item No.s 7(a) to 7(d) are the blood stains collected from the crime scene, Hummer Car, car

parking area, and the security cabin produced in Court as per P.I No.60/15 (Item No.7) & Item No. 7(e) the control sample. Item No.s 7(a) to 7(d) contained the blood of the deceased. Ext.P61 is the analysis report, by which, the materials collected from the scene of occurrence and the vehicle were compared. Item Nos.1 and 2 were respectively the particles found adhered to the metallic shield of the engine at the bottom of the vehicle and the control sample collected from the metallic shield. Item No.1 was found similar to item No.4, which are the broken granite pieces of the fountain wall, collected from the crime scene. The material collected as control sample from the metallic shield of the engine of the vehicle (item No.2) was found identical to item No.3, metal like particles found on the fountain wall. Item No.5 is the black colored material collected from the fountain wall which was identical with item No.8, the black colored tyre particles recovered from the tyre of the vehicle. The presence of blood on the dress of the accused, at the crime scene, in the Hummer, at the car parking area and in the security cabin; identical to that of the deceased and the identity of materials from the crime scene and that from the vehicle further adds credence to the ocular testimony. The blood of the accused was detected only on the glass pieces which also is in consonance with the ocular testimony and in tune with the abrasive injuries found on the accused. These are

further incriminating circumstances pointing to the guilt of the accused.

XVI. INJURIES ON THE ACCUSED:

83. The defence put forth a version, that it was the accused who was assaulted by the staff of 'Sobha City' and in his attempt to escape, the deceased was accidentally hit by the vehicle. It is to this end that the injuries on the accused were emphasized, which, according to the defence, were attempted to be suppressed by the prosecution. There is also an allegation of the Police having not been co-operative, thus denying the accused proper medical attention, despite the request from the jail authorities. Ext.D34 is the remand report submitted before the JFCM Court, Kunnamkulam. At the first instance, the accused had raised the contention of having been assaulted by the staff. The endorsement made by the Magistrate, was not clearly decipherable, but we got it typed out by the very Magistrate who made it, which is extracted herein below:

"Accused arrested and produced before me at 4.10 p.m. He having allegation of ill-treatment against security staff of 'Sobha City' quarters. No allegation against Police. In view of the remand report, remanded to Sub-Jail, Chavakkad till 13.02.2015.

Medical Certificate produced. Some contusion below eye and nose. No other external injury noted. Jail Superintendent is

directed to give proper medical treatment if any."

84. There are two Medical Certificates of the accused produced, Exts.P35 & P30, one on examination at 4.30 a.m on 29.01.2015 and the other at 9.25 p.m. of the same day. Ext. P30 is the one produced along with the remand report. Ext.P35 indicates only an abraded wound over the bridge of nose and an abraded wound over the right elbow. The examination leading to the above Certificate, is recorded as carried out on 29.01.2015, but issued only on 30.01.2015. Ext.P30 records (i) blackish red contusion below left eye, (ii) blackish red abrasion on nasal bridge with minor contusion, (ii) linear abrasion right elbow and (iv) paraspinal muscular tenderness at T12. The above noted visible injuries on the accused are in consonance with the testimony of PW6, his wife. There is also recorded complaint of *'pain nose, decreased hearing right ear',* with an ENT consultation recommended for *'o/e cannot appreciate ear drum';* ear drum not being appreciated on examination, meaning not seen.

85. DW1 is the Radiologist of the Government Medical College, Thrissur, who examined the accused on 02.02.2015 at around 7 p.m., who took a CT Scan of the thoracic and lumbar region.. The injuries noted by the ENT Department was marked as Ext.P45(a) and the report of CT Scan was marked as Ext.P45(b). According to DW1, as

per the CT Scan, there was fracture of the right transverse process of L2, L3, L4 vertebrae, which fractures were opined to have been caused by forceful impact with a blunt object. The suggestion made by the defence in chief examination was that the said fractures could be caused by a violent scuffle or that part of the body hitting against a blunt object like thick wall, glass wall, window frame or blunt portion of iron table. DW1 answered that it would depend upon the force of the impact and it requires a large force, since that area is covered with thick muscles and then there will be corresponding external injury. In cross-examination a specific question was put by the prosecution as to whether these fractures are possible, if the driver of a speeding vehicle suddenly hits on solid concrete structure [*sic*]. The question obviously was that these fractures could be caused on the driver of a vehicle, when the vehicle hits a solid concrete structure. The answer was in the affirmative and the Doctor explained, there could be sudden lateral flexion, when the vehicle makes the hit. The back of the accused was examined at the initial stage as recorded in ExtP30 and the only observation was regarding a muscular tenderness at the paraspinal area at T12, the thoracic spinal area; which means tenderness detected on touching the said portion. This is not an injury as would be caused on hitting with a blunt object or a fall leading to the fractures of the spine. There was another argument

raised based on the perforation in the tympanum of the right ear, to further canvass the story of aggression on the accused. There is no question put to DW1 regarding the same, but Ext. D45 (a) records the Impression: '*Traumatic perforation ® Tympanum'* indicating it. However there is no corresponding injury, redness or trauma recorded on the right ear portion when the accused was examined initially, despite the accused having raised a complaint of decreased hearing. A perforation caused due to a slap on the ears, as argued by the accused, would have to be very forceful and there would definitely be an indication of such a trauma on the exterior. Further, as argued by the prosecution, the age of the perforation is not discernible.

86. The visible injuries as noted by the Magistrate and the Wound Certificate do not show serious injuries, so as to infer an assault on the accused. Of course the Magistrate is not an expert and the fractures to the spine could not have been detected then. As we noticed, the accused went on a rampage and there was a scuffle, in which the minor injuries, other than the fractures could have been caused. These are not serious, compared to the injuries found on the body of the victim; that too all over his body, who was the target of the accused. The accused does not have any complaint of an assault with a blunt object for the injuries on the vertebrae to be caused. The fractures on the

vertebrae, definitely were not possible in the scuffle or by an assault, since the Doctor also had opined that in that circumstance, there would definitely have been external injuries on the back of the victim; which is absent, except for some tenderness as noted in Ext.P30. Pertinent in this context is the opinion of the expert, DW1, that the fractures could have been caused if the person had been driving a vehicle, which hit a concrete wall. The ocular testimony is to the effect that the vehicle driven by the accused, after hitting on the deceased, hit the solid granite wall around the fountain, causing the right tyre to burst. The vehicle, in the impact, bounced over the wall and become stationery, with one of the wheels inside the fountain wall. The impact was very forceful and it was the right tyre which hit the wall, which burst and also bounced over the wall. The expert opinion is also that the injury could have been caused in a sudden lateral flexion; ie: bending of the spine on sudden impact. We cannot from the injuries noted on the accused, infer it to have been caused by an assault on him. Contrary to that, the minor injuries, validate the scuffle and the fractures, similarly confirm the Hummer's violent hit on the fountain wall, in complete accord with the ocular testimony of PW1 to PW3.

87. There is also a contention raised of the Superintendent of the Sub Jail, Chavakkad having complained to the jurisdictional

Magistrate about the non-cooperation of the Police in providing security to take the accused to the hospital. It was only later that the Police co-operated in taking the accused to the hospital, as is evident from Ext.D37 & Ext.D38 reports. True, there has been a laxity on the part of the Police to provide immediate security for taking the accused to the hospital, especially when there was wide media coverage about the incident, raising a public outcry against the accused. But this does not in any way affect the findings regarding the crime proper. There is also the evidence of one consultant in Psychiatry, DW3, who was consulted by the accused, once, on 24.01.2014. The observations of the consultant on that day is seen recorded in Ext.D47(a). The complaints recorded are of *'brooding, reduced sleep, loss of interest, reluctance to go out, reduced interaction with friends and history of excitement, overconfidence and overspending'*. The diagnosis was also of a Bi-polar Affective Disorder. There is nothing in the observations recorded or the testimony of the witness regarding any mental illness. In fact it is specifically recorded that there is no previous history of mental illness or suicide. Obviously, the accused was carrying on his normal activities, without any impairment of cognitive faculties and on his own showing, he was thoroughly successful in his business; having inherited a Beedi manufacturing unit from his father, which business considerably

diversified in his hands. Admittedly, the consultation with DW3, was not continued and there is nothing decipherable of a cognitive impairment from the single consultation carried out, more than an year back from the date of incident.

88. *Sanjay Yadav v. State of Bihar (2019) KHC 3176,* relied on, is not relevant, since therein, the previous animosity between the accused and the deceased raised the doubt of a probable false implication of the accused in the crime and the eye-witnesses were also closely related to the victim and in inimical terms towards the accused. There was also no independent witness examined by the prosecution, upon which adverse inference was drawn. *Mitter Sen v. State of U.P. (1976) 1 SCC 723* was a case in which the names of persons, who had acted in private defence, causing the injuries on the accused, were not mentioned in the FIR, in which event it was held that there was no explanation of the injuries caused on the accused. None of these circumstances exist here. *Lakshmi Singh v. State of Bihar AIR (1976) SC 2663* was also with respect to non-explanation of injuries on the accused, when there could be inferences drawn as to (i) the prosecution having suppressed the genesis and origin of the occurrence, (ii) the witnesses who denied the injuries on the accused, deliberately lying on a material point, thus making them unreliable and (iii) if the defence

explains the injuries, their version being rendered probable. It was further held that such an omission to explain an injury on the accused assumes greater importance, where the evidence consists of interested or inimical witnesses; when the defence version competes in probability with that of the prosecution case.

89. In the present case the assault on the accused is stated only by the accused and the injuries are not as grave as could be occasioned by three persons; the eye-witnesses (PW1 & 3) & the deceased ganging up to attack the accused. It is also pertinent that the version of the accused is not at all probable, especially of the deceased having run behind him with a glass piece to stab him. There is not even a lacerated wound, leave alone a stab injury found on the accused. PW6 the wife of the accused who saw him immediately after the incident, does not testify to the accused having spoken of any such assault on him; except the innuendo we referred to, which was marked as an omission in her prior statement. The witnesses, at the scene of occurrence in the present case, also admit a scuffle having ensued, so does the accused say in his S.313 questioning, and it is probable that the minor injuries on the accused were caused in such scuffle. As far as the fractures to the vertebra, we have already found that even the accused does not have a case of a concerted attack with weapons or blunt objects on the accused,

by the staff of 'Sobha City', which could result in such fracture on the vertebra; otherwise than from the impact of the vehicle. On the contrary, the eye-witness testimony regarding the vehicle driven by the accused, having hit a solid granite wall and bounced on it, probabalises the vertebrae fractures having been caused in such impact, which is spoken of in the expert testimony of DW1. In the circumstance of there being no prior enmity between the eye-witnesses and the accused, no case of false implication can be inferred. No suppression is discernible on the side of the prosecution and no deliberate falsehood is demonstrated from the testimonies of any of the witnesses. The version of an assault on the accused is not at all probable and it offers absolutely no competition to the testimony of the eye-witnesses, through whom the prosecution case is put forth.

XVII.THE DEFENCE VERSION:

90. We get the defence version from the suggestions made in cross-examination, the defence witnesses and that put forth in S.313 by the accused, both in the answers and the statement submitted; all of which resonated time and again in the arguments of the defence before this Court. The comprehensive version is that put forth in S. 313, which is as follows. According to the accused, he was troubled by sleeplessness and he had gone to his office after two months on the night of

28.01.2015. He came back late and when he approached the entrance of the apartment complex at 3 a.m, the gates remained closed, obstructing his entry. The version of the accused is that he honked, then came out and questioned the security staff. A person who stepped out of the security cabin questioned him about not having a sticker in his vehicle. He called his wife to tell her about the entrance gates not being open. There ensued a wordy duel with the person who stepped out of the cabin, whose authority, the accused questioned especially since he was not in uniform. Then three security staff came to the scene and the first person informed him that he was superior to the security staff. That person also beat the accused with a baton, which was evaded, but still it hit on his nose and below his left eye. He called his wife again, twice and when that person again attempted to strike him, he caught hold of the baton, which culminated in a scuffle. The three others joined and he sustained blows on the left eye and below it and also a slap on his left ear, from which he heard a persistent buzz. That other person was healthier and when grappling with each other, both hit the glass window panes of the cabin, which broke, resulting in both of them tumbling down, into the cabin, causing complete disarray of the various objects placed in the cabin. Both men fell on to the floor of the cabin, where they wrestled for some time and then the accused jumped out of the

cabin through the window and ran to his car, when that other person followed him with a glass piece. The accused, was in fright, blood was dripping from his nose, sensed pain on his left eye, the buzz in his left ear persisted and he felt pain on various parts of his body. The accused jumped into the car and attempted to drive in through the outer gate, which gates were also closed. Hence he drove on to the circular road, and on his reaching, the southern side of the fountain, where the circular road of the complex opens into the main road, the person who was following him, jumped on to the road upon which the accused braked the vehicle. The vehicle hit the deceased, accidentally and the accused lost control of the vehicle which ran over the curb, then over the fountain wall and became stationary with one wheel lodged inside the fountain and one tyre burst. The accused got out and helped the injured, who was trying to stand up, to sit, leaning on the fountain wall. The accused was frightened and totally confused and when he saw a crane passing by, on the main road, he asked them to help him retrieve the car as also take the victim to the hospital. The people in the crane refused to do so and he, took out the vehicle himself, boarded the injured man into his vehicle, asked his wife to get in and drove into the parking area, intending to seek the help of the association staff to take the injured to the hospital. The statement then, spoke about the police having

neglected his injuries and also alleged that the investigation was ill motivated.

91. As submitted by the learned Senior Counsel for the prosecution the incident at the entrance which occurred at around 3.00 a.m in the morning is admitted by the accused, with variations, so as to urge the aggression alleged to have been perpetrated on the accused. The accused admits to have been troubled by sleeplessness which resulted in his reaction at the entrance and allege that the barrier was closed, obstructing his entry into the complex. The variation from the ocular testimony are of the barrier remaining closed at the entrance, the deceased having beaten him with a baton, window panes having been broken when the accused and the deceased who were grappling with each other fell on it and tumbled into the cabin, the accused having jumped out first, followed by the deceased with a glass piece and the accused having attempted to make an escape in the car. According to the accused when he reached the side of the fountain where the circular road opens into the main road, the deceased jumped on to the road, accosting the accused, who was driving the vehicle; very improbable. If we believe the accused, the other staff of the Sobha City, at the entrance, were mere spectators; but for their holding him when the altercation commenced.

92. Be that as it may, the scuffle is admitted and now we have to look at the crime proper which was the head-on collision on the deceased, by the accused. It is very improbable that the accused who was driving away in the Hummer car would be chased by the deceased, to overtake the car and jump on to the road, right in front of the vehicle. If the deceased, was running away in the first place, again there was no reason for him to accost the accused who was in the vehicle. Further, if the accused was concerned about the injured man, who was allegedly hit by his vehicle, then necessarily he would have tried to take him to the hospital. He also admits to his car being mobile, into which he bundled the deceased. But since the tyre had burst, it is probable that he wanted to seek help, to take the injured to the hospital. But the fact remains that his wife came in a car and he took his wife also to the parking area inside the complex, in the Hummer, one tyre of which was burst. There was no attempt made to take the injured to the hospital, in his wife's car. At the initial point according to the accused, the gates were closed, which prompted him to alight from the vehicle, but he speaks of a smooth passage inside, after the alleged accident. There is no reason for the staff to open the gates when the incident was happening and after that, especially when there was an altercation going on at the entrance between the staff and the accused, who was a resident of the complex.

Arguments were addressed about the car being not mobile, which has been demonstrated to be a falsehood.

93. *Mohan Lal Pangasa v. State of U.P (1974) 4 SCC 607* was a case in which the accused was last seen together with the deceased and also confessed to the Rakshaks about his murderous act, which was deviated from under S. 313. A new version of both of them being attacked by '*badmashes*' was a demonstrable falsehood, which he did not state before; neither when he was apprehended nor before the committal Court. Hence it was held to be a circumstance which could be taken into consideration, if there are other materials bringing home the guilt of the accused. In the present case the accused raised the allegation of assault by the security staff, at the first instance, before the committal Court. But we are convinced that the version of the accused under S. 313, is demonstrably false. *Ashok Kumar v. State of Haryana (2010) 12 SCC 350* considered the effect of the statement of the accused made under S.313 Cr.P.C, to hold that: *'The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution' (sic).* The statements made under S.313 are not substantive evidence,

but the same can be used against the accused, if there is other evidence to find him guilty. The statement under S.313 though cannot be considered in isolation, can be considered in conjunction with the evidence adduced by the prosecution as held in *Ashok Debbarma v. State of Tripura (2014) 4 SCC 747*, following *Devender Kumar Singla v. Baldev Krishan Singla (2004) 9 SCC 15* and *Bishnu Prasad Sinha v. State of Assam (2007) 11 SCC 467*.

94. It is pertinent that even according to PW6, the wife of the accused, she was summoned to the spot over the telephone, when she heard noises in the background. It was not once but thrice the accused called his wife, over the mobile phone and it is very improbable, if he was being subjected to an aggressive assault by the staff at the entrance. After taking the injured inside, the accused pulled him out of the car, which presumably was a clear indication of there being no desire to help the injured and on the contrary a definite intention to further assault him and surely send him to his death. It was at that point that the wife made a call to her friend, seeking assistance of her husband. PW5 and two residents came to the spot upon which the accused was insisting that he or his friends would take the injured to Ernakulam; which is admitted by PW6. Then PW5 witnessed the injured man, lying on the floor of the parking area raising his head, on which the accused

committed the very demeaning act of stomping the injured man on the head and uttering the abusive words, which shocks any civilized human being and reveals the mind of the accused. The testimony of PW6, the wife of the accused was also that she saw the police, coming behind PW5 and the other two residents, at a distance, contrary to which the accused stated that they came together. We find no reason to attach any credibility to the version put forth by the defence under S.313. On the contrary the deliberate falsehood stated by him commends us to find those, to be further incriminating the accused, in addition to the ocular testimony as also the medical & scientific evidence.

95. The defence examined six witnesses, D1 to D6, respectively, the Doctor who examined the accused, the expert in tyres, the Psychiatric Consultant, the Pathologist, the I.O (PW23) and the incumbent SHO of Peramangalam Police Station. We have already discussed D1 to D4; of which D1's testimony aids the prosecution case and the other's, of no avail to the defence. D5 and D6 were brought to project deficiencies in investigation; which turned out to be a wild goose chase. Questions were put to DW5 regarding the log book of the vehicle maintained and the weekly case diaries from which certain inconsequential mistakes were noticed, explained by the witness as clerical errors. DW6 marked Exts. D56 & 57, General Diaries at the

relevant time and Exts. D56 (a), pages 75 to 77, two entries Exts. D56(b) & (c). Ext. D56 (b) is the entry at 3.30 a.m referring to the SHO having proceeded to 'Sobha City' on getting information about the skirmish in the location and the assault on a security employee. Ext. D56(c) is the entry regarding the accused in this crime having been entrusted to those on guard duty. Nothing turns on these entries and the first entry need not be as elaborate as argued by the defence and the mere fact that the use of the vehicle is not mentioned does not rubbish the entire prosecution version regarding how the murder occurred. The defence evidence led, falls flat and the attempt to digress from the essential issue fails. There is also an argument raised regarding the rejection of the attempt of the defence to examine many more witnesses, which was rejected partially by this Court. Yet another application filed before the trial Court for examination of the I.O, after confronting him with the DVD taken of the scene mahazar was rejected against which the accused approached this Court, unsuccessfully. This Court's orders were challenged before the Hon'ble Supreme Court; by which time the trial Court reserved judgment. The Hon'ble Supreme Court refused to interfere but left liberty to the accused to raise the plea in appeal. A reading of the order of this Court in Crl.M.C No. 7647 of 2015 dated 08.12.2015 indicates that the rejection was with respect to the request to

cross examine the I.O; confronting him with the DVD's in which were recorded the activities and preparation of the scene mahazar, simultaneously. This Court found that the DVD, which is an electronic record admissible under S. 65B (4) of the Evidence Act cannot be made use of, as a prior statement under S. 145 or S.155(3) of the Evidence Act. It was directed that the admissibility of the electronic record can be considered by the Court below at the appropriate stage. Again an application was filed numbered as Crl.M.P 5116 of 2015 in SC 300/2015 for sending the memory cards produced by PW17 and the I.O for recovery of the data contained therein; again the video footage at the time of preparation of scene mahazar. This application stood dismissed *inter alia* for reason of the said application being one filed to protract the trial; the same having been filed after the defence evidence was closed. These are the two orders challenged before the Hon'ble Supreme Court in S.L.P No.s 304-305/2016, in which liberty was reserved. Merely for placing the orders before this Court, no arguments were addressed on how prejudice was caused to the accused, by not being permitted to carry out such examination of the I.O. We also notice that the trial Judge had in the impugned judgment explained as to why the digital recordings made of the scene of occurrence was not permitted; which was not touched upon in the arguments. Hence nothing valid

ensues from such contentions blandly raised, but not effectively pursued. In Crl.M.C No. 8095 of 2015 dated 05.01.2016 the plea was regarding the rejection of examination of certain witnesses; Editors and Publishers from the Media. This order was not challenged and has attained finality and nothing remains to be considered.

XVIII. MURDER OR CULPABLE HOMICIDE:

96. The defence version having been disbelieved, there is no hypothesis available, not in the least, even a reasonable hypothesis of the deceased having been injured in an accident, pure and simple or even in the midst of an altercation. We have accepted the ocular testimony and dealt with the medical evidence and scientific evidence all of which incriminate the accused, beyond all reasonable doubt. There is also no reason to find any medical negligence on the part of the doctors nor is the cause of death due to a medical emergency, totally unconnected with the injuries caused in the accident. *Shanmugham @ Kulandaivelu v. State of T.N (2002) 10 SCC 4* rejected a plea of self defence, but found only an intention to cause severe injuries and not death, thus modifying the conviction, to that under S. 304. The mitigating factors were the lack of a motive, the genesis of the incident from a petty quarrel on which a weapon was picked up and used on the deceased and the accused having surrendered the weapon to his wife on

her interceding, without delivering any fatal blows though he was capable of doing so. In this case as we noticed, the prosecution, in the trial alleged no prior motive, but in the teeth of the incriminating circumstances, the lack of such motive, bestow ominous proportions to the crime proper. The intention, as revealed from the facts, cannot be a mere physical assault, when the deceased was chased with a car and mowed down.

97. In *Tukaram v. State of Maharashtra (2011) 14 SCC 250* the eye witness testimony of a brutal assault was not supported by the medical evidence and the doctors were found to have attempted to cover up their lack of vigilance and the accused was convicted only of S.326 and not even S.304. *Harishkumar v. State Delhi Administration (1993) AIR 973* was a case in which there was no sufficient material to show the nature of treatment given to the deceased during two days before death and though the injuries resulted in death, it was not conclusively proved to be sufficient to cause the death, thus modifying the conviction to S.304 Part II, from S.302. We have detailed the medical evidence from the testimonies and the case sheet, fairly elaborately in the above paragraphs, which renders inapplicable the decision cited. *Sukumaran V. State of Kerala ILR (2004) 2 Ker 207* also examined the question whether injuries were sufficient in the ordinary course of nature to cause

death; which the Court held, was not to be considered merely with reference to the date of death, but with reference to the date of infliction. It was also held that there should be an examination of intervening factors to accelerate the death and if the details of treatment are not produced, it could be inferred that there were such intervening factors. Here the treatment details are on record and even on the date of infliction, death was staring at the face of the injured, as per the expert testimony.

98. *Kishan Chand v. State of Punjab AIR (1994) SC 32* was a case in which a single blow was delivered and the death occurred two weeks later, which was held to be culpable homicide not amounting to murder. Quite in contrast, in the present case there was a deliberate mowing down of a person with a powerful vehicle, causing poly-trauma, clearly evident from the medical evidence and the deceased having been given treatment, after which he met with his death on the 19th day from the incident. *Ganga Dass v. State of Haryana (1994) KHC 2216* was again a solitary hit on the head of the deceased with an iron pipe and the death occurred 18 days after a surgical procedure was conducted on the patient and the cause was cardiac failure. There is absolutely no doubt that the injuries caused from the hit by the vehicle, fractured the ribs of the accused and also caused fatal injuries to the abdomen, by way of

tears to the mesentery, which though attempted to be repaired, proved unsuccessful. The treatment given was stated by PW14, the Surgeon who attended to the patient, elaborately in her testimony. The allegation of missing pages in the case-sheet is negatived and we find no reason for the Doctor to testify falsely before Court and the details also would not have escaped her memory for reason of the prolonged procedures the patient was subjected to, the grievous injuries sustained, the crime having evoked public shock and the testimony in Court having been given, not very far from the incident itself.

99. *Rajwant Singh v. State of Kerala (1966) Supp SCR 230* saw, burglars tie up a Naval Officer with his mouth taped and secured by a handkerchief, cotton laced in chloroform, placed in both nostrils and laid down in a shallow drain. The burglary was foiled due to the hue and cry raised by the sentry and on the next day morning the tied up Officer was found dead. The argument was that the offence is one falling under the second part of S.304, culpable homicide not amounting to murder. The Hon'ble Supreme Court elaborated on the four mental attitudes, the special *mens rea,* which distinguishes the offence of murder and culpable homicide not amounting to murder. The first is a clear intention to cause death, the second, intention of causing such bodily injury, which the offender knows is likely to cause the death of the

person who sustains that injury, thirdly, acts done with the intention to cause bodily injury, which injury in the ordinary course of nature would cause death, sans even the subjective knowledge and fourthly, the commission of imminently dangerous acts which the accused knows, would in all probability cause death. Viewed in any angle the act of the accused herein is murder. The ocular witnesses specifically speak of the accused having threatened to shoot the deceased and then to kill him with the car, a clear intention, which latter threat, he carried out deliberately and mercilessly by mowing down the fleeing man. Minus the threats, as we noticed, the running man was just a sprint away, as brought out in cross-examination, when the accused deliberately got into the vehicle, chased and rammed him, which act definitely would cause such bodily injury, which any person knows is likely to lead to death. Then, sans even this subjective knowledge, it is clear that the conscious act of running down a man to cause injuries, which injuries in the ordinary course would lead to death, makes the accused liable for murder. Ramming a man, deliberately with a vehicle, is also an act, imminently dangerous as to cause death, in all probability. Looking at the commission of the act, which cannot be termed to be an accident, it is murder, most foul and vicious, snuffing out the life of a poor soul. *Badru Ram v. State of Rajasthan (2015) 11 SCC 476* declared that a

murderous assault resulting in death cannot be converted to culpable homicide, not amounting to murder and when there is not the slightest provocation, the mere absence of motive does not bring home the lesser charge; which declaration is squarely applicable in this case.

100. We are quite conscious of the caution expressed by the Hon'ble Supreme Court in *Arjun Marik v. State of Bihar (1994) suppl 2 SCC 372*, that in a murder trial, the accused stands the risk of being subjected to the highest penalty prescribed by the IPC and naturally the judicial approach dealing with such cases has to be cautious, circumspect and careful. We have meticulously gone through the evidence and have elaborately discussed it, to find the accused guilty of the offence of murder, the gravest of the offences and in this case committed in a most foul & dastardly manner, shocking the public consciousness and challenging the basic values of human societies. Such acts of depravity is an indelible mar on civil society and the economic disparity between the accused and the deceased, accentuates the gravity of the offence.

XIX. THE CONCLUSION:

101. We have found the ocular testimony to be credible, trustworthy and fully corroborating each other. The genesis of the incident is the fracas at the entrance of 'Sobha City' initiated by the

accused, which was followed up with physical violence on the staff of the complex. Without doubt, the aggressor was the accused and he not only created damage to the property, but also perpetrated violence on those manning the gates of the complex. The frightened staff ran helter-skelter and it is clear from the testimonies that the physical violence was mainly targeted against the deceased, who had questioned the accused at the initial stage, as to what was the reason for his frenzied expressions against the security staff. While the deceased along with the others were running away from the security cabin, the eye witnesses clearly state that the accused threatened to shoot the deceased and gestured a shooting action with his hands as he proceeded to the vehicle. We saw from the testimony of PW2, that the deceased was just a sprint away from the accused, when the accused mounted the driving seat of the car, reversed it and moved it after the running deceased. The car was steered on to the curb near the fountain to strike the accused down and the car collided on the granite wall, with one wheel bouncing inside the circular wall of the fountain. The frenzied acts did not stop there and the accused after retrieving the vehicle bundled the injured man into its back seat and took him inside the apartment complex; where he was accompanied by his wife from the entrance. What happened inside the parking area, with variations from her prior statement, has been spoken

by the wife, PW6, which testimony to certain extent corroborates the evidence of PW5, who came to the parking area on being summoned by PW6. PW5 narrates the ghastly act committed by the accused on the injured man inside the parking area and speaks specifically of the words uttered by the accused, while stomping on the head of the injured, which further projects an intention to kill the injured.

102. That the injured man suffered fatal injuries is spoken of by PW13, the CMO who first saw the injured, PW14, the Surgeon who attended to the victim and PW15, the Pathologist who conducted post-mortem examination. We have elaborately dealt with the medical evidence which lead to the only conclusion of the death having been caused by the injuries sustained on the deliberate head-on collision and the complications arising there from. The scientific evidence also fully supports the ocular testimony of the witnesses. The arguments regarding the delay in recording of the FIS, the FIR having not been immediately sent to the court, non-examination of material witnesses and the delay in recording the statement of PW5, have all been rejected by us. The injuries on the accused, and the defence version in the S.313 examination as discussed above, does not bring forth any other reasonable hypothesis than that projected by the prosecution. We have already discussed *Rajwant Singh (1966) Suppl. SCR 230* and applied

each of the clauses under S. 300 to the instant case; only to bring completeness to the discussion and fully negate the argument raised of the only sustainable charge being one of culpable homicide not amounting to murder. That is not to say that we entertain any doubt regarding the offence falling under clause 'firstly' of S.300; the act being done with the intention of causing death.

103. We notice *Virsa Singh v. State of Punjab (1958) SCR 1494*, wherein pursuant to an unlawful assembly a person was killed by reason of a solitary injury of a spear thrust, inflicted by the accused. The opinion of the Doctor was that the solitary, incised wound inflicted on the accused was sufficient to cause death in the ordinary course of nature. The learned Sessions Judge found the intention to be only to cause grievous hurt and noticing the supervening peritonitis to have hastened the death, found that the case fell under S.300, 'thirdly'. Their Lordships held that even if, on facts it is found that there is an intention to inflict an injury, sufficient in the ordinary course of nature to cause death; then the intention is to kill and, in that event, 'thirdly' would be unnecessary because the act would fall under the first part of the section, viz: *'if the act by which the death is caused is done with the intention of causing death'*. Their Lordships further held that the consideration of the intention, necessarily proceeds on broad lines as to whether there

was an intention to strike at a vital or dangerous part and whether it was done with sufficient force, to cause the injury that was inflicted. It was cautioned that there is no requirement to enquire as to whether he intended to penetrate a vital organ; in which case a man who has no knowledge of anatomy could never be convicted for murder. In the present case the intention is very clear from the ocular testimony. At the crime scene itself, a threat was levelled to shoot the deceased, then the deliberate act of moving the car and turning it on the deceased callously and with malicious intent. Yet again there was no attempt to save the injured or take him to the hospital and he was taken into the parking lot of the complex, where the accused resided. Inside the confines of the parking area, again a gruesome act was committed by the accused, spoken of by PW5 which further demonstrates the vile intent of the accused. The intention to inflict the particular injuries as found on the deceased having been established, the rest, as held in *Virsa Singh 1958 SCR 1495*, is a matter for objective determination from the medical and other evidences, about the nature and seriousness of the injury. We have already discussed the entire gamut of evidence led by the prosecution which establishes beyond reasonable doubt that the offence falls under s.300 of the IPC. We have also discussed the so called aggravating circumstances of an alleged assault against the accused, put forth by the

defence and found it to have not raised any hypothesis of innocence in our minds nor even a mitigation, to term the acts committed by the accused as a mere accident. We find absolutely no reason to, in any manner, interfere with the conviction as found in the judgment impugned. We uphold the conviction of the accused, as passed by the trial court and as a consequence dismiss the appeal of the accused.

XX. THE SENTENCE:

104. The appeal of the State seeks the sentence to be enhanced to one of capital punishment. The learned Senior Counsel, who prosecuted the appeal on behalf of State, also argued that at least the alternate sentence as provided in *Swamy Shraddananda(2) v. State of Karnataka (2008) 13 SCC 767* be imposed. The learned Senior Counsel also relied on *Lehna v. State of Haryara(2002) 3 SCC 76,* which was a case in which the accused took away the lives of his mother, brother and sister in law and injured his father and nephew. In *Lehna* their Lordships considered the leading cases on the point, *Dalip Singh v. State of Punjab AIR1953 SC364, Vadivelu Thevar v. State of Madras AIR 1957 SC 614*, *Ediga Annamma v. State of Andra Pradesh AIR 1974 SC 79*, *Bachan Singh v. State of Punjab AIR 1980 SC 898* and *Machhi Singh v. State of Punjab 1986 (3) SCC 470*. The broad guidelines laid down in *Bachan Singh* and *Machhi Singh* were also referred to and it

was held so in para 25 to 28 which are extracted hereunder:

> ***"25.*** *A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.*
>
> ***26.*** *The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.*
>
> ***27.*** *The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each*

case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

28. *Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies; but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But, in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime uniformly disproportionate punishment has some very undesirable practical consequences."*

105. The Hon'ble Supreme Court in *Lehna* modified the sentence from death to imprisonment for life. It was to take in the principles of proportionality that *Swamy Shraddananda (2)* laid down

an alternate option of imprisonment for imprisonment beyond 14 years, without remission, to avoid the imposition of death penalty. In *Union of India v. V Sriharan (2016) 7 SCC 1* a Constitution Bench of the Hon'ble Supreme Court, by majority, reaffirmed the alternative option as laid down in *Swamy Shraddananda (2)*. In *Swamy Shraddananda (2)* it was noticed that the five judge bench in *Bechan Singh* and the three judge bench in *Machhi Singh* refused to standardize cases for the purpose of death sentence. It was held that even within a single category offence there are infinite, unpredictable, unforeseen variations, with permutations and combinations beyond the anticipatory capacity of the human calculus. It was reiterated that *'the standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity' (sic-Bachan Singh)*.

106. It was to effectively reduce the marked imbalance in the end results, caused by the lack of uniformity in sentencing that *Swamy Shraddananda (2)* trod a new path and held so in para 56:

> *"**56.** But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to*

remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in Dalbir Singh v. State of Punjab (1979) 3 SCC 745 . In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

"14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case [Rajendra Prasad v. State of U.P., (1979) 3 SCC 646] . Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the

convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."

(emphasis added)

We think that it is time that the course suggested in Dalbir Singh [(1979) 3 SCC 745] should receive a formal recognition by the Court."

[underlining by us for emphasis]

107. *V Sriharan* upholding the alternate sentencing, held so in paragraph 73:

"73. The above chiselled words of the learned Judge in Maru Ram case [Maru Ram v. Union of India, (1981) 1 SCC 107] throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the learned Judge which came to be made about three-and-a-half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and goondas. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in

most of the cases, even the kith and kin, close relatives, friends, neighbours and passers-by who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well-thought out principles, it can be said that the conclusions drawn by this Court in Swamy Shraddananda (2) [Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767] are well founded and can be applied without anything more, at least until as lamented by Fazal Ali, J. the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realises the consequence of playing with human lives. It is also appropriate where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal."

[*underlining by us for emphasis*]

While upholding the principle of alternate sentencing, it was also held that this would not affect the power of remission provided under Articles 72 and 161 of the Constitution.

108. Understanding the issue in the perspective of the above precedents, it is to be observed that the alternative option of imposing a life sentence beyond 14 years, restricting the exercise of power of remission as provided under Cr.PC, is only a measure to avoid death penalty. We have to first find the instant case to be the rarest of the rare, to decide whether the penalty of death should be imposed or the ends of justice and the principles of proportionality would be met, by imposing a sentence of life without remission, specifying the period of such restriction in invoking the powers of remission . In so far as death sentence is concerned, *Lehna noticed* the test laid down by *Machhi Singh* and elaborated further as here under, to determine the rarest of the rare case in Para 21 and 23:

> *"21. In Machhi Singh case [(1983) 3 SCC 470] it was observed : (SCC p. 489, para 39)*
>
> *The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:*
>
> *(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

xxx xxx xxx

23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of

a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

109. *Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257*, further dilated upon the above principles to reiterate the test of aggravating and mitigating circumstances; the former on the crime proper and the latter on the aspect of the criminal, to decide upon the sentencing in individual cases to identify the rarest of the rare cases. After listing out the probable aggravating and mitigating circumstances the principles were encapsulated as follows:

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

110. The instant crime was committed in a dastardly manner and it can be said that the accused, a resident of the apartment complex, was in a dominant position *vis-a-vis* the deceased, an employee of the complex. The claim of the accused having suffered from bipolar disorder was not proved. The accused had no previous convictions and though the crime was dastardly and brutal, no motive was alleged. There was no diabolic planning or preparation. The crime was one committed in anger, but without any provocation whatsoever or even a quarrel. The accused has a family and he runs a business establishment providing employment to many. The learned Sessions Judge also found chances for reformation, to make the accused a worthy individual of the society. It is pertinent that on the conspectus of the facts, applying the trite principles, the learned Sessions Judge had considered the issue; both the aggravating and mitigating circumstances. The Sessions Judge found the mitigating circumstances to be of relevant import, with more

weightage. Having arrived at such a finding, it is not for us to substitute the opinion; which by no stretch of imagination can be called unreasonable. *Subash Chander v. Krishan Lal (2001) 4 SCC 458* was a case in which the trial court awarded death sentence, which on general conspectus and consideration of facts, the High Court commuted to life imprisonment. It was held that where two views are possible, the one favourable to life sentence should be accepted and for interfering with such sentence, further exceptional grounds should be made out. On facts, their Lordships though expressed strong reservations about the commutation of death sentence to life imprisonment, it was held that the discretion exercised by the High Court should not be interfered with, unless there are exceptional circumstances. The learned Judges also opined that but for the discretion exercised by the High Court in commuting the death sentence, on the facts arising therein, of a whole family having been eliminated, their Lordships would have been inclined to conform the death sentence awarded by the trial court. It was in this circumstance and the undertaking made by one of the accused who was the kingpin, that he would never claim his premature release or commutation of sentence, the accused-kingpin's sentence of life imprisonment was directed to be for the rest of his life without commutation or remission. The aforesaid decision was long before

Swamy Shraddananda(2) and the dicta as harmonized with *Swamy Shraddananda(2)* and the other precedents, are: (i) when a Court has exercised discretion in avoiding death sentence and imposing a sentence for life, converting the same to a death sentence should only be in very exceptional circumstances and (ii) the alternate mode of sentencing a person without commutation or remission should only be to substitute or avoid death; which is irreversible. In this perspective we stay our hands from interfering with the sentence awarded by the trial court, also there being no exceptional circumstances coming forth. In that circumstance, we also restrain ourselves from applying the alternate sentencing option since this is not one of the rarest of the rare cases where death sentence could be awarded. The learned Sessions Judge, as any reasonable man would do, examined the circumstances and held that there is no reason to find the crime, to be the rarest of the rare, to award death penalty, with which we fully concur.

111. We cannot but observe that it does not lie on the State, to seek exercise of the alternative measure provided in *Swamy Shraddananda(2)*. We refer to para 61 of *V. Sriharan*, which is extracted below:-

> **"61.** *Having noted the above referred two Constitution Bench decisions in Godse [Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440] and Maru Ram [Maru*

> *Ram v. Union of India, (1981) 1 SCR 1196] which were consistently followed in the subsequent decisions in Sambha Ji Krishan Ji [Sambha Ji Krishan Ji v. State of Maharashtra, (1974) 1 SCC 196] , Ratan Singh [State of M.P. v. Ratan Singh, (1976) 3 SCC 470] , Ranjit Singh [Ranjit Singh v. UT of Chandigarh, (1984) 1 SCC 31] , Ashok Kumar [Ashok Kumar v. Union of India, (1991) 3 SCC 498 : and Subash Chander [Subash Chander v. Krishan Lal, (2001) 4 SCC 458] . The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Criminal Procedure Code."*
>
> [*underlining by us for emphasis*]

Hence, a sentence of imprisonment for life means imprisonment for the rest of the life of the convict subject only to remission as provided under the Constitution and under the Cr.PC. As far as the remission under the Constitution is concerned it has been categorically held that there can be no restriction placed on such powers, judicially. Now, coming to the Cr.P.C, the power of remission is on the State Government, being the appropriate Government herein and if the State is of the opinion that the instant crime is one which should not be considered for remission, then

the State could restrict itself; the power of remission being within its exclusive domain. The sentence imposed by the trial court, as confirmed by us, is imprisonment for life, which is for the rest of the life of the convict. The State requires no nudge or prodding from the Courts, on the judicial side and it is for the State to take a decision on remission; considering the gravity of the offence, the shock it generated in society as also the conduct of the convict in prison and any other relevant factors. If the State stays its hands and restricts itself and the power of remission is not invoked, the convict spends his life in prison. We hence find, no reason to interfere with the sentence imposed by the trial court and agree with the trial court that it is not one of the rarest of the rare cases. The Criminal Appeal filed by the State is rejected.

XXI. Crl.A.No.233 of 2016:

112. The above appeal is filed against the order in Crl.M.A No.308/2016 in SC 300/2015. The prayer in the application was to release the vehicle MO2 to the appellant herein. The learned Session Judge rejected the petition on two grounds. The first, for reason of the judgment having been passed in the Sessions Case wherein, the disposal of the vehicle MO2 was directed to be released to the family member of the convict on proper authorisation and only on payment of fine or providing adequate security to realise the fine amounts; in which

context, the Court having become *functus officio*. It was also found that the averments in the application itself showed that the applicant had transferred the vehicle to the convict in exchange for another vehicle which belonged to the convict. We also observe that there is no challenge against the directions in the judgment in the Sessions Case ordering release of the vehicle, on conditions. We find no reason to entertain the appeal which stands dismissed.

Ordered accordingly.

Sd/-
K. VINOD CHANDRAN, JUDGE

Sd/-
C. JAYACHANDRAN, JUDGE

jma/sp/uu