IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

TUESDAY, THE 23RD DAY OF SEPTEMBER 2025 / 1ST ASWINA, 1947

CRL.A NO. 1788 OF 2007

JUDGMENT DATED 19.09.2007 IN SC NO.240 OF 2005 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, THODUPUZHA

APPELLANT/ACCUSED NOS. 2 TO 4:

1 SIVAN, S/O. GOPALAN, KADAVUMKAL VEEDU, VATTAPPARA KARA, KANTHIPPARA VILLAGE.

2 SAJEEVAN, S/O. GOPALAN, KADAVUMKAL VEEDU, VATTAPPARA KARA, KANTHIPPARA VILLAGE.

3 SUDHEESH, S/O. KRISHNAN, -DO- -DO-

BY ADVS.
SRI.S.RAJEEV
SRI.V.VINAY
SRI.M.S.ANEER
SHRI.SARATH K.P.
SHRI.PRERITH PHILIP JOSEPH
SHRI.ANILKUMAR C.R.
SHRI.K.S.KIRAN KRISHNAN

RESPONDENT/COMPLAINANT:

STATE – C.I OF POLICE, DEVIKULAM, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

SMT. HASNAMOL N.S., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19.09.2025, THE COURT ON 23.09.2025 DELIVERED THE FOLLOWING:

'C.R'

JOHNSON JOHN, J.

Crl. Appeal No. 1788 of 2007

Dated this the 23rd day of September, 2025

J U D G M E N T

Accused Nos. 2 to 4 in S.C. No. 240 of 2005 on the file of the Additional Sessions Judge (Adhoc)-II, Thodupuzha filed this appeal challenging the conviction and sentence imposed under Sections 448 and 436 r/w 34 IPC as per judgment dated 19.09.2007.

2. As per the prosecution case, on 03.02.2000, at about 1 p.m., accused Nos. 2 to 4 along with accused Nos. 1 and 5, in furtherance of their common intention, trespassed into the courtyard of the house of the de facto complainant in Vattappara and the first accused set fire to the house thereby causing loss of Rs.25,000/- to the de facto complainant and it is alleged that accused Nos. 2 to 4 helped the first accused to set fire to the house.

3. Accused Nos. 1 and 5 were absconding and hence, charge was framed for the offences under Sections 448 and 436 r/w 34 IPC against

accused Nos. 2 to 4 and when they pleaded not guilty to the charge, the prosecution examined PWs 1 to 6 and marked Exhibits P1 to P5 and MOs 1 and 2. From the side of the defence, Exhibits D1 to D3 were marked.

4. After trial and hearing both sides, the trial court found accused Nos. 2 to 4 guilty of the offences under Sections 448 and 436 r/w 34 IPC and sentenced to undergo rigorous imprisonment for 5 years each and to pay a fine of Rs.5,000/- each for offence under Section 436 r/w 34 IPC and in default of payment of fine, to undergo rigorous imprisonment for six months and they are also sentenced to undergo rigorous imprisonment for one year each for offence under Section 448 r/w 34 IPC.

5. Heard Sri. Sarath K.P., the learned counsel for the appellants and Smt. Hasnamol N.S., the learned Public Prosecutor for the State.

6. The learned counsel for the appellants argued that PWs 2 and 3, the occurrence witnesses examined by the prosecution, have no case that they witnessed any overtact from the side of the appellants and the circumstantial evidence relied on by the prosecution is not of a conclusive nature and tendency to fully establish the guilt of the

appellants. It is argued that the prosecution has not adduced any evidence to prove the ownership or possession of the property to bring home the charge of trespass and there was no proper dock identification of accused Nos. 2 to 4 by PWs 2 and 3 and therefore, the accused/appellants are entitled for the benefit of reasonable doubt.

7. The learned Public Prosecutor argued that the evidence of PWs 1 to 3 would clearly show that PWs 1 and 2 were residing in the house and there is no reason to disbelieve the evidence of PWs 2 and 3 that they saw the accused persons trespassing into the property and subsequently running away from there after the incident. It is argued that the prosecution has adduced reliable evidence consistent only with the hypothesis of the guilt of the appellants and therefore, there is no reason to interfere with the findings in the impugned judgment.

8. The evidence of PW1 shows that he came to know about the incident from his wife and when he reached the place of occurrence, the house was completely burned in fire. He would say that he sustained a loss of Rs.25,000/- and that there was a dispute with the accused

persons regarding the boundary of his property. He would say that the said case was between the mother of his wife and the accused persons.

9. PW2 is the wife of PW1 and her evidence shows that at about 1 p.m., on 03.02.2000, her younger sister, Lissy, informed her about the incident, while she was working in the house of one Janaky and thereafter, when she reached the place of occurrence, she saw her house burning in fire. According to PW2, at that time, she also saw accused Nos. 1 to 5 going away from the courtyard of her house. PW2 also deposed in chief examination that the 1st accused, Mohanan, was holding a chopper in his hand.

10. In cross examination, PW2 deposed as follows:

> "പ്രതികളെ വീടിന്റെ കിഴക്കുവശം മുറ്റത്തുവച്ചാണ് കണ്ടത്. ഈ വിവരം police-ൽ പറഞ്ഞു കൊടുത്തോ എന്നോർക്കുന്നില്ല. അങ്ങനെ പറഞ്ഞുകൊടുത്തതായി കാണുന്നില്ലെങ്കിൽ ഒന്നും പറയാനില്ല. 2, 3, 4 പ്രതികൾ വഴിയിൽ നിൽക്കുന്നതു കണ്ടു എന്ന് ഞാൻ പോലീസിൽ പറഞ്ഞു കൊടുത്തു. വഴിയും വീടും തമ്മിൽ 5 മീറ്റർ അകലമെ ഉള്ളൂ."

11. In another part of the cross examination, PW2 stated that the accused persons owns property at a distance of 5 metres from her house. But, she cannot remember, whether any work was going on in the property of the accused persons on that day. When the learned

counsel for the accused persons made a suggestion that the house caught fire from the hearth in the kitchen, the witness would say that the kitchen side is not burned in fire.

12. PW3 is the sister of PW2 and in chief examination, she stated that at about 1 p.m., on 03.02.2000, she heard noise from the way on the eastern side of the house of PW2. According to PW3, she also saw accused Nos. 1 to 5 running towards the house of PW2.

13. In chief examination PW3 deposed as follows:

> "മുറ്റത്തിറങ്ങി നിന്ന ശ്രദ്ധിച്ചപ്പോൾ വാഴ വെട്ടുന്നതും പുക ഉയരുന്നതും കണ്ടു. വീടിന തീവെച്ചതാണെന്ന സംശയിച്ചു ഞാൻ ചേച്ചിയും മറ്റും പണിതുകൊണ്ടിരുന്ന സ്ഥലത്തേക്ക് ഓടിച്ചെന്ന."

PW3 also deposed that there was a boundary dispute between her mother and the accused persons. In cross examination, PW3 deposed as follows:

> "പ്രതികളെ ഞാൻ side-ൽ നിന്നാണ് കണ്ടത്. ഞാൻ നിന്ന സ്ഥലത്തുനിന്ന് 3-4 മീറ്റർ മാറിയ ദൂരത്തിലാണ് പ്രതികൾ ഓടിയത്. ഞാൻ മുറ്റത്തായിരുന്ന. ബഹളം കേട്ട് മുറ്റത്തേക്കിറങ്ങി നോക്കിയതാണ്. ഒച്ചത്തിൽ സംസാരിച്ചുകൊണ്ട് ചേച്ചിയുടെ വീടിന്റെ ഭാഗത്തേക്ക് പ്രതികൾ ഓടിപോകുന്നതു കണ്ടു. അവിടെ നിന്ന് വാഴ വെട്ടുന്ന ഒച്ച കേട്ടു. അല്പം കഴിഞ്ഞപ്പോൾ പുക ഉയരുന്നതു കണ്ടു. വാഴവെട്ടി മറിക്കുന്നത് എനിക്കു കാണാമായിരുന്ന. ആരാണ വാഴ വെട്ടുന്നതെന്ന കാണാൻ പറ്റില്ലായിരുന്ന."

14. The evidence of PWs 2 and 3 would show that they saw the accused persons near to the place of occurrence at the time of occurrence and there is nothing in the evidence of PWs 2 and 3 to show that they witnessed any overtact from the side of the accused persons. It has come out in evidence that there was previous enmity and boundary dispute between the accused persons and mother of PWs 2 and 3.

15. The Investigating Officer, when examined as PW6, admitted in cross examination that he has not collected any document to show the ownership of the house. According to PW6, there was no Panchayath number for the house. PW6 would say that the property is in the name of Thankamma, the mother of PWs 2 and 3. It is pertinent to note that PW1 has admitted in cross examination that there is no voters list, ration card or identity card to show that he was residing in the said house. In the absence of evidence regarding ownership or possession of the property, it is not possible to substantiate the ingredients of criminal trespass.

16. In ***Anilkumar v. State of Kerala*** [2024 KHC 223], a Division Bench of this Court held thus:

> "27. What remains is the offence under S.449 of IPC. The charge against the appellant is that he committed the murder of the deceased after committing house - trespass. In common parlance, trespass means entering another's property without his express or implicit permission or authority. S.441 defines the offence of criminal trespass. Going by the said provision, the essential ingredients for the offence of criminal trespass are:
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> (i) Entry into or upon property in the possession of another;
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> (ii) If this entry is lawful, then unlawfully remains upon such property;
>
> (iii) Such entry or unlawful remaining must be with intent:
>
> a) To commit an offence; or
>
> b) To intimidate, insult or annoy the person in possession of the property.
>
> What is relevant under S.441 is possession and not ownership. A reading of the above provision makes it clear that to attract the offence of criminal trespass, the property entered into by the offender must be in possession of another. In other words, the property into which the offender entered must not be in his possession. So also, when the property is in the joint possession of the accused and the victim, the latter's entry thereon is lawful and cannot be termed as criminal trespass. There cannot be criminal trespass into a property in which the accused himself is in joint possession. Criminal trespass under S.441 or house - trespass with the intention to commit an offence punishable with death under S.449 can be said to be committed only when a person enters or upon any property / house which is not in his possession, either exclusive or joint, but in the possession of another. As stated already, it is an admitted case that the house in question belongs to PW2 and the appellant and the deceased, along with PW2 and PW5, are in possession of the same. They were living jointly in the said house. That being so, it cannot be said that the appellant's entry into the said house was unlawful and amounts to criminal trespass. The finding of the trial court that even if the entry of the appellant into the house was considered lawful, the offence is still attracted since he unlawfully remained there with the intent to commit an offence cannot be sustained inasmuch as the word used in the second part of S.441 is 'such property', meaning thereby the 'property in the possession of

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

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

17. It is well settled that to bring home the charge of trespass, the prosecution has to establish that there has been unlawful entry upon a property which is in the possession of another and that such unlawful entry was with an intent to commit an offence and therefore, I find merit in the argument of the learned counsel for the appellants that the prosecution has not succeeded in establishing the offence under Section 448 IPC against the appellants.

18. The identification of an accused in court by the witness is the substantive evidence and even if the witness and the accused are persons known to each other, it is obligatory for the witness to identify the accused in court by pointing out that the person referred to by him in the evidence is the person who is standing in the dock and it is obligatory for the court to record in the deposition that the witness had identified the accused in the dock, as held by this Court in ***Vayalali***

Girishan and Others v. State of Kerala [2016 KHC 204] and ***Shaji @ Babu @ Japan Shaji v. State of Kerala*** [2021 (5) KHC SN 27].

19. In this case, the presiding Judge has omitted to do so, while recording the deposition of PWs 2 and 3 and there was no attempt on the part of the prosecutor to put appropriate questions to PWs 2 and 3 for the said purpose. The trial court has not recorded in the deposition of PWs 2 and 3 that the said witnesses have identified accused Nos. 2 to 4 in the dock.

20. It is clear from the evidence of PWs 2 and 3 in cross examination that they have not witnessed any overtacts from the side of the accused persons at the time of occurrence and therefore, the main question to be considered is as to whether the evidence of PWs 2 and 3 that they saw the appellants near to the place of occurrence at the time of occurrence is sufficient to record a conviction for the offence under Section 436 IPC. In this connection, it is pertinent to note that as per the prosecution case, it was the 1st accused who set fire to the house and the allegation as against accused Nos. 2 to 4 is that they helped accused No.1 in setting fire to the house.

21. In ***Chellappa v. State*** **[(2020) 5 SCC 160],** the Honourable Supreme Court held thus:

> "9. It must be noted that Section 34 IPC is not a substantive offence. Before a person can be held responsible under this section, it must be established that there was a common intention and the person being sought to be held liable must have participated in some manner in the act constituting the offence. The common intention shared by the accused should be anterior in time to the commission of the offence, but may develop on the spot when the crime is committed (see *Virendra Singh* v. *State of M.P.* [*Virendra Singh* v. *State of M.P.*, (2010) 8 SCC 407 : (2010) 3 SCC (Cri) 893]). However, from a perusal of the impugned High Court judgment [*Kennady* v. *State*, Criminal Appeal (MD) No. 1 of 2006, order dated 19-12-2007 (Mad)] , as well as the submissions of the prosecution, it is clear that no reasoning or evidence has been advanced as to the fulfilment of the requirements for the conviction of the appellant-accused under Section 34 IPC in the present case."

22. In ***Balu v. State (UT of Pondicherry)*** **[(2016) 15 SCC 471],** the Honourable Supreme Court held as follows:

> "11. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that : (*i*) there was common intention on the part of several persons to commit a particular crime, and (*ii*) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention."

23. It is well settled that the question as to whether there was any common intention or not depends upon the inference to be drawn from the proven facts and circumstances of each case and that the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

24. As noticed earlier, the evidence of PWs 2 and 3, the occurrence witnesses who supported the prosecution case, is of a circumstantial nature and their evidence in cross examination clearly shows that they have not witnessed any overact from the side of the appellants.

25. The evidence of PWs 2 and 3 in cross examination further shows that they saw the accused persons on the road near to the house and that the accused persons owns property at a distance of 5 metres from there. While evaluating the circumstantial evidence, the court has to ensure that the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused.

26. In ***Parubai v. State of Maharashtra*** [2021 (4) KLT OnLine 1127 (SC)], the Honourable Supreme Court held as follows:

> "13. The position of law is well settled that the links in the chain of circumstances is necessary to be established for conviction on the basis of circumstantial evidence. This has been articulated in one of the early decisions of this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***, (1984 KLT SN 59 (C.No.101) SC = (1984) 4 SCC 116). The relevant paragraphs are as hereunder:-
>
> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
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> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p.807: SCC (Cri) p.1047]
>
> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
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> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
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> (3) the circumstances should be of a conclusive nature and tendency,
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> (4) they should exclude every possible hypothesis except the one to be proved, and
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> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

27. In this case, the evidence of PWs 2 and 3 regarding the presence of the appellants on the road near to the house at the time of occurrence by itself cannot be accepted as a circumstance pointing to the guilt of the accused, especially in view of the fact that they also own property at a distance of 5 metres from there. The mere suspicion would not be sufficient, unless the circumstantial evidence tendered by the prosecution leads to the conclusion that it "must be true" and not "may

be true", as held by the Honourable Supreme Court in ***Devi Lal v. State of Rajasthan*** [2019 (1) KLT OnLine 3237 (SC)] and ***Sujit Biswas v. State of Assam*** [2013 (2) KLT SN 154 (C No.194)

28. Thus, taking into consideration all these aspects in the facts and circumstances of this case, I am of the opinion that the appellants are entitled to be acquitted as the benefit of doubt weighs in their favour.

In the result, the appeal is allowed. The conviction and sentence imposed by the trial court against the appellants/accused Nos. 2 to 4 is set aside and they are acquitted of the offences under Sections 448 and 436 r/w 34 IPC. The bail bonds executed by the appellants/accused Nos. 2 to 4 shall stand cancelled and they are set at liberty forthwith.

sd/-
JOHNSON JOHN,
JUDGE.

Rv