2026:KER:13793

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE JOBIN SEBASTIAN

TUESDAY, THE 17TH DAY OF FEBRUARY 2026 / 28TH MAGHA, 1947

CRL.A NO. 545 OF 2019

CRIME NO.385/2012 OF NJARAKKAL POLICE STATION, ERNAKULAM

AGAINST THE JUDGMENT DATED 05.04.2019 IN SC NO.57 OF 2014 OF ADDITIONAL SESSIONS COURT-VI,ERNAKULAM ARISING OUT OF THE ORDER/JUDGMENT DATED IN CP NO.21 OF 2013 OF JUDICIAL FIRST CLASS MAGISTRATE-I,KOCHI

APPELLANT/ACCUSED NO.1 TO 8:

1 ABDUL JALEEL
AGED 52 YEARS
S/O.KHADER, ALIYAVEETTIL, PAZHANGATTU, EDAVANAKAD

2 MUHAMMED SABEER
AGED 40 YEARS
S/O.HAMEED, VALIYAVEETTIL HOUSE, PAZHANGATTU
BHAGOM, EDAVANAKAD

3 NOUSHAD.V.A
AGED 40 YEARS
S/O.AHAMMED.A.K., VALIYAVEETTIL, PAZHANGATTU
BHAGOM, EDAVANAKAD

4 P.S.NOUSHAD,
AGED 40 YEARS
S/O.SAIDU MUHAMMED, PUTHANVEETTIL, PAZHANAGATTU,
EDAVANAKAD

5 NADIRSHA.K.I
AGED 43 YEARS
S/O.ISMAIL, KAKKADU VEETTIL, PAZHANGATTU,
EDAVANAKAD.

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6 ANOOP.M.M.,
AGED 35 YEARS
S/O.ABDUL MAJEED, MOOLEKKATTU VEETTIL,
PAZHANGATTU BHAGOM, EDAVANAKAD

7 MANAF .M.M
AGED 34 YEARS
S/O.ABDUL MAJEED, MOOLEKKATTU VEETTIL,
PAZHANGATTU BHAGOM, EDAVANAKAD

8 THAZIYATHU.K.K
AGED 34 YEARS
S/O.KHADERKUTTY, KAKATTU VEETTIL, PAZHANGATTU
BHAGOM, EDAVANAKAD

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.D.FEROZE
SHRI.ANAND KALYANAKRISHNAN

RESPONDENT/STATE:

STATE OF KERALA
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031
(CRIME NO.385/2012 OF NJARAKKAL POLICE STATION,
ERNAKULAM DISTRICT)

BY ADV SRI.T.R.RENJITH, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10.02.2026, THE COURT ON 17.02.2026 DELIVERED THE FOLLOWING:

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"CR"

J U D G M E N T

Jobin Sebastian, J.

Accused Nos. 1 to 8 in S.C. No.57/2014 on the file of the Additional Sessions Court- VI, Ernakulam, have preferred this appeal challenging the judgment of conviction and the order of sentence passed against them for the offences punishable under Sections 143, 147, 342, 352 and 302 r/w 149 of the Indian Penal Code.

2. The prosecution case in brief is as follows:

Abdul Khayoom, the deceased in this case, was the President of Ershadul Muslim Sabha and the manager of H.I.H.S. School, Edavanakkad, during the period 2004-2008. The accused Nos. 1 to 8 bore a grudge towards Abdul Khayoom as they were under the impression that he was the person behind obtaining an order from the Waqf Board that new members shall not be inducted in the Ershadul Muslim Sabha. Owing to the said animosity, on 03.03.2012 at about 9.00 p.m., in front of the vegetable shop of PW6, accused Nos. 1 to 8 formed themselves into an unlawful assembly, and in prosecution of the common object of the said assembly, they approached Abdul Khayoom and quarrelled with him, questioning as to why membership had not been granted to them in the Ershadul Muslim Sabha. Thereafter, without any provocation on the part of the deceased, near a henna shop

situated along the Vypin–Munambam Public Road at Pazhangad Bhagom, the accused encircled the deceased and wrongfully confined him. The 1st accused assaulted the deceased by fisting him; the 2nd and 5th accused pushed him, and the 4th accused pushed and fisted him. While the other accused held the deceased, the 1st accused kicked him, the 2nd accused fisted him, and the 3rd accused beat him with his bare hands. In the meantime, the 6th accused caught hold of the deceased's neck, and all the accused continued the assault repeatedly. When the deceased proceeded towards his car, the accused followed him, manhandled him and caused him to fall into the car. When certain bystanders who witnessed the incident intervened and attempted to restrain the accused, they were threatened by the accused. Further, due to the intimidating presence of the accused, those who had gathered at the spot were deterred from taking the injured to the hospital, and the deceased succumbed to the injuries sustained. Hence, the accused are alleged to have committed the offences mentioned above.

3. Upon completion of the investigation, the final report was laid before the Judicial First Class Magistrate-I, Kochi. Being satisfied that the case is one triable exclusively by a Court of Session, the learned Magistrate, after complying with all the necessary formalities, committed the case to the Court of Session, Ernakulam, under Section 209 of Cr.P.C. The learned Sessions Judge, having taken cognizance

made over the case for trial and disposal to the Additional Sessions Court-VI, Ernakulam. On the appearance of the accused before the trial court, the learned Additional Sessions Judge, after hearing both sides under Section 227 of Cr.P.C. and upon perusal of the records, framed a written charge against the accused for offences punishable under Sections 143, 147, 342, 352 and 302 r/w 149 of the IPC. When the charge was read over and explained to the accused, they pleaded not guilty and claimed to be tried.

4 . During the trial, from the side of the prosecution, PW1 to PW19 were examined and marked Exts.P1 to P57. MO1 to MO4 were exhibited and identified. The contradictions in the 161 statements of the prosecution witnesses were marked as Exts.D1 to D16 from the side of the defence. After the completion of the prosecution evidence, the accused were questioned under Section 313 of Cr.P.C., during which they denied all the incriminating materials brought out in evidence against them. Thereafter, both sides were heard under Section 232 of Cr.P.C., and since it was not a fit case to acquit the accused under the said provision, they were directed to enter on their defence and to adduce any evidence that they may have in support thereof. However, no evidence whatsoever was produced from the side of the accused. Thereafter, both sides were heard in detail, and finally, the learned Additional Sessions Judge found the accused guilty of the offences punishable under Sections 143, 147, 342, 352 and 302 r/w 149 of the

IPC, and they were convicted.

5. The accused Nos. 1 to 8 were sentenced to undergo rigorous imprisonment for four months for the offence punishable under Section 143 of the IPC, and for the offence punishable under Section 147 r/w 149 of the IPC, the accused Nos. 1 to 8 were sentenced to undergo rigorous imprisonment for one year. Likewise, the accused Nos.1 to 8 were sentenced to undergo rigorous imprisonment for eight months for offence punishable under Section 342 r/w 149 of the IPC. Further, the accused Nos. 1 to 8 were sentenced to undergo rigorous imprisonment for three months for offence punishable under Section 352 r/w 149 of the IPC. For offence punishable under Section 302 r/w 149 of the IPC, the accused Nos. 1 to 8 were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- each. In default of payment of fine, the accused were ordered to undergo rigorous imprisonment for six months. The sentences were ordered to be run concurrently. Fine amount, if paid or realised, Rs.20,000/- was ordered to be given to the legal heirs of the deceased under Section 357(1) of Cr.P.C. Challenging the said finding of guilt, conviction, and the order of sentence passed, the accused have preferred this appeal.

6. We heard Sri. S. Rajeev, the learned counsel appearing for the appellants, and Sri. T. R. Renjith, the learned Public Prosecutor.

7. This is a case in which a 56-year-old man was allegedly murdered by the accused in the prosecution of the common object of an unlawful assembly formed by them. The incident that led to the death of the deceased occurred on 03.03.2012 at 9.00 p.m. in front of the shop of PW6. In order to prove the occurrence, the prosecution relies upon the evidence of PW1 to PW3, who are allegedly eyewitnesses to the incident.

8. The law was set in motion in this case on the basis of Ext.P1 First Information Statement (FIS) given by PW1, one of the alleged eyewitnesses, to the Sub-Inspector of Police, Njarakkal (PW17). Acting on this statement, PW17 registered the First Information Report (FIR), marked as Ext.P26, alleging the commission of offences punishable under Sections 143, 147, and 302 r/w 149 of the IPC. Thereafter, the Circle Inspector of Police, Njarakkal (PW18), conducted the major chunk of the investigation of the case and later, PW19, his successor-in-office, after compiling the evidence and materials collected, filed the final report before the jurisdictional Magistrate.

9. When the first informant, who allegedly witnessed the incident, was examined as PW1, he deposed as follows;

During the period of occurrence in this case, he was working as a driver and was residing on the eastern side of a school at Pazhangad. He is acquainted with the deceased and the accused in this

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case, as all of them reside in the same locality where he resides. The deceased was a businessman and a social worker. On 03.03.2012 at 9.00 p.m., while he was talking with his friend Shawkathali (PW2), standing near Pazhangad bridge on Vypin-Munambam road, Abdul Khayoom came in a car and parked the same in front of the office of the league house and after alighting from the car, went to the shop of PW6. Then the 1st accused approached Abdul Khayoom and said something. Immediately thereafter, the 1st accused grabbed the shirt worn by Abdul Khayoom abruptly and pulled him to the northern side. Then all the accused assaulted Abdul Khayoom. Sabeer (A2), Nadrisha (A5), Noushad V. A. (A3) and P. S. Noushad (A4) together assaulted Abdul Khayoom. They kicked and hit Abdul Khayoom. The attack of Sabeer (A2) and Nadrisha (A5) seems to be cruel. Seeing the same, he, as well as his friend, asked the accused not to assault the deceased. He also warned the accused that the deceased was an ill person. But the accused pushed PW1 as well as his friend away. By that time, one Muhammed Ramli (PW3) and his friends came to restrain the accused. Then he went to the house of another social worker named Abdul Razak (PW5) and informed him about the matter. Then PW5 also accompanied them to the place of occurrence after changing his dress. When they came back to the place of occurrence, they did not find Abdul Khayoom. When looked further, Abdul Khayoom was found sitting inside the driver's seat of his car in a slanting position without any movements. Then he, along with PW2, PW5 and one Salam, took Abdul Khayoom to

Kristu Jayanthi Hospital, Njarakkal. After examining him, the Doctor reported his death. Accordingly, he went to Njarakkal Police Station and gave Ext.P1 statement. A dispute was then existing between the deceased and the accused in connection with the issuance of membership in Ershadul Muslim Sabha. The same may be the motive for the incident. The people in the locality were very well aware that the deceased was a heart patient. PW2 and PW3, the other witnesses examined by the prosecution to prove the occurrence, also deposed in similar lines as spoken by PW1.

10. An important piece of evidence which requires consideration is the evidence of the Doctor (PW12) who conducted autopsy examination of the deceased. The post-mortem certificate issued by him was marked as Ext.P13. According to PW12, in the post-mortem examination, he noted the following ante-mortem injuries;

1. *Multiple abrasions over an area 10x9cm over front of chest in midline 3cm below suprasternal notch.*
2. *Linear abrasion 4.4x0.1cm vertical left side of neck, upper edge at angle of jaw.*
3. *Linear abrasion 3x0.1cm oblique left side of neck, upper outer end 1.8cm in front of injury No.2.*
4. *Abrasion 1x0.4cm on outer aspect of left arm, 3cm above elbow.*
5. *Abrasion 1x0.4cm outer aspect of left side of trunk, 2.5cm below the level of armpit in the posterior axillary fold.*
6. *Abrasion 1.5x1cm front of right arm 2cm below*

armpit.

7. *Multiple abrasions over an area 5x3cm over outer aspect of right forearm 2cm below elbow.*
8. *Multiple abrasion over an area 6x6cm over back of trunk, 10cm above natal cleft. Beneath this injury, contusions 8x6x0.3cm at back of trunk in midline. lower end 11cm above natal cleft.*
9. *Contusion 8x6x0.3cm beneath injury No.1. Sternum and ribs were normal and intact.*

11. After referring to the post-mortem certificate, PW12 opined that post-mortem findings are suggestive of death due to cardiac failure due to occlusive coronary-artery disease (natural cause). However, the injuries could have provoked the events leading to death. The histopathology report and chemical analysis report received in this case were marked as Exts.P15 and P16, respectively, through PW12, the Doctor. Likewise, PW12 categorically deposed that the deceased had a diseased heart. However, during the chief examination, when a definite question was put to PW12 about whether sustaining these injuries, coupled with the emotional strain that he was subjected to during the incident, can be taken as a possibility of his immediate death, he replied with an answer that it is possible.

12. Curiously, during cross-examination, PW12 deposed that all the injuries noted in the post-mortem report are simple and minor and not fatal in the case of a normal person. Likewise, he deposed that the deceased was suffering from a very serious heart ailment. He had an

abnormal heart size. The wall of the left ventricle was much thicker than normal and showed fibrosis. The ventricular wall had become toughened and enlarged, thereby impairing its ability to pump an adequate supply of blood to the tissues. In addition, the fine blood vessels supplying blood to the brain, namely the circle of willis, were considerably narrowed and, to a certain extent, damaged, thereby affecting proper blood flow to the brain. Moreover, PW12 deposed that one artery was completely occluded, while another showed 90% occlusion.

13. The crucial question that now arises for consideration is whether the act of the accused would constitute the offence of murder as defined under Section 300 of the IPC and, consequently, punishable under Section 302 thereof. Before embarking upon that question, it is imperative to first examine whether the act of the accused would amount to culpable homicide as defined under Section 299 of the IPC. Only if the ingredients of culpable homicide are satisfied, the further question of murder would arise. In the scheme of the Indian Penal Code, culpable homicide is the genus and murder its species. All murder is culpable homicide, but not vice versa.

14. To constitute culpable homicide, the prosecution must establish that the act was committed by the accused with the intention of causing death, or with the intention of causing such bodily injury as

is likely to cause death or with the knowledge that such an act is likely to cause death. The existence of intention or knowledge of the nature mentioned above is the *sine qua non* for attracting the offence of culpable homicide. The same has to be gathered from the totality of the circumstances, including the nature of the weapon used, the part of the body targeted, the number of injuries inflicted, the severity of the injuries, the force employed in inflicting the injury, etc. However, the said list is not exhaustive.

15. Keeping the above in mind, while reverting to the facts of the present case, a careful analysis of the ocular evidence and the testimony of the doctor who conducted the post-mortem examination unmistakably reveals that all the injuries sustained by the deceased were minor and trivial in nature. Out of the nine injuries noted, all were contusions and abrasions. The Doctor categorically deposed that all the injuries were simple and minor, and none of the injuries were fatal in nature to a normal person.

16. Further, the Doctor who conducted the post-mortem examination opined that the death was due to cardiac failure due to occlusive coronary-artery disease (natural cause). It is true that the Doctor stated that in a person suffering from a pre-existing cardiac ailment, physical or mental stress could precipitate cardiac arrest. However, a holistic reading of the medical evidence and the other

materials on record clearly demonstrates that none of the acts attributed to the accused were committed with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. The evidence of PW1 to PW3 shows that none of the accused used any weapon in inflicting injuries on the deceased. The nature of injuries, as borne out from the medical records, does not indicate the use of force of such a degree as would endanger life. Therefore, the requisite intention necessary to constitute culpable homicide is wanting in this case.

17. The learned Public Prosecutor would contend that there is ample evidence to establish that the accused had a strong motive to eliminate the deceased and that, even prior to the occurrence, they had expressed an intention to do away with him. Relying on the evidence adduced, it is further submitted that on one occasion, the 1st accused had intimidated the deceased over the phone. While examining the said contention, we accept that the prosecution has succeeded in establishing a dispute between the accused and the deceased regarding the non-granting of membership in a Muslim Sabha, of which the deceased was the President. PW8 and PW9, who were members of the said Sabha, deposed that the accused were under the impression that it was the deceased who was instrumental in denying them membership.

18. PW8 deposed that on the previous day of the incident, when

he went to the shop of one Sidhique (PW6) to purchase vegetables, he saw accused Nos. 1, 2, 4 and 5 there and heard them discussing matters relating to the Muslim Sabha. According to PW8, he heard the accused stating that it was the deceased who was responsible for the denial of membership and that "he has to be finished."

19. PW9, on the other hand, deposed that on the date of the incident, at about 8.45 p.m., he met the deceased at the mosque when he had gone there to offer prayers. According to him, at that time, the deceased received a phone call in which the caller used obscene language and threatened to do away with him and to beat and break the deceased's son's hands and legs. PW9 further stated that from the voice of the caller, he understood it to be the 1st accused.

20. While appreciating the above evidence, it must be borne in mind that the present case rests primarily on direct ocular testimony regarding the occurrence. In cases supported by eyewitness evidence, proof of motive, though relevant, does not assume much importance. It is true that, the prosecution has established that there existed some animosity between the accused and the deceased on account of the membership dispute in the Sabha. However, whether such animosity was so grave and compelling as to furnish a strong motive for committing murder is highly doubtful.

21. Motive and intention are states of mind, and there are obvious limitations in ascertaining what exactly transpired in the mind of an accused at the time of the commission of the act. The existence of prior hostility or even the utterance of a threat does not, by itself, inexorably lead to the conclusion that the accused intended to carryout such a threat. Words uttered in anger or frustration cannot automatically be equated with a settled intention to commit murder.

22. In the present case, apart from the uncorroborated testimony of PW9, there is no independent evidence, such as call detail records or other electronic material, to establish that it was the 1st accused who made the alleged threatening phone call. Even assuming that such a call was made, the same would not be independently sufficient to conclusively establish an intention to kill. As already observed, intention is ordinarily gathered from the overt acts attributed to the accused, the nature of the weapons used, the part of the body where the injury was inflicted, the severity of the injuries inflicted, the force used in inflicting the injuries, the overall conduct of the accused at the crime scene, etc. In the case at hand, admittedly, all the injuries sustained by the deceased are minor in nature. None of the accused inflicted any injury with a weapon. The overt acts attributed to the accused, taken as a whole, indicate at most an intention to cause hurt.

23. It is also significant that, from the circumstances brought on

record, the accused had sufficient opportunity to inflict fatal injuries and could have caused injuries sufficient in the ordinary course of nature to cause death, if they had so intended. The non-infliction of fatal injuries, despite the availability of the opportunity, suggests that the accused did not possess the requisite intention either to cause death or to cause such bodily injury as was likely to result in death.

24. However, the absence of intention *ipso facto* does not lead to the conclusion that no offence of culpable homicide is made out. From the proved facts, if it is established that the act was done with the knowledge that such an act was likely to cause death, the offence of culpable homicide would clearly be attracted. Where the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death, the perpetrator of the act would be liable to be punished under Section 304 Part II of the IPC.

25. Generally, “knowledge” connotes consciousness, and an offender is expected to be aware of the consequences of his act, albeit not beyond the natural and normal awareness attributable to a reasonable person. In the case at hand, as already noted, all the injuries inflicted are simple and minor in nature. Likewise, it is pertinent to note that the doctor opined that, in comparison to a normal person, the injuries sustained by the deceased were not fatal in nature. Therefore,

by no stretch of imagination, it could be said that the acts in question were committed with the knowledge that they were likely to cause death. Consequently, the accused cannot be attributed with the knowledge contemplated under the third limb of Section 299 of the IPC. Likewise, the accused cannot be subjected to the punishment provided under Section 304 Part II of the IPC.

26. At this juncture, it is apposite to advert to explanations to Section 299 of the IPC.

> *Explanation 1.- A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.*
>
> *Explanation 2.- Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have prevented.*
>
> *Explanation 3.- The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.*

27. In view of explanation 1, a person causes bodily injury to

another, who is labouring under a disorder, disease, or bodily infirmity and thereby accelerates the death of the other, shall be deemed to have caused his death. Notably, in explanation 1, it is not mentioned that the person who caused the bodily injury in the circumstances mentioned in the said explanation shall be deemed to have caused culpable homicide. So, the deeming is with respect to the cause of death and not with respect to culpability. Likewise, explanation 2 also provides a clarification on the question of death in cases wherein the deceased, to whom the injury was caused by the accused, could have recovered and the death could have been avoided if prompt and proper medical treatment had been given to him. Even in the said explanation, the culpability of the accused is not addressed; it merely clarifies the cause of death.

28. Homicide, in its generic sense, merely denotes the causing of death of a human being by another human being and does not, in every case, amount to murder or even culpable homicide not amounting to murder. Depending upon the facts and the mental element accompanying the act, the offence may fall within the lesser categories of voluntarily causing hurt or grievous hurt, or even causing death by rash or negligent act under Section 304A IPC. It is only when the act resulting in death is accompanied by the requisite *mens rea,* namely, intention to cause death, intention to cause such bodily injury as is likely to cause death, or knowledge that the act is likely to cause death

that the offence would fall within the ambit of culpable homicide under Section 299 IPC, and, in appropriate cases, amount to murder under Section 300 IPC.

29. Explanations 1 and 2 to Section 299 IPC cannot be construed as independently creating or constituting instances of culpable homicide. These explanations do not address or determine the culpability of the accused; they merely elucidate the concept of "causing death," which is the foundational requirement for invoking liability under Section 299. In other words, they clarify the causal connection between the act of the accused and the death of the victim, including situations where the deceased was suffering from a pre-existing disease or where death might have been averted by proper treatment. However, the mere establishment of death and its causal link to the act of the accused is not sufficient to attract liability for culpable homicide. The essential ingredient that transforms a case of homicide into culpable homicide is the presence of the requisite *mens rea* as contemplated under Section 299, namely: (i) intention to cause death, (ii) intention to cause such bodily injury as is likely to cause death, or (iii) knowledge that the act is likely to cause death. Therefore, unless the prosecution establishes beyond reasonable doubt the existence of such intention or knowledge at the time of the commission of the act, a conviction for culpable homicide cannot be sustained. Where death is caused in the absence of the mental element required under Section

299, the act may nonetheless attract penal consequences under other appropriate provisions of the IPC, such as those relating to voluntarily causing hurt or grievous hurt, or under Section 304A in cases involving rash or negligent acts, depending upon the nature and circumstances of the conduct proved.

30. Therefore, even if it is established that the death was caused by the act of the accused, an offence of culpable homicide would not be attracted automatically unless it is further established that the said act was committed with the requisite intention or knowledge. Liability under Explanation 1 to Section 299 for culpable homicide would not arise where the injury inflicted by the accused was not of such a nature as was likely to cause death, but the victim died due to a weak and dilated heart, and where there was neither any intention on the part of the accused to cause death nor any knowledge of the heart disease from which the deceased was suffering.

31. In the present case, there is absolutely no convincing evidence or attendant circumstance to indicate that the accused was aware that the deceased was suffering from any heart disease or bodily infirmity. We are not unmindful of the fact that when PW1 and PW2 were examined before the Court during their chief examination, both deposed that, during the course of the incident, they had intervened and questioned the accused as to whether they were not aware of the

ill-health of the deceased. However, when the Investigating Officer was examined as PW18, he categorically admitted that no such version was stated by PW1 at the time when his statement was recorded under Section 161 of the Cr.P.C. during the investigation, and the said omissions stand clearly proved. Likewise, during cross-examination, PW2 admitted that in his statement given to the police, he had not stated that he had informed the accused that the deceased was a person of ill-health or questioned them as to why they were assaulting him. This clearly establishes that PW1 and PW2 made material improvements in their testimonies at the stage of trial in an attempt to show that they had warned the accused about the ill-health of the deceased during the occurrence of the incident.

32. Such improvements, touching upon a crucial aspect and intended to bring the case within the sweep of Explanation 1 to Section 299 of the IPC, cannot be lightly accepted. The omission of such a material aspect while giving statements to the police during the course of investigation cannot be viewed lightly in the facts and circumstances of the present case. The version now put forth by PW1 and PW2 for the first time before the Court during their examination appears to be an afterthought and lacks credibility. In the absence of reliable and cogent evidence to show that the accused had knowledge of the alleged heart ailment of the deceased, it cannot be said that the accused acted with the intention or knowledge of accelerating the death of the deceased.

33. While dealing with a similar situation in **Mayandi v. State** [(2010) 11 Supreme Court Cases 774], the Supreme Court observed as follows;

> "*It is the admitted fact that the Doctors have not opined that the death was caused due to the injuries caused by the appellant. There is also no evidence to show that the injuries could have independently caused the death of the deceased, even if the deceased had not been suffering from a heart problem. It is also the conceded position that the deceased had a serious heart problem which was a matter not within the appellant's knowledge and on the contrary the medical evidence reveals that he had undergone an angioplasty but had nevertheless suffered a heart attack thereafter".*

34. After making such an observation, the Supreme Court entered into a finding that the case would fall within Section 326 IPC and not under Section 302 thereof. Moreover, the Supreme Court rejected the contention that the act of the accused would fall within Section 304 Part I or Part II of IPC on a finding that there was no intention on the part of the appellant to cause the death of the deceased, nor could he be attributed with the knowledge that death would be caused. In the present case, there is no convincing material on record to suggest that the accused had knowledge that the deceased was suffering from a serious heart ailment. In the absence of any specific or peculiar circumstances establishing that the accused were aware of such a pre-existing medical condition, it would be unjustified to bring their act within the ambit of culpable homicide.

35. Further, in the facts of this case, a conviction under Section 304A of the IPC is impermissible in the absence of a specific charge under that provision. The principle embodied in Section 222 of the Code of Criminal Procedure permits conviction for a minor offence only when such offence is comprised within the major offence charged. However, Section 304A IPC is not a minor offence included within Sections 302 or 304 IPC. The ingredients of Section 304A causing death by rash or negligent act are distinct and fundamentally different from those constituting murder or culpable homicide, which require intention or knowledge. Sections 302 and 304A are not cognate offences, and merely because Section 304A prescribes a lesser punishment, it cannot be treated as a minor offence of Section 302. In this regard, reliance can be placed on the decision in **Benny v. State of Kerala** (1991 KHC 181), wherein it was categorically held that for a conviction under Section 304A IPC, a specific charge under that section is necessary, and a charge under Sections 302 or 304 IPC would not suffice. In the present case, the accused have been charged only under Section 302 IPC. In the absence of a specific charge under Section 304A, and having regard to the distinct ingredients of the said offence, the accused cannot be convicted under Section 304A IPC. However, the evidence on record establishes that the act of the accused would attract the offence of voluntarily causing hurt, punishable under Section 323 of the IPC.

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In the result, the criminal appeal filed by accused Nos. 1 to 8 is allowed in part. The finding, conviction, and sentence for the offences punishable under Sections 143, 147, 342, and 352 r/w Section 149 of the Indian Penal Code, as recorded by the Additional Sessions Judge, Ernakulam, against accused Nos. 1 to 8, stand confirmed. However, the conviction of accused Nos. 1 to 8 under Section 302 of the Indian Penal Code is altered to one under Section 323 of the Indian Penal Code. The appellants are sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 1,000/- each for the offence punishable under Section 323 of the Indian Penal Code. In default of payment of the fine, they shall undergo rigorous imprisonment for a further period of three months. The sentences imposed shall run concurrently and the accused shall also be entitled to set off as provided under Section 428 of Cr.P.C.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
JOBIN SEBASTIAN
JUDGE

ANS